IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SAVE CENTENNIAL VALLEY ASSOCIATION, INC. AND CHARLES BROWN,

Appeal No. 31091

Petitioners/Appellants,

vs.

BRENDA MCGRUDER, in her capacity as Lawrence County Auditor; COUNTY OF LAWRENCE, SOUTH DAKOTA; BOARD OF COMMISSIONERS OF LAWRENCE COUNTY, SOUTH DAKOTA, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING, AND ERIC JENNINGS, in their official capacity,

Respondents/Appellees.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

The Honorable Eric Strawn
Circuit Court Judge

Notice of Appeal filed on May 15, 2025

APPELLANTS' BRIEF

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Statutes:

Preliminary Statement

On January 13, 2025, Save Centennial Valley Association, Inc. and Charles Brown (collectively "SCVA" unless otherwise noted) petitioned the Circuit Court to issue a Writ of Mandamus requiring the Lawrence County Auditor ("Auditor") to accept SCVA's Referendum Petition and submit the Lawrence County Board of Commissioners' (the "Commission") vote to approve "Ordinance #24-05, an Ordinance Amending the Lawrence County Zoning Ordinance, Amendments and Additions thereto" (the "Ordinance Amendment") to a vote of the qualified voters of Lawrence County. The parties agreed there were no factual issues for the Circuit Court to address. Instead, the Circuit Court was asked to interpret applicable statutes and, ultimately, decide whether the passage of the Ordinance Amendment was an administrative or legislative decision under SDCL § 7-18A-15.1, and whether or not a County Commission reviewing and approving conditional use permits ("CUPs") is, by operation of law, the default board of adjustment, regardless of the text of the applicable ordinances.

Following the March 26, 2025, hearing on the questions of law presented by the parties, the Circuit Court entered its Order Granting Judgment on the Pleadings and Declaratory Relief, finding the passage of the Ordinance Amendment was an administrative decision, and the Commission is, by operation of law, acting as the board of adjustment whenever it reviews and approves conditional use permits, therefore shielding the passage of the Ordinance Amendment from referendum.

In this appeal, SCVA maintains the Circuit Court erred, as a matter of law, when it held the passage of the Ordinance Amendment was an administrative decision by the

Commission, and that the Commission, by operation of law, acts as the board of adjustment whenever it reviews and approves conditional use permits.

References to the record are designated as "SR" followed by the appropriate page number. References to SCVA's Appendix are designated as "App." followed by the appropriate page number.

Jurisdictional Statement

On April 16, 2025, the Circuit Court entered its Order Granting Judgment on the Pleadings and Declaratory Relief, which resolved each party's claims, counterclaims, and cross-claims. App. 001-006; SR 232-237. Notice of Entry was served on April 17, 2025. SR 238. SCVA's Notice of Appeal was filed on May 15, 2025. SR 246-247. This Court has jurisdiction pursuant to SDCL § 15-26A-3.

Statement of the Issues

1. **Whether the Circuit Court Erred in Granting County's Motion for Judgment on the Pleadings and Denying the Writ of Mandamus.**

   The Circuit Court granted County's Motion for Judgment on the Pleadings, holding that the Commission's passage of the Ordinance Amendment was an administrative, not legislative, act and, therefore, not subject to referendum. It further held that, by default, the Commission is acting as the Board of Adjustment whenever it is reviewing and approving conditional use permits.

   Most Relevant Authority:

   Kirschenman v. Hutchinson County Bd. Of Com'rs, 2003 S.D. 4, N.W.2d 330.
   Wang v. Patterson, 469 N.W.2d 577 (S.D. 1991).

   Tibbs v. Moody Cty. Bd. of Comm'rs, 2014 S.D. 208, N.W.2d 851.

   Hanson v. Minnehaha Cty. Comm'n (In re Conditional Use Permit # 13-08), 2014 S.D. 75, 855 N.W.2d 836.

SDCL § 7-18A-15.1

SDCL § 11-2-17.3

SDCL § 11-2-53

SDCL § 11-2-60

2. **Whether Referendums are Allowed when Conditional Use Permits are Issued by a Commission in a Legislative or Quasi-Legislative Manner.**

The Circuit Court did not make an explicit finding on this issue.

Most Relevant Authority:

Hanson v. Minnehaha Cty. Comm'n (In re Conditional Use Permit # 13-08), 2014 S.D. 75, 855 N.W.2d 836.

Kirschenman v. Hutchinson County Bd. Of Com'rs, 2003 S.D. 4, N.W.2d 330.

SDCL § 7-18A-15.1

SDCL § 11-2-17.3

SDCL § 11-2-61.1

Statement of the Case

This is an appeal from the Fourth Judicial Circuit, Lawrence County, South Dakota, the Honorable Eric Strawn. SCVA initiated this action against the Lawrence County Board of County Commissioners, the Lawrence County Auditor, and the County (collectively, "County" or "Appellees") by filing a Petition for Writ of Mandamus ("Writ") mandating the Lawrence County Auditor place the Petition for Referendum on the passage of the Ordinance Amendment on the ballot. The Writ was filed on January 13, 2025. App. 007-033; SR 1. County filed a Motion for Judgment on the Pleadings, Declaratory Judgment, and an Answer to SCVA's Writ.

The parties agreed there were no facts in dispute and that the issues before the Circuit Court were purely questions of law. After briefing the issues, the Circuit Court

held a hearing on March 26, 2025, and issued a ruling on April 16, 2025, in favor of County.

Statement of the Facts

The facts in this case are not in dispute. Through the Ordinance Amendment (Ordinance #2024-05), Lawrence County amended a number of its pre-existing zoning ordinances which included amendments leading to this dispute. SR 9-17. The passage of the Ordinance Amendment by the Commission was procedurally correct, with the normal and appropriate legislative steps being taken. The SCVA, in a manner that was also correct and timely, petitioned County Auditor to present this substantial change to the voters of Lawrence County. SR 18.

The Auditor sought guidance from the Commission and its attorney, who both believed the Ordinance Amendment was merely administrative, not legislative and, therefore, not subject to referendum. The Auditor responded accordingly to SCVA via letter dated January 3, 2025. App. 033; SR 27. On January 6, 2025, the Commission voted to approve the Auditor's position that the Commission's passage of Ordinance #24-05 was immune from referendum.

To enforce the public's statutory right to put zoning ordinances of this nature to a referendum, SCVA petitioned the Circuit Court for a Writ of Mandamus. App. 007-033; SR 1. County moved for judgment on the pleadings, seeking a judicial declaration that the Commission was, as a matter of law, acting as a board of adjustment for conditional use permits and that no conditional use permit can ever be referred. SR 49; SR 101. Following a hearing on March 26, 2025, the Circuit Court issued its ruling on April 16, 2025,

granting County's Motion and denying SCVA's Petition for a Writ of Mandamus. App. 001-006.

Standard of Review

This Court reviews rulings on a motion for judgment on the pleadings and declaratory judgments under the *de novo* standard of review, giving no deference to a Circuit Court's conclusions of law. *Pooled Advocate Tr. v. S.D. Dep't of Soc. Servs.*, 2012 S.D. 24, ¶ 20, 813 N.W.2d 130, 138; *Sturzenbecher v. Sioux Cty. Ranch, LLC*, 2025 S.D. 24, ¶ 46, 20 N.W.3d 419, 432. Questions of law, including the question of whether the county ordinances at issue satisfy the statutory requirements of SDCL § 11–2–17.3, are reviewed *de novo*. *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 8, 855 N.W.2d 836, 839.

Argument

1. The Circuit Court Erred in Denying the Writ of Mandamus.

A writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. SDCL § 21-29-2. It is appropriate when "there is a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty." *Hanig v. City of Winner*, 2005 S.D. 10, ¶ 9, 692 N.W.2d 202, 205. Mandamus is a proper remedy when a county auditor refuses to perform their duty by not putting a valid referendum to a vote. *See generally Kirschenman v. Hutchinson County Bd. Of Com'rs*, 2003 S.D. 4, 656 N.W.2d 330 (addressing legislative vs. administrative decisions and noting that a writ of mandamus is proper where a county auditor rejects a valid petition for

referendum); SDCL § 11-2-35 (also authorizing mandamus for violations of SDCL Ch. 11-2).

The well-defined obligation for county auditors to refer decisions, such as this Ordinance Amendment, stems from two statutes. On point, SDCL § 11-2-22 states "the comprehensive plan, zoning ordinance, and subdivision ordinance may be referred to a vote of the qualified voters of the county pursuant to §§ 7-18A-15 to 7-18A-24, inclusive." And within the referenced statutes, SDCL § 7-18A-15.1 more broadly provides that "[a]ny legislative decision of a board of county commissioners is subject to the referendum process." As defined, "a legislative decision is one that enacts a permanent law or lays down a rule of conduct or course of policy for the guidance of citizens or their officers. Any matter of a permanent or general character is a legislative decision." SDCL §7-18A-15.1.

On the other hand, administrative decisions are not referrable, unless specifically authorized by statute. *Id.* Administrative decisions are those that "merely put[] into execution a plan already adopted by the governing body itself or by the Legislature. Supervision of a program is an administrative decision. Hiring, disciplining, and setting the salaries of employees are administrative decisions." *Id.*

A. The Commission's Passage of the Ordinance Amendment is a Legislative Decision.

Providing guidance to courts undertaking a legislative vs. administrative determination, this Court has held that "where the local government has discretion as to what it may do and it acts under that discretion, it is a legislative act subject to referendum." *Kirschenman*, 2003 S.D. 4 at ¶ 7, 656 N.W.2d at 333. When "applying the

'legislative' versus 'administrative' distinction this Court will apply a liberal rule of construction *permitting rather than preventing*, citizens from exercising their powers of referendum." *Wang v. Patterson*, 469 N.W.2d 577, 580 (S.D. 1991) (emphasis added).

Here, the Commission's act of passing of the Ordinance Amendment falls readily within the definition of a legislative act. It is a zoning ordinance that is permanent in nature and lays down a new course of policy and guidance for the citizens and employees of Lawrence County. County was not under any sort of mandate to pass this Ordinance Amendment. Nor did it perfunctorily "put into execution" a plan that was enacted or adopted by the Legislature or a controlling body. To the contrary, it had great discretion in amending the ordinance. In adopting the amendment, the Commission relied upon its statutory discretion to make many choices. *See Wang*, 469 N.W.2d at 580 (finding that when a government gets a *choice* about what to do, it is acting legislatively, and its choices are subject to referendum). No hard rules or plans of action are set in place by the Legislature for the counties to follow with respect to who finalizes conditional use permits or has the authority to act as a board of adjustment. SDCL § 11-2-17.3 provides that county zoning ordinances "shall *specify the approving authority*" for conditional use permits. No mandate has been placed on which entity that authority must be. *Armstrong v. Turner Cnty. Bd. Of Adjustment*, 2009 S.D. 81, ¶ 10, 772 N.W.2d 643, 647; *Tibbs v. Moody Cty. Bd. of Comm'rs*, 2014 S.D. 44, ¶ 26, 851 N.W.2d 208, 217 (noting that the legislature passed SDCL § 11-2-17.3 to give power to the county to designate the entity responsible for approving conditional use permits).

Further, the Legislature provided broad discretion to each county regarding which body may be empowered to act as a board of adjustment. SDCL § 11-2-49 states that, "the board shall provide for the appointment of a board of adjustment, or for the planning and zoning commission to act as a board of adjustment[.]" The prior Lawrence County ordinance followed that course. But, if the Commission chooses not to appoint a board of adjustment as provided in SDCL § 11-2-49, it can instead choose to perform those duties itself and act as the board. SDCL § 11-2-60. No singular "plan" has been adopted by the Legislature that the Commission was bound to follow. SR 108-109. Rather, the Commission had a few alternatives, it chose the option it preferred, and it now faces a legitimate referendum challenge to the legislative choices it made. This fact was acknowledged by the Circuit Court, when it held "the county selected option three of the statutory framework in appoint a BoA." SR 234. Even setting aside the focus on the Ordinance Amendment designating the board of adjustment as CUP approving authority, the Ordinance Amendment also made discretionary changes to items like variances. Discretionary changes are legislative and subject to referendum.

Counties are inherently creations of state law and are bound by statute with respect to what they can do. SR124. A county's authority to issue zoning ordinances itself is merely a power provided by the legislature. But if, as County argued to the Circuit Court, the act of being given statutory discretion constitutes putting "into execution a plan" of the legislature, then no ordinance could ever be referred. The "plan" exception would swallow the rule and SDCL § 11-2-22 would be neutered. *See Argus Leader v. Hagen,* 2007 S.D. 96, ¶ 15, 739 N.W.2d 475, 480 ("In construing a statute, we presume

that the legislature did not intend an absurd or unreasonable result from the application of the statute.").

Finally, the Ordinance Amendment does not deal with any of the items in the enumerated list for an administrative act with respect to hiring, disciplining, or setting salaries. Instead, the Ordinance Amendment adjusts a variety of terms and empowered entities, including a variety of broad changes to the board of adjustment sections as well as the conditional use permit sections.

One would be hard pressed to find a decision that is more legislative in nature than this one. Even if this were a close call, the constructive weight afforded in favor of permitting citizens to exercise their referendum powers tips the scales towards granting the writ.

B. The Commission Does Not Act as the Board of Adjustment by Operation of Law Whenever it Reviews and Approves Conditional Use Permits.

The Circuit Court held the Commission was previously acting as the board of adjustment by default when handling CUPs because, by statute, only the board of adjustment has the authority to review and approve CUPs. The "intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." *Argus Leader*, 2007 S.D. at ¶ 13. Plain meaning and effect must be given to the words, which, when clear, provide no reason for further judicial construction. *Id.*

a. The Power to Review and Approve Conditional Use Permits is Not Unique to the Board of Adjustment.

SDCL § 11-2-17.3 states, in part, that:

> A county zoning ordinance adopted under this chapter that authorizes a conditional use of real property shall specify the approving authority, each category of conditional use requiring approval, the zoning districts in which a conditional use is available, the criteria for evaluating each conditional use, and any procedures for certifying approval of certain conditional uses.

SDCL § 11-2-53 provides:

> The board of adjustment *may*:
>
> (1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant to this chapter;
>
> (2) Authorize upon appeal in specific cases a variance from the terms of the ordinance that is not contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance is observed and substantial justice done; and
>
> (3) Hear and determine conditional uses *as authorized by the zoning ordinance.* The uses shall be determined by an affirmative majority vote of the present and voting members of the board of adjustment.

(emphasis added). *See also* Ord 24-05, Ch. 19, p. 7 (showing Lawrence County's prior ordinance to have set in the place the standard that "the County Commission shall take action to approve or deny the conditional use permit request.").

Although empowered to approve the permits, nothing in the board of adjustments' statutory scheme disempowers others from issuing these permits. *See In re Conditional Use permit No. 13-08*, 2014 S.D. 75, ¶ 25, 855 N.W.2d 836, 845 ("Although boards of adjustment are generally given the power to grant variances, South Dakota law does not require board of adjustment action to approve conditional use permits."); *Armstrong*, 2009

S.D. at ¶ 10, 772 N.W.2d at 647 (noting that "the Legislature passed a new law giving the power to the county to designate the entity responsible for approving conditional use permits.").

The Circuit Court held SDCL § 11-2-53 was amended in 2015 by the Legislature in direct response to this Court's decisions in *In re Conditional Use permit No. 13-08* and *Tibbs v. Moody Cty. Bd. of Comm'rs* wherein this Court interpretated the statutes as allowing counties to designate the approving authority of CUPs. SR 115-116. County claims SDCL § 11-2-53(3) was "specifically amended to provide the board of adjustment with the authority to issue conditional use permits." *Id.* Based on the amendment to the statute, County and the Circuit Court would have this Court interpret the addition of the permissive "may" in SDCL § 11-2-53 as being a definitive statement of law that entities may not issue the permits, even in the face of SDCL § 11-2-17.3's grant of discretion to counties in which entity to award that power to. "Ordinarily, the word 'may' in a statute is given a permissive or discretionary meaning. It is not obligatory or mandatory as is the word 'shall.'" *Matter of Groseth Intern., Inc.*, 442 N.W.2d 229, 231 (S.D. 1989) (noting that, although not always determinative, the form of the verb is the "single most important textual consideration determining whether a statute is mandatory or directory").

Further, SDCL § 11-2-53(3) provides the board of adjustment may "hear and determine conditional uses *as authorized by the zoning ordinance*." (emphasis added). A plain reading of the statute makes it clear that the board of adjustment may only exercise authority as authorized by county ordinance, again expressing the Legislature's intent to

provide flexibility to each county with regard to the review and approval of CUPs. Only if the county, by ordinance, creates and designates the board of adjustment as the approving authority of CUPs, may the board of adjustment exercise the powers outlined in SDCL § 11-2-53. Nothing in the amended statute strips counties from designating the commission as the approving authority for CUPs.

b. The Commission Does Not Act as the Board of Adjustment by Operation of Law when it Reviews and Approves CUPs.

Despite the swath of cases on the matter, two things remain true. Counties are legislatively authorized to determine who issues the conditional use permit, and boards of adjustment (also variable) are granted the permissive power to issue permits if tasked with the job. *See* SDCL §§ 11-2-17.3, 11-2-49, 11-2-60; SDCL § 11-2-53 ("the board of adjustment *may* ... hear and determine conditional uses *as authorized* by the zoning ordinance") (emphasis added). As was, and remains, proper, Lawrence County (before the Ordinance Amendment) tasked its County Commission with making decisions on conditional use permits in Chapter 19 of its Zoning Ordinances. And the prior ordinances also provided for the appointment of a board of adjustment, but did not vest the board with the job of handling conditional use permits. That being the case, no judicial finding could be made that the board, not the Commission, was making those determinations.

In short, County asks the Court declare the Commission to have acted as a board of adjustment by simple operation of law and in the face of the prior ordinances designating the Commissioners as the approving authority. As this Court has noted, "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...." *Armstrong*, 2009 S.D. at ¶ 17, 772 N.W.2d at 649. "The necessity of keeping the entities separate is of utmost importance." *Id.* No statutory default to the county commission acting as board of adjustment has been signed into law, nor should one be read into existence in its absence. If the Legislature wishes to make it so that only boards of adjustment are authorized to issue conditional use permits, it can readily amend SDCL § 11-2-17.3's permissive language. That the Legislature has not made such a choice despite recent other amendments to that very statute is itself telling.

2. Whether Referendums are Allowed When Conditional Use Permits are Issued by a Commission in a Legislative or Quasi-Legislative Manner.

Any legislative act by a county commission is subject to referendum. SDCL § 7-18A-15.1. As discussed, conditional use permits may be approved by county commissions. SDCL § 11-2-17.3; *Armstrong*, 2009 S.D. at ¶ 10, 772 N.W.2d at 647. Restrictions on how appeals of permits are handled, such as SDCL § 11-2-61.1, are not at issue here. Referendums on legislative decisions are separate and distinct from appeals and are guided and controlled instead by SDCL Ch. 7-18A.

Based on controlling caselaw and statute, to determine whether a specific conditional use permit is referable, a case-by-case analysis of the applicable zoning ordinance must be undertaken to determine the level of discretion that a county commission had when making the decision. This Court espoused this very approach in *In re Conditional Use permit No. 13-08* when it looked back and provided a deeper understanding of the *Kirschenman* case:

> We applied a liberal rule of construction to permit citizens to exercise their powers of referendum. Because the ordinance's complete lack of standards or conditions meant

> it was only "an open-ended statement that the Board is allowed to grant or deny a use permit[,] we concluded that the Board's approval of the conditional use was a legislative action subject to referendum."

In re Conditional Use Permit No. 13-08, 2014 S.D. at ¶ 15, 855 N.W.2d at 841 (cleaned up).

This Court further clarified:

> The implication of *Kirschenman* and our decision in the present case is that a conditional use could conceivably be simultaneously quasi-judicial for purposes of determining its constitutionality and quasi-legislative for purposes of being subject to referendum. We do not decide here whether the general criteria of MCZO art. 19.01 are sufficient to immunize that ordinance from referendum.

Id. at fn. 1.

SCVA readily acknowledges that there are cases wherein a specific conditional use would properly be found as being immune from referendum. But before this Court is not the constitutionality or propriety of any specific conditional use against the backdrop of its governing zoning ordinances and structure. Rather, despite controlling precedent and in opposition to statutes saying otherwise, County asks for a broad judgment, as a matter of law, that all conditional use permits are never subject to referendum. Such a finding conflicts with all that came before it.

Conclusion

This Court faces three straightforward questions: (1) is the Ordinance Amendment (Ordinance #24-05) referrable; (2) whether, as a matter of law, a county commission acts as a board of adjustment despite ordinance and statutory language

otherwise; and (3) whether the approval of conditional use permits can never be subject to referendum.

For the first, being a zoning ordinance that is permanent in nature and setting a policy for all in the county, the Ordinance Amendment was legislative and subject to referendum. This finding is bolstered by the mandate that courts err towards constructing statutes in favor of referendum. For the second, a county has several choices with respect to who can act as the board of adjustment and who is to issue conditional use permits. Thus, there is no clear legal mandate that the Commission be found, as a matter of law, to have acted as the board, or that the permits ultimately issue from the board, especially when the controlling ordinance states otherwise. Lastly, determining the referability of a conditional use permit requires a case-by-case review of the permit and applicable zoning standards set in place by ordinance. This Court has made clear that situations can exist that would bring a conditional use into referrable territory, so no judgment as a matter of law can be issued that conditional use permits are never referrable.

The Order Granting Judgment on the Pleadings and Declaratory Relief should be vacated and this case remanded to the Circuit Court for an order granting SCVA's Petition for Writ of Mandamus.

Dated this 22nd day of August, 2025.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: /s/ *Matthew J. Lucklum*
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing Brief is typed in proportionally spaced typeface in Equity A Tab 12 point. The word processor used to prepare this Brief indicated that there are a total of 4,801 words in the body of the Brief.

/s/ *Matthew J. Lucklum*
Matthew J. Lucklum

CERTIFICATE OF SERVICE

I certify that, on August 22, 2025, I served copies of this document upon each of the listed people by the following means:

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Appendix

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

SAVE CENTENNIAL VALLEY ASSOCIATION, INC. and CHARLES BROWN, Petitioners, v. **BRENDA MCGRUDER, in her capacity as Lawrence County Auditor; COUNTY OF LAWRENCE, SOUTH DAKOTA; BOARD OF COMMISSIONERS OF LAWRENCE COUNTY, SOUTH DAKOTA, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING, and ERIC JENNINGS, in their official capacity,** Respondents.	**40CIV25-000009** **ORDER GRANTING JUDGMENT ON THE PLEADINGS AND DECLARATORY RELIEF**

This matter came before the Court on March 26, 2025, at 9:00 am, after Petitioners filed a Verified Petition for Writ of Mandamus with Notice (Jan. 13, 2025) concerning the Lawrence County Board of Commissioners Hearing and Board action taken November 26, 2024, involving a zoning ordinance (Ordinance # 24-05); Respondents filed a Verified Answer to Petitioners' Verified Petition and also filed a Motion for Judgement on the Pleadings with Brief in Support (Feb. 10, 2025); Petitioners filed Petitioner's Memorandum in Support of Petition for Mandamus and Opposition to Respondents' Motion for Judgment on the Pleadings and Declaratory Judgment (Feb. 28, 2025); Respondents filed Respondents' Reply Brief to Petitioners' Memorandum in Support of Petition for Mandamus and Opposition to Respondents' Motion for Judgment on the Pleadings and Declaratory Judgment (Mar. 17, 2025). Petitioners appeared by and through their

attorney, Matthew J. Lucklum, Bangs, McCullen, Butler, Foye & Simmons, L.L.P.; respondents appeared by and through their attorneys, Richard M. Williams and Jacob A Stewart, Gunderson, Palmer, Nelson & Ashmore, LLP.

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Slota v. Imhoff and Associates, P.C.*, 949 N.W.2d 869, 873, 2020 S.D. 55, ¶ 12 (quoting *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 3, 723 N.W2d 694,695). "However, it is only an appropriate remedy to resolve issues of law when there are no remaining issues of fact." *In re Estate of Lester*, 2014 S.D. 73, ¶ 3, 855 N.W.2d 876, 878 (citation omitted). A motion for judgment on the pleadings challenges whether Petitioners have stated a plausible claim for which relief can be granted. *See* South Dakota Codified Laws (SDCL) 15–6–12(c). The Court only considers the allegations and documents cited or referred to in the petition, and accepting as true the allegations made by Petitioners, the Court limits its inquiry to the legal sufficiency of their claim. *Id.*

Here, the Court agrees with and adopts Respondents' argument that counties have only three options to establish the board of adjustment. *See* Respondents' Reply Brief to Petitioner's Memorandum in Support of Petition for Mandamus and Opposition to Respondents' Motion for Judgment on the Pleadings and Declaratory Judgment, at 4, filed Mar. 17, 2025; SDCL §§ 11-2-49, -53, -60. Because the Lawrence County Board of Commissioners neither appointed an independent board of adjustment (BoA), nor a planning and zoning commission under SDCL 11-2-49, the Lawrence County Commission acts as the board of adjustment "in lieu of appointing the board of adjustment." Respondents' Reply Brief to Petitioner's Memorandum in Support of Petition for Mandamus and Opposition to Respondents' Motion for Judgment on the Pleadings and Declaratory Judgment, at 4; SDCL §§ 11-2-49, -60.

Respondents pointed out that, prior to 2015, confusion was widespread regarding the authority of the county to issue conditional use permits which is illustrated in the carefully drafted opinions by the Supreme Court on the issue. However, in 2015 the legislature worked eliminate the issues presented in the statutes, thereby giving the counties guidance in appointing a BoA and thereafter the ability to issue conditional use permits. Lawrence County Board of Commissioners should have remedied their language in their ordinances to conform to statute at that time. The ordinance language remained the same until they discovered the issue in 2024. In order to conform the ordinance language to statutory law, they had to change the language. This is administrative action in its simplest form. This Court determines the action to bring the ordinances into compliance with the required statutory law was administrative and not legislative.

Further, this Court determines the county selected option three of the statutory framework in appointing a BoA. In declining to select either a stand-alone BoA or name the planning and zoning commission to act as a BoA they defaulted their selection back to the Board of Commissions. "In lieu" of taking no action, the legislature provided counties a default option (option 3). Further, all the actions taken by the Board of Commissioners illustrate their selection of option 3.

After having considered the entirety of the record, this Court finds that the Lawrence County Board of Commissioners' updating of Ordinance # 24-05 to comply with state law is an administrative act not subject to referral as a legislative decision under SDCL §§ 11-2-22, 7-18A-15.1.

Thus, Petitioners' Petition for Writ of Mandamus is denied, and Respondents' Motion for Judgment on the Pleadings is granted.

Respondents' Motion for Declaratory Judgment is granted. When issuing conditional use permits, the Lawrence County Commission acts as the board of adjustment by operation of law, pursuant to SDCL 11-2-60.

Dated this 16th day of April, 2025.

BY THE COURT:

Honorable Eric J. Strawn
Circuit Court Judge

ATTEST:

Carol Latuseck
Clerk of Court

By: _____
Deputy Clerk of Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the ORDER GRANTING JUDGMENT ON THE PLEADINGS AND DECLARATORY JUDGMENT in the case of SAVE CENTENNIAL VALLEY ASSOCIATION, INC. AND CHARLES BROWN vs BRENDA MCGRUDER, in her capacity as Lawrence County Auditor, COUNTY OF LAWRENCE SD, BOARD OF COMMISSIONERS OF LAWRENCE COUNTY SD, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING and ERIC JENNINGS, in their official capacity 40CIV25-000009 upon the persons herein next designated all on the date below shown, by emailing a copy thereof to said addressees, and receiving a delivery receipt for the same confirming the email was delivered to the recipients' mailboxes.

Mr. Richard Williams
Attorney at Law
rwilliams@gpna.com

Mr. Jacob Steward
Attorney at Lawn
jstewart@gpna.com

Mr. Matt Lucklum
Attorney at Law
mlucklum@bangsmccullen.com

which addresses are the last addresses of the addresses known to the subscriber.

Dated this 16th day of April 2025.

Carol Latuseck
Lawrence County Clerk of Courts

Latuseck, Carol

From:	Microsoft Outlook <MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@k12.sd.us>
To:	mlucklum@bangsmccullen.com; Richard Williams; jstewart@gpna.com
Sent:	Wednesday, April 16, 2025 4:45 PM
Subject:	Relayed: 40CIV25-9 SAVE CENTENNIAL VALLEY ASSOCIATION, CHARLES BROWN vs MCGRUDER, BOARD OF COMMISSIONERS, ET AL

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

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Subject: 40CIV25-9 SAVE CENTENNIAL VALLEY ASSOCIATION, CHARLES BROWN vs MCGRUDER, BOARD OF COMMISSIONERS, ET AL

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
LAWRENCE COUNTY	)	FOURTH JUDICIAL CIRCUIT

SAVE CENTENNIAL VALLEY ASSOCIATION, INC. AND CHARLES BROWN,

Petitioners,

vs.

BRENDA MCGRUDER, in her capacity as Lawrence County Auditor; COUNTY OF LAWRENCE, SOUTH DAKOTA; BOARD OF COMMISSIONERS OF LAWRENCE COUNTY, SOUTH DAKOTA, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING, AND ERIC JENNINGS, in their official capacity,

Respondents.

Verified Petition for Writ of Mandamus with Notice

Petitioners, for their cause of action against Respondents, state and allege as follows:

1. Petitioners, Save Centennial Valley Association, Inc. and Charles Brown (collectively "SCVA" unless otherwise noted), is a Domestic Non-Profit South Dakota Corporation established by residents and taxpayers of Lawrence County, South Dakota, including Charles Brown.

2. Respondent, Brenda McGruder ("Auditor"), is the auditor of Lawrence County, South Dakota. Auditor is named in her official capacity only.

3. Respondents, Lawrence County, South Dakota, and the Lawrence County Board of Commissioners, Richard Sleep, Rick Tysdal, Brandon Flanagan, Bob Ewing, and Eric Jennings, in their official capacity.

4. On or about October 3, 2024, following prior readings and public comment, Lawrence County Planning and Zoning voted to approve "Ordinance #24-05, an Ordinance Amending the

Lawrence County Zoning Ordinance, Amendments and Additions thereto" (the "Ordinance Amendment"). **Exhibit 1**.

5. On or about November 12, 2024, Lawrence County Planning and Zoning submitted the Ordinance Amendment for a first reading and hearing with the Lawrence County Board of Commissioners (the "Commission").

6. On or about November 26, 2024, Lawrence County Planning and Zoning submitted the Ordinance Amendment for a second reading and hearing with the Commission.

7. At the final public hearing on November 26, 2024, the Commission expressly noted and discussed the fact that the Ordinance Amendment would alter the current Lawrence County Zoning Ordinances to take away the opportunity for impacted citizens to refer Commission decisions regarding matters such as Conditional Use Permits to a public vote.

8. On November 26, 2024, the Commission voted to approve the Ordinance Amendment.

9. On November 30, 2024, the Commission published the Minutes from the November 26, 2024, meeting in the Black Hills Pioneer newspaper, the official county newspaper for Lawrence County.

10. Petitioners sought and obtained signatures of 5 percent or more of the registered voters in Lawrence County (based upon the total number of registered voters at the last general election) in order to refer the Commission's decision to approve the Ordinance Amendment. SDCL §§ 11-2-22; 7-18A-15 to 7-18A-24.

11. On December 20, 2024, within the 20-day time limit, Petitioners presented the Auditor with the signed petition for a referendum on the Commission's decision to approve Ordinance #24-05 (the "Referendum"), for her review.

12. On December 26, 2024, pursuant to SDCL § 7-18A-18.1 and in a word document entitled "County Referendum 2024-05 12262024 Cert Letter," the Auditor informed the Petitioners that

her validation process indicated a sufficient number of qualified electors signed the petition, but that she intended to present the petition to the Commission for guidance. **Exhibit 2**.

13. On December 31, 2024, at a Commission meeting, the Commission and the Commission's counsel stated that they believed the Ordinance Amendment was "administrative" rather than "legislative" and, thus, non-referrable because it was necessary for "state law compliance." No specific citation to state law requiring the Ordinance Amendment was provided. **Exhibit 3** at pages 3-4.

14. On January 2, 2025, the Auditor was asked when she intended to hold the special election under the scheduling constraints in SDCL § 7-18A-19.

15. On January 3, 2024, the Auditor advised Petitioners that, although enough qualified electors signed the Petition, the decision of the Commission to approve the "Ordinance Amending the Lawrence County Zoning Ordinance, Amendments and Additions thereto" was not referable.

16. The Auditor asserted that the Ordinance Amendment was not referable because, based on recommendations from legal counsel for the Commission and the Commission itself, she believed that the Ordinance Amendment was "administrative" rather than "legislative" in nature. **Exhibit 4**.

17. South Dakota law requires that a special election "*shall be held* within sixty days after the filling of a [referendum] petition . . ." SDCL § 7-18A-19 (emphasis added).

18. A county auditor is the person required to set the special election. SDCL § 7-18A-18.1.

19. When an auditor refuses to set the required election, South Dakota courts may compel the election by writ of mandamus. SDCL § 21-29-1 provides:

> The writ of mandamus may be issued by the Supreme and circuit courts, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or

> station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

See also Kirschenman v. Hutchinson County Bd. Of Com'rs, 2003 SD 4, 656 N.W.2d 330 (noting that a writ of mandamus is proper where a county auditor rejects a petition for referendum).

20. A writ of mandamus is appropriate when "there is a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty." *Hanig v. City of Winner*, 2005 S.D. 10, ¶ 9, 692 N.W.2d 202, 205; *see also Kirschenman*, 2003 S.D. 4 at ¶ 11, 656 N.W.2d at 332 (S.D. 2003) (stating that to prevail, Petitioner "must show that [it] had a clear legal right to submit [the Board's] decision to the referendum process, and that [the Board] must have a definite legal obligation to submit its decision to the referendum process.").

21. The citizens of South Dakota have a constitutionally established right to refer legislative actions to a public vote. SD Const art III, § 1.

22. Qualified voters also have statutory permission to refer a zoning ordinance to a vote according to the provisions of SDCL Ch. 7-18A. SDCL § 11-2-22.

23. Any legislative decision from a board of county commissioners is subject to referendum. SDCL § 7-18A-15.1.

24. Administrative decisions are not subject to the referendum process. SDCL § 7-18A-15.1.

25. A legislative decision is one that "enacts a permanent law or lays down a rule of conduct or course of policy for the guidance of citizens or their officers. Any matter of a permanent or general character is a legislative decision." SDCL § 7-18A-15.1.

26. "An administrative decision is one that merely puts into execution a plan already adopted by the governing body itself or by the Legislature. Supervision of a program is an administrative

decision. Hiring, disciplining, and setting the salaries of employees are administrative decisions." SDCL § 7-18A-15.1.

27. "In applying the 'legislative' versus 'administrative' distinction this Court will apply a liberal rule of construction *permitting rather than preventing*, citizens from exercising their powers of referendum." *Wang v. Patterson*, 469 N.W.2d 577, 580 (S.D. 1991) (emphasis added).

28. The Ordinance Amendment permanently and substantially amends the Lawrence County Zoning Ordinances and alters current policy. The Ordinance Amendment was brought about via the standard Lawrence County legislative process and, functions, in part, to eliminate the currently held and constitutionally and statutorily authorized rights of impacted citizens to refer certain governmental acts to a public vote. *See generally* SDCL § 11-2-11; SDCL Ch. 7-18A.

29. On its face and as a functional matter, by removing the referendum avenue for citizens who disapprove of actions taken by the Commission, the Ordinance Amendment falls well outside the statutory examples of an "administrative act" such as hiring, disciplining, setting salaries, or pure supervision of programs. SDCL § 7-18A-15.1.

30. The Commission's explanation that the Ordinance Amendment is required by South Dakota law is wrong. At best, state law grants local governments the authority to legislatively adopt an ordinance like the Ordinance Amendment, but state law does not require counties to take one specific approach. *See generally* SDCL §§ 11-2-49, 11-2-60.

31. Ultimately, "[w]here discretion is left to the local government as to what it may do, when the local government acts, it acts legislatively and its actions are subject to normal referendum procedure." *Wang*, 469 N.W.2d at 580. Here, the Commission had the *option* to pass this ordinance, but no mandate to do so. With the Ordinance Amendment's passage being a discretionary decision, and not falling otherwise within the defined scope of administrative actions, it is legislative in nature and subject to referendum. *Id.*

32. A referendum petition must be signed by 5 percent of the registered voters at the last preceding general election, the petition must contain the title of the ordinance or resolution passed and the date of passage, and the petition must be filed with the county auditor within 20 days after the minutes (approving the ordinance or resolution) have been published in the official county newspaper. SDCL §§ 7-18A-1; 7-18A-15 through 17.

33. "Each person who has circulated a petition shall, before filing the petition, sign an affidavit, under oath, verifying that he or she circulated the petition and that either the circulator or the signer added the signer's place of residence and date of signing. If multiple sheets of paper are necessary to obtain the required number of signatures, each sheet shall be self-contained and separately verified by the circulator." SDCL § 7-18A-12.

34. The Auditor concedes that "a sufficient number of qualified electors have signed the petition referring ORD 2024-05 to a vote," and no procedural discrepancies were otherwise identified. **Exhibit 4**.

35. "A special election *shall be held* within sixty days after the filling of a [referendum] petition . . ." SDCL § 7-18A-19 (Emphasis added). As such, when a valid referendum petition has been received, an Auditor has no discretion to choose not to hold a special election, and their refusal to hold a special election is properly addressed via mandamus. *Kirschenman*, 2003 S.D. 4 at ¶ 12, 656 N.W.2d at 335.

36. Petitioners complied with applicable state law and turned in a valid referendum petition regarding a legislative matter to the Auditor of Lawrence County.

37. The Auditor's decision to deny Petitioners' Referendum Petition was contrary to clear South Dakota precedent and South Dakota law.

38. Petitioners have no plain, speedy, or adequate remedy in the course of the law.

39. "The writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." SDCL § 21-29-2.

WHEREFORE, Petitioners respectfully request:

A. That the Court issue a Writ of Mandamus requiring the Auditor of Lawrence County to accept Petitioner's Referendum Petition and submit the ordinance to a vote of the qualified voters of Lawrence County at special election within 60 days from the original filing of the Petition; and

B. That the Court issue a preliminary injunction pursuant to SDCL Ch. 21-8 enjoining the Lawrence County Board of Commissioners and Lawrence County from effectuating the Ordinance Amendment pending resolution of the relief sought in this Application; and

C. That the Court grant such other and further relief it deems just and equitable under the circumstances.

Dated this 8th day of January, 2025.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: /s/ *Matthew J. Lucklum*

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ATTORNEYS FOR SAVE CENTENNIAL VALLEY ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned certifies that, on January 8, 2025, he caused true and correct copies of the above to be served upon each of the persons identified below by email and by depositing copies thereof in the United States mail, first class, postage prepaid, upon the following individuals:

Brenda McGruder
AUDITOR'S OFFICE
90 Sherman Street
Deadwood, SD 57732

Bruce Outka
COUNTY ATTORNEY
90 Sherman Street
Deadwood, SD 57732

Richard Sleep
COUNTY COMMISSIONER
90 Sherman Street
Deadwood, SD 57732

Rick Tysdal
COUNTY COMMISSIONER
90 Sherman Street
Deadwood, SD 57732

Brandon Flanagan
COUNTY COMMISSIONER
90 Sherman Street
Deadwood, SD 57732

Bob Ewing
COUNTY COMMISSION CHAIR
90 Sherman Street
Deadwood, SD 57732

Eric Jennigs
COUNTY COMMISSIONER
90 Sherman Street
Deadwood, SD 57732

which are the last addresses of the addresses known to the subscriber.

/s/ *Matthew J. Lucklum*
Matthew J. Lucklum

ORD 24-05

AN ORDINANCE AMENDING THE LAWRENCE COUNTY ZONING ORDINANCE, AMENDMENTS AND ADDITIONS THERETO.

BE IT HEREBY ORDAINED BY THE LAWRENCE COUNTY BOARD OF COMMISSIONERS THAT THE FOLLOWING SECTIONS OF EACH CHAPTER AND ARTICLE BE AMENDED:

The following sections of each chapter and article be amended:

CHAPTER 2: ADMINISTRATION AND ENFORCEMENT

§ II-2.003 POWERS AND DUTIES OF BOARD OF ADJUSTMENT.

(A) *Establishment.* ~~The Board of Adjustment shall be appointed by the County Commission. The Board may, in appropriate cases and subject to appropriate conditions and safeguards, grant variances and hear appeals to the terms of these regulations in harmony with the general purpose and intent and in accordance with general and specific rules herein contained.~~

The Lawrence County Commissioners shall provide for the appointment of a Board of Adjustment. The Board may, in appropriate cases and subject to appropriate conditions and safeguards, grant Conditional Use Permits, grant variances, and hear appeals to the terms of these regulations in harmony with the general purpose and intent and in accordance with general and specific rules herein contained.

(B) *Operational procedure.*

(1) The Board of Adjustment shall meet at the regularly scheduled meeting of the County Commission. Special meetings may be held at the call of the Chairperson. All meetings of the Board of Adjustment shall be open to the public and all business coming before the Board of Adjustment shall be transacted at such meetings.

(2) The Board of Adjustment shall keep minutes of its proceedings, records of examinations, and other official actions, all of which shall be filed in the County Planning and Zoning Department and the County Auditor's office and shall be of public record.

~~(C) *Appeals.* The Board of Adjustment shall hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by the County Planning and Zoning Director in the enforcement of these regulations.~~

~~(D) *Appeals procedure.* Any person, firm, or corporation desiring a variance shall make application for such request to the County Planning and Zoning Department. Such application shall be provided by the Department and completed in full by the applicant. Appeals procedure shall comply with Chapter 15 of this zoning title.~~

~~(E) *Variances.* The Board of Adjustment shall not vary the regulations unless it shall make findings based upon the evidence presented to it in each specific case that all of the following conditions are present:~~

~~(1) The particular physical surroundings, shape, or topographical conditions of the specific property involved would result in a particular hardship upon the owner as distinguished from a mere inconvenience, if the strict letter of the regulations were to be carried out;~~

~~(2) The conditions upon which the application for a variance is based would not be applicable generally to other property within the same zoning classification or other property substantially similar in use;~~

~~(3) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the area in which the property is located;~~

~~(4) The proposed variance will not unreasonably impair: an adequate supply of light and air to adjacent property; increase the congestion in the public streets; increase the danger of fire; endanger the public safety; or diminish or impair property values within the area;~~

~~(5) Because of circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of this title and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;~~

~~(6) The variance, if authorized, will represent the minimum variance that will afford reasonable relief and will represent the least modification desirable of this title;~~

~~(7) The Board of Adjustment shall hear and make determinations on variance to exceed the height limits as established by these regulations; and~~

~~(8) The Board of Adjustment, under its authority to grant variances, may impose reasonable conditions on the grant, and one accepting those conditions is bound by them.~~

~~(F) *Variance procedure.* Any person, firm, or corporation desiring a variance shall make application for such request to the County Planning and Zoning Department. Such application shall be provided by the Department and completed in full by the applicant. Variance procedure shall comply with Chapter 16 of this zoning title.~~

~~(G) *Appeals of decision of Board.* Appeals may be taken to the Circuit Court 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, aggrieved by any decision of the Board of Adjustment, in the manner and form provided by the statutes of the state, in such cases made and provided.~~

~~(H) *Limitations.* Any order of the Board of Adjustment granting a variance may be declared invalid by the Board of Adjustment unless substantially completed within two years from the date of such order. The County Planning and Zoning Director shall notify the property owner of record upon invalidation of a variance.~~

~~(I) *Jurisdiction restricted.* The Board of Adjustment shall have no jurisdiction to hear requests or grant variances of the height limitations for broadcast towers, telecommunication towers, antenna support structures, and wireless communications facilities regulated by this title.~~

CHAPTER 15: ZONING BOARD OF ADJUSTMENT

§ II-15.001 ~~ESTABLISHMENT.~~ GENERAL

~~The Lawrence County Commissioners shall provide for the appointment of a Board of Adjustment.~~ The Board may, in appropriate cases and subject to appropriate conditions and safeguards, grant Conditional Use Permits, grant variances, and hear appeals to the terms of these regulations in harmony with the general purpose and intent and in accordance with general and specific rules herein contained.

~~(Ord. 22-04, passed 4-11-2023)~~

~~§ II-15.002 OPERATIONAL PROCEDURE.~~

~~(A) The Board shall meet at the regularly scheduled meetings of the County Commission. All meetings of the Board shall be open to the public and all business coming before the Board shall be transacted at such meetings.~~

~~(B) The Board shall keep minutes of its proceedings, records of examinations and other official actions, all of which shall be filed in the Auditor's Office and shall be a public record.~~

(Ord. 22-04, passed 4-11-2023)

§ II-15.002~~3~~ FEES (moved from 15.006)

Upon the filing of any application for a variance, ~~or~~ appeal, or conditional use permit to the Board of Adjustment, the applicant shall pay the county the appropriate fee as designated in Chapter 21 of this zoning title. These fees shall be utilized to help defray necessary administrative costs of processing the applications as required.

Upon the filing of any application for an extractive industry conditional use permit to the Board of Adjustment, the applicant shall pay the county the appropriate fee as designated in Chapter 20 of this zoning title. These fees shall be utilized to help defray necessary administrative costs of processing the applications as required.

§ II-15.003~~4~~ VARIANCES.

The Zoning Board of Adjustment may authorize upon appeal, in specific cases, a variance from the terms of the ordinance that is not contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance is observed and substantial justice done ~~shall not vary the regulations unless it shall make findings based upon the evidence presented to it in each specific case and~~ The Board of Adjustment shall use the following considerations to do so:

(A) Shall find that the variance would not be injurious to the neighborhood or detrimental to the public interest/ welfare;
(B) Shall find that "special conditions" exist, such that, because of a particular feature of the property or because of some "extraordinary and exceptional" situation on the property, a variance is necessary; and
(C) Whether a denial of the variance would create "peculiar and exceptional practical difficulties or an exceptional and undue hardship".

~~(A) The particular physical surroundings, shape or topographical conditions of the specific property involved would result in a particular hardship upon the owner as distinguished from a mere inconvenience, if the strict letter of the regulations were to be carried out.~~

~~(B) The conditions upon which the application for a variance is based would not be applicable generally to other property within the same zoning classification or other property substantially similar in use.~~

~~(C) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the area in which the property is located.~~

~~(D) The proposed variance will not unreasonably impair an adequate supply of light and air to adjacent property, increase the congestion in the public streets, increase the danger of fire, endanger the public~~

~~safety, or diminish or impair property values within the area.~~

~~(E) That because of circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning regulations and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.~~

~~(F) That the variance, if authorized, will represent the minimum variance that will afford reasonable relief and will represent the least modification desirable of the zoning regulations.~~

~~(G) The Board of Adjustment shall hear and make determinations on variance to exceed the height limits as established by these regulations.~~

~~(H) The Board of Adjustment, under its authority to grant variances may impose reasonable conditions on the grant, and one accepting those conditions is bound by them.~~

(Ord. 14--01, passed 6-6-2014, Ch. 16, §§ 1.1, 1.5; Ord. 22-04, passed 4-11-2023)

§ II-15.004~~5~~ APPLICATION ~~TO COUNTY~~ FOR VARIANCE.

(A) Any person, firm or corporation desiring a variance or wishing to appeal a decision of the Planning Director or authorized representatives shall make application for such request to the Office of Planning and Zoning. Such an application shall be provided by the Office and be completed in full by the applicant.

(B) The application for a variance shall include a site plan and a written summary to include, at a minimum, the following information:

(1) *Site plans.* Site plans shall be drawn to scale upon substantial paper or cloth and shall be of sufficient clarity to indicate the location, nature, and extent of the work proposed and show in detail that it will conform to the provisions of this title and all relevant laws, ordinances, rule, and regulations. At a minimum they shall include:

(a) Setbacks from all property lines, roads, streets, easements and section lines, if applicable;

(b) Location of all existing and proposed structures;

(c) All incidental uses such as wells, septic tanks, drain fields, waterways, driveways, utilities, existing easements, slopes, and the like;

(d) Property lines with dimensions;

(2) *Written summary.*

(a) A detailed reason for the request;

(b) Proposed time line of completion of plans;

(c) Adjacent land uses;

(d) Relationship of the proposed development to the surrounding area;

(e) A letter from the appropriate fire district in regard to fire protection;

(f) A letter from any entity which may have joint jurisdiction over the property; and

(g) Other pertinent information, as required, to include, but not be limited to, e.g., outside engineer/plan/inspector review of all plans and drawings; wetland information, streams, geotechnical

information, on-site wastewater disposal systems, percolation tests, soil profiles, and the like, solely at the owner's expense.

(C) The application for a an appeal shall include a written summary to include, at a minimum, the following information:

(1) *Written summary.*

(a) A detailed reason for the request.

(Ord. 14-01, passed 6-6-2014, Ch. 15, § 1.2, Ch. 16, § 1.2; Ord. 22-04, passed 4-11-2023)

§ II-15.004~~6~~ APPEALS. (moved from 15.004)

~~The Board shall hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Planning Director in the enforcement of these regulations.~~

The Board shall hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant to this chapter.

(Ord. 14-01, passed 6-6-2014, Ch. 15, § 1.1; Ord. 22-04, passed 4-11-21023)

§ II-15.006~~7~~PROCEDURE FOR VARIANCES AND APPEALS.

The Planning Department shall review the completed, variance or appeal application for compliance with this title. Any application not containing and/or addressing all the information required in § II-15.005 shall be rejected and returned to the applicant together with the reasons for rejection. If the Planning Department determines the application in compliance with this title then the following specific procedure will apply, depending on the type of application listed:

(A) *Variance procedure.*

(1) A Planning and Zoning recommendation meeting will be scheduled for the next regular meeting.

(2) A recommendation meeting will be held in front of the Planning and Zoning Board. The Planning and Zoning Board shall make recommendation to approve or deny the variance application within 30 days of the initial hearing of the application. If the action is to deny the variance application, the reasons for such action shall be stated in the minutes and specific reference shall be made to the requirements not met.

(3) After the recommendation meeting has been held, a public hearing will be scheduled in front of the Board of Adjustment.

(4) A notice of public hearing sign will be furnished by the Planning Department, and posted by the Planning Department. The sign must be posted no less than ten days prior to the date of the hearing and must remain posted until final action by the Board of Adjustment.

(5) The Planning Department will submit legal notice to the local newspaper(s). The notice shall state the date the Board of Adjustment will review and consider the variance application.

(6) The Planning Department shall create a staff report with recommendations to the Board of

Adjustment for either approval or denial of the application.

(7) Within 45 days of the receipt of the Planning and Zoning Board's recommendation, the Board of Adjustment shall take action to approve or deny the variance request.

(B) *Appeal procedure.*

(1) A public hearing in front of the ~~Zoning~~ Board of Adjustment will be scheduled for the next regular meeting.

(2) The Planning Department will submit legal notice to the local newspaper(s). The notice shall state the date the Board of Adjustment will review and consider the appeal application.

(3) The Planning Department shall create a staff report with recommendations to the Board of Adjustment for either approval or denial of the application.

(4) Within 45 days, the Board of Adjustment shall take action to approve or deny the appeal request.

(Ord. 14-01, passed 6-6-2014, Ch. 15, § 1.4, Ch. 16, § 1.4; Ord. 15-01, passed 6-5-2015; Ord. 22-04, passed 4-11-2023)

§ II-15.007~~8~~ DECISION FOR VARIANCES & APPEALS.

~~All requests under this chapter shall be acted upon at a meeting of the Zoning Board of Adjustment. A favorable vote by a majority of the members of the Board shall be required to approve each request.~~

The concurring vote of two-thirds of the members of the board of adjustment is necessary to reverse any order, requirement, decision, or determination of any administrative official or to effect any variation in the ordinance.

(Ord. 22-04, passed 4-11-2023)

§ II-15.008~~9~~ APPEALS FROM DECISION OF BOARD FOR VARIANCES & APPEALS.

Appeals may be taken to the Circuit Court 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, aggrieved by any decision of the Board of Adjustment, in the manner and form provided by the statutes of the State of South Dakota, in such cases made and provided.

(Ord. 22-04, passed 4-11-2023)

II-15.009~~10~~ PROCEDURE FOR CONDITIONAL USE PERMITS and EXTRACTIVE INDUSTRY CONDITIONAL USE PERMITS.

(A) Any person, firm or corporation desiring a conditional use permit or extractive industry conditional use permits shall follow the process per Chapter 19-Conditional Use Permit or Chapter 20 - Extractive Industry Conditional Use Permits, whichever is applicable.

§ II-15.010~~11~~ DECISION FOR CONDITIONAL USE PERMITS.

The uses shall be determined by an affirmative majority vote of the present and voting members of the board of adjustment.

~~§ II-15.010 LIMITATIONS.~~

~~Any order of the Board of Adjustment granting a variance may be declared invalid by the Board of Adjustment unless substantially completed within two years from the date of such order. The Planning Director shall notify the property owner of record upon invalidation of a variance.~~

(Ord. 22-04, passed 4-11-2023)

Chapter 19 - CONDITIONAL USE PERMITS

§ II-19.007 PROCEDURE.

(E) (3) The Planning Department shall provide a notice of public hearing sign, which is to be posted by the Planning Department on or near the property involved in the conditional use request in a location with the greatest public visibility. If the property is not adjacent to any public right-of-way, the sign shall be placed at the access point to the property along the nearest public right-of-way. Said sign shall be placed no less than ten days prior to the date of the public hearing before the Planning Commission and shall remain placed until a decision has been made by the Board of Adjustment ~~County Commission.~~

(J) After the Planning and Zoning Board makes recommendation to the Board of Adjustment ~~County Commission.~~, the Planning Department shall schedule a public hearing in front of the Board of Adjustment ~~County Commission.~~

(L) Within 45 days of the receipt of the Planning and Zoning Board's recommendation, the Board of Adjustment ~~County Commission~~ shall take action to approve or deny the conditional use permit request.

(Ord. 14-01, passed 6-6-2014, Ch. 19, § 1.7; Ord. 15-01, passed 6-5-2015; Ord. 22-04, passed 4-11-2023)

§ II-19.012 ANNUAL REVIEW.

The Board of Adjustment ~~County Commission~~ may, at its discretion, require of the operator a written annual report, on-site review, or attendance at a Board of Adjustment ~~County Commission~~ meeting, or all of the above, on each anniversary date of the approval of the conditional use permit. The annual report, on-site review, or attendance at a Board of Adjustment ~~County Commission~~ meeting, or all of the above, shall update the Board of Adjustment ~~County Commission~~ on the operator's compliance with the terms, requirements, and conditions stipulated in the approval of the conditional use permit.

(Ord. 14-01, passed 6-6-2014, Ch. 19, § 1.12)

§ II-19.013 SUSPENSION OR REVOCATION OF CONDITIONAL USE PERMIT.

If the County Planning Director finds that, at any time, the terms, conditions, or requirements of the conditional use permit have not been complied with, or that any phase thereof has not been completed within the time required under the permit or any amendment thereto, the Director shall report this fact to the permittee, landowner, and/or operator, and the Board of Adjustment ~~County Commission~~. The Board of Adjustment ~~County Commission~~may, after conducting a public hearing, of which the permittee, landowner, and/or operator shall be notified, revoke the conditional use permit for failure to comply with the terms, conditions, or requirements of the permit.

(Ord. 14-01, passed 6-6-2014, Ch. 19, § 1.13)

CHAPTER 20: EXTRACTIVE INDUSTRY CONDITIONAL USE PERMITS, BUFFER ZONES, AND WAIVERS

§ II-20.001 GENERAL.

(B) The County Commission hereby finds and declares that:

(9) An appropriate buffer zone, extending outward from the area of disturbance, shall be established at the discretion of the Board of Adjustment ~~County Commission~~ upon evaluation of the considerations found in § II-20.008. The standard buffer zone shall be no less than 500 feet from the area of disturbance, subject to the application of the provisions of §§ II-20.030 through 20.035 in such case the buffer zone may be less than 500 feet.

(Ord. 14-01, passed 6-6-2014, Ch. 20, Art. 1, § 1.1; Ord. 16-03, passed 7-21-2017)

§ II-20.006 SOCIOECONOMIC IMPACT STUDY.

(A) *Large-scale operations.*

(1) Each large-scale application shall be accompanied by a socioeconomic impact study which identifies the potential impact of the development on the following areas, and mitigation measures proposed to address those impacts. These areas to be addressed by the socioeconomic impact study area considered to be minimums. The Board of Adjustment ~~County Commission~~ may determine, based upon circumstances unique to the application, that additional areas will be addressed by the study. In such cases, the applicant will be so informed at the earliest practical stage of the application process.

§ II-20.007 PROCEDURE.

(E) (3) A notice of public hearing sign will be furnished by the Planning Department. The sign must be posted no less than ten days prior to the date of the hearing and must remain posted until final action by the Board of Adjustment ~~Planning and Zoning Board~~.

(K) After the Planning and Zoning Board makes recommendations to the Board of Adjustment ~~County Commission~~, the Planning Department shall schedule a public hearing in front of the Board of Adjustment ~~County Commission~~.

(N) Within 45 days of the receipt of the Planning and Zoning Board's recommendation, the Board of Adjustment ~~County Commission~~ shall take action to approve, approve with conditions, or deny the conditional use permit request.

(Ord. 14-01, passed 6-6-2014, Ch. 20, Art. 1, § 1.7; Ord. 16-03, passed 7-21-2017)

§ II-20.010 ANNUAL REVIEW.

The Board of Adjustment ~~County Commission~~ may, at its discretion, require of the operator a written annual report, on-site review, or attendance at a Board of Adjustment ~~County Commission~~ meeting, or all of the above, on each anniversary date of the approval of the conditional use permit. The annual report, on-site review, or attendance at a Board of Adjustment ~~County Commission~~ meeting, or all of the above, shall update the Board of Adjustment ~~County Commission~~ on the operator's compliance with the terms, requirements, and conditions stipulated in the approval of the conditional use permit.

(Ord. 14-01, passed 6-6-2014, Ch. 20, Art. 1, § 1.10; Ord. 16-03, passed 7-21-2017)

§ II-20.011 ANNUAL REPORT.

The Board of Adjustment ~~County Commission~~ may, at its discretion, require of the operator a written annual report on each anniversary date of the approval of the conditional use permit. The annual report

shall update the Board of Adjustment ~~County Commission~~ on the operator's compliance with the terms, requirements, and conditions stipulated in the approval of the conditional use permit.

(Ord. 14-01, passed 6-6-2014, Ch. 20, Art. 1, § 1.11; Ord. 16-03, passed 7-21-2017)

§ II-20.013 SUSPENSION OR REVOCATION OF CONDITIONAL USE PERMIT.

(A) If the County Planning Director finds that, at any time, the terms, conditions, or requirements of the conditional use permit have not been complied with, or that any phase thereof has not been completed within the time required under the permit or any amendment thereto, the Director shall report this fact to the permittee, landowner, and/or operator, and the Board of Adjustment ~~County Commission~~.

(B) The Board of Adjustment ~~County Commission~~ may, after conducting a public hearing, of which the permittee, landowner, and/or operator shall be notified, revoke the conditional use permit for failure to comply with the terms, conditions, or requirements of the permit.

(Ord. 14-01, passed 6-6-2014, Ch. 20, Art. 1, § 1.13; Ord. 16-03, passed 7-21-2017)

§ II-20.035 RELEASE OF BUFFER ZONE.

The Board of Adjustment ~~County Commission~~, upon release of the operator's reclamation liability from the State Board of Minerals and Environment, shall issue the operator a release of all conditions relating to the established buffer zone surrounding the operating unit.

(Ord. 14-01, passed 6-6-2014, Ch. 20, Art. 2, § 1.6; Ord. 16-03, passed 7-21-2017)

Lawrence County Auditor's Office
90 Sherman Street Ste 1
Deadwood, SD 57732

LAWRENCE COUNTY
SOUTH DAKOTA
"Where Beauty and Adventure Meet"

Ph: 605-578-1941
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www.lawrence.sd.us
auditor@lawrence.sd.us

December 26, 2024

Charles Brown
11757 Timber Ridge Ln
Whitewood SD 57793

Re: Notice to Petition Sponsors pursuant to SDCL 7-18A-18.1

Dear Charles:

On December 20, 2024, as the petition sponsor, you submitted a County Referendum Petition regarding Ordinance 24-05: An Ordinance amending the Lawrence County Zoning Ordinance Amendments and Additions passed on November 26, 2024.

Pursuant to SDCL 7-18A-18.1 notice is hereby given that the validation process of the petition indicates that, a sufficient number of qualified electors have signed the petition. Before the proposed measure will be certified to appear on the ballot, however, the petition will be presented to the County Commission on December 31, 2024 for further guidance.

Brenda McGruder

Lawrence County Auditor

LAWRENCE COUNTY COMMISSIONERS MEETING – December 31, 2024

Chairman Robert Ewing called the regular meeting of the Lawrence County Commissioners to order and the Pledge of Allegiance was conducted at 8:00 a.m. on December 31, 2024 in the Administrative Annex Building of the Lawrence County Courthouse located at 90 Sherman Street, Deadwood, SD with Commissioners Brandon Flanagan, Richard Tysdal, Richard Sleep and Eric Jennings.

All motions were passed by unanimous vote, by all members present, unless stated otherwise.

AGENDA: Moved-Seconded (Tysdal-Flanagan) to approve the agenda as amended. Motion Carried.

DECLARE CONFLICTS: No Conflicts were declared by the Lawrence County Commission.

MINUTES: Moved-Seconded (Sleep-Jennings) to approve the minutes of December 17, 2024 County Commission meeting. Motion Carried.

PERSONNEL:
CORONER: Moved-Seconded (Flanagan-Tysdal) to approve the new hire for Delaney Knottnerus as a Deputy Coroner at a base rate of $240.00 (2025) per call, effective January 6, 2025. Motion Carried.

GENERAL GOVERNMENT BUILDINGS: Moved-Seconded (Flanagan-Tysdal) to approve the step raise for Tim Agena as a full-time permanent Foreman G3 at a base rate of $40.43 (2025) per hour, effective December 29, 2024. Motion Carried.

Moved-Seconded (Flanagan-Tysdal) to approve the step raise for Frank Cortez as a full-time permanent Light Equipment Operator G3 at a base rate of $31.88 (2025) per hour, effective December 29, 2024. Motion Carried.

Moved-Seconded (Flanagan-Tysdal) to approve the step raise for Robert Mattson as a full-time permanent Custodian II G 3 at a base rate of $24.21 (2025) per hour, effective December 29, 2024. Motion Carried.

HIGHWAY: Moved-Seconded (Flanagan-Tysdal) to approve the step raise for Jeff Harper as a full-time permanent Heavy Equipment Operator G3 at a base rate of $34.16 (2025) per hour, effective December 29, 2024. Motion Carried.

Moved-Seconded (Flanagan-Tysdal) to approve the step raise for Daniel (Cory) Sheeler as a full-time permanent Crew Foreman G3 at a base rate of $40.43 (2025) per hour, effective December 29, 2024. Motion Carried.

Moved-Seconded (Flanagan-Tysdal) to approve the classification change for Krista Rear as a full-time permanent CE 4 G1 at a base rate of $27.48 (2025) per hour, effective December 29, 2024. Motion Carried.

SHERIFF: Moved-Seconded (Tysdal-Jennings) to approve the new hire for Kodiak England as a full-time permanent Correctional Officer I G1 at a base rate of $24.08 (2025) per hour, effective January 6, 2025. Motion Carried.

Moved-Seconded (Tysdal-Jennings) to approve the new hire for James Puckett as a full-time permanent Correctional Officer I G1 at a base rate of $24.08 (2025) per hour, effective January 6, 2025. Motion Carried.

Moved-Seconded (Tysdal-Jennings) to approve the classification change for Blaze Eaglehorse as a full-time permanent Correctional Officer II G3 at a base rate of $26.61 (2025) per hour, effective January 1, 2025. Motion Carried.

Moved-Seconded (Tysdal-Jennings) to approve the step raise for Brent McNeil as a full-time permanent Deputy II G2 at a base rate of $33.33 (2025) per hour, effective January 12, 2025. Motion Carried.

ABATEMENT: Moved-Seconded (Tysdal-Sleep) to approve the abatement for Balo Ranch LLC. on parcel #25000-00704-244-00 for 2024 taxes payable in 2025. Home was destroyed by fire. Motion Carried.

2024 UNASSIGNED FUND BALANCE: Brenda McGruder, Auditor, reported on the 2024 unassigned fund balance. McGruder recommended that $750,000 unassigned fund balance be assigned to the Public Safety and Service Center Project and $235,000 unassigned fund balance be assigned to Information Systems & Technology projects.

Moved-Seconded (Sleep-Tysdal) to assign $750,000 from the 2024 unassigned fund balance to be used for the Public Safety and Service Center Project. Motion Carried.

Moved-Seconded (Sleep-Tysdal) to assign $235,000 from the 2024 unassigned fund balance to be used for the Information Systems & Technology Projects. Motion Carried.

CLOUD PERMITTING: Moved-Seconded (Tysdal-Ewing) to approve and authorize Greg Dias, Information Systems & Technology Director, to sign the Cloud Permitting Contract. Motion Carried.

SHERIFF:
PUBLIC SAFETY & SERVICES CENTER PROJECT UPDATE: Brian Dean, Sheriff, gave an update on the Public Safety & Services Center project.

HIGHWAY:
MASTER TRANSPORTATION PLAN FINAL REPORT/KLJ ENGINEERING: Continued discussion will be held at the January 6, 2025 meeting.

2024 YEAR IN REVIEW: John Bey, Highway Superintendent, gave a 2024 year-end review.

TREASURER:
OFFICE CLOSURE:
Moved-Seconded (Flanagan-Sleep) to authorize Deb Tridle, Treasurer, to use her discretion and close the Lawrence County Treasurer's Office on the afternoon of February 13, 2025 for MV system transfer. Motion Carried.

DELINQUENT TAX SALE: Deb Tridle, Treasurer, reported on the delinquent tax sale that took place on December 16, 2024. (Attached list of sold properties is on file in the Lawrence County Treasurer's Office)

PLANNING & ZONING:
RECESS: 9:15 a.m. Moved-Seconded (Sleep-Jennings) to recess the County Commission meeting and convene as the Board of Adjustment. Motion Carried. At 9:48 a.m., the Chairman called the Commission meeting back to order. See Board of Adjustment minutes for detail.

AMENDED VACATION OF PLAT/BH PROPERTIES, LLC: The legal description of the plat: Vacation of a portion of a dedicated public utility and access easement located in South Ridge Estates being a subdivision of a portion of Tract 2 of Powder House Pass located in the SE ¼ of Section 19 and the SW ¼ of Section 20, T4N, R3E, B.H.M., Lawrence County, South Dakota. Located in portions of Monmouth No. 3, Monmouth No. 4, Lamplighter, West Virginia and Stead, M.S. 1142 as shown on Plats 2022-2490 and 2022-7381,

Brenda McGruder, Auditor, presented the Amended Resolution #2024-39 Resolution & Order Vacating a Portion of a Plat.

Moved-Seconded (Flanagan-Jennings) to approve and authorize the Chairman to sign the following Amended Resolution #24-39 Resolution & Oder Vacating a plat. Motion Carried. AMENDED RESOLUTION #2024-39 RESOLUTION & ORDER VACATING A PORTION OF A PLAT WHEREAS, a petition was presented to the Board of County Commissioners of Lawrence County, South Dakota, by BH Properties, LLC, requesting for the Vacation of a portion of said Plats: Plat Document 2022-2490 and Plat Document 2022-7381 pursuant to SDCL 11-3-21.1 et seq., and WHEREAS, the Board of County Commissioners set a date for hearing and evidence having been presented to the Board of County Commissioners that notice has been given of the time, place and purpose of said hearing by publication of notice in the B.H. Pioneer at least

ten days in advance of hearing, and WHEREAS, the Board of County Commissioners having acted as a committee of the whole concerning said vacation, and WHEREAS, the names and addresses of the record owner of the plat or part thereof sought to be vacated; BH Properties, LLC, PO Box 2524, Sioux Falls, SD 57101, and WHEREAS, the legal description of the plat: Vacation of a portion of a dedicated public utility and access easement located in South Ridge Estates being a subdivision of a portion of Tract 2 of Powder House Pass located in the SE ¼ of Section 19 and the SW ¼ of Section 20, T4N, R3E, B.H.M., Lawrence County, South Dakota. Located in portions of Monmouth No. 3, Monmouth No. 4, Lamplighter, West Virginia and Stead, M.S. 1142 as shown on Plats 2022-2490 and 2022-7381, and WHEREAS, the no legal voters reside upon the platted land and WHEREAS, the character and use of the plat: rural residential, and WHEREAS, the facts and the reasons for such partial vacation are as follows: The road network in the South Ridge Estates, specifically Meadow Wood Way, was modified after the preliminary plat was approved due to road constructability issues that were encountered during construction. A revised preliminary plat will be submitted which will match the as-constructed road network. This petition is accompanied by the portion of the plat to be vacated, (Exhibit "A") recorded as Document No. 2022-2490 and Document No. 2022-7381 and is verified by the oath of the petitioners, and WHEREAS, a description of any public highway located there: Rochford Road runs north-south adjacent to and west of the South Ridge Estates subdivision. In addition, Meadow Wood Way and Lofty Pines Court lie within the boundaries of the Powder House Pass CID, and WHEREAS, the granting of the petition will not abridge or destroy any of the rights and privileges of other proprietors of such plat and will not authorize the closing or obstruction of any public highway laid out according to law, it may vacate the plat specified in the petition. All property taxes on such plat shall be paid before it may be vacated, BE IT RESOLVED by the Lawrence County Board of Commissioners to hereby vacate a portion of said Plats: Plat Document #2022-2490 and #2022-7381. Dated this 31st day of December, 2024. Robert Ewing, Chairman Lawrence County Commissioner ATTEST: I, Brenda McGruder, the duly elected Auditor of Lawrence County, SD, do hereby certify that the within and foregoing resolution was passed by the Lawrence County Board of County Commissioners at a regular session held December 31, 2024. Dated at Deadwood, SD this 31st day of December, 2024. Brenda McGruder Lawrence County Auditor.

REFERENDUM PETITIONS/LAWRENCE COUNTY ORDINANCE 2024-05:
EXECUTIVE SESSION: 8:44 a.m. Moved-Seconded (Tysdal-Sleep) to go into executive session pursuant to SDCL 1-25-2(3) consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters. Motion Carried. 8:59 a.m. The Board opened for regular business with no action taken.

Brenda McGruder, Auditor, stated that Lawrence County Referendum Petitions were received on December 20, 2024 from Charles Brown and enough qualified electors have signed the petition. McGruder added that the petitions have not been certified.

Bruce Outka, Deputy State's Attorney, read the following statement:

1. Though a sufficient number of qualified electors have signed the petition referring ORD 2024-05 to a vote, the question remains whether the matter may properly be placed on a ballot pursuant to SDCL Ch. 7-18A and in particular SDCL 7-18A-18.1.

2. I helped draft ORD 24-05 and it was on my recommendation that ORD 24-05 was initiated. As I have said a number of times at public meetings, the amendment was initiated to bring the existing ordinance into compliance with state law - thereby implementing a plan already put in place by the State Legislature - and done to avoid legal challenges to the existing procedure.

3. On November 26, 2024, the county commission passed ORD 24-05. And, now, there is an attempt to refer that decision to a vote.

4. SDCL 7-18A-15.1 draws a distinction between legislative and administrative decisions by the county commission. SDCL 7-18A-15.1:

No administrative decision of a governing body is subject to the referendum process, unless specifically authorized by this code. An administrative decision is one that merely puts into execution a plan already adopted by the governing body itself or by the Legislature. Supervision

of a program is an administrative decision. Hiring, disciplining, and setting the salaries of employees are administrative decisions.

5. It is my legal opinion that the adoption of ORD 24-05 by the county commission was an administrative decision made to bring the ordinance into compliance with state law - thereby implementing a plan already put in place by the State Legislature and also to avoid legal challenges to the existing procedure.

As the decision to approve 24-05 was administrative in nature, pursuant to SDCL 7-18A-15.1, the amendment is not subject to referendum because the action was necessary for state law compliance.

6. As a result, it is my further legal opinion that the Auditor does not have the authority to certify the measure for placement on a ballot.

Commissioner Jennings read the following statement: The popular thing to do is not always the right to do, nor is the right thing always popular. As commissioners we took an oath, in part, to uphold the laws of the State. Unfortunately, occasionally those laws are interpreted differently by those involved. I did not take this decision lightly, and I doubt any of us sitting up here did. I studied the statutes, read interpretations of the laws and how the courts ruled on them. I tried to be objective and allow the statutes to direct my decision.

I believe the statutes are directing the county's Board of Adjustment to issue CUP's. It is not clearly written in one State statute to that effect, but when reading several statutes together, along with the court's interpretation of them, and being objective, I reached this decision that this ordinance was necessary for the county to comply with state law.

I know what it takes to get signatures on a petition. I also know that this decision is an Administrative decision and not a Legislative one. Administrative decisions are not referable, they are appealable. Even though it pains me to do so, and it is certainly not the popular thing to do, the right thing is to deny these petitions based on our responsibility to follow state law.

Moved-Seconded (Tysdal-Sleep) On November 26, 2024, the Lawrence County Commission's approval of the amendment to the zoning ordinance, as reflected in ORD 24-05, was necessary to bring the ordinance into compliance with state law. The amendment is not subject to referendum because the action was necessary for state law compliance and the decision to name the board of adjustment as the approving authority for conditional use permits was an administrative decision which put into effect a comprehensive zoning scheme already set forth by the Legislature. Therefore, the Lawrence County Commissioner recommends that the measure not be placed on the ballot. Motion Carried.

Outka explained that the Auditor will take the recommendation into account and provide a certified letter within 5 days to the petition sponsors.

McGruder stated she will take all the information provided by legal counsel and the commission and make her decision and send the certified letter within 5 days.

ITEMS FROM THE PUBLIC:
REFERENDUM PETITIONS/LAWRENCE COUNTY ORDINANCE 2024-05: The following citizens provided comments in opposition to Lawrence County Ordinance 2024-05: Mark Mowry, 125 N 7th Street, Paula Mowry, 125 N 7th Street, Todd Akes, 22988 Cedar Berry, Kevin Farmer, 11794 Crook City Rd, Charles Brown 11757 Timber Ridge Ln, Tom Schmitz, 11831 Cuba Rd.

H&S SAND & GRAVEL: The following citizens provided comments in reference to the silica dust provided by H&S Sand & Gravel: Mark Rizzi, 11457 Brownsville Rd, Vicki Rizzi, 11457 Brownsville Rd.

Bruce Outka, Deputy State's Attorney, stated that an email was received from Victoria Reid in opposition to Ordinance 2024-05.

ITEMS FROM THE COMMISSIONERS: Commissioner Jennings stated that while reading through the Master Transportation Plan he was reminded that the board took a road tour of some

Forest Service Road that County does maintenance/snow removal on and feels it is appropriate to request a proposal of maintenance changes from John Bey, Highway Superintendent.

Commissioner Jennings stated that as part of the Master Transportation Plan it was recommended that a UTV/OHV ordinance be drafted and recommended that Brian Dean, Sheriff, review the draft ordinance.

Commissioner Sleep voiced his concern with the City of Spearfish bike path that follows the truck route.

ITEMS FROM THE COMMISSIONERS: BILLS (APPROVED DURING GENERAL BUSINESS AT 8:00 A.M.): Moved-Seconded (Jennings-Tysdal) to approve payment of the following payroll and vouchers listed below for expenditures for insurance, professional services, publications, rentals, supplies, repairs, maintenance, travel, conference fees, utilities, furniture and equipment drawn on the proper funds and various departments. Motion Carried.
Payroll: Comm-$8,501.82; Aud-$15,114.46; Treas-$17,939.67; States Atty-$21,544.73; Pub Def-$16,058.20; Gen Govt Bldg-$13,168.50; Equal-$18,678.88; Rod-$11,976.12; Vso-$2,173.00; Ist-$14,643.80; Sher-$57,030.97; Jail-$50,960.34; Coroner-$402.82; 24/7-$1,458.00; Emerg Mgnt-$5,483.75; E911-$19,450.33; Highway-$56,981.90; Weed-$9,087.14; P&Z-$12,789.65; **Bills:** Ridley, Clint-$543.97; Whalen, Michael-$991.15; Hauge, John-$726.90; Vavruska, Kyle-$242.62; Palmer, Lance-$126.00; Chaffins, Crystal-$126.00; A To Z Shredding-$29.06; A&B Business,Inc Solutions-$842.35; A&B Welding Supply-$123.09; A&I Distributors-$2,222.65; Aarms-$150.00; Ace Hardware Of Lead-$43.75; Alpine Impressions-$138.00; American Family Life-$2,559.58; At&T Mobility-$536.04; BH Land Analysis-$942.50; BH Pioneer-$534.31; BH Window Cleaning-$4,961.00; Bickle's Truck & Diesel-$207.80; Black Hills Chemical-$154.78; Black Hills Energy-$14,592.74; Blackstrap-$15,053.44; Bluepeak-$1,928.87; Bomgaars-$39.98; Butler Machinery Co-$14,233.60; Cbh Cooperative-$20,179.43; Center For Internet Security-$11,160.00; Charm-Tex-$43.87; Civicplus-$14,573.67; Dakota Equip Rental/Chain Saw-$123.91; Dakota Power Services-$295.00; Deadwood Recreation Center-$790.00; Delta Dental Of South Dakota-$10,150.36; Dept Of Hlth Lab Services-$40.00; Dept Of The Treasury-$82,861.82; Diamond Pharmacy-$1,203.32; Dustbusters-$271,463.29; Dvorak, Tristan-$218.77; Election Sys & Software-$8,000.00; Elevatus Architecture-$12,000.00; Ewert, Kelli-$120.00; Fidler-Isburg Funeral Chapel-$2,000.00; Fischer, Shawn-$240.00; Fox Law Firm-$162.47; Id Zone-$479.88; Idemia Idenity & Security-$3,447.00; Inland Truck Parts-$11,647.57; Jacobs Precision Welding-$7.14; Janke, Wendy-$120.00; John Deere Financial-$128.23; Katterhagen, Mark-$15.00; Kapsa, Marlo-$32.20; Kimball-Midwest Co-$554.10; Kinney Law-$572.84; Knecht Home Center-$13.99; Knowbe4-$4,000.23; Language Line Services-$37.24; Larson, Val-$15.00; Lead, City Of-$48.73; Lustre-Cal-$609.00; Bradley, Brooke-$120.00; Mcleod's Office Supply-$139.90; Mg Oil Company-$22,660.89; Midcontinent Communications-$163.63; Montana Dakota Utilities-$416.19; Monument Health Network-$1,147.92; Motorola Solutions-$16,451.40; Nalco Company-$386.26; Nelson Law-$874.00; Northern Hills Rec Center-$92.00; Nuharbor Security-$44,098.73; Nutrien Ag Solutions-$21,940.00; Office Of Child Support-$184.62; Onsite First Aid-$128.65; Onsolve-$568.71; Paessler Ag-$1,547.28; Pennington Co Jail-$992.68; Percy, Melissa-$60.00; Pitney Bowes Bank-$1,500.00; Pitney Bowes-$299.00; Quik Signs-$90.00; Ray O'herron Co-$250.22; Rcs Construction-$715,871.22; Safe Life Defense-$808.20; Sd Dept Of Transportation-$204,476.78; SD Retirement System-$87,401.82; SD Sheriff's Association-$1,273.04; Sdrs Supplemental Retirement-$5,880.00; Silverado-$1,331.36; Stahl, Mike-$31.85; Staples/Advantage-$51.29; Sturdevant's Auto Parts-$2,877.54; Sysaid Technologies-$1,998.00; Sysco Montana-$1,785.90; Transource Truck & Equip-$24.81; Twin City Hardware & Lumber-$444.74; Uline-$523.56; Virtru Corporation-$13,624.27; Vsp Insurance Co-$1,615.52; Waeckerle Law-$207.50; Washington State Support Regis-$73.84; Wellmark Blue Cross-$141,112.85; Wells Fargo Banks-$131.88; West River Anesthesiology-$207.32; Western Communication-$1,842.93; Western States Sheriff Assoc-$100.00; White Drug-$285.17; White's Canyon Motors-$116.55; White's Queen City Motors-$1,585.32; Whitewood, City Of-$83.00; Williams Standard Serv-$183.82; Yankton Co Sheriff-$50.00; **Witness & Jurors:** $149.88.

ADJOURN: 10:23 a.m. There being no further business, Chairman Ewing adjourned the meeting.

_____
Date Approved

_____
Robert Ewing, Chairperson

ATTEST:

_____
Brenda McGruder, Auditor

LAWRENCE COUNTY BOARD OF ADJUSTMENT – December 31, 2024

Chairman Robert Ewing called the meeting of the Lawrence County Board of Adjustment to order at 9:15 a.m. on December 31, 2024, in the Administrative Annex Building of the Lawrence County Courthouse located at 90 Sherman Street, Deadwood, SD with Commissioner Brandon Flanagan, Richard Tysdal, Richard Sleep and Eric Jennings.

All motions were passed by unanimous vote, by all members present, unless stated otherwise.

DECLARE CONFLICTS: No conflicts were declared by the Lawrence County Commission.

CONDITIONAL USE PERMIT #469-24/SCHULTES: A public hearing was held on Conditional Use Permit #469-24 OWNER/APPLICANT: Troy Schultes LEGAL DESCRIPTION: M.S. 1208 Lot 2A-1 of Woodbine Placer Section 24, T5N, R3E, (legal shortened) VICINITY LOCATION: Boulder Canyon/ Mattson Lane SUMMARY: Amendment to CUP for Cabins instead of campers ZONING: PF.

Bruce Outka, Deputy State's Attorney, presented the staff report.

Troy Schultes, applicant, asked for clarification on the 450 sq. ft. size limitation, and whether it included the loft area? Discussion that followed clarified that the loft area would not be included in the calculation of the maximum square footage allowed. Rather the 450 sq. ft. maximum would be based on the building footprint only.

No other public input was voiced and the hearing was closed.

Moved-Seconded (Tysdal-Jennings) to approve Conditional Use Permit #469-24 with the amendment to condition #21 as follows: Cabin size not to exceed 450 sq. ft. footprint and adding condition #22 as follows: Cabins will not be on a permanent foundation. OWNER/APPLICANT: Troy Schultes LEGAL DESCRIPTION: M.S. 1208 Lot 2A-1 of Woodbine Placer Section 24, T5N, R3E, (legal shortened) VICINITY LOCATION: Boulder Canyon/ Mattson Lane SUMMARY: Amendment to CUP for Cabins instead of campers ZONING: PF. Motion Carried.

VARIANCE #213/GOLDSTANDARD CABINETRY & SIMEK: A Public Hearing was held on VAR #213 OWNERS/APPLICANTS: Goldstandard Cabinetry/Lilyana Simek LEGAL DESCRIPTION: Tract B of M.S. 1687 Section 5, T4N, R3E, (legal shortened) VICINITY LOCATION: Hwy 14A SUMMARY: A 16.8' variance to the 25' front setback for a coffee kiosk ZONING: HSC

Bruce Outka, Deputy State's Attorney, presented the staff report.

Lilyana Simek, applicant, asked why the coffee stand could not be located closer to the highway?

Mike Simek, 21120 Gilded Mountain Rd, commented on the current location off the highway and not getting the exposure for coffee sales.

No other public input was voiced and the hearing was closed.

The board discussed the consideration for a variance.

Moved-Seconded (Jennings-Sleep) to deny Variance #213 pursuant to SDCL 11-2-53: Though granting the variance would not be contrary to the public interest or injurious to the neighborhood, no special conditions exist such that because of a particular feature of the property or because of some extraordinary and exceptional situation on the property, a variance is necessary. Also, denying the variance would not create a peculiar and exceptional practical difficulty or an exception and undue hardship. OWNERS/APPLICANTS: Goldstandard Cabinetry/Lilyana Simek LEGAL DESCRIPTION: Tract B of M.S. 1687 Section 5, T4N, R3E, (legal shortened) VICINITY LOCATION: Hwy 14A SUMMARY: A 16.8' variance to the 25' front setback for a coffee kiosk ZONING: HSC. Motion Carried.

ADJOURN: 9:48 a.m. There being no further business it was Moved-Seconded (Jennings-Tysdal) to adjourn the meeting. Motion Carried.

_____ Date Approved

_____
Robert Ewing, Chairperson

ATTEST:

_____
Brenda McGruder, Auditor

Lawrence County Auditor's Office
90 Sherman Street Ste 1
Deadwood, SD 57732

LAWRENCE COUNTY
SOUTH DAKOTA
"Where Beauty and Adventure Meet"

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auditor@lawrence.sd.us

January 3, 2025

Charles Brown
11757 Timber Ridge Ln
Whitewood SD 57793

Anderson-Wing, Kristen E
22986 Cedar Berry Ave
Spearfish SD 57783

Charles and Kristine,

Though a sufficient number of qualified electors have signed the petition referring ORD 2024-05 to a vote, the question remained whether the matter may properly be placed on a ballot pursuant to SDCL Ch. 7-18A and in particular SDCL 7-18A-18.1.

SDCL 7-18A-15.1 provides, however, that "no administrative decision of a governing body is subject to the referendum process." As defined in the statute, "an administrative decision is one that merely puts into execution a plan already adopted by . . . the Legislature."

Legal counsel to the county commission, who was responsible for drafting and initiating ORD 2024-05, has stated at a number of public meetings that the purpose of amended ORD 2024-05 was to bring the ordinance into compliance with state law and to avoid legal challenges to the existing procedure.

ORD 2024-05 was passed by the county commission on November 26, 2024. At the time of approval of the amendment, the commission discussion recognized its "obligation to uphold the laws of SD." ORD 2024-05 merely implements a plan already put in place by the State Legislature.

At the county commission meeting held on December 31, 2024, the commission confirmed that its decision on November 26, 2024, approving ORD 2024-05, was an administrative decision and passed with the intent to bring the ordinance into compliance with state law.

Considering the foregoing and upon the advice of legal counsel and the recommendation of the county commission, I am left conclude that the approval of ORD-2024-05 was an administrative decision as defined by SDCL 7-18A-15.1 and not subject to the referendum process. Furthermore, the amendments are necessary to bring Lawrence County's ordinances into compliance with state law. Consequently, I do not have the authority to certify the measure for placement on a ballot.

Brenda McGruder
Lawrence County Auditor

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
LAWRENCE COUNTY	)	FOURTH JUDICIAL CIRCUIT

SAVE CENTENNIAL VALLEY ASSOCIATION, INC. AND CHARLES BROWN,

Petitioners,

vs.

BRENDA MCGRUDER, in her capacity as Lawrence County Auditor; COUNTY OF LAWRENCE, SOUTH DAKOTA; BOARD OF COMMISSIONERS OF LAWRENCE COUNTY, SOUTH DAKOTA, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING, AND ERIC JENNINGS, in their official capacity,

Respondents.

Affidavit of Charles Brown in Support of Verified Petition for Writ of Mandamus with Notice

Charles Brown, being first duly sworn, deposes and states as follows:

1. My name is Charles Brown, I am a Director of the Save Centennial Valley Association ("SCVA"), and I reside at 11757 Timber Ridge Lane, Whitewood, South Dakota.

2. I am a resident and taxpayer of Lawrence County, South Dakota.

3. Members of SCVA were present at the hearings before the Lawrence County Board of Commissioners and, more specifically, the hearing held on November 26, 2024, wherein the Commission made a decision on Ordinance #24-05, an Ordinance Amending the Lawrence County Zoning Ordinance, Amendments and Additions thereto, affecting my residence and neighborhood.

5. I obtained a copy of the Black Hills Pioneer newspaper from November 30, 2024, wherein the Minutes from the November 26, 2024, Lawrence County Board of Commissioners meeting were published.

6. I, along with other residents of Lawrence County, obtained 1,730 signatures for our Referendum Petition.

7. On December 20, 2024, I submitted the Petition to the Auditor for her filing.

8. On December 26, 2024, the Auditor informed me that her validation process indicated that a sufficient number of qualified electors signed the timely petition, but that she would be referring the matter to the Lawrence County Board of Commissioners for guidance.

9. On January 3, 2025, the Auditor rejected our Referendum Petition.

10. Specifically, she told me that she would not accept the Referendum Petition because she was advised Ordinance #24-05 was "administrative" and that the matter was not referable.

11. I have no plain, speedy, or adequate remedy in the course of the law.

12. I have read the Verified Petition for Writ of Mandamus with Notice in this matter and affirm that the contents of the Petition are true and correct to the best of my knowledge and belief.

Dated this 8 day of January, 2025.

Charles Brown

SUBSCRIBED AND SWORN to before me this 8th day of January, 2025.

SEAL CONNOR D. DONOHOE NOTARY PUBLIC State of South Dakota SEAL

Notary Public, South Dakota
My commission expires: Jan 5, 2029

Appeal No. 31091

In the
Supreme Court of the State of South Dakota

SAVE CENTENNIAL VALLEY ASSOCIATION, INC. and CHARLES BROWN,

Petitioners and Appellants

vs.

BRENDA MCGRUDER, in her capacity as Lawrence County Auditor; COUNTY OF LAWRENCE, SOUTH DAKOTA; BOARD OF COMMISSIONERS OF LAWRENCE COUNTY, SOUTH DAKOTA, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING, AND ERIC JENNINGS, in their official capacity,

Respondents and Appellees

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

The Honorable Eric Strawn

Notice of Appeal filed May 15, 2025

BRIEF OF APPELLEES

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Filed: 10/31/2025 2:58 PM CST Supreme Court, State of South Dakota #31091

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PRELIMINARY STATEMENT

Citations to the record will appear as "(CR ___)" with the page number from the Clerk's Appeal Index. Citations to Appellants' Appendix will appear as "(APP ___)" with the page number from the Appendix. Appellants, Save Centennial Valley Association, Inc. and Charles Brown will be referred to as "SCV." Appellee, Lawrence County, shall be referred to as "Lawrence County" or "the County."

JURISDICTIONAL STATEMENT

The SCV appeals from the Circuit Court's Order Granting Judgment on the Pleadings and Declaratory Relief (the "Order"), dated April 16, 2025. (CR 240 - 244; APP 001-005). The County filed a Notice of Entry of Order on April 17, 2025. (CR 238 - 239). SCV timely filed a Notice of Appeal on May 15, 2025. (CR 362). This Court has appellate jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether the Circuit Court Erred in Granting the County's Motion for Judgment on the Pleadings regarding the Writ of Mandamus.

The Circuit Court did not err. Ordinance #24-05 was not subject to referendum. The Court's *Order* was based on the correct interpretation of State law. State law required the amendment to clarify the Lawrence County Commission, sitting as the Board of Adjustment, with authority to decide conditional use permits.

Schafer v. Deuel Cnty. Bd. of Comm'rs, 2006 S.D. 106, 725 N.W.2d 241, 248
Bechen v. Moody Cnty. Bd. of Comm'rs, 2005 S.D. 93, ¶ 9, 703 N.W.2d 662, 664
Hay v. Bd. of Comm'rs for Grant Cnty., 2003 S.D. 117, 670 N.W.2d 376, 379
SDCL 11-2-49
SDCL 11-2-53
SDCL 11-2-60
SDCL 11-2-17.3

II. Whether the Circuit Court Erred in Granting the County's Motion for Declaratory Relief.

The Circuit Court did not err. The Court's relief was based on the correct interpretation of State law. In this instance, the Lawrence County Commission, sitting as the Board of Adjustment, had authority, pursuant to State law, to hear and decide conditional use permits.

Bechen v. Moody Cnty. Bd. of Comm'rs, 2005 S.D. 93, ¶ 9, 703 N.W.2d 662, 664
SDCL 11-2-49
SDCL 11-2-53
SDCL 11-2-60
SDCL 11-2-17.3

STATEMENT OF THE CASE

On January 13, 2025, SCV filed a *Verified Petion for Writ of Mandamus with Notice* seeking to compel the County to refer Ord. #24-05 to a public vote. (CR 1-38; APP 007-014). The zoning ordinance at issue provided the County Commission, sitting as the Board of Adjustment, with specific authority to hear and decide conditional use permits. *Id.* The County filed a *Verified Answer to Verified Petion for Writ of Mandamus with Notice and Counterclaims,* on February 10, 2025. (CR 49-100). The County's Counterclaim requested the Court declare the Lawrence County Commission was sitting as the Board of Adjustment, for the issuance of conditional use permits, even without the zoning amendment. (CR5 4-57). Along with the filing of the *Verified Answer to Verified Petion for Writ of Mandamus with Notice and Counterclaims* the County also filed its *Motion for Judgment on the Pleadings* seeking denial of the Writ of Mandamus and the grant of declaratory relief. (CR101-102).

The Circuit Court, the Honorable Eric J. Strawn, granted the County's *Motion for Judgment on the Pleadings*. (CR 232-236; APP 001-005). The Circuit Court determined (1) that Ord. #24-05 was not subject to referendum, and (2) the Lawrence County

Commission was sitting as the Board of Adjustment for the issuance of conditional use permits. (CR 240 - 244; APP 001-005). SCV now appeals from the Circuit Court's *Order*. (CR 246-247).

FACTS

Since at least 2014, long predating the passage of Ord. #24-05, the Lawrence County Commission acted as the Board of Adjustment. No independent board of adjustment was established pursuant to SDCL 11-2-50 nor was the planning commission appointed as the Board of Adjustment. In lieu of such appointments, the Board of County Commissioners opted to act as the Board of Adjustment pursuant to SDCL 11-2-49 and 11-2-60. Every year, the Lawrence County Commission designated the County Commission to sit as the Board of Adjustment. *See* Lawrence County Agenda for Tuesday, January 2, 2024, and meeting minutes appointing Robert Ewing, Brandon Flanagan, Richard Tysdal, Richard Sleep, and Eric Jennings (County Commissioners) as the Board of Adjustment, on January 6, 2025. (CR 208, 80). The Lawrence County Commission, sitting as the Board of Adjustment, met "…at the regularly scheduled meetings of the County Commission." *See* Ord. #24-05; § 11-2.003(B) (CR 88).

Despite being designated as the Board of Adjustment, and prior to the amendment seen in Ord. #24-05, Lawrence County Ordinances did not specifically provide that the Lawrence County Commission sat as the Board of Adjustment for conditional use permits. Rather, the Ordinances specified that the County Commission, after reviewing all delineated considerations, and based upon the recommendation of the Planning and Zoning Board, determined whether to grant or deny conditional use permits. Ord. § II-19.007; Ord. § II-19.008. (CR 94, 139-140).

This discrepancy occurred by force of law. It is not disputed that prior to the enactment of Ord. #24-05, the Lawrence County Commission sat as the Board of Adjustment. The comprehensive amendment to the procedure for the issuance of conditional use permits, in Lawrence County, first passed on June 6, 2014. *See* Ord. #24-05, §11-19.007 - §11-19.012 (source notes) (CR 15). It was not until July 1, 2015, that the Legislature provided the board of adjustment with specific authority to "hear and determine conditional uses as authorized by the zoning ordinance." *See* 2015 S.D. Sess. Laws Ch. 72 § 3 (SDCL 11-2-53(3)). Accordingly, prior to the 2015 amendment of SDCL 11-2-53, the Lawrence County Commission, sitting as the Board of Adjustment, did not have legislative authority to hear and decide conditional use permits.

Lawrence County amended its ordinances, by means of Ord. #24-05, to bring itself into compliance with the later-enacted legislation. The Lawrence County Commission gave its second reading of Ord. #24-05 on November 26, 2024, and voted in favor of approval. (CR 2) (Verified Petition ¶¶ 6, 8). Ord. #24-05 became effective on December 21, 2024. As relevant to this appeal, Ord. #24-05 provided the County Commission, sitting as the Board of Adjustment, with specific authority to hear and decide conditional use permits. *See* Amendment to Lawrence County Zoning Ordinance, Chapter 19 – Conditional Use Permits, § 11-19.007 Procedure (CR 15). The issue on appeal is very narrow. Ord. #24-05 merely recognizes the authority, provided by the Legislature in 2015, for the Lawrence County Commission, sitting as the Board of Adjustment, to hear and decide conditional uses under the zoning ordinances.

STANDARD OF REVIEW

1. Writ of Mandamus

When determining whether mandamus relief should issue to force a county to submit a matter for referendum, this Court has stated:

> The grant or denial of a writ of mandamus is discretionary, and reviewed under an *abuse of discretion standard*. An abuse of discretion refers to the use of discretion that is clearly against reason and evidence. 'We do not determine whether we would have made a like decision, only whether a judicial mind, considering the law and the facts, could have reached a similar decision.' *In order to compel Commission to submit the issue to referendum, [the applicant] must have 'a clear legal right to performance of the specific duty sought,' and the Commission 'must have a definite legal obligation to perform that duty.'*

Bechen v. Moody Cnty. Bd. of Comm'rs, 2005 S.D. 93, ¶ 9, 703 N.W.2d 662, 664 (cleaned up; emphasis added). "Underlying questions of statutory interpretation and application in the mandamus action 'are questions of law that we review *de novo*.' " *Puffy's, LLC v. Dep't of Health*, 2025 S.D. 10, ¶ 26, 18 N.W.3d 134, 142 (citing *Bohn v. Bueno*, 2024 S.D. 6, ¶ 12, 3 N.W.3d 441, 447 (citation omitted).

2. Motion for Judgment on the Pleadings (Declaratory Judgment)

> When considering a motion for judgment on the pleadings, the court considers 'the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.' ... In general, materials embraced by the pleadings include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings. We review a ruling on a motion for judgment on the pleadings *de novo*.'

Sturzenbecher v. Sioux Cnty. Ranch, LLC, 2025 S.D. 24, ¶ 46, 20 N.W.3d 419, 432 (citing *Slota v. Imhoff & Assocs., P.C.*, 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873) (cleaned up).

ARGUMENT AND AUTHORITIES

The Circuit Court correctly determined Lawrence County's passage of Ord. #24-05 was an administrative action and necessary to bring the County into compliance with State law. For those reasons, the ordinance was not subject to referendum. The Circuit Court was also correct in declaring, even without the amendment provided by Ord. #24-05, that the Lawrence County Commission, sitting as the Board of Adjustment, was granted authority pursuant to State statute, in 2015, to hear and decide conditional use permits. As described more fully below, the issuance of conditional use permits has had a tumultuous legal history. In order to avoid additional referenda of broad-scale legislative action, as seen in 2003, the Legislature engaged in piecemeal enactments of zoning regulation related to conditional uses. In the end, the Legislature accomplished what it originally set out to do – designate the board of adjustment with the authority to issue conditional use permits. Under the provisions set forth in SDCL Chapter 11-2, related to county zoning, that designation is necessary to ensure compliance with constitutional mandates.

1. THE CIRCUIT COURT DID NOT ERR IN GRANTING THE COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS DENYING MANDAMUS RELEF.

The Circuit Court correctly denied mandamus relief to SCV by refusing to require Lawrence County to refer Ord. #24-05 to a public vote. "The writ of mandamus must be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law." SDCL 21-29-2.

> In order to compel Commission to submit the issue to referendum, [the applicant] must have a clear legal right to performance of the specific duty sought, and the Commission 'must have a definite legal obligation to perform that duty.

Bechen, 2005 S.D. 93, ¶ 9, 703 N.W.2d at 664 (cleaned up). Mandamus relief is only appropriate when the duty to act is unequivocal. *Argus Leader v. Hagen*, 2007 S.D. 96 ¶¶ 8, 9, 739 N.W.2d 475, 478-479. The remedy does not lie where the obligation to be compelled is of doubtful validity. *Crowley v. Spearfish Independent School Dist.*, 445 N.W.2d 308, 311 (S.D. 1989).

Mandamus cannot act to require Lawrence County to place Ord. #24-05 to a public vote. As described more fully below, there is no clear legal right to refer Ord. #24-05. Unlike municipalities, which derive their authority for initiative and referendum from the State Constitution, county actions may only be referred as allowed by State statute. *Bechen*, 2005 S.D. 93, ¶ 13, 703 N.W.2d at 662, 665. Here, a comprehensive plan, set forth by the Legislature, required the passage of Ord. #24-05 by Lawrence County. Lawrence County's actions were both administrative and necessary for Lawrence County to comply with State law. As such, SCV had no clear legal right to refer Ord. #24-05, and the County had no corresponding obligation to act on that request.

A. The Amendment of Ordinance #24-05 Was an Administrative Action and Necessary to Bring Lawrence County Ordinances into Compliance with State Law.

1. Introduction

SCV's primary reason for bringing this action is to argue the issuance of conditional use permits, by Lawrence County, are subject to referendum. SCV's theory is that a conditional use permit issued by a county commission, rather than a board of adjustment, is subject to a public vote. Brief of Appellants, pp. 12-13. In order to accomplish its goal, SCV attacks the passage of Ord. #24-05. SCV's theory is misplaced. As specific to this case, the Lawrence County Commission was already sitting as the

Board of Adjustment prior to the passage of Ord. #24-05. In so acting, even without the amended ordinance, the Board of Adjustment was vested with authority, granted by SDCL 11-2-53(3), in 2015, to hear and decide conditional use permits. Ord. #24-05 was an administrative action which merely recited the legislative authority already provided to a board of adjustment. The statutory scheme put in place by the Legislature required the Lawrence County Commission to sit as the Board of Adjustment, and a board of adjustment has statutory authority to issue conditional use permits. The implementation of the statutory provisions, in this manner, is necessary to protect landowners' constitutional rights under the Due Process Clause of the United States Constitution.

2. The Evolution of Conditional Use Permit Issuance

The Legislature's passing of zoning laws, including those related to conditional use permits, has been met with certain opposition. That opposition resulted in a number of amendments to the zoning statutes, and this Court's interpretation of the same. In 2000, the Legislature enacted a comprehensive set of statutes related to county zoning. 2000 S.D. Sess. Laws Ch. 69 § 19 (HB 1108). The Court found the 2000 enactments sufficiently comprehensive to occupy the field of county appeal procedures leaving "no room for supplementary county regulation." *In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 21, 670 N.W.2d 34, 41. In 2003, HB 1281 made various amendments to the county zoning provisions, including conditional uses. (2003 S. D. Sess. Laws, Ch. 78). SDCL 11-2-49 was amended to provide the board of adjustment with authority to act pursuant to SDCL 11-2-53. SDCL 11-2-53 was amended to provide the board of adjustment with specific authority to approve conditional uses, and SDCL 11-2-60 was amended to

provide the county commission, sitting as the board of adjustment, authority to grant a conditional use. *Id.*

HB 1281, however, became the subject of a referendum.[1] Rather than proceed with an election on the referendum of HB 1281, the 2004 Legislature enacted SB 164. 2004 S.D. Sess. Laws Ch. 101. SB 164 repealed the provisions put in place by HB 1281. The repeal stripped the board of adjustment, and county commission sitting as the board of adjustment, of authority to issue conditional use permits.[2] Instead, the 2004 Legislature, enacted SDCL 11-2-17.3, which provided that a county zoning ordinance "shall specify the approving authority" for evaluation of a conditional use. 2004 S.D. Sess. Laws Ch. 103 § 3.

Following the Legislature's 2004 amendments, confusion regarding the issuance and appeal of conditional use permits spurred litigation. The appeal process was predicated on *what* public entity issued the conditional use permit. In 2009, to determine the correct standard and process for appeal, this Court was required to determine whether an appeal to the Circuit Court was from a board of adjustment or from a decision of the county commission. *Goos RV Ctr. v. Minnehaha Cnty. Comm'n*, 2009 S.D. 24, ¶ 20, 764

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[1]As reported in the *Watertown Public Opinion*,

> House Bill 1281 passed during the 2003 legislative session in an attempt to provide some certainty to the developers and financiers of farming and ranching projects that need a county zoning variance or special permit. The measure, which Gov. Mike Rounds signed into law, would prevent opponents from referring county commission decisions on such variances and permits to a local vote.

HB 1281 became the subjection of a successful referendum. https://www.thepublicopinion.com/story/news/local/2004/01/29/leaders-seek-to-halt-statewide-ag-zoning-vote/45945567/

[2] See also *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 10, 772 N.W.2d 643, 647 (discussing the effect of the 2004 repeal of HB 1281).

N.W.2d 704, 711. In determining that the entity issuing the conditional use permit was the county commission, and not the board of adjustment, the Court stated, "[i]t is highly relevant to note that the legislature modified SDCL Ch. 11-2 concerning the powers of a board of adjustment, in 2004, to eliminate a board of adjustment's authority to approve certain conditional use permits." *Goos RV Ctr.*, 2009 S.D. 24, ¶ 21, 764 N.W.2d at 704, 711 (citing 2004 S.D. Sess. Laws Ch. 101, § 2–4). "As a result [the] attempt to rely on authority concerning Board of Adjustment appeals is not persuasive and the appeal is proper." *Id.*

That uncertainty continued in *Armstrong v. Turner County Board of Adjustment*, when the Court wrote, the Minnehaha County ordinances in *Goos RV Center*, "…apparently allowed an appeal to the county commission [from a decision regarding a conditional use permit] before proceeding to circuit court." *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 11, 772 N.W.2d 643, 648. The *Armstrong* Court went on to state, "[a]lthough the legislature left intact the appeal procedure from a board of adjustment, the legislature omitted any reference to an appeal procedure if the county-designated entity was not a board of adjustment." *Armstrong*, 2009 S.D. 81, ¶ 10, 772 N.W.2d at 648. This Court, expressing its apparent frustration, further noted, "Whether intentional or inadvertent, the current law allows for inconsistent procedures among counties and a confusing system of *approving and appealing* conditional use permits." *Id.* (emphasis added).

In 2014, this Court issued two decisions related to the issuance of conditional use permits. The first was *Tibbs* decided July 9, 2014. *Tibbs v. Moody Cnty. Bd. of Comm'rs*, 2014 S.D. 44, ¶ 2, 851 N.W.2d 208, 211. The challengers to the issuance of a

conditional use permit argued Moody County did not have the authority to delegate the issuance of conditional use permits to the board of adjustment. *Tibbs*, 2014 S.D. 44, ¶ 3, 851 N.W.2d at 211. They further argued the differing standards of appeal from the board of adjustment and county commission violated the Equal Protection Clause of the South Dakota Constitution. *Id.* The *Tibbs* decision fell between the 2004 amendment of SDCL 11-2-17.3 which removed the board of adjustment's specific authority to consider conditional use permits and the reenactment of that authority in 2015. Ultimately, the Court determined the board of adjustment could lawfully issue conditional use permits. *Tibbs*, 2014 S.D. 44, ¶ 26, 851 N.W.2d at 217. The Court noted that despite the board of adjustment's lack of specific authority to hear conditional use permits, SDCL 11-2-17.3 allowed the counties to "chose the approving authority for CUPs." *Id.*

In *In re Conditional Use Permit No. 13-08,* decided October 29, 2014, the Court again analyzed whether a conditional use permit was issued by a county commission or the board of adjustment. In determining the county commission issued the conditional use permit, and not the board of adjustment, the Court noted the lack of specific authority in SDCL 11-2-53 providing the board of adjustment power to hear conditional use permits. The Court wrote, "[a]lthough boards of adjustment are generally given the power to grant variances, South Dakota law does not require board of adjustment action to approve conditional use permits." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 25, 855 N.W.2d 836, 845. As a consequence, the challengers "fail to point to authority designating the act of upholding the approval of a conditional use permit unique to a board of adjustment." *Id.* That lack of authority, however, was about to change.

Immediately after the decision in *Tibbs*, the 2015 Legislature again amended SDCL 11-2-53 to specifically provide the board of adjustment with authority to issue conditional use permits. SDCL 11-2-53(3) (2015 S.D. Sess. Laws 2015 Ch. 72). The 2015 amendment clearly vests the board of adjustment with the authority to hear and decide conditional uses. The amendment read:

> 11-2-53. The board of adjustment may:
>
> (1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant to this chapter; ~~and~~
> (2) Authorize upon appeal in specific cases such variance from terms of the ordinance as will not be contrary to the public interest, if, owing to specific conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance is observed and substantial justice done; and
> (3) Hear and determine conditional uses as authorized by the zoning ordinance. The uses shall be determined by an affirmative vote of the present and voting members of the board of adjustment at a percentage specifically set forth in the zoning ordinance.

(2015 S.D. Sess. Laws Ch. 72, §§ 2-3) (new language underlined and deleted with strikethrough). This statute reads substantially the same today. *See* SDCL 11-2-53 (amended voting requirement in paragraph 3).

The amendment of SDCL 11-2-53, immediately after this Court decided *In re Conditional Use Permit No. 13-08*, cannot be considered coincidental. The amendment replaces portions of the 2003 amendment repealed in 2004. It is also presumed the Legislature acted with knowledge of that decision and this Court's prior decisions. *Sanford v. Sanford*, 2005 S.D. 34, ¶ 19, 694 N.W.2d, 289. ("We presume the Legislature acts with knowledge of our judicial decisions."). A review of the decisions, cited *supra*, show a lack of continuity in the issuance, and therefore appeals, of conditional use

permits among counties. In fact, that lack of conformity led to this Court's pronouncement that, "[w]hether intentional or inadvertent, the current law allows for inconsistent procedures among counties and a confusing system of *approving and appealing* conditional use permits." *Armstrong*, 2009 S.D. 81, ¶ 11, 772 N.W.2d at 648 (emphasis added). It stands to reason the Legislature would take action to address this Court's concerns.

To the extent prior opinions, such as *In re Conditional Use Permit No. 13-08*, cited to the board of adjustment's lack of authority, under SDCL 11-2-53, to support a holding that a county commission issued a conditional use permit, the Legislature spoke directly to that issue. The amendment of SDCL 11-2-53(3) clearly provides the board of adjustment with such power. As a matter of statutory interpretation, it is presumed the amendment was made to change the existing law. *S. Dakota Subsequent Inj. Fund v. Federated Mut. Ins., Inc.*, 2000 S.D. 11, ¶ 18, 605 N.W.2d 166, 170; *In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 20, 670 N.W.2d 34, 41 ("Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights.")(citations omitted). Contrary to SCV's argument that *In re Conditional Use Permit No. 13-08* and *Armstrong* support their argument, the Legislature's placement of conditional use authority back in the hands of the board of adjustment illustrates the Legislature's intent to change the law. *See* Brief of Appellants at 10. *Armstrong* stated:

> In 2004, the legislature removed the provision in the law that gave a county board of adjustment the authority to approve conditional use permits. In its place, the legislature passed a new law giving the power to the county to designate the entity responsible for approving conditional use permits.

Armstrong, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 647 (citing SDCL 11-2-17.3). Similarly, *In re Conditional Use Permit* provided: "Although boards of adjustment are generally

given the power to grant variances, South Dakota law does not require board of adjustment action to approve conditional use permits." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 25, 855 N.W.2d at 845 (citing SDCL 11-2-53 (2014)); SDCL 11-2-17.3 (2014); *Armstrong*, 2009 S.D. 81, ¶ 10, 772 N.W.2d at 647). In *Goos RV Center*, 2009 S.D. 24, ¶ 21, 764 N.W.2d at 711, this Court stated it was "highly relevant that the legislature modified SDCL Ch. 11-2 concerning the powers of a board of adjustment in 2004 to eliminate a board of adjustment's authority to approve certain conditional use permits." Without that authority, it was not possible "…to point to authority designating the act of upholding the approval of a conditional use permit as a power unique to a board of adjustment." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 25, 855 N.W.2d at 845. It is, therefore, "highly relevant" the Legislature again granted the board of adjustment specific authority to hear conditional use permits. Taking into consideration this Court's previous opinions, the Legislature's amendment of SDCL 11-2-53 placed the authority to issue conditional use permits squarely with the board of adjustment.

This interpretation is further solidified when interpreting the amendment in conjunction with previous legislation. Lawrence County may only exercise the authority granted by the Legislature. Counties possess "only such powers as are expressly conferred [ ] by statute and such as may be reasonably implied from those expressly granted." *Schafer v. Deuel Cnty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 15, 725 N.W.2d 241, 248 (citations omitted). In order to implement zoning, the county commission "shall provide for the appointment of a board of adjustment." SDCL 11-2-49. As described in *Bechen v. Moody County Board of Commissioners*, "[t]he county board of adjustment was created by and received its powers from the legislature … and not from any act of

the county government itself." *Bechen*, 2005 S.D. 93, ¶ 10, 703 N.W.2d at 665 (citing SDCL 11-2-49 and SDCL 11-2-60). Lawrence County cannot act contrary to these statutory directives.

Under this statutory scheme, a county has only three options to establish the board of adjustment: 1) an independent board of adjustment can be appointed; 2) the planning and zoning commission may be appointed to act as the board of adjustment; or 3) the county commission, *in lieu of appointing a board of adjustment,* can act as the board of adjustment. *Hay v. Bd. of Comm'rs for Grant Cnty.*, 2003 S.D. 117, ¶ 8, 670 N.W.2d 376, 379 (emphasis added); SDCL 11-2-49, 11-2-60. SCV argues "[n]o statutory default to the county commission acting as the board of adjustment has been signed into law…" Brief of Appellants at 12. But that is exactly what SDCL 11-2-49 requires of Lawrence County. Lawrence County did not appoint an independent board of adjustment or designate the planning and zoning commission as the board of adjustment. In *lieu* of such appointment, the Lawrence County Commission is required by statute to operate as the board of adjustment.

Operating under the third "default" option of SDCL 11-2-49, the county commission, sitting has the board of adjustment,

> may *act as and perform <u>all</u> the duties and exercise the powers of the board of adjustment.* When acting as the board of adjustment, the chair of the board of county commissioners is chair of the board of adjustment. … Any initial conditional use determinations of the board shall be determined by the vote set forth in § 11-2-17.3.

SDCL 11-2-60 (emphasis added). This does not mean that the County Commission issues conditional use permits. Instead,

> … when a county commission decides not to appoint a separate board of adjustment, but elects to sit as the board of adjustment, this does not mean

> that the county commission and the board of adjustment become a single entity. While the members of each board may be identical, each board remains a separate legal entity with its own distinct powers and responsibilities under state law.

Bechen, 2005 S.D. 93, ¶ 11, 703 N.W.2d at 662, 665. By law, the Lawrence County Commission is acting as the board of adjustment. In carrying out these duties, the county commission no longer acts as a county commission. Rather, it exercises *all* the authority granted to the board of adjustment by statute, not *some* of that authority. *Bechen*, 2005 S.D. 93, ¶ 11, 703 N.W.2d at 665; SDCL 11-2-60. This now includes the authority to "[h]ear and determine conditional uses as authorized by the zoning ordinance." SDCL 11-2-53(3).

Despite this directive, SCV argues the Lawrence County Commission was free to ignore *Bechen* and unilaterally decide, based on an ordinance which has been superseded by the 2015 amendment of SDCL 11-2-53, it was not sitting as the board of adjustment for the issuance of conditional use permits. Brief of Appellants at 12. SCV argues SDCL 11-2-17.3 provides the county with general authority to appoint an entity as the "approving authority" for conditional use permits. Brief of Appellants at 12. While this may have been the case prior to the 2015 amendment of SDCL 11-2-53, that argument can no longer be sustained.

In addition to the arguments above regarding the Legislature's intent to change the law existing prior to 2015, when construing statutes, including the power to zone provided by the Legislature, "statutes of specific application take precedence over statutes of general application." *Schafer*, 2006 S.D. 106, ¶ 10, 725 N.W.2d at 245. The Legislature knows "how to include and exclude specific items in is statutes." *Sanford*, 2005 S.D. 34, ¶ 19, 694 N.W.2d at 283, 289. (citations omitted). SDCL 11-2-17.3 is a

statute of general application. It requires the county to "specify the approving authority" and requires that authority to set forth and consider criteria for the issuance of conditional use permits. As the statutes now read, the only entity given specific legislative authority to decide conditional use permits *is* the board of adjustment – no matter what form that board takes. SDCL 11-2-53(3). SDCL 11-2-17.3, read in this light, allows the county to "specify the approving authority" for conditional use permits but that "approving authority" must be vested with the specific authority granted by SDCL 11-2-53. The argument that the county commission is allowed to issue conditional use permits because the board of adjustment has not been given that authority, has now been turned on its head. The authority to grant conditional use permits is now provided to the board of adjustment, which is, by statute, either the independent board of adjustment, the planning and zoning commission sitting as the board of adjustment, or, in *lieu* of those options, the county commission sitting as the board of adjustment.

SCV also argues the term "may", as used in SDCL 11-2-53, where "[t]he board of adjustment may…hear and determine conditional uses", forecloses the County's position that the board of adjustment is the only entity required to hear and decide conditional use permits because "may" is permissive. Brief of Appellants at 11. This argument is backwards. The term "may" as used in SDCL 11-2-53 is a grant of authority *to the board of adjustment*. It is not a pronouncement that any other entity may also exercise that power. No statute provides the county commission independent authority to issue a conditional use permit, especially – as in this case – when the county commission, sitting as the board of adjustment, is statutorily charged with *all* the duties of the board of adjustment. To the extent that authority was assumed by the county commission in the

past – because no specific grant of authority to any particular entity existed – the Legislature has now clarified the issue. As of 2015, that authority has been specifically provided to the board of adjustment. SDCL 11-2-53(3).

3. The Role of the Writ of Certiorari in Identifying the Board of Adjustment as the Issuing Entity

The Legislature's plan is further expressed in later-enacted statutes. Those statutes clarify that a decision on a conditional use permit shall be treated as an appeal from the board of adjustment – regardless of the form the of the approving entity. SCV is dismissive of this analysis, arguing appeals are not at issue. Brief of Appellants at 12. This analysis is not about the appeals themselves, but rather the Legislature's amendments to the appeals process which identifies the board of adjustment as making all decisions on conditional use permits.

In 2018, the Legislature amended SDCL 7-8-30, appeals from a county commission, to read "[a]n appeal relating to a conditional use permit shall be heard and determined pursuant to § 11-2-61.1." 2018 S.D. Sess. Laws Ch. 68, § 3. That same year, the Legislature also enacted HB 1292. 2018 S.D. Sess. Laws Ch. 68. House Bill 1292 created a new section, now appearing as SDCL 11-2-61.1, which provides, regardless of the form of the "approving authority" and "notwithstanding any provision of law to the contrary", the only form of appeal is by writ of certiorari. *See also Sierra Club v. Clay Cnty. Bd. of Adjustment*, 2021 S.D. 28, ¶ 13, 959 N.W.2d 615, 620. The Legislature's enactments reaffirmed the State's intent to "occupy the field" with regard to appeals of conditional use permits. *In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 21, 670 N.W.2d at 41; *Freeman v. Clay Cnty. Bd. of Cnty. Commissioners*, 706 F. Supp. 3d 873, 890 (D.S.D. 2023). There is no room left for county ordinances to the contrary.

It cannot go unnoticed that the method of appeal is by writ of certiorari only – regardless of the form of the approving authority. And it can also be seen, from the procedural statutes surrounding SDCL 11-2-61.1, the writ must be directed to the board of adjustment. *See* SDCL 11-2-61 – 11-2-65. The writ of certiorari would have no legal effect unless it was directed to the entity making the decision on the issuance of a conditional use permit.

SCV may again argue because SDCL 11-2-61.1 uses the term "approving authority" rather than "board of adjustment", that any entity, specified by the county pursuant to SDCL 11-2-17.3, may hear and decide conditional use permits. As discussed earlier, that argument is unavailing. Additionally, SDCL 11-2-61.1 does not operate independently. SDCL 11-2-61.1 is read *in pari materia* with the surrounding statutes. *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 16, 709 N.W.2d 824, 831.

> The object of the rule of *[in] pari materia* is to ascertain and carry into effect the intention of the legislature. It proceeds upon the supposition that the several statutes [are] governed by one spirit and policy, and [are] intended to be consistent and harmonious in their several parts and provisions.

Seeba, 2006 S.D. 7, ¶ 15, 709 N.W.2d 824 at 831 (citations omitted). The statutes surrounding SDCL 11-2-61.1 must be interpreted in harmony because they relate to the same purpose or objective, and in each instance, direct the writ to the board of adjustment.

In fact, SDCL 11-2-61.1 cannot operate without the adjacent statutes as they provide necessary procedural requirements to effectuate the writ.

> The procedural framework for a challenge to a board's decision to issue or deny a CUP originates from the South Dakota Legislature. SDCL 11-2-61 provides that '[a]ny person ... *aggrieved by any decision of the board of adjustment* may present to a court of record a petition ... setting forth that the decision is illegal, ... specifying the grounds of the illegality.' 'Any

> appeal of a decision ... denying a conditional use permit shall be brought under a petition, duly verified, for a writ of certiorari directed to the approving authority and ... shall be determined under a writ of certiorari standard regardless of the form of the approving authority.' SDCL 11-2-61.1.

Miles v. Spink Cnty. Bd. of Adjustment, 2022 S.D. 15, ¶ 30, 972 N.W.2d 136, 147 (emphasis added). Standing to utilize SDCL 11-2-61.1 may only be established by a person "aggrieved by any decision of the board of adjustment." SDCL 11-2-61.[3] *Sierra Club*, 2021 S.D. 28, ¶ 13, 959 N.W.2d at 615, 620 (reviewing SDCL 11-2-61 and SDCL 11-2-61.1 in conjunction for standing). SDCL 11-2-61 also establishes the time for presentation of the writ as "thirty days after thirty days after the filing of the decision in the office of the *board of adjustment*." (emphasis added). SDCL 11-2-62 provides, in part, "[u]pon presentation *of the petition*, the court may allow a writ of certiorari directed to the *board of adjustment*…" (emphasis added). And further, under this process, "costs and attorneys' fees are not allowed against the *board of adjustment* unless…" SDCL 11-2-65. SDCL 11-2-61.1 operates as a catch-all in conjunction with SDCL 11-2-61-11-2-

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[3] As stated in *Huber v. Hanson Cnty. Plan. Comm'n*,

> SDCL 11-2-61 provides, "Any person or persons, jointly or severally, or any taxpayer, or any officer, department, board, or bureau of the county, *aggrieved by any decision of the board of adjustment* 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." SDCL 11-2-61.1 became effective shortly after Hubers filed their Application in this case. SDCL 11-2-61.1 also reflects a legislative intention that an "appeal of a decision relating to the grant or denial of a conditional use permit shall be brought under a petition, duly verified, for writ of certiorari[.]"

2019 S.D. 64, fn. 2, 936 N.W.2d 565, 570 (emphasis added).

65. Notwithstanding any law to the contrary, the appeal must be by writ of certiorari directed to the board of adjustment, regardless of the form the board of adjustment takes. As applied to this case, where the Lawrence County Commission sits as the board of adjustment pursuant to statutory authority, it cannot be seriously argued the now-existing process anticipates a decision regarding a conditional use permit being issued by any entity other than the board of adjustment.

4. Statutory and Constitutional Protections Related to the Referendum Process

As discussed above, conditional use permits must be issued by the board of adjustment. And those decisions are not subject to referendum. *Bechen*, 2005 S.D. 93, ¶ 28, 703 N.W.2d at 669. Even if this Court were to disagree with the County's assertion that Lawrence County, sitting as the Board of Adjustment, issues conditional use permits, SCV cannot utilize the referendum process to put Ord. #24-05 to a public vote. The ability to use initiative to alter a county's zoning process was closely reviewed in *Schafer*, 2006 S.D. 106, ¶ 12, 725 N.W.2d at 241, 246.

In *Schafer*, the petitioners sought, by initiative, to amend Deuel County's ordinances in three ways: 1) to amend special exceptions; 2) to grant "the right of referendum on legislative decisions of the board of adjustment, zoning board, or county commissioners"; and 3) amend setback requirements. *Schafer*, 2006 S.D. 106, ¶ 1, 725 N.W.2d at 241, 243. Ultimately, the Court determined the initiative could not be put to a vote because the proposed ordinance would violate due process and exceed the authority provided by the Legislature to the county. *Schafer*, 2006 S.D. 106, ¶ 1, 725 N.W.2d at 241, 243. SCV's attempt to refer Ord. #24-05 should fail for the same reason. The difference here is that SCV is attempting to prevent Lawrence County from enacting an

ordinance which complies with State law, and ensures the due process rights discussed in *Schafer* are met.

In this case, Ord. #24-05 clarifies county ordinance in a manner to conform to State law. In accordance with State law, Ord. #24-05 places the review of conditional use permits with the County Commission sitting as the Board of Adjustment. Under *Bechan*, a conditional use permit issued by a board of adjustment is not subject to referendum. SCV's challenge to Ord. #24-05 is an attempt to veto the decisions of Lawrence County, with regard decisions on conditional use permits, through the referendum process. SCV, however, cannot utilize the referendum process for this purpose.

In *Kirschenman*, the Court discussed whether the issuance of a particular conditional use permit, by the county, could be subject to referendum. *See generally*, *Kirschenman v. Hutchinson Cnty. Bd. of Comm'rs*, 2003 S.D. 4, ¶ 7, 656 N.W.2d 330, 333 (overruled, in part, by *Bechen*, 2005 S.D. 93, ¶ 7, 703 N.W.2d 662). The Court, assuming a right of referendum existed for county decisions under the South Dakota Constitution, turned the analysis to whether the decision of the county commission was administrative or legislative. *Kirschenman*, 2003 S.D. 4, ¶ 3, 656 N.W.2d 330 at 332.[4] In finding the decision was legislative, and therefore subject to referendum, the Court relied heavily on the fact that there were "no standards or conditions" to guide the issuance of the permit and, as such, the decision lacked "objective criteria."

[4] The Court in *Kirschenman* also applied a "liberal rule of construction to permit citizens to exercise their powers of referendum" citing *Wang v. Patterson,* 469 N.W.2d 577, 578 (S.D.1991), which discussed a referendum at the municipal level of government. As discussed in *Bechen*, and in *Wang*, the power of referendum at the municipal level is derived from the South Dakota Constitution. The right of referendum at the county level, on the other hand, is not constitutional, it is constrained by statute. *Bechen*, 2005 S.D. 93, ¶ 24, 703 N.W.2d 668.

Following *Kirschenman*, decided in 2003, the Legislature enacted SDCL 11-2-17.3. (2004 S.D. Sess. Laws Ch. 103, § 3). For the issuance of a conditional use permit, SDCL 11-2-17.3 now requires a review of the standards and criteria the *Kirschenman* Court found lacking. Pursuant to SDCL 11-2-17.3, the county ordinance must specify:

> …each category of conditional use requiring approval, the zoning districts in which a conditional use is available, the criteria for evaluating each conditional use, and any procedures for certifying approval of certain conditional uses,

and the county "shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and the relevant zoning districts." The board of adjustment is empowered to "hear and determine" the conditional uses authorized under this statute. SDCL 11-2-53(3). Furthermore, as part of the Legislature's larger plan, any person "aggrieved" by the decision on the issuance of a conditional use permit may appeal to the Circuit Court by means of writ of certiorari. *See* SDCL 11-2-61-11-2-65.

The statutes above not only obligate the county to follow statutory procedures regarding the issuance of conditional use permits, the statutes also establish the right to judicial review of those decisions for applicants and citizens of Lawrence County.[5] Because these obligations are statutory directives to the county from the Legislature, the county may not alter them or adopt contradictory ordinances. *Schafer*, 2006 S.D. 106, ¶

[5] It also cannot be said that all citizens in opposition to the issuance of a specific conditional use permit would oppose the permit in its entirety as is the nature of a referendum. Instead, they may be opposed to certain conditions, or they may request additional considerations. SDCL 11-2-65, which allows the Circuit Court, upon review, to "…reverse or affirm, wholly or partly, or may modify the decision…" upon appeal, would be eliminated by referendum.

15, 725 N.W.2d at 248. As the Court's analysis in *Schafer*, on this issue, is controlling for much of the argument, it is quoted in full:

> In this case, Petitioners seek to enact legislation which would amend the special exceptions provision of Section 278 by eliminating the current requirement that special exceptions are subject to approval by the Board of Adjustment and are quasi-judicial administrative in nature. Furthermore, Petitioners proposed legislation would add a new section 508 which would grant Deuel County residents the right of referendum on legislative decisions of the board of adjustment, zoning board, or county commissioners. Currently, the law does not provide for the right of referendum on decisions made by the board of adjustment which are quasi-judicial administrative decisions. SDCL 11–2–53; SDCL 7–18A–15; *see also Bechen,* 2005 SD 93, ¶ 18, 703 N.W.2d at 666 ("We must conclude that the legislature intended the referendum provisions of SDCL 7–18A–15 to cover only the actions of the county commissions and not other county boards such as the county board of adjustment."). In addition, only legislative decisions are subject to referendum. SDCL 7–18A–15.1. Petitioner's proposed initiatives, in essence, would define decisions that are quasi-judicial administrative as legislative and thereby subject to referendum. Further, enactment of Petitioner's initiatives would eliminate the requirement of approval from the Board of Adjustment for special exceptions.[2] Petitioners, through the use of initiatives, are attempting to enact amendments which the county would not have the authority to enact under current state statutes. Because one of the basic limitations on the right of initiative is that the proposed ordinance or amendment must be within the power of the county board to adopt, Petitioners proposed use of initiatives cannot be sustained. *Heine Farms,* 2002 SD 88, ¶ 16, 649 N.W.2d at 601 (quoting *Custer City v. Robinson,* 79 S.D. 91, 93, 108 N.W.2d 211, 212 (1961)).

Schafer, 2006 S.D. 106, ¶ 16, 725 N.W.2d 241, 249; *Id.* at fn. 2 (board of adjustment serves an essential purpose in protecting constitutional rights). As noted above, County initiated measures which would operate contrary to State statutes are "invalid as they are not within the power of the county board to adopt." *Id.* Likewise, a referendum which performs the same function – preventing a county from complying with above obligations – is likewise invalid.

Similar to *Schafer*, SCV's position would also bypass procedures that are designed to protect constitutional rights. "Zoning, by its nature, restricts and regulates use of land which would otherwise be lawful and proper." *Schafer*, 2006 S.D. 106, ¶ 11, 725 N.W.2d at 245. In order for a zoning regulation, such as the grant or denial of a conditional use permit, to be valid, must not result in arbitrary or capricious decisions and must meet due process requirements. *Schafer*, 2006 S.D. 106, ¶¶ 13-14, 725 N.W.2d at 247 ("political subdivisions must scrupulously comply with statutory requirements"). Zoning by initiative is not proper when it would "bypass constitutionally required protections" found in SDCL Ch. 11-2. *Id.* at ¶ 14. *See Schafer*, 2006 S.D. 106, ¶ 14, 725 N.W.2d 241, 247, fn.1 (compiling cases). A referendum of a conditional use permit would completely negate the county's review of the objective criteria in SDCL 11-2-17.3 and any determination that the conditional use was in conformance with the county's comprehensive plan.

And since *Schafer*, this Court has had additional opportunities to re-address the definition of a quasi-judicial administrative decision – which is not subject to referendum. In *Dep't of Game, Fish & Parks v. Troy Twp.*, the Court recognized, "[s]ince the 1970s, however, some of this Court's decisions have blurred the distinction between quasi-judicial and non-quasi-judicial acts." *Dep't of Game, Fish & Parks v. Troy Twp.*, 2017 S.D. 50, ¶ 13, 900 N.W.2d 840, 846. The Court went on to clarify:

> Administrative action is quasi-judicial if it 'investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist' rather than 'look[ing] to the future and chang[ing] existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.' ...Or as one commentator has remarked: 'Perhaps as good a criterion as any for determining what is judicial is merely to compare the action in question with the ordinary business of courts: that which resembles what courts customarily do is

judicial, and that which has no such resemblance is nonjudicial.' *Troy Twp.*, 2017 S.D. 50, ¶ 21, 900 N.W.2d at 840, 849. In *Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Commissioners*, 2017 S.D. 87, ¶ 26, 905 N.W.2d 344, 352, the Court analogized the county commission's role in taking administrative quasi-judicial action to the administrative quai-judicial action in issuing a conditional use permit. Fn. 5.

As discussed in *Troy Twp.*, that makes sense. The county must create and pass a zoning plan in conformance with Chapter 11-2 and SDCL 11-2-17.3. It must then examine specific criteria, applicable to each individual application, before reaching a decision on whether to issue a conditional use permit under the current law. This is the exact factual inquiry in which a court would engage to reach a decision. It is not a legislative activity which puts into effect a new rule to which all members of the public are beholden. The analysis is the same for county commissions as it is for boards of adjustment. It makes no more sense to refer a county decision on this matter than it does to refer a decision from a court of law. That is the purpose of appeal.

Troy Twp. and *Croell Redi-Mix* (both 2017), were decided, and SDCL 11-2-17.3 was enacted, after *Kirschenman* (2003). Not only was *Kirschenman* overruled by *Bechen* with regard to the referability of conditional use permits issued by the board of adjustment, given the enactment of SDCL 11-2-17.3 and the guidance from subsequent case law, it is becoming clear that the issuance of conditional use permits, from any form of county government, are administrative quasi-judicial and thus not subject to referendum.

SCV's position is, therefore, untenable. Without a review of the criteria set forth in SDCL 11-2-17.3, or the ability to seek judicial review in case of denial, a successful

referendum provides an arbitrary and capricious result which "bears no relationship to the police power" necessary to restrict land use. *Schafer*, 2006 S.D. 106, ¶ 12, 725 N.W.2d at 246 (citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976)). "Such actions may constitute a taking or be void as unconstitutional." *Schafer*, 2006 S.D. 106, ¶ 14, 725 N.W.2d at 247. Not only would a referendum on this issue be void as a result of contradicting State law, "the use of a person's property to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines" is repugnant to the due process clause of the Fourteenth Amendment. *Schafer*, 2006 S.D. 106, ¶ 12, 725 N.W.2d at 246 (citing *Cary v. Rapid City*, 1997 SD 18, ¶¶ 19–22, 559 N.W.2d 891, 895). Like zoning by initiative, the Legislature would not allow an "ad hoc" scheme that zoning by referendum would establish. *Schafer*, 2006 S.D. 106, ¶ 14, 725 N.W.2d at 247. For that very reason, the Legislature has put into effect a comprehensive scheme for the issuance of conditional use permits. The county has no authority to ignore the review required by SDCL 11-2-17.3 or do away with the appeals process. A referenda, which odes the same, must also fail.

Certainly, the Legislature has taken a circuitous route since 2003, in completing its legislative plan regarding the issuance of conditional use permits. With the current legislation, read as a whole, it has completed that package. As illustrated above, the passage of Ord. #24-05 was an administrative decision which merely put into execution "a plan already adopted by … the Legislature." SDCL 7-18A-15. As such, it is not subject to referendum. For much the same reason, Lawrence County was required to pass the amendment to comply with State law and protect due process rights of landowners.

II. THE CIRCUIT COURT DID NOT ERR IN GRANTING THE COUNTY'S MOTION FOR DECLARATORY RELIEF

As described in more detail under issue one, the Lawrence County Commission has, for any timeframe relevant to this appeal, acted as the Board of Adjustment. In summary, the however, "county commission could either appoint a separate board of adjustment or the county commission could itself sit as the board of adjustment. *Bechen*, 2005 S.D. 93, ¶ 10, 703 N.W.2d at 662, 665 (citing SDCL 11–2–49 and 11–2–60). In this case, the Lawrence County Commission acts as the Board of Adjustment. This does not mean the Lawrence County Commission issues conditional use permits. Instead,

> … when a county commission decides not to appoint a separate board of adjustment, but elects to sit as the board of adjustment, this does not mean that the county commission and the board of adjustment become a single entity. While the members of each board may be identical, each board remains a separate legal entity with its own distinct powers and responsibilities under state law.

Bechen, 2005 S.D. 93, ¶ 11, 703 N.W.2d at 662, 665. By law, the County Commission, sitting as the Board of Adjustment performs "…*all* the duties and exercise[s] the powers of the board of adjustment." SDCL § 11-2-60 (emphasis added). As of the 2015 amendment to SDCL 11-2-53, this includes the power of the County Commission, sitting as the Board of Adjustment, to "[h]ear and determine conditional uses…" SDCL 11-2-53(3). To make these decisions, the Board of Adjustment must follow the requirements of SDCL 11-2-17.3

Because the power of the Board of Adjustment derives from the Legislature, not from the actions or inactions of the county government, the County Commission, sitting as the Board of Adjustment, has been vested with the authority, by operation of law, to

decide and issue conditional use permits. And because the authority to hear and decide conditional use permits was imposed by State law on an existing entity – the Lawrence County Commission, sitting as the Board of Adjustment – Lawrence County did not need to amend its ordinances to carry the provision into effect. Nonetheless, the County does have a responsibility to ensure its ordinances conform to State law. Accordingly, Lawrence County amended its ordinances.

CONCLUSION

Based on the arguments and authorities provided above, Lawrence County respectfully requests this Court affirm the Circuit Court's decision in all respects.

REQUEST FOR ORAL ARGUMENT

Appellees request oral argument.

Dated: October 31, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellee, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 9,703 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellee. The original Brief for Appellee and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*
Richard M. Williams

CERTIFICATE OF SERVICE

I hereby certify on October 31, 2025, the **BRIEF OF APPELLEES** was filed through EFile SD File and Serve Portal and the original plus one copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
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and the **BRIEF OF APPELLEES** was served by electronic mail and mailed by U.S. Mail to the following:

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Richard M. Williams

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SAVE CENTENNIAL VALLEY ASSOCIATION, INC. AND CHARLES BROWN,

Appeal No. 31091

Petitioners/Appellants,

vs.

BRENDA MCGRUDER, in her capacity as Lawrence County Auditor; COUNTY OF LAWRENCE, SOUTH DAKOTA; BOARD OF COMMISSIONERS OF LAWRENCE COUNTY, SOUTH DAKOTA, RICHARD SLEEP, RICK TYSDAL, BRANDON FLANAGAN, BOB EWING, AND ERIC JENNINGS, in their official capacity,

Respondents/Appellees.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

The Honorable Eric Strawn
Circuit Court Judge

Notice of Appeal filed on May 15, 2025

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. SDCL § 11-2-53(3) Does Not Abrogate County Discretion Affirmatively Granted Under SDCL § 11-2-17.3

The County argues SDCL § 11-2-53 was amended by the South Dakota Legislature in response to confusing and conflicting laws requiring the board of adjustment to sit as the approving authority for CUPs. *Appellee's Brief* at 12-18. SDCL § 11-2-17.3 explicitly states that a county zoning ordinance "shall specify the approving authority" for conditional use permits, along with other requirements such as categories of conditional use, zoning districts, and evaluation criteria. This statutory language is unambiguous and mandatory, as evidenced by the use of the term "shall", which "manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL § 2-14-2.1.

The Legislature has placed the power in counties to choose the approving authority for CUPs through this specific statutory provision. *Tibbs v. Moody Cty. Bd. of Comm'rs*, 2014 S.D. 44, ¶ 4, 851 N.W.2d 208, 211. This authority has been consistently recognized by this Court, which has noted that "the South Dakota Legislature empowered individual counties to not only enact their own zoning ordinances, but also to permit conditional uses of real property that might otherwise be contrary to those zoning ordinances." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 11, 855 N.W.2d 836, 839.

The 2015 amendment to SDCL § 11-2-53(3) states that the board of adjustment "may" hear and determine conditional uses "as authorized by the zoning ordinance." This language is significant for two reasons. First, the statute uses the permissive term

"may" rather than the mandatory "shall". While in certain instances, "may" can have the effect of "must", this occurs only when legislative intent clearly indicates such an interpretation. *Matter of Groseth Intern., Inc.*, 442 N.W.2d 229, 231 (S.D. 1989). No such intent is evident here, particularly given the continued existence of SDCL § 11-2-17.3. Second, the board of adjustment's authority is explicitly conditioned on what is "authorized by the zoning ordinance". SDCL § 11-2-53(3). This language directly ties back to SDCL § 11-2-17.3, which requires counties to "specify the approving authority" in their zoning ordinances. The conditional language in SDCL § 11-2-53(3) thus preserves rather than eliminates county discretion.

A. Principles of Statutory Construction Support County Discretion

A fundamental principle of statutory construction is that "statutes of specific application take precedence over statutes of general application". *Wharf Res. (USA) v. Farrier*, 1996 S.D. 110, ¶ 42, 552 N.W.2d 610, 617. Additionally, "when the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute." *Faircloth v. Raven Indus.*, 2000 S.D. 158, ¶ 18, 620 N.W.2d 198, 203 (quoting *Dahn v. Trownsell*, 1998 S.D. 36, ¶ 14, 576 N.W.2d 535, 539).

SDCL § 11-2-17.3 is a statute of specific application regarding the designation of the "approving authority" for conditional use permits. It directly addresses a county's duty to specify this authority in its zoning ordinances. *Jensen v. Lincoln Cty. Bd. of Comm'rs*, 2006 S.D. 61, ¶ 13, 718 N.W.2d 606, 611. In contrast, SDCL § 11-2-53(3) is a statute of general application regarding the powers of boards of adjustment. Under established principles of

statutory construction, the specific provisions of SDCL § 11-2-17.3 should prevail over the general provisions of SDCL § 11-2-53(3).

Further, consistent with a harmonious reading of the statutes, discretion in choosing the approving authority of CUPs is left to the county. The County argues SDCL § 11-2-17.3 and SDCL § 11-2-53(3) are confusing and conflict with one another. *Appellee's Brief* at 12-18. Essentially arguing the amendment to SDCL § 11-2-53(3) was an implicit repeal of the discretion afforded in SDCL §11-2-17.3 by the Legislature. In applying the principles of statutory construction, this Court has recognized that when multiple statutes may apply to the same subject matter, "it is the responsibility of the court to give a reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable." *Orthopedic Inst., P.C. v. Sanford Health Plan, Inc.*, 2024 S.D. 9, ¶ 19, 3 N.W.3d 407, 414 (quoting *Karlen v. Janklow*, 339 N.W.2d 322, 323 (S.D. 1983)). "Repeal by implication will be indulged only where there is a manifest and total repugnancy." *Id.* (quoting *Karlen*, 339 N.W.2d at 323). "If, by any reasonable construction, both acts can be reconciled, they should be." *Id.* (quoting *Karlen,* 339 N.W.2d at 323).

The most harmonious reading of these statutes is that SDCL § 11-2-17.3 grants counties the authority to specify the approving authority for CUPs, while SDCL § 11-2-53(3) clarifies that boards of adjustment may serve as that authority when so designated by county ordinance. This interpretation gives effect to both statutes without creating conflict.

B. The 2015 Amendment to SDCL § 11-2-53 Was Not Intended to Eliminate County Discretion

When considering a subsequent amendment, the Court "must decide whether the purpose of the amendment was to clarify or alter the law." *Nine, Inc. v. City of Brookings*, 2011 S.D. 16, ¶ 11, 797 N.W.2d 73, 76. Several factors indicate that the 2015 amendment to SDCL § 11-2-53(3) was not intended to eliminate county discretion under SDCL § 11-2-17.3.

First, the Legislature did not repeal or modify SDCL §11-2-17.3 when it amended SDCL § 11-2-53(3) in 2015. The County argues that the amendment to SDCL § 11-5-53(3), was essentially in direct response to this Court's 2014 decision in *Tibbs v. Moody Cnty. Bd. Of Comm'rs*, wherein this Court explicitly held SDCL § 11-2-17.3 gives counties the power to designate the approving authority for CUPs. 2014 S.D. 44, ¶ 4, 851 N.W.2d 208, 211. However, if the Legislature had intended to make boards of adjustment the exclusive authority for CUPs, it could have amended the statute this Court explicitly recognized as granting discretion (SDCL § 11-2-17.3) to reflect this change, not make an amendment to SDCL § 11-2-53 to include permissive language. The continued existence of SDCL § 11-2-17.3 without relevant modification strongly suggests that the Legislature intended to preserve county discretion, as well as the "different appeal procedure depending on which entity approves the permit." *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶¶ 10-11, 772 N.W.2d 643, 647-48. Second, the permissive language in SDCL § 11-2-53(3) ("may" and "as authorized by the zoning ordinance")

indicates that the amendment was not intended to mandate that boards of adjustment serve as the approving authority for all CUPs.

Conclusion

Based on the foregoing it is clear that the Legislature never intended to abrogate the discretion granted by SDCL § 11-2-17.3. By adopting the County's interpretation of the statutes, this Court would be repealing SDCL §11-2-17.3's discretion by assuming the Legislature intended a result it could have easily undertaken through an amendment to SDCL §11-2-17.3 itself.

The Order Granting Judgment on the Pleadings and Declaratory Relief should be vacated and this case remanded to the Circuit Court for an Order granting SCVA's Petition for Writ of Mandamus.

Dated this 1st day of December, 2025.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

BY: /s/ *Matthew J. Lucklum*

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing Reply Brief is typed in proportionally spaced typeface in Equity A Tab 12 point. The word processor used to prepare this Reply Brief indicated that there are a total of 1,185 words in the body of the Reply Brief.

/s/ *Matthew J. Lucklum*
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CERTIFICATE OF SERVICE

I certify that, on December 1, 2025, I served copies of this document upon each of the listed people by the following means:

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