

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**No. 27598**

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LAKE HENDRICKS IMPROVEMENT ASSOCIATION, CITY OF  
HENDRICKS, MINNESOTA, and NORRIS PATRICK,

Petitioners/Appellants,

vs.

BROOKINGS COUNTY PLANNING AND ZONING COMMISSION,  
BROOKINGS COUNTY PLANNING AND ZONING COMMISSION SITTING  
AS THE BROOKINGS COUNTY BOARD OF ADJUSTMENT, MICHAEL  
CRINION, KILLESKILLEN LLC, and LC OLSON LLP,

Respondents/Appellees.

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Appeal from the Circuit Court  
Third Judicial Circuit  
Brookings County, South Dakota

The Honorable Vincent A. Foley, Presiding Judge

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Notice of Appeal filed October 12, 2015

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## **PRELIMINARY STATEMENT**

In this brief, Appellants, Lakes Hendricks Improvement Association, Inc. (“LHIA”), City of Hendricks, Minnesota, and Norris Patrick, will be collectively referred to as “Petitioners.” Appellees Brookings County Planning & Zoning Commission and Brookings County Planning & Zoning Commission Sitting as the Brookings County Board of Adjustment will be referred to as the “Board.” Appellees Michael Crinion and Killeskillen, LLC, will be referred to as “Killeskillen.”

Citations to the certified record appear as “CR” followed by the initial page number assigned by the Brookings County Clerk of Courts; citations may also include a citation to the particular item being cited. Citations to the transcript of the May 8, 2015, hearing on the Petition appear as “T” followed by the page number.

## **JURISDICTIONAL STATEMENT**

This is an appeal from the Circuit Court’s Findings of Fact and Conclusions of Law dated September 24, 2015, Order Affirming Decision to Grant Conditional Use Permit dated September 24, 2015, and Order Denying Petitioners’ Motion to Reconsider dated September 17, 2015. (CR 1369, 1378, 1365.) Notice of entry of the Findings of Fact and Conclusion of Law and Order Affirming Decision to Grant Conditional Use Permit was served on September 25, 2015, and notice of entry of Order Denying Petitioners’ Motion to Reconsider

was served on September 21, 2015. (CR 1379, 1366.) Petitioners served a Notice of Appeal on October 12, 2015. (CR 1391.)

Killeskillen also appeals the Circuit Court’s denial of its Motion to Dismiss, which was an oral ruling made at the January 28, 2015, hearing. (CR 1419.) Killeskillen served a Notice of Review on October 26, 2015.

This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because the Circuit Court entered final judgment affirming the Board’s decision granting Killeskillen’s application for a conditional use permit (“CUP”). (CR 1378.)

### **STATEMENT OF THE ISSUES**

**I. Whether the Circuit Court Erred When It Refused to Consider the Validity of the 2007 Revised Zoning Ordinance of Brookings County, South Dakota.**

The Circuit Court found that it was unable to consider whether the 2007 Revised Zoning Ordinance of Brookings County, South Dakota, (“the Ordinances”) were properly adopted under writ of certiorari review.

**Authority on Point:**

- *Pennington Cnty. v. Moore*, 525 N.W.2d 257 (S.D. 1994)
- *Tibbs v. Moody Cnty. Bd. of Comm’rs*, 2014 S.D. 44, 851 N.W.2d 208
- *Dodds v. Bickle*, 85 N.W.2d 284 (S.D. 1957)
- *Schafer v. Deuel Cnty. Bd. of Comm’rs*, 2006 S.D. 106, 725 N.W.2d 241
- SDCL 11-2-19
- SDCL 11-2-21

**II. Whether the Circuit Court Erred When It Affirmed the Board’s Decision to Grant Killeskillen a CUP.**

The Circuit Court found that the Board did not exceed its jurisdiction and pursued its authority in a regular manner when it granted Killeskillen’s application for a CUP.

Authority on Point:

- *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, 675 N.W.2d 231
- *Lamar Outdoor Adver. of S.D., Inc. v. City of Rapid City*, 2007 S.D. 35, 731 N.W.2d 199
- *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, 772 N.W.2d 643

**III. Whether Petitioners Have Statutory Standing to Bring This Action under SDCL 11-2-61.**

The Circuit Court found that all Petitioners have statutory standing under SDCL 11-2-61 to seek review of the Board’s decision granting Killeskillen’s application for a CUP.

Authority on Point:

- *Agar Sch. Dist. #58-1 Bd. of Educ. v. McGee*, 527 N.W.2d 282 (S.D. 1995).
- SDCL 11-2-61

**STATEMENT OF THE CASE**

The Board granted Killeskillen a CUP for a concentrated animal feeding operation (“CAFO”). (CR 94, Return, Ex. F.) Petitioners challenged this decision pursuant to SDCL 11-2-61, contending the Board’s decision was illegal and violated the Ordinances. (CR 1.) The challenge was submitted to the Circuit Court

of Brookings County, South Dakota, of the Third Judicial Circuit, and was presided over by the Honorable Vincent A. Foley. (*Id.*)

The Circuit Court affirmed the Board's decision to grant Killeskillen a CUP in a Memorandum Decision and entered Findings of Fact and Conclusions of Law and an Order Affirming Decision to Grant Conditional Use Permit. (CR 1329, 1369, 1378.)

### **STATEMENT OF FACTS**

#### ***The Ordinances***

The Brookings County Commission ("County Commission") adopted the Ordinances in 2007. (CR 94, Return, Ex. A.) Before adopting the Ordinances, the County Commission held two meetings regarding the adoption of the Ordinances, the first on November 20, 2007, and the second on November 27, 2007. (CR 548, Peterson Aff. ¶ 4, Ex. C.) No notices were provided before these County Commission meetings; yet, the County Commission adopted the Ordinances anyway at the November 27, 2007, meeting. (CR 548, Peterson Aff. ¶¶ 20-22, Ex. D at 588-737.) After the County Commission adopted the Ordinances, it failed to publish notice of adopting the Ordinances. (CR 548, Peterson Aff. ¶ 24, Ex. D at 696-737.) Similar failures to provide notice existed with respect to the adoption of the 1997 zoning ordinances. (CR 548, Peterson Aff. ¶¶ 14-15.) Nonetheless, the County Commission and the Board have purported to act under the authority of the Ordinances since 2007. (CR 94, Return, Ex. A.)

Under the Ordinances, the Board is authorized to consider applications for CUPs. (CR 94, Return, Ex. A at 20-22.) Included within the Ordinances are certain requirements and factors the Board must consider when determining whether to grant a CUP. (*Id.*) Additional requirements and factors exist when the CUP application is for a CAFO. (CR 94, Return, Ex. A at 74-93.) If an application complies with the Ordinances and satisfies all requirements therein, the Board is authorized to grant a CUP. (CR 94, Return, Ex. At 20-22.) If the CUP application does not comply with the Ordinances, the Board cannot grant a CUP. (*Id.*)

***Killeskillen's Application for a CUP***

Killeskillen submitted an application for a CUP to construct a new CAFO in Brookings County, South Dakota, on September 8, 2014. (CR 94, Return, Ex. B.) The proposed CAFO will be a Class A CAFO—housing 5,500 animal units—and will be located at the NE ¼ of Section 10-112-48, Brookings County, South Dakota. (*Id.*) The Board held a hearing on the application on October 7, 2014. (CR 94, Return, Ex. H.)

The Ordinances contain certain minimum requirements that must be met before a CUP can be granted. For example, Class A CAFOs cannot be built within 2,640 feet of private wells. (CR 94, Return, Ex. A at 86-87.) Here, a private well is located within 2,640 feet of the proposed CAFO site on Darrel Snodgress's property. (CR 364.) Indeed, the well is only 200 yards from the CAFO site and sticks up about three feet above the ground; and it also has a 20-foot metal tower above it signaling the presence of a well. (CR 1419, T 8.) No evidence of this well

was presented to the Board at the hearing, in part because Darrel Snodgrass did not receive notice of the hearing. (CR 364.) Indeed, the only evidence presented at the hearing regarding well setbacks was Killeskillen's statement to the Board that no wells existed within the 2,640 feet setback. (CR 94, Return, Ex. C at 2.)

Another requirement within the Ordinances relates to road use agreements.

Before granting any CUP, the Ordinances require the Board to ensure that

[t]he roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use. The [Board] may require the applicant to enter into a written contract with any affected township . . . regarding the upgrading and continued maintenance of any roads used for the conditional use requested prior to the issuance of a conditional use permit.

(CR 94, Return, Ex. A at 21.) Here, the Board determined that Killeskillen's use of township roads necessitated Killeskillen enter into a road use agreement with Oaklake Township. (CR 94, Return, Ex. K at 1.) The Board stated in its Findings of Fact and Special Conditions that it "shall require a written road use agreement with Oaklake Township . . . regarding the upgrading and continued maintenance of any road use[d] for the conditional use requested prior to issuance of a conditional use permit." (*Id.*) Killeskillen, however, has not entered into any agreements with Oaklake Township regarding upgrading or maintaining the roads that will be used for the CUP. (CR 367.)

Additionally, the Ordinances prohibit Class A CAFOs from being built in Zone A or Zone B aquifer protection areas. (CR 94, Return, Ex. A at 60-62, 88-90.) This prohibition exists to prevent contamination of groundwater. (CR 94, Return, Ex. A at 89.) A Zone B aquifer protection area sits below a portion of the

NE ¼ of Section 10-112-48, Brookings County, South Dakota, which is where the CAFO will be built and operated. (CR 370, Almond Aff. ¶ 10; CR 94, Return, Ex. C at 70-71.)

Despite these violations of the Ordinances, the Board granted Killeskillen a CUP to build and operate a CAFO on the NE ¼ of Section 10-112-48 on October 7, 2014. (CR 94, Return, Ex. K at 3.)

Petitioners filed their Petition challenging the Board's decision on November 5, 2014. (CR 1.) Killeskillen moved for dismissal of the Petition on standing grounds, and the Circuit Court denied Killeskillen's motion. (CR 48, 1419.) The Circuit Court then held a hearing on the Petition and issued a Memorandum Decision and Findings of Fact and Conclusions of Law, in which it affirmed the Board's decision. (CR 1419, 1329, 1369.) Because the Circuit Court refused to consider the validity of the Ordinances in its ruling, Petitioners moved for reconsideration. (CR 1354.) The Circuit Court denied Petitioners' Motion to Reconsider. (CR 1365.) Thereafter, Petitioners filed this appeal. (CR 1391.)

### **STANDARD OF REVIEW**

Review of the Board's decision to grant Killeskillen a CUP is conducted under the certiorari standard of review. SDCL 11-2-62. "A writ of certiorari may be granted by the Supreme and circuit courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction." SDCL 21-31-1; *see also Lamar Outdoor Adver. of S.D., Inc. v. City of Rapid City*, 2007 S.D. 35, ¶ 14, 731 N.W.2d 199. The Court's "consideration of a matter presented on certiorari is

limited to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it. A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law." *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 12, 772 N.W.2d 643, 648 (citing *Jensen v. Turner Cnty. Bd. of Adjustment*, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413 (quoting *Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367)).

Though, the Court's review extends beyond the certiorari standard if the Board acted in "arbitrary or willful disregard of undisputed and indisputable proof;" the Court can then review the merits of the underlying decision for its correctness. *Lamar*, 2007 S.D. 35, ¶ 21 (quoting *Cole v. Bd. of Adjustment of the City of Huron*, 1999 S.D. 54, ¶ 10, 592 N.W.2d 175); *Willard v. Civil Service Bd. of Sioux Falls*, 63 N.W.2d 801, 801 (S.D. 1954); see also *Lamar*, 2007 S.D. 35, ¶ 26 ("Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, at least in the absence of fraud, or willful and arbitrary disregard of undisputed and indisputable proof[.]").

Courts "interpret zoning laws according to the rules of statutory construction and any rules of construction included in the enactments themselves. The interpretation of an ordinance presents a question of law reviewable de novo." *City of Marion v. Rapp*, 2002 S.D. 146, ¶ 5, 655 N.W.2d 88, 90.

## **ARGUMENT**

This appeal is separated into two parts. The first part focuses on the validity of the Ordinances. The Brookings County Commission failed to follow the statutorily-mandated process when it adopted the Ordinances. Under this Court's precedent, such a failure makes the Ordinances invalid and unenforceable. Because the Board derives its authority to grant Killeskillen's CUP exclusively from the Ordinances, the invalidity of the Ordinances necessarily means the Board lacked jurisdiction to grant Killeskillen a CUP. Reversal is therefore appropriate.

Assuming *arguendo* the Ordinances are valid, the second part of this appeal focuses on whether the Board exceeded its jurisdiction, failed to pursue its authority in a regular manner, or arbitrarily ignored indisputable proof when it granted Killeskillen a CUP. Put simply, the Board granted Killeskillen's CUP in direct contravention of the Ordinances, making its decision forbidden under the law and beyond its authority and jurisdiction. For this additional reason, reversal is appropriate.

- I. **The Circuit Court Erred When It Refused to Consider the Validity of the Ordinances**
  - A. **Reviewing the Validity of the Ordinances Is Permitted under SDCL 11-2-61 and SDCL 11-2-62**

Petitioners challenged the validity of the Ordinances, because they were improperly adopted. The Circuit Court, however, held that whether the

Ordinances were properly adopted was beyond the review permitted under SDCL Ch. 11-2. (CR 1369.) Respectfully, the Circuit Court erred.

This matter was brought pursuant to SDCL 11-2-61. Matters brought pursuant to SDCL 11-2-61 are reviewed under the certiorari standard. *See* SDCL 11-2-62. This Court’s “consideration of a matter presented on certiorari is limited to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it.” *Armstrong*, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 648. The jurisdiction of the Board and the authority conferred upon the Board are issues directly relevant to an action brought pursuant to SDCL 11-2-61.

The Board obtains its jurisdiction and authority solely from the Ordinances. (CR 94, Return, Ex. A at 19-24.); *see* SDCL 11-2-17.3; *Pennington Cnty. v. Moore*, 525 N.W.2d 257, 258-59 (S.D. 1994) (“Because the zoning statutes in issue set forth express procedural requirements with which the County failed to comply, there is no legal basis for concluding that County may enforce these improperly enacted ordinances.”); *c.f. Save Centennial Valley Ass’n v. Schultz*, 284 N.W.2d 452, 455 (S.D. 1979) (“[I]t is noted that the Commission has no inherent power to enact a zoning ordinance. Its authority to do so arises from statute.”). Absent the Ordinances, the Board had no jurisdiction over Killeskillen’s CUP application and had no authority to grant Killeskillen a CUP. If the Ordinances are invalid, then the Board necessarily exceeded its jurisdiction and had no authority to act when it granted Killeskillen its CUP. The validity of the Ordinances, therefore, should have been considered by the Circuit Court.

In *Tibbs v. Moody County Board of Commissioners*, 2014 S.D. 44, 851 N.W.2d 208, this Court analyzed the validity of zoning ordinances in a certiorari proceeding that reviewed the grant of a conditional use permit by a board of adjustment. The appellants argued the county did not properly adopt the ordinances establishing its board of adjustment. *Id.* at ¶ 20. After analyzing how the zoning ordinances were adopted, this Court found they were validly adopted. *Id.* at ¶ 23. This Court then held that the board of adjustment acted within its jurisdiction and authority. *Id.* at ¶¶ 20-26. Thus, whether zoning ordinances are properly adopted is an issue relevant to an action brought pursuant to SDCL 11-2-61. *See also Dodds v. Bickle*, 85 N.W.2d 284 (S.D. 1957) (determining ordinances to be invalid); *Save Centennial Valley*, 284 N.W.2d at 458 (noting, even under certiorari review, the notice and hearing requirements of SDCL Ch. 11-2 “are mandatory and may not be disregarded”); *Pennington Cnty.*, 525 N.W.2d 257.

Because the validity of the Ordinances was an issue squarely before the Circuit Court, the Circuit Court erred when it refused to consider whether the Ordinances were properly adopted.

**B. The Ordinances Were Improperly Adopted and Are Thus Invalid**

Brookings County failed to comply with statutory requirements when it adopted the Ordinances. SDCL 11-2-19 mandates that “[a]fter receiving the recommendation of the planning commission the board [of county commissioners] shall hold at least one public hearing on the respective . . . zoning ordinance . . . . Notice of the time and place of the hearings shall be given once at

least ten days in advance by publication in a legal newspaper of the county.” The County Commission held two meetings regarding the Ordinances, the first on November 20, 2007, and the second on November 27, 2007, during which the County Commission adopted the Ordinances. (CR 548, Peterson Aff. ¶ 4, Ex. C.) No notices were provided before either of these County Commission meetings. (CR 548, Peterson Aff. ¶¶ 20-22, Ex. D, p. 588-737.) Brookings County failed to comply with SDCL 11-2-19 when it adopted the Ordinances.

Moreover, when a county adopts new ordinances, SDCL Chapter 11-2 requires counties to publish notice of adoption to allow for public referendum. SDCL 11-2-21; SDCL 11-2-22; SDCL 11-2-30. Following its adoption of the Ordinances, Brookings County failed to publish notice that it adopted the Ordinances, which denied Brookings County residents their right to referendum. (CR 548, Peterson Aff. ¶ 24, Ex. D, p. 696-737.) Again, Brookings County failed to comply with statutory requirements when it adopted the Ordinances.

Zoning ordinances must be properly adopted to be valid and enforceable. *See Pennington Cnty*, 525 N.W.2d at 259 (“South Dakota case law establishes that improperly adopted zoning regulations are invalid and will not be enforced.”). Proper adoption necessitates compliance with express statutory procedural requirements. *Id.* These procedural requirements ensure county residents are afforded due process of law. *Id.* (noting “political subdivisions must *scrupulously* comply with statutory requirements, including notice and hearing, in order to provide due process of law”) (emphasis added) (quoting *Carter v. City of Salina*, 773 F.2d 251 (10th Cir. 1985)); *see Schafer v. Deuel Cnty. Bd. of*

*Comm'rs*, 2006 S.D. 106, ¶ 13, 725 N.W.2d 241, 246 (noting that statutory due process protections in zoning statutes safeguard against the arbitrary exercise of power, inform decision makers, and afford affected landowners the opportunity to oppose measures).

Brookings County failed to comply with statutory procedural requirements when it adopted the Ordinances, thereby denying Petitioners and others their due process rights. “Because the zoning statutes in issue set forth express procedural requirements with which [Brookings] County failed to comply, there is no legal basis for concluding that [Brookings] County may enforce these improperly enacted ordinances.” *Pennington Cnty.*, 525 N.W.2d at 258-59; *see Dodds*, 85 N.W.2d at 286-88 (zoning ordinances invalid due to failure to comply with statutory notice requirements); *City of Brookings v. Martinson*, 246 N.W. 916 (S.D. 1933) (holding that failure to give notice as required by statute renders ordinance ineffective as a zoning ordinance). Therefore, the Ordinances are invalid and ineffective.

Because the Ordinances are invalid and ineffective, the Board necessarily exceeded its authority when it granted Killeskillen a CUP by acting under purported authority conferred by invalid ordinances. *See Pennington Cnty.*, 525 N.W.2d at 259 (noting that an act by a county which fails to comply with legislative mandates “*is an act in excess of its jurisdiction*”) (emphasis added). Indeed, the Ordinances did not confer any authority on the Board to grant Killeskillen a CUP. This Court should reverse the Board’s decision and order

Killeskillen's CUP be revoked or voided. Alternatively, the Court should remand this matter for consideration of the Ordinances' validity.

**II. The Board Exceeded Its Jurisdiction, Failed to Pursue Its Authority in a Regular Manner, and Arbitrarily Ignored Indisputable Proof When It Granted Killeskillen's Application for a CUP**

Even if the Ordinances are valid, the Board's decision should still be reversed, because the Board exceeded its jurisdiction, failed to pursue its authority in a regular manner, and arbitrarily ignored indisputable proof. First, the Board granted a CUP to build and operate a CAFO within 2,640 feet of a private well. This is a direct violation of the Ordinances caused by the Board's failure to investigate the application's compliance with the Ordinances. Second, the Board did not require Killeskillen to enter into a road use agreement before granting the CUP, even though the Board recognized the need for one and the Ordinances require the agreement be entered into *before* granting a CUP. And third, the Board granted a CUP to build and operate a CAFO atop a Zone B aquifer protection area, which is also a direct violation of the Ordinances.

**A. Presence of a Private Well within 2,640 Feet of CAFO Precluded Granting the CUP**

The Ordinances prohibit new Class A CAFOs from being built within 2,640 feet of private wells. (CR 94, Return, Ex. A at 86-87.) A private well is located within 2,640 feet of the proposed CAFO on Darrell Snodgrass's property. (CR 364.) In fact, that a well exists within the setback can no longer be disputed. In its Memorandum Decision, the Circuit Court stated: "The Court finds the

evidence convincing that a well as contemplated by the Ordinance exists.” (CR 1329.) Respondents have not appealed that finding, making it the law of the case. *A.L.S. Properties, Silver Glen v. Graen*, 465 N.W.2d 783, 787 (S.D. 1991) (refusing to consider arguments not properly noticed for review); *Bayer v. Johnson*, 400 N.W.2d 884, 886 (S.D. 1987) (“The law of the case doctrine is used to provide finality to an issue once it has been determined by a court of record.”). Because a private well is located within the setback, denial of Killeskillen’s application was required under the Ordinances. Therefore, granting Killeskillen a CUP to build and operate a CAFO within 2,640 feet of a private well was an act forbidden by the Ordinances, and the Board failed to regularly pursue its authority. *See Armstrong*, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 648; *Lamar*, 2007 S.D. 35, ¶ 14, 731 N.W.2d at 203. Reversal of the Board’s decision is required.

**B. The Board Failed to Conduct Any Independent Investigation Regarding Whether Private Wells Existed within the Setback**

Despite finding that a well exists within the setback, the Circuit Court nevertheless upheld the Board’s decision. Its basis for doing so was the lack of evidence of Snodgress’s well being presented to the Board at the hearing. In other words, the Board’s ignorance justified upholding its decision. The Circuit Court misconstrued the manner in which the Board was required to pursue its authority.

Before it can grant a CUP, the Board has a duty to investigate whether the CUP application complies with the Ordinances. *See Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶¶ 13-16, 675 N.W.2d 231, 234-36 (requiring a board of adjustment to contribute “independent thought” in order to “fulfill its

duty to follow the guidelines of the city ordinance and make a public interest determination on behalf of the entire city”); 8A McQuillin Law of Municipal Corp. § 25:276 (3d ed.) (stating that zoning officials have a “duty to take appropriate steps and proceedings to apply and enforce zoning measures, regulations and restrictions”). Failing to conduct an investigation equates to a failure to regularly pursue authority, because any decision made without conducting a proper investigation is necessarily arbitrary and irregular. *Hines*, 2004 S.D. 13, ¶ 13-16.

Here, the Board failed to conduct any investigation as to whether a well existed within the setback. A simple drive around the property would have put the Board on notice of Snodgress’s well, because the well is clearly visible from the road. (CR 364.) Indeed, the well is only 200 yards from the CAFO site and sticks up about three feet above the ground; it also has a 20-foot metal tower signifying its existence. (CR 1419, T 8.) Had the Board conducted even the most cursory investigation (e.g., visiting the property and looking to see if a well was visible from the road), it would have noticed Snodgress’s well. Instead, the Board conducted no investigation to ensure the application complied with the Ordinances. The Board’s dereliction of its duty to investigate establishes that it failed to pursue its authority in a regular manner, which is cause for reversal. *Hines*, 2004 S.D. 13, ¶ 13-16; SDCL 21-31-8.

The situation here illustrates why boards of adjustment have a duty to investigate before granting CUPs. Without conducting an investigation, any decision made by a board of adjustment is necessarily arbitrary. The Board’s

failure to investigate caused it to make the arbitrary assumption that no private wells existed within the setback. Because a private well exists within the setback, granting the CUP was in direct violation of the Ordinances. This type of arbitrary decision making is not permitted, and the Board exceeded its jurisdiction by taking an action in contravention of the Ordinances. *Hines*, 2004 S.D. 13, ¶ 13-16.

In upholding the Board's decision, the Circuit Court concluded that the Board could rely solely on the representations made by Killeskillen and had no duty to independently investigate the merits of the application. (CR 1329.) This reasoning conflicts with this Court's precedent.

In *Hines*, this Court reversed a board of adjustment's decision denying a variance. *Id.* at ¶¶ 13-16. In denying the variance, the board of adjustment relied entirely on the opinions of those opposed to the variance rather than conducting its own analysis and contributing independent thought. *Id.* This Court condemned such conduct, because the board of adjustment had a duty to follow the zoning ordinances and its failure to conduct its own analysis and contribute its own independent thought violated that duty. *Id.* at ¶ 13. This Court specifically noted that relying solely on the statements of those invested in the proceeding is improper, because such statements "may be wholly self-serving." *Id.* at ¶ 15. Consequently, this Court reversed and remanded to the board of adjustment for a proper determination. *Id.* at ¶ 16.

The facts here are nearly identical. The Board relied solely on the statements of Killeskillan with respect to whether its application complied with the setback requirements in the Ordinances. As the applicant, Killeskillen was

highly invested in the outcome of the Board's decision and of course would state that it met all of the requirements in the Ordinances, including the well setback requirements. Such statements are "wholly self-serving," and the Board was obligated to conduct its own investigation to ensure compliance. *Id.* at ¶¶ 13-16. The Board's failure to do so is grounds for reversal. *Id.*

Moreover, adopting the Circuit Court's rationale rewards boards of adjustment for sticking their heads in the sand. Under the Circuit Court's rationale, so long as a board of adjustment is ignorant of a violation of the ordinances and has any baseless representation that the application complies with the ordinances, its decision is irreversible. Taken to its logical extreme, a CUP applicant could show up at a hearing and simply state, "All ordinance requirements have been met," and if a board of adjustment were to grant a CUP based on that representation, its decision would be untouchable under this rationale. But ignorance is *not* bliss. More should be, and in fact is, required under the law. *Hines*, 2004 S.D. 13, ¶¶ 13-16; *Save Centennial Valley Ass'n*, 284 N.W.2d at 457.

The Circuit Court questioned Petitioners regarding not presenting evidence of the well at the hearing.<sup>1</sup> (CR 1329.) But, Petitioners had no duty to

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<sup>1</sup> It is worth noting that Snodgress did not receive notice of Killeskillen's application or the hearing, and had he received notice, Snodgress would have voiced his opposition thereto, in part, because of his well. (CR 364.) To be clear, Petitioners are *not* arguing there was insufficient notice here, only that there is justification for why evidence of the well was not presented during the hearing.

introduce evidence at the hearing. The burden rests entirely on the applicant, and it is the Board's duty to make sure that burden is met.

CUPs, by definition, are exceptions to the general zoning rules. The burden to show that a CUP should be granted rests on the applicant. (CR 94, Return, Ex. A at 20-22, 74-93.); *W&G McKinney Farms, LP v. Dallas Cnty. Bd. of Adjustment*, 674 N.W.2d 99, 103-04 (Iowa 2004) (nothing the “applicant has the burden of proof in showing that all the conditions of the ordinance are satisfied”); *Kinney v. Harrison Cnty. Bd. of Sup’rs*, 172 So.3d 1266, 1271 (Miss. Ct. App. 2015) (CUP applicant has burden of proof); 8A McQuillin Law of Municipal Corp. § 25:367 (3d ed.). County residents, on the other hand, do not need to present evidence opposing CUP applications, because they are (or should be) assured that the boards of adjustment considering the applications will require applicants to comply with the Ordinances before granting CUPs. *See Save Centennial Valley Ass’n*, 284 N.W.2d at 457 (“The residents of the county have a right to rely on the protections afforded by the plan[.]”); *Schafer*, 2006 S.D. 106, ¶ 12, 725 N.W.2d at 246.

The Circuit Court's criticism of Petitioners for not presenting evidence of the well at the hearing misappropriates which party had the burden during the hearing. Petitioners had no duty to bring forth evidence opposing Killeskillen's application. Killeskillen had the burden to prove it should be granted a CUP, and the Board had a duty to ensure that Killeskillen met that burden. If highly relevant and easily discoverable evidence was not presented during the hearing, it merely demonstrates the Board failed in its duty to investigate the application to ensure it

complied with the Ordinances. Where that failure results in arbitrarily granting a CUP in violation of the Ordinances, as it did here, it results in the Board exceeding its jurisdiction and failing to pursue its authority in a regular manner.

In sum, the Board failed to fulfill its duty to investigate Killeskillen's application to ensure it complied with the Ordinances. This failure resulted in a CUP being granted in direct violation of the Ordinances. Put differently, the Board failed to regularly pursue its authority, engaged in arbitrary decision making, exceeded its jurisdiction, and acted in direct violation of the Ordinances. Reversal is required. *See Grant County Concerned Citizens*, 2015 S.D. 54, ¶ 10, 866 N.W.2d 149; *Armstrong*, 2009 S.D. 81, ¶ 12; *Lamar*, 2007 S.D. 35, ¶ 14.

Alternatively, this Court may remand this matter to the Board for consideration of the "actual facts," including the presence of the Snodgrass well. *See In re Application of Benton*, 2005 S.D. 2, ¶ 24, 691 N.W.2d 598 (when new facts come to light after an administrative decision is made, the matter may be "remanded to conduct further proceedings on the 'actual facts.'").<sup>2</sup>

**C. Killeskillen's Failure to Have a Road Use Agreement in Place with Oaklake Township Precluded the Board from Granting Killeskillen a CUP**

Killeskillen was required to enter into a road use agreement with Oaklake Township *before* it could receive a CUP. Article 5.00 of the Ordinances provides: "[b]efore granting any Conditional Use Permits the [Board] shall make written

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<sup>2</sup> *Benton* involved remanding a paramedic licensure matter when the paramedic had received a pardon while her case was on appeal to this Court, which appeal followed the licensing board's denial of her application for licensure based on her prior criminal conviction.

findings certifying compliance with the specific rules and criteria governing individual Conditional Uses and that satisfactory provision and arrangement have been made” to ensure that the “roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use.” (CR 94, Return, Ex. A at 21-22 (emphasis added).) In other words, the Ordinances require that an applicant obtain any necessary road use agreements with townships *before* the Board grants a CUP.<sup>3</sup> Also, the Board stated in its Findings of Fact and Special Conditions that it “*shall* require a written road use agreement with Oaklake Township . . . regarding the upgrading and continued maintenance of any road use[d] for the conditional use requested *prior to issuance of a conditional use permit.*” (CR 94, Return, Ex. K at 1 (emphasis added).) Therefore, both the Ordinances and the Board required Killeskillen to enter into a road use agreement with Oaklake Township *before* a CUP could be granted.

Killeskillen, however, has not entered into any agreements with Oaklake Township regarding upgrading or maintaining the roads that will be used for its CUP. (CR 367.) This failure directly contravenes the Ordinances and the Board’s Findings of Fact and Special Conditions. Yet, the Board granted Killeskillen a CUP anyway. Put simply, the Board did not enforce the Ordinances or its own requirement. The Board’s failure to enforce the Ordinances and its own findings is grounds for reversal. *See Armstrong*, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 648;

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<sup>3</sup> Courts “interpret zoning laws according to the rules of statutory construction and any rules of construction included in the enactments themselves. The interpretation of an ordinance presents a question of law reviewable *de novo*.” *City of Marion v. Rapp*, 2002 S.D. 146, ¶ 5, 655 N.W.2d 88, 90.

*Lamar*, 2007 S.D. 35, ¶ 14, 731 N.W.2d at 203; *Hines*, 2004 S.D. 13, ¶¶ 13-16, 675 N.W.2d at 234-36.

**D. Presence of Aquifer below CAFO Site Precluded Board from Granting Killeskillen's CUP**

The Ordinances prohibit Class A CAFOs from being located in Zone A or Zone B aquifer protection areas. (CR 94, Return, Ex. A at 60-62, 88-90.) This prohibition is in place to prevent contamination of groundwater. (CR 94, Return, Ex. A at 89.) No exceptions to the aquifer-zone prohibition exist. (CR 94, Return, Ex. A at 60-62, 88-90.)

The property for which the Board granted a CUP (i.e. NE ¼ of Section 10-112-48, Brookings County, South Dakota) sits atop a Zone B aquifer area. (CR 370, Almond Aff. ¶ 10; CR 94, Return, Ex. C at 70-71.) Thus, the Board exceeded its authority and violated the Ordinances when it granted Killeskillen a CUP for property that sits atop a Zone B aquifer area. *See Armstrong*, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 648; *Lamar*, 2007 S.D. 35, ¶ 14, 731 N.W.2d at 203.

At the circuit court level, Respondents did not dispute the existence of a Zone B aquifer area within the NE ¼ of Section 10-112-48 and, instead, argued that the plans presented to the Board propose the buildings, structures, and ponds will be built on the northeast corner of the property, which purportedly avoids the Zone B aquifer area. Such an argument misses the mark.

First, a CAFO operation is not limited to just the buildings, structures, and ponds. Activity will be conducted outside of those specific areas. Trucks will come and go. Feed will be delivered and stored. Chemicals for the cattle and the

operation of the CAFO will be delivered and stored. Manure will eventually need to be removed, whether by hoses or trucks. The carcasses of dead cows will need to be stored and eventually removed. Therefore, limiting the CAFO to just the structures and ponds for purposes of whether the application complies with the Ordinances makes little sense from a practical perspective.

Second, Respondents' argument ignores the fact that Killeskillen's CUP application is for the entire NE ¼ of Section 10-112-48—all 160 acres. An applicant for a CUP cannot dance around restrictions contained in the Ordinances by creatively placing certain buildings, structures, or ponds only on a particular part of the land parcel. Allowing an applicant to do so is contrary to the text and spirit of the Ordinances.<sup>4</sup> (*See* CR 94, Return, Ex. A at 2 (“In their interpretation and application, the provisions of this regulation shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals, or general welfare.”); Ex. A at 59 (“In the event of a conflict . . . the map showing the larger aquifer area shall be followed.”); Ex. A at 90 (recognizing the Board's authority to increase setbacks above the minimum set out in the Ordinances).)

Killeskillen applied for a CUP to build a CAFO on the NE ¼ of Section 10-112-48. The Board granted Killeskillen a CUP for the NE ¼ of Section 10-112-48. It is indisputable that the NE ¼ of Section 10-112-48 sits atop a Zone B aquifer area. The Ordinances prohibit Class A CAFOs from being built or

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<sup>4</sup> Courts “interpret zoning laws according to the rules of statutory construction and any rules of construction included in the enactments themselves. The interpretation of an ordinance presents a question of law reviewable de novo.” *City of Marion v. Rapp*, 2002 S.D. 146, ¶ 5, 655 N.W.2d 88, 90.

operated atop a Zone B aquifer area. Thus, the Board exceeded its authority and engaged in conduct forbidden by the Ordinances when it granted Killeskillen a CUP to build and operate a Class A CAFO on the NE ¼ of Section 10-112-48. *See Armstrong*, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 648; *Lamar*, 2007 S.D. 35, ¶ 14, 731 N.W.2d at 203.

For the foregoing reasons, the Board exceeded its jurisdiction, failed to pursue its authority in a regular manner, and arbitrarily ignored indisputable proof when it granted Killeskillen a CUP. Reversal is appropriate.

### **III. Killeskillen’s Notice of Review Regarding Petitioners’ Standing**

#### **A. Killeskillen’s Notice of Review Should Be Dismissed, Because Killeskillen Failed to Serve LC Olson LLP**

After Petitioners filed their Notice of Appeal, Killeskillen served and filed a Notice of Review. Killeskillen failed, however, to serve its Notice of Review on a party to this action, namely LC Olson LLP. This failure is fatal to Killeskillen’s appeal and requires its dismissal.

SDCL 15-26A-22 requires appellees to serve the notice of review and docketing statement “on all other parties.” Failure to do so is fatal to the appeal and requires its dismissal. *See, e.g., A.L.S. Properties, Silver Glen v. Graen*, 465 N.W.2d 783, 787 (S.D. 1991) (“This Court has consistently held that failure to comply with the notice of review requirements results in a waiver.”); *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2012 S.D. 20, 813 N.W.2d 122; *In re Estate of Geier*, 2012 S.D. 2, 809 N.W.2d 355. LC Olson is a party, and

Killeskillen failed to serve its Notice of Review and Docketing Statement on LC Olson. Dismissal of Killeskillen's appeal is therefore required.

To avoid dismissal, Killeskillen argues LC Olson is not a party.

"Typically, the parties to a case can be identified by referring to the parties named in the captions on the pleadings and other formal legal documents filed in the proceeding." *In re Reese Trust*, 2009 S.D. 111, ¶ 6, 776 N.W.2d 832, 833-34. LC Olson was named in the caption on the Petition, Memorandum Decision, Findings of Fact and Conclusions of Law, Order Affirming Decision to Grant Conditional Use Permit, and Petitioners' Notice of Appeal. (CR 1, 1329, 1369, 1378, 1391.) Moreover, LC Olson has an interest in this appeal. As Killeskillen admits in its brief, LC Olson is the owner of the real estate upon which the CAFO at issue will be built. (Killeskillen's Brief Opposing Motion to Dismiss Notice of Review at 2.) Therefore, Killeskillen's argument that LC Olson is somehow not a party lacks merit.

Next, Killeskillen cites *In re Estate of Flaws*, 2012 S.D. 3, 811 N.W.2d 749, for the proposition that "where the interests of the parties are identical, or there is certainty that the interests of the party who is not served are represented by counsel filing the notice, there is no reason to serve the Notice of Review on a party in the proceedings below." (Killeskillen's Brief Opposing Motion to Dismiss Notice of Review at 5.) First, *In re Estate of Flaws* does not stand for the legal proposition for which Killeskillen cites it and does not relieve Killeskillen from its procedural gaffe. *In re Estate of Flaws* involved a very narrow holding in which the Court found that a party who was represented by the same counsel as

another party in the matter who had properly been served did not necessarily need to be served. 2012 S.D. 3, ¶¶ 12-13 (“Accordingly, Audrey and Clinton’s motion to dismiss Yvette’s appeal for failure to serve the notice of appeal on Tamara is denied for the reason that Yvette and Tamara are represented by the same counsel and this had the effect of service of the notice of appeal on Tamara.”). Here, LC Olson is not represented by the same counsel as another party to this action. Thus, *In re Estate of Flaws* is not on point.

Second, even if *In re Estate of Flaws* supports the proposition for which Killeskillen cites it, Killeskillen simply assumes that LC Olson’s interests are perfectly aligned with Killeskillen’s. Nothing in the record supports this assumption. LC Olson may have separate and distinct interests entirely different from Killeskillen’s interests. Thus, *In re Estate of Flaws* does not shield Killeskillen from its procedural error.

Killeskillen also incorrectly argues that because its argument relates to Petitioners’ standing, the Court should look past its failure to serve LC Olson. As this Court recently stated, “[a]ccording to our precedent, a challenge to standing can be waived.” *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶¶ 9-10, 850 N.W.2d 840, 842 (citing *In re Midwest Motor Express, Inc.*, 431 N.W.2d 160, 162 (S.D. 1988) (“MME, while arguing the issue of standing to the circuit court and in its brief to this court, failed to file a notice of review with either the circuit court . . . or this court (pursuant to SDCL 15-26A-22). Because of MME’s failure, the issue of Rude’s standing is waived.”); *see also In re Trade Dev. Bank*, 382 N.W.2d 47, 49 (S.D. 1986) (standing argument not preserved for appeal

because the record did not contain a notice of review). By failing to properly serve its Notice of Review, Killeskillen has waived its challenge to Petitioners' standing. *Whitesell*, 2014 S.D. 41, ¶ 10 (“But that did not prevent Employer from filing a notice of review with the circuit court regarding its standing argument. Such failure to file a notice of review precludes appellate review of that issue.”).

In sum, Killeskillen waived its challenge to Petitioners' standing by failing to properly serve its Notice of Review.

**B. Petitioners Have Standing to Challenge the Board's Decision**

Petitioners have standing to challenge the Board's decision to grant Killeskillen a CUP. “Standing is established through being a ‘real party in interest’ and it is statutorily controlled.” *Agar Sch. Dist. #58-1 Bd. of Educ. v. McGee*, 527 N.W.2d 282, 284 (S.D. 1995) (quoting *Wang v. Wang*, 393 N.W.2d 771, 775 (S.D. 1986)). SDCL 11-2-61 is the statute that controls here and provides:

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the county, may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality.

A plain reading of SDCL 11-2-61 shows that Patrick, LHIA, and Hendricks all have standing to challenge the Board's decision granting Killeskillen a CUP.

**1. Norris Patrick Has Standing**

Patrick is a landowner and taxpayer in Brookings County. (CR 79.) SDCL 11-2-61 unambiguously permits “any taxpayer” to bring an action under SDCL 11-2-61 challenging a decision made by a board of adjustment. Thus, Patrick has standing to challenge the Board’s decision.

Killeskillen will likely argue that Patrick must also be aggrieved by the decision appealed from. A plain reading of SDCL 11-2-61 shows no such additional requirement exists. SDCL 11-2-61 reads: “Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, *or* any taxpayer” may challenge any board of adjustment decision. (emphasis added). The Legislature’s use of the disjunctive indicates that either “a person or persons, jointly or severally, aggrieved” may challenge the decision *or* “any taxpayer” may challenge the decision. If the Legislature had intended to require “any taxpayer” to also be aggrieved by the decision appealed from, it could have easily said so. But it did not.

Furthermore, by permitting “any taxpayer” to challenge the Board’s decision, the Legislature recognized that any and all taxpayers have an interest in “any decision” of the Board such that they can challenge said decision. SDCL 11-2-61; *see also Agar Sch. Dist.*, 527 N.W.2d at 284 (“taxpayer plaintiffs in this case clearly have standing...[a] taxpayer need not have a special interest...to entitle him to institute an action to protect public rights”).

Patrick has standing to challenge the Board’s decision as a taxpayer, which is all that SDCL 11-2-61 requires. *See Agar Sch. Dist.*, 527 N.W.2d at 284

("[s]tanding...is statutorily controlled"). Because Patrick has standing, no further analysis is necessary. *See Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998) ("If one party has standing in an action, a court need not reach the issue of standing of other parties when it makes no difference to the merits of the case.").

## 2. **LHIA Has Standing**

LHIA is a South Dakota nonprofit corporation that was formed "to promote, construct, improve, own, operate, manage, develop and donate to public, benevolent or charitable organizations, recreation facilities in the Lake Hendricks area, for use by the public as a whole; . . . to do all things necessary, suitable or proper for the accomplishment of the purposes aforesaid[.]" (CR 60.) Several of LHIA's members own real property around Lake Hendricks and within Brookings County. (*Id.*)

SDCL 11-2-61 affords standing to "[a]ny person or *persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer[.]*" (emphasis added). Accordingly, if LHIA falls within the definition of "any person or persons, jointly or severally, aggrieved by any decision of the Board," then it has standing under SDCL 11-2-61.

The first issue to address is what the Legislature meant by "person or persons." SDCL Chapter 11-2 does not define the term person. Two other SDCL Title 11 Chapters, however, define person and do so in the same manner. Both SDCL 11-7-1(11) and SDCL 11-8-1(12) define person as "any individual, firm,

partnership, limited liability company, *corporation*, company, *association*, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof[.]” (emphasis added). LHIA—as a formal corporation and an informal association—clearly falls within the definition of “person” as defined in SDCL Title 11. Moreover, in drafting SDCL 11-2-61, the Legislature permitted a collection of individuals to challenge a board of adjustment’s decision by use of the terms “persons” (i.e. person in the plural) and “jointly” (i.e. with another person; together) when identifying who can bring a challenge under SDCL 11-2-61. Thus, LHIA’s status as a corporation and collection of individuals poses no obstacle for it to assert standing under SDCL 11-2-61.

The second issue then becomes whether LHIA is “aggrieved” by the Board’s decision to grant Killeskillen a CUP. The Board’s decision creates a serious risk of pollutants entering the Lake Hendricks watershed as well as aquifers in the region, thereby decreasing the water quality of Lake Hendricks. The decision will also diminish the availability and quality of groundwater. Other negative consequences of the Board’s decision include increased odor, noise, pollutants, and glare; negative economic impacts; incompatibility with surrounding area and properties, including public lands and public access areas; negative impacts on ecology and wildlife; and dilapidation of roads. Because LHIA is an entity devoted to promoting, constructing, improving, owning, operating, managing, and developing recreation facilities in the Lake Hendricks area, the Board’s decision impedes LHIA’s ability to pursue its primary corporate

mission and directly harms LHIA's past and present efforts. Thus, LHIA is "aggrieved" by the Board's decision and has an interest in preventing these negative consequences from occurring. Because LHIA is aggrieved by the Board's decision, LHIA has standing under SDCL 11-2-61.

Separately, LHIA has standing to challenge the Board's decision, because many of its members own real property in Brookings County and are taxpayers. SDCL 11-2-61 permits "any taxpayer" to bring the type of action currently before the Court. The taxpayers composing LHIA each have standing as taxpayers, and their free association with one another through LHIA cannot constitutionally be a basis for excluding them from this action. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); U.S. Const. First Amendment. For this additional reason, LHIA has standing to challenge the Board's decision.

In *Hunt*, the United States Supreme Court summarized the standing of associations as follows:

Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

First, LHIA's members would otherwise have standing under SDCL 11-2-61 as taxpayers, landowners, and aggrieved persons. Second, the interests LHIA seeks to protect are germane to LHIA's purpose: promoting, constructing, improving, owning, operating, managing, and developing recreation facilities in the Lake Hendricks area. Third, neither the claims asserted nor relief requested requires the

participation of LHIA’s individual members, because the Court is reviewing the decision and actions of the Board. Under *Hunt*, LHIA has standing to bring an action under SDCL 11-2-61.

### 3. **Hendricks Has Standing**

Municipalities are included under SDCL 11-2-61. SDCL 11-2-61 affords standing to “any person or persons, jointly or severally, aggrieved[.]” SDCL 11-7-1(11) and SDCL 11-8-1(12) define person as “any individual, firm, partnership, limited liability company, corporation, company, association, joint stock association, or *body politic*; and includes any trustee, receiver, assignee, or other similar representative thereof[.]” (emphasis added). Hendricks, as a municipality, is a body politic and thus falls within the meaning of “person” in SDCL 11-2-61.

Hendricks borders Lake Hendricks and relies on Lake Hendricks such that a decrease in the lake’s quality directly harms Hendricks. (CR 63.) Hendricks has a large public beach on Lake Hendricks, has a large public park on the shores of Lake Hendricks, and operates a municipal campground bordering Lake Hendricks that helps fund city government. (*Id.*) Hendricks has invested substantial monies improving the quality of Lake Hendricks, including redoing its storm sewer to bypass Lake Hendricks. (*Id.*) Hendricks also owns a well near the outlet of Lake Hendricks that it uses as a backup water source. (*Id.*) Consequently, the Board’s decision—which will result in detriment to Lake Hendricks and the surrounding area via pollution, diminishment of the availability and quality of groundwater, increased odor, noise, and glare, negative economic impacts, negative impacts on

ecology and wildlife, and dilapidation of roads—aggrieves Hendricks. Thus, Hendricks has standing under SDCL 11-2-61.

Separately, Hendricks represents its residents. Those residents are also aggrieved by the Board’s decision as described above. SDCL 11-2-61 explicitly permits “persons, jointly or severally, aggrieved” to challenge the Board’s decision. Hendricks is a collection of individuals (i.e., persons) who are together and independently (i.e., jointly and severally) harmed by the Board’s decision (i.e., aggrieved). For this additional reason, Hendricks has standing under SDCL 11-2-61.

### **CONCLUSION**

For the reasons stated above, the Court should enter the following relief:

1. The Court should reverse the Board’s decision granting Killeskillen a CUP;
2. The Court should reverse the Circuit Court’s order affirming the Board’s decision, thereby reversing the Board’s decision;
3. Alternatively, the Court should direct this matter to be remanded to the Board for further hearings consistent with the Ordinances and the Board’s duties under South Dakota law;
4. Alternatively, the Court should remand this matter to the Circuit Court for consideration of the validity of the Ordinances; and
5. For other relief that the Court finds just, equitable, and lawful.

**REQUEST FOR ORAL ARGUMENT**

Petitioners respectfully request oral argument.

Dated at Sioux Falls, South Dakota, this 10th day of January, 2016.

DAVENPORT, EVANS,  
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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief of Appellants complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 8,073 words and 42,063 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 10th day of January, 2016.

DAVENPORT, EVANS,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing “Brief of Appellants” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on December 10, 2015.

The undersigned further certifies that an electronic copy of “Brief of Appellants” was emailed to the attorneys set forth below, on December 10, 2015, with a hardcopy mailed to LC Olson LLP on the same date:

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Respondents*

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Sioux Falls, SD 57103

  
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## **APPENDIX**

- |   |              |
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STATE OF SOUTH DAKOTA)  
: SS.  
COUNTY OF BROOKINGS)

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

\* \* \* \* \*

LAKE HENDRICKS IMPROVEMENT  
ASSOCIATION; CITY OF HENDRICKS,  
MINNESOTA; and NORRIS PATRICK,

File No. 05CIV14-247

Petitioners,

-vs-

BROOKINGS COUNTY PLANNING AND  
ZONING COMMISSION; BROOKINGS  
COUNTY PLANNING AND ZONING  
COMMISSION SITTING AS THE  
BROOKINGS COUNTY BOARD OF  
ADJUSTMENT; MICHAEL CRINION;  
KILLESKILLEN, LLC; and  
LC OLSON, LLP,

**ORDER AFFIRMING DECISION TO  
GRANT CONDITIONAL USE PERMIT**

Respondents.

\* \* \* \* \*

The Court having this same day entered its Findings of  
Fact and Conclusions of Law, which are incorporated herein by  
this reference, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the decision of the  
Brookings County Planning and Zoning Commission, sitting as the  
Brookings County Board of Adjustment, to grant Michael Crinion  
and Killeskillen, LLC's Application for a Conditional Use Permit  
is hereby AFFIRMED.

BY THE COURT: Signed: 9/24/2015 10:22:33 AM

  
Circuit Court Judge

Attest:  
ROXANNE KNAPP Clerk/Deputy



Filed on: 09/24/2015 BROOKINGS County, South Dakota 05CIV14-000247

Filed: 9/25/2015 3:07:06 PM CST Brookings County, South Dakota 05CIV14-000247

STATE OF SOUTH DAKOTA)  
: SS.  
COUNTY OF BROOKINGS)

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

\* \* \* \* \*

LAKE HENDRICKS IMPROVEMENT  
ASSOCIATION; CITY OF HENDRICKS,  
MINNESOTA; and NORRIS PATRICK,

File No. 05CIV14-247

Petitioners,

-vs-

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

BROOKINGS COUNTY PLANNING AND  
ZONING COMMISSION; BROOKINGS  
COUNTY PLANNING AND ZONING  
COMMISSION SITTING AS THE  
BROOKINGS COUNTY BOARD OF  
ADJUSTMENT; MICHAEL CRINION;  
KILLESKILLEN, LLC; and  
LC OLSON, LLP,

Respondents.

\* \* \* \* \*

Petitioners, Lake Hendricks Improvement Association, City of Hendricks, Minnesota, and Norris Patrick, petitioned the Court for a Writ of Certiorari to challenge the decision of Brookings County Planning & Zoning Commission, acting as the Brookings County Board of Adjustment ("Board"), to grant a conditional use permit ("CUP") to Michael Crinion and/or Killeskillen, L.L.C. ("Killeskillen"). The matter came on for hearing before the Honorable Vincent A. Foley, Circuit Court Judge, presiding, on May 8, 2015. Petitioners appeared through their attorney, Mitchell A. Peterson; the Board appeared through its attorney,

Jack H. Hieb; and Crinion and Killeskillen appeared through their attorney, Brian Donahoe.

Having conducted a review of this matter under the certiorari standard of review, having considered the arguments of counsel, and having rendered its written decision dated August 14, 2015<sup>1</sup>, which is attached hereto and incorporated herein by this reference, the Court now makes and enters the following:

**FINDINGS OF FACT**

1. Petitioners seek relief from the Board's action to grant a CUP to Crinion and/or Killeskillen on the Northeast Quarter (NE¼) of Section 10-112-48 of the 5<sup>th</sup> P.M., all in Brookings County.

2. On September 8, 2014, Crinion and Killeskillen applied for a CUP for a Class A Concentrated Animal Feeding Operation ("CAFO") under Brookings County Ordinances with the Board.

3. On October 7, 2014 the Board conducted a hearing on the application which culminated in a vote to approve the CUP with certain conditions.

4. Thereafter, the Board entered its written decision and findings granting the CUP.

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<sup>1</sup> Although the written decision lists August 14, 2015 as the date of the document, the Court advised counsel that the correct date of the document is August 21, 2015, which is when it was officially signed and filed.

5. Petitioners raise several issues that fall within the Court's examination in this appeal. Several require specific attention: 1) Does a well fall within the setback requirement of the CUP? 2) Does the CUP fall over a Zone B aquifer? 3) Does the CUP grant violate the Comprehensive Plan rendering approval improper? 4) What is the geographic extent of the CUP permission?

6. Others fall within an analysis determining whether the Board determined compliance and weighed the information: 5) Was sufficient notice of the hearing provided to all neighbors? 6) Are the roads serving the CAFO sufficiently addressed in the CUP? 7) Does the road agreement status defeat the CUP?

7. The County considered the State registry of well-heads when considering whether there were any wells within the setback requirement. As conveyed by Crinion and Killeskillen to the Board, a search of the South Dakota Department of Environment & Natural Resources ("DENR") Water Well Completion Reports reveals no wells within Sections 2, 3, or 10 of Township 112, Range 48, Brookings County.

8. Crinion and Killeskillen presented the evidence that no wells were present within the setback. No other evidence concerning wells was presented at the October 7, 2014 hearing.

9. Petitioners attempted to present evidence of the existence of a well within the setback after the October 7, 2014 hearing.

10. The entire site applied for in the application includes realty that is within the Zone B aquifer protection area. However, the actual site description of the CUP does not include any Zone B property.

11. The Board considered Crinion and Killeskillen's application in its entirety, which included the proposed buildings to be constructed. It approved the CUP application which presented the actual locations of structures within the notice property; none of which extends over the Zone B realty.

12. The Board's approval does not provide *carte blanche* approval for the Petitioners to build throughout the property. Instead, the CUP as submitted achieved approval from the Board. Changes will require further Board action on amendments. Actual construction will require building permits.

13. The Board determined that appropriate protections were in place as to those who will be affected by traffic, road use, and other factors created by the CAFO, or such protections will be implemented in the future.

14. The Board determined that the necessary notice steps were taken.

15. The Board determined that roads now and into the future will be addressed, and if they aren't, it may avail itself of the remedies intended to allow the Board ongoing oversight of CUPs granted.

16. The Board determined that the Board's actions procedurally, and the CUP application factually, complied with the ordinance.

**CONCLUSIONS OF LAW**

1. Any of the foregoing Findings of Fact that contain Conclusions of Law or are a mixture of fact and law are by this reference incorporated herein.

2. This Court has jurisdiction of the subject matter and of the parties.

3. SDCL Chapter 11-2, constrains review to the writ of certiorari standard. Namely, the statutes limit this review to facts that demonstrate whether the Board acted illegally, in whole or in part. In other words, did the Board "pursue in a regular manner the authority conferred upon it[?]" Jensen v. Turner County Board of Adjustment, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413.

4. The Court must consider whether the Board followed the Ordinance and the standards set in the Ordinance when it granted the CUP. The Board's actions must be sustained unless it did some act forbidden by law or neglected to do some act

required by law. Tibbs v. Moody County Board of Commissioners, 2014 SD 44, ¶28 (citing Armstrong v. Turner County Bd. of Adjustment, 2009 SD 81, ¶12, 772 N.W.2d 643, 648).

5. This Court will not go so far as to review whether the underlying decision was correct since there is no proof competently suggesting that the Board "acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof." Lamar Outdoor Advertising of S.D., inc. v. City of Rapid City, 2007 S.D. 35, 731 N.W.2d 199.

6. Petitioners suggest this Court should review the enactment of the underlying Ordinances and their predicate enactments. As this review is pursuant to SDCL Chapter 11-2, the Court will not do so.

7. Brookings County adopted an ordinance framework contemplated by the State of South Dakota in SDCL Chapter 11-2. Any attack on the Ordinance remains a question to be addressed in another cause of action.

8. The Ordinance, unchallenged at the time of the CUP application and hearing, exists as the applicable law in Brookings County. At that time, and since that time, the statutes of the State of South Dakota authorizing a County to zone in the manner done by Brookings County in the Ordinances still govern. Thus, from this framework, the Board possessed the authority; legally conferred.

9. As to the well setback issue, under a certiorari review, the Court should not, and does not consider Petitioners' purported evidence in the examination it is charged to perform. Instead, a review of the evidence suggested by the County as sufficient to rely upon, and its own policies noted in the Land Use Plan answers the certiorari inquiry.

10. Courts reviewing under certiorari don't determine whether the Board decided factual issues correctly. Here, the Board determined it could rely upon the representations of Crinion and Killeskillen concerning the lack of wells within the setback, and not call for a more comprehensive review of the premises.

11. The Board regularly pursued its authority in considering the evidence presented to it concerning a lack of wells within the setback.

12. Petitioners' attempt to introduce evidence of a well within the setback under the provisions of SDCL 11-2-64 is rejected. To allow a late disqualifying feature such as a well to be added to the evidence frustrates the orderly process of evidence presentation before the Board.

13. Permitting such evidence to be considered now would serve to award the withholding of information from a Board when it is making the determination of compliance or non-compliance. The better course in all proceedings is to present

all information to the decision-maker in order that it has full information at its disposal.

14. The Board regularly pursued its authority in determining that no portion of the CAFO sat over a Zone B aquifer.

15. The Comprehensive Plan provides a County and its citizens with a roadmap and ethos guiding the County as it moves forward in development. Yet the Ordinance provides the statutory framework, and the bodies to make the decisions that follow.

16. The examination here must focus on the information supplied to the Board, the Board's interpretation of the Ordinance, and the Board's determination that the submitted information met the Ordinance requirements. The claim that the Board failed to comply with the Comprehensive Plan does not call for reversal of the Board's decision.

17. The Board regularly pursued its authority in considering the geographic description of the parcel for the CAFO. The modification of the application to a conforming parcel upon which a CUP can be granted does not create a violation. Rather, it demonstrates the Board's approval of steps to ensure compliance to its standards.

18. The Board serves not only as the approving entity, but also the tribunal before which noncompliance with a CUP is arraigned. As such, the Board regularly pursued its authority in

requiring a road use agreement. To the extent Crinion and Killeskillen fail to obtain such an agreement, the Board may avail itself of the remedies intended to allow the Board ongoing oversight of CUP's granted.

19. The Board regularly pursued its authority in providing notice to parties determined to be affected by the CAFO.

20. In light of the South Dakota Supreme Court's decision in Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, 866 N.W.2d 149, Petitioners conceded their argument concerning a lack of due process in the conduct of the proceedings.

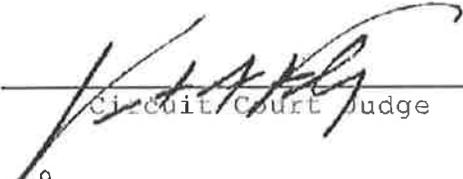
21. The Board had jurisdiction over Crinion and Killeskillen's application for a CUP and it pursued its authority in a regular manner. Accordingly, the petitioners' request for certiorari relief is denied.

22. Based on all of the foregoing reasons and the reasons set forth in the Court's written decision, the Board's decision to grant Crinion and Killeskillen's application for a CUP is affirmed, and an order consistent with these findings shall be entered.

BY THE COURT:  
Signed: 9/24/2015 10:22:20 AM

Attest:  
ROXANNE KNAPP Clerk/Deputy



  
\_\_\_\_\_  
Circuit Court Judge

Filed on: 09/24/2015 Brookings County, South Dakota 05CIV14-000247

# CIRCUIT COURT OF SOUTH DAKOTA

VINCENT A. FOLEY  
CIRCUIT COURT JUDGE  
vince.foley@ujs.state.sd.us

THIRD JUDICIAL CIRCUIT  
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BROOKINGS, SOUTH DAKOTA 57006

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August 14, 2015

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Re: Lake Hendricks Improvement Association, City of Hendricks,  
Minnesota; and Norris Patrick, Petitioners,  
v.  
Brookings County Planning and Zoning Commission; Brookings County  
Planning and Zoning Commission Sitting as the Brookings County Board  
of Adjustment; Michael Crinion; Killeskillen, LLC; and LC Olson, LLP,  
Respondents.

(Brookings County File 05CIV14-00247)

Counsel:

The Petitioners seek relief from the Brookings County Planning and Zoning Commission<sup>1</sup> (the "Board") action to grant a conditional use permit ("CUP") to Michael Crinion and/or Killeskillen, L.L.C. ("Killeskillen") on the Northeast Quarter (NE ¼) of Section 10-112-48 of the 5<sup>th</sup> P.M, all in Brookings County. September 8, 2014 Crinion and Killeskillen applied for a CUP for a Class Concentrated Animal Feeding Operation ("CAFO") under Brookings

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<sup>1</sup> The Court uses this entity name to avoid confusion with the statutes and the case law. The action arises from that entity acting as a Board of Adjustment. No issue has been raised concerning this entity's proper role. The Court writes in this narrative format with most citations footnoted for readability by the lay parties and public interest.

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County Ordinances<sup>2</sup> with the Board. October 7, 2014 the Board conducted a hearing on the application which culminated in a vote to approve the CUP with certain conditions. Thereafter, the Board entered its written decision and findings granting the CUP.

The Petition and subsequent argument seeks many courses of relief but ultimately only one receives attention here. Specifically, SDCL Chapter 11-2, constrains review to the writ of certiorari standard. Namely, the statutes limit this review to facts that demonstrate whether the Board acted illegally, in whole or in part.<sup>3</sup> In other words, did the Board “pursue in a regular manner the authority conferred upon it[?]” Jensen v. Turner County Board of Adjustment, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413. The reformulated question for the Court asks whether under the Board’s authority, derived from the creating statutes of the State of South Dakota<sup>4</sup> and empowering ordinances from Brookings County<sup>5</sup>, did the Board follow applicable legal standards in conducting its process, and reach a conclusion permitted by the County ordinances.<sup>6</sup> Far from an improvement upon the stated standard, this construction nevertheless sets out an order of questions for the Court’s review.

Brookings County adopted an ordinance framework contemplated by the State of South Dakota in SDCL Chapter 11-2. The Petitioners attack the underlying procedural sufficiency of the Ordinance from which the CUP was granted. Worthwhile, and interesting, these identified procedural issues validly call in to question the Ordinance. But any attack on the Ordinance remains a question for another cause of action. Here, the CUP application receives its roadmap and procedural direction from the Ordinance. The Ordinance, unchallenged at the time of the CUP application and hearing, exists as the applicable law in Brookings County. At that time, and since that time, the statutes of the State of South Dakota authorizing a County to zone in the manner done by Brookings County in the Ordinances still govern. Thus, from this framework the Board possessed the authority; legally conferred.

Whether the Board exercised that authority in a regular manner remains as the question for the Court. The statute uses the language “. . . acted illegally”,<sup>7</sup> while the Supreme Court in Jensen uses language clarifying the level of illegality as something irregularly done.<sup>8</sup> Perhaps

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<sup>2</sup> The Petitioners suggest this Court should review the enactment of the underlying Ordinances and their predicate enactments. As this review is pursuant to SDCL Chap 11-2, the Court will not do so. However, if as the facts alleged are true, this whole review may be a futile exercise. Brookings County should review the procedures and notice used in enacting the CAFO ordinances.

<sup>3</sup> SDCL § 11-2-61

<sup>4</sup> SDCL Chapter 11-2

<sup>5</sup> Brookings County Ordinances. Section 5.05

<sup>6</sup> This Court will not go so far as to review whether the underlying decision was correct since there is no proof competently suggesting that the Board “acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof.” Lamar Outdoor Advertising of S.D., Inc. v. City of Rapid City, 2007 S.D. 35, 731 N.W.2d 199,2015 (2007).

<sup>7</sup> SDCL § 11-6-2

<sup>8</sup> To the lay person, the concept of illegality too often connotes something criminal; a law was “broken”. In this and many contexts, a more appropriate construction simply means a law was not followed as it was intended.

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more succinctly stated, the Court must consider whether the Board followed the Ordinance and the standards set in the Ordinance when it granted the CUP.<sup>910</sup>

Petitioners raise several issues that fall within this examination. Several require specific attention: 1) Does a well fall within the setback requirement of the CUP? 2) Does the CUP fall over a Zone B aquifer? 3) Does the CUP grant violate the Comprehensive Plan rendering approval improper? 4) What is the geographic extent of the CUP permission?

Others fall within an analysis determining whether the Board determined compliance and weighed the information: 5) Was sufficient notice of the hearing provided to all neighbors? 6) Are the roads serving the CAFO sufficiently addressed in the CUP? 7) Does the road agreement status defeat the CUP?

One issue was withdrawn but warrants discussion: 8) Was sufficient due process provided in the conduct of the proceedings?

Finally, other sub-issues may be identified. The Court does not dismiss them out of hand but would rather suggest they fall within one of the analyses above. In any event, the Court does not find for the petitioners on those items.

The Court now turns to the issues identified above and addresses them below.

#### Well Setback Requirement

The County suggests this Court should consider its efforts sufficient to defeat this challenge. It notes the County considered the State registry of wellheads when considering whether there were any wells within the setback requirement. Yet Petitioners present evidence that a well exists within the setback after the hearing. The Court finds the evidence convincing that a well as contemplated by the Ordinance exists. However, under a certiorari review, the Court should not, and does not consider Petitioners' purported evidence in the examination it is charged to perform. Instead, a review of the evidence suggested by the County as sufficient to rely upon, and its own policies noted in the Land Use Plan answers the certiorari inquiry. The evidence calls into serious question whether the Board staff reviewed the application and the circumstances to determine compliance. The Board received no evidence of any survey or inspection of the setback area such that unregistered wellheads were sought out. It only received evidence of a paperwork survey of registrations; the survey conducted by the applicant! Yet the Board and its officials determined that the effort sufficed. Petitioners suggest Hines v. Bd. Of Adjustment of City of Miller, 2004 S.D. 13, 675 N.W.2d 231 requires more. Perhaps more should be required. But until the legislative framework changes, and the burdens of proofs

<sup>9</sup> Another legal construction of the standard is ". . . whether [the Board] pursued in a regular manner the authority conferred upon it. A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law." Armstrong v. Turner Cnty. Bd. Of Adjustment, 2009 S.D. 81, 772 N.W.2d at 648.

<sup>10</sup> Although not law, the Brookings County Land Use Plan adopted Jul 25, 2000 provides guidance on what the County intends by the terminology used in its Ordinances.

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required by Boards change (either by the Boards own decision or ordinance requirements), Courts reviewing under certiorari don't determine whether the Board decided correctly, but rather decided upon the facts it determines are sufficient for its review. Here the Board determined they could rely upon the representation of the petitioner, and not call for a more comprehensive review of the premises.<sup>11</sup>

### Zone B aquifer

The entire site applied for in the application includes realty that is within the Zone B aquifer protection area.<sup>12</sup> However, the actual site description of the CUP does not include any Zone B property. Petitioners contend that the application violates the Ordinance because the entire noticed area of the CUP crosses that boundary. The Board considered the application in its entirety which included the proposed buildings to be constructed. It approved the CUP application which presented the actual locations of structures within the notice property; none of which extends over the Zone B realty. That approval does not provide carte blanche approval for the Petitioners to build throughout the property. Instead, the CUP as submitted achieved approval from the Board. Changes will require further Board action on amendments. Actual construction will require building permits. Moreover, to the extent the notice provided an

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<sup>11</sup> It is important to note that the regular order of conducting proceedings such as this matter could be disrupted if late information is allowed to attack the process. In Grant County, the alleged well was dug at the last minute perhaps in an attempt to defeat the petition. Here, and the Court in no way suggest that there was any deceit in the lack of identification of the well until after the proceedings, to allow a late disqualifying feature such as a well to be added to the evidence frustrates the orderly process of evidence presentation before the Board. Permitting such evidence to be considered now would serve to award the withholding of information from a Board when it is making the determination of compliance or non-compliance. The better course in all proceedings is to present all information to the decision-maker in order that it has full information at its disposal.

<sup>12</sup> The Brookings County Land Use Plan adopted July 25, 2000 discusses development constraint categories and states on page 29:

Shallow aquifer -- This development constraint category has been designated from groundwater shallow aquifer studies. Special consideration should be given to preventing types of development, which have the potential to pollute the aquifer (concentration of residences, chemical storage, concentrated animal feeding operations, certain commercial and industrial uses, etc.) unless coordinated precautionary measures are instituted.

It further notes on page 30 et seq.;

#### Environmental Areas:

It is the goal of Brookings County to avoid development in areas that:

1. Are environmentally fragile or unique;
  2. Present health and safety hazards, as defined in County, State and Federal statutes, to county residents.
- Policy 1. Soil characteristics, depth to aquifer, topography and other construction limitations should be carefully considered in project site planning.

#### Policy 1 – Supporting Policies

- County officials shall be provided assurances of environmental protection measures, prior to the approval of any required permit or legal document, in areas having obvious or documented development limitations.
- The development of stream corridors, the aquifer, natural floodplains and drainageways and other significant natural areas that are unsuitable for construction shall be precluded.
- County Officials shall strive to protect surface water and groundwater, especially in those areas what are designated wellhead and shallow aquifer protection areas.

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imprecise location within the larger property involved, the application itself and information submitted in support rendered that moot as the Board considered it sufficient.

#### Failure to Comply with Comprehensive Plan

A Comprehensive Plan provides a County and its citizens with a roadmap and ethos guiding the County as it moves forward in development. Yet the Ordinance provides the statutory framework, and the bodies to make the decisions that follow. While one may pull portions of any comprehensive plan to support or oppose any project, the proper role of the plan remains as a guide. The true decisions come at the Ordinance enactment, and enforcement levels. If a County says one thing in its Comprehensive Plan, but does another in action through Ordinance, Commission and Board action, then it becomes an issue for the voters. The examination here must focus on the information supplied to the Board, the Board's interpretation of the Ordinance, and its determination that the submitted information met the Ordinance requirements.

#### Geographic Description

Closely related to the Zone B aquifer discussion is the actual geographic description of the parcel in the notice, and in the proposal brought to the Board. While a description may be broader in the initial notice, and perhaps even contain disqualifying characteristics, the modification of the application to a conforming parcel upon which a CUP can be granted does not create a violation. Rather, it demonstrates the Board's approval of steps to ensure compliance to its standards.

#### Board Determinations (Sufficient Notice; Road Service Addressed; Road Agreement Status)

The Board serves not only as the approving entity, but also the tribunal before which non-compliance with a CUP is arraigned. As part of that procedural context, it must determine whether parties determined to be affected by the ordinance receive notice. It must also determine whether those affected off-site, such as by traffic are protected. In that function, the board must assess whether compliance has occurred, and if it continues to be sufficient. Here, the Board determined those protections were in place, and if not yet, will be met. It determined that the necessary notice steps were taken. It determined that roads now and into the future will be addressed, and if they aren't, may avail itself of the remedies intended to allow the Board ongoing oversight of CUPs granted. Most importantly for the items in this section, the Board considered the information. It determined the Board procedurally, and the CUP application factually, met the ordinance. Thus, it pursued in a regular manner the authority conferred to it.

#### Meeting Due Process

The Petitioners concede this argument in light of the decision in Grant County. However, the Court would comment on the nature of these meetings, and a solution precluding due process objections. So often when Zoning and Planning issues come before a board, emotions are high.

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Livelihoods are at stake, as are the existing characteristics of the “neighborhood”.<sup>13</sup> However, the board needs to have a presentation in opposition that provides clarity to the issues involved to avoid errors of fact. While not something that is foolproof, a board would be well-served to ask the opponents to identify a spokesperson to make an organized presentation of the issues.<sup>14</sup> Once that has been offered, the board could open comments to the floor under a time restraint such as was applied here, and in Grant County.<sup>15</sup> If a particular Board fails to provide the opportunity for a sufficient voice, the aggrieved citizenry may resort to attempt an ordinance change requiring such procedural protections. However, barring that instruction from the County Commission, the Board determines the fair process.

### Conclusion

Initially, the Court would commend counsel on the presentation of issues raised. While the certiorari review certainly limits any Court to grant relief, the litany of issues presented should be raised. Dismissing the effort as wasted or egregious, risks pulling the cloak over important issues to the “neighborhood”. Moreover, as noted above, the issues identified on the enactment of the Ordinance raise valid concerns. Nevertheless, the certiorari review mandates a ruling in favor of the respondents whether this Court personally agrees with the result or not.<sup>16</sup>

Respondent County shall prepare findings of fact and conclusions of law consistent with this opinion, consistent with the Court’s determination that certiorari review does not allow the attack on the underlying Ordinances, and consistent with further findings that the Board pursued in a regular manner the authority conferred upon it on all issues raised in attack.

Sincerely,

<sup>13</sup> A bucolic “neighborhood” in the country belies the fact that an agricultural zone resembles an industrial space due to machinery, chemicals, sprays, livestock, hours of operation, and smells, notwithstanding a CAFO.

<sup>14</sup> The Land Use Plan further notes on page 31:

#### Management and Coordination

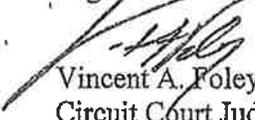
It is the goal of Brookings County to efficiently and effectively manage and coordinate land use plans and implementation tools.

- Citizen participation should be a major component of the development process.
- Ample opportunity will be provided for direct public comment, in every appropriate situation.

<sup>15</sup> The Supreme Court in Grant County notes that written submissions in opposition could have been made. While true, in the context of any conditional use permit proceeding, or variance proceeding, the actual application parameters can be a moving target. Rightly so, as in the time leading up to the hearing, new discoveries and solutions to issue may be addressed with amendments. Thus, the written submissions could result in repeated volleys of positions which could further complicate the process for a Board.

<sup>16</sup> The Court does not intend on suggesting that its personal opinion bends one way or another on the CAFO issue. Instead, the reference is simply meant as illustrative of the review posture of any Court. The Court should also note that I have become aware of a CAFO controversy involving parties involved here in Codington County where the site location is within five miles of my home. The Court became aware of the Codington Count project sometime after the hearing and initial draft of the Court’s opinion.

Page 7: Lake Hendricks Improvement Association et al v. Brookings County et al.

  
Vincent A. Foley  
Circuit Court Judge

VAF:jj

cc: Brookings County State's Attorney by hand delivery

STATE OF SOUTH DAKOTA)  
; SS.  
COUNTY OF BROOKINGS)

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

\* \* \* \* \*

LAKE HENDRICKS IMPROVEMENT  
ASSOCIATION; CITY OF HENDRICKS,  
MINNESOTA; AND NORRIS PATRICK,

File No. 05CIV14-247

Petitioners,

-vs-

BROOKINGS COUNTY PLANNING AND  
ZONING COMMISSION; BROOKINGS  
COUNTY PLANNING AND ZONING  
COMMISSION SITTING AS THE  
BROOKINGS COUNTY BOARD OF  
ADJUSTMENT; MICHAEL CRINION;  
KILLESKILLEN, LLC; and LC  
OLSON, LLP,

**ORDER DENYING PETITIONERS'  
MOTION TO RECONSIDER**

Respondents.

\* \* \* \* \*

Petitioners filed a Motion to Reconsider on September 1, 2015. Respondents Killeskillen, LLC, and Michael Crinion served a brief in opposition to the Motion on September 2, 2015. The Court having considered the motion and the arguments of counsel, having issued a written decision denying the Motion dated September 3, 2015, which was filed on September 4, 2015, and being otherwise fully advised in the premises; now, therefore, it is hereby

ORDERED that Petitioners' Motion to Reconsider is hereby DENIED.

BY THE COURT: 9/17/2015 11:32:58 AM

  
\_\_\_\_\_  
Circuit Court Judge

Attest:  
Emily Mosley, Clerk/Deputy



## South Dakota Codified Laws

## Title 11. Planning, Zoning and Housing Programs

## Chapter 11-2. County Planning and Zoning (Refs &amp; Annos)

## SDCL § 11-2-19

## 11-2-19. Publication of notice of hearing

## Currentness

After receiving the recommendation of the planning commission the board shall hold at least one public hearing on the respective comprehensive plan, zoning ordinance, or subdivision ordinance. Notice of the time and place of the hearings shall be given once at least ten days in advance by publication in a legal newspaper of the county.

**Credits**

**Source:** SL 1941, ch 216, § 5; SDC Supp 1960, § 12.20A05; SL 1961, ch 37, § 1; SL 1967, ch 20, § 4; SL 1972, ch 72, § 1; SL 1977, ch 104, § 2; SL 1983, ch 105, § 1; SL 1999, ch 65, § 4; SL 2000, ch 69, § 11.

## Notes of Decisions (1)

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S D C L § 11-2-19, SD ST § 11-2-19

Current through the 2015 Regular Session, Exec.Order 15-1, and Supreme Court Rule 15-16

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South Dakota Codified Laws

Title 11. Planning, Zoning and Housing Programs

Chapter 11-2. County Planning and Zoning (Refs & Annos)

SDCL § 11-2-21

11-2-21. Filing of board action adopting comprehensive plan--  
Publication of notice of fact of adoption--Public inspection

Currentness

The action of the board on the plan shall be filed with the county auditor. A notice of fact of the adoption shall be published once in a legal newspaper of the county and take effect on the twentieth day after its publication unless the referendum is invoked. Any notice of fact of adoption published under the provisions of this chapter shall contain a notification that the public may inspect the entire comprehensive plan at the office of the county auditor during regular business hours.

If such a zoning or subdivision ordinance is adopted, the ordinance is subject to the provisions of § 7-18A-5 as a comprehensive regulation unless the referendum is invoked.

**Credits**

**Source:** SL 1970, ch 84, § 2; SL 1975, ch 113, § 9; SL 1977, ch 104, § 4; SL 1983, ch 105, § 2; SL 1999, ch 65, § 5; SL 2000, ch 69, § 13.

Notes of Decisions (1)

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## South Dakota Codified Laws

## Title 11. Planning, Zoning and Housing Programs

## Chapter 11-2. County Planning and Zoning (Refs &amp; Annos)

## SDCL § 11-2-30

## 11-2-30. Adoption or rejection by board--Publication of change--Referendum applicable

## Currentness

After the hearing, the board shall by resolution or ordinance, as appropriate, either adopt or reject the amendment, supplement, change, modification, or repeal. If adopted, the board shall publish a notice of the fact of adoption once in a legal newspaper of such county and take effect on the twentieth day after its publication. The provisions of § 11-2-22 are applicable to this section.

**Credits**

**Source:** SDC Supp 1960, § 12.20A06 as added by SL 1961, ch 37, § 2; SL 1967, ch 20, § 6; SL 1975, ch 113, § 18; SL 1999, ch 65, § 8; SL 2000, ch 69, § 41.

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Current through the 2015 Regular Session, Exec.Order 15-1, and Supreme Court Rule 15-16

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COUNTY ZONING COMMISSION,  
APPEALS, VARIANCE, AND  
CONDITIONAL USES

ARTICLE 5.00  
COUNTY ZONING COMMISSION, APPEALS, VARIANCE  
AND CONDITIONAL USES

Section 5.01. Within Brookings County, outside of incorporated municipalities and joint jurisdictional areas, the power and jurisdiction related to this article shall be executed by the County Planning Commission, known as the County Zoning Commission.

1. The members of the Commission shall select one (1) of their members as Chairman and another as Vice-chairman, who shall act as Chairman in the Chairman's absence. Both shall serve one (1) year and until their successors have been selected. Meetings of the Commission shall be held at the call of the Chairman and at such times as the Commission shall determine.
2. The Chairman, or in his or her absence the Acting Chairman, may administer oaths and compel the attendance of witnesses in order to execute the purposes of this article.
3. All meetings of the County Zoning Commission shall be open to the public. The Commission shall keep minutes of its proceedings and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Commission and shall be public record. The Commission shall keep record in the minutes showing the vote of each member upon each question or if absent or failing to vote, indicating that fact.

Section 5.02. That pursuant to SDCL 11-2-49 the County Zoning Commission shall act as the Board of Adjustment. (Ord. 2004-01, 9-28-2004)

Section 5.03. Powers and Jurisdiction Relating to Administrative Review. The County Zoning Commission acting as the Board of Adjustment, pursuant to SDCL 11-2-53, shall have the power to hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official or agency based on or made in the enforcement of any zoning regulation or any regulation relating to the location of structures or to interpret any map. (Ord. 2004-01, 9-28-2004)

**COUNTY ZONING COMMISSION,  
APPEALS, VARIANCE, AND  
CONDITIONAL USES**

Section 5.04. Appeals, Record and Appeal, Hearing and Stays. Appeals to the County Zoning Commission acting as the Board of Adjustment, pursuant to SDCL 11-2-53, may be taken by any person aggrieved or by an officer, department, board or bureau of the County or city/town affected by any decision of the administrative officer. Such appeals shall be taken within a reasonable time, as provided by the rules of the Board of Adjustment by filing with the officer from whom the appeal is taken and with the Board of Adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the Board of Adjustment all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the Board of Adjustment after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property.

In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The Board of Adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. In exercising the above-mentioned powers, the Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

The concurring vote of two-thirds (2/3) of the Board of Adjustment shall be necessary to reverse any order, requirement, decision or determination upon which it is required to pass under this regulation. (Ord. 2004-01, 9-28-2004)

Section 5.05. Powers and Jurisdiction Relating to Conditional Use Permits. The County Zoning Commission shall have the power to hear and decide in accordance with the provisions of this regulation, requests for Conditional Use Permits or for decisions upon other special questions upon which the Zoning Commission is authorized by this regulation to pass; to decide such questions as are involved in determining whether special conditions and safeguards as are appropriate under this regulation, or to deny Conditional Use Permits when not in

**COUNTY ZONING COMMISSION,  
APPEALS, VARIANCE, AND  
CONDITIONAL USES**

harmony with the purpose and intent of this regulation. A Conditional Use Permit shall not be granted by the Zoning Commission unless and until:

- a. A written application for a Conditional Use Permit is submitted, indicating the section of this regulation under which the Conditional Use Permit is sought and stating the grounds on which it is requested. Applications are due the second Tuesday of the month for the following month's meeting.
- b. Notice of hearing shall be published twice in a paper of general circulation in the area affected.
- c. Adjoining landowners shall be notified by First Class mail at their last known address of the public hearing time and date at least seven (7) days prior to the hearing.
- d. The public hearing shall be held. Any party may appear in person, or by agent or attorney.
- e. The County Zoning Commission shall make a finding that it is empowered under the section of this regulation described in the application to grant the Conditional Use Permit and that the granting of the Conditional Use Permit will not adversely affect the public interest. An affirmative vote of two thirds (2/3) of the full membership of the County Zoning Commission is required for approval of a Conditional Use Permit.
- f. Before granting any Conditional Use Permits the County Zoning Commission shall make written findings certifying compliance with the specific rules and criteria governing individual Conditional Uses and that satisfactory provision and arrangements have been made concerning the following, where applicable:
  1. Entrance and exit to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.
  2. The roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use. The County Zoning Commission may require the applicant to enter into a written contract with any affected township or other governmental unit regarding the upgrading and continued maintenance of any roads used for

**COUNTY ZONING COMMISSION,  
APPEALS, VARIANCE, AND  
CONDITIONAL USES**

the conditional use requested prior to the issuance of a conditional use permit.

3. Off-street parking and loading areas where required, with particular attention to the items in (a) above and economic, noise, glare or other effects of the Conditional Use on adjoining properties and properties generally in the district.
  4. Utilities, refuse and service areas, with reference to locations, availability, and compatibility.
  5. Screening and buffering with reference to type, dimensions and character.
  6. Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district.
  7. Required yards and other open space.
  8. General compatibility with adjacent properties and other property in the district.
- g. Any Conditional Use Permit that is granted and not used within 3 years will be considered invalid.
- h. The County Zoning Commission may, after notice and hearing, revoke a Conditional Use Permit in the event of a violation of any of the conditions upon which such permit was issued. In addition, the Conditional Use Permit may not be transferred during any violation. (Ord. 2004-01, 9-28-2004)

Section 5.06. Powers and Jurisdiction Relating to Variances. The County Zoning Commission acting as the Board of Adjustment pursuant to SDCL 11-2-53 shall have the power, where, by reason of exception, narrowness, shallowness or shape of a specific piece of property at the time of the enactment of this regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation under this regulation would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to

**CONCENTRATED ANIMAL  
FEEDING OPERATION****ARTICLE 22.00  
CONCENTRATED ANIMAL FEEDING OPERATION**Section 22.01. Concentrated Animal Feeding Operation Regulations.Intent

An adequate supply of healthy livestock, poultry and other animals is essential to the well being of county citizens and the State of South Dakota. However, livestock, poultry, and other animals produce manure, which may, where improperly stored, transported, or disposed, negatively affect the County's environment. Animal manure must be controlled where it may add to air, surface water, ground water, or land pollution. The following regulations have been adopted to provide protection against pollution caused by manure from domesticated animals. All new and proposed expansions of Concentrated Feeding Operations shall comply with the regulations as outlined herein.

It is the intention of the County Zoning Commission in the enforcement of this ordinance that when an operator of an existing Concentrated Animal Feeding Operation applies for a permit to expand to another class level, the standards that apply to the expansion will not be applied to existing structures that were built in compliance with accepted industry standards in existence at the time of the construction of such facilities.

Definitions

1. A 25-year, 24-hour Storm Event is the amount of rainfall in a 24-hour period expected to occur only once every 25 years. Typically, the 25-year, 24-hour storm event is about 5 inches in Brookings County. The map in Appendix A shows the actual amount of rainfall that constitutes the 25-year, 24-hour storm event for South Dakota.
2. Accessory Buildings and Uses is a subordinate use, which is incidental to that of the main building or to the main use of the premises. Buildings of 120 square feet or less are not required to have a building permit.
3. Anaerobic Lagoon means an impoundment used in conjunction with an animal feeding operation, if the primary function of the impoundment is to store and stabilize organic manure, the impoundment is designed to receive manure on a regular basis, and the impoundment's design manure loading rates provide that the predominant biological activity is anaerobic. An anaerobic lagoon does not include any of the following:

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

- a. A confinement feeding operation structure.
  - b. A runoff control basin, which collects and stores only precipitation induced runoff from an open feedlot.
  - c. An anaerobic treatment system, which includes collection and treatment facilities for all gases.
4. Animal Feeding Operation Structure means an anaerobic lagoon, formed manure storage structure, egg washwater storage structure, earthen manure storage basin, or confinement building.
  5. Animal Manure is poultry, livestock, or other animal excreta or mixture of excreta with feed, bedding or other materials.
  6. Animal Unit See page 22.00-8.
  7. Applicant is an individual, a corporation, a group of individuals, partnership, joint venture, owners, or any other business entity having charge or control of one or more concentrated animal feeding operations.
  8. Aquifer is a geologic formation, group of formations or part of a formation capable of storing and yielding ground water to wells or springs.
  9. Best Management Practices (BMP) means schedules of activities, prohibitions of practice, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the state. BMP's also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge, manure disposal, manure application, waste or manure stockpiles, or drainage from raw material storage.
  10. Building is any structure in excess of 120 square feet designed for the support, shelter and protection of persons, animals, or property.
  11. Bypass means the intentional diversion of waste streams from any portion of a treatment facility.
  12. Change in Operation means a cumulative increase of more than 500 animal units, after May 13, 1997, which are confined at an un-permitted concentrated feeding operation.
  13. A Chronic or Catastrophic Event is a single precipitation event, or a series of rainfall events in a short period of time that totals or exceeds the volume of a 25-year, 24-hour storm event. The event includes tornadoes, or other catastrophic conditions. The event would directly result in, or cause, an

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

- overflow from the containment structure or lagoon that receives and contains runoff from an open lot.
14. Common Ownership is defined as single, corporate, cooperative or other joint operation or venture.
  15. Concentrated Animal Feeding Operation see page 22.00-9.
  16. Confinement Feeding Operation means a totally roofed animal feeding operation in which wastes are stored or removed as a liquid or semi-liquid.
  17. Confinement Feeding Operation Structure means a formed manure storage structure, egg washwater storage structure, earthen manure storage basin, or confinement building. A confinement feeding operation structure does not include an anaerobic lagoon.
  18. Corner lot is a lot with two front yards.
  19. Domestic Animal is any animal that through long association with man, has been bred to a degree which has resulted in genetic changes affecting the temperament, color, conformation or other attributes of the species to an extent that makes it unique and different from wild individuals of its kind. For the purpose of this ordinance the definition shall include, but is not limited to, animals commonly raised on farms and ranches, such as cattle, horses, hogs, sheep and mules.
  20. Earthen Manure Storage Basin means an earthen cavity, either covered or uncovered, which, on a regular basis, receives waste discharges from a confinement feeding operation if accumulated wastes from the basin are removed at least once each year.
  21. Established Building Site means an established building site shall have been used in the past as a farmstead for a normal farming operation. Any residence established for more than ten (10) years shall become an established building site.
  22. Established Residence is any residence established by a personal presence, in a fixed and permanent dwelling and an intention to remain there.
  23. Farm Dwelling means any residence farmer owned or occupied by the farm owners, operators, tenants, or seasonal or year-around hired workers.
  24. Feedlot Operator means an individual, a corporation, a group of individuals, partnership, joint venture, owners, or any other business entity having charge or control of one or more concentrated animal feeding operations.

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

25. Formed manure Storage Structure means a structure, either covered or uncovered, used to store manure from a confinement feeding operation, which has walls and a floor constructed of concrete, concrete block, wood, steel, or similar materials.
26. Housed Lot means totally roofed buildings that may be open or completely enclosed on the sides. Animals are housed over solid concrete or dirt floors, slotted floors over pits or manure collection areas in pens, stalls or cages. Housed lot is synonymous with other industry terms such as slotted floor buildings.
27. Letter of Assurances is a list of conditions signed by the applicant for a permit acknowledging agreement to follow the conditions of the permit.
28. Man-made means a pipeline, ditch, drain, tile, terrace, irrigation system, machine, or other object that carries manure, wastewater, or runoff into waters of the state.
29. Manure Management System means any piping, containment structures, and disposal appurtenances associated with the collection, storage, treatment, and disposal of manure or wastewater at an concentrated animal feeding operation.
30. Non-farm Dwelling means any occupied dwelling, which is not a farm dwelling.
31. No-till Cropland means land which is subject to a conservation farming practice: where the soil is left undisturbed from harvest to planting; where planting or drilling is done in a narrow seedbed or slot created by coulters, row cleaners, disk openers, or in-row chisel; and where this conservation practice has been ongoing for at least four consecutive years to establish the soil characteristics necessary to reduce or eliminate erosion from runoff.
32. Open Concentrated Animal Feeding Operation is an un-roofed or partially roofed animal feeding operation in which no crop, vegetation, forage growth or post-harvest residues are maintained during the period that animals are confined in the operation.
33. Open Lot means pens or similar confinement areas with dirt, or concrete (or paved or hard) surfaces. Animals are exposed to the outside environment except for possible small portions affording some protection by windbreaks or small shed type shade areas. Open lot is synonymous with other industry terms such as pasture lot, dirt lot or dry lot.
34. Permit is required by these regulations unless stated otherwise.

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

35. Potential Pollution Hazard A Concentrated Animal feeding Operation of 100 to 500 Animal Units may be classified as a Class D Operation by the County Zoning Officer when a Potential Pollution Hazard exists. Factors to be considered by the Zoning Officer in determining a Potential Pollution Hazard include the following:
- a. The Concentrated Animal Feeding Operation does not meet the minimum setback and separation distances of these regulations.
  - b. A Potential Water Pollution Hazard exists due to sitting over a shallow aquifer or drainage that contributes to the waters of the State.
36. Process Generated Wastewater means water directly or indirectly used in the operation of an animal feeding operation. The term includes spillage or overflow from watering systems; water and manure collected while washing, cleaning or flushing pens, barns, manure pits or other areas; water and manure collected during direct contact swimming, washing or spray cooling of animals; and water used in dust control.
37. Process Wastewater means any process generated wastewater and any precipitation (rain or snow) that comes into contact with the animals, manure, litter or bedding, feed, or other portions of the animal feeding operation. The term includes runoff from an open lot.
38. Producer means the owner or operator of the concentrated livestock feeding operation.
39. Sediment Basin is a basin constructed to trap and store water-borne sediment and debris.
40. Severe Property Damage means substantial physical damage to property, damage to the treatment facilities, which causes them to become inoperable, or substantial and permanent loss of natural resources, which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
41. Shall means that the condition is an enforceable requirement of this permit.
42. Shallow Aquifer is an aquifer vulnerable to contamination because the permeable material making up the aquifer (a) extends to the land surface so percolation water can easily transport contaminants from land surface to the aquifer, or (b) extends to near the land surface and lacks a sufficiently thick layer of impermeable material on the land or near the land surface to limit

**CONCENTRATED ANIMAL  
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percolation water from transporting contaminants from the land surface to the aquifer.

43. Shallow Well is a well that is located in a shallow aquifer.
44. Should means that the condition is a recommendation. If violations of the permit occur, the County Zoning Commission will evaluate whether the producer implemented the recommendations contained in this permit that may have helped the producer to avoid the violation.
45. Significant Contributor of Pollution means to determine if a feedlot meets this definition, the following factors are considered:
  - a. Size of feeding operation and amount of manure reaching waters of the state;
  - b. Location of the feeding operation in relation to waters of the state;
  - c. Means of conveyance of manure and process wastewater into waters of the state; and
  - d. The slope, vegetation, rainfall and other factors affecting the likelihood or frequency of discharge of animal manure and process wastewater into waters of the state.
46. Solid Waste (reference SDCL 34A-6-1.3, 17.) any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded materials, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial and agricultural operations and from community activities, but does not include mining waste in connection with a mine permitted under Title 45, hazardous waste as defined under chapter 34A-11, solid or dissolved materials in domestic sewage or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended to January 1, 1989, or source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended to January 1, 1989.
47. Solid Waste Facility or solid waste disposal facility, (reference SDCL 34A-6-1.3, 18.) all facilities and appurtenances connected with such facilities, which are acquired, purchased, constructed, reconstructed, equipped, improved, extended, maintained or operated to facilitate the disposal or storage of solid waste.

**CONCENTRATED ANIMAL  
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48. Solid Waste Management System (reference SDCL 34A-6-1.3, 19.) is the entire process of storage, collection, transportation, processing and disposal of solid wastes by any person.
49. Conditional Use. A Conditional Use is a use that would not be appropriate generally or without restriction throughout the zoning division or district, but which, if controlled as to number, area, location, or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. Such uses may be permitted in such zoning division or district as Conditional Uses, as specific provisions for such exceptions is made in these zoning regulations. The County Zoning Commission may, after notice and hearing, revoke a Conditional Use in the event of a violation of any of such conditions. In addition, the Conditional Use permit may not be transferred during any violation.
50. Unauthorized Releases mean the discharge of water from the lower end of the treatment or containment system through a release structure or over or through retention dikes. An unauthorized release is distinguished from a bypass in that a bypass discharges wastewater prior to any treatment or containment.
51. Waters of the State means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state.
52. Zoning Complaints. All zoning complaints must be in writing and signed.

**Animal Units**

Animal species and number of a species required to equal 500, 1,000 and 2,000 animal units. Note that these figures relate to inventory rather than animal production. Other animal species equivalents, which are not listed, will be based on species' waste production.

**CONCENTRATED ANIMAL  
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**EQUIVALENT NUMBER OF A SPECIES TO EQUAL:**

<u>ANIMAL SPECIES</u>	<u>500 AU</u>	<u>1,000 AU</u>	<u>2,000 AU</u>	<u>ANIMAL UNIT EQUIVALENT SPECIES/ AU</u>
Feeder or Slaughter Cattle	500 hd	1,000 hd	2,000 hd	1.0
Mature Dairy Cattle	357 hd	714 hd	1,428 hd	1.4
Calves (up to 400 pounds)	1250 hd	2,500 hd	5,000 hd	0.4
Finisher Swine (over 55 lbs)	1250 hd	2,500 hd	5,000 hd	0.4
Nursery Swine (less than 55 lbs)	5,000 hd	10,000 hd	20,000 hd	0.1
Farrow to Finish*	135 hd	270 hd	540 hd	3.7
Sow and Litter	465 hd	1,076 hd	2,150 hd	0.93
Horses	250 hd	500 hd	1,000 hd	2.0
Sheep	5,000 hd	10,000 hd	20,000 hd	0.1
Turkeys	27,750 hd	55,550 hd	11,150 hd	0.018
Laying Hens and Broilers (continuous overflow watering in facility)	50,000 hd	100,000 hd	200,000 hd	0.01
Laying Hens and Broilers (liquid handling system in confinement facility)	15,150 hd	30,300 hd	60,600 hd	0.033
Ducks	2,500 hd	5,000 hd	10,000 hd	0.2

\*Figures in the farrow to finish column include sows, pigs born and fed to market weight at one site, at one time.

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

Classes of Concentrated Animal Feeding Operations

A Concentrated Animal Feeding Operation is defined as a lot, yard, corral, building or other area where animals have been, are, or will be stabled or confined for a total of 45 days or more during any 12-month period, and where crops, vegetation, forage growth, or post harvest residues are not sustained over any portion of the lot or facility. Two or more animal feeding operations under common ownership are single animal operation if they adjoin each other within one mile, or if they use a common area, or if they use a common area or system for disposal of manure. In the event that a Confined Animal Feeding Operation includes facilities on and off Zone B and are under common ownership, the area not on Zone B may be allowed to expand without including the number of animal units on Zone B in determining what class permit is required.

For the purpose of these regulations, Concentrated Animal Feeding Operations are divided into the following classes:

UNITS		
Class A	2,000 or more	
Class B	1,000 to 1,999	
Class C	500 to 999	
Class D	100 to 499	(Potential water pollution hazard)
Class E	0 to 499	(No pollution hazard)

Concentrated Feeding Operation Permit Requirements

Owners of Class A, Class B, Class C, and Class D Concentrated Feeding Operations are required to complete a permit application whenever any of the following occur:

1. A new Concentrated Feeding Operation is proposed where one does not exist.
2. An expansion is proposed beyond what a current permit allows.
3. Accumulative expansion by 500 animal units, after May 13, 1997 if an existing concentrated animal feeding operation that does not have a permit or if expansion takes the animal units into another class.
4. Any complaint against a Concentrated Animal Feeding Operation must be in writing and signed. Names of complainants will be kept confidential. A signed complaint has been received by the Zoning Officer or South Dakota Department of Environment and Natural Resources and after inspection

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

reveals that the Concentrated Feeding Operation is in violation of County or State regulations.

5. An existing concentrated animal feeding operation is to be restocked after being idle for five (5) or more years.

Concentrated Animal Feeding Operation Control Requirements

1. No Significant Contribution of Pollution.

In general, no Concentrated Animal Feeding Operation shall be constructed, located, or operated so as to create a significant contribution of pollution.

2. State General Permit

Classes A and B Concentrated Animal Feeding Operations shall obtain coverage under a State General Permit pertaining to the animal species of the Concentrated Animal Feeding Operation. A county permit may be approved conditioned on receiving State approved plans.

Classes C and D Concentrated Animal Feeding Operations will be required to obtain a State General Permit if the following occur:

- a. If an earthen storage basin or lagoon is used for manure storage.
- b. The County Zoning Commission decides conditions require a state permit.

3. Nutrient Management Plan.

The applicant shall develop, maintain, and follow a nutrient management plan to ensure safe disposal of manure and protection of surface and ground water. The nutrient management plan must be either approved by the Brookings County Zoning Officer or by the South Dakota Department of Environment & Natural Resources if a State General Permit is required prior to land application of any manure. Due to crop rotation, site changes, and other operational changes, the applicant should update the plan annually to reflect the current operation and crops grown on the application sites. The applicant should collect, store, and dispose of manure according to recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land disposal site are secondary to the proper and safe disposal of the manure. If a violation of the nutrient management plan occurs the violator will be required to update the nutrient management plan annually and the collection, storage and disposal of liquid and solid manure will be done according to recognized practices of good agricultural management.

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

A generic nutrient management plan that the applicant may use in developing a nutrient management plan is available from the South Dakota Department of Environment & Natural Resources and NRCS. The generic nutrient management plan is based on application of nitrogen. The applicant may use other plans, provided the alternate plan contains all the information necessary to determine compliance with conditions of this general permit or Brookings County requirements. Nitrogen, in addition to that allowed in the nutrient management plan, may be applied up to the amounts as indicated by soil or crop nitrogen test results that are necessary to obtain the realistic crop yield. The South Dakota Department of Environment & Natural Resources and Brookings County encourage producers to develop a nutrient management plan for phosphorous. Over application of phosphorous may lead to water quality problems in area lakes and streams.

The applicant must have the manure analyzed, soil tests taken on land where manure is to be applied and take the results to the Cooperative Extension Service and/or an agronomist for recommendations for the correct amount to apply per acre. This must be done the first year and every year thereafter. Phosphorus should be sampled every 3-5 years.

The applicant must maintain records to show compliance with the plan.

Land spreading agreements shall be provided if applicant does not have minimum acreage to apply animal waste.

**4. Manure Management and Operation Plan**

Classes A, B, C, and D Concentrated Animal Feeding Operations must submit a Manure Management and Operation Plan.

**A. Plan must include:**

1. The location and specifics of proposed animal manure facilities.
2. The operation procedures and maintenance of manure facilities.
3. Plans and specifications must be prepared or approved by a registered professional engineer, or a Natural Resource Conservation Service (NRCS) engineer. Waste containment facilities will require inspection by an engineer or NRCS technician and as-built plans be submitted to the Brookings County Zoning Officer.
4. Animal manure shall not be stored longer than two years.

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

5. Manure containment structures shall provide for a minimum design volume of 270 days of storage. In addition open outdoor storage shall include storage for direct precipitation and/or runoff from a 25 year, 24 hour storm.
  6. Applicants shall keep records of manure applications on individual fields, which document acceptable manure, and nutrient management practices have been followed. These records shall include soils test results for surface two feet of soil, actual and projected crop yields, nutrient analysis of manure, and information about date, rate and method of manure applications for individual fields. The producer shall retain records of all monitoring information, maintenance and inspection records, copies of reports required by this permit. The producer shall keep the records for at least three years from the date of the sample, measurement, report, or application. Data collected and a copy of this permit must be kept at the confined animal feeding operation or the usual place of business where employees of the operation have access to them. These shall be made available for review by the Brookings County Zoning Board or its representative upon a written request. (Ord. 2006-02, 3-28-2006).
- B. The applicant must participate in environmental training programs and become a certified livestock manager if available.
  - C. The applicant is responsible for the misapplication of the manure whether applied on the applicants own land or on land where there is a land spreading agreement or in transport. The complaint procedure will be the same as for any other zoning complaint.
  - D. The County Zoning Commission may require manure to be injected or incorporated in order to minimize air and water quality impacts.
  - E. Requests for application of liquid manure by means of irrigation systems will be reviewed by the County Zoning Commission on a site-specific basis. Impact on air and water quality will be taken into consideration.
  - F. All irrigation systems blending manure with ground water must have check valves installed to prevent back flow into the water supply.
  - G. The County Zoning Commission may, after notice and hearing, revoke a Conditional Use in the event of a violation of any of such conditions. In addition, the Conditional Use permit may not be transferred during any violation.

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

**5. Management Plan for Fly and Odor Control**

Classes A, B, C, D and E Concentrated Animal Feeding Operations shall dispose of dead animals, waste and wastewater in such a manner as to control odors and flies. A management plan is required for submission of a permit. Brookings County Zoning Commission will review the need for control measures on a site specific basis, taking into consideration prevailing wind direction and topography. The following procedures to control flies and odors shall be considered in a management control plan.

- A. Operational plans for manure collection, storage treatment and use must be kept updated and implemented.
- B. Methods to be utilized to dispose of dead animals shall be included in the management plan.

The following procedures to control flies and odors should be considered in a management control plan.

- A. Plant trees and shrubs to reduce wind movement of odors away from buildings, manure storage ponds and/or lagoons.
- B. Provide adequate slope and drainage to remove surface water from pens and keep pen area dry so odor production is minimized.
- C. Store solid manure in containment areas having good drainage to minimize odor production.
- D. Consider use of BMP's on open storage systems for liquid manure systems to control odor production.

**6. Required Setbacks and Separation Distance for New Concentrated Feeding Operations and those Expanding by 500 or More Animal Units after May 13, 1997.**

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

MINIMUMS (Ord. 2006-03, 9-26-2006)

	<u>CLASS A</u>	<u>CLASS B</u>	<u>CLASS C</u>	<u>CLASS D &amp; E</u>
Established residences	2,640 feet	1,760 feet	1,320 feet	1,320 feet
Adjoining property lines	200 feet	200 feet	200 feet	200 feet
Churches, Businesses and Commercially Zoned Areas	2,640 feet	2,640 feet	1,320 feet	1,320 feet
Municipal Areas and Incorporated Municipal boundary limits	5,280 feet	5,280 feet	2,640 feet	1,320 feet
Lake Park District boundary limits	5,280 feet	5,280 feet	2,640 feet	1,320 feet
Private Wells other than the operator	2,640 feet	1,760 feet	1,320 feet	1,320 feet
Lakes and Streams classified as Fisheries as identified by the state	500 feet	500 feet	200 feet	200 feet
Federal, State & County Road ROW Confinement	300 feet	300 feet	200 feet	200 feet
Federal, State & County Road ROW Open lot	50 feet	50 feet	50 feet	50 feet
Township Road ROW Confinement	150 feet	150 feet	150 feet	150 feet
Township Road ROW Open lot	50 feet	50 feet	50 feet	50 feet

The County Zoning Commission shall have the power where exceptional topographic conditions or other extraordinary and exceptional situations or conditions exist to require setbacks in excess of the above minimum for proposals for new concentrated animal feeding operations. (Ord. 2006-02, 3-28-2006)

Permitted uses in Zone A, Provided They Meet Appropriate Performance Standards Outlined For Aquifer Protection Overlay Zones:

1. Agriculture;

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

- a. Application of manure is permitted with an approved nutrient management plan.
2. Horticulture;
3. Park, greenways or publicly owned recreational areas;
4. Necessary public utilities/facilities designed so as to prevent contamination of ground water.

Conditional Uses in Zone A:

The following uses are permitted only under the terms of a Conditional Use and must conform to provisions of the underlying zoning district and meet the Performance Standards outlined for the Aquifer Protection Overlay Zones.

1. Expansion of existing conforming and non-conforming uses to the extent allowed by the underlying district. The County Zoning Commission shall not grant approval unless it finds such expansion does not pose greater potential contamination to ground water than the existing use.
2. Sediment basins will be allowed on a case by case basis and must be constructed to current NRCS standards and specifications.

Prohibited Uses in Zone A:

The following uses are expressly prohibited in Zone A:

1. New Concentrated Animal Feeding Operations after adoption of this ordinance.
2. Existing Concentrated Animal Feeding Operations will not be able to expand beyond a total of 500 animal units (Class D).
3. Earthen storage basins and lagoons.
4. Disposal of or stockpiling of solid waste.
5. Post harvest application of nitrogen fertilizer prior to October 15<sup>th</sup> except for the spreading of manure.
6. Storage of road salt or disposal of snow containing deicing chemicals.

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7. Processing and storage of PCB containing oils;
8. Car washes;
9. Auto service, repair or painting facilities and junk or salvage yards;
10. Disposal of radioactive waste;
11. Graveyards or animal burial sites;
12. Open burning and detonation sites;
13. All other facilities involving the collection, handling, manufacture, use storage, transfer or disposal of any solid or liquid material or waste having a potentially harmful impact on ground water quality;
14. Land spreading or dumping of petroleum contaminated soil, waste oil or industrial wastes.
15. Class V injection wells.
16. All uses permitted or not permitted as Conditional Uses in Zone A.

**Zone B -- Aquifer Secondary Impact Zones**

Zone B is established as the remainder of the mapped shallow/surficial aquifer not included in Zone A.

This portion of the aquifer is being protected because (1) it is a valuable natural resource for future development, (2) it provides drinking water supply for individual households, (3) contamination is not justified, even though this area is not a public water supply wellhead and (4) contaminants could eventually reach Zone A.

**Permitted Uses in Zone B:**

1. All uses permitted in the underlying zoning districts provided that they can meet the Performance standards as outlined for the Aquifer Protection Overlay Zones.

**Conditional Uses in Zone B:**

1. New Class D and expansion of existing Class D up to 999 animal units (Class C).

**CONCENTRATED ANIMAL  
FEEDING OPERATION**

2. Sediment basins will be allowed on a case by case basis and must be constructed to current NRCS standards and specifications.
3. All Conditional Uses allowed in underlying districts may be approved by the County Zoning Commission provided they can meet Performance Standards outlined for the Aquifer Protection Overlay Zones.

Prohibited Use in Zone B:

The following use is expressly prohibited in Zone B:

1. New and expansion of Class A, B and C Concentrated Animal Feeding Operations.
2. Earthen storage basins and lagoons.
3. Post harvest application of nitrogen fertilizer prior to October 15<sup>th</sup> except for the spreading of manure.
4. Land spreading or dumping of petroleum contaminated soil, waste oil or industrial wastes.
5. Class V injection wells.

Each application for a new or expanded concentrated animal feeding operation (CAFO) will be reviewed by the County Zoning Commission on a site specific basis. The County Zoning Commission reserves the right to increase the minimum required setbacks and separation distance on a site specific review, based on one or more of the following considerations.

- A. A concentration of CAFO's in the area exists or would occur which may pose an air or water quality concern.
  - B. Due to topography and prevailing wind direction, additional setback and separation distance is appropriate to safeguard air or water quality.
  - C. A concentrated animal feeding operation is in excess of 5,000 animal units.
7. Standards for Conditional Uses
- A. The County Zoning Commission may request information relating to a Concentrated Animal Feeding Operation not contained in these regulations.

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- B. The County Zoning Commission may impose, in addition to the standards and requirements set forth in these regulations, additional conditions which the County Zoning Commission considers necessary to protect the public health, safety and welfare.
- C. Conditional Uses shall be in effect only as long as sufficient land specified for spreading purposes is available for such purposes and other provisions of the permit are being adhered to.
- D. When considering an application, the County Zoning Commission will take into consideration current and past violations relating to Concentrated Animal Feeding Operations that the applicant has an interest in.
- E. The permit holder shall provide and at all times maintain General Liability insurance in the amount of at least \$1,000,000.00, with an Environmental Protection Insurance rider of at least \$100,000.00. Proof of such insurance must be received prior to the issuance of a permit and must be provided annually during the operation of such CAFO. The insurance carrier shall be required to provide Brookings County with notice of insurance and with a notice of cancellation or change in coverage. Failure to maintain such insurance shall be grounds for cancellation of the Conditional Use Permit. (Ord. 2006-02, 3-28-2006).
- F. Permit applicants will be required to file a letter of assurances as required by the County Zoning Commission. The letter of assurances will be prepared by the zoning officer and signed by both the applicant and the zoning officer.
- G. In the event of a discharge (as defined by SDCL 34A-2B-1) of manure or other materials or wastes associated with a CAFO, the permit holder shall cooperate fully with and comply with all requirements of the South Dakota Department of Environment and Natural Resources and such permit holder shall take all steps necessary to clean up and eliminate such discharge at the sole expense of the permit holder and/or its insurance carrier. Failure to comply with the requirements of this paragraph shall be grounds for cancellation of the Conditional Use Permit. (Ord. 2006-02, 3-28-2006).
- H. The permit holder shall at all times properly dispose of dead livestock consistent with the rules, regulations and directives of the South Dakota Animal Industry Board of the Department of Agriculture. Failure to comply with such rules, regulations or directives shall be grounds for cancellation of the Conditional Use Permit. (Ord. 2006-02, 3-28-2006).

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- I. The permit holder shall notify Brookings County in writing in the event of closure of the animal confinement operation. Included in the notification shall be: plans for cleaning the buildings, waste system and emptying of the holding pond, storage pit or lagoon. (Ord. 2006-02, 3-28-2006).
8. Information Required for Class A and B Concentrated Feeding Operation Permit.
    - A. Owner's name, address and telephone number.
    - B. Legal descriptions of site and site plan.
    - C. Number and type of animals.
    - D. Nutrient management plan.
    - E. Manure management and operation plan.
    - F. Management Plan for Fly and Odor Control.
    - G. Information on ability to meet designated setback requirements including site plan to scale.
    - H. General permits from South Dakota Department of Environment & Natural Resources if available for animal species.
    - I. Review of Plans and Specifications and Nutrient Management Plan by the South Dakota Department of Environment & Natural Resources.
    - J. Information on soils, shallow aquifers, designated wellhead protection areas, and 100-year flood plain designation.
    - K. Notification of whoever maintains the access road (township, county and state). Notification of public water supply officials
    - L. Any other information as contained in the application and requested by the County Zoning Officer.
  9. Information Required for Class C and D Concentrated Feeding Operation Permit.
    - A. Owner's name, address and telephone number.
    - B. Legal descriptions of site and site plan.

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- C. Number and type of animals.
- D. Nutrient management plan.
- E. Manure management and operation plan.
- F. Management Plan for Fly and Odor Control.
- G. Information on ability to meet designated setback requirements including site plan to scale.
- H. Review of Plans and Specifications and Nutrient Management Plan by the South Dakota Department of Environment & Natural Resources if using lagoon or earthen storage basin.
- I. Information on soils, shallow aquifers, designated wellhead protection areas, and 100-year floodplain designation.
- J. Notification of whoever maintains the access road (township, county and state). Notification of public water supply officials
- K. Any other information as contained in the application and requested by the County Zoning Officer.

BROOKINGS COUNTY ZONING  
CONDITIONAL USE PERMIT # 2014cu011

An Application for a conditional use permit having been filed with the Brookings County Planning and Zoning Commission, a copy of the application being attached hereto. Such application being made by: **Michael Crinion/Killeskillen, LLC** regarding the following real property **NE ¼ of Section 10-112-48, of the 5<sup>th</sup> P.M., Brookings County, South Dakota.** After due notice, a public hearing having been held on the Application on the 7<sup>th</sup> day of **October 2014**:

FINDINGS OF FACT AND SPECIAL CONDITIONS

- 1) The applicant(s) Michael Crinion/Killeskillen, LLC
- 2) LC Olson LLP the owner(s) of record of the following described property which is the subject of the application:

NE ¼ of Section 10-112-48 of the 5<sup>th</sup> P.M., Brookings County, SD.

Parcel Number: 130001124810100

- 3) The applicant(s) filed an application with the Brookings County Development Office on 9 September 2014 for a conditional use permit Conditional Use #11, "Class A Concentrated Animal Feeding Operation," 5,500 animal units/3,999 Dairy Cattle, in the NE ¼ of SEC 10-112-48. The 160-acre property is zoned Agricultural.

Section 5.05 of the Brookings County Zoning Ordinance specifies standards governing the conditional use permits. The commission must find all standards are met and ensure additional provisions/conditions are in place for the conditional use permit to be granted:

- 4) Section 5.05.a-d, has been met, specifying rules governing the process for submittal, public notice, Findings of Fact, and assurance that no adverse effect to public interest may occur if conditional use is permitted.
- 5) Section 5.05.e, the planning and zoning commission shall make finding that it is empowered under the section of this regulation described in the application to grant the conditional use permit. The commission is empowered to approve conditional use permits for those uses listed as such in the applicable district.

Section 5.05.f, the planning and zoning commission must make written findings for the following compliance with the specific rules and criteria governing individual conditional uses and issue additional provisions/conditions concerning the following, where applicable:

- 6) Entrance and exit to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe. *Requirements:* Two access drive ways off of county 197<sup>th</sup> Street.
- 7) The road providing access to the property is adequate to meet the transportation demands of the proposed conditional use. *Requirements:* Brookings County shall require a written road use agreement with Oaklake Township or other governmental units regarding the upgrading and continued maintenance of any road use for the conditional use requested prior to issuance of a conditional use permit.
- 8) Off-street parking and loading areas where required, with particular attention to the items in (2.a) above and the economic, noise, glare or other effects of the conditional use on adjoining properties and surrounding properties generally in the district. *Requirements:* loading areas will be on site on the east and west sides of the proposed parlor building.
- 9) List utilities, refuse and service areas (i.e. trash storage area), with reference to locations, availability, and compatibility. *Requirements:* all utility easements and waste storage areas should be depicted on site plan with distance and setbacks specified.

- 10) Screening and buffering with reference to type, dimensions and character. *Requirements:* contract with Conservation District to plant 4-5 rows of trees along the north and east property lines.
- 11) Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district. *Requirements:* legal entrance signage.
- 12) Required yards and other open spaces. *Requirements:* no additional yard requirements proposed.
- 13) General compatibility with adjacent properties and other property in the district. *Requirements:* NA
- 14) Comprehensive plan considerations for AG district. *Requirement:* no additional requirements are proposed, property and uses must remain in the general character of the agricultural district's purpose and intent of the zoning ordinance.

The Brookings County Planning and Zoning Commission should further determine and condition this conditional use permit upon the following special conditions or safeguards:

- 15) **No Significant Contribution of Pollution.** In general, no Concentrated Animal Feeding Operation shall be constructed, located, or operated so as to create a significant contribution of pollution.
- 16) **State General Permit.** Classes A and B Concentrated Animal Feeding Operations shall obtain coverage under a State General Permit pertaining to the animal species of the Concentrated Animal Feeding Operation. A county permit may be approved conditioned on receiving State approved plans.
- 17) **Nutrient Management Plan.** The applicant shall develop, maintain, and follow a nutrient management plan to ensure safe disposal of manure and protection of surface and ground water. The nutrient management plan must be either approved by the Brookings County Zoning Officer or by the South Dakota Department of Environment & Natural Resources if a State General Permit is required prior to land application of any manure. Due to crop rotation, site changes, and other operational changes, the applicant should update the plan annually to reflect the current operation and crops grown on the application sites. The applicant should collect, store, and dispose of manure according to recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land disposal site are secondary to the proper and safe disposal of the manure. If a violation of the nutrient management plan occurs the violator will be required to update the nutrient management plan annually and the collection, storage and disposal of liquid and solid manure will be done according to recognized practices of good agricultural management.
- 18) **Manure Management and Operation Plan.** Classes A, B, C, and D Concentrated Animal Feeding Operations must submit a Manure Management and Operation Plan.
- 19) Manure containment structures shall provide for a minimum design volume of 270 days of storage. In addition open outdoor storage shall include storage for direct precipitation and/or runoff from a 25 year, 24 hour storm.
- 20) Applicants shall keep records of manure applications on individual fields, which document acceptable manure, and nutrient management practices have been followed.
- 21) The applicant must participate in environmental training programs and become a certified livestock manager if available.
- 22) The applicant is responsible for the misapplication of the manure whether applied on the applicants own land or on land where there is a land spreading agreement or in transport. The complaint procedure will be the same as for any other zoning complaint.
- 23) The County Zoning Commission may require manure to be injected or incorporated in order to minimize air and water quality impacts.
- 24) Requests for application of liquid manure by means of irrigation systems will be reviewed by the County Zoning Commission on a site-specific basis. Impact on air and water quality will be taken into consideration.

- 25) All irrigation systems blending manure with ground water must have check valves installed to prevent back flow into the water supply.
- 26) The County Zoning Commission may, after notice and hearing, revoke a Conditional Use in the event of a violation of any of such conditions. In addition, the Conditional Use permit may not be transferred during any violation.
- 27) **Management Plan for Fly and Odor Control.** Classes A, B, C, D and E Concentrated Animal Feeding Operations shall dispose of dead animals, waste and wastewater in such a manner as to control odors and flies. A management plan is required for submission of a permit. Brookings County Zoning Commission will review the need for control measures on a site specific basis, taking into consideration prevailing wind direction and topography. The following procedures to control flies and odors shall be considered in a management control plan. Operational plans for manure collection, storage treatment and use must be kept updated and implemented. Methods to be utilized to dispose of dead animals shall be included in the management plan.
- 28) **The following procedures to control flies and odors should be considered in a management control plan:** plant trees and shrubs to reduce wind movement of odors away from buildings, manure storage ponds and/or lagoons; provide adequate slope and drainage to remove surface water from pens and keep pen area dry so odor production is minimized; store solid manure in containment areas having good drainage to minimize odor production; or consider use of BMP's on open storage systems for liquid manure systems to control odor production.
- 29) **The County Zoning Commission shall have the power where exceptional topographic conditions or other extraordinary and exceptional situations or conditions exist to require setbacks in excess of the above minimum for proposals for new concentrated animal feeding operations. (Ord. 2006-02, 3-28-2006)**
- 30) **The conditional use may be revoked if the state permit is violated or if any of the management plans are found to be in violation.**
- 31) **Include an additional berm protection area south of pond #3 to be inspected by DENR.**
- 32) **Test wells to be set and tested by DENR and request DENR to determine surface water monitoring locations/requirements.**

The Brookings County Planning and Zoning Commission by a vote of full membership hereby grants the above Petitioner(s) a conditional use permit for the above described real property for the use as follows: **Conditional Use #11, "Class A Concentrated Animal Feeding Operation," 5,500 animal units/3,999 Dairy Cattle, in the NE ¼ of SEC 10-112-48. The 160-acre property is zoned Agricultural.**

This conditional use permit is specifically conditioned upon initial and continued compliance with all of the requirements and conditions listed above and compliance with all applicable provisions of the Brookings County Zoning Ordinance.

Any conditional use permit that is granted and not used within three years will be considered invalid.

The county planning and zoning commission may, after notice and hearing, revoke a conditional use permit in the event of a violation of any of the conditions upon which such permit was issued. In addition, the conditional use permit may not be transferred during any violation.

The Brookings County Zoning Director is authorized to issue any required building permits for construction consistent with the requirements of this conditional use permit.

Dated this 7th day of October 2014.



Jeff Robbins, Chairman  
Brookings County Planning & Zoning Commission

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

LAKE HENDRICKS IMPROVEMENT ASSOCIATION, CITY OF  
LAKE HENDRICKS, MINNESOTA, and NORRIS PATRICK,

**Petitioners/Appellants,**

-vs-

BROOKINGS COUNTY PLANNING AND ZONING COMMISSION,  
BROOKINGS COUNTY PLANNING AND ZONING COMMISSION  
SITTING AS THE BROOKINGS COUNTY BOARD OF ADJUSTMENT,  
MICHAEL CRINION, KILLESKILLEN LLC, and LC OLSON LLP,

**Respondents/Appellees.**

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Appeal No. 27598

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APPEAL FROM THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
BROOKINGS COUNTY, SOUTH DAKOTA

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THE HONORABLE VINCENT A. FOLEY,  
CIRCUIT COURT JUDGE

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**BRIEF OF COUNTY APPELLEES**

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NOTICE OF APPEAL FILED  
OCTOBER 12, 2015

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<u>Coyote Flats, L.L.C. v. Sanborn County Comm'n,</u> 1999 S.D. 87, ¶ 7, 596 N.W.2d 347 . . . . .	19
<u>Dodds v. Bickle,</u> 77 S.D. 54, 85 N.W.2d 284 (1957). . . . .	13, 15
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<u>Circuit</u> , 2004 SD 19, ¶33, 676 N.W.2d 126. . .	31
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<u>Elliot v. Bd. of County Comm'rs of Lake County</u> , 2005 S.D. 92, ¶13, 703 N.W.2d 361 . . . . .	11, 19
<u>Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. Of Adjustment</u> , 2015 S.D. 54, 866 N.W.2d 149. . . . .	3-32 passim
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<u>In re M.C.</u> , 527 N.W.2d 290 (S.D. 1995). . . . .	3-26
<u>Jensen v. Turner County Bd. of Adjustment</u> , 2007 S.D. 28, ¶4, 730 N.W.2d 411. . . . .	11
<u>Linard v. Hershey</u> , 516 N.W.2d 304 (S.D. 1994) .	24
<u>Olson v. Olson</u> , 438 N.W.2d 544 (S.D. 1989). . .	24
<u>Pennington County v. Moore</u> , 525 N.W.2d 257 (S.D. 1994) . . . . .	13, 15, 17
<u>Poindexter v. Hand Cnty. Bd. of Equalization</u> , 1997 S.D. 71, ¶ 18, 565 N.W.2d 86 . . . . .	24
<u>Save Centennial Valley Ass'n v. Schultz</u> , 284 N.W.2d 452 (S.D. 1979). . . . .	13, 14
<u>Sherburn v. Patterson Farms, Inc.</u> , 1999 S.D. 47, ¶ 4, 593 N.W.2d 414 . . . . .	10
<u>State ex rel. LeCompte v. Keckler</u> , 2001 S.D. 68, ¶ 6, 628 N.W.2d 749 . . . . .	10
<u>Tibbs v. Moody Co. Bd. Of Commissioners</u> , 2014 S.D. 44, 851 N.W.2d 208. . . . .	13, 14
<u>Wangsness v. Builders Cashway, Inc.</u> , 2010 S.D. 14, ¶ 11, 779 N.W.2d 136. . . . .	25

**OTHER AUTHORITY:**

S.D. Const. Art. V, §§ 1,5. . . . . 2, 11

**PRELIMINARY STATEMENT**

In this brief, the Lake Hendricks Improvement Association, the City of Hendricks, Minnesota, and Norris Patrick will be referred to as "Petitioners." Respondents and appellees Brookings County Planning and Zoning Commission and Brookings County Planning and Zoning Commission sitting as the Brookings County Board of Adjustment will be referred to as "Board." Respondents and Appellees Michael Crinion and Killeskillen, LLC, will be collectively referred to as "Killeskillen." The Brookings County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. Citations to the transcript of the May 8, 2015 hearing appear at "T" followed by the corresponding page number. The 2007 Revised Zoning Ordinance for Brookings County will be referred to as "Ordinance."

**JURISDICTIONAL STATEMENT**

This is an appeal from the Order Denying Petitioners' Motion to Reconsider dated September 17, 2015, the Findings of Fact and Conclusions of Law dated September 24, 2015, and the Order Affirming Decision to Grant Conditional Use Permit dated September 24, 2015. (CR 1369, 1378, 1365) Notice of Entry of the Order Denying Petitioners' Motion to Reconsider was served on September 21, 2015. (CR 1366) Notice of Entry of the

Findings of Fact and Conclusions of Law and Order Affirming Decision to Grant Conditional Use Permit was served on September 25, 2015. (CR 1379) Petitioners served a Notice of Appeal on October 12, 2015. (CR 1391) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because the Circuit Court entered a final judgment affirming the Board's decision to grant Killeskillen's application for a conditional use permit ("CUP").

#### QUESTIONS PRESENTED<sup>1</sup>

**I. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE APPELLATE JURISDICTION CONFERRED UPON IT UNDER SDCL 11-2-61 AND 11-2-62 DID NOT AUTHORIZE IT TO REVIEW BROOKINGS COUNTY'S ADOPTION OF THE ORDINANCE.**

*The Circuit Court concluded that, in the context of a zoning appeal brought under SDCL 11-2-61 and 11-2-62 and reviewed under a writ of certiorari standard, it lacked jurisdiction to examine the steps taken by Brookings County in enacting the Ordinance.*

Cable v. Union County Bd. of County Comm'rs, 2009 S.D. 59, 769 N.W.2d 817.

S.D. Const. Art. V, §§ 1,5.

SDCL 11-2-61.

SDCL 11-2-62.

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<sup>1</sup> A third issue relating to Petitioners' lack of standing to appeal the Board's decision concerning the CUP was made a part of this appeal by Killeskillen's Notice of Review. As the Board did not raise this issue below, the Board will defer to Killeskillen's argument on this subject.

**II. WHETHER THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DECISION TO GRANT THE CUP TO KILLESKILLEN.**

*The Circuit Court determined that the Board had jurisdiction over Killeskillen's application for a CUP and it pursued its authority in a regular manner. Petitioners' request for certiorari relief was denied.*

Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. Of Adjustment, 2015 S.D. 54, 866 N.W.2d 149.

Armstrong v. Turner County Bd. of Adjustment, 2009 S.D. 81, 772 N.W.2d 643.

In re M.C., 527 N.W.2d 290 (S.D. 1995).

**STATEMENT OF THE CASE**

Petitioners commenced this appeal by personally serving their Petition on all respondents, which initially included the individual Board members. (CR 1-31) By stipulation of the parties, the individual Board members were dismissed. (CR 50-55)

On December 5, 2014, Killeskillen moved to dismiss the Petition under SDCL 15-6-12(b)(1), claiming that Petitioners lacked standing to appeal the Board's decision regarding the CUP. (CR 32) Killeskillen's motion was denied at a hearing held on January 28, 2015.

Following the January 28, 2015 hearing, the Board made its return. (CR 94) The parties then submitted their briefs to the Circuit Court, the Honorable Vincent A. Foley, presiding. Petitioners also moved the Court to consider evidence under SDCL

11-2-64. (CR 362; CR 546) The Board moved the Court to allow it to supplement the return and to present evidence relating to the procedures followed in providing notice of the Board's October 7, 2014 hearing to adjoining landowners. (CR 528)

The hearing on Petitioners' appeal occurred on May 8, 2015. (CR 349) On June 24, 2015, this Court issued its decision in Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. Of Adjustment, 2015 S.D. 54, 866 N.W.2d 149. The Circuit Court requested additional briefing concerning the impact of the decision on this case.

On August 14, 2015, the Circuit Court issued a Memorandum Decision, concluding that the Board's decision should be affirmed. (CR 1345) On September 1, 2015, Petitioner filed a Motion to Reconsider. (CR 1354) The Circuit Court issued a decision denying the motion to reconsider on September 3, 2015, which was followed by an Order Denying Petitioners' Motion to Reconsider. (CR 1363; 1365) On September 24, 2015, the Circuit Court entered its Findings of Fact and Conclusions of Law, and an Order Affirming Decision to Grant Conditional Use Permit. (CR 1369; 1378)

#### **STATEMENT OF FACTS**

The first issue in this appeal presents a question of law concerning the manner in which the Circuit Court exercised

appellate jurisdiction over the zoning appeal. Few facts bear upon the legal issue relating to the scope of the Circuit Court's appellate jurisdiction. The following factual background is provided to give this Court the context relating to the second issue in this appeal, which is whether the Board acted within its jurisdiction and regularly pursued its authority.

**A. Notice and Hearing Regarding Killeskillen's Application.**

Under the Ordinances, the Board is authorized to consider applications for CUPs. (CR 115-117) On September 8, 2014, Killeskillen filed an application for a CUP to construct and operate a Class A Concentrated Animal Feeding Operation ("CAFO") in Brookings County. (CR 228-313) The application was set for hearing, with notice published in area newspapers. (CR 323-325)

Petitioners state on page 6 of the Brief of Appellants that ". . . Darrell Snodgress did not receive notice of the hearing." Under Ordinance §5.05(c), "[a]djoining landowners shall be notified by First Class mail at their last known address of the public hearing time and date at least seven (7) days prior to the hearing." (CR 116) Richard Haugen, the office manager for the Brookings County Development Department, prepared an adjoining landowner map and drafted letters to the adjoining landowners at their last known address. (CR 530-544) Included

in this mailing was a letter to Darrell Snodgress. (CR 531, 539) Haugen marked the envelope addressed to Snodgress with postage and deposited it into the United States Postal Services' mailbox, located in front of the Brookings County Courthouse. (CR 531) The letter was not returned as undeliverable. (Id.)

Prior to the October 7, 2014 hearing, the zoning office received written materials concerning the proposed CAFO from members of the public. (CR 326-333) At the hearing held on October 7, 2014, the Board heard testimony from the CAFO's proponents and opponents, as more particularly appears in the minutes from that proceeding. (CR 352-355)<sup>2</sup> The Board ultimately approved Killeskillen's application and entered Findings of Fact and Special Conditions. (CR 356; 343-345)

**B. The Alleged Snodgress Well.**

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<sup>2</sup> The copy of the minutes attached to the Return to Writ of Certiorari as Exhibit H (CR 334-339) included only the odd-numbered pages due to a copying error. When the error was discovered, a replacement Exhibit H was filed with the Brookings County Clerk of Courts. (CR 351-361) The replacement Exhibit H is referred to in this brief.

The Ordinances establish a setback of 2,640 feet between Class A CAFOs and private wells. (CR 182) In Petitioners' recitation of the facts, they state that "a private well is located within 2,640 feet of the proposed CAFO site on Darrel Snodgress's property," and "the well is only 200 yards from the CAFO site and sticks up about three feet above the ground; and it also has a 20-foot metal tower above it signaling the presence of a well." (Brief of Appellants, page 5.) In support of the assertion that a private well is located within 2,640 feet of the proposed CAFO site, Petitioners cite to Darrel Snodgress' affidavit - evidence that the Circuit Court declined to allow. (CR 1887-1888) In support of the latter factual assertions regarding the characteristics of the alleged well, Petitioners cite to page 8 of the transcript of the May 8, 2015 hearing, which is comprised of their counsel's oral argument to the Circuit Court.

There is no evidence in this record that suggests that the alleged well on the Snodgress property is a functioning well that is being used by anyone. The Board heard no testimony and received no evidence at its October 7, 2014 hearing concerning a private well within the setback. In fact, the only evidence presented pointed to no wells in the area. The report prepared by Killeskillen's engineers states: "It is believed all other

required setbacks are met, as we are unaware of any listed features being present within the prescribed distances. A database search of the surrounding area indicated no documented wells within the required setback distance.” (CR 231)

**C. Road Use Agreement.**

The proposed CAFO sits on a blacktop county road. (CR 316-317; CR 353). Ordinance §5.05(f) (2) leaves the requirement for a road use agreement to the Board’s discretion:

2. The roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use. The County Zoning Commission may require the applicant to enter into a written contract with any affected township or other governmental unit regarding the upgrading and continued maintenance of any roads used for the conditional use requested prior to the issuance of a conditional use permit.

(CR 116-117) (Emphasis added.)

The Board imposed a requirement that Killeskillen enter into a road use agreement with Oaklake Township. (CR 343) Although there was not yet a road use agreement in place at the time of the Board’s consideration of this matter, under Ordinance §5.05(h), the Board retains jurisdiction to enforce all conditions of the CUP. (CR 117)

**D. The CAFO Site in Relation to Area Aquifers.**

The aquifer issue was discussed and considered by the Board during the hearing. The CAFO facility site is positioned

in the northeast corner of the northeast quarter of Section 10, which is not over any areas within the boundaries on the aquifer maps. (CR 299-303; CR 353; CR 524) Brian Friedrichsen's September 24, 2014 report clarifies the status of various aquifers in the area and refers to certain studies which have mapped the prevalent aquifers in Brookings County. (CR 231-232)

Ordinance §16.01, Aquifer Protection Overlay District, refers to two maps depicting boundaries for aquifer protection zones in Brookings County. (CR 151) These maps appear as part of Mr. Friedrichsen's report, but a better color copy is attached to the Affidavit of Reece Almond as Exhibit H. (CR 300; CR 525) The map entitled "First Occurrence of Aquifer Materials in Brookings County" shows that there are likely to be sand and gravel deposits along the course of Upper Deer Creek in the southwest quarter of the northeast quarter of section 10. (CR 299; CR 524). Otherwise, the map indicates that aquifers/aquifer materials on Section 10 occur greater than 100 feet below the surface. Id.

Mr. Friedrichsen summarized the location of the site versus the aquifers depicted on these maps:

The above corresponds with the map titled "First Occurrence of Aquifer Materials in Brookings County, South Dakota" (SD DENR, 2004), which indicates the site to be located in an area where no aquifers are

encountered within 100 feet of the ground surface. The map titled "Brookings County Groundwater Protection Zones" also indicates the site is not located within the wellhead protection area or the shallow aquifer boundary.

(CR 232)

The boundaries depicted in the maps are an accurate portrayal, considering that the soil borings included by Mr. Friedrichsen did not hit water within 50 feet of the surface at various locations of the site where the CAFO will sit. (CR 282-290; CR 355) Additionally, Mr. Friedrichsen noted during his discussion that the applicant would be amenable to the installation of test wells to alleviate additional concerns of the Board. (CR 353) The Board added as a special condition: "Test wells to be set and tested by DENR and request DENR to determine surface water monitoring locations/requirements."

(CR 345)

#### **ARGUMENT**

**A. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE APPELLATE JURISDICTION CONFERRED UPON IT UNDER SDCL 11-2-61 AND 11-2-62 DID NOT AUTHORIZE IT TO REVIEW BROOKINGS COUNTY'S ADOPTION OF THE ORDINANCE.**

"On review, jurisdictional issues are issues of law to be reviewed under the de novo standard of review." Cable v. Union Cty. Bd. of Cty. Comm'rs, 2009 S.D. 59, ¶ 19, 769 N.W.2d 817, 825 (citing State ex rel. LeCompte v. Keckler, 2001 S.D.

68, ¶ 6, 628 N.W.2d 749, 752). “Under the de novo standard of review, this Court gives no deference to the circuit court's conclusions of law.” Id. (citing Sherburn v. Patterson Farms, Inc., 1999 S.D. 47, ¶ 4, 593 N.W.2d 414, 416).

While the South Dakota Constitution gives each circuit court general subject matter jurisdiction in many cases, circuit courts only have appellate jurisdiction where conferred by statute. S.D. Const. Art. V, §§ 1,5. A court cannot create its own subject matter jurisdiction, because “[s]ubject matter jurisdiction is conferred solely by constitutional or statutory provisions.” Cable at ¶ 20, 769 N.W.2d at 825 (quotation omitted). As such, the Circuit Court’s jurisdiction is limited to the appellate jurisdiction permitted by statute.

The statutory provisions invoked by Petitioners, SDCL 11-2-61 and 11-2-62, establish the judicial boundaries of the Circuit Court’s jurisdiction, namely, the writ of certiorari standard of review. Indeed, this Court has repeatedly declared that appeals from board of adjustment decisions are limited to writ of certiorari review. See e.g. Jensen v. Turner County Bd. of Adjustment, 2007 S.D. 28, ¶4, 730 N.W.2d 411, 412-13 (“[a]ppeals from boards of adjustment are considered by circuit courts under writs of certiorari, and therefore, judicial review

is limited.”); Elliot v. Bd. of County Comm’rs of Lake County, 2005 S.D. 92, ¶13, 703 N.W.2d 361, 367 (stating that an appeal from a board of adjustment decision must be in the form of a petition for writ of certiorari).

In this regard, the Circuit Court properly concluded that it could not consider the validity of the Ordinance. This simply cannot be done in the context of a statutorily-mandated writ of certiorari standard of review where Petitioners are seeking review of the Board’s decision vis-a-vis Killeskillen’s application for a CUP. SDCL 11-2-61 and 11-2-62 grant Petitioners a narrow right, namely, judicial review of the Board’s decision for illegality. That limitation restricts the Court’s jurisdiction to address matters beyond the scope of that limited judicial review, including issues concerning the validity of the actions taken by the Brookings County Board of Commissioners years before when it enacted the Ordinance. Indeed, the board of county commissioners is an entirely separate legal entity from the Board and is not even a party to this case. See e.g. Bechen v. Moody Cty. Bd. of Comm’rs, 2005 S.D. 93, ¶ 11, 703 N.W.2d 662, 665 (Board of Adjustment is “a separate legal entity with its own distinct powers and responsibilities under state law”); Armstrong v. Turner Cty. Bd.

of Adjustment, 2009 S.D. 81, ¶ 17, 772 N.W.2d 643, 649 (“Technically, under the law, each entity - the board of county commissioners, the planning and zoning commission, and the board of adjustment - has a different statutory function with different statutory responsibilities and powers in regard to land use and regulation.”).

Petitioners cite four cases in an attempt to persuade the Court that it may ignore the narrow scope of review authorized under SDCL 11-2-61 and 11-2-62 and consider whether a county properly enacted its zoning ordinance. These cases are distinguishable, because they fall into one of two categories: (1) appeals under the writ of certiorari standard, in which the Court considered whether the challenged board’s decision was in excess of the board’s authority to act under the language of the zoning ordinance, but the Circuit Court’s *jurisdiction* to consider the enactment of the ordinance was not raised or decided (Tibbs v. Moody Co. Bd. Of Commissioners, 2014 S.D. 44, 851 N.W.2d 208); Save Centennial Valley Ass’n v. Schultz, 284 N.W.2d 452 (S.D. 1979)); and (2) cases where the Circuit Court was exercising general jurisdiction and specifically asked to enforce ordinances against a particular land use (Pennington County v. Moore, 525 N.W.2d 257 (S.D. 1994); Dodds v. Bickle, 77 S.D. 54, 57, 85 N.W.2d 284, 286 (1957)). Neither category

met the jurisdictional issue head on.

In Tibbs, this Court concluded that the procedure followed by Moody County in enacting its zoning ordinance in 2003 was appropriate under SDCL Chapter 11-2. Id. at ¶ 23, 851 N.W.2d at 216. But the Court did not address the issue raised in this case: whether the Circuit Court's proper exercise of certiorari jurisdiction can extend to examining whether the County properly enacted its zoning ordinance. As the Circuit Court put it, "[w]hile in Tibbs, the Supreme Court considered the enactment of the ordinance, it does not contain express instruction that a Court should." (CR 1364) This is an issue of first impression for this Court.

In Save Centennial Village, the trial court ruled that the definition of "detached single-family dwellings" in the ordinance could be interpreted by the Commission to allow a residential subdivision to be located in the A-1 general agriculture zone. Id. at 457. The trial court also ruled that the interpretation of the phrase "detached single-family dwellings" was a matter within the Commission's discretionary authority, and concluded that the Commission's interpretation should not be disturbed under the certiorari proceeding. Id. This Court disagreed, finding that "by disregarding the clear intent of the comprehensive plan, the Commission acted in excess

of its jurisdiction.” Id. This Court’s review in Save Centennial Village fit squarely within the proper standard of review in a case presented under certiorari review, i.e., examining whether the Board acted within its jurisdiction.

The Court’s discussion about compliance with SDCL Ch. 11-2 illustrated the proper steps to be followed *if* a change in zoning was to occur. However, the holding in Save Centennial Village concerned how the Commission acted under the Court’s interpretation of the existing ordinance, not whether the existing ordinance was properly enacted. This Court concluded that a zoning change was necessary for the residential subdivision to go forward, as the plain language of the ordinance and comprehensive plan did not permit such a use in the agricultural district. But no zoning change had taken place in Lawrence County, and this Court was not called upon to consider whether Lawrence County correctly followed all of the steps in enacting such a change. Nor did the Court decide whether this is a proper inquiry for the Circuit Court when a board’s decision is challenged through a writ of certiorari.

In the Moore case, Pennington County alleged that Moore was operating a salvage yard in violation of the zoning ordinance. The County was attempting to enforce the ordinance against Moore. Moore was *not* an appeal of a zoning decision made

by a board of adjustment being considered under a writ of certiorari standard of review. The circuit court was exercising general subject matter jurisdiction.

Similarly, in Dodds, the plaintiffs owned residential property near the defendant's truck repair shop in Spearfish. The plaintiffs sought injunctive relief to keep the defendant from building or continuing to build additions to his truck repair shop and from doing any other act in violation of the zoning ordinance of the City of Spearfish. They were also asking the circuit court to order the defendant to discontinue the repair shop at its present location and to remove his garage building. This Court found that the circuit court properly found the ordinances invalid because no notice of their adoption was published. Id. at 56, 85 N.W.2d at 285. Again, the circuit court was exercising general jurisdiction over the controversy. Its jurisdiction was not constrained by the writ of certiorari standard of review.

Neither the cases cited by the Petitioners nor the statutes controlling the actions of the Circuit Court when presented with an appeal like this one support an examination into the propriety of the underlying zoning ordinance. SDCL 11-2-65 limits the judicial remedies available to the Court if it finds the Board acted outside its authority: "The court may

reverse or affirm, wholly or partly, or may modify the decision brought up for review.” The Court’s remedial powers are limited to reversing, affirming, or modifying the Board’s decision. Neither SDCL 11-2-65 nor anything else in SDCL Chapter 11-2 authorizes the Circuit Court to invalidate Ordinances or enter declarations to that effect.

If Petitioners wish to challenge the validity of the Ordinance, their recourse lies in a declaratory judgment action, in which the Circuit Court would have general subject matter jurisdiction. But Petitioners have no interest in making such a challenge, because it comes with consequences. In Moore, the Court held that the zoning statutes set forth express procedural requirements with which the county failed to comply, so there was no legal basis to conclude that the county could enforce the improperly enacted ordinances. As the Court noted in Moore, “[w]e agree with the trial court that, inasmuch as County’s zoning ordinances are void for want of compliance with mandatory notice and hearing requirements, Moores’ property is *unzoned*. Absent other applicable law which restricts the use of their land, they may proceed with their use of the property as an auto salvage yard.” Id. at 260 (emphasis added).

If Petitioners are correct that Brookings County

lacks a validly enacted Ordinance, what protections do Petitioners retain? Unless a previously enacted Ordinance applies - an issue not reached in this case - the proposed CAFO site would be *unzoned*. The Circuit Court recognized that the lack of an Ordinance essentially makes the requirement for a CUP a nullity. (CR 1364) The CUP that sits at the center of this dispute would not be needed to construct a CAFO.

Rather than risking this outcome, Petitioners are attempting to use SDCL 11-2-61 and 11-2-62 to have their cake and eat it too. They are seeking the revocation of Killeskillen's CUP based on an argument about the invalidity of the Ordinance, without litigating an appropriate action to test its validity. The outcome of this matter would be different if some prior challenge to the Ordinance had succeeded, and *then* the Board was attempting to enforce provisions of its Ordinance. As the Circuit Court noted in its Memorandum Decision:

The Ordinance, unchallenged at the time of the CUP application and hearing, exists as the applicable law in Brookings County. At that time, and since that time, the statutes of the State of South Dakota authorizing a County to zone in the manner done by Brookings County in the Ordinances still govern. Thus, from this framework the Board possessed the authority; legally conferred.

(CR 1330)

The Ordinance was not invalidated prior to the Board's consideration of Killeskillen's CUP. Petitioners did not

commence a declaratory judgment action or any other case in which the Circuit Court would have general jurisdiction to consider the Ordinance. It simply asked the Circuit Court to review its validity in the context of an appeal of the Board's decision on the CUP application. An appeal under the writ of certiorari standard of review is not the proper action to challenge the validity of the Ordinance. The Circuit Court correctly acted within its limited appellate jurisdiction by rejecting Petitioners' invitation to consider the enactment of the Ordinance.<sup>3</sup>

**B. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DECISION TO GRANT THE CUP TO KILLESKILLEN.**

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<sup>3</sup> Petitioners include a section in their argument concerning the merits of their argument that the Ordinance was invalidly enacted. Because the Circuit Court found it did not have jurisdiction, it did not reach this issue.

The standard of review for a writ of certiorari "cannot be extended further than to determine whether the . . . board . . . has regularly pursued the authority of such . . . board . . . ." SDCL 21-31-8. "This appellate procedure departs significantly from the trial de novo and arbitrary and capricious standard of review formerly applied to zoning appeals." Elliot v. Board of County Com'rs of Lake County, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367 (citing Coyote Flats, L.L.C. v. Sanborn County Comm'n, 1999 S.D. 87, ¶ 7, 596 N.W.2d 347, 349). "Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding . . . ." Hines v. Bd. of Adjustment of City of Miller, 2004 S.D. 13, ¶10, 675 N.W.2d 231, 234 (internal quotations and citations omitted); see also Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, ¶ 21, 866 N.W.2d 149, 157 (factual determinations are properly resolved by the Board).

**1. The alleged well on the Snodgress property does not call for reversal of the Board's decision.**

There was absolutely no evidence in the record before the Board at the time of its October 7, 2014 hearing supporting the claim that a private well exists within the setback. The only evidence the Board heard concerning area wells came from Killeskillen's engineers: "It is believed all other required

setbacks are met, as we are unaware of any listed features being present within the prescribed distances. A database search of the surrounding area indicated no documented wells within the required setback distance.” (CR 231)

Likewise, there is no evidence of a well in this record now, as the Circuit Court declined to consider Petitioners’ post-hearing evidence. Even if the Circuit Court had considered the Darrel Snodgress’ s affidavit, it would not change the outcome. In Grant County Concerned Citizens, this Court acknowledged that “the more likely purpose behind the setback requirement seems to be to prevent the disruption of existing water supplies to the neighbors of a proposed CAFO.” Id. at ¶ 16, 866 N.W.2d at 156. Snodgress’ s affidavit does not assert that his well is functional, let alone describe his need for a water supply. It does not explain when the alleged well was added to his property, explain that it was there at the time Killeskillen applied for its CUP, or explain why it is not identified on public databases. In spite of Petitioners’ multiple motions asking the Circuit Court to consider evidence under SDCL 11-2-64, they can point to no documentation or testimony showing that the thing that they claim exists on Darrel Snodgress’ s property is a functioning, licensed well.

Petitioners are now engaging in gamesmanship with the

record to bolster their claim that a private well within the setback calls for reversal. They rely upon two tactics: (1) cherry-picking the Circuit Court's Memorandum Decision (while ignoring its findings) to argue that the Circuit Court found favorably to Petitioners on the issue of the existence of the well; and (2) citing to evidence in the record that really is not evidence. Neither tactic is legally acceptable, and neither supports a reversal of the Board's decision. Nor does this Court's decision in Hines support reversal.

**a. Petitioners erroneously rely upon the Memorandum Decision to support the existence of a well within the setback.**

Petitioners argue that the existence of a well within the setback can no longer be disputed, pointing to the following language in the Memorandum Decision: "The Court finds the evidence convincing that a well as contemplated by the Ordinance exists." (CR 1329) Petitioners neglect to mention the Circuit Court's findings regarding this issue, in which the Court flatly rejected Petitioners' only evidence concerning the alleged well.

The Court's Findings of Fact and Conclusions of Law includes the following factual findings:

7. The County considered the State registry of wellheads when considering whether there were any wells within the setback requirement. As

conveyed by Crinion and Killeskillen to the Board, a search of the South Dakota Department of Environment & Natural Resources ("DENR") Water Well Completion Reports reveals no wells within Sections 2, 3, or 10 of Township 112, Range 48, Brookings County.

8. Crinion and Killeskillen presented the evidence that no wells were present within the setback. No other evidence concerning wells was presented at the October 7, 2014 hearing.
9. Petitioners attempted to present evidence of the existence of a well within the setback after the October 7, 2014 hearing.

(CR 1383-1384)

Significantly, although the Circuit Court's Memorandum Decision discussed the evidence of a well being "convincing," the Court recognized that it would be inappropriate to allow the presentation of such evidence *after* the Board's hearing. (CR 1332) The Circuit Court ultimately ruled in its conclusions of law that it would not consider Petitioners' post-hearing evidence:

9. As to the well setback issue, under a certiorari review, the Court should not, and does not consider Petitioners' purported evidence in the examination it is charged to perform. Instead, a review of the evidence suggested by the County as sufficient to rely upon, and its own policies noted in the Land Use Plan answers the certiorari inquiry.
10. Courts reviewing under certiorari don't determine whether the Board decided factual issues correctly. Here, the Board determined it could rely upon the representations of

Crinion and Killeskillen concerning the lack of wells within the setback, and not call for a more comprehensive review of the premises.

11. The Board regularly pursued its authority in considering the evidence presented to it concerning a lack of wells within the setback.
12. **Petitioners' attempt to introduce evidence of a well within the setback under the provisions of SDCL 11-2-64 is rejected.** To allow a late disqualifying feature such as a well to be added to the evidence frustrates the orderly process of evidence presentation before the Board.
13. Permitting such evidence to be considered now would serve to award the withholding of information from a Board when it is making the determination of compliance or non-compliance. The better course in all proceedings is to present all information to the decision-maker in order that it has full information at its disposal.

(CR 1887-1888) (Emphasis added.)

Petitioners attribute far too much significance to a single sentence within the Memorandum Decision. The Circuit Court judge's comments in such a decision do not constitute the law of the case, particularly when considered alongside other discussion in the decision and the Circuit Court's actual findings. "As its name implies, a memorandum opinion is merely an expression of the trial court's opinion of the facts and law. Any expression of opinion or views by the trial judge *extraneous to his decision* in the manner and form contemplated by law is of no binding force and effect as a matter of law either upon

the trial judge himself or anyone else.” Poindexter v. Hand Cnty. Bd. of Equalization, 1997 S.D. 71, ¶ 18, 565 N.W.2d 86, 91 (quoting Linard v. Hershey, 516 N.W.2d 304, 305 (S.D. 1994), and Olson v. Olson, 438 N.W.2d 544, 547 (S.D. 1989)) (Emphasis added.).

Petitioners are not just incorrect about the significance of the Court’s language in the Memorandum Decision; they completely ignore the Circuit Court’s actual ruling on this issue. The Circuit Court made express findings that the only evidence of a well that exists in the entire record would *not* be considered under SDCL 11-2-64. (CR 1887-1888) As the record now stands, there is not undisputed evidence of a well within the setback. Rather, there is no evidence of a well at all.

Petitioners have not asserted in their appeal that the Circuit Court abused its discretion in rejecting their evidence of a well. See Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, ¶ 40, 866 N.W.2d 149, 163 (quoting Wangsness v. Builders Cashway, Inc., 2010 S.D. 14, ¶ 11, 779 N.W.2d 136, 140) (“[E]videntiary rulings made by the circuit court are presumed correct and are reviewed under an abuse of discretion standard.”). Instead, they repeatedly

cite to Mr. Snodgress' affidavit as though it is valid evidence that was considered by the Circuit Court. They even go so far as to claim that the evidence concerning the well is "undisputed." As demonstrated by the Court's findings, Petitioners are simply wrong.

**b. Petitioners rely upon their counsel's argument, rather than evidence admitted by the Circuit Court, to establish facts about the well.**

To bolster their argument about the existence and characteristics of an alleged well within the setback, Petitioners attempt to utilize argument from the May 8, 2015 hearing before the Circuit Court. Specifically, they point to this content from that hearing:

MR. PETERSON: Certainly , they don't have a duty to do everything perfectly, but they have got to try, and they didn't do that here. This well is plainly visible from the road. I have Brad Olson here, if the Court wants some testimony. There is basically a 20-foot tower that is above this well, and the well head, itself, sticks up about three feet. We have got pictures of it, and Brad Olson is here to testify, and I know one of the complaints about the Snodgress affidavit was nobody has cross-examined him. Well, we have somebody here that is subject to cross-examination if the Court would be inclined to want to hear that testimony, but it's not like this is an overgrown well that is hidden in the weeds. There is a 20-foot tall metal tower above the top of

it that is 200 yards from the CAFO site.

(T8)

Petitioners' problem is that the argument they cite is not evidence. "Argument by the parties' counsel is not evidence." In re M.C., 527 N.W.2d 290, 292 (S.D. 1995). The Court should disregard counsel's commentary about the visibility of the Snodgress well.

Considering the Circuit Court's rulings, there is no evidence in the record that establishes the existence of a well, let alone anything in the record describing the qualities of the claimed well. Furthermore, although Petitioners deride the Board for failing to conduct a proper investigation, the well was apparently not as easily identified or well-recognized as they assert. Brad Olson, the witness Petitioners' counsel identified as a person who could testify about the well, attended the Board's October 7, 2014 hearing. (CR 359) Mr. Olson did not bring up the Snodgress well at that time. If this was such an obvious feature known to Mr. Olson, it is curious that he made absolutely no attempt to bring it to the Board's attention.

It is also curious that Petitioners continue to assert that Mr. Snodgress did not receive notice of the October 7, 2014 hearing. The evidence in the record shows that all proper steps were taken in mailing notice of the hearing to him. (CR 530-544)

It is well established that proof of mailing by depositing a letter in a proper mail receptacle, properly addressed and stamped, raises a presumption of delivery to the person addressed. Cox v. Brookings Int'l Life Ins. Co., 331 N.W.2d 299, 301 (S.D. 1983).

The Circuit Court correctly observed that it would be improper to allow the presentation of late information in an attempt to defeat the CUP. It is equally improper for this Court to rely upon Petitioners' counsel's comments. **c. Hines is distinguishable.**

Petitioners' reliance on Hines is misplaced. Petitioners attempt to use a sentence in Hines to argue that the Board failed to contribute independent thought in its consideration of the Killeskillen application, because it failed to conduct a proper investigation.

In Hines, this Court found that, "[i]n denying the variance, the Board simply relinquished its decision to a vote of the neighbors." Id. at ¶ 13, 675 N.W.2d at 234. In essence, the City of Miller's Board of Adjustment cast the ordinances aside and decided based solely upon the objections of neighboring property owners. The important aspect of Hines was the Board's outright rejection of the factors it was to consider under the Ordinance in favor of simply doing what the neighbors

asked it to do.

No similarities exist here. The Board did not simply rely upon Killeskillen's representations in granting the CUP. While Petitioners point to authority for the proposition that Killeskillen bore the burden of proof, the burden of proof really is not the issue here. Killeskillen took steps toward proving its proposed CAFO complied with the Ordinance requirements. Killeskillen's information concerning the lack of wells within the area was based upon a search of public databases which track data concerning active wells.<sup>4</sup> Nothing was found in the vicinity of the CAFO site. (CR 231)

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<sup>4</sup> Such a database can be easily found online. For instance, using <http://denr.sd.gov/des/wr/dblogsearch.aspx>, a search of well completion reports can be conducted.

Also, the Board's information was not limited to what Killeskillen presented. It had at its disposal a detailed Staff Report prepared by the zoning office, which included photographs and maps of the area. (CR 314-319) It documented no violations of applicable setbacks.

The simple fact is that there was nothing presented to the Board which alerted it to the presence of a supposed well on the Snodgress property. The record continues to be devoid of any such evidence, as Petitioners' purported evidence fails to demonstrate that the object on the Snodgress property is a licensed, operating "well."

Under the guise of challenging the Board's investigation based on the "independent thought" language in Hines, Petitioners are simply trying to inject evidence going to the merits of the Board's decision that the CAFO met the setback requirements. But the merits of the Board's decision are not reviewable in this proceeding. The Circuit Court correctly rejected the evidence of the well that the Board never heard. The record clearly reflects that the Board considered the requirements of the Ordinance, found that they were met, and granted the CUP. Right or wrong in that decision, the Board regularly pursued its authority.

**2. The lack of a road use agreement**

**may preclude Killeskillen from operating, but it does not call for reversal of the Board's decision.**

Petitioners do not explain how the failure of the Board to require something that falls entirely within the Board's discretion should call for an outright reversal of the Board's decision. Ordinance §5.05(f)(2) leaves the requirement for a road use agreement to the Board's discretion:

2. The roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use. The County Zoning Commission *may* require the applicant to enter into a written contract with any affected township or other governmental unit regarding the upgrading and continued maintenance of any roads used for the conditional use requested prior to the issuance of a conditional use permit.

(CR 116) (Emphasis added.)

This is particularly true when the Board retains the authority to enforce this provision and revoke the CUP if no road use agreement is signed prior to Killeskillen attempting to construct the facility. See Ordinance §5.05(h) (CR 117). In practice, this road use requirement creates an issue between Killeskillen and Oaklake Township that needs to be resolved between those two entities before Killeskillen can become operational. This is a requirement that the Board can still enforce and, if Killeskillen fails to comply, its CUP could be

revoked. The timing of the road use agreement does not undermine the Board's regular pursuit of its authority in granting the CUP.

**3. The CAFO site is not over a Zone B Aquifer Area, and the Board's decision on that issue cannot be reviewed for correctness.**

Petitioners' arguments concerning the location of the CAFO site invite the Court to second-guess the Board's substantive decision-making. This Court put it best in Armstrong v. Turner County Bd. of Adjustment, 2009 S.D. 81, 772 N.W.2d 643: "Additionally, we have said '[w]ith a writ of certiorari, we do not review whether the [board's] decision is right or wrong. We are limited to determining whether the [board] regularly pursued its authority.'" Id. at ¶12, 772 N.W.2d at 648 (quoting Duffy v. Circuit Court, Seventh Judicial Circuit, 2004 S.D. 19, ¶33, 676 N.W.2d 126, 138); see also Grant County Concerned Citizens at ¶21 ("factual determinations [are] properly resolved by the Board"). The Board had the authority to consider the evidence and determine whether the proposed CAFO site was within the boundaries of a Zone B Aquifer Area. The Board read and heard the evidence and made the determination that

it was not. The correctness of that finding is not an issue in this appeal.

Nonetheless, there is ample evidence that the Board got it right, which further suggests that there was no lapse in the Board's exercise of its lawful authority. Petitioners attempt to disqualify the entire quarter on which Killeskillen's CAFO facility is to be built due to the possible presence of aquifer materials in its southwest corner. But the CAFO facility site is positioned in the northeast corner of the northeast quarter of Section 10, i.e., not over any areas within the boundaries on the aquifer maps.

In Grant County Concerned Citizens, the Court considered whether an entire parcel of ground should be disqualified from manure application if some part of the parcel contains drainage. Section 1304(10) of the Zoning Ordinance for Grant County requires the application of manure to be set back from certain water sources and structures. The Court concluded that "an entire property is not rendered unusable by the presence of such setback." Grant County at ¶19. To juxtapose this reasoning with this case, Killeskillen's proposed CAFO facility is to be built in the north half of the northeast quarter of Section 10, i.e., in an area not located over any shallow/surficial aquifer of the type protected by the



**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 33 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 6,984 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 27<sup>th</sup> day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for County Appellees, hereby certifies that on the 27<sup>th</sup> day of January, 2016, a true and correct copy of **BRIEF OF COUNTY APPELLEES** was electronically transmitted to:

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and the original and two copies of **BRIEF OF COUNTY APPELLEES** were mailed by first-class mail, postage prepaid, to

Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500

East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted

in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 27<sup>th</sup> day of January, 2016.

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**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**No. 27598**

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LAKE HENDRICKS IMPROVEMENT ASSOCIATION, CITY OF  
HENDRICKS, MINNESOTA, and NORRIS PATRICK,

Petitioners/Appellants,

vs.

BROOKINGS COUNTY PLANNING AND ZONING COMMISSION,  
BROOKINGS COUNTY PLANNING AND ZONING COMMISSION SITTING  
AS THE BROOKINGS COUNTY BOARD OF ADJUSTMENT, MICHAEL  
C.R.INION, KILLESKILLEN LLC, and LC OLSON LLP,

Respondents/Appellees.

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Appeal from the Circuit Court  
Third Judicial Circuit  
Brookings County, South Dakota

The Honorable Vincent A. Foley, Presiding Judge

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Notice of Appeal filed October 12, 2015

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## **PRELIMINARY STATEMENT**

Appellants, Lakes Hendricks Improvement Association, Inc. (“LHIA”), City of Hendricks, Minnesota, and Norris Patrick, will be collectively referred to as “Petitioners.” Appellees Brookings County Planning & Zoning Commission and Brookings County Planning & Zoning Commission Sitting as the Brookings County Board of Adjustment will be referred to as the “Board.” Appellees Michael Crinion and Killeskillen, LLC, will be referred to as “Killeskillen.”

Citations to the certified record appear as “C.R.” followed by the initial page number assigned by the Brookings County Clerk of Courts; citations may also include a citation to the particular item being cited.

## **JURISDICTIONAL STATEMENT**

Killeskillen does not dispute the Jurisdictional Statement provided by Petitioners, except as to the issue on cross-appeal. Killeskillen timely filed and served a Notice of Review on October 26, 2015 to appeal the Circuit Court’s denial of its Motion to Dismiss, which was an oral ruling made at the January 28, 2015, hearing. (C.R. 1419.) The cross-appeal issue seeks dismissal of this case for lack of subject matter jurisdiction, as no Petitioner meets the requirements of SDCL 11-2-61 for authority of the Circuit Court to hear an appeal of a conditional use permit (“CUP”) decision under a zoning ordinance.

This Court has jurisdiction to decide subject matter jurisdiction as a threshold matter and, if found, has jurisdiction to address the merits

pursuant to SDCL 15-26A-3(1), because the Circuit Court entered final judgment affirming the Board's decision granting Killeskillen's application for a CUP. (C.R. 1378.)

### **STATEMENT OF THE ISSUES**

#### **I. Whether the Circuit Court Erred When It Failed to Dismiss the Appeal for Lack of Jurisdiction.**

The Circuit Court found denied a Motion to Dismiss, finding that the Petitioners met the statutory requirements for bringing an appeal. The matter was not addressed in the final order affirming the county decision.

#### **Authority on Point:**

- *Cable v. Union Board of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825
- *Elliott v. Bd. of Co. Comm'rs.*, 2007 SD 6, ¶ 17, 727 N.W.2d 288, 290.
- *In re Appeal from Decision of Yankton County Comm'n*, 2003 SD 109, ¶ 9, 670 N.W.2d 34, 37.
- SDCL 11-2-61
- SDCL 11-2-1(5) (defining "Municipality" for Ch. 11-2)

#### **II. Whether the Circuit Court Properly Affirmed the Board's Decision to Grant Killeskillen a CUP.**

The Circuit Court found that the Board did not exceed its jurisdiction and pursued its authority in a regular manner when it granted Killeskillen's application for a Conditional Use Permit to operate a dairy.

#### **Authority on Point:**

- *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54
- *Jensen v. Turner Cty. Bd. of Adjustment*, 2007 SD 28, ¶ 4, 730 N.W.2d 411, 412-13

- SDCL 11-2-17.3
- SDCL 11-2-53

### **III. Whether the Circuit Court Correctly Denied Collateral Attack on the Zoning Ordinance Validity.**

The Circuit Court found that an appeal under a writ of certiorari standard as required by SDCL 11-2-62 does not allow for a collateral attack on the validity and proper enactment of a county zoning ordinance.

#### Authority on Point:

- *Heine Farms v. Yankton County*, 2002 S.D. 88, 649 N.W.2d 597 (S.D., 2002)
- SDCL 21-31-1
- SDCL 11-2-62
- SDCL 11-2-65

### **STATEMENT OF THE CASE**

The Board granted Killeskillen a CUP for a concentrated animal feeding operation (“CAFO”) to build a dairy. (C.R. 94, Return, Ex. F.) The decision came after a public hearing with significant input from members of the county and from residents of nearby Hendricks, Minnesota. No nearby neighbors chose to appeal the decision to grant the permit, but Petitioners filed an action pursuant to SDCL 11-2-61 claiming the Board’s decision was illegal and violated the Ordinances. (C.R. 1.) The Circuit Court of Brookings County, South Dakota, in the Third Judicial Circuit, heard the appeal. *Id.* At no time did the entity LP Olson LLP appear before the Circuit Court. The Honorable Vincent A. Foley presided over the appeal. *Id.*

Killeskillen filed a Motion to Dismiss, which was denied after a hearing. The Circuit Court then later ruled on the merits and denied the appeal. (C.R. 1378.) Findings of Fact and Conclusions of Law and an Order Affirming Decision to Grant Conditional Use Permit was issued. (C.R. 1329, 1369, 1378.) The Petitioners brought this appeal and Killeskillen raised its cross-appeal by Notice of Review.

Petitioners filed a Motion to Dismiss Notice of Review for failure to serve that Notice on a party in default. Killeskillen resists the Motion.

### **STATEMENT OF FACTS**

#### ***Brookings County Zoning Ordinance Requirements for a CUP***

The Brookings County Commission (“County Commission”) adopted the applicable Zoning Ordinance (“Ordinance”) in 2007 and has used it since adoption. (C.R. 94, Return, Ex. A.) Petitioners raise several allegations about the validity of the Ordinance. The Board will present opposing facts and arguments. Those arguments and issues will not be repeated here. Killeskillen joins the Board and supports its position in all respects.

Under the Ordinance, the Board is authorized to consider and decide applications for CUPs. (C.R. 94, Return, Ex. A at 20-22.) Certain requirements and factors the Board must consider when determining whether to grant a CUP are listed in the Ordinance. *Id.*; SDCL 11-2-17.3. Within the district zoned for Agriculture, certain practices or land uses are subject to control. Livestock and dairy production in what is known as a

Concentrated Animal Feeding Operation (“CAFO”) is one of the uses requiring a CUP under the Ordinance. *Id.* Specific requirements and factors apply to a CUP application for a CAFO. (C.R. 94, Return, Ex. A at 74-93.) If an application complies with the Ordinances and satisfies all requirements therein, the Board is authorized to grant a CUP. (C.R. 94, Return, Ex. A at 20-22.) If the CUP application does not comply with the Ordinances, the Board may deny a CUP but can consider a variance under appropriate circumstances. *Id.* No variance is at issue here.

### ***Killeskillen’s Site Selection and Application for a CUP***

Michael Crinion is an owner and operator of a dairy in Brookings County and his company Killeskillen sought to develop another dairy site within the area. Suitable building sites were evaluated and Killeskillen submitted an application for a CUP to construct a new dairy operation in Brookings County, South Dakota, on September 8, 2014. (C.R. 94, Return, Ex. B.) Under the Ordinance, a dairy of the size proposed, housing up to 3,999 mature dairy cows, is a CAFO under what is deemed a large or Class A operation. It will be located at the NE ¼ of Section 10-112-48, Brookings County, South Dakota. *Id.* The Board properly noticed and held a public hearing on the application on October 7, 2014. (C.R. 94, Return, Ex. H.)

When it adopted the Ordinance in 2007, Brookings County would have reviewed and determined appropriate measures to further its comprehensive plan and meet other goals of the zoning process. The deliberative legislative acts necessary to develop and adopt the zoning

ordinance resulted in certain criteria or requirements for CUPs. A site meeting these criteria is presumably an appropriate location for that land use consistent with the public good. Setbacks are typically employed by counties and other zoning authorities to ensure that a CUP is allowed where appropriate. In this case, in reliance on the setbacks in the Ordinance, Killeskillen sought and found a willing seller, LC Olson LLP, to option a site that meets the requirements of a Class A CAFO for a dairy operation. Killeskillen did those things required by the Board to establish that it has or would be able to meet all the conditions and requirements for a CUP as a Class A CAFO on its chosen site. At the public hearing Killeskillen agreed to additional conditions intended to address concerns raised by opponents. (C.R. 94, Return Ex. D and Ex. K.)

Killeskillen utilized an engineering firm to investigate and provide a site design that met these CAFO criteria for a CUP. (C.R. 94, Ex. C.) Based on a review of the public records and available information, the engineer reported to the Board that no private water wells were located within the Ordinance setback for this site. (C.R. 94, Return, Ex. C, pgs. 2, 47-48.) Maps and aerial photographs were provided to the Board, and the Board did its own review of all setbacks and other CUP criteria. (*Id.*; C.R. 94, Ex. D.) The Board determined that Killeskillen's proposal met the CUP requirements. (*Id.* at Ex. D; Ex. H.) It also determined that traffic counts and other considerations for use of township roads required Killeskillen to enter into a road use agreement with Oaklake Township prior to operating

the dairy. (C.R. 94, Return, Ex. K at 1.) Killeskillen will also complete other requirements in the future, upon completion of litigation. One of those outstanding matters is obtaining authority to operate the dairy from the South Dakota Department of Environment and Natural Resources (“DENR”) under the Clean Water Act. *See* SDCL 34A-2-13, 34A-2-20; 40 C.F.R. Part 125, Subparts A, B, C, D, H, I, J, K, and L (July 1, 1991) (surface water discharge permit criteria).

The dairy will be operated to standards required by state and federal laws governing activities of confined animal feeding operations under the South Dakota state general permit application and authorization. *See* ARSD Article 74:52. Both the application of manure on farmland (by incorporation into the soil) and feed storage leachate collection (from silage) on the dairy site would be subject to DENR oversight. *Id.* (covering surface water discharge of pollutants in South Dakota, administering the federal Clean Water Act and South Dakota statutes). The dairy will not commence operation until approved controls are in place for compliance with applicable environmental regulations. ARSD 74:52:01:04 (permit requirement); ARSD 74:52:01:05(1) (concentrated animal feeding operations identified as potential point source requiring permit prior to operating). At the public hearing the Board of Adjustment heard an explanation of the applicable rules and that this was a zero discharge facility by applicant Killeskillen, LLC. *See* C.R. 94, Return, Ex. H, pg. 4 (“We have a “o” discharge facility, we have to

account for every gallon in and every gallon going out.”). The engineer explained further how the manure storage capacity was calculated and how the facility ensured 150% capacity over the design standard for storage. *Id.* at pg. 4-5. The Board required additional conditions as a safeguard although nothing in the Ordinance specifically required them. (C.R.94, Ex. K.)

First, Killeskillen agreed to add an additional berm to bolster surface water containment. (C.R. 94, Return, Ex. K, pg. 3, Item 31.)

Second, Killeskillen agreed to install any monitoring wells and other testing as prescribed by DENR to ensure no groundwater or surface water is adversely affected by dairy operations. *Id.* at Ex. K, pg. 3, Item 32.

Killeskillen will build the dairy on a portion of the parcel listed in the application which is away from a Zone B aquifer protection area on a small part of the parcel C.R. 94, Return, Ex. C at 70-71(engineer’s report). The exact location of the buildings will be adjusted to incorporate any changes required for DENR approval while maintaining the conditions of the CUP for Brookings County. (C.R. 94, Return, Ex. K at 3 (conditions).)

### ***Allegations on Appeal to Circuit Court***

Upon appeal, Petitioners claimed violations of the Ordinances and for the first time claimed that a water well existed within the setback distance on property owned by Darrell Snodgress. Killeskillen contests whether an operating (and not abandoned) well remains unregistered with state authorities.

Petitioners raised many other issues in their appeal. Critically, Petitioners sought to attack the validity of the Ordinance, which was denied initially and upon motion for reconsideration. (C.R. 1354 & 1365.) However, at no time did Petitioners seek to amend their pleadings to add a Declaratory Judgment count or otherwise seek to address the alleged Ordinance invalidity outside the *writ of certiorari* process. The Circuit Court held that the attack on the validity of the Ordinance was outside not within its authority under SDCL 11-2-65 and affirmed the grant of the CUP on authority of the Ordinance. (C.R. 1329.) Petitioners filed this appeal and continue to attack the validity of the Ordinance. (C.R. 1391.)

### **STANDARD OF REVIEW**

Review of the Board's decision to grant Killeskillen a CUP is conducted under the *certiorari* standard of review. SDCL 11-2-62. "A writ of certiorari may be granted by the Supreme and circuit courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction." SDCL 21-31-1.

"The review upon writ of certiorari cannot be extended further than to determine whether the . . . board . . . has regularly pursued [its] authority . . ." SDCL 21-31-8. "With a writ of certiorari, we do not review whether the [board's] decision is right or wrong." *Duffy v. Cir. Ct., 7th Jud. Cir.*, 2004 S.D. 19, ¶ 33, 676 N.W.2d 126, 138. "A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law." *Jensen v. Turner Cnty. Bd. of Adj't*, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413 (quoting *Elliott v. Bd. of Cnty. Comm'rs*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367).

*Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 10. “A board’s actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law.” *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 12, 772 N.W.2d 643, 648 (citing *Jensen v. Turner Cnty. Bd. of Adjustment*, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413 (quoting *Elliott v. Bd. of Cnty. Comm’rs of Lake Cnty.*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367)).

This Court will not address disputed factual issues within the authority of the Board to decide. *Id.* at ¶ 16.

Because “[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding[.]” *Elliott*, 2005 S.D. 92, ¶ 14, 703 N.W.2d at 367 (quoting *Hines v. Bd. of Adj’t of City of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 234), we do not decide whether we would have reached the same conclusion as the Board.

*Id.*; Further, the Circuit Court, and therefore this Court, may not substitute and usurp the discretion of the Board by making its own determination of whether an applicant has met the applicable zoning criteria.

The Board has wide discretion in deciding whether or not to grant a variance to a zoning ordinance, and in reviewing that decision, the circuit court may not substitute its discretion for that of the Board. *Id.* This limitation on scope of review prevents “courts from usurping policy decisions from other branches of government.” *Bell v. Township of Bass River*, 196 N.J.Super. 304, 482 A.2d 208, 212 (Ct.Law Div.1984).

*Cole v. Board Of Adj. Of City Of Huron*, 2000 SD 119, ¶ 17, 616 N.W.2d 483, 488. The Board has expertise to be respected. *Id.*

## ARGUMENT

The Petitioners in this case do not meet the requirements of SDCL 11-2-61 to bring the action presented to the Circuit Court and therefore no subject matter jurisdiction exists. Dismissal is therefore appropriate.

Assuming *arguendo* that subject matter jurisdiction does exist, the Board properly exercised its jurisdiction, pursued its authority in a regular manner, and properly decided disputed issues of fact when it granted Killeskillen a CUP. All of the arguments of Petitioners are an attempt to have this Court decide issues properly left to the discretion of the Board. Here, the Board has or will properly exercise its authority over the CUP and its conditions and enforce those conditions in the future. The Board acted properly within its authority and has shown no disregard for undisputable facts. Brookings County properly adopted the Ordinance, but if it did not, the appropriate procedure for attacking existing ordinances is through a Declaratory Judgment action or otherwise, and not under an appeal governed by SDCL 11-2-62. For these reasons, affirmance is appropriate.

**I. The Circuit Court Had No Subject Matter Jurisdiction**

**A. Jurisdiction Must be Determined Regardless of the Service of the Notice of Review on LP Olson LLP**

Killeskillen timely filed a Notice of Review but admittedly only served the County Respondents and Petitioners. In the Circuit Court, LC Olson LLP (“Olson”), the landowner for the project, did not appear and

after default had not been served with pleadings or other papers by any parties pursuant to SDCL 15-6-5(a) (exempting service on parties in default for failure to appear). Petitioners did serve Olson with the Notice of Appeal as indicated in its Certificate of Service. Based on SDCL 15-26A-22, which requires service of the Notice of Review on all parties to the appeal, Petitioners moved to dismiss the Notice of Review issues.

Killeskillen resisted on the basis that Olson is not a “party” in this instance and the issue is a matter of appellate jurisdiction that may be raised even without a Notice of Review.

Olson’s name does not appear in the record of this case except for being listed in some documents as the property owner. The Conditional Use Permit was granted to Killeskillen, LLC and does not mention Olson anywhere in the approved permit. C.R. 94, Exhibit B. In the Circuit Court proceedings, Olson did not appear and was not served with pleadings and the Notice of Entry of Findings of Fact and Conclusions of Law and Order and Judgment at its conclusion. C.R. 1379. In the appeal to this Court, Olson has likewise failed to appear. The only participants in the trial court proceedings are represented in this appeal: the Appellees, the Board, and Michael Crinion and his company Killeskillen, LLC. Consistent with the practice of the parties in the Circuit Court at the conclusion of the case, Killeskillen only served the Appellees and the Brookings County Respondents when it filed the Notice of Review. Killeskillen submits that

Olson is not a party to this appeal, but even if a party, jurisdiction is lacking.

This Court does not dismiss the entire appeal if the requirements of SDCL 15-26A-22 are not met; the statute merely determines if an issue may be raised as a cross-appeal. However, in this instance, the issues sought to be raised by Killeskillen are actually ones that this Court has determined are matters for determination *sua sponte* by the Court if not raised by the appealing parties. *Elliott v. Board of County Com'rs*, 2005 SD 92, ¶ 17, 703 N.W.2d 361, 368.

**B. Subject Matter Jurisdiction Under SDCL 11-2-61 Requires Aggrieved Status**

It is important to identify what Killeskillen seeks to address with the Notice of Review issue. The Circuit Court only has appellate jurisdiction if the requirements of SDCL 11-2-61 are met, and the record does not support appellate jurisdiction here.

This is not a matter that can be waived for failure to file a Notice of Review. But if the Court determines the issue of compliance with SDCL 15-26A-22, the lack of service on Olson is not fatal to the Notice of Review.<sup>1</sup>

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<sup>1</sup> Killeskillen filed a Notice of Review out of an abundance of caution. The language of SDCL 15-26A-22 applies to “review of a judgment or order entered in the same action which may adversely affect” the appellee, but here the trial court affirmed the zoning decision in favor of Killeskillen, so the judgment is not adverse. *See, e.g., Lamar Adver. of S. Dakota, Inc. v. Zoning Bd. of Adjustment of City of Rapid City*, 2012 S.D. 76, ¶ 9, n. 3, 822 N.W.2d 861, 864 (notice of review not necessary where ruling is not adverse to party raising

First, the default status of Olson renders it a non-party to this appeal. SDCL 15-26A-22 requires appellees to serve the notice of review and docketing statement “on all other parties.” Olson did not and has not appeared in this appeal in any way. A review of the settled record from the Circuit Court reveals that Olson is at best merely a nominal party whose interest, if any, in this appeal is directly aligned with those of Killeskillen. As noted previously, SDCL 15-6-5(a) does not require service on parties who default by failure to appear at the Circuit Court level.

Whether Petitioners’ service of their Notice of Appeal on Olson after default in the Circuit Court makes Olson a party under SDCL 15-26A-22 has not been addressed by this Court. Petitioners rely heavily on naming Olson in the caption and upon that service to establish that Olson is a party to this appeal. The continuing default at this stage would seem to belie that argument. It is clear that the purposes to be served by SDCL 15-26A-22 are not furthered by requiring service on Olson here. Including such a nominal party only adds inconvenience and cost. Consistent with this Court’s ruling in the case of *In re Estate of Flaws*, 2012 S.D. 3, 811 N.W.2d 749, the process need not induce such a burden.

The Circuit Court denied Killeskillen’s Motion to Dismiss but the record is devoid of evidence that the appealing individuals or

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issue). Instead, as argued, the jurisdictional issue may be raised at any time. This matter is critical because the law is not clear as to who may bring an appeal. Killeskillen is in the business of developing dairies and expects this issue to arise in future conditional use permit proceedings.

organizations were within the statutory grant of appeal rights from a county board of adjustment decision.

Although jurisdictional questions were not raised below or on appeal, we have consistently held that questions of jurisdiction can be raised at any time and *sua sponte* by this Court. *Pennington County v. State ex rel. Unified Judicial System*, 2002 SD 31, ¶9, 641 N.W.2d 127, 130. "It is the rule in this state that jurisdiction must affirmatively appear from the record and this court is required *sua sponte* to take note of jurisdictional deficiencies, whether presented by the parties or not." *State v. Phipps*, 406 N.W.2d 146, 148 (S.D.1987) (citation omitted); *see also Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 SD 62, ¶14, 594 N.W.2d 357, 362; *Deno v. Oveson*, 307 N.W.2d 862, 863 (S.D.1981).

*Id.* SDCL 11-2-61 only permits an appeal from the decision of a board of adjustment from those listed as follows:

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the county, may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality. The petition shall be presented to the court within thirty days after the filing of the decision in the office of the board of adjustment.

The Petitioners have the burden to establish facts in the record showing they are those persons or entities allowed to appeal under SDCL 11-2-61. But this record establishes that no Petitioner is permitted to appeal the decision of the board. The Circuit Court had no jurisdiction to decide the merits of the Petition, which leaves this Court with no subject matter jurisdiction either.

This Court recently held: "Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void." *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 20, 769 N.W.2d 817, 825 (quoting *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 10, 675 N.W.2d 739, 742). "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." *Id.* (quoting *In re Application of Koch Exploration Co.*, 387 N.W.2d 530, 536 (S.D. 1986)). In the case of a zoning decision appeal from a county board of adjustment, the appeal is purely statutory under a Petition for Writ of Certiorari. SDCL 11-2-61; SDCL 11-2-62.

This Court has held that failure to meet all statutory requirements for a zoning appeal leaves the Circuit Court without subject matter jurisdiction over such an appeal. A party must establish standing as an aggrieved person such that a court has subject matter jurisdiction. *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825 (citations omitted). Further, "jurisdiction must affirmatively appear from the record and this [C]ourt is required *sua sponte* to take note of jurisdictional deficiencies, whether presented by the parties or not." *Elliott*, 2005 S.D. 92 at ¶ 17, 703 N.W.2d at 368 (citations omitted). Killeskillen readily admits that the concept of standing can be separate from the jurisdiction of the Circuit Court to hear a matter. *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 9, n.6, 805 N.W.2d 714, 717. When the matter is a county zoning appeal,

however, the issue is jurisdictional because only those persons or entities listed may bring such an appeal and the Circuit Court's subject matter jurisdiction is circumscribed by those limits. SDCL 11-2-61.

Petitioners also conflate a failure to raise the issue in the Circuit Court or failure to raise the issue on Notice of Review with the issue of non-waiver where standing is jurisdictional. First, a failure to file a Notice of Review might otherwise waive argument on such issues, but the filing of the Notice was accomplished here and there is no waiver of the issue. Second, *In re Estate of Flaws*, 2012 S.D. 3, 811 N.W.2d 749 holds that where the interests of the parties are identical and represented by counsel filing the notice, SDCL 15-26A-22 does not bar the appeal upon failure to serve one party. Here, Olson is not represented by the same counsel as Killeskillen but the record demonstrates that a favorable ruling for Killeskillen benefits Olson as well. The parties did not serve Olson in the Circuit Court after default and that entity was not a real party in interest. If there is a waiver or law of the case that applies here, it is a waiver or determination that Olson was not a party necessary to the case.

Looking at the interests involved, it is clear that Olson would gain if the permit is allowed and its interests line up with those of Killeskillen. The Petitioners argue that Killeskillen is merely assuming that Olson's interests are perfectly aligned with Killeskillen's interests, and that nothing in the record supports that assumption. Under that claim, Petitioners argue that *In re Estate of Flaws* does not apply because there is

no common representation of Olson by counsel for Killeskillen.

Technically it is correct that Killeskillen does not represent Olson, but it is not correct to say that there is nothing in the record to establish that the interests of Killeskillen align with those of Olson. No one from Olson spoke at the public hearing on the conditional use permit. Olson then defaulted at the Circuit Court level and made no appearance before this Court. Petitioners did not seek a default judgment and did not argue to the Circuit Court that the interests of LP Olson must be addressed as a real party in interest. The record before the Board was devoid of any documents or other evidence to suggest that LP Olson had any interest other than those consistent with the pursuit of the conditional use permit. There is ample evidence that all parties treated the interests of LP Olson as aligned with Killeskillen throughout the proceedings below.

Petitioners incorrectly argue that standing of the type presented here can be waived, citing a workers compensation case, *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶¶ 9-10, 850 N.W.2d 840, 842 which in turn cites another workers compensation case, *In re Midwest Motor Express, Inc.*, 431 N.W.2d 160, 162 (S.D. 1988) (“MME, while arguing the issue of standing to the circuit court and in its brief to this court, failed to file a notice of review with either the circuit court . . . or this court (pursuant to SDCL 15-26A-22). Because of MME’s failure, the issue of Rude’s standing is waived.”). These cases all involve a failure to file a Notice of Review and raise the standing issue where standing is not

jurisdictional. *See also In re Trade Dev. Bank*, 382 N.W.2d 47, 49 (S.D. 1986) (standing argument not preserved for appeal because the record did not contain a notice of review; the issue of standing was specifically determined in proceedings below and not contested). Here, on the contrary, Killeskillen is arguing that Petitioners never established facts sufficient to provide the subject matter jurisdiction of the Circuit Court and that the appeal to this Court must be dismissed because the statutes at issue do not allow any Appellant to appeal a decision of the Board.

The extent to which a court can rule on an appeal of a county zoning decision is limited strictly to what is authorized by statute. Here, the statutes only allow a person aggrieved by the zoning decision to appeal. This Court has treated that as jurisdictional. “A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction.” *Cable v. Union County Bd. of County Com’Rs*, 2009 SD 59, ¶ 21, 769 N.W.2d 817, 825 (citations omitted).

Standing in this sense is therefore a starting point for the subject matter jurisdiction of the Circuit Court. Where the party seeking to appeal cannot establish that statutory right, the Court cannot proceed on the appeal. Such a jurisdictional appellate issue cannot be waived and will be addressed by this Court regardless of the manner it is raised, even if raised by this Court. *In re Murphy*, 2013 S.D. 14, ¶¶ 9-10, 827 N.W.2d 369, 372 (citing, in part, *Pennington Cnty. v. State ex rel. Unified Judicial*

*Sys.*, 2002 S.D. 31, ¶ 17, 641 N.W.2d 127, 133("Jurisdiction cannot be conferred by consent, agreement, stipulation or waiver." (citing *Weston v. Jones*, 1999 S.D. 160, ¶ 33, 603 N.W.2d 706, 713 (Sabers, J., dissenting))).

The right to any appeal is statutory and established by the legislature. This court has consistently recognized that the right to an appeal is purely statutory and no appeal may be taken absent statutory authorization. An attempted appeal from which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it. *Appeal of Lawrence County*, 499 N.W.2d 626, 628 (S.D.1993) (internal citations omitted).

*Elliott*, 2005 SD 92 at ¶15, 703 N.W.2d at 368. Petitioners are interpreting the statute at issue in a way to grant jurisdiction. The Court must determine is that interpretation is correct and, if not, dismiss the action because there is no jurisdiction for an appeal. The issues presented here cannot be waived by failure to serve a defaulting co-appellee or by other acts of Killeskillen. *Id.* at ¶ 20 (subject matter jurisdiction “can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ.”) (quoting *Application of Koch Exploration Co.*, 387 N.W.2d 530, 536 (S.D.1986) (further citation omitted)).

**C. Petitioners Lack Any Standing to Challenge the Board’s Decision**

Petitioners did not establish statutory standing to appeal the Board’s decision to grant Killeskillen a permit to construct and operate a dairy. SDCL 11-2-61 is the statute that controls here and only authorizes an appeal by: “Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer,

department, board, or bureau of the county.” Petitioners claim that the statute merely requires taxpayer status and that the individual taxpayer need not be aggrieved. Petitioners argue the status of certain individuals and those associated with them as aggrieved individuals, or alternatively argue association with a taxpayer eligible to appeal gives all Petitioners standing. The Petitioners are not correct in either their statutory interpretation or in the factual basis for their claimed standing.

**1. Norris Patrick Is Not Aggrieved.**

Patrick is admittedly a landowner and taxpayer in Brookings County. (C.R. 79.) Petitioners claim SDCL 11-2-61 unambiguously permits “any taxpayer” to bring an action under SDCL 11-2-61 challenging a decision made by a board of adjustment. Surely this is not correct. The first part of the sentence at issue provides for an aggrieved person to appeal, and then includes others also aggrieved, such as a taxpayer or a county official, to likewise appeal.<sup>2</sup> The provision must be read in that manner to be logical and consistent with appellate jurisdiction. “When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Porto Rico*

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<sup>2</sup> This is so because the text is ambiguous and subject to two interpretations, giving rise to the need for interpretation. An applicable canon of statutory construction and interpretation is the “Series-Qualifier” canon. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 147 (2012) (“When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.”).

*Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S. Ct. 516, 518 (1920). Appeals of county decisions by taxpayers require an aggrieved status. To hold otherwise makes the statute so broad as to render it unworkable.

Petitioners argue that the Legislature's use of the disjunctive indicates that either "a person or persons, jointly or severally, aggrieved" may challenge the decision *or* "any taxpayer" may challenge the decision, and the Legislature could have easily stated that taxpayer appeals require "aggrieved" status but did not. This presumes that the disjunctive "or" removes the meaning of the adjective "aggrieved" from the beginning of the list of persons or entities which might bring an appeal. The list does not include every potentially interested party or real party in interest who may claim to be aggrieved by Board of Adjustment adjudications. For example, the word "person" is not defined by SDCL 11-2-1 for terms in Chapter 11-2, and therefore one would look at the definition of the term in general. SDCL 2-14-2 provides a definition, stating: "'Person' includes natural persons, partnerships, associations, cooperative corporations, limited liability companies, and corporations;" and thereby does not include trusts, as one example. Trusts, estates and other common landowners in South Dakota would fit the term "taxpayer" but not "person" under the statutes. The question thus is whether the Legislature intended all taxpayers, regardless of concrete or particularized injury, be allowed to appeal a zoning adjudication.

Petitioners argue that “any taxpayer” may challenge the Board’s decision because the Legislature recognized that any and all taxpayers have an interest in “any decision” of the Board such that they can challenge said decision. Petitioners then cite SDCL 11-2-61 and *Agar Sch. Dist.*, 527 N.W.2d at 284 (“taxpayer plaintiffs in this case clearly have standing...[a] taxpayer need not have a special interest...to entitle him to institute an action to protect public rights”). Petitioners confuse the holding in that school district taxation case challenging the authority to tax, and cite it for the proposition that if the statute allows a taxpayer claim, the statute provides standing. *See Agar School Dist. v. McGee*, 527 N.W.2d 282, 284 (taxpayer standing to challenge taxation and protect “public rights”). This is not so – the case cited ultimately resulted in a dismissal of taxpayers’ trial court order for refunds by those who did not actually pay the tax and then challenge it in the initial case. There was no jurisdiction for the circuit court to grant a refund because the statutes allowed for an exclusive procedure to seek refund of taxes. *Agar School Dist. v. McGee (Agar II)*, 1997 S.D. 31, 561 N.W.2d 318, 323 (case dismissed on appeal; sole remedy was tax refund procedure). Further, this Court has stated: “No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in courts of justice to defend their official acts.” *Cable*, 2009 S.D. at ¶ 30, quoting *Wood v. Bangs*, 46 N.W. 586, 588, 1 Dakota 179 (Dakota Terr.1875).

Mr. Patrick has no standing to challenge the Board's decision as a taxpayer because he cannot show aggrieved status. Unlike the taxpayers in the Agar School District case, who had constitutional standing because they paid more taxes than others outside the district, there is no showing here that Norris Patrick will suffer any harm because of the zoning decision, or if he has some alleged harm, it is no different from any other taxpayers in the county.

Mr. Patrick does not reside near the dairy site. In fact, he lives more than three miles away. C.R. 34, Aff. Ex. C (map). There is no evidence that he or his family own property within any setback from the dairy under the applicable zoning ordinance. Evidence from the engineer for Killeskillen established at the hearing that any surface water would be controlled at the dairy site and was subject to conditions both within the conditional use permit and applicable state and federal environmental laws regulating dairy operations. C.R. 94, Ex. H (meeting minutes). Michael Crinion of Killeskillen explained that this was to be a "zero discharge" facility meaning no surface water discharge would be allowed. *Id.* The arguments of Petitioners are all based on area water quality or other general interests; Mr. Patrick did appear at the public hearing and before the Circuit Court but did not assert that his water well or other source of water was likely to be impaired or that he would suffer any specific injury different from all other users of public water bodies or watercourses. C.R. 94, Ex. H. He had concerns about taxation and manure handling, which were addressed. *Id.*

No issues raised by Mr. Patrick were specific to him as unique, and were all about concerns over large dairies.

Standing requires (1) that the plaintiff suffer an "injury in fact"; (2) that a causal connection exists between the injury and the conduct complained of; and (3) that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 2136, 119 L.Ed.2d 351 (1992) (citations and internal quotations omitted). This Court applies the *Lujan* test to aggrieved person status for subject matter jurisdiction of a zoning appeal. *Cable*, 2009 SD 59, ¶¶ 21-22, 769 N.W.2d at 825-26. This is necessary even in taxpayer appeals. "The right to appeal by a 'person aggrieved' required a showing that the person suffered 'a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county[.]'" *Id.* ¶ 26, quoting *Barnum v. Ewing*, 53 S.D. 47, 220 N.W. 135, 137-38.

Norris Patrick cannot meet this constitutional requirement. The fact that he is a taxpayer does not confer subject matter jurisdiction to the Circuit Court. Merely paying real estate taxes is not enough to confer standing, or any decision by a board of adjustment will be subject to delay and expense of an appeal whenever someone within the county decides to challenge the county's action. "The rationale for limiting the right of appeal to only those persons who are actually aggrieved is to preclude

‘every citizen, elector, or taxpayer of a county who deems himself aggrieved in his capacity as a citizen, taxpayer, or elector’ from appealing.” *Id.* at ¶ 30, quoting *Barnum*, 220 N.W. at 138. This Court recognizes the decision to grant or deny a conditional use permit is a zoning matter by a board of adjustment is a quasi-judicial act. *Armstrong v. Turner County Bd. of Adj.*, 2009 SD 81, ¶, 772 N.W.2d 643, 650-51. The claim under a *writ of certiorari* standard is that the board exceeded its authority or otherwise acted unlawfully in granting the permit.

Adjudication of this issue allows a lawful business to operate at a specific location under certain conditions, and does not automatically raise public concern in general nor does it increase taxes or otherwise directly impact every taxpayer in the county.<sup>3</sup> The county has deemed agricultural production to be in the public good by approving its use in districts zoned for such use, and a confined animal feeding operation like a dairy is permitted with conditions. *In re Conditional Use Permit Denied to Meier*, 2000 SD 80, ¶ 16, 613 NW2d 523, 529 (proposed conditional use is consistent with the public good where allowed by plan and ordinance).

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<sup>3</sup> A general taxpayer appeal under a different situation, where a county commission and not a board of adjustment makes the zoning decision, may be sought under a separate statute, SDCL 7-8-28. Such an appeal is brought only by the county’s States Attorney upon receipt of written demand by at least fifteen taxpayers “if [the States Attorney] deems it to the interest of the county so to do[.]” The States Attorney therefore has discretion to deny the demanded appeal. *Weger v Pennington County*, 534 N.W.2d 757 (S.D. 1995). This is a procedure for appeal of any county commission decision, not just zoning. The provisions requiring fifteen taxpayers signing onto a written demand, plus discretion of the States Attorney, distinguish that procedure. It provides for appeal on matters addressing more general public interests.

No case in South Dakota has ever held that an unaggrieved taxpayer has standing to attack a quasi-judicial decision by a county board like this. Taxpayers bringing an action against the county board arguing general harm to the environment or the county residents in general have no standing. There is no evidence in this record to demonstrate any adverse impact on Patrick Norris as an individual taxpayer.

Mr. Patrick was obligated to state facts that also prove the alleged harm is caused by the actions of the dairy. He questioned very general environmental, policy and other concerns, none of which were specifically shown to be likely because a dairy is constructed and operated. This is not enough. *Cable*, 2009 SD 59 at ¶ 40, 769 N.W.2d at 830 (must offer “[s]omething other than speculation and legal argument”). When the regulation is focused on the conduct of some independent third party, in this case the dairy, “it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.” *Lujan II*, 504 U.S. at 561, 112 S.Ct. at 2137, 119 L.Ed.2d 351, as quoted in *Cable*, 2009 S.D. at ¶ 24. “Showing standing under such circumstances is not precluded, but is ‘substantially more difficult.’ *Id.* [*Lujan II*] (quoting *Allen v. Wright*, 468 U.S. 767, 758, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984)).” *Cable*, 2009 S.D. at ¶ 24. Here the harms alleged are those that are addressed by environmental or other laws and not zoning decisions.

No evidence in this record establishes the building and operation of a large dairy creates harm as alleged by Petitioners. In fact, the setback requirements established by the zoning ordinance presumably establish the opposite – that building a dairy is acceptable and will not cause harm to the environment so long as the dairy meets those criteria. Without some actual evidence of causation, there is no “aggrieved” status for jurisdiction. *Cable* 2009 S.D. at ¶ 36 (cannot rest on the allegations in his pleadings, but rather must adduce facts showing pollution, diminution of land value, and loss of quality of life have been caused by proposed or similar operations).

## **2. LHIA Has No Standing**

LHIA is a South Dakota nonprofit corporation with its principal place of business in Hendricks, Minnesota. C.R. 34. Petitioners state it was formed “to promote, construct, improve, own, operate, manage, develop and donate to public, benevolent or charitable organizations, recreation facilities in the Lake Hendricks area, for use by the public as a whole; . . . to do all things necessary, suitable or proper for the accomplishment of the purposes aforesaid[.]” (C.R. 60.) Some members own real property around Lake Hendricks and within Brookings County. *Id.* However, no evidence in the record shows that Lake Hendricks will have any harm or suffer any adverse effect solely because the dairy project may be built. Critically, there is no evidence in the record to establish that Oak Lake, which drains into Lake Hendricks and is nearer to the dairy site, is within the setback

for rivers, lakes and streams in the zoning ordinance. In fact, the record shows that the dairy is outside those setbacks without need for variance or reduction of the setback. C.R. 94, Ex. D, Fig. 3 (setback map). Oak Lake is shown on various aerial photos and maps in the report from the Brookings County Zoning Office, but Lake Hendricks is too far away to appear. C.R. 94, Ex. D. Affidavits were submitted by various Petitioners and their witnesses, but none identifies any basis to claim that Lake Hendricks is not adequately protected by the zoning ordinance setbacks and conditions required by the permit. *See* C.R. 60; 63; 66; 364; 367. They provide additional facts not presented to the Board of Adjustment before or at the hearing, but fail to address specific reasons why the Lake Hendricks Improvement Association is subject to harm that is different or unique from others in the general public. Although they point out the reasons they want to protect the lake, there is no evidence to establish some unique harm that this dairy or any other concentrated animal feeding operation would pose to Lake Hendricks. All the arguments presented by Petitioners in regard to water pollution are general concerns about runoff or potential leaks from storage facilities. No evidence in the record establishes a risk of harm that is different in kind than the risks to waters in general. While the association points out the current status of Lake Hendricks and improvements made to it, there is no distinction made between this lake and others in the watershed or to lakes in general. The record is devoid of

specific facts pleaded or proven to establish either particularized injury or causation. *Cable*, 2009 S.D. 59, ¶ 26.

Not one single person has established that the permitting of a dairy at this location will cause or is likely to cause them a harm that is unique to their property or person. Instead the association relies solely on speculation and conjecture about animal feeding operations in general. Again, the property at issue meets the setback and other requirements of the zoning ordinance and is therefore presumed to be consistent with the public good. *In re Cond. Use Permit Denied to Meier*, 2000 S.D. 80 at ¶ 16.

### **3. Hendricks, MN Cannot Appeal**

Petitioners are flatly incorrect in asserting that “Municipalities are included under SDCL 11-2-61.” That statute does not list municipalities as entities which may appeal, and the definition of Municipality under SDCL 11-2-1 for use in Chapter 11-2 precludes any claim otherwise. SDCL 11-2-61 only allows “any person or persons, jointly or severally, aggrieved” to appeal, or aggrieved taxpayers as set forth above. The municipality of another state is not a taxpayer, and a municipality cannot rely on definitions of the word “person” in other statutes when municipality is defined in SDCL 11-2-1 for use in the Chapter at issue. Furthermore, while SDCL 11-7-1(11) and SDCL 11-8-1(12) define “person” as including “any individual, ... or body politic,” those provisions are limited to use within SDCL Chapter 11-7 and Chapter 11-8 respectively, not Chapter 11-2.

Hendricks, as a municipality, is not an association of “persons” allowed to appeal under SDCL 11-2-61. In fact, Chapter 11-2 specifically provides for joint jurisdiction with municipalities within three miles of the corporate borders of the municipality. SDCL 11-2-32; referencing municipal zoning beyond municipal corporate limits in SDCL Ch. 11-4 and Ch. 11-6.

Municipalities are not included in the definition of a person nor are they listed in SDCL 11-2-61. Since there is a definition of “Municipality” at SDCL 11-2-1(5) for use in Chapter 11-2, the absence of that term in SDCL 11-2-61 indicates an intention to exclude that term.

The legislature was specific here and although it could have, it did not include municipalities, which have their own zoning powers. SDCL Ch. 11-04 (municipal planning and zoning); SDCL Ch. 11-06 (comprehensive city planning). In the areas outside city limits, the county government controls and will only cede authority to a municipality upon consent. SDCL 11-6-12.1 (county concurrence required for municipal extraterritorial powers). Every word excluded from a statute is presumed to be excluded for a purpose. *Trumm v. Claeffer*, 2013 SD 85, 841 N.W.2d 11. The legislature clearly intended to exclude municipalities from the list of those entitled to bring an appeal under SDCL 11-2-61. It is easy to see that the legislature excluded municipalities as they have no authority over zoning outside their municipal limits unless specifically authorized by the county, and then only within three miles of the municipal limits. The South Dakota Supreme Court has repeatedly noted that municipalities

“possess only those powers given to them by the Legislature.” *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶19, 804 N.W.2d 428 (citations omitted).

Nothing in SDCL Chapter 11-2 provides any authority for a municipality to appeal a county zoning decision. Here, a foreign state municipality has even less standing. No subject matter jurisdiction exists for Hendricks, Minnesota to appeal the conditional use permit at issue here.

Hendricks and its residents are protected by a number of environmental and other laws and have the power of a municipal corporation to defend their interests. In this instance, there is no authority for this Court to hear the appeal by Hendricks. Its claims must be dismissed. As there is no single Appellant able to show facts to establish subject matter jurisdiction, the entire appeal must be dismissed.

**II. The Board Acted Within Its Jurisdiction, Regularly Pursued Its Authority, and Ignored No Evidence When It Granted Killeskillen’s Application for a CUP**

As addressed in the last section of this Brief, the Ordinance is valid and the scope of the subject matter jurisdiction under SDCL 11-2-65 does not permit collateral attack on its validity without an additional procedure. The Board’s decision should be upheld here because the Board acted within its jurisdiction, regularly pursue its authority, and did not ignore any evidence, let alone any indisputable proof. First, the Board granted a CUP without knowledge of an alleged private well within 2,640 feet. Petitioners raised this issue on appeal but neither Killeskillen nor the zoning authorities have proof that this is an operating well and Killeskillen

is skeptical about this claim. Regardless, the well is not registered pursuant to SDCL 46-6-6 and 46-6-11. Second, the Board did not require Killeskillen to enter into a road use agreement *before* granting the CUP, but instead made it a condition like others that can be accomplished in the future. The CUP language “shall require a written road agreement with Oaklake Township” is similar to requirements of obtaining state authority to operate a CAFO and other matters that can be achieved prior to operation and after issuance of the permit. And third, the Board granted a CUP to build and operate a CAFO outside the Zone B aquifer protection area, not inside it as argued by Petitioners.

**A. No Evidence of a Private Well Within 2,640 Feet of the CAFO Was Available and the Board Properly Relied on State Database Information**

The Ordinances provide a setback of 2,640 feet from private wells for Class A CAFOs. (C.R. 94, Return, Ex. A at 86-87.) Petitioners argue that a private well is located within 2,640 feet of the proposed CAFO based on the affidavit of Darrell Snodgrass, presented in the appeal. (C.R. 364.) This affidavit was expressly rejected by the Circuit Court and the Findings of Fact and Conclusions of Law recite this. (C.R. 1387-88 at ¶ 12.) Contrary to the arguments of Petitioners, the issue of the existence of a private well within the setback was and is disputed by Killeskillen and has not been proven to the satisfaction of the Board. Nothing in the record establishes the alleged water well as one that is operating and not abandoned. It is

undisputed that no such well appears in the database of water wells maintained by the State of South Dakota.

The Board properly reviewed setback issues. Killeskillen's engineer found no evidence of any water well within the CAFO setback upon review of the database maintained by the DENR. (C.R. 231.) It is simply incorrect to claim, as Petitioners do, that the Board failed to conduct any investigation as to whether a well existed within the setback. The record shows that the zoning staff did investigate the site and photographed it, and upon review of available information determined that setbacks for a Class A CAFO were met. (C.R. 94, Return, Ex. C and Ex. D.) At the hearing, no neighbors or opponents of the dairy raised the issue of any existing water well within the setback. (C.R. 359.) Clearly if the well were as easily identified as Petitioners claim, there would be someone who could have raised that issue before the Board made its CUP decision. It is more likely that this is an abandoned well. Regardless, the Board fulfilled its duty to review the facts and apply them to the criteria for the CAFO before granting the CUP.

Killeskillen urges this Court to carefully review the record before it. Petitioners disingenuously attempt to rely on a Memorandum Opinion statement that is contrary to the actual Findings of Fact and Conclusions of Law adopted by the Circuit Court. (C.R. 1887-88.) The Circuit Court expressly determined:

**12. Petitioners' attempt to introduce evidence of a well within the setback under the provisions of**

**SDCL 11-2-64 is rejected.** To allow a late disqualifying feature such as a well to be added to the evidence frustrates the orderly process of evidence presentation before the Board.

*Id.* (emphasis added). The trial court did not abuse its discretion in making an evidentiary ruling here. The orderly process described by the Circuit Court is another way of determining that the Board regularly exercised its authority. Mr. Snodgress has other options for addressing any concerns over protection of his water supply if that is truly a concern. *See* SDCL Ch. 46-6.

**B. Killeskillen's Future Road Use Agreement with Oaklake Township is a Proper CUP Condition to be Met before Operating**

Killeskillen was required to enter into a road use agreement with Oaklake Township as a condition for its CUP. The Board complied with Article 5.00 of the Ordinances provides by granting any Conditional Use Permit with “written findings certifying compliance with the specific rules and criteria governing individual Conditional Uses and that satisfactory provision and arrangement have been made” to ensure that the “roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use.” (C.R. 94, Return, Ex. A at 21-22.) No ordinance provision requires a road agreement before issuance of the permit, and the CUP’s Findings of Fact and Conclusions of Law make it a condition of the permit, not a pre-condition which must be established before a permit can be issued. The language “shall require a written road agreement with Oaklake Township” is similar to requirements of obtaining

state authority to operate a CAFO and other matters that can be achieved prior to operation and after issuance of the permit. The Board is allowed to interpret its ordinance to determine compliance. “As noted above, we do not decide whether we would have reached the same conclusion, *Elliott*, 2005 S.D. 92, ¶ 14, 703 N.W.2d at 367 (quoting *Hines*, 2004 S.D. 13, ¶ 10, 675 N.W.2d at 234), only that the Board regularly pursued its authority in this regard.” *Grant County*, 2015 SD at ¶ 23.

**C. Presence of an Aquifer on Part of the CAFO Site Does not Invalidate Killeskillen’s CUP**

Petitioners advance an argument that the CAFO will be partially on a protected Zone B aquifer protection area, but that is merely because one part of the *land* (not buildings, structures or lagoon) upon which the actual dairy operation would sit is allegedly labeled that way. There is no showing that the Board acted arbitrarily in the absence of facts or upon undisputed and indisputable facts. Killeskillen’s engineer presented evidence in the record demonstrating how the CAFO complies with the aquifer protection provisions of the zoning ordinance and the staff reviewed this issue and found the application in compliance. There are no structure setbacks from the aquifer protection areas, and therefore nothing in the zoning ordinance to interpret. At most, this is a disputed factual issue as to what constitutes the actual dairy operation with structures outside the Zone B areas. *See, generally, Grant County* 2015 S.D. 54 at ¶ 19 (discussing manure application setbacks, and holding that “an entire property is not rendered unusable by the presence of such

setback.”). Factual disputes are for the Board of Adjustment to decide and are not reviewable on appeal. *Grant County*, 2015 S.D. 54 at ¶ 17. This Court made it clear that factual determinations are “properly resolved by the Board.” *Id.* at ¶ 21. The issue is no more than an attempt to have this Court sit in the Board’s place and rule anew. The Court cannot do so. *Id.*

### **III. The Circuit Court Properly Rejected Collateral Attack on the Ordinance’s Validity**

Petitioners seek to have this Court determine that the Ordinance was not properly enacted. Killeskillen agrees with Brookings County - the result of such a claim could be a lack of any zoning, and therefore Killeskillen would be free to construct a dairy without a CUP. The plain language of SDCL 11-2-65 only provides for the Circuit Court to affirm, reverse or modify the Board decision and the writ of certiorari standard is not equivalent to a declaratory judgment. While the Circuit Court has general subject matter jurisdiction to entertain a declaratory judgment action, no such pleading or claim was presented to the Circuit Court here. *Cf. Heine Farms v. Yankton County*, 2002 S.D. 88, 649 N.W.2d 597. The process set up by the Legislature for appeal of a zoning decision by a board of adjustment does not include the County Commission or the Planning Commission which developed and enacted the Ordinance. *See* SDCL 11-2-10 through 11-2-30. A declaratory judgment action or other process must be utilized to address the enactment and validity of the Ordinance. Here,

the Circuit Court was constrained to act within SDCL 11-2-61 through 11-2-65.

The additional arguments and authorities of the Board on this issue will not be repeated here. Killeskillen joins in that argument and respectfully requests that the Court reject Petitioners claims on these issues.

### **CONCLUSION**

For the reasons stated above, the Court should enter the following relief:

1. The Court should dismiss this appeal for lack of subject matter jurisdiction.
2. Alternatively, the Court should affirm the Circuit Court's order.

Dated at Sioux Falls, South Dakota, this 27<sup>th</sup> day of January, 2016.

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief of Appellees Michael Crinion and Killeskillen, LLC complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,375 words and 47,358 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Iowan Old Style font (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, January, 2016.

DONAHOE LAW FIRM, P.C.

  
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**CERTIFICATE OF SERVICE**

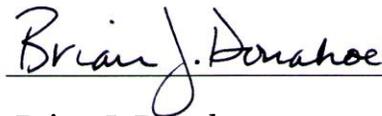
The undersigned hereby certifies that the foregoing “Brief of Appellants” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on January 27, 2016.

The undersigned further certifies that an electronic copy of “Brief of Appellants” was emailed to the attorneys set forth below, on January 27, 2016, with a hardcopy mailed to LC Olson LLP on the same date:

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Brian J. Donahoe

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**No. 27598**

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LAKE HENDRICKS IMPROVEMENT ASSOCIATION, CITY OF  
HENDRICKS, MINNESOTA, and NORRIS PATRICK,

Petitioners/Appellants,

vs.

BROOKINGS COUNTY PLANNING AND ZONING COMMISSION,  
BROOKINGS COUNTY PLANNING AND ZONING COMMISSION SITTING  
AS THE BROOKINGS COUNTY BOARD OF ADJUSTMENT, MICHAEL  
CRINION, KILLESKILLEN LLC, and LC OLSON LLP,

Respondents/Appellees.

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Appeal from the Circuit Court  
Third Judicial Circuit  
Brookings County, South Dakota

The Honorable Vincent A. Foley, Presiding Judge

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## REPLY ARGUMENT

### I. Circuit Court Erred By Refusing to Consider Validity of the Ordinances

#### A. Reviewing the Validity of the Ordinances Is Necessary under SDCL 11-2-61 and SDCL 11-2-62

The jurisdiction of the Board and the authority conferred upon the Board are issues directly relevant to an action brought pursuant to SDCL 11-2-61. *See Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 12, 772 N.W.2d 643, 648 (“consideration of a matter presented on certiorari is limited to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it”). The Board obtains its jurisdiction and authority from the Ordinances. (CR 94, Return, Ex. A at 19-24.); *see* SDCL 11-2-17.3; *Pennington Cnty. v. Moore*, 525 N.W.2d 257, 258-59 (S.D. 1994); *c.f. Save Centennial Valley Ass’n v. Schultz*, 284 N.W.2d 452, 455 (S.D. 1979). Absent the Ordinances, the Board has no jurisdiction over CUP applications and has no authority to grant a CUP. If the Ordinances are invalid, the Board had no jurisdiction over Killeskillen’s application and had no authority to grant Killeskillen a CUP. The validity of the Ordinances, therefore, is relevant to whether the Board had jurisdiction over Killeskillen’s CUP application and whether it pursued in a regular manner the authority conferred upon it by the Ordinances.

The Board argues that analyzing the validity of zoning ordinances is beyond the permitted review of a certiorari proceeding. Noticeably absent from the Board’s brief, however, is any authority supporting its argument. That is

because when applying certiorari review, courts evaluate the extent of a board of adjustment's jurisdiction as well as whether a board pursued in a regular manner the authority conferred upon it. *Armstrong*, 2009 S.D. 81, ¶ 12. As was recently demonstrated in *Tibbs v. Moody Cnty. Bd. of Comm'rs*, 2014 S.D. 44, 851 N.W.2d 208, determining a board of adjustment's jurisdiction and authority may require an analysis of whether the zoning ordinances conferring such jurisdiction and authority were properly adopted.

In *Tibbs*, this Court analyzed whether zoning ordinances were properly adopted in a certiorari proceeding nearly identical to the situation here. *Id.* at ¶¶ 20-23. In challenging the board of adjustment's determination, appellants argued the county did not properly adopt the zoning ordinances establishing the board, thereby causing the board's decision to be beyond its jurisdiction and authority. *Id.* at ¶ 20. The Court analyzed how the zoning ordinances in question were adopted and found they were properly adopted. *Id.* at ¶ 23. Because the ordinances were properly adopted, the Court held they were valid and effective. Accordingly, the board acted within its jurisdiction and authority. *Id.* at ¶¶ 20-26.

Nowhere in *Tibbs* did the Court indicate that analyzing whether the zoning ordinances were properly adopted is beyond the jurisdictional scope of certiorari review. *Id.* And "this court is required *sua sponte* to take note of jurisdictional deficiencies, whether presented by the parties or not." *Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 2005 S.D. 92, ¶ 17, 703 N.W.2d 361, 368 (citing *State v. Phipps*, 406 N.W.2d 146, 148 (S.D. 1987); *Decker v. Tschetter Hutterian Brethren, Inc.*, 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362; *Deno v. Oveson*, 307

N.W.2d 862, 863 (S.D. 1981)). In *Tibbs*, this Court did not note any jurisdictional deficiencies with respect to analyzing the ordinances; indeed, it performed that very analysis. *Tibbs*, therefore, supports Petitioners' position that whether zoning ordinances are properly adopted is an appropriate issue for a court to consider in an action brought under SDCL 11-2-61. *See also Save Centennial Valley*, 284 N.W.2d at 458 (noting, even under certiorari review, the notice and hearing requirements of SDCL Ch. 11-2 "are mandatory and may not be disregarded").<sup>1</sup>

The Board argues SDCL 11-2-61 and SDCL 11-2-62 preclude the Court from analyzing whether the Ordinances were properly adopted, because the Court's jurisdiction is limited to reviewing the Board's decision for illegality.<sup>2</sup> Illegality is only one aspect of zoning appeals under a certiorari review. *See Lamar Outdoor Adver. of SD Inc. v. Rapid City*, 2007 S.D. 35, ¶ 21, 731 N.W.2d 199 (arbitrary or willful disregard of undisputed proof is grounds for relief); *Lamar*, ¶ 14 (board reversed when it exceeds its jurisdiction); *Armstrong*, 2009 S.D. 81 ¶ 12 ("Since the appeal in this case is from a county board of adjustment, ... [the] scope of review on a writ of certiorari 'cannot be extended further than to

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<sup>1</sup> Courts from other jurisdictions have also found that analyzing the validity of zoning ordinances is proper during an appeal from a board's zoning decision. *E.g., Cardon Investments v. Town of New Market*, 485 A.2d 678, 682-83 (Md. 1984) (noting "objections to the validity of a local zoning ordinance may be raised for the first time on administrative appeal").

<sup>2</sup> Separately, Respondents note that the Brookings County Commission is not a party to this action without explaining or citing authority as to the significance. Petitioners only seek reversal of Killeskillen's CUP, which was granted by the Board. SDCL 11-2-62 identifies the Board as the proper party to name in this action.

determine whether the ... board ... has regularly pursued [its] authority[.]’ ”). Nevertheless, reviewing the Board’s decision for illegality is exactly what Petitioners are requesting this Court to do. Because the Board had no authority to grant Killeskillen a CUP given that the Ordinances conferring such authority are invalid, its decision to do so was illegal. *See Pennington Cnty.*, 525 N.W.2d at 259.

Next, the Board argues SDCL 11-2-65 supports its position that courts cannot consider the validity of ordinances when applying certiorari review. SDCL 11-2-65 provides: “The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.” The only relief Petitioners seek in this action is a reversal of the Board’s decision granting Killeskillen a CUP. Petitioners are not seeking a declaration from the Court that the Ordinances are invalid and that all actions taken thereunder are likewise invalid. The only relief Petitioners seek here—reversal of the Board’s decision granting Killeskillen a CUP—is explicitly permitted under SDCL 11-2-65.

Lastly, the Board posits the only way to challenge the validity of zoning ordinances is through a declaratory judgment action. But examples of challenges to zoning ordinances outside a declaratory judgment action are plentiful. *See Tibbs*, 2014 S.D. 44; *Pennington Cnty.*, 525 N.W.2d at 257; *Save Centennial Valley*, 284 N.W.2d at 458; *Dodds v. Bickle*, 85 N.W.2d 284, 287 (S.D. 1957); *City of Brookings v. Martinson*, 246 N.W. 916, 917 (S.D. 1933). Additionally, adopting the Board’s position would require a petitioner seeking to reverse the grant of a CUP to file two separate actions: one action under SDCL 11-2-61 and a

parallel declaratory judgment action challenging the validity of the zoning ordinances. Two separate legal actions would be necessary to challenge one CUP. *McElhaney v. Anderson*, 1999 S.D. 78, ¶ 16, 598 N.W.2d 203, 207 (“It clearly is an unwise waste of judicial resources to allow two independent proceedings to simultaneously go forward where the relief sought in both is the same.”). Furthermore, if the relief Petitioners seek here were attainable via a declaratory judgment action, then it would follow that *all* conditional use permits granted under the Ordinances would be at risk of being revoked.<sup>3</sup> The Board’s approach of utilizing declaratory judgment actions would wreak havoc on a county’s zoning system. For these reasons, the Board’s position is unworkable, and not supported by authority.

In sum, the Circuit Court erred by not considering the validity of the Ordinances.

**B. Ordinances Were Improperly Adopted**

By failing to comply with statutory requirements, Brookings County’s adoption of the Ordinances was improper. No dispute exists. Instead, Respondents argue that if the Ordinances are invalidated, then the area will be un-zoned, which would allow Killeskillen to build a CAFO without obtaining a CUP. No evidence in the record supports this position. In all likelihood, zoning ordinances were in place before the Ordinances were adopted which would presently be in effect.

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<sup>3</sup> Notably, any decision revoking Killeskillen’s CUP would have no impact on other conditional use permits previously granted under the Ordinances, unless actions challenging those permits were brought within the thirty-day window set forth in SDCL 11-2-61.

Regardless, whether prior ordinances are in effect is not the issue before this Court.

Because Brookings County failed to comply with statutory requirements when it adopted the Ordinances, the Ordinances are invalid and unenforceable. *Pennington Cnty*, 525 N.W.2d at 259 (“South Dakota case law establishes that improperly adopted zoning regulations are invalid and will not be enforced.”). And because the Ordinances are invalid and unenforceable, the Board necessarily exceeded its authority when it granted Killeskillen a CUP. *See Pennington Cnty.*, 525 N.W.2d at 259. Reversal of the Board’s decision is appropriate.

**II. The Board Exceeded Its Jurisdiction, Failed to Pursue Its Authority in a Regular Manner, and Arbitrarily Ignored Indisputable Proof by Granting Killeskillen’s Application for a CUP**

Even if the Ordinances are valid, the Board’s decision should still be reversed. The Board granted a CUP to build and operate a CAFO within 2,640 feet of a private well in violation of the Ordinances. Also, the Board violated the Ordinances by not requiring Killeskillen to enter into a road use agreement after recognizing the need for one. Further, the Board violated the Ordinances by permitting a CAFO to be built atop an aquifer protection area.

**A. Presence of Well within 2,640 Feet of CAFO Precluded Granting CUP**

The Ordinances prohibit new Class A CAFOs from being built within 2,640 feet of private wells. (CR 94, Return, Ex. A at 86-87.) A private well is located within 2,640 feet of the proposed CAFO on Darrell Snodgrass’s property. (CR 364.) Because a private well is located within the setback, denial of

Killeskillen's application was required under the Ordinances. By granting Killeskillen a CUP to build and operate a CAFO within 2,640 feet of a private well, the Board failed to regularly pursue its authority. *See Armstrong*, 2009 S.D. 81, ¶ 12; *Lamar*, 2007 S.D. 35, ¶ 14.

In response to this violation of the Ordinances, Respondents argue the well's existence should be ignored, because evidence of the well was not presented during the hearing before the Board. The Circuit Court accepted this argument by declining to consider evidence of the well despite finding "the evidence convincing that a well *as contemplated by the Ordinance*<sup>4</sup> exists." (CR 1329.) Specifically, the Circuit Court stated: "As to the well setback issue, under a certiorari review, the Court *should not*, and does not consider Petitioners' purported evidence[.]"<sup>5</sup> (CR 1887 (emphasis added).) Put differently, the Circuit

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<sup>4</sup> Respondents attack Snodgrass's well by suggesting it somehow does not fit within the definition of "well" to utilize this Court's holding in *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, 866 N.W.2d 149. But the Board did not make a determination regarding the Snodgrass well here; the Board was completely unaware of it. Moreover, the Circuit Court stated: "a well as contemplated by the Ordinance exists." Thus, *Grant County* is inapposite.

The Board also incorrectly characterizes Petitioners' citation to the record as argument. As evidenced by the record, Brad Olson was prepared to provide testimony regarding the well's existence and the obviousness of the same. (CR 1419, T 8.) The Circuit Court refused such testimony, because it was not presented to the Board at the hearing.

<sup>5</sup> The Board incorrectly asserts Petitioners did not appeal the Circuit Court's rejection of evidence of the well. Petitioners' Notice of Appeal encompasses the Circuit Court's decision rejecting evidence of the well. Whether the Circuit Court abused its discretion or erred by refusing to consider evidence of the well is properly before this Court.

Court concluded it was improper to consider any evidence not presented to the Board during the hearing. This conclusion is problematic.

First, nowhere in SDCL ch. 11-2 did the Legislature prohibit courts from considering evidence that was not presented during the hearing before a board of adjustment. Indeed, the opposite is true. By passing SDCL 11-2-64,<sup>6</sup> the Legislature authorized courts to consider evidence that was not presented during the hearing before a board. By refusing to consider evidence because such evidence was not presented during the hearing before the Board, the Circuit Court ignored the evidentiary framework created by the Legislature, which explicitly permits such evidence to be considered.

Second, ignoring highly relevant evidence not discovered by a board of adjustment rewards a board for neglecting its duty to investigate an application to ensure compliance with zoning ordinances. *See Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶¶ 13-16, 675 N.W.2d 231, 234-36 (requiring a board of adjustment to “fulfill its duty to follow the guidelines of the city ordinance”); 8A McQuillin Law of Municipal Corp. § 25:276 (3d ed.) (zoning officials have a “duty to take appropriate steps and proceedings to apply and enforce zoning measures, regulations and restrictions”). Without conducting proper investigations, decisions will not be based on evidence but instead be entirely arbitrary, which is something this Court has previously admonished. *Hines*, 2004

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<sup>6</sup> SDCL 11-2-64 provides: “If upon the hearing it appears to the court that testimony is necessary for the proper disposition of the matter, the court may take evidence . . . which constitute a part of the proceedings upon which the determination of the court is made.”

S.D. 13, ¶ 13-16. Because boards have a duty to ensure an application for a CUP complies with the applicable ordinances, they should be encouraged to investigate more, not less.

Third, only considering evidence that was presented during the hearing before a board improperly places too great of a burden on county residents and others affected by zoning decisions. County residents have no obligation to present oppositional evidence during a hearing. *See Save Centennial Valley Ass'n*, 284 N.W.2d at 457; *Schafer v. Deuel Cnty. Bd. of Comm'rs*, 2006 S.D. 106, 725 N.W.2d 241, ¶ 12; *W&G McKinney Farms, LP v. Dallas Cnty. Bd. of Adjustment*, 674 N.W.2d 99, 103-04 (Iowa 2004); *Kinney v. Harrison Cnty. Bd. of Sup'rs*, 172 So.3d 1266, 1271 (Miss. Ct. App. 2015); 8A McQuillin Law of Municipal Corp. § 25:367 (3d ed.). Rather, “residents of the county have a right to rely on the protections afforded by the [Ordinances].” *Save Centennial Valley Ass'n*, 284 N.W.2d at 457. Further, unlike boards of adjustment, most county residents are not well-versed in the nuances of county ordinances and the law relating to such. Oftentimes county residents are unaware of what evidence is significant to a particular zoning decision. Only considering the evidence presented during the hearing effectively places the burden on county residents not only to present oppositional evidence during the hearing, but to present *all possible* oppositional evidence. Doing so is impractical and contrary to South Dakota law, because it is a board’s duty to ensure an application complies with ordinances, not the residents’ duty to oppose such application.

The issue here is straightforward. Respondents argue—and the Circuit Court agreed—that the Board’s ignorance of Snodgrass’s well at the time of the hearing shields the Board’s decision from any attack related to the well. Petitioners urge the Court to hold otherwise, because the existence of the well means the Board’s decision violated the Ordinances. At a minimum, the Circuit Court should have remanded the matter back to the Board to consider such evidence. *In re Application of Benton*, 2005 S.D. 2, ¶ 14 (matter may be “remanded to conduct further proceedings on the ‘actual facts’”). The Board should not be rewarded for performing a deficient investigation, nor should other boards be encouraged to investigate less. And county residents should not be penalized for entrusting their elected officials to effectively perform their jobs. Boards are going to make undeniable errors. The Courts are the avenue by which such errors are corrected. The Board erred here by failing to discover the well. That error should be corrected, not ignored.

**B. Lack of Road Use Agreement Violated Ordinances**

Whether Killeskillen was required to enter into a road use agreement with Oaklake Township *before* it could receive a CUP is a matter of ordinance interpretation. *City of Marion v. Rapp*, 2002 S.D. 146, ¶ 5, 655 N.W.2d 88, 90 (“The interpretation of an ordinance presents a question of law reviewable de novo.”).

Article 5.00 of the Ordinances provides: “[*b*]efore granting any Conditional Use Permits the [Board] shall make written findings certifying compliance with the specific rules and criteria governing individual Conditional

Uses and that satisfactory provision and arrangement have been made” to ensure that the “roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use.” (CR 94, Return, Ex. A at 21-22 (emphasis added).) Here, the Board determined a road use agreement with Oaklake Township was necessary in light of the transportation demands of the proposed CUP. Indeed, the Board stated that it “*shall* require a written road use agreement with Oaklake Township . . . regarding the upgrading and continued maintenance of any road use[d] for the conditional use requested *prior to issuance of a conditional use permit.*” (CR 94, Return, Ex. K at 1 (emphasis added).)

The plain meaning and effect of the phrases “before granting any conditional use permits” and “prior to issuance of a conditional use permit” is that Killeskillen was required to enter into a road use agreement before it received a CUP. *See State v. Hatchett*, 2014 S.D. 13, ¶ 11, 844 N.W.2d 610, 614 (“When engaging in statutory interpretation, we give words their plain meaning and effect[.]”). Killeskillen has not entered into any such road use agreements with Oaklake Township. (CR 367.) Therefore, the Board violated the Ordinances when it granted Killeskillen a CUP, which is cause for reversal. *See Armstrong*, 2009 S.D. 81, ¶ 12; *Lamar*, 2007 S.D. 35, ¶ 14; *Hines*, 2004 S.D. 13, ¶¶ 13-16.

Unable to quarrel with the violation itself, the Board argues that the violation is inconsequential, because the Board retains authority to enforce the provision later. That provides little solace to Petitioners, given the Board’s failure to enforce the requirement at the hearing despite the Board’s acknowledgement that a road use agreement is necessary “*prior to issuance of a conditional use*

*permit.*” The Board cannot pick and choose if and when it will enforce the provisions in the Ordinances.

C. **Presence of Aquifer below CAFO Site Precluded Granting CUP**

The Ordinances prohibit Class A CAFOs from being located in Zone B aquifer protection areas. (CR 94, Return, Ex. A at 60-62, 88-90.) No exceptions exist. (*Id.*)

It is undisputed that a portion of the land that was granted a CUP sits atop a Zone B aquifer protection area. Respondents argue the Ordinances allow for this so long as the building structures themselves do not sit atop an aquifer protection area. Petitioners disagree.

The question here turns on whether the footprint of a CAFO is limited to the building structures of the operation, or whether the area surrounding the building structures is also part of the CAFO.<sup>7</sup> The Ordinances define a CAFO as a “lot, yard, corral, building or other area where animals have been, are, or will be stabled or confined . . . , and where crops, vegetation, forage growth, or post harvest residues are not sustained over any portion of the lot or facility.” (*Id.* at 82.) This definition suggests the CAFO footprint includes the lot, yard, and area surrounding the building structures themselves. Moreover, the Ordinances separately define an “Animal Feeding Operation Structure” as “an anaerobic lagoon, formed manure storage structure, egg washwater storage structure,

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<sup>7</sup> Whether the Ordinances permit a CUP to be granted for a property that partially sits atop an aquifer protection area is a matter of ordinance interpretation. *Rapp*, 2002 S.D. 146, ¶ 5.

earthen manure storage basin, or confinement building.” (*Id.* at 76.) By providing a separate definition for an “animal feeding operation structure,” the implication is that the structures are only part of the CAFO, not the entire CAFO.

Common sense also indicates a CAFO operation is not limited to just the buildings, structures, and ponds. Activity will be conducted outside of those areas. Trucks will come and go. Feed and chemicals will be delivered and stored. Manure will be removed, whether by hoses or trucks. The carcasses of dead cows will be stored and removed. Therefore, limiting the CAFO to just the structures and ponds for purposes of whether the application complies with the Ordinances makes little sense.

In sum, Killeskillen’s CUP application was for the entire NE ¼ of Section 10-112-48—all 160 acres. A portion of this property sits atop a Zone B aquifer protection area. Reversal is therefore required, as the Ordinances do not authorize the Board’s action. *See Armstrong*, 2009 S.D. 81, ¶ 12; *Lamar*, 2007 S.D. 35, ¶ 14.

### **III. Killeskillen’s Notice of Review Regarding Petitioners’ Standing**

#### **A. Killeskillen’s Notice of Review Should Be Dismissed, Because Killeskillen Failed to Serve LC Olson LLP**

Because Killeskillen failed to serve its Notice of Review on LC Olson LLP, Killeskillen’s appeal should be dismissed.<sup>8</sup>

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<sup>8</sup> Given the length limitation of this reply brief, Petitioners rely on the arguments in their original brief pertaining to this issue.

**B. Petitioners Have Standing to Challenge the Board's Decision**

Petitioners have standing to challenge the Board's decision to grant Killeskillen a CUP. "Standing is established through being a 'real party in interest' and it is statutorily controlled." *Agar Sch. Dist. #58-1 Bd. of Educ. v. McGee*, 527 N.W.2d 282, 284 (S.D. 1995) (quoting *Wang v. Wang*, 393 N.W.2d 771, 775 (S.D. 1986)). SDCL 11-2-61 controls here and provides:

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the county, may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality.

A plain reading of SDCL 11-2-61 shows that Patrick, LHIA, and Hendricks all have standing to challenge the Board's decision granting Killeskillen a CUP.

**1. Norris Patrick Has Standing**

Patrick is a landowner and taxpayer in Brookings County. (CR 79.) SDCL 11-2-61 unambiguously permits "any taxpayer" to bring an action under SDCL 11-2-61 challenging a decision made by a board of adjustment. Thus, Patrick has standing to challenge the Board's decision.

As anticipated, Killeskillen argues Patrick must also be aggrieved by the decision appealed from. A plain reading of SDCL 11-2-61 shows no such requirement exists. SDCL 11-2-61 reads: "Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, *or* any taxpayer" may challenge any board of adjustment decision. (emphasis added). The Legislature's use of the disjunctive indicates that either "a person or persons,

jointly or severally, aggrieved” may challenge the decision *or* “any taxpayer” may challenge the decision. If the Legislature had intended to require “any taxpayer” to also be aggrieved by the decision appealed from, it would have said so.

Moreover, requiring a taxpayer to also be aggrieved would make the phrase “any taxpayer” superfluous. A taxpayer who is aggrieved would certainly fall within the category of “any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment.” This Court has previously stated: “We assume the Legislature did not intend to include duplicative, surplus language in its enactments.” *VanGorp v. Sieff*, 2001 S.D. 45, ¶ 10, 624 N.W.2d 712, 715. When the legislature included “any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment” and “any taxpayer” in SDCL 11-2-61, it intended that those phrases take on separate and distinct meanings from one another. Killeskillen’s interpretation would make the phrase “any taxpayer” completely superfluous, which flatly contradicts this rule of construction.

Furthermore, by permitting “any taxpayer” to challenge the Board’s decision, the Legislature recognized that any and all taxpayers have an interest in “any decision” of the Board such that they can challenge said decision. SDCL 11-2-61; *see also Agar Sch. Dist.*, 527 N.W.2d at 284 (“taxpayer plaintiffs in this case clearly have standing...[a] taxpayer need not have a special interest...to entitle him to institute an action to protect public rights”).

Rather than address the language of SDCL 11-2-61 directly, Killeskillen cites to decisions from this Court and others dealing with unrelated statutes and

concepts. For example, Killeskillen relies on this Court’s decision in *Cable v. Union Cnty. Bd. of Cnty. Comm’rs*, 2009 S.D. 59, 769 N.W.2d 817, to support its argument that a taxpayer must also be “aggrieved.” In *Cable*, the Court analyzed an entirely different statute—SDCL 7-8-27—which controls who can appeal decisions made by county commissions. *Id.* SDCL 7-8-27 explicitly limits those who can appeal to “any person aggrieved.”<sup>9</sup> Accordingly, the Court analyzed whether the petitioner was “aggrieved.” The Court did not, as Killeskillen suggests, hold that all petitioners appealing any decision made by any county entity must be aggrieved. Rather, the *Cable* holding is specific to appeals from county commissions pursuant to SDCL 7-8-27.

Killeskillen also improperly relies on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which concerns the “case and controversy” requirement necessary to confer constitutional standing in *federal court*. This case, however, is not in federal court. There is no “case and controversy” or “constitutional standing” requirement in South Dakota state court, as standing can be either constitutionally *or* statutorily controlled. *Agar Sch. Dist.*, 527 N.W.2d at 284; *Sioux Falls v. Mo. Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 10, (conferring subject matter jurisdiction by “constitutional or statutory provisions”). “Standing to sue in any Article III court is, of course, a federal question which does not depend on the party’s standing in state court.” *Miller v. Redwood Toxicology*

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<sup>9</sup> SDCL 7-8-27 is not the sole avenue by which to appeal a county commission decision. SDCL 7-8-28 allows appeals if demanded by at least fifteen taxpayers.

*Lab., Inc.*, 688 F.3d 928, 933 (8<sup>th</sup> Cir. 2012). Killeskillen fails to appreciate the difference.

SDCL 11-2-61 confers standing to “any taxpayer.” Patrick is a taxpayer and, thus, has standing. Because Patrick has standing, no further analysis is necessary. *See Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998) (“If one party has standing in an action, a court need not reach the issue of standing of other parties when it makes no difference to the merits of the case.”).

## **2. LHIA Has Standing**

SDCL 11-2-61 affords standing to “[a]ny person or *persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer[.]*” (emphasis added). LHIA—as a formal corporation and an informal association—falls within the definition of “person.” *See* SDCL 11-7-1(11); SDCL 11-8-1(12).

LHIA is also “aggrieved” by the Board’s decision. The Board’s decision creates a serious risk of pollutants entering the Lake Hendricks watershed as well as aquifers in the region, thereby decreasing the water quality of Lake Hendricks. The decision will also diminish the availability and quality of groundwater. Other negative consequences of the Board’s decision include increased odor, noise, pollutants, and glare; negative economic impacts; incompatibility with surrounding area and properties, including public lands and public access areas; negative impacts on ecology and wildlife; and dilapidation of roads. LHIA is devoted to promoting, constructing, improving, owning, operating, managing, and developing recreation facilities in the Lake Hendricks area. The Board’s decision

impedes LHIA's ability to pursue its primary corporate mission and directly harms LHIA's past and present efforts. Thus, LHIA is "aggrieved" by the Board's decision and has standing under SDCL 11-2-61.

Separately, LHIA has standing to challenge the Board's decision, because many of its members own real property in Brookings County and are taxpayers. SDCL 11-2-61 provides standing to "any taxpayer." The taxpayers composing LHIA each have standing as taxpayers, and their free association with one another through LHIA cannot constitutionally be a basis for excluding them from this action. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); U.S. Const. First Amendment.

### **3. Hendricks Has Standing**

Hendricks, as a municipality, is a body politic falling within the meaning of "person" in SDCL 11-2-61. *See* SDCL 11-7-1(11); SDCL 11-8-1(12).

A decrease in the quality of Lake Hendricks directly harms Hendricks. (CR 63.) Hendricks has a large public beach on Lake Hendricks, has a large public park on the shores of Lake Hendricks, and operates a municipal campground bordering Lake Hendricks that helps fund city government. (*Id.*) Hendricks has invested substantial monies improving the quality of Lake Hendricks, including redoing its storm-sewer system. (*Id.*) Hendricks also owns a well near the outlet of Lake Hendricks that it uses as a backup water source. (*Id.*) Consequently, the Board's decision—which will result in detriment to Lake Hendricks and the surrounding area via pollution, diminishment of the availability and quality of groundwater, increased odor, noise, and glare, negative economic

impacts, negative impacts on ecology and wildlife, and dilapidation of roads—aggrieves Hendricks. Thus, Hendricks has standing under SDCL 11-2-61.

Separately, Hendricks represents its residents. Those residents are also aggrieved by the Board’s decision as described above. SDCL 11-2-61 explicitly permits “persons, jointly or severally, aggrieved” to challenge the Board’s decision. Hendricks is a collection of individuals (i.e. persons) who are together and independently (i.e. jointly and severally) harmed by the Board’s decision (i.e. aggrieved). For this additional reason, Hendricks has standing under SDCL 11-2-61.

### **CONCLUSION**

For the reasons stated above,

1. The Court should reverse the Board’s decision granting Killeskillen a CUP;
2. The Court should reverse the Circuit Court’s order affirming the Board’s decision, thereby reversing the Board’s decision;
3. Alternatively, the Court should direct this matter to be remanded to the Board for further hearings consistent with the Ordinances and the Board’s duties under South Dakota law;
4. Alternatively, the Court should remand this matter to the Circuit Court for consideration of the validity of the Ordinances; and
5. For other relief that the Court finds just, equitable, and lawful.

Dated at Sioux Falls, South Dakota, this 26th day of February, 2016.

DAVENPORT, EVANS,  
HURWITZ & SMITH, L.L.P.



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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Reply Brief of Appellants complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 5,000 words and 26,786 characters, excluding the table of contents, table of authorities, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 26th day of February, 2016.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing “Reply Brief of Appellants” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on February 26, 2016.

The undersigned further certifies that an electronic copy of “Reply Brief of Appellants” was emailed to the attorneys set forth below, on February 26, 2016, with a hardcopy mailed to LC Olson LLP on the same date:

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March 17, 2016

SUPREME COURT  
STATE OF SOUTH DAKOTA  
**FILED**

MAR 21 2016

*Shirley A. Johnson Legal*  
Clerk

Honorable Justices of the Supreme Court  
Supreme Court of the State of South Dakota  
500 East Capitol Avenue  
Pierre, SD 57501

Re: Appeal No. 27598 – Lake Hendricks Improvement Association v. Brookings County  
Planning & Zoning Commission

To the Honorable Justices of the Supreme Court:

This letter is to inform the Court that no party to the appeal in No. 27598, Lake Hendricks Improvement Association v. Brookings County Planning & Zoning Commission, will be requesting permission to file supplemental briefing in regard to the question reserved by the Court: whether standing is a jurisdictional issue which may be argued on appeal absent properly filed notice of review. Upon consultation with the other parties, I provide this report to ensure that the Court is aware that the parties consider it fully submitted as to briefing. We appreciate the invitation from the Court as set forth in footnote 9 of the Opinion in Appeal No. 27604, 2016 SD 17.

We await further action at the Court's pleasure. On behalf of my clients Killeskillen, LLC and Michael Crinion, we respectfully request that the Court proceed on the merits for decision as soon as possible. Thank you.

Sincerely,

DONAHOE LAW FIRM, P.C.

*Brian J. Donahoe*  
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cc: Mr. Mitchell A. Peterson, Mr. Reece Almond,  
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