

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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APPEAL NO. 31317

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STEVE AND MONICA ZIRBEL  
Appellants,

v.

DEUEL COUNTY COMMISSIONERS,  
Appellee.

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APPEAL FROM THE CIRCUIT COURT  
THIRD CIRCUIT  
DEUEL COUNTY, SOUTH DAKOTA

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HONORABLE DAWN ELSHERE  
Presiding Judge

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APPELLANTS' BRIEF

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## **REQUEST FOR ORAL ARGUMENT**

Appellants Steve and Monica Zirbel respectfully request the privilege of being heard on oral argument on all of the issues raised in this appeal.

### **STATEMENT REGARDING ABBREVIATION AND CITATION CONVENTIONS**

1. "Zirbels" – Appellants Steve and Monica Zirbel
2. "County" - Deuel County Board of Commissioners
3. "East Parcel" – The easternmost parcel owned by the Zirbels, legally described as:  
  
Government Lot 6 in Altmont Township, Section 7,  
Township 116 North, Range 48 West of the 5<sup>th</sup> P.M.,  
Deuel County, South Dakota,  
  
and outlined in red on AR. 40, visually depicted on AR. 1514
4. "West Parcel" – The westernmost parcel owned by the Zirbels, legally described as  
  
Government Lot 8 in Altmont Township, Section 1,  
Township 116 North, Range 49 West of the 5<sup>th</sup> P.M.,  
Deuel County, South Dakota,  
  
and outlined in red on AR. 40, visually depicted as the peninsula on AR. 1499.
5. "Properties" – the East Parcel and the West Parcel, collectively.
6. "Dakota Ridge" – Dakota Ridge, Inc., a South Dakota Corporation with a principal office located at 47618 173<sup>rd</sup> St., Clear Lake, South Dakota 57226. Owners are Jim Dailey (deceased) and Ryan Dailey. Dakota Ridge owns the servient tenement at issue with respect to the West Parcel.
7. "Moe" – William Moe and Julie Moe, husband and wife. Owners of one of the servient tenements with respect to the East Parcel.

8. “Haas” – Andrew Haas, and Haas Family LLC, a South Dakota Limited Liability Company with a principal office located at 47763 173<sup>rd</sup> St., Clear Lake, South Dakota 57226 – Owner of one of the servient tenements with respect to the East Parcel.
9. “USFWS” – United States Fish and Wildlife Service – Owner of one of the servient tenements with respect to the East Parcel.
10. “Interested Parties” – Dakota Ridge, Moe, Haas, and USFWS
11. “AR” – References to the appellate record followed by applicable page number(s).

## **JURISDICTIONAL STATEMENT**

Zirbels seek appellate review of the Memorandum Decision, filed November 7, 2025, and the Order, filed November 13, 2025, by the Deuel County Circuit Court, Third Judicial Circuit, Honorable Judge Dawn Elshere. The Circuit Court appeal arose from the Zirbels’ appeal of the Final Decision from the Deuel County Commissioners, Regular [sic] Meeting Minutes, dated April 9, 2025, published on April 30, 2025, pursuant to SDCL § 7-8-27. This Court has jurisdiction of the appeal pursuant to SDCL § 15-26A-3.

## **STATEMENT OF THE ISSUES**

### **I. Whether the Circuit Court erred in denying Zirbels’ request for a trial de novo under SDCL § 7-8-30.**

The Circuit Court determined that the Zirbels were not entitled to a trial de novo because the standard of review for the County’s decision was based on an abuse of discretion, notwithstanding the language of SDCL § 7-8-30.

- *MRose Dev. Co., LLC v. Turner Cnty. Bd. Of Cnty. Comm’rs*, 2024 SD 28, 7 N.W.3d 685

- *Carmody v. Lake Cnty. Bd. Of Comm'rs*, 2020 SD 3, 938 N.W.2d 433
- *Dep't of Game, Fish & Parks v. Troy Twp.*, 2017 SD 50, 900 N.W.2d 840
- SDCL § 7-8-30

**II. Whether the Circuit Court erred in finding that the section line right-of-way at issue was properly vacated in 1959.**

The Circuit Court determined that the section line right-of-way at issue was vacated.

- SDCL ch. 31-3
- SDCL § 31-3-8
- SDCL § 31-3-12

**III. Whether the Circuit Court erred when it failed to apply the statutory procedures of SDCL Chapter 31-22 to the Zirbels' isolated tract(s).**

The Circuit Court affirmed the decision of the County. In doing so, neither the Circuit Court nor the County: (1) considered the convenience of the parties as expressly required by SDCL ch. 31-22, nor (2) selected easement locations that minimized intrusion or promoted cost-effectiveness, instead placing the easements in the most intrusive and least economical locations.

- *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366 (SD 1978)
- SDCL ch. 31-22

**IV. Whether the Circuit Court erred in affirming the County's assessment of damages under SDCL Chapter 31-22.**

The Circuit Court affirmed the County's assessment of damages pursuant to SDCL ch. 31-22. The Circuit Court held in favor of the County's assessment with respect to the diminution in land value and fencing costs. The Circuit Court reversed the County's decision to assess the appraisal costs on the Zirbels.

The damages imposed are arbitrary, unreasonable, and unsupported by the evidence.

- SDCL § 31-22-4
- SDCL § 31-22-7
- SDCL ch. 43-23

**V. Whether the County's actions constitute a "government taking."**

The Circuit Court affirmed the County's decision regarding the assessment of damages which the Zirbels argued created a "substantial and burdensome interference by the government with a private property owner's use of his property."

- *Donohoe Constr. Co. v. Montgomery Cty. Council*, 567 F.2d 603, 608 (4<sup>th</sup> Cir. App. 1977)
- *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)
- *State v. Legacy Land Co.*, 2023 SD 58, 998 N.W.2d 94

**VI. Whether the Circuit Court erred by failing to determine that a conflict of interest existed between Commissioner Grabow and interested party Jim Dailey/Ryan Dailey.**

The Circuit Court declined to address the issue of whether or not a conflict of interest was present due to the lack of record on the issue.

- SDCL § 6-1-17.

**STATEMENT OF CASE**

This appeal arises from proceedings in the Circuit Court of Deuel County, the Honorable Judge Dawn Elshere, presiding.

In November 2023, Steven and Monica Zirbel applied to the Deuel County Board of Commissioners for access easements under SDCL chapter 31-22 after being denied access to two parcels abutting Lake Alice in Altamont Township, Deuel County. AR 40–45.<sup>1</sup> On December 12, 2023, the County determined the parcels were not isolated, finding Lake Alice a public highway under chapter 31-22. AR 50.

The Zirbels appealed to the Circuit Court. AR 51. Following briefing and hearing, the Circuit Court reversed and remanded on April 12, 2024, holding the County's determination "beyond comprehension" and directing compliance with

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<sup>1</sup> Throughout this brief, the Zirbels rely largely on attorney work product for record citations because the County failed to record meetings held on December 5 and 12, 2023, and June 20, 2024. At those meetings, the Zirbels presented testimony and evidence concerning the property purchase, planned residential development, issues with access, and other matters central to this appeal. The absence of recordings, coupled with the Circuit Court's denial of a trial de novo (see Section I), has left an exceedingly limited record for review.



SDCL ch. 31-22, including creation of a clear record in further proceedings. AR 84–85; AR 1618.

On remand, the County held meetings on June 20, 2024, and April 9, 2025, and issued a decision on April 30, 2025, ultimately establishing easement routes and assessing damages of \$270,647.20 against the Zirbels in order to pay for this access. AR 708–712; AR 826–867.

The Zirbels appealed again to the circuit court on May 1, 2025. AR 120–126. They requested de novo review under SDCL § 7-8-30. AR 727. After a telephonic hearing on July 9, 2025, the circuit court ruled on July 15, 2025, that the County’s decision was non-quasi-judicial, subject only to abuse-of-discretion review, and limited proceedings to a one-hour hearing without evidence. AR 1429.

Following a September 18, 2025, hearing, the Circuit Court affirmed in part and reversed in part the County’s decision in its November 7, 2025, Memorandum Decision. AR. 1518-1520. On November 13, 2025, the Circuit Court entered an Order incorporating the Memorandum Decision. AR. 1521-1522.

On December 4, 2025, the Zirbels timely noticed their appeal to this Court. AR. 1529-1530.

## **STATEMENT OF FACTS**

Steven and Monica Zirbel are a happily married, once retired, couple that, in 2023, decided to purchase two parcels of land in Deuel County, South Dakota to live out their lifelong dream—erecting a home on the shores of Lake Alice where they could enjoy the lake’s amenities, wildlife, and scenery. Unfortunately, that

dream has turned into a nightmare. Rather than realizing their dream, the Zirbels have not been able to step foot on their newly acquired Properties since their purchase. Due to the issues laid out herein, the Zirbels, at the hands of the County, have been stripped of their constitutional and fundamental right to use and enjoy their property. Steven Zirbel was forced to come out of retirement solely to pay for the costs of this litigation to gain access to the Properties.

The Zirbels are like any South Dakota couple, they worked tirelessly their entire lives to one day be able to purchase a lake home to live out the rest of their days together in peace and harmony. In 2023, the Zirbels were on the cusp of realizing that dream. The Zirbels purchased two parcels in Deuel County, South Dakota, that abut Lake Alice (i.e., the East Parcel and the West Parcel). AR. 40. Prior to purchasing the Properties, the Zirbels contacted the Deuel County Register of Deeds to question the validity of the 478<sup>th</sup> Avenue section line right-of-way that traverses between Sections 7 and 12 in the Altamont Township. AR. 41. The Deuel County Register of Deeds could not locate any document vacating the section line right-of-way. The Register of Deeds provided the Zirbels with a copy of the County's plat book, displaying the existence of the section line right-of-way. *Id.* The Zirbels believed that at a minimum they had access to the East Parcel via the section line right-of-way. With this apparent confirmation, the Zirbels proceeded with the purchase of the Properties.

A short time thereafter, the Zirbels went to inspect their newly acquired Property. AR. 41. The Zirbels utilized a marked, grass path that extended north of

the 174<sup>th</sup> Street, 478<sup>th</sup> Avenue, intersection along what the Zirbels understood to be a right-of-way. *Id.* While they were inspecting the Properties, the Zirbels were met by the Deuel County Sheriff. The Sheriff served the Zirbels with a Notice of Trespass, informing them that the section-line right-of-way had been vacated and that they were prohibited from accessing their Properties via that route. *Id.*

Seeking clarity, the Zirbels retained Brinkman Land Surveying to survey the area and further determine whether the section line right-of-way was vacated. AR. 41. The resulting survey, AR. 44-45, concluded that the right-of-way was not vacated. *Id.* (*see also* AR. 1424-1426; Affidavit of Brandon Huppler confirming that no record of vacation exists). The surveyor then staked the right-of-way accordingly.

The Zirbels provided the survey to Deuel County State's Attorney Craig Evenson for review, believing it would confirm their lawful access to the East Parcel along the section line. Instead, Mr. Evenson issued an Interoffice Memorandum dated October 24, 2023, concluding that the right-of-way was vacated in 1959.<sup>2</sup> AR. 33-39. Faced with this unexpected determination and without further recourse, the Zirbels retained counsel to pursue access to the Properties.

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<sup>2</sup> All documents referenced by Attorney Evenson in preparing the Interoffice Memorandum were produced by the Moe family, owners of a neighboring property and one of the Interested Parties to this action. The documents, to this day, have not been verified, produced to all parties, or introduced into evidence.

Without access via the 478<sup>th</sup> Avenue section line, the Zirbels' Properties constitute "Isolated Tracts" as defined by SDCL § 31-22. After review of SDCL § 31-22, the Zirbels initially attempted to resolve the issues of access with neighboring landowners. The seller of the Properties was able to previously access the Properties along the routes proposed by the Zirbels. The Zirbels offered the Interested Parties a sum of money for continued access via these same routes. These attempts were unsuccessful. On November 8, 2023, the Zirbels wrote the County a letter requesting relief under SDCL § 31-22. AR. 40-45. The request was simple: because the Properties are inaccessible, the County must establish access easements across neighboring properties to give the Zirbels access. After receipt of the letter, the County held a Public Hearing related to the letter on December 5, 2023. AR. 46. The County postponed the decision with respect to the Zirbels' request. *Id.* On December 12, 2023, the County held a Special Meeting, without notice to the Zirbels, and determined that the Properties were not isolated. AR. 50. The County determined that *Lake Alice* was a "public highway" for purposes of SDCL ch. 31-22. *See* Appellee Brief AR. p 54-65. Given the impracticability of this ruling, the Zirbels appealed the County's decision to the Circuit Court pursuant to SDCL § 7-8-27.

The parties filed briefs and a hearing was held on April 8, 2024. After hearing argument, the Circuit Court concluded that the County's contention that Lake Alice constituted a passable public highway for purposes of SDCL ch. 31-22 was "beyond comprehension." AR. 1618. The Court accordingly reversed the

decision and remanded the matter to the County for further proceedings. AR. 84-85. Noting the inadequacy of the record developed by the County, the Circuit Court, in addition to remanding the matter, directed the County to establish a clear record in all further proceedings. AR. 85.

Following the decision by the Circuit Court, the County scheduled a Special Meeting on June 20, 2024, to meet at the Properties with the Zirbels and the Interested Parties. AR. 820. At the Special Meeting, the County disregarded the Circuit Court's requirement of establishing a clear record. No audio or video recording was made, and no stenographer was present. The Zirbels, through counsel, promptly notified the County of this deficiency. Notwithstanding this objection, the County proceeded with the June 20, 2024, meeting.

To begin the meeting, the County requested that each of the parties draw their respective proposed routes on a map. AR. 820. The Zirbels, Dakota Ridge, Haas, and Moe were all present, and placed their preferred route on the County's map. *Id.* Thereafter, the County determined that they, along with the parties, should physically inspect the proposed routes. Following the inspection, the County unanimously resolved to defer any decisions with respect to the easements until an appraisal could be completed. *Id.* The Zirbels objected to the need for an appraiser, citing SDCL § 31-22-4, which requires the County to make the decision. The County disregarded the objection.

Months began to drag on. The Zirbels repeatedly reached out to the County requesting input with the appraiser and a completion deadline for the appraisal.

Most of the correspondence was left unanswered. In an attempt to speed up the process, on September 9, 2024, the Zirbels filed a Motion for Judgment of Contempt and Motion for Final Judgment and Issue of Writ of Mandamus, in the alternative, a Motion to Establish Deadline, in the alternative, Motion for Temporary Access. AR. 873- 876. A hearing was held on September 30, 2024, regarding the Zirbels' motion. On October 1, 2024, the Circuit Court issued its order denying all relief sought by the Zirbels. AR. 116. The Zirbels, more than a year after the purchase of their Properties, were still left without access.

After almost six months without an update or progress, the Zirbels contacted the County in March 2025 to request an update on the appraisal. The County advised that the appraisal was complete and scheduled a Special Meeting for April 9, 2025, to determine access under SDCL ch. 31-22. The County did not provide the Zirbels with a copy of the appraisal at that time. Rather, the County provided the Zirbels with a copy of the 500-plus-page appraisal at 1:00 p.m. on April 8, 2025—less than twenty-four hours before the Special Meeting. AR. 833. As a result, the Zirbels and their counsel lacked a meaningful opportunity to review or prepare for the April 9, 2025, Special Meeting.

At the April 9, 2025, Special Meeting, the County opened the meeting indicating that the appraiser determined damages with respect to three (3) alternative routes to access the Properties: Alternative 1, Alternative 2, and Alternative 3. AR. 827; *see also* AR. 1410-1412. The respective damages are highlighted in the appraisal at AR. 1413. The April 9, 2025, hearing proved

unproductive. The County refused to consider arguments from the parties regarding topics of convenience, cost, location, and related matters. *See* transcript of the April 9, 2025, Special Meeting: AR. 826-867. Moreover, the County was unable to respond to inquiries regarding the appraisal, demonstrated minimal knowledge thereof, and insisted on consulting the appraiser—who they did not ask to be at the Meeting—before making any modifications. AR. 839:3-4; 841:21-23; 842:18-19; 846:17-24; 847: 22-24; 851:10-17. The Zirbels were distressed by this approach, and numerous times expressed their concerns regarding their inability to question the appraiser or have any input on the appraisal process. AR. 833:13-14; 847:8-12; 850:21-23; AR. 852-854.

At the conclusion of the meeting, the County, by unanimous decision, determined to approve the easements established by Alternative 1, and required the Zirbels to pay \$270,647.20 for access. AR. 866; *see also* AR. 708-712. With respect to the \$270,647.20: \$181,488.00 was assessed for purported damage to the property owned by Dakota Ridge for an approximately 300-yard easement to the West Parcel, and \$59,360 was assessed for damage relating to the properties owned by Moe, Haas, and the USFWS for a less than one-acre (total surface area) easement to the East Parcel. AR. 708; *see also* SDCL § 31-22-4.

Following the County's May 1, 2025, decision, the Zirbels filed their second Notice of Appeal to the Circuit Court. AR. 120-126. The Zirbels filed their second Appellant Brief on June 27, 2025. AR. 719-1426. Included within their brief, the Zirbels requested a *de novo* appeal as required by SDCL § 7-8-30.

Such a hearing would afford them the opportunity to present a “full evidentiary hearing with witnesses and transcripts.” AR. 727. After the filing of the Appellant Brief, the County requested a hearing regarding the applicable standard of review for this Circuit Court appeal. AR. 1427-1428. A telephonic hearing was held on July 9, 2025. *Id.* The Zirbels argued that SDCL §7-8-30 required a de novo trial and review, granting them the ability to cross-examine the appraiser about his report and permitting the Zirbels to present testimony regarding the relevant factors that the County was to consider. The County argued that its decision was subject to an abuse of discretion standard, only, and that the Zirbels were not entitled to present evidence. The Circuit Court took the issue under advisement and ultimately returned its decision via email on July 14, 2026. AR. 1427-1428. The Circuit Court agreed with the County that the applicable standard of review was abuse of discretion and that the Zirbels were not afforded a trial de novo. A subsequent order was prepared and filed on July 15, 2025, requiring an abuse of discretion review. AR. 1429. The parties were afforded a one-hour appellate hearing with no evidence presented and no mechanism for the Zirbels to question the appraiser about his report or methodology.

The Circuit Court appeal was heard on September 18, 2025. There, the Zirbels argued: (1) the section line right-of-way at issue was not vacated, (2) the County failed to follow the procedure set forth in SDCL ch. 31-22 with respect to the isolated Properties, (3) the County’s assessment of damages was arbitrary, and (4) the County’s decision constituted a “taking” under the 5<sup>th</sup> Amendment to the



United States Constitution and Article VI, § 13 of the South Dakota Constitution.

The County argued that its decision was proper and argued the Zirbels were responsible for the appraisal costs. At the conclusion of the hearing, the Circuit Court took the matter under advisement.

On November 7, 2025, the Circuit Court filed its Memorandum Decision affirming the County's decision in part and reversing in part. AR. 1518-1520. The Circuit Court affirmed the County's decision with respect to the determination of the location of the respective access easements and damages associated therewith.

*Id.* Implicit in the Memorandum Decision—although not explicitly detailed therein—is the Circuit Court's finding that the section-line right-of-way had been vacated. Additionally, although not explicitly referenced, is the Court's affirmation of the fencing costs imposed on the Zirbels, *see* Section IV(B), *infra*.

The Circuit Court reversed only one aspect of the County's decision: the imposition of the appraisal costs on the Zirbels. The Court directed that the County bear those costs. *Id.* On November 13, 2025, the Circuit Court filed its Order incorporating its Memorandum Decision. AR. 1521-1522.

On December 4, 2025, the Zirbels filed their Notice of Appeal to this Court. AR. 1529-1530.

## STANDARD OF REVIEW

### I. The issues on appeal are subject to de novo review as the County's decisions were quasi-judicial.

The issues presented on this appeal are subject to de novo review. *See State v. Troy Twp.*, 2017 S.D. 50, ¶ 24, 900 N.W.2d 840, 850 (de novo review applies if the administrative action is quasi-judicial); *Carmody v. Lake Cnty. Bd. of Comm'rs*, 2020 S.D. 3, ¶ 16, 938 N.W.2d 433, 438 (same); *MRose Dev. Co., LLC v. Turner Cnty. Bd. of Cnty. Comm'rs*, 2024 S.D. 28, ¶ 22, 7 N.W.3d 685, 691 (same).

Regardless of statutory authorization to the contrary, a court may not substitute its judgment for that of an administrative board on issues that are not quasi-judicial. However, neither should a court abdicate its judicial power to the legislative or executive branches of government if the action appealed is quasi-judicial, then the separation-of-powers doctrine is not offended by a de novo hearing on appeal, and statutes prescribing such review must be followed.

*Troy Twp.*, 2017 SD 50, ¶ 20, 900 N.W.2d 840, 849 (citations omitted).

An “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.” Similarly, quasi-judicial acts are akin to “the ordinary business of courts” or are actions that “could have been determined as an original action in circuit court.” In contrast, non-quasi-judicial administrative acts are of the type that are prospective. Those actions look to the future and change “existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.” Further, non-quasi-judicial acts include those done in the public interest without “adjudicating existing rights of specific individuals.”

*Carmody*, 2020 SD 3, ¶ 16, 938 N.W.2d at 438.

For clarity, there are two different kinds of “de novo review” that the issues in this case are subject to. As explained further below, some of the issues in this

case—those arguments contained in § I (applicable standard of review under SDCL § 7-8-30), § II (whether a section line has been properly vacated), § V (whether the County’s decision amounted to a Fifth Amendment taking), and § VI (whether members of the Board should have recused themselves due to a conflict of interest), *infra*—are subject to *de novo review* meaning that this Court gives deference to the lower court’s factual findings but gives no deference the lower court on legal questions. *Hauck v. Clay Cnty. Comm’n*, 2023 S.D. 43, ¶ 5, 994 N.W.2d 707, 710 (“Under the *de novo* standard of review, no deference is given to the circuit court’s conclusions of law”).

With respect to the County’s decisions regarding the application of SDCL ch. 31-22—issues III and IV below—the reviewing court is to hold a *trial de novo* and supplant the County’s decision with its own based on the evidence presented at that *de novo* trial. *See MRose Dev. Co., LLC*, ¶ 22, 7 N.W.2d at 691 n. 2 (“[T]he *de novo* standard courts use to review questions of law relating to the interpretation of text is not the same as trial *de novo* procedure referenced in some administrative appeal statutes”). In cases subject to a trial *de novo*, “[t]he powers of the circuit court are the same as those of the [administrative] board. The court exercises independent judgment . . . . In effect, it sits as another board . . . .” *Troy Twp.*, ¶ 19, 900 N.W.2d at 848 (alterations in original). As further argued in Section I, *infra*, the Circuit Court erred when it decided not to hold a trial *de novo* regarding the County’s application of SDCL ch. 31-22 to the Zirbels’ petition.

To determine the proper standard of review from decisions of a board of county commissioners, the threshold question is whether the County's decision is quasi-judicial or non-quasi-judicial. *Troy Twp.*, ¶ 20, 900 N.W.2d at 849. "A court may not substitute its judgment for that of an administrative board" on non-quasi-judicial issues. *Id.* However, if the action is quasi-judicial, the separation-of-powers doctrine permits a de novo hearing on appeal, and statutes prescribing such review must be followed. *Id.*

An 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," or is akin to "the ordinary business of courts" or "could have been determined as an original action in the circuit court." *Carmody*, 2020 S.D. 3, ¶ 16, 938 N.W.2d at 438. In contrast, non-quasi-judicial acts are prospective, future-looking decisions and change existing conditions by making a new rule for general application, or done in the public interest without adjudicating specific individuals' rights. *Id.* A county board's legislative actions are non-quasi-judicial.

The County's decision under SDCL ch. 31-22 was quasi-judicial, as it applied existing law to specific facts regarding the Zirbels' access to isolated tracts, adjudicating their rights and those of affected landowners through a detailed statutory framework. For instance, the request for an easement pursuant to SDCL ch. 31-22 is precisely the same process for an easement by necessity. It was not legislative or rulemaking; it resolved particular parties' existing rights without creating a new countywide policy.

Because the decision was quasi-judicial, the appeal to the Circuit Court should have proceeded via a trial de novo and the Circuit Court should have decided the issues contemplated by SDCL ch. 31-22 anew. *See Troy Twp.*, ¶ 24, 900 N.W.2d at 850. The Circuit Court's failure to do so hampers this Court's review of the issues specific to the County's application of SDCL ch. 31-22.

**II. If the County's decision was non-quasi-judicial, then its decision is reviewed for arbitrariness.**

In the alternative, if this Court determines the decision by the Commissioners is non-quasi-judicial, this appeal is subject to the arbitrariness standard of review. *MRose Dev. Co., LLC*, ¶ 37, 7 N.W.3d at 694 (citing *Troy Twp.*, ¶ 33, 900 N.W.2d at 852-53). A decision is arbitrary if it is "not governed by any fixed rules or standard" or "based on personal, selfish, or fraudulent motives." *Id.* (quoting *Troy Twp.*, ¶ 33, 900 N.W.2d at 853). When determining whether a board acted arbitrarily, a court asks whether the County has relied on factors which the Legislature has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the County, or is so implausible that it could not be ascribed to a difference in view or the product of expertise. *Id.* (quoting *Troy Twp.*, ¶ 33, 900 N.W.2d at 853). "The party asserting a claim against the board has the burden of proving it acted in an arbitrary manner." *Id.* at ¶ 38. Under either applicable standard of review, the Commissioners, and subsequently the Circuit Court, committed reversible error with respect to the decisions herein.

## ARGUMENT

### I. The Circuit Court erred in denying Zirbels' request for a trial *de novo* under SDCL § 7-8-30.

The Circuit Court erred in denying the Zirbels' request for a trial *de novo*. As stated previously, SDCL § 7-8-27 – 30 and SDCL § 31-22-5 authorize the Circuit Court to conduct a trial *de novo* regarding the County's decision. SDCL § 7-8-30 states that an "appeal taken to the circuit court . . . *shall*<sup>3</sup> be heard and determined *de novo*." SDCL § 7-8-30 (emphasis added).

Pursuant to S.D. Codified Laws § 7-8-30, an appeal to the circuit court from the decision of the county commissioners is to be "heard and determined *de novo*," that is, the circuit court should determine the issues before it on appeal as if they had been brought before the court originally.

*Tri County Landfill Ass'n v. Brule County*, 535 N.W.2d 760 (SD 1995). "On a *de novo* appeal in the circuit court from the county commissioner's decision, the powers of the circuit court are the same as those possessed by the county commissioners, that is, to determine anew that which the commissioners decided by means of a full evidentiary hearing with witnesses and transcripts." *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 371 (SD 1978) (citing SDCL § 31-22-5).

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<sup>3</sup> The statute's language is imperative and unequivocal, using "shall" to denote a compulsory duty without discretion or exception. See SDCL § 2-14-2.1 ("As used in the South Dakota Codified Laws to direct any action: . . . (2) The term 'shall' manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.").

This Court's decision in *Carmody* is instructive in determining that the County's decision in this case was quasi-judicial. *See Carmody*, 2020 SD 3, ¶ 16, 938 N.W.2d at 438 (setting forth the standard for distinguishing quasi-judicial from non-quasi-judicial board decisions). The Zirbels sought relief under SDCL ch. 31-22, a Chapter that provides eight very specific statutes for the County to follow in determining access to isolated tracts. The County's decision "investigate[d], declare[d], and enforce[d] liabilities as they stand on present or past facts and under laws supposed already to exist." *Carmody*, 2020 SD 3, ¶ 16, 938 N.W.2d at 438. For instance, the request for an easement pursuant to SDCL ch. 31-22 is precisely the same process for an easement by necessity. The County's action in this case is "akin to 'the ordinary business of courts,'" not a legislative action. *Id.*

The County contends that its decision was non-quasi-judicial because SDCL ch. 31-22 expressly requires an application to the board of county commissioners for relief. *See* SDCL § 31-22-2. This argument is a non sequitur. If the mere existence of a statutory application requirement were sufficient to render a decision non-quasi-judicial, then any time the legislature mandates that relief be sought from a county board, the resulting decision would automatically fall outside the quasi-judicial category. Such a rule would eliminate the need for this Court to ever analyze whether a particular board action qualifies as quasi-judicial, contrary to established precedent.

Further, the County has argued that its actions in this case are prospective, and “look to the future and change ‘existing conditions.’” *Carmody*, 2020 SD 3, ¶ 16, 938 N.W.2d 433, 438. However, this Court required additional requirements in order for a decision to be non-quasi-judicial. For a non-quasi-judicial determination, the decision must “mak[e] a new rule, to be applied thereafter to all or some part of those subject to its power.” *Id.* “Further, non-quasi-judicial acts include those done in the *public interest without ‘adjudicating existing rights of specific individuals.’*” *Id.* (emphasis added). Acts that are non-quasi-judicial are prospective, legislative actions taken by a board—that is not what the decision at issue was. The County’s decision applies only to the Zirbels and the Interested Parties. The County did not “make a new rule” to be applied prospectively to the residents of Deuel County.

The County’s decision was quasi-judicial, and therefore, this appeal and the appeal to the Circuit Court should have been decided de novo as required by SDCL § 7-8-30 and SDCL § 31-22-5.

The Zirbels acknowledge that the language in SDCL § 31-22-5, on its face, applies only to an appeal brought by servient landowners who disagree with the county’s decision. However, the appeal rights granted by SDCL § 31-22-5 should be mutual, affording a servient tenement, or dominant tenement, to seek circuit court review de novo, applying the same protections afforded by SDCL § 7-8-27. SDCL § 7-8-27 allows for an appeal to be brought to the circuit court from the board of county commissioners “by any person aggrieved.” SDCL § 31-22-5



should likewise afford owners of dominant tenements the right to de novo review in circuit court of decisions made by the board of county commissioners under ch. 31-22.

The Circuit Court's refusal to conduct a hearing de novo was highly prejudicial to the Zirbels' ability to obtain effective relief. The result of failing to conduct such a hearing is that the record before the Circuit Court—and now before this Court—is virtually nonexistent. Because the Circuit Court declined to hear evidence, there is scarcely any testimony in the record upon which this Court can conduct a review—even one de novo.

The most glaring illustration of the prejudice caused by the Circuit Court's denial of de novo review is the absence of any testimony from the appraiser whose report formed the cornerstone of the County's decision. The County failed to record the December 5, 2023; December 12, 2023; and June 20, 2024, meetings, notwithstanding the Circuit Court's explicit directive following remand that they "shall create a clear record" in all further proceedings. AR 85. At the April 9, 2025, special meeting—where the County considered the appraisal and ultimately imposed damages of \$270,647.20 on the Zirbels—the appraiser was not present. The Zirbels repeatedly objected to the inclusion of the appraisal and to their inability to question its author. *See* AR 826–867 (transcript). Without the appraiser available to lay foundation, the report constituted inadmissible hearsay under fundamental evidentiary principles.

Had the Circuit Court conducted a de novo evidentiary hearing as required by SDCL § 7-8-30, the Zirbels could have subpoenaed the appraiser and cross-examined him regarding his methodology, assumptions, data sources, and conclusions. As this Court explained in *Frawley Ranches, Inc. v. Lasher*, the admissibility of an appraiser's opinion turns on whether the witness is properly qualified, a preliminary question of fact committed to the trial court's discretion, but one that requires a foundation of familiarity with the property and evidence of expertise in local land values. 270 N.W.2d 366, 371-72 (S.D. 1978); *see also State Highway Comm'n v. Hayes Estate*, 140 N.W.2d 680, 688 (S.D. 1966) (an appraiser's knowledge and familiarity with the land must be weighed in order to establish foundation for the appraisal). In *Frawley*, the appraisals were admitted only after the appraisers testified to their qualifications and site visits, allowing the court to assess admissibility and the parties to challenge weight. Here, by contrast, the appraisal was admitted and relied upon without any such foundation or opportunity for adversarial testing, rendering it unreliable and depriving the Zirbels of the ability to probe its validity.

Instead, the Zirbels were denied any meaningful opportunity to challenge the appraisal's accuracy, propose revisions, or test its reliability. This procedural failure not only deprived the Zirbels of due process in the adjudication of their property rights but also left both the Circuit Court and this Court without an adequate, reviewable record upon which to assess the County's decision. The Circuit Court's denial of the Zirbels' request for a de novo trial is reversible error,

and resulting prejudice is irreparable absent reversal and remand for a full de novo trial.

**II. The Circuit Court erred in finding that the section line right-of-way at issue was properly vacated.**

One of the central and dispositive issues preserved for this appeal is whether the section-line right-of-way along 478<sup>th</sup> Avenue affecting the East Parcel was lawfully vacated. If the right-of-way was not properly vacated and remains in existence, the East Parcel is not an “isolated tract” under SDCL ch. 31-22, and the statutory procedures for establishing access easements would be inapplicable. The Zirbels would instead have direct public access via the existing right-of-way.

Since the outset of these proceedings in 2023, the Zirbels have consistently maintained that the section-line right-of-way along 478<sup>th</sup> Avenue was not lawfully vacated. In support of this position, they submitted substantial evidence, including: (1) records from the Deuel County Register of Deeds confirming the right-of-way’s existence; (2) the Deuel County Plat Book depicting the right-of-way; (3) a certified survey from Huppler Land Surveying establishing its location; and (4) an affidavit of Brandon Huppler attesting that no record of vacation appears in the public records. AR 40, 45, 1424–1426.

Despite this uncontroverted evidence, the County and the Circuit Court relied on an interoffice memorandum from the Deuel County State’s Attorney dated October 24, 2023. AR 33–39. That memorandum concluded the right-of-way had been vacated in 1959 based solely on newspaper clippings and unverified

documents supplied by Bill Moe—an interested and adverse party in these proceedings. None of these materials were authenticated, supported by any testimony, produced to the Zirbels for inspection, or admitted into evidence through any proper foundation. They therefore constituted inadmissible hearsay and could not lawfully support a finding of vacation.

The law governing vacation of a section-line right-of-way is set forth in SDCL chapter 31-3, which prescribes a specific statutory process. Under SDCL ch. 31-3, vacation begins with a petition to the board of county commissioners to vacate the highway. *See* SDCL § 31-3-6. The Deuel County State's Attorney's Interoffice Memorandum references minutes reflecting submission of such a petition. AR 37. Under SDCL § 31-3-7, upon receiving the petition, the board must set a public hearing, provide notice, and determine—by affirmative resolution—whether vacation serves the public interest. The memorandum indicates a hearing occurred. AR 38.

SDCL § 31-3-8 requires the following:

The resolution and order provided for in § 31-3-7 shall describe the highway vacated . . . in general language by description of the land across which the highway extends, or by landmarks or survey designate the particular highway intended. The county auditor *shall prepare and maintain a current map* showing the course and location of all county highways within or on the border of the county. The county auditor *shall, within thirty days* of the resolution and order provided for in § 31-3-7, *make those changes to the map* as necessary to reveal the course and location of any county highway vacated, changed, or located. A certified copy of the resolution and order *shall be filed with the register of deeds.*

SDCL § 31-3-8 (emphasis added). SDCL § 31-3-8 is a necessary component of the vacation process so that proper notice is provided to the public, and prospective landowners, i.e., the Zirbels. Herein lies the “break” in the process required by SDCL ch. 31-3. The county auditor failed to update the county highway map or plat book to reflect the purported vacation of the section line highway. *See* Affidavit of Brandon Huppler, AR. 1424-1426. As of the date of the Zirbels’ purchase of the Properties, the county highway/plat book displays a valid, existing section line right-of-way traversing between sections 7 and 12. No recorded document exists evidencing the vacation of the section line right-of-way, and the Zirbels had no notice of the purported vacation. The Zirbels’ certified survey likewise shows the right-of-way traversing north of 174<sup>th</sup> Street to the East Parcel, with no evidence of vacation. AR 45.

A section line is not vacated, and the land contained therein does not revert to the adjoining property owners, unless and until SDCL §§ 31-3-6 through -9 are performed by the appropriate board. *See* SDCL §31-3-10 (“Upon the discontinuance and vacation of a highway *pursuant to* §§ 31-3-6 to 31-3-9, inclusive, the title to the land embodied therein shall revert to the original owners or their grantees or successors in interest”) (emphasis added). The legislature clearly intended that *all* of these steps be followed in order to affirmatively vacate a section line. *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 13, 878 N.W.2d 406, 411 (“[W]e assume that the Legislature intended that no part of its statutory scheme be rendered mere surplusage . . . .”) (alterations in original). The

procedure most important to informing the public of any purported vacation was not followed in this case, and as a direct result, the Zirbels believed—and still believe—that their parcel may be accessed by a public highway.

The record establishes that the 478<sup>th</sup> Avenue section-line right-of-way was never lawfully vacated under SDCL ch.31-3, as the county auditor failed to update the highway map, file a certified resolution with the register of deeds, or provide public notice as required by § 31-3-8. The Zirbels' uncontroverted evidence confirms the right-of-way remains extant, providing direct public access to the East Parcel.

The county auditor's error is further exemplified by SDCL § 31-12-2, which provides:

Except for minimum maintenance roads established pursuant to § 31-12-46, no county highway system may be changed, altered, or modified except by authority of and in accordance with a written executive order of the Department of Transportation. Any such change *shall be shown on the map* of the county highway system in an office designated by the board of county commissioners and on *such map in the Department of Transportation*.

SDCL § 31-12-2. The forgoing statute was enacted in 1939, long before Deuel County's purported vacation of the section line and provides further guidance to this Court of the need and importance of proper notice to the public.

**III. The Circuit Court failed to properly apply the statutory procedures of SDCL Chapter 31-22 to the Zirbels' isolated tracts.**

Even assuming arguendo the section-line right-of-way was lawfully vacated, the County and Circuit Court failed to properly apply the procedures of

SDCL ch. 31-22 to the Properties. Chapter 31-22 establishes a clear, mandatory framework for granting access to isolated tracts, including notice, hearing, selection of the most convenient and least-damaging route, and assessment of damages. The County did not adhere to these requirements in several critical respects, as detailed below. The Circuit Court erred by failing to remedy these defects through de novo review.

SDCL § 31-22-1 defines what constitutes an isolated tract. If this Court determines that the section line was properly vacated, there is no question that the Properties are isolated tracts.

SDCL § 31-22-2 requires the owner of an isolated tract to first attempt to negotiate access with neighboring landowners before petitioning the County for relief. The Zirbels made such efforts with the Interested Parties, and the futility of these discussions is evident from the ongoing litigation and the parties' inability to reach agreement. After these negotiations failed, the Zirbels properly applied to the County for relief under chapter 31-22. AR 40–45.

SDCL § 31-22-3 is central to this case. It requires the County to personally inspect the property and establish a right-of-way “not less than twenty-five nor more than sixty-five feet in width” from the isolated tract to a public highway. In doing so, the County “shall consider the convenience of the parties,” and, “wherever it is practicable to do so, such board shall lay such right-of-way along a section line.” SDCL § 31-22-3. This appeal turns, in significant part, on the County’s failure to consider the convenience of the parties as the statute requires.

The appropriate application of SDCL Ch. 31-22 is an issue of first impression for this Court. Zibels can only locate one case in which this Court analyzed the application of SDCL § 31-22—*Frawley Ranches, Inc. v. Lasher*, *supra*—and that case analyzed the constitutionality of the chapter, not its proper application. Although the ultimate rulings in *Lasher* are not applicable to this case, the board's approved actions in that case provide guidance to the County. The County is required to consider the convenience of the parties and use common sense in determining the most convenient right-of-way locations.

**A. West Parcel**

With respect to access to the West Parcel, rather than consider the convenience of the parties, the County effectively chose the least convenient, most intrusive, and highest cost option. The Zirbels proposed a route along the northern edge of the large tree grove—a grassy, unobstructed area that would provide straightforward access from public highway 173<sup>rd</sup> Street to their parcel with minimal disruption, cost, or environmental impact. *See* AR 835–836 (transcript of Zirbels' counsel describing the proposal to “follow the tree line” to avoid cutting trees and the associated “headache, cost, time, labor, [and] obstructions”). Drone imagery submitted to the Circuit Court clearly depicts this preferred route and the surrounding terrain. AR 1498–1504; *see* particularly AR 1502 (overview showing the West Parcel peninsula at the top, 173<sup>rd</sup> Street at the bottom, and the tree grove in between).



Instead, the County chose to lay the right-of-way through the entire tree grove, requiring the removal of 486 trees. *See* AR. 1408-1409. The total damage assessed for the removal of 486 trees is \$29,500.00. *Id.* This decision was not the product of independent consideration of convenience, cost, or minimal intrusion; instead, the County deferred entirely to the appraiser's recommendation without soliciting or incorporating input from the Zirbels or other affected parties. AR 849:1-3; AR 847:22-24. In fact, even the owner of the servient tenement, Dakota Ridge, stated that the hill located immediately northeast of highway 173<sup>rd</sup> Street could provide the starting point for the right-of-way, thereby eliminating the need to remove a significant number of trees. AR 848:16-25. The County disregarded this proposal as well.

Again, the County failed to present the appraiser for questioning, to lay foundation for these appraisals, or to offer any insight as to why these routes were selected. The County contends that the location was selected due to wetland concerns. AR. 836. There is no evidence in the record, at all, that the Zirbels' proposed route would affect any wetlands. The Zirbels' proposed route—along the northern edge of the tree grove—traverses the same general topography and elevation as the path chosen by the County. AR 989 (depicting comparable low-lying terrain across the area). The entire vicinity is naturally low-lying, as the property abuts Lake Alice, yet no evidence demonstrates that the Zirbels' route would encounter "wetlands" any differently than the selected route. Removing 486 trees to traverse the grove is neither necessary nor convenient under SDCL §

31-22-3; it imposes disproportionate cost, disruption, and unnecessary environmental impact in conflict with the intent of the statute. The County abused its discretion when it chose this route.

**B. East Parcel**

The Circuit Court committed the same reversible error with respect to the East Parcel. Assuming *arguendo* the East Parcel is an isolated tract, SDCL § 31-22-3 required the County to “consider the convenience of the parties” and, “wherever it is practicable to do so,” to lay the right-of-way “along a section line.” The Zirbels proposed routing the easement along the existing (or previously vacated) section line, utilizing an already-established, mowed, dirt path immediately east of the fence that divides the Moe property (east) from the USFWS and Haas properties (west). *See* AR 1505-1514 (showing proposed route beginning at the intersection of 174<sup>th</sup> Street and 478<sup>th</sup> Avenue and progressing straight north). The fence is in good repair, and the dirt path is already cleared, maintained, and unobstructed.

The County has not identified the precise location for the easement to access the East Parcel. It is clear from the April 9, 2025, transcript that no one really knows (1) the location of the easement itself, or (2) why the fence has to be removed and replaced. *See* AR. 841-843 (Commissioner: “I don’t know exactly where they put [the fence] so I can’t answer that, but that’s what they have in the appraisal.”). Nonetheless, the County’s decision requires removing and replacing

a perfectly functional fence, effectively tripling the costs and expenses related to the fencing.

The Circuit Court, failed to consider the convenience of the parties, the least intrusive route, and apply common sense to the location of the easements as required by SDCL § 31-22-3 and suggested by *Lasher*.

**IV. The Circuit Court erred in affirming the County's assessment of damages under SDCL ch. 31-22.**

**A. The damages imposed are arbitrary and unreasonable.**

SDCL § 31-22-4 requires the County to “assess and determine the damage which the right-of-way is to the owner of the land across which it is laid.” The County hired an appraiser to assist in determining the cost of the easements. The Zirbels repeatedly objected to the need for an appraiser, citing assessed values provided by the Deuel County Assessor's Office. AR. 840. The County has nonetheless taken the position that the Zirbels failed to submit any competing valuations. The Circuit Court elaborated on this issue, stating “[w]hile the Zirbels take issue with the hiring of an appraiser, they did not hire their own appraiser either . . . Zirbels did not present counter appraisals.” AR. 1520.

The above is simply untrue. The Zirbels repeatedly presented evidence to the County—based on assessed values from the Deuel County Assessor's Office—regarding the appropriate calculation of damages at the prior, unrecorded meetings. AR 1588. Given this information, the Zirbels reasonably concluded that an independent appraisal was unnecessary. Moreover, had the County provided

the 500-plus-page appraisal more than fifteen hours before the April 9, 2025, special meeting—such as a month in advance—the Zirbels would have had sufficient time to review it thoroughly and retain their own appraiser if warranted. The Zirbels had no reasonable basis to anticipate that the combined cost of the two easements would exceed \$270,000.

The County's late disclosure and refusal to engage with the Zirbels' evidence deprived them of any meaningful opportunity to contest the damages assessment.

1. West Parcel: \$181,488.00

The County conditioned access to the Zirbels' West Parcel on payment of \$181,488.00 in damages to Dakota Ridge. AR 708. This amount, derived from the appraiser's before-and-after valuation, comprises \$149,000.00 for the taking of less than one acre, \$29,500.00 for the unnecessary removal of 486 trees, and \$2,988.00 for a temporary construction easement. AR 884, 1409. The appraiser utilized a "best use approach."<sup>4</sup>

This assessment is extraordinary.<sup>5</sup> It is driven largely by repeated assertions that the proposed route across Dakota Ridge's property would eliminate

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<sup>4</sup> A "comparison approach" or a "cost approach" drastically decreases the assessed damage. Again, the Zirbels were unable to question the appraiser as to why a "best use approach" was utilized.

<sup>5</sup> The total square footage of the proposed easement (25' to 65') is between 22,500 sq. ft. and 58,500 sq. ft. (.52 acres – 1.34 acres). The entire Dakota Ridge parcel is 175.5 acres. The assessed value for the entire parcel, including the home, buildings, and improvements, is \$270,415.00, or \$1,540.83 per acre. The County

the land's potential for future lake-lot development. AR. 850, lines 9-12. The appraiser accordingly valued the property based on its purported "highest and best use." AR. 882. Yet Ryan Dailey, the current owner and operator of the Dakota Ridge property, repeatedly testified that he has "no intentions of developing it." AR. 830:19; AR. 839:3-12; AR. 848:16-19. He simply stated, "never say never." The County apparently latched onto this comment as the basis for justifying the damage assessment to the Zirbels. *See* AR. 1442-1443.

Mr. Dailey's testimony shows why this assessment is arbitrary. A Board acts arbitrarily if it "offered an explanation for its decision that runs counter to the evidence before the County." *MRose Dev. Co., LLC*, ¶ 37, 7 N.W.3d at 694. Mr. Dailey testified three different times that he had no intention of developing the land. Yet, the County, its appraiser, and the Circuit Court, all required the Zirbels to pay damages based on the prospective loss in value to the property as if the property already possessed fully developed lake lot value.<sup>6</sup> This runs contrary to the evidence and is thus arbitrary.

The Zirbels suggested a figure between \$1,500 and \$5,000, which would reflect the current tax assessed value of the land, multiplied by a factor of 1x-3x. AR. 1588. Again, these discussions are not a part of the record due to the

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assessed 67% of the parcel's entire assessed value on the Zirbels for a less-than-one-acre dirt path.

<sup>6</sup> The appraiser did not consider the significant costs that would be incurred by a developer in actually developing lake lots. Dakota Ridge would be required to run water, electricity, build a road, etc.

County's failure to record the underlying meetings. Regardless, the Zirbels proposal was never considered.

Notwithstanding the County's concern that future development of lake lots on the Dakota Ridge property could be impeded, the Zirbels have repeatedly proposed a practical solution: include a merger or contingency provision in the easement document. *See* AR 1562–1563. The proposed clause would provide that, if Dakota Ridge (or its successors or assigns) develops lake lots requiring access roads, the Zirbels' easement would merge into and utilize the developed road system for direct access to their West Parcel. This approach preserves Dakota Ridge's ability to develop the property in the future while eliminating the need for the Zirbels to bear \$149,000 in damages for a taking that would become unnecessary if a shared road is established.

The County has contended that such a contingency clause would undermine the “permanency” of the easement required by SDCL ch. 31-22. This argument is unpersuasive. Easements across South Dakota routinely include contingency or conditional language without impairing their permanent nature. For example, utility and access easements often permit reconstruction after damage (*e.g.*, a downed wind tower or destroyed driveway), with provisions for repair or replacement by the parties. These clauses do not render the easement temporary; they address changed circumstances while maintaining the easement's ongoing validity and purpose. The Zirbels' proposed merger provision is analogous: it ensures the easement remains permanent unless and until a more efficient, shared

access road is developed for the benefit of all parties. Far from violating SDCL ch. 31-22, this solution promotes the statute's core directive to consider the "convenience of the parties" and to select the route causing the least damage and intrusion. *See* SDCL § 31-22-3.

2. East Parcel: \$59,360.00

The County assessed arbitrary damages with respect to the Moe, Haas, and USFWS properties for access to the East Parcel. As to the Moe property, the County awarded total damages of \$44,058.00. AR 708. This figure comprises \$30,000.00 for diminution in value based on the appraiser's before-and-after valuation, *see* AR 1126, and an additional \$14,058.00 for fencing costs added by the County during the April 9, 2025, special meeting.<sup>7</sup> AR. 165. The fencing costs are addressed separately in Section IV(B), *infra*. This section focuses on the \$30,000.00 diminution in value.

The appraisal asserts that "the taking of the land removes pasture and site land along the section line boundary," thereby reducing the Moe property's value by \$30,000.00. AR 1188. If accurate, identical damages should appear in the appraisals for the Haas and USFWS properties. They do not. *See* AR 1236, 1323 (reporting \$0 diminution in value). The County determined that the easement

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<sup>7</sup> *See* AR. 165 (Counsel for the Zirbels asked why the Moe appraisal did not include fencing costs, similar to the USFWS and Haas properties. Although the County was reluctant to make any changes to the appraisal, routes, or damages to the benefit of the Zirbels, the County swiftly added an additional \$14,058 to the Moe's benefit. "[They] missed that.")

would follow the section line. AR 841–846. If so, comparable land area would be affected across all three properties that the easement runs through. Yet the Haas and USFWS appraisals repeatedly conclude that the “total land area does not change,” yielding \$0 in damages. AR 1251, 1338. There is no difference in how the easement would affect these three properties, and it was arbitrary for the County to assess \$30,000.00 for one owner’s land and no other land implicated.

**B. SDCL § 31-22-7: Fencing**

One of the final steps outlined in SDCL ch. 31-22 relates to privacy concerns and protection for the servient tenements. Relevant to the East Parcel,<sup>8</sup> the statute provides: “[i]f the right-of-way be laid along the line separating two farms, then the owner of the isolated tract for which such right-of-way was laid *shall erect and maintain* one-half of the fence along both sides of such right-of-way.” SDCL § 31-22-7 (emphasis added). The proposed route traverses along a section line separating three properties with separate owners. Pursuant to statute, the Zirbels are required to *erect* one half of each fence that is constructed on either side of the easement. This is a separate process from the County’s determination of *damages* to the servient tenement caused by the creation of the easement.

The statute further explains that “the laws of this state pertaining to the erection and maintenance of partition fences shall apply to the fencing of such right-of-way wherever not in conflict with this section.” SDCL § 31-22-7; *see also*

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<sup>8</sup> SDCL § 31-22-7 does not apply to the West Parcel because no fencing has been requested, or ordered, as to the servient tenement.



SDCL ch. 43-23. SDCL ch. 43-23 again requires neighboring landowners to be equally responsible for the *erection* of a partition fence, not the cost. The County, and subsequently the Circuit Court, required the Zirbels to *compensate* the servient tenements for the costs of the fence. The County and Circuit Court have a fundamental misunderstanding of the relevant statute. The Zirbels are not responsible for 100% of the fencing costs; they are simply responsible for *erecting* and maintaining one-half of the fence(s). The imposition of any fencing *costs* on the Zirbels is arbitrary. The County's decision in this regard was "not governed by any fixed rules or standard," and "relied on factors which the Legislature has not intended [them] to consider." *See MRose Dev. Co., LLC*, 2024 SD 28, ¶ 37, 7 N.W.3d at 694.

**V. The County's excessive damages assessment constitutes an unconstitutional taking under Article VI, § 13 of the South Dakota Constitution.**

The County conditioned the Zirbels' access to their properties on payment of \$270,647.20 in damages—an amount so disproportionate and unsupported as to effect a taking of private property for public use without just compensation, in violation of Article VI, § 13 of the South Dakota Constitution.

While a taking normally occurs as a result of formal condemnation proceedings instituted by the acquiring governmental unit, it is well established that an unconstitutional taking can also be implied from a substantial and burdensome interference by the government with a private property owner's use of his property.

*Donohoe Constr. Co. v. Montgomery Cty. Council*, 567 F.2d 603, 608 (4<sup>th</sup> Cir.

App. 1977) (citing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)). "Governmental

action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.” *Goldblatt* at 594.

This Court has expressly held that access is a recognized property interest, and its infringement by governmental action may constitute a taking requiring just compensation. *State v. Legacy Land Co.*, 2023 SD 58, ¶ 19, 998 N.W.2d 94 (citations omitted). The right of access is infringed in the constitutional sense when it is destroyed or substantially impaired. *Id.* at ¶ 21. This depends on a case-by-case analysis which involves consideration of “factors such as ‘the nature of the property involved, the character of the access before and after governmental activity, and the location (rural or urban).’” *Id.* (citations omitted).

SDCL § 31-22 provides relief for owners of isolated tracts in recognition of every South Dakotan's constitutional right to access their own property. Although the County purports to have granted access, the imposition of damages exceeding \$270,000—far beyond any reasonable valuation—effectively denies the Zirbels meaningful access to their property without just compensation. This constitutes a taking prohibited by Article VI, § 13 of the South Dakota Constitution. The Zirbels cannot reach their land without paying an exorbitant sum that renders the purported access illusory.

The Zirbels respectfully urge this Court to apply the factors articulated in *State v. Legacy Land Co.*, *supra*—particularly “the nature of the property involved” and “the location”—in determining whether the County’s decision substantially impaired their right of access. The Properties are rural, undeveloped

parcels. The proposed easements traverse only uncultivated grassland—no cultivated fields, structures, or improvements are affected. The Zirbels seek no improved roadway; they request only the right to cross grass for basic vehicular access. This is especially true for the East Parcel, where an existing, mowed dirt path already runs along the section line on the servient tenement. No new road construction or material alteration is necessary; the Zirbels could simply use the path already in place.

The Zirbels were stunned by the damage imposed by the County. Requiring payment of such an exorbitant sum to exercise the fundamental right of access effectively destroys or substantially impairs that right. Under the case-by-case analysis set forth in *Legacy Land Co.*, this constitutes a taking of private property without just compensation, in violation of Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment to the United States Constitution (made applicable through the Fourteenth Amendment).

The Zirbels respectfully request that this Court reverse the Circuit Court's order affirming the County's decision and remand for further proceedings consistent with constitutional protections and the statutory mandate of SDCL ch. 31-22.

**VI. The Circuit Court erred when it determined that there was no conflict of interest between Commissioner Grabow and interested party Jim Dailey.**

SDCL § 6-1-17 states in relevant part:

No county . . . official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:

- (1) The official has a direct pecuniary interest in the matter before the governing body; or
- (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.

If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

SDCL § 6-1-17.

While the Zirbels acknowledge that the record on this issue is virtually nonexistent, that is due to the County's failure to record the underlying meetings in which the Zirbels presented this conflict. Commissioner Jay Grabow was the only commissioner that actively participated in the discussions, negotiations, and underlying proceedings.<sup>9</sup> The Zirbels discovered that Commissioner Grabow is the nephew of previous Dakota Ridge owner, Jim Dailey, and cousin to current

---

<sup>9</sup> All commissioners were present at the underlying meetings, however, offered little to no involvement other than voting.

Dakota Ridge owner, Ryan Dailey.<sup>10</sup> If the Zirbels were afforded the opportunity to submit their appeal to the Circuit Court via a de novo trial, these issues would have been brought to light. The Zirbels believe Commissioner Grabow's bias played a huge role in the underlying proceedings.

### **CONCLUSION**

For the foregoing reasons, the Zirbels respectfully request that this Court reverse the Circuit Court's November 13, 2025 Order affirming the County's decision; declare the 478<sup>th</sup> Avenue section-line right-of-way extant and providing lawful public access to the East Parcel, rendering SDCL chapter 31-22 inapplicable to that parcel; reverse the easement determinations and damages assessments for both parcels as arbitrary, unsupported, and contrary to law; and remand the matter to the Circuit Court with directions to conduct a full de novo evidentiary trial pursuant to SDCL §§ 7-8-30 and 31-22-5, including presentation of evidence, cross-examination of witnesses (including the appraiser), and reconsideration of all issues in accordance with the statutory and constitutional requirements set forth herein. The Zirbels further request such other and further relief as this Court deems just and proper.

---

<sup>10</sup> Jim Dailey unfortunately passed during the pendency of these proceedings.

Respectfully submitted this 17<sup>th</sup> day of February, 2026.

AUSTIN, STRAIT, BENSON,  
THOLE & KOEHN, LLP

BY: 

MITCHELL L. KOEHN  
Attorneys for Appellants  
25 1st Avenue Southwest  
Watertown, SD 57201  
Telephone: (605) 886-5823  
State Bar #5158

### **CERTIFICATE OF COMPLIANCE**

I, Mitchell L. Koehn, attorney for the Appellants, hereby certifies that the Appellants' Brief complies with the type volume limitation as provided in SDCL 15-26A-66 and that the Appellants' Brief contains 9,731 words and is set in Times New Roman, size 13.

Dated this 17<sup>th</sup> day of February, 2026.

A handwritten signature in black ink, appearing to read 'MCK', is written above a horizontal line.

Mitchell L. Koehn

## CERTIFICATE OF SERVICE

I, Mitchell L. Koehn, hereby certify that on the 17<sup>th</sup> day of February, 2026, the Appellants' Brief was served on the interested parties herein by electronically filing and serving through the Court's ECF system; and by mailing a true and correct copy to the Supreme Court at the address below:

Supreme Court Clerk's Office  
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and by mailing a true and correct copy to the following:

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Clear Lake, SD 57226

Haas Family, LLC  
Attn: Anthony Haas  
47763 173<sup>rd</sup> St  
Clear Lake, SD 57226

U.S. Fish and Wildlife Service  
PO Box 48  
23520 SD Hwy 19  
Madison, SD 57042

This 17<sup>th</sup> day of February, 2026.

  
\_\_\_\_\_  
Mitchell L. Koehn



## Appendix

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Order Regarding Deuel County Commissioners' April 9, 2025 Decision.....4-5



STATE OF SOUTH DAKOTA  
**THIRD JUDICIAL CIRCUIT COURT**

**Counties**

**HON. DAWN M. ELSHERE**  
Circuit Judge  
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Hamlin, Hand, Jerauld  
Kingsbury, Lake, Miner  
Moody and Sanborn*  
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November 7, 2025

Mr. Mitchell Koehn  
Law Firm  
25 1<sup>st</sup> Ave SW  
Watertown, SD 57201

Mr. Zach Peterson/Mr. Ryan Vogel  
Law Firm  
1 Court Street  
Aberdeen, SD 57402

Re: *Steven and Monica Zirbel vs. Deuel County Commissioners 19CIV23-55*

Counsel:

**INTRODUCTION**

The above-entitled matter came on for hearing before the Court on September 18, 2025. Appellant's Steve and Monica Zirbel (hereinafter Zirbels) appeared personally along with their counsel Mr. Mitchell Koehn. Appellee's Deuel County Commissioners (hereinafter County) appeared via their counsel, Mr. Ryan Vogel. This matter is an appeal of a final decision of Deuel County Commissioners dated April 9, 2025, determining a route for Zirbels to their two separate isolated tracts of lands and assessing damages to the Zirbels in amount of \$270, 647.20. Zirbels appeal the decision under SDCL 7-8-27.

**BACKGROUND**

As indicated above the Zirbels are appealing a decision made by the County as the placement of a right of way to two tracts of isolated land in Deuel County. The Zirbels purchased this land in 2023. The land is in Altamont Township adjacent to Lake Alice. Zirbels requested relief from County under SDCL 31-22 on November 23, 2023. After an initial hearing

on the matter the County held that the land owned by Zirbels was not isolated as it could be accessed by Lake Alice, which they deemed to be a public highway. Zirbels filed their first notice of appeal to this Court on December 23, 2024. After a hearing on the matter the Court reversed and remanded the matter back to the County to provide access under SDCL 31-22.

A special meeting was held on the matter in June of 2024 wherein the County requested that an appraisal be done before considering proposed routes. A special meeting was held on April 9, 2025, to determine the access and assess damages. Three proposed routes were considered by the County. However, Alternative 1 became the favorite as other alternatives were met with disfavor. While Alternative 1 was mostly agreed upon, the Zirbels objected to both tracts (east and west tract) that were proposed in Alternative 1 and the resulting damages. All parties present during the special meeting provided input and objections to certain alternatives and the placement of the east and west tract. Following this discussion a motion was made to approve Alternate 1 along with the damages in the amount of \$270,657.20 that were set forth in the appraisal for Alternative 1. The motion was approved unanimously. Zirbels filed their appeal on May 1, 2025. Any other facts that are relevant will be set forth in the decision below.

#### RULE OF LAW

Zirbels bring this appeal under SDCL 7-8-27 as a final decision made by the Deuel County Commissioners in their regular meeting of April 8, 2025. This Court's review of the decision is limited. As the Court previous ruled, see order dated July 15, 2025, the decision of the commissioners was non-quasi-judicial. Therefore, the standard of review is under the abuse of discretion. *Carmody v. Lake County Bd. Of Commissioners*, 938 NW2d 433, 2020 SD 3.

#### ANALYSIS

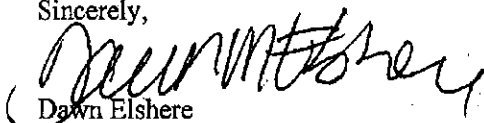
Under the abuse of discretion standard, the Court must determine whether County has acted unreasonably, arbitrarily or has manifestly abused its discretion. *Department of Game, Fish and Parks vs. Troy Township*, 900 NW2d 840, 2017 SD 50. The County "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" *Id.* at 853, citations omitted. The decision is arbitrary if the County relied on factors which were not intended, failed to consider a relevant factor, and offered an explanation that was contrary to the evidence. *Id.* The burden is on Zirbels to establish arbitrariness which they have failed to do.

The County did inspect the land at issue on several occasions. They hired an appraiser to assess damages. While Zirbels take issue with the hiring of an appraiser, they did not hire their own appraiser either. The County received input from all the adjoining landowners, including Dakota Ridge, Moes, Haas and US Fish and Wildlife. Factors such as flooding, wetland, and the removal of trees were all considered by the appraisal and by the County. Therefore, the County did consider all the pertinent factors before making an informed decision and did not act arbitrarily or unreasonably.

Additionally, the damages assessed by the County were also not unreasonable or arbitrary. Again, the County hired an appraiser to assess damages. Zirbels did not present counter appraisals. The damages assessed were determined by the routes that the appraiser choose based upon input from all the parties. Furthermore, the assessed damages are laid out based upon the tracts of Zirbel 1 and Zirbel 2 and to how each adjoining landowner is affected. The Court agrees that it is not difficult to separate these damages out if the Zirbels choose only to proceed with one of the tracts. Finally, the Zirbels also contend that the cost of the appraisal should not have been included in the damages. The Court agrees with the Zirbels as the County did not have to incur this cost but chose to. The nearly \$30,000-damage assessed to Zirbels for the cost of the appraisal was unreasonable and should be removed from the assessed damages.

In all other aspects the decision of the County is approved<sup>1</sup>. Counsel for the Appellee shall prepare the appropriate order consistent with the Court's decision.

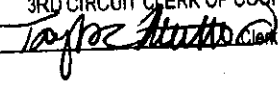
Sincerely,

  
Dawn Elshere  
Circuit Court Judge

**FILED**

NOV 07 2025

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
3RD CIRCUIT CLERK OF COURT

By  Clerk / Deputy

<sup>1</sup> County alleges in its brief that the Court does not have subject matter jurisdiction over this appeal. The Court does find jurisdiction over this matter under SDCL 7-8-27 and makes the above decision based upon that jurisdiction.

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

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

\*\*\*\*\*

STEVE ZIRBEL AND MONICA  
ZIRBEL,

19 CIV 23-55

Appellants,

-vs-

DEUEL COUNTY  
COMMISSIONERS,

Appellee.

**ORDER REGARDING DEUEL  
COUNTY COMMISSIONERS'  
APRIL 9, 2025 DECISION**

\*\*\*\*\*

Steven Zirbel and Monica Zirbel ("Zirbels"), filed a Notice of Appeal on May 1, 2025 appealing the April 9, 2025 decision of the Deuel County Commissioners ("Commissioners") determining access routes to two (2) separate isolated tracts of Zirbels' property and assessing damages for providing access to these parcels. The matter came on for hearing before the Court, the Honorable Dawn Elshere presiding, on September 18, 2025. Zirbels appeared through their attorney, Mitchell Koehn. Commissioners appeared through their attorney, Ryan S. Vogel.

Having considered the arguments of counsel, having reviewed the submissions of the parties, having conducted a review of this matter under the abuse of discretion standard of review, and having issued a Memorandum Decision dated November 7, 2025, which is incorporated herein by this reference, now, therefore, it is hereby

1. ORDERED, ADJUDGED, AND DECREED that the Commissioners' decision in determining access routes to Zirbels' property is AFFIRMED in accordance with the Memorandum Decision; and
2. ORDERED, ADJUDGED, AND DECREED that the Commissioners' assessment of damages to Zirbels is AFFIRMED, except the Commissioners' assessment of damages for appraisal costs of \$29,799.20 to Zirbels is REVERSED, in accordance with the Memorandum Decision.

11/13/2025 8:47:25 AM

BY THE COURT:

Attest:  
Nutter, Taylor  
Clerk/Deputy



*Daunte Eshere*

Circuit Court Judge

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

STEVE ZIRBEL AND MONICA ZIRBEL  
Appellants

vs.

DEUEL COUNTY COMMISSIONERS  
Appellee

---

Appeal No. 31317

---

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

---

THE HONORABLE DAWN M. ELSHERE  
CIRCUIT COURT JUDGE

---

**APPELLEE'S BRIEF**

---

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NOTICE OF APPEAL FILED  
DECEMBER 4, 2025

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## **PRELIMINARY STATEMENT**

In this brief, the Appellants, Steve and Monica Zirbel, will be referred to as “the Zirbels.” The Appellee, Deuel County Commissioners, will be referred to as “the County.” The Deuel County Clerk of Courts’ record will be referred to by the initials “CR” and the corresponding page numbers. The video recording of the County’s April 9, 2025 special meeting, which was filed as a physical exhibit (CR 1550), will be referred to as “V” followed by the corresponding minutes and seconds being referenced.

## **JURISDICTIONAL STATEMENT**

The Zirbels appeal the Order Regarding Deuel County Commissioners’ April 9, 2025 Decision, entered on November 13, 2025, and noticed on November 14, 2025. (CR 1521-1522, 1523-1526.) The Zirbels’ Notice of Appeal was filed on December 4, 2025. (CR 1529.) The County agrees this Court may exercise jurisdiction pursuant to SDCL 15-26A-3.

The County preserved the right to seek review of the Circuit Court’s Order Regarding Deuel County Commissioners’ April 9, 2025 Decision by filing and serving a Notice of Review. The County’s Notice of Review was filed and served on December 23, 2025. The Notice of Review is timely under SDCL 15-26A-22, as it was filed within 20 days after service of the Zirbels’ Notice of Appeal.

## QUESTIONS PRESENTED

- I. Whether the County's creation of a right-of-way under SDCL Chapter 31-22 to provide access to the Zirbels' isolated tracts should be reviewed under the arbitrariness standard.**

*The Circuit Court concluded that the County's decision was not quasi-judicial and reviewed the decision to determine whether the County abused its discretion.*

McLaen v. White Twp., 2022 S.D. 26, 974 N.W.2d 714.

Carmody v. Lake Cnty. Bd. of Comm'rs, 2020 S.D. 3, 938 N.W.2d 433.

State v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840.

SDCL 31-22-5.

- II. Whether the County acted unreasonably, arbitrarily, or manifestly abused its discretion in the way it provided access to the Zirbels' isolated tracts or assessed damages to the affected landowners?**

*The Circuit Court concluded that, except for the County's assessment of damages for the costs of the County's appraisal, the County did not act unreasonably, arbitrarily, or manifestly abuse its discretion.*

Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366 (S.D. 1978).

SDCL 31-22-3.

SDCL 31-22-4.

- III. Whether the Circuit Court erred by determining that the County was not entitled to assess the costs of its appraisal on the Zirbels?**

*Although SDCL 31-22-6 provides that "the owner of such isolated tract shall have paid all of the costs of the proceedings in laying out and assessing the damages of said right-of-way," the Circuit Court reversed the County's assessment of the cost of the appraisal.*

Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366 (S.D. 1978).

SDCL 31-22-6.

**IV. Whether the Circuit Court had jurisdiction, in an administrative appeal brought pursuant to SDCL 7-8-27, et seq., to consider the validity of an Altamont Township road vacation resolution from 1959.**

*The Circuit Court did not specifically address this issue in the Memorandum Decision, but concluded the decision with “[i]n all other aspects the decision of the County is approved,” suggesting that the Circuit Court rejected the Zirbels’ position that the road vacation should be reviewed.*

Little v. Hanson Cnty. Drainage Bd., 2022 S.D. 63, 981 N.W.2d 657.

SDCL 31-18-3.

S.D. Const. art. V, § 5.

SDCL 16-6-10.

**V. Whether the Circuit Court had jurisdiction, in an administrative appeal brought pursuant to SDCL 7-8-27, et seq., to consider whether the County’s decision was a regulatory taking of the Zirbels’ property.**

*The Circuit Court did not specifically address this issue in the Memorandum Decision, but concluded the decision with “[i]n all other aspects the decision of the County is approved,” suggesting that the Circuit Court rejected the Zirbels’ position that the County’s provision of access under the terms decided effected a taking of the Zirbels’ property.*

S.D. Const. art. V, § 5.

SDCL 16-6-10.

**VI. Whether the Zirbels demonstrated that Commissioner Grabow should have been disqualified due to a direct pecuniary interest in the proceedings related to the isolated tracts?**

*The Circuit Court concluded it was provided insufficient evidence of Commissioner’s Grabow’s alleged conflict of interest.*

Holborn v. Deuel Cty. Bd. of Adjustment, 2021 S.D. 6, 955 N.W.2d 363.

SDCL 6-1-17.

### **STATEMENT OF THE CASE**

The Circuit Court, the Honorable Dawn Elshere, determined that the Zirbels' two tracts, described as the "East Parcel" and the "West Parcel," are isolated tracts as defined in SDCL Chapter 31-22. (CR 84-85.) She declined to find any conflict of interest by Commissioner Grabow, citing a lack of evidence. (Id.) Judge Elshere's April 14, 2024 order was not appealed.

This appeal concerns the County's proceedings that followed, which were undertaken pursuant to SDCL Chapter 31-22. On April 9, 2025, the County held a special meeting to address the routes for the Zirbels' access and corresponding assessment of damages. (CR 708-712.) On May 1, 2025, the Zirbels filed a Notice of Appeal to challenge the County's determinations. (CR 120-126.) Pursuant to SDCL 7-8-29, the County filed the Auditor's Certificate of Transcript on May 21, 2025. (CR 717.)

The Zirbels filed their opening brief on June 27, 2025, together with an appendix of documents. (CR 719-1423.) After the Zirbels submitted their brief, the Zirbels engaged Judge Elshere regarding the standard of review. Judge Elshere determined that "[t]he decision of the commission about where to lay the road and to assess the damages is not one that would be asked of a court to do," and ordered that the appeal would be reviewed for abuse of discretion. (CR 1427-1428; 1429.)

After the County submitted its brief and the Zirbels replied, the parties appeared and argued their positions on September 8, 2025. (CR 1480-1481; 1556-1589.) On November 7, 2025, Judge Elshere filed her Memorandum Decision. (CR 1519-1520.) The Order Regarding Deuel County Commissioners' April 9, 2025 Decision was filed on November 13, 2025, and noticed on November 14, 2025. (CR 1521-1522, 1523-1526.) The Zirbels filed their Notice of Appeal on December 4, 2025. (CR 1529-1530.)

### **STATEMENT OF FACTS**

The Zirbels own two parcels of land situated on Lake Alice in Deuel County that are isolated tracts pursuant to SDCL Chapter 31-22. The Zirbels were unable to reach agreements with landowners for the purchase of rights-of-way, so they asked the County to carve routes through surrounding lands so they could access their isolated tracts. (CR 753-756.)

As part of the process to determine access to the isolated tracts and assess damages to impacted landowners, on June 20, 2024, the County met with the Zirbels and other landowners. (CR 820.) The Zirbels and the various landowners marked different access routes showing their preferences, and those present then walked the various proposed access routes. (Id.)

The commissioners felt that a professional was needed to determine how installing the roads affected the values of the various landowners' properties. (CR 152; V30:25-31:00.) The County retained Northern Plains Appraisal, LLC, to assist it with appraising the various options to provide



access to the Zirbels' parcels. (CR 109; 820.) The process utilized to determine damages to the landowners affected by the new rights-of-way is analogous to when the Department of Transportation seeks to construct a highway and determines the value of the necessary taking. (CR 109; 136-137; V8:15-8:45.) Since more than one route option was considered to provide access to the isolated tracts, multiple properties were appraised, and before and after values were established on the affected properties. (CR 175-705.)

Once the County received the appraisals, a meeting was conducted on April 9, 2025 to set the access route and assess damages to affected landowners. (CR 708-712.) The appraisals broke the potential routes into three alternatives. (CR 122; CR 1410-1412.) During the meeting, two of the three alternatives were largely met with disfavor, and "Alternative 1" became the overriding focus. (CR 125; CR 1410.)

While the Zirbels acknowledged that Alternative 1 was the best proposal, the Zirbels quarreled with the particulars of Alternative 1 based on a couple objections. First, they did not want the access to the parcel labeled "ZIRBEL 1" to go through Dakota Ridge's trees; rather, they preferred the access be abutting the trees and situated to the northwest, closer to the Lake Alice shoreline. (CR 139; V:12:40-15:30.) Commissioner Grabow pointed out that locating the access closer to the shoreline would not address the potential for rising water levels. (CR 140; V14:20-14:30.)

The area Zirbels preferred closer to the shoreline also included wetlands, which would require wetland mitigation if the road would go through it. (CR 141; V15:30-16:05.) The appraisal of the Dakota Ridge parcel noted that the parcel was encumbered with a “USFW Wetland conservation easement.” (CR 179.) The appraisal also states: “Subject US FWS provided confirmation no wetland can be disturbed, thus this will impact where the proposed road can go and any changes or development could occur.” (CR 200.) The description of Alternative 1 states that the route “would impact trees but does avoid any wetlands present on the Dakota Ridge property.” (CR 230.)

The commissioners also considered the interests of Dakota Ridge, and how their real estate would be impacted by locating the access to “ZIRBEL 1” where the Zirbels preferred. Dakota Ridge’s representatives and counsel attended the April 9, 2025 meeting, and made clear that they objected to changing Alternative 1 to move the route west of the trees and closer to the shoreline. (CR 156-157.) The discussion also considered the negative impact on the value of Dakota Ridge’s property. (CR 156-157; V34:45-36:00.) The appraisal notes: “Deuel County zoning requires any residential home to be 35’ set back from the ordinary high water market (sic).” (CR 195.) Essentially, if the Zirbels’ access route moved any closer to the Lake Alice shoreline, the road would leave Dakota Ridge with a sliver of land between the road and the lake that is rendered undevelopable as lake frontage. (CR 155.) As Mr.

Dailey stated during the meeting: “I think if you move it any closer to the lake, just as well put it in the lake.” (CR 153; V31:20-31:45.)

Second, the Zirbels objected to the damages assessed on the north-south road that leads to the parcel labeled “ZIRBEL 2.” A fence is currently situated on the former section line between the property labeled “MOE” on the east and the “USFW” property to the west. The Zirbels previously asked that the road to access ZIRBEL 2 be situated on the former section line. (CR 148-150; V25:10-26:20.) However, at the April 9, 2025 meeting, they suggested that the road be situated east of the former section line on the Moe property, so that the existing fence that is in place can continue to be used. (Id.; CR 124; V28:00-28:40.) Even if the road location was moved further east onto Moes’ property, there still needs to be a fence installed. (Id.; V26:45-27:15.) Plus, moving east would mean more of the Moes’ property would have to be taken to create the right-of-way, resulting in additional cost not currently considered in Alternative 1. (CR 125; V50:45-51:45.)

Following discussion, a motion was made to approve Alternative 1, which motion was amended to include that the road must be built correctly and to assess the damages per the appraisals. (CR 126; V55:50-57:00.) During the formulation of the motion, the County specifically acknowledged that if the location of the access route to ZIRBEL 2 is far enough east that the existing fence could be used, the Zirbels should not be charged for all the fencing costs laid out in the appraisal:

COMMISSIONER: I think, to be fair to the Zirbels, I think we have to address the fence issue because if it truly moves over enough that the U.S. Wildlife doesn't need a new fence, you can't charge them for that. Is that fair? It may not, I'm saying if it does, if it was a mistake or something. We'll adopt with that motion those if that's okay with you, Harry. And you second that, Steve?

(CR 170; CR 126.)

The commissioners “considered all parties’ input and the appraisals to make [their] decision.” (CR 169-170.) They voted unanimously in favor of the motion. (CR 126.)

## **ARGUMENT**

### **A. The Circuit Court correctly reviewed the County’s decision for arbitrariness.**

The Circuit Court correctly concluded the County’s decisions concerning the placement of access rights-of-way to isolated tracts are administrative decisions, not quasi-judicial decisions. As such, the separation of powers doctrine requires that the review of the County’s decisions be confined to whether the County abused its discretion. “Abuse of discretion review” is limited to determining whether the administrative board ‘has acted unreasonably, arbitrarily, or has manifestly abused its discretion[.]’” McLaen v. White Twp., 2022 S.D. 26, ¶ 43, 974 N.W.2d 714, 728 (quoting State v. Troy Twp., 2017 S.D. 50, ¶ 17, 900 N.W.2d 840, 848 (quoting Dunker v. Brown Cnty. Bd. of Ed., 80 S.D. 193, 203, 121 N.W.2d 10, 17 (1963))).

The Zirbels cite SDCL 7-8-30, SDCL 31-22-5, and Tri County Landfill Ass'n v. Brule County, 535 N.W.2d 760 (S.D. 1995), to argue that the Circuit Court erred by failing to conduct a de novo review. However, beginning in Troy Twp., this Court clarified that the judiciary's authority to review an administrative body's decision de novo depends on whether the action was quasi-judicial or non-quasi-judicial. Id. at ¶ 24, 900 N.W.2d at 850. In Troy Twp., the Court found that “a township’s vacation of a highway is not a quasi-judicial act.” Id. at ¶ 22, 900 N.W.2d at 849.

This Court also found that a county’s issuance of a drainage permit constitutes an administrative act. In Carmody v. Lake Cnty. Bd. of Comm’rs, 2020 S.D. 3, 938 N.W.2d 433, the Court held that “[i]t is antithetical to maintaining the separation of powers to have a circuit court decide whether to issue a drainage permit.” Id. at ¶ 29, 938 N.W.2d at 442. “Because, here, the Board's decision to grant the drainage permits was not akin to ‘the ordinary business of courts,’ the circuit court did not err when it found that the appropriate standard of review was abuse of discretion[.]” Id.

Most recently, in McLaen, this Court stated: “The Township's decision in response to the McLaens' request to install culverts under Township roads and drain into a Township right-of-way was administrative in nature.” Id. at ¶ 42, 974 N.W.2d at 727-28. “The decision did not involve adjudicating existing rights between specific individuals, and the McLaens could not have asked the circuit court in the first instance to approve their request.” Id.

“Because the Township's decision was one of policy, the circuit court properly applied the abuse of discretion standard of review.” Id.

Similarly, the County's handling of a request for access to isolated tracts does not involve quasi-judicial decision-making. The County is not adjudicating a dispute between parties in this setting. Compare Surat Farms, LLC v. Brule Cnty. Bd. of Comm'rs, 2017 S.D. 52, ¶ 11, 901 N.W.2d 365, 369 (holding the adjudication of rights between two landowners in a land-drainage dispute was quasi-judicial). Rather, it is creating “an easement or right-of-way across adjacent lands to reach a public highway.” SDCL 31-22-1. Once the County takes action to establish the right-of-way, “they shall file with the county auditor a full report of all their proceedings in the premises, and the county auditor shall record the same in his record of highways.” SDCL 31-22-4. The result of this process is the creation of “a public right-of-way open to all the world.” Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366, 370 (S.D. 1978).

Like Troy Township, where roads were removed from the township highway system, Circuit Courts do not ordinarily involve themselves in creating publicly available access routes that are added to the county auditor's record of highways. The decisions reached relative to the access routes involved a policy-making function of the executive branch, namely, the Board of County Commissioners. Decision-making on this level does not

involve the County serving a role as an adjudicatory body. As such, the County's decision is properly reviewed only for abuse of discretion.

**B. The County did not act arbitrarily in the way it provided access to the Zirbels' isolated tracts and appraised the damages to the owners of the surrounding lands.**

This Court has explained how a County's decision must be reviewed under the abuse of discretion standard. The County "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

McLaen, 2022 S.D. 26, ¶ 46, 974 N.W.2d at 728 (quoting Troy Twp., 2017 S.D. 50, ¶ 33, 900 N.W.2d at 853 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983)). On review, a decision is arbitrary "if the [County] has relied on factors which [the Legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the [county], or is so implausible that it could not be ascribed to a difference in view or the product of . . . expertise." Id. (citation omitted) (second alteration in original).

As the parties challenging the County's decision, the Zirbels carry the burden of proving the County acted arbitrarily. McLaen, 2022 S.D. 26, ¶ 46, 974 N.W.2d at 728. The County followed the requirements of the statutes regarding the provision of access to isolated tracts. The Zirbels did not meet

their burden to prove that the County acted arbitrarily in any aspect of the process.

**1. The County followed the requirements of SDCL 31-22-3.**

The Zirbels argue that “[t]his appeal turns, in significant part, on the County’s failure to consider the convenience of the parties as the statute requires.” (Appellants’ Brief, at 28.) To the contrary, the County considered the convenience of *all* parties, not just the Zirbels. See SDCL 31-22-3 (mandating that the County “shall consider the convenience of *the parties*.”) The process envisioned under SDCL Chapter 31-22 is not just about satisfying the Zirbels’ desire for access to their property. Their right of access affects other landowners, whose property will be encumbered by an access right-of-way that did not previously exist. Indeed, the statutory scheme is set up with any eye toward the protection of the owners of land affected by the right-of-way, not the Zirbels. SDCL 31-22-5 provides “*the owner of the land over which such right-of-way is laid* may appeal from the decision and assessment of damages by such county commissioners to the circuit court . . .” (Emphasis added.)

A review of the record and the April 9, 2025 special meeting shows that the County did exactly what was required under SDCL 31-22-3. The record reflects that the County visited the land for the purpose of laying out the rights-of-way and appraising the damages. It hired appraisers and, ultimately, adopted the recommendations and values determined.



As below, the Zirbels drastically understate the complications created by their chosen access route to the west parcel, ZIRBEL 1. The County rejected the Zirbels' request to move the access to the parcel labeled ZIRBEL 1, in favor of the appraiser's chosen route, for several reasons. First, the Zirbels' proposal to move the road closer to the Lake Alice shoreline would not address the potential for rising water levels. Second, the area Zirbels preferred closer to the shoreline impacted wetlands, and the appraiser purposely steered clear of those areas due to concerns over wetland mitigation. Third, the commissioners considered the interests of Dakota Ridge, and how their real estate would be impacted by locating the access to "ZIRBEL 1" where the Zirbels preferred. The record clearly shows that the County examined the relevant data and articulated a satisfactory explanation for the choices it made. McLaen, 2022 S.D. 26, ¶ 46, 974 N.W.2d at 728.

The County also rejected Zirbels' request, for the first time at the April 9, 2025 special meeting, to move further east the north-south right-of-way that leads to the east parcel, ZIRBEL 2. The fallacy of the Zirbels' position was discussed at the meeting. The Zirbels previously asked that the access to ZIRBEL 2 be situated on the former section line. (CR 148-150; V25:10-26:20.) However, at the April 9, 2025 meeting, they suggested that the road be situated east of the former section line on the Moe property, so that the existing fence that is in place can continue to be used. (Id.; CR 124; V28:00-

28:40.) Even if the road location is moved further east onto Moes' property, there still needs to be a fence installed. (Id.; V26:45-27:15.) Plus, more eastward movement of the right-of-way may mean more of the Moes' property is taken, resulting in additional cost not currently considered in Alternative 1. (CR 125; V50:45-51:45.)

The County considered these factors and declined to shift the property further east and take more of Moe's property. But it also agreed that, if the current fence can be used and the Zirbels can stay within the former section line, the damages associated with the fencing should be reduced. (CR 170.) The County did not make this decision arbitrarily; it considered the information presented to it and made an informed decision about how to proceed.

**2. The County appropriately assessed damages under SDCL 31-22-4.**

SDCL 31-22-4 requires county commissioners to "assess and determine the damage which the right-of-way is to the owner of the land across which it is laid . . ." In selecting the routes and assessing damages, the County relied on the study and opinions of certified general appraisers. Brian Gatzke and John Green are Certified General Appraisers who are well-qualified to appraise South Dakota real estate. (CR 1121-1123; CR 615-618.) The Zirbels did not take issue with the appraisers' credentials below or point to their own independent appraisals to refute their conclusions.

The Zirbels now seem to argue that the County should have used assessed values or some multiplier of assessed values. (Appellants' Brief, at 32, 34.) Under South Dakota law, property value reflects the price a willing buyer would pay a willing seller in an open market transaction, considering the property's legally permissible uses and actual economic characteristics. See Brookings Assocs. v. State Bd. of Equal., 482 N.W.2d 873, 876-77 (S.D. 1992). In Brookings, this Court cautioned against valuation methodologies driven solely by tax assessment practices rather than actual market realities and emphasized that valuation must reflect concrete economic characteristics of the property rather than an artificial or purely tax-oriented approach. Id. The County relied upon certified appraisals so that the amount it assessed as damages would fairly and accurately reflect the impact of the rights-of-way on the affected parcels. Had it simply used values derived for tax assessment purposes, its methodology would have certainly been challenged by the affected landowners, rather than the Zirbels.

The Zirbels also argue that, had the County provided for more time between the production of the appraisals and the special meeting, they could have retained their own appraiser. (Appellants' Brief, at 33.) The County's decision to hire an appraiser was discussed when the commissioners met with the interested parties on June 20, 2024, and walked the various routes. (CR 820.) The Zirbels were fully aware the County hired an appraiser. (CR 92.) In fact, the Zirbels sought to hold the County in contempt for not moving

quickly enough to provide access and assess damages, and they complained about the time the appraisal was taking. (CR 86-89.) Considering the Zirbels' desire for resolution of the issues and prior motion practice, the County moved with all due haste to bring the matter on for a special meeting once it received the completed appraisals.

The Zirbels were not deprived of “any meaningful opportunity to contest the damages assessment.” (Appellants’ Brief, 33.) At any point in the proceedings prior to the April 9, 2025 special meeting, the Zirbels had the prerogative to pursue their own appraisals. They elected not to do so. They are now simply displeased that certified appraisers found that providing them access to the isolated tracts will cause significant economic impact on the parcels they are crossing.

**a. The County’s assessment of damages regarding ZIRBEL 1 was not arbitrary.**

The Zirbels argue that the County’s assessment of damages regarding the west parcel, ZIRBEL 1, concerning the Dakota Ridge taking, is “extraordinary.” (Id.) But they support their assertion only with their own second-guessing of the appraisers’ work product and selective citation to the record.

For example, the Zirbels argue that Ryan Dailey stated that he never intends to develop the lake shore on the Dakota Ridge property. (Appellants Brief, at 34.) However, the Zirbels’ attorney was corrected on this point:

COMMISSIONER: . . .But the road, one of the things that when you're out there that the Daileys said was if you put the road down there, then he loses all use of that piece of land.

MR. KOEHN: And I apologize, you're the son?

SPEAKER: Right.

MR. KOEHN: Right. He just said that they have zero intention to develop the land.

SPEAKER: **Never say never** (indiscernible).

(CR 144.) (Emphasis added.)

Indeed, counsel for the Daileys and Dakota Ridge made clear that he had concerns with moving the right-of-way closer to the shoreline, as the Zirbels requested. These concerns related specifically to the impact on the value of the Dakota Ridge property:

MR. KNIGHT: Well, they don't want the road on that side of the trees. The Daileys don't want the road on that side of the trees.

COMMISSIONER: That side of the trees being the lakeside of the trees?

MR. KNIGHT: Correct. And the reason is that we think that that has a significant impact on valuation of that property.

COMMISSIONER: Sure.

(CR 156-157.)

The Court must decide if the Zirbels proved that the County acted arbitrarily by adopting the recommendations of the appraiser as to the location of the route and the assessment of damages to Dakota Ridge. The Zirbels speculate about how different appraisal approaches may have yielded

different results. (Appellant's Brief, at 33, n.4.) But they point to no authority or opinion suggesting that the selected approach is inappropriate in this setting. Nor do the Zirbels specify anything within the methodology used by the appraisers that suggests the dollar amount conclusions lack a basis.

The record, viewed as a whole, portrays a classic example of the commissioners considering all aspects of the problem of providing access to ZIRBEL 1, not just addressing the problems faced by the Zirbels associated with tree removal. The Zirbels did not demonstrate that the County's concerns were arbitrary, or that the County's decision ran counter to the evidence the County had before it.

The Zirbels also argue that the issues associated with pushing the access to ZIRBEL 1 closer to Lake Alice could have been resolved via a merger clause. (Appellants' Brief, at 35.)<sup>1</sup> First, while this proposal potentially prevents leaving useless slivers of waterfront property, it fails to address the other issues associated with the Zirbels' preferred right-of-way location, i.e., water levels rising and wetland intrusion. Second, the Zirbels cite no statute which would authorize the County to use such a clause. Counties are creatures of statute, and possess only the powers given to them

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<sup>1</sup> Citing the transcript of the oral argument hearing before the Circuit Court, CR 1562-1563, the Zirbels argue the merger clause has been "repeatedly proposed." (Appellants' Brief, at 35.) However, it appears from the settled record that the merger clause idea was only argued in the Zirbels' reply brief and oral argument to the Circuit Court. The balance of the record does not appear to include discussion of a merger clause at the County level. If this idea was not presented to the County, the County cannot be said to have abused its discretion for not embracing it.

by the Legislature. Tibbs v. Moody Cnty. Bd. of Comm'rs, 2014 S.D. 44, ¶ 25, 851 N.W.2d 208, 217. SDCL 31-22-1 says that owners of isolated tracts are “entitled to an easement or right-of-way across adjacent lands to reach a public highway, which easement or right-of-way may be secured *as provided in this chapter*.” (Emphasis added.) The Zirbels cite no provision in SDCL Chapter 31-22 that contemplates a County’s authority to utilize a merger clause to reduce damage assessments to the affected landowners.

**b. The County’s assessment of damages regarding ZIRBEL 2 was not arbitrary.**

The Zirbels also quarrel with the \$30,000 in damages assessed on the right-of-way through the Moe property to provide access to their east parcel, ZIRBEL 2. They offer nothing to refute the appraiser’s determination that the right-of-way would cause a \$30,000 diminution in value regarding the Moe parcel. Instead, their argument centers on the USFW and Haas appraisals not fixing similar damages. Per the appraisals, no land is taken from USFW and Haas. (CR 166.) The County’s failure to assess additional damages associated with the USFW and Haas parcels simply follows the appraiser’s recommendations.

The Zirbels also contend the County somehow erred by assessing fencing costs as damages. SDCL 31-22-7 provides, in pertinent part:

If the right-of-way be laid along the line separating two farms, then the owner of the isolated tract for which such right-of-way was laid shall erect and maintain one-half of the fence along both sides of such right-of-way, but if it be laid through a farm and not along the border thereof, no fence will be deemed

necessary unless requested by the owner of land through which such road passes, in which cases the owner of the isolated tract shall erect and maintain the fence along both sides of such right-of-way and shall locate at a point to be described by the owner of the land gates at least sixteen feet wide in each of such fences. . .

The County's understanding from the property visit was that Zirbels' chosen access was to be centered on the former section line. (CR 148; V25:30-25:50.) If the access route is centered on the former section line, the fence located within the former section line must be relocated, which would mean building two new fences, consistent with SDCL 31-22-7. (CR 148-149; V:25:50-26:25.) Even if access right-of-way could be shifted to the east slightly, and the existing fence could be used, a new fence must be constructed on the Moe property. (Id.; V26:30-27:00.)

During the formulation of the motion that was voted on, the County specifically acknowledged that if the location of the access route to ZIRBEL 2 is far enough east that the existing USFW fence could continue to be used, the Zirbels should not be charged for all the fencing costs laid out in the appraisal:

COMMISSIONER: I think, to be fair to the Zirbels, I think we have to address the fence issue because if it truly moves over enough that the U.S. Wildlife doesn't need a new fence, you can't charge them for that. Is that fair? It may not, I'm saying if it does, if it was a mistake or something. We'll adopt with that motion those if that's okay with you, Harry. And you second that, Steve?

(CR 170; CR 712 ("If USFW fencing cost is not needed, then they will not be assessed for that damage."))



The County's intention was not to assess more in fencing cost on the Zirbels than SDCL 31-22-7 requires. But, if *two* new fences are required because of the Zirbels' chosen location, they should bear the burden of one-half the fencing costs on the two fences.

The Zirbels argue on appeal that they are not responsible for the fencing costs; they are responsible for erecting and maintaining one-half of the fences. Thus, the Zirbels assert the imposition of any fencing costs is arbitrary. This position seems to be at odds with the conclusion in Frawley Ranches, Inc., where the appraisals relied upon by the trial court assumed that fencing would not be needed. The Court concluded that this omission meant that the damages awarded were inadequate and a remand was necessary. Id. at 372. The County understood that it was to include the fencing costs as part of the damages to be assessed, and it did not abuse its discretion by doing so.

**C. The County is entitled to recover the appraisal costs under SDCL 31-22-6.**

The Circuit Court concluded that “[t]he nearly \$30,000-damage assessed to Zirbels for the cost of the appraisal was unreasonable and should be removed from the assessed damages.” (CR 1520.) Because the County disagrees with this conclusion, it sought this Court's review.

SDCL 31-22-6 states, in full:

Upon payment of the sum assessed to the owner of the land over which such right-of-way is laid or upon his refusal to accept the same upon the deposit of such sum with the clerk of courts of the

county in which such lands are located, the right of the owner of such isolated tract to the free use of said right-of-way shall be complete; **provided the owner of such isolated tract shall have paid all of the costs of the proceedings in laying out and assessing the damages of said right-of-way**, and the commissioners shall each be entitled to a fee of three dollars per day and five cents for each mile necessarily traveled in going to and returning from the lands where such right-of-way is located.

(Emphasis added.)

The Zirbels were unable to reach agreements with landowners for the purchase of rights-of-way, so they asked the County to carve routes through surrounding lands so they could access their isolated tracts. To do this, the County was charged with “assess[ing] and determin[ing] the damage which the right-of-way is to the owner of the land across which it is laid[.]” SDCL 31-22-4.

Being an elected official does not expand one’s background, education, training, and experience, such that the commissioners here were equipped to determine the before-and-after valuations of several unique parcels of real estate affected by the Zirbels’ requests. Before the county allowed for the creation of encumbrances affecting these parcels, it sought the help of qualified professionals. The appraisals conducted in this case mirror what the DOT would do if the state was taking land for a road project. (CR 109.) Appraisals are commonplace and critical in that setting. See e.g. State Highway Comm’n v. Anderson, 90 S.D. 503, 507, 242 N.W.2d 674, 676 (1976) (discussing the importance of expert opinions in condemnations). In the only other reported case considering SDCL 31-22-4, appraisers were utilized to

help assess damages associated with a one-half mile right-of-way that was twenty-five feet in width. Frawley Ranches, Inc., 270 N.W.2d at 372.

The County does not know how it could have fairly and accurately determined the impact of its new access routes on the affected landowners without employing a qualified appraiser. The appraisal costs are appropriately considered part of “the costs of the proceedings in laying out and assessing the damages of said right-of-way,” which fall on the Zirbels as the owners of the isolated tracts. The Circuit Court erred by ruling that the County may not collect these costs.

**D. The Zirbels raise issues that are not appropriately reviewed by a Court considering an appeal under SDCL 7-8-27, et seq.**

While Circuit Courts enjoy general jurisdiction over most matters, their appellate jurisdiction is not as broadly cast. Under the South Dakota Constitution, “the circuit courts have such appellate jurisdiction as may be provided by law.” S.D. Const. art. V, § 5. Similarly, SDCL 16-6-10 provides: “The circuit court has jurisdiction of appeals from all final judgments, decrees or orders of all courts of limited jurisdiction, inferior officers or tribunals, in the cases prescribed by statute.” The Zirbels’ appeal was brought under SDCL 7-8-27, et seq., under which a Circuit Court can hear appeals taken “[f]rom all decisions of the board of county commissioners upon matters properly before it[.]”

The Circuit Court determined that it had jurisdiction to hear the Zirbels’ appeal under SDCL 7-8-27. (CR 1520.) But that does not mean the

Circuit Court, while exercising appellate jurisdiction, could make decisions that are completely unrelated to the issues decided by the County.

Regarding the Zirbels' claim about the veracity of Altamont Township's road vacation proceedings and the claim that the County effected a taking, the Zirbels essentially asked the Circuit Court to abdicate its appellate role and delve into subjects that are not appropriately considered in an administrative appeal challenging a county's decisions. The Circuit Court wisely steered clear of these issues, and this Court should as well.

**1. The administrative appeal does not concern Altamont Township's 1959 decision to vacate a section line.**

The Zirbels contend that "[o]ne of the central and dispositive issues preserved for this appeal is whether the section-line right-of-way along 478th Avenue affecting the East Parcel [ZIRBEL 2] was lawfully vacated." (Appellants' Brief, at 24.) The record includes meeting minutes and a published resolution showing that Altamont Township took actions to vacate the section line in question. (CR 37-39, 201.) The Zirbels presented no judgment or decree under which Altamont Township's vacation of 478<sup>th</sup> Avenue was set aside. It is not within the County's purview to overturn or set aside another governmental entity's vacation proceedings. Nor could a Circuit Court exercising appellate jurisdiction under SDCL 7-8-27, et seq., do so.

The efficacy of a township road vacation is an ancillary issue over which the County has been granted no legislative authority. To the contrary,

by statute, the County is foreclosed from vacating or changing any portion of the township's road system. See SDCL 31-18-3.

In Little v. Hanson Cnty. Drainage Bd., 2022 S.D. 63, 981 N.W.2d 657, following Hanson County's approval of a drainage permit application to remove debris from a ditch located in a township road right-of-way, the Littles filed an appeal in circuit court. Section 2.02 of the drainage ordinance required written approval of the governing agency for any drainage into a road right-of-way. Two signatures from members of the Spring Lake Township Board of Supervisors, granting the township's approval, were presented with the application. On appeal, the Littles claimed *inter alia* that the Spring Lake Township failed to post notice of its meeting, so its approval of the permit was invalid. This Court clarified that review of a township's actions is not possible in a SDCL 7-8-27 appeal:

The matter before this Court is an action against the Hanson County Drainage Board, not the Spring Lake Township Board of Supervisors. The Hanson County Drainage Board and the Spring Lake Township Board of Supervisors are different political entities with different powers granted by the Legislature. Although a township's authority may sometimes be subordinate to a county's authority, the entities remain separate. See SDCL 8-2-9; see also Welsh v. Centerville Twp., 1999 S.D. 73, 595 N.W.2d 622 (discussing a conflict between a township's and a county's respective regulatory authority). **Accordingly, the action now before this Court is not the appropriate avenue to invalidate the Township's consent to the permit based on the alleged violation of the Township's special meeting notice requirements.**

2022 S.D. 63, ¶ 16, 981 N.W.2d 657, 663 (emphasis added).

Similarly, this action is an appeal of the County's decisions concerning access to isolated tracts. It is not the proper legal mechanism for challenging the efficacy of Altamont Township's 1959 road vacation proceedings.

Altamont Township is a separate governmental entity that has nothing to do with deciding access routes to isolated tracts. Indeed, Altamont Township is not even a party to this administrative appeal. Nor could it be. The statutory framework relied upon by the Zirbels in bringing this action recognizes this appeal as their exclusive remedy to seek judicial review of the *County's* decisions. SDCL 7-8-32.

Even if the County was the designated arbiter of the validity of Altamont Township road vacations (it is not), the Zirbel's argument misinterprets various authorities. First, the Zirbels quote the current language of SDCL 31-3-8, and blame the county auditor for not having an updated map. The Zirbels also argue that "[n]o recorded document exists evidencing the vacation of the section line right-of-way[.]" (Appellants' Brief, at 26.) While recording the resolution is a requirement under the *current* language of SDCL 31-3-8, that requirement came about with an amendment in 2012.

The final sentence of the current version of SDCL 31-3-8 reads: "A certified copy of the resolution and order shall be filed with the register of deeds." This final sentence was added in 2012, when our Legislature took up "An Act to require the filing of certain documents relating to the vacation,

location, or changing of highways with the register of deeds.” 2012 S.D. ALS 155, 2012 S.D. Laws 155, 2012 S.D. CH 155, 2012 S.D. HB 1094. Since 2012, townships have been required to record vacation resolutions. But the present version of SDCL 31-3-8 would not apply to a 1959 road vacation. See SDCL 2-14-21 (“No part of the code of laws . . . shall be construed as retroactive unless such intention plainly appears....”) For better or worse, in 1959, there was no requirement to record.

The County does not know if its auditor in 1959 was or was not advised of the Altamont Township vacation, such that the auditor could have or should have updated the highway map. But the County also does not have the prerogative to simply cast aside an Altamont Township resolution concerning its road system. The validity of the 1959 vacation is not an issue that was or could be resolved by the County, and it is not a proper subject of this appeal.

Second, the Zirbels point to SDCL 31-12-2. That statute has nothing to do with a *township* road that is not a part of the “county highway system.” The township is a separate road authority which has jurisdiction over its own road system. The term “county highway system” is a defined term, and under SDCL 31-1-5(2), it includes “the highways designated by the board of county commissioners in organized counties under the supervision of these bodies that have been approved by the department of transportation.” Conversely, “Township highways” are “the secondary highways in organized townships

that are administered by a board of township supervisors . . .” SDCL 31-1-5(3). Altamont Township’s decisions with respect to its highways does not fall under SDCL 31-12-2.

The Circuit Court committed no error with respect to the Zirbels’ arguments about Altamont Township’s section line vacation proceedings. This issue has no place in a county commission proceeding or an appeal brought under SDCL 7-8-27, et seq.

**2. The administrative appeal does not concern an alleged taking under Article VI, § 13 of the South Dakota Constitution.**

Once again, the Circuit Court served as an appellate court and reviewed the County’s actions under SDCL Chapter 31-22. No part of that inquiry involves determining whether the County effected a taking of private property for public use. Indeed, this issue is not even joined by a pleading in this action. The Zirbels’ Notice of Appeal is clearly brought pursuant to SDCL 7-8-27. (CR 120.) They requested in briefing that the Circuit Court use the administrative appeal decide that a taking had occurred. Procedurally, this is simply untenable.

Nor does the authority presented by the Zirbels support an alleged takings claim. The Zirbels first cite Donohoe Constr. Co. v. Montgomery Cnty. Council, 567 F.2d 603, 608 (4th Cir. 1977), which was filed as a takings claim under the fifth and fourteenth amendments to the Constitution, not as an administrative appeal. Donohoe claimed the County impermissibly



interfered with its plans to proceed with construction of a fourteen-story building on its property, which amounted to a de facto taking. However, the Fourth Circuit Court of Appeals determined that the Donahoes' frustrations were misdirected. "[T]he fundamental impediment to Donohoe's construction plans was (and still is) the sewer moratorium imposed upon the Friendship Heights area by the State of Maryland. This impediment was clearly beyond the control of any of the parties to this litigation." Id. at 608. "[F]or governmental interference with private property rights to constitute an implied or de facto taking, such interference must be so substantial as to 'deprive the owner of all or most of his interest' in the property." Id. at 608 n.13. The Fourth Circuit did not agree with the district court that the County's interference was substantial enough to constitute a taking and reversed the decision.

Likewise, State v. Legacy Land Co., 2023 S.D. 58, 998 N.W.2d 94, was an *eminent domain case* in which this Court upheld summary judgment in favor of the State of South Dakota on a landowner's claim that a restriction of its access was a taking under S.D. Const. art. VI, § 13. Legacy did not try to prosecute its takings claim within an administrative appeal under SDCL 7-8-27. The factors under consideration in Legacy Land Co., have no bearing on the resolution of this appeal.

Here, the County was not involved in the Zirbels' acquisition of the isolated tracts. The County was asked to exercise the authority granted to it

by statute to create routes of access to the Zirbels' isolated tracts. The Zirbels clearly do not like the costs associated with the provision of such access. But the Zirbels present no authority suggesting that the County's assessment of higher-than-expected costs to create access to isolated tracts is so substantial as to deprive them of all or most of their interest in their property.

**E. The Zirbels failed to support any claim for disqualification of Jay Grabow under SDCL 6-1-17.**

Early in the case, the Zirbels raised an issue concerning Mr. Grabow's qualifications to decide the issues concerning their request for access. (CR 26-27.) The Circuit Court declined to find any conflict, citing a lack of evidence. (CR 85.) As the County moved through the process of creating the access routes to the Zirbels' isolated tracts, the Zirbels did not further pursue their objection to Mr. Grabow's involvement, including in their briefing to the Circuit Court regarding the County's decision-making under SDCL Chapter 31-22. Now, the argument resurfaces, albeit without any further evidentiary support.

"Our Legislature has established statutory grounds for disqualification of county, or other local officials, under the provisions of SDCL 6-1-17 and SDCL 6-1-21, to address circumstances involving an official with a conflict of interest, or when an official's authority, statements, or actions demonstrate prejudice or an unacceptable risk of bias." Miles v. Spink Cnty. Bd. of Adjustment, 2022 S.D. 15, ¶ 37, 972 N.W.2d 136, 149.

SDCL 6-1-17 does not call for disqualification of Mr. Grabow. The Zirbels rely solely on the fact that the former owner of Dakota Ridge, Jim Dailey, was Mr. Grabow's uncle, and the current owner, Ryan Dailey, is his cousin. Standing alone, this is insufficient to bar Mr. Grabow. There is no claim Mr. Grabow has a direct pecuniary interest in the outcome of the Zirbels' request for access to isolated tracts, which is what must be shown for disqualification. As this Court reasoned in Holborn v. Deuel Cnty. Bd. of Adjustment:

SDCL 6-1-17 does not define the phrase "direct pecuniary interest." In Hanig, this Court looked to statutes and cases in other jurisdictions to determine whether a city council member had an indirect financial interest in a city council decision on a liquor license application. 2005 S.D. 10, ¶ 19, 692 N.W.2d at 209. In this context, we noted authorities suggesting that a direct pecuniary interest requires a showing that the property of the official will be benefitted, or that he or she will receive direct financial gain from a decision on the matter before the board. Id. There is no evidence that DeBoer or Dahl stood to gain financially from their votes on the SEPs. Moreover, Appellees do not argue that any of the Board members held a "direct pecuniary interest" under SDCL 6-1-17. Absent such a direct pecuniary interest, the plain language of SDCL 6-1-17 leaves the disqualification decision exclusively to the official's judgment, or the collective vote of at least two-thirds of the governing body when any other potential conflict is disclosed or identified.

2021 S.D. 6, ¶ 32, 955 N.W.2d 363, 377

The Zirbels blame the County for not doing more to preserve this issue for them. The April 9, 2025 special meeting was video recorded and a transcript was prepared. The Zirbels did not so much as mention SDCL 6-1-17, much less request that the commissioners vote on whether Mr. Grabow

had an “identifiable conflict of interest” that should prevent him from participating on the access issues. Once this matter returned to circuit court, the Zirbels did not seek to depose Mr. Grabow or otherwise conduct any other discovery as to his alleged conflict.

If the record is silent as to Mr. Grabow’s alleged conflict of interest, that is for two reasons. First, because Mr. Grabow has no direct pecuniary interest of any kind related to the Zirbels’ request for access, and there are no grounds for disqualification. Second, because the Zirbels did nothing to preserve this issue. “The appellant has the burden of going forward in an appeal, and providing this Court with an adequate record upon which to do so.” Owens v. Moyes, 530 N.W.2d 663, 665 (S.D. 1995).

### **CONCLUSION**

The County respectfully urges the Court to reverse the Circuit Court’s decision to preclude the County from assessing as damages its appraisal costs in the amount of \$29,799.20, and to affirm the Circuit Court’s Order Regarding Deuel County Commissioners’ April 9, 2025 Decision in all other respects.

Respectfully submitted this 16<sup>th</sup> day of April, 2026.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief does not exceed the number of words permitted by SDCL 15-26A-66(b)(2), said brief containing 8,233 words Century Schoolbook, 12-point, and 42,420 characters (no spaces).

Dated this 16<sup>th</sup> day of April, 2026.

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## **CERTIFICATE OF SERVICE**

The undersigned one of the attorneys for the appellee, hereby certifies that on the 16<sup>th</sup> day of April, 2026 a true and correct copy of **APPELLEE'S BRIEF** was electronically transmitted to:

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and the original and one copy of APPELLEE'S BRIEF were mailed by first-class mail, postage prepaid to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court of South Dakota, State Capitol Building, 500 East Capitol

Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 16<sup>th</sup> day of April, 2026.

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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APPEAL NO. 31317

---

STEVE AND MONICA ZIRBEL  
Appellants,

v.

DEUEL COUNTY COMMISSIONERS,  
Appellee.

---

APPEAL FROM THE CIRCUIT COURT  
THIRD CIRCUIT  
DEUEL COUNTY, SOUTH DAKOTA

---

HONORABLE DAWN ELSHERE  
Presiding Judge

---

APPELLANTS' REPLY BRIEF

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NOTICE OF APPEAL WAS FILED DECEMBER 4, 2025

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## ARGUMENT

### I. The Circuit Court Erred by Failing to Conduct a Trial De Novo.

#### A. The County's decision was a quasi-judicial adjudication of specific access rights, not an administrative policy decision.

The County argues that the decision of the County pursuant to SDCL ch. 31-22 is non-quasi-judicial and therefore an administrative act, subjecting the Court to an abuse of discretion review. (Appellee Brief, at 10). This argument is incorrect. The County asserts the following: (1) the County improperly analogizes this case to *McLaen v. White Twp.*, 2022 SD 26, ¶ 42, 974 N.W.2d 714, 727-28 (holding “the decision did not involve adjudicating existing rights between specific individuals”), (2) “The County is not adjudicating a dispute between parties in this setting,” and (3) “the decisions reached relative to the access routes involved a policy-making function of the executive branch . . . Decision-making on this level does not involve the County serving a role as an adjudicatory body.” *Id.* at 10-12. Each of these arguments fail as they ignore the facts and procedural basis for seeking relief under SDCL ch. 31-22.

The prerequisite condition to the application to the County for relief under SDCL ch. 31-22 is the inability of an isolated tract owner to agree with servient tenements regarding the purchase of a right-of-way to said isolated tract. *See* SDCL § 31-22-2. Here, the Interested Parties denied the Zirbels access following the Zirbels' offer to purchase access. The Zirbels then sought statutory relief from

the County. The County was therefore required to decide the parties' respective property rights in recognition of SDCL ch. 31-22.

This Court's holding in *Surat Farms, LLC v. Brule Cnty. Bd. of Comm'rs*, confirms that this type of county-board decision is quasi-judicial. 2017 S.D. 52, 901 N.W.2d 365. In *Surat*, a county board resolved a drainage dispute between adjoining landowners after the board inspected the properties, held a hearing, received evidence from counsel for both parties, and determined that one landowner had impermissibly altered the natural flow of water across the other's land. 2017 SD 52, ¶¶ 6-7, 901 N.W.2d at 368. Applying this Court's holding in *Troy Township*, the Court held that the board's task—"an adjudication of a land-drainage dispute between two landowners"—was quasi-judicial because it involved a land dispute between neighbors that could have been determined as an original action in circuit court. *Id.* ¶¶ 10-11, 901 N.W.2d at 369 (citing *State v. Troy Twp.*, 2017 S.D. 50, ¶ 21, 900 N.W.2d 840, 849).

This case is likewise an adjudication of a property dispute between landowners. The County did not make a new rule, amend an ordinance, rezone property, or adopt a general policy for the public at large. It decided whether the Zirbels' parcels were isolated, where access would be imposed, what damages would be paid, and what conditions would attach to the right-of-way. Those determinations "investigate, declare, and enforce" existing rights and liabilities under existing law, and they are "akin to the ordinary business of courts."

*Carmody v. Lake Cnty. Bd. of Comm'rs*, 2020 SD 3, ¶ 16, 938 N.W.2d 433, 438 (quoting *Troy Twp.*, 2017 S.D. 50, ¶ 21, 900 N.W.2d at 849).

The County's reliance on *McLaen* and *Carmody* is misplaced, and its attempt to distinguish *Surat Farms* fails. *McLaen* involved a township's road-management decision that did not adjudicate existing rights between specific individuals. *Carmody* involved drainage permits, not a dispute between landowners. *Surat Farms*, by contrast, involved a county board's adjudication of competing property rights between neighboring landowners—the same kind of *inter partes* property dispute presented here. Because this case involves a statutory proceeding triggered by private landowners' failure to agree on access, and because the County was required to decide present property rights, route location, and compensation, the County acted quasi-judicially.

**B. A statutory trial de novo was required because the County's decision was quasi-judicial.**

Because the County's decision under SDCL ch. 31-22 was quasi-judicial, South Dakota statutes and case law required the circuit court to hear the appeal by trial de novo. See SDCL §§ 7-8-30, 31-22-5; *MRose Dev. Co., LLC v. Turner Cnty. Bd. of Cnty. Comm'rs*, 2024 S.D. 28, ¶ 22, n. 2, 7 N.W.3d 685, 691. As highlighted by the Zirbels in their Appellant Brief, this Court recently addressed this issue in *MRose Dev. Co., LLC*:

To perhaps clarify, the de novo standard courts use to review questions of law relating to the interpretation of text *is not the same* as trial de novo procedure referenced in some administrative appeal statutes and discussed in our cases. The former contemplates no

deference to a trial court or administrative body's legal interpretation of statutes or ordinances. But, where it is authorized under our decisions, the trial de novo procedure allows a trial court to broadly reconsider the propriety of an administrative decision in its entirety, including rehearing the subject of the decision with the presentation of evidence. The fact that the distinct de novo standard and the trial de novo procedure sound so similar may account for some of the imprecision associated with "de novo" references before the circuit court.

*Id.* SDCL § 7-8-30 and SDCL § 31-22-5 both require a trial de novo to the circuit court following an appeal from the county commissioners. Because the County's decision adjudicated specific rights between individuals, the circuit court was required to conduct a trial de novo rather than confine review to the limited County record. The absence of a trial de novo mattered here. The circuit court never received live testimony from the appraiser, never developed a full evidentiary record on route feasibility or damages, and never had the opportunity to resolve disputed facts independently. That is precisely the function trial de novo serves where a county board has exercised quasi-judicial power. The scarcity of the record confirms why a trial de novo was required. The circuit court's refusal to conduct a trial de novo is reversible error.

**II. Alternatively, the Circuit Court Erred by Affirming the County's Decision Even Under Abuse-of-Discretion Review.**

**A. The County arbitrarily selected the easement routes.**

The County contends it did not act arbitrarily in selecting the easement locations and asserts it satisfied its obligation under SDCL § 31-22-3 by "consider[ing] the convenience of all parties, not just the Zirbels." (Appellee Brief,

at 13). The County argues that it “did exactly what was required under SDCL 31-22-3.” *Id.* The record demonstrates otherwise.

After the circuit court ordered the County to provide access to the isolated tracts, the County convened a special meeting on June 20, 2024, at the Properties. AR 820. During that meeting, the parties spent approximately ten minutes identifying potential routes by marking a map. *Id.* These suggestions were merely preliminary. At that time, the parties lacked critical information, including topography, physical obstructions, and projected costs. The proposed routes were thus based on generalized assumptions—such as selecting the shortest distance between a public road and the Zirbels’ parcels—rather than any meaningful evaluation of statutory factors. They were not final proposals.

The County then inspected the suggested routes but deferred any substantive discussion or decision until completion of a \$30,000 appraisal. *Id.* Only after receiving that appraisal did the County reconvene on April 9, 2025, to render its decision. AR 821–25.

The County’s process created a practical trap. At the June 20, 2024, meeting, the parties identified only preliminary route concepts because they lacked the information necessary to evaluate cost, topography, wetlands, fencing, damages, and feasibility. The County then deferred substantive route selection until after the appraisal. But when the parties reconvened on April 9, 2025, the County treated the appraisal as effectively controlling and resisted route modifications because any change would require revised appraisal work. See AR



826–67. As a result, the parties never received a meaningful opportunity to evaluate and propose routes in light of the very information the County had deferred its decision for—the cost and feasibility consequences of each preliminarily proposed route. That process is incompatible with SDCL ch. 31-22, which requires the County, not the appraiser, to consider the convenience of the parties and determine the appropriate right-of-way.

The County’s position—that the Zirbels “chose” the access routes and only later attempted to revise them (Appellee Brief, at 14)—is a fallacy. The suggestions submitted at the June 20, 2024, meeting were tentative and uninformed. The April 9, 2025, meeting was the first meaningful opportunity to address cost, feasibility, and convenience—precisely the considerations the statute requires. Once the appraisal revealed that the selected routes imposed the highest possible cost, in the most inconvenient locations possible, the Zirbels sought reasonable modifications. *Id.*<sup>1</sup>

Far from being untimely, the Zirbels’ proposals were responsive to information the County itself withheld until the day before that hearing.

The result underscores the arbitrariness of the County’s decision: the adopted routes require the Zirbels to pay \$270,647.20 for access to their own property, even though the record identified less burdensome modifications that the

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<sup>1</sup> At the April 9, 2025, meeting, the Zirbels repeatedly argued for the most convenient routes, suggesting the routes could traverse “along the trees” and “along the fence.”

County rejected without meaningful analysis. Indeed, even Ryan Dailey, Interested Party and owner of Dakota Ridge, expressed dissatisfaction with "ALTERNATE 1."

Dailey: We planted trees there, did everything there for recreation, conservation area, enjoy the wonders of the lake, and everything like that. After a road going through there, this road with that I think absolutely destroys it. We deer hunt out there. Our kids, their first deer was out there. They love that.

AR. 830:16-24 (V6:20-7).

Commissioner: So [Ryan] you're saying where it is going through the trees there, I mean, obviously cutting trees down you're opposed to that, if you go closer to the lake it's going to get flooded and there's not going to be access.

Dailey: Not initially. Right there where you started, there is a hill there. I understand that and like I said we don't have any intentions of developing it, but we can never say never. Who knows when we're gone what's going to happen. Just we picked there because there's a spot in the trees that you can go through. It gets it off the lake a little bit (indiscernible) a little more. That's why we went off there a little ways and we went through there and cut some trees in there. There's kind of an opening so you go through here and just snake right up to their property.

AR. 848:12-25.

Ryan Dailey articulated multiple, concrete reasons for preferring an alternative location for the West Parcel access easement, including his reluctance to remove mature trees, the presence of a hill that could minimize tree removal, and his preference that any route avoid the lake altogether—the Zirbels agreed with some of these concerns. However, the County declined to make any modifications because doing so would require revising the appraisal. All of these

considerations fall squarely within the “convenience” the County was obligated to weigh.

The County did not meaningfully engage with the parties. Instead, it repeatedly took the position that it was effectively bound by the appraiser’s determinations. That position cannot be reconciled with SDCL ch. 31-22. The statute does not delegate route selection to an appraiser, nor does it permit the County to abdicate its decision-making responsibility in favor of an appraisal report. If it did, the Legislature could have simply required the appointment of an appraiser to both value and select easement locations. It did not.

In reality, infinite easement alternatives exist that warranted consideration by the County, the Zirbels, and the Interested Parties. Rather than facilitating that process, the County constrained it—retaining an appraiser, adopting the appraiser’s independently selected routes, and limiting the parties to a small set of suboptimal options. This is not the deliberative, balanced process contemplated by SDCL ch. 31-22.

Accordingly, the County arbitrarily selected the easement routes, and the circuit court erred by affirming that decision.

#### **B. The County arbitrarily assessed damages.**

The County defends its damages awards by emphasizing that it retained certified appraisers and by faulting the Zirbels for not challenging the appraisers’ credentials or obtaining a competing appraisal. (Appellee Brief, at 15). That argument misstates both the record and the issue. The issue is not whether the

appraisers were credentialed in the abstract, but whether the County could impose substantial damages based on appraisal opinions disclosed less than twenty-four hours before the hearing, without producing the appraiser for examination, and without affording the Zirbels a meaningful opportunity to respond.

The record does not establish acquiescence by the Zirbels. They objected to the appraisal-based process at the June 20, 2024, meeting, raised concerns at the April 9, 2025, meeting about their inability to question the appraiser, and—despite being promised input into the appraisal process—were never permitted to speak with the appraiser. They also proposed an alternative valuation method, i.e., use of the assessor’s office to determine damages. AR 840:1–5. The County therefore cannot defend the damages awards by blaming the Zirbels for failing to produce a competing appraisal when the County controlled the process, withheld the 500-plus-page appraisal until the eve of the hearing, and prevented meaningful examination of the valuation evidence on which it relied.

### **1. West Parcel**

The County’s damages determination for the West Parcel is internally inconsistent and speculative. At the April 9, 2025, meeting, the County justified the selected route on the ground that moving the easement closer to the lake would impair Dakota Ridge’s ability to develop future lake lots. In other words, the County chose the route through the trees because it supposedly avoided interference with Dakota Ridge’s lakefront development potential. But the damages award then valued the taking as though that same development potential

was still substantially impaired. The County cannot have it both ways. If the selected route preserves Dakota Ridge's ability to develop lake lots, then damages cannot be based on the loss of that same development potential. If the selected route materially impairs future development, then the County's stated reason for rejecting less burdensome alternatives fails.

Nor did the record establish that lake-lot development was anything more than speculative. As detailed in the Zirbels' Appellant Brief, Ryan Dailey repeatedly testified that he had no intent to develop the property. The County nevertheless imposed enhanced damages based on the conjectural possibility reflected in Mr. Dailey's statement "never say never." (Appellee Brief, at 18). A damages determination grounded in speculation, rather than record evidence, is the hallmark of arbitrary decision-making.

The County's response to the Zirbels' proposed merger clause confirms the same error. The County argues the issue was not raised until circuit court argument and that SDCL ch. 31-22 does not expressly authorize such a provision. (Appellee Brief, at 19 n.1; 20). The concept was raised throughout the proceedings; any gap in the record stems from the County's failure to record its meetings. In any event, the argument was preserved before the circuit court.

Importantly, SDCL § 31-22-3 required the County to consider the "convenience of the parties." A merger provision would do exactly that: secure access for the Zirbels while allowing the easement to merge into any future development road constructed by Dakota Ridge. Such a provision would not

undermine the permanence of the easement; it would harmonize present access with potential future lake-lot development. The County's categorical refusal to consider it reflects a failure to balance the parties' interests under SDCL ch. 31-22.

In sum, the County acted arbitrarily in awarding damages for the West Parcel, and the circuit court erred in affirming the County's decision.

## **2. East Parcel**

The County's own Appellee Brief highlights the arbitrary nature of its damages award for the East Parcel. This point bears emphasis: if, as the County asserts, the easement is located directly along the section line—i.e. taking thirty-three feet from each side of the line—then the burden is necessarily shared equally on both sides of that line—affecting the western properties (USFW and Haas) to the same extent as the eastern property (Moe). Yet the County awarded \$30,000 in damages to Moe for the taking of land and nothing to USFW or Haas. That disparate allocation is irreconcilable with the County's stated premise and lacks any rational basis in the record.

The County's treatment of fencing costs further underscores the error. The Zirbels do not dispute that SDCL § 31-22-7 requires them to erect and maintain fencing associated with the right-of-way. But that obligation is separate from the damages the County may assess as compensation to the servient landowner under SDCL § 31-22-4. Section 31-22-7 imposes a construction duty on the isolated-tract owner; it does not permit a damages assessment. By folding fencing costs into the damages assessment, the County conflated two distinct statutory

questions: what compensation is owed for the taking of the right-of-way, and what fencing obligation the Zirbels must later satisfy. That conflation inflated the assessment and imposed costs. The County acted arbitrarily in awarding damages for the East Parcel, and the circuit court erred in affirming the County's decision.

### **III. The Circuit Court Properly Refused to Assess the County's Appraisal Costs Against the Zirbels.**

The County seeks reversal of the circuit court's refusal to assess nearly \$30,000 in appraisal costs against the Zirbels. The County relies on SDCL § 31-22-6, asserting that such costs may be imposed on the Zirbels, and contends that its elected officials cannot properly assess damages without a qualified appraiser. (Appellee Brief, at 23). In support, the County cites *State Highway Comm'n v. Anderson*, 242 N.W.2d 674 (SD 1976), and *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366 (SD 1978).

SDCL § 31-22-6 does not specifically authorize recovery of appraisal costs. By its terms, the statute contemplates only the expenses incurred by county commissioners in traveling to and from the affected properties. By contrast, SDCL § 31-22-4 expressly requires “[t]he county commissioners shall assess and determine the damage which the right-of-way is to the owner of the land across which it is laid.” SDCL § 31-22-4 (emphasis added). The statutory scheme places both the responsibility and the cost of the assessment on the County. Having elected—over the Zirbels’ repeated objections—to retain an appraiser, the County cannot shift that discretionary expense to the Zirbels.

The County retained the appraiser as its own consultant to assist the County in performing its statutory duty. That discretionary expense is not a “cost of the proceedings” chargeable to the isolated-tract owner under SDCL § 31-22-6. If it were, the County could unilaterally expand the landowner’s financial burden by hiring outside professionals of its choosing and then characterize those expenses as recoverable proceeding costs. This logic would permit the County to shift other discretionary expenses—such as outside counsel fees—despite no express statutory authorization. SDCL ch. 31-22 does not support that result.

The *Anderson* case does not help the County as much as the County suggests. Contrarily, *Anderson* recognizes the danger of relying on appraisal opinions without allowing meaningful validation:

Unlike other civil actions, condemnation cases largely involve the *subjective* opinions of experts rather than the objective observations of lay witnesses. The admission of testimony of the experts as to value before and after the taking, without being able to *explain their valuations* in the light of comparable sales, *renders a real injustice* to the plaintiff as the *naked valuations* of an out-of-town expert *would not aid and would probably do harm* in the minds of a jury. In this battle of experts, the jury must test not only the *credibility* of each witness but also his qualifications as an expert and *the precise method* by which he arrived at an ultimate conclusion or opinion. *It is therefore crucial that each side be allowed to introduce evidence to show that its particular witness used all available methods in making his appraisal.*

*Anderson*, 242 N.W.2d at 676-77 (emphasis added). This Court in *Anderson* recognized the injustice that occurs when a party cannot meaningfully challenge an appraiser’s methodology, analysis, and qualifications. That concern is directly implicated here. The County relied on appraisal opinions to impose substantial



damages, yet the appraiser did not appear at the April 9, 2025, meeting and the Zirbels had no meaningful opportunity to examine his qualifications, methodology, assumptions, comparable sales, or damages calculations. Although the County had represented that the Zirbels would have input in the appraisal process, they were never permitted to speak with the appraiser. The result is precisely what *Anderson* cautions against.

Furthermore, the appraiser selected by the County conducted a DOT-style appraisal. As the Zirbels argued before the circuit court, the County hired the FBI to investigate a speeding ticket. AR. 1568:11-13. The appraisals include consideration for construction of the easements, temporary construction easement costs, culverts, drainage, etc. SDCL ch. 31-22 does not require the installation of a four-lane highway. It requires access. The Zirbels only seek dirt path access to the isolated tracts. A significant portion of the appraiser's damage assessment is irrelevant and inapplicable to the Zirbels requested relief, and the County reliance thereon was arbitrary. This Court should affirm the circuit court's refusal to assess appraisal costs against the Zirbels.

**IV. The County Cannot Avoid Review of the Section-Line Right-of-Way Because Its Existence Determines Whether the East Parcel Was Isolated.**

The County argues that the circuit court, and now this Court, is precluded from addressing the efficacy of the Altamont Township's 1959 road vacation proceedings. "The validity of the 1959 vacation is not an issue that was or could be resolved by the County, and it is not a proper subject of this appeal." (Appellee

Brief, at 28). That characterization misstates the issue and obscures the question presented. The Zirbels do not seek appellate review of the 1959 proceedings. Rather, they have consistently argued that those “proceedings” were legally ineffective to vacate the section line right-of-way. Whether that right-of-way was ever properly vacated is a threshold question—one that necessarily precedes the determination of whether the East Parcel is, in fact, an isolated tract.

The Zirbels’ argument is straightforward: if Altamont Township failed to satisfactorily vacate the section line right-of-way, the section line right-of-way is still extant, providing access to the Zirbels’ East Parcel, rendering the entirety of these proceedings with respect to the East Parcel obsolete.

In addition to the arguments laid out in the Zirbels’ Appellant Brief regarding this issue, the Zirbels are bona fide purchasers of the East Parcel. Prior to their purchase of the properties, the Zirbels conducted due diligence ensuring access to, at a minimum, the East Parcel. The Zirbels contacted the Deuel County Register of Deeds, which confirmed the existence of the right-of-way. Furthermore, the Zirbels were provided a copy of the county plat book displaying a validly existing right-of-way.<sup>2</sup> The Zirbels, therefore, proceeded with the purchase of the Properties.

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<sup>2</sup> As further evidence of the existence of a right-of-way presented to the County and circuit court, the Zirbels obtained a Certified Survey displaying a validly existing right-of-way. Additionally, Brandon Huppler, the Surveyor, executed an Affidavit stating, “there [is] no record of the section line right-of-way located between Section 12 and Section 7 . . . being vacated.” AR. 1424-26.

An important question to be presented to this Court is whether the Zirbels are considered “bona fide purchasers” pursuant to South Dakota law. The common application of this issue relates to the idea of multiple sales of the same parcel (typically involving the failure of a party to record some document). The Zirbels argue the same application is relevant in their case.

The State of South Dakota adopted laws requiring the recording of documents involving interests in real property to provide notice to the public. The vacation of a right-of-way is an instrument that must be recorded and is void if unrecorded. SDCL § 43-28-17 governs.

*Every conveyance of real property other than a lease for a term not exceeding one year is void as against any subsequent purchaser or encumbrancer including an assignee of a mortgage, lease, or other conditional estate of the same property, or any part thereof in good faith and for a valuable consideration whose conveyance is first duly recorded. The term "conveyance" as used in this section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to any real property may be affected, except wills and powers of attorney.*

SDCL § 43-28-17 (emphasis added). The above statute governed in 1939, long before the attempted vacation proceedings in 1959. The vacation of a public right-of-way is an instrument that requires recording. Because the Altamont Township, or the county auditor, failed to record the attempted vacation of the right-of-way, the right-of-way still exists. The Zirbels reject the County’s argument that “for better or worse, in 1959, there was no requirement to record.” (Appellee Brief, at 28).

The Zirbels, their surveyor, and members of the public alike were—and remain—unable to locate any recorded document evidencing the alleged vacation. The only materials relied upon by the County, and later by the circuit court, in concluding that the section line right-of-way had been vacated consisted of unsubstantiated handwritten notes and newspaper clippings supplied by Bill Moe, an interested party.

The Legislature established South Dakota’s recording system precisely to avoid this uncertainty. By requiring that instruments affecting real property be recorded, the law ensures clarity, reliability, and public notice. Disregarding those requirements here undermines that system and unfairly prejudices subsequent purchasers who relied on public record. The County failed to establish the threshold premise necessary to treat the East Parcel as isolated, and the circuit court erred by affirming the County’s decision without resolving that foundational issue.

**V. The County’s Determination of Damages Created a “Taking” Under Article VI § 13 of the South Dakota Constitution.**

The County argues that the Zirbels “taking” issue is not properly situated before this Court. (Appellee Brief, at 29). But the constitutional injury asserted by the Zirbels arises from the very decision under review. The County purported to grant access while conditioning that access on payment of \$270,647.20—nearly five times the purchase price of the property itself. The issue is therefore not collateral to the appeal; it is a direct consequence of the County’s route and

damages determinations.

The County's brief provides: "For government interference with private property rights to constitute an implied or de facto taking, such interference must be so substantial as to 'deprive the owner of all or most of his interest' in the property." (Appellee Brief, at 30, quoting *Donohoe Constr. Co. v. Montgomery Cnty. Council*, 567 F.2d 603, 608 (4th Cir. 1977)). That is precisely the effect of the County's decision. By conditioning access on the payment of excessive and unsupported damages, the County has denied the Zirbels any meaningful use of their property.

The magnitude and composition of the damages underscore the point. Rather than tailoring relief to provide minimal, reasonable access, the County imposed costs associated with speculative future development, unnecessarily extensive tree removal, highway construction-grade improvements, and fencing costs. The Zirbels sought only a simple, minimally intrusive route—a basic dirt path sufficient for access. Instead, the County's decision imposes a financial burden so substantial that it renders the property unusable and inaccessible. The County's decision constitutes a taking, and the circuit court erred by affirming the County's damages assessment despite the constitutional impairment it created.

**VI. The Limited Record on Commissioner Grabow's Conflict Further Supports Reversal and Remand for De Novo Proceedings.**

The Zirbels acknowledge that the existing record concerning Commissioner Grabow's disqualification is limited. But that limitation resulted from the

County's own process. The Zirbels raised the conflict issue during prior County meetings, but those meetings were not recorded. The absence of a record therefore should not be treated as proof that the concern lacked merit, particularly where the issue involved the impartiality of a decisionmaker in a proceeding affecting specific property rights.

The Zirbels presented this issue in their first appeal to the circuit court. AR 26–27. The circuit court declined to find a conflict of interest, not because it determined none existed, but because the record was insufficient to permit meaningful review. AR 85. On remand, the circuit court specifically directed the County to “create a clear record” due to the inadequacy of the record for the first appeal. *Id.* That direction underscores the point—meaningful review of a conflict issue requires a record adequate to show what was disclosed, what was considered, and whether the statutory disqualification procedure was followed. Particularly when the record—or lack thereof—is developed by the very person alleged to have a conflict of interest.

The limited record now before this Court reinforces the prejudice caused by the circuit court's refusal to conduct a trial de novo. Had the circuit court conducted the de novo proceeding, the parties could have developed evidence regarding Commissioner Grabow's relationship to Dakota Ridge, the nature of any potential conflict, and the effect of his participation on the County's route and damages determinations. This issue bears directly on the integrity and balance of

the underlying proceedings. At minimum, the unresolved conflict issue supports reversal and remand for proceedings on a complete evidentiary record.

### CONCLUSION

For the foregoing reasons, the Zirbels respectfully request that this Court reverse the circuit court's November 13, 2025, order affirming the County's April 9, 2025, decision and remand for a trial de novo. Alternatively, if this Court applies abuse-of-discretion review, the Zirbels request that the Court reverse the circuit court's affirmance of the County's route-selection and damages determinations, affirm the circuit court's refusal to assess appraisal costs against the Zirbels, and remand with instructions that the threshold existence of the 478th Avenue section-line right-of-way be resolved before SDCL ch. 31-22 is applied to the East Parcel. The Zirbels further request such other and further relief as this Court deems just and proper.

Respectfully submitted this 15<sup>th</sup> day of May, 2026.

AUSTIN, STRAIT, BENSON,  
THOLE & KOEHN, LLP

BY:   
\_\_\_\_\_  
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### **CERTIFICATE OF COMPLIANCE**

I, Mitchell L. Koehn, attorney for the Appellants, hereby certifies that the Appellants' Reply Brief complies with the type volume limitation as provided in SDCL 15-26A-66 and that the Appellants' Brief contains 4,983 words and is set in Times New Roman, size 13.

Dated this 15<sup>th</sup> day of May, 2026.

  
\_\_\_\_\_  
Mitchell L. Koehn



## CERTIFICATE OF SERVICE

I, Mitchell L. Koehn, hereby certify that on the 15<sup>th</sup> day of May, 2026, I mailed the original Appellants' Reply Brief to the Supreme Court at the address below and emailed a Word version of the Appellants' Reply Brief, along with a PDF version to the following address:

Supreme Court Clerk's Office  
500 East Capital Avenue  
Pierre, SD 57201-5070  
[SCClerkBriefs@ujs.state.sd.us](mailto:SCClerkBriefs@ujs.state.sd.us)

I further certify that I served all interested parties, herein by emailing a true and correct copy to:

Jack Hieb  
Richardson, Wyly, Wise, Sauck & Hieb  
[jhieb@rwwsh.com](mailto:jhieb@rwwsh.com)

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and by mailing a true and correct copy to the following:

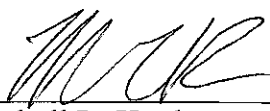
John Knight, attorney for  
Dakota Ridge, Inc.  
816 S. Broadway  
PO Box 1600  
Watertown, SD 57201

William and Julie Moe  
47808 174<sup>th</sup> St  
Clear Lake, SD 57226

Haas Family, LLC  
Attn: Anthony Haas  
47763 173<sup>rd</sup> St  
Clear Lake, SD 57226

U.S. Fish and Wildlife Service  
PO Box 48  
23520 SD Hwy 19  
Madison, SD 57042

This 15<sup>th</sup> day of May, 2026.

  
\_\_\_\_\_  
Mitchell L. Koehn

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

DEC 23 2025

*Shirley A. Johnson-Lopez*  
Clerk

\*\*\*\*\*

STEVE ZIRBEL AND MONICA  
ZIRBEL,

Appeal No. 31317

Appellants,

-vs-

DEUEL COUNTY  
COMMISSIONERS,

**NOTICE OF REVIEW**

Appellee.

\*\*\*\*\*

**TO: STEVE ZIRBEL, MONICA ZIRBEL AND THEIR COUNSEL OF  
RECORD:**

Please take notice that Appellee, Deuel County Commissioners, pursuant to SDCL 15-26A-22, seeks review of the Order Regarding Deuel County Commissioners' April 9, 2025 Decision, filed with the Deuel County Clerk of Courts on November 13, 2025, to the extent that it reversed the assessment of damages for appraisal costs of \$29,799.20.

Appellants filed their Notice of Appeal and Docketing Statement on December 4, 2025; therefore, this Notice of Review is timely pursuant to SDCL 15-26A-22, which requires filing of a notice of review within 20 days after service of a notice of appeal.

Dated this 23<sup>rd</sup> day of December, 2025.

RICHARDSON, WYLY, WISE, SAUCK  
& HIEB, LLP

By /s/ Zachary W. Peterson  
Attorneys for Appellee

Zachary W. Peterson  
Ryan S. Vogel  
One Court Street  
Post Office Box 1030  
Aberdeen, SD 57402-1030  
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Email: ZPeterson@rwwsh.com  
RVogel@rwwsh.com

**CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Appellee, hereby certifies that on the 23<sup>rd</sup> day of December, 2025, a true and correct copy of **NOTICE OF REVIEW** was served via eFileSD on:

Mr. Mitchell L. Koehn  
Austin, Strait, Benson, Thole & Koehn  
Mitch@AustinLawSD.com  
*Attorneys for Appellants*

Dated this 23<sup>rd</sup> day of December, 2025.

RICHARDSON, WYLY, WISE, SAUCK  
& HIEB, LLP

By /s/ Zachary W. Peterson  
Attorneys for Appellee

Zachary W. Peterson  
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DEC 23 2025

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

*Shirley A. Johnson Legal*  
Clerk

\*\*\*\*\*

STEVE ZIRBEL AND MONICA  
ZIRBEL,

Appeal No. 31317

Appellants,

-vs-

DEUEL COUNTY  
COMMISSIONERS,

APPELLEE'S DOCKETING  
STATEMENT

Appellee.

\*\*\*\*\*

SECTION B. TIMELINESS OF APPEAL

*(If Section B is completed by an appellee filing a notice of review pursuant to SDCL 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)*

1. The date the judgment or order appealed from was signed and filed by the trial court:

Signed and Filed – **November 13, 2025**

2. The date notice of entry of the judgment or order was served on each party:

**November 14, 2025**

3. State whether either of the following motions was made:

- a. Motion for judgment n.o.v., SDCL 15-6-50(b):

\_\_\_\_ Yes       X  No

- b. Motion for new trial, SDCL 15-6-59:

\_\_\_\_ Yes       X  No

## NATURE AND DISPOSITION OF CLAIMS

*(Confine responses to questions 4-8 to the space provided)*

4. State the nature of each party's separate claims, counter-claims or crossclaims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

**Steven Zirbel and Monica Zirbel filed a Notice of Appeal on May 1, 2025 appealing the April 9, 2025 decision of the Deuel County Commissioners determining access routes to two (2) separate isolated tracts of Zirbels' property and assessing damages for providing access to these parcels. The matter came on for hearing before the Court, the Honorable Dawn Elshere presiding, on September 18, 2025.**

**On November 7, 2025, Judge Elshere issued a Memorandum Decision affirming the Deuel County Commissioners as to the selected access routes, and affirming, in part, the Deuel County Commissioners' assessment of damages. Judge Elshere reversed the Deuel County Commissioners' assessment of damages for appraisal costs of \$29,799.20.**

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.

a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims?  
  X   Yes           No

b. If the trial court did not enter a final judgment or order as to each party's individual claims, counter-claims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)?  
       Yes                             No

6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

a. **Whether the Circuit Court erred by reversing the Deuel County Commissioners' assessment of damages for appraisal costs of \$29,799.20 to the Zirbels.**

Date: December 23, 2025

Signature: /s/ Zachary W. Peterson

*Attach a copy of any memorandum opinion and findings of fact or conclusions of law supporting the judgment or order appealed from. See SDCL 15-26A-4(2).*

## **CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Appellee, hereby certifies that on the 23<sup>rd</sup> day of December, 2025, a true and correct copy of **APPELLEE'S DOCKETING STATEMENT** was served via eFileSD on:

Mr. Mitchell L. Koehn  
Austin, Strait, Benson, Thole & Koehn  
Mitch@AustinLawSD.com  
*Attorneys for Appellants*

Dated this 23<sup>rd</sup> day of December, 2025.

RICHARDSON, WYLY, WISE, SAUCK  
& HIEB, LLP

By /s/ Zachary W. Peterson  
Attorneys for Appellee

Zachary W. Peterson  
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Email: ZPeterson@rwwsh.com



STATE OF SOUTH DAKOTA  
**THIRD JUDICIAL CIRCUIT COURT**

**Counties**

**HON. DAWN M. ELSHERE**  
Circuit Judge  
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*Beadle, Brookings, Clark  
Codington, Deuel, Grant  
Hamlin, Hand, Jerauld  
Kingsbury, Lake, Miner  
Moody and Sanborn*  
[http://uds.sd.gov/Third\\_Circuit/](http://uds.sd.gov/Third_Circuit/)

**Michelle Gaikowski**  
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November 7, 2025

Mr. Mitchell Koehn  
Law Firm  
25 1<sup>st</sup> Ave SW  
Watertown, SD 57201

Mr. Zach Peterson/Mr. Ryan Vogel  
Law Firm  
1 Court Street  
Aberdeen, SD 57402

Re: *Steven and Monica Zirbel vs. Deuel County Commissioners 19CIV23-55*

Counsel:

**INTRODUCTION**

The above-entitled matter came on for hearing before the Court on September 18, 2025. Appellant's Steve and Monica Zirbel (hereinafter Zirbels) appeared personally along with their counsel Mr. Mitchell Koehn. Appellee's Deuel County Commissioners (hereinafter County) appeared via their counsel, Mr. Ryan Vogel. This matter is an appeal of a final decision of Deuel County Commissioners dated April 9, 2025, determining a route for Zirbels to their two separate isolated tracts of lands and assessing damages to the Zirbels in amount of \$270, 647.20. Zirbels appeal the decision under SDCL 7-8-27.

**BACKGROUND**

As indicated above the Zirbels are appealing a decision made by the County as the placement of a right of way to two tracts of isolated land in Deuel County. The Zirbels purchased this land in 2023. The land is in Altamont Township adjacent to Lake Alice. Zirbels requested relief from County under SDCL 31-22 on November 23, 2023. After an initial hearing



on the matter the County held that the land owned by Zirbels was not isolated as it could be accessed by Lake Alice, which they deemed to be a public highway. Zirbels filed their first notice of appeal to this Court on December 23, 2024. After a hearing on the matter the Court reversed and remanded the matter back to the County to provide access under SDCL 31-22.

A special meeting was held on the matter in June of 2024 wherein the County requested that an appraisal be done before considering proposed routes. A special meeting was held on April 9, 2025, to determine the access and assess damages. Three proposed routes were considered by the County. However, Alternative 1 became the favorite as other alternatives were met with disfavor. While Alternative 1 was mostly agreed upon, the Zirbels objected to both tracts (east and west tract) that were proposed in Alternative 1 and the resulting damages. All parties present during the special meeting provided input and objections to certain alternatives and the placement of the east and west tract. Following this discussion a motion was made to approve Alternate 1 along with the damages in the amount of \$270,657.20 that were set forth in the appraisal for Alternative 1. The motion was approved unanimously. Zirbels filed their appeal on May 1, 2025. Any other facts that are relevant will be set forth in the decision below.

#### **RULE OF LAW**

Zirbels bring this appeal under SDCL 7-8-27 as a final decision made by the Deuel County Commissioners in their regular meeting of April 8, 2025. This Court's review of the decision is limited. As the Court previous ruled, see order dated July 15, 2025, the decision of the commissioners was non-quasi-judicial. Therefore, the standard of review is under the abuse of discretion. *Carmody v. Lake County Bd. Of Commissioners*, 938 NW2d 433, 2020 SD 3.

#### **ANALYSIS**

Under the abuse of discretion standard, the Court must determine whether County has acted unreasonably, arbitrarily or has manifestly abused its discretion. *Department of Game, Fish and Parks vs. Troy Township*, 900 NW2d 840, 2017 SD 50. The County "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" *Id.* at 853, citations omitted. The decision is arbitrary if the County relied on factors which were not intended, failed to consider a relevant factor, and offered an explanation that was contrary to the evidence. *Id.* The burden is on Zirbels to establish arbitrariness which they have failed to do.

The County did inspect the land at issue on several occasions. They hired an appraiser to assess damages. While Zirbels take issue with the hiring of an appraiser, they did not hire their own appraiser either. The County received input from all the adjoining landowners, including Dakota Ridge, Moes, Haas and US Fish and Wildlife. Factors such as flooding, wetland, and the removal of trees were all considered by the appraisal and by the County. Therefore, the County did consider all the pertinent factors before making an informed decision and did not act arbitrarily or unreasonably.

Additionally, the damages assessed by the County were also not unreasonable or arbitrary. Again, the County hired an appraiser to assess damages. Zirbels did not present counter appraisals. The damages assessed were determined by the routes that the appraiser choose based upon input from all the parties. Furthermore, the assessed damages are laid out based upon the tracts of Zirbel 1 and Zirbel 2 and to how each adjoining landowner is affected. The Court agrees that it is not difficult to separate these damages out if the Zirbels choose only to proceed with one of the tracts. Finally, the Zirbels also contend that the cost of the appraisal should not have been included in the damages. The Court agrees with the Zirbels as the County did not have to incur this cost but chose to. The nearly \$30,000-damage assessed to Zirbels for the cost of the appraisal was unreasonable and should be removed from the assessed damages.

In all other aspects the decision of the County is approved<sup>1</sup>. Counsel for the Appellee shall prepare the appropriate order consistent with the Court's decision.

Sincerely,



Dawn Elshere  
Circuit Court Judge

**FILED**

NOV 07 2025

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
3RD CIRCUIT CLERK OF COURT

By  Clerk / Deputy

<sup>1</sup> County alleges in its brief that the Court does not have subject matter jurisdiction over this appeal. The Court does find jurisdiction over this matter under SDCL 7-8-27 and makes the above decision based upon that jurisdiction.

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

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

\*\*\*\*\*

STEVE ZIRBEL AND MONICA  
ZIRBEL,

Appellants,

-vs-

DEUEL COUNTY  
COMMISSIONERS,

Appellee.

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**ORDER REGARDING DEUEL  
COUNTY COMMISSIONERS'  
APRIL 9, 2025 DECISION**

\*\*\*\*\*

Steven Zirbel and Monica Zirbel ("Zirbels"), filed a Notice of Appeal on May 1, 2025 appealing the April 9, 2025 decision of the Deuel County Commissioners ("Commissioners") determining access routes to two (2) separate isolated tracts of Zirbels' property and assessing damages for providing access to these parcels. The matter came on for hearing before the Court, the Honorable Dawn Elshere presiding, on September 18, 2025. Zirbels appeared through their attorney, Mitchell Koehn. Commissioners appeared through their attorney, Ryan S. Vogel.

Having considered the arguments of counsel, having reviewed the submissions of the parties, having conducted a review of this matter under the abuse of discretion standard of review, and having issued a Memorandum Decision dated November 7, 2025, which is incorporated herein by this reference, now, therefore, it is hereby

1. ORDERED, ADJUDGED, AND DECREED that the Commissioners' decision in determining access routes to Zirbels' property is AFFIRMED in accordance with the Memorandum Decision; and
2. ORDERED, ADJUDGED, AND DECREED that the Commissioners' assessment of damages to Zirbels is AFFIRMED, except the Commissioners' assessment of damages for appraisal costs of \$29,799.20 to Zirbels is REVERSED, in accordance with the Memorandum Decision.

11/13/2025 8:47:25 AM

BY THE COURT:

Attest:  
Nutter, Taylor  
Clerk/Deputy



*Daumtshere*

Circuit Court Judge