IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29531

KAREN DUNHAM**,**
PETITIONER / APPELLANT
vs.

LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE LAKE COUNTY BOARD OF ADJUSTMENT & HODNE HOMES, LLC
RESPONDENTS / APPELLEES.

Appeal from the decision of the Lake County Board of Adjustment and the decision of the Circuit Court, Third Circuit, Lake County, South Dakota, The Honorable Kent A. Shelton, Circuit Court Judge, Circuit Court Judge Presiding

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BRIEF OF APPELLANT

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Preliminary Statement

Citations to the settled record in this matter appear as "SR-" followed by the page number assigned by the Lake County Clerk of Court in its indices. References to the transcript for the oral argument before the Circuit Court will be denoted as "Tr.," followed by the page and line numbers as they appear in the transcript. References to the Lake County Commission, Lake County Commission Sitting as the Lake County Board of Adjustment will be denoted as "Board." References to the transcript for the Board's hearing on July 21, 2020 will be denoted as "Board Tr.," followed by the page and line numbers as they appear in the transcript. References to the Lake County Zoning Ordinance will be denoted as "Ordinance." References to documents included in the Appendix of this Brief will be denoted as "App-" followed by the assigned document number.

Jurisdictional Statement

Petitioner/Appellant, Karen Dunham ("Karen") appeals from the whole and all parts of the Board Decision, dated September 1, 2020 (SR-877), the Circuit Court's *Letter Memorandum*, dated December 22, 2020 (SR-885, App-04), and the Circuit Court's *Judgment of Dismissal*, dated January 14, 2021, in the matter numbered 39CIV18-71, in the Third Judicial Circuit of South Dakota, the Honorable Kent A. Shelton, Circuit Judge, presiding, following an oral argument after which the Circuit Court found in favor of Respondents/Appellees, Board and Hodne Homes, LLC ("Hodne Homes") (SR-896, App-02). Notice of Entry of Judgment of Dismissal was filed on January 15, 2021. SR-897. Notice of Appeal was filed on February 5, 2021. SR-900. This Court has jurisdiction pursuant to SDCL 15-26A-3(1) and SDCL 15-26A-3(4).

Statement of the Issues

1. Whether Petitioner has standing to challenge the variance granted by the Board of Adjustment.

   The Circuit Court held in the negative.

   (1) *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825–26

   (2) *Huber v. Hanson Cnty. Planning Comm'n*, 2019 S.D. 64, ¶ 10, 936 N.W.2d 565, 569.

   (3) *Sierra Club v. Clay Cty. Bd. of Adjustment*, 2021 S.D. 28, ¶ 10, 959 N.W.2d 615, 620.

   (4) *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 2206–07, 45 L. Ed. 2d 343 (1975).

2. Whether the Lake County Board of Adjustment exceeded its authority and jurisdiction by granting the Variance to Hodne Homes, LLC.

   The Circuit Court declined to address the issue.

   (1) *Dunham v. Lake County Commission*, 2020 S.D. 23, 943, N.W.2d 330 (2020); App-23.

   (2) Ordinance § 505, SR-066, App-22 .

   (3) Ordinance definition of "variance," SR-057, App-21.

Statement of the Case

This is the second appeal of this case, which originally arose from the decision of the Board to grant a conditional use permit ("CUP") and variance ("Variance") to Hodne Homes on April 17, 2018, at Lake County, South Dakota. On the first appeal, this Court affirmed the CUP allowing an increased building height, but reversed the Board's decision to grant the Variance allowing a larger building footprint infringing on the minimum side and rear yard setbacks. SR-756. On remand, the Board held a hearing on July 21, 2020 regarding the Variance; after which the Board again approved the Variance. SR-798, Board Tr. 28:11-3. On September 1, 2020, the Board issued findings of fact ("Board's FOF") and filed their decision with the Lake County Auditor. SR-877. On September 30, 2020, Karen again petitioned the Circuit Court for a writ of certiorari to appeal the Board's decision to grant the Variance. SR-761. On October 26, 2020, the Board moved to dismiss Karen's *Petition for Writ of Certiorari*. SR-810. On December 28, 2020, the Circuit Court granted the Board's motion to dismiss, ruling that Karen lacked the standing necessary to seek certiorari relief. SR-885. The Circuit Court did not rule on the questions this Court remanded to it in Dunham I. *Id*, and SR-756.

Statement of the Facts

Incorporated herein by reference are the Statement of Facts referenced in *Appellant's Brief,* dated April 25, 2019. APP-43. The material facts that follow occurred following the Court's remand of the Variance, or are material to the issue of standing that is raised in this second appeal.

1. On May 29, 2020, the Circuit Court[1] remanded the case to the Board. SR-757.

2. On July 21, 2020, the Board held a remand hearing. SR-769.

3. On September 1, 2020, the Board announced its Findings of Fact from the July 21, 2020 hearing. SR-844, App-15.

4. On September 30, 2020, Karen appealed the Boards' re-approval of the Variance. SR-761.

5. On October 26, 2020, the Board moved to dismiss the appeal. SR-810.

6. On December 16, 2020, the Circuit Court held an oral argument via telephone on the Board's motion to dismiss. SR-885, App-04.

7. On December 22, 2020, the Circuit Court granted the Board's motion to dismiss. App-14.

8. Karen's petitions (SR-1, SR-761) alleged the following injuries as a result of the decision of the Board of Adjustment to grant the Variance:

    a. The size of the Showroom blocks daylight and hinders access to the door on the side of her building. SR-197, SR-190, App - 88, App-91.

    b. The setbacks for the Showroom are not in conformance with the development or the covenants when the lots were developed. SSR-197, SR-190, App - 88, App-91.

    c. The Showroom would result in drainage issues due to the size of the building. SR-197, SR-190, App - 88, App-91.

    d. Changing use by expanding into commercial use of Lot 1, which will increase traffic. SR-190, App-91.

9. Hodne Homes, as part of its application to the Board was required to give Karen notice it was seeking a Variance. SR-172.

[1] The Circuit Court erroneously said in the memorandum decision that Hodne Homes re-applied for a variance. App-05. There is no record of Hodne Homes re-applying for a Variance.

Argument & Authorities

Standard of Review.

> 'Issues of jurisdiction are questions of law, and we review a dismissal for lack of jurisdiction de novo.' *Huber v. Hanson Cnty. Planning Comm'n*, 2019 S.D. 64, ¶ 10, 936 N.W.2d 565, 569. Further, '[a] motion to dismiss tests the legal sufficiency of the pleadings, and therefore, we review the circuit court's decision on the motion de novo.' *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 408.

Sierra Club v. Clay Cty. Bd. of Adjustment, 2021 S.D. 28, ¶ 10, 959 N.W.2d 615, 620.

1. Whether Petitioner has standing to challenge the variance granted by the Board of Adjustment.

In Dunham I, this Court vacated the Variance granted by the Board and remanded this matter to the Board so it could address the "special conditions" prong of the two part test found in SDCL 11-2-53(2). *Dunham v. Lake County Commission*, 2020 S.D. 23 at ¶6, 943, N.W.2d 330 (2020), APP-27. This Court also provided the "parties with guidance on remand" that in order to comply with Section 505(3) of the Ordinance, "the Board must determine whether the variance will allow a use that is not permissible within LP-3." However, on remand, the Board brought a motion to dismiss under SDCL 15-6-12(b)(1) alleging that this Court's affirmation of the CUP in Dunham I, allowing an increase in the allowable height of the building, deprived the Circuit Court of subject matter jurisdiction to consider whether Karen had suffered an injury due to the increased footprint of the building and infringement on the side and rear yard setbacks. Following an oral argument on the motion, the Circuit Court authored a memorandum granting the Board's motion to dismiss. APP-13. The Circuit Court did not hold an evidentiary hearing, allow discovery, nor allow Karen to supplement the record. APP-13.

(a) Karen Is An Aggrieved Person Under SDCL 11-2-61.

Karen's status as an aggrieved person was not contested in Dunham I. As indicated above, this Court limited what was remanded in Dunham I.

> When the scope of remand is limited, the entire case is not reopened, but rather, the lower tribunal is only authorized to carry out the appellate court's mandate. 5 AmJur2d Appellate Review § 787 (1995).

In re Conditional Use Permit Granted to Van Zanten, 1999 S.D. 79, ¶ 13, 598 N.W.2d 861, 864. The Circuit Court erred by exceeding the scope of remand by re-examining the facts that constitute the injuries Karen alleged would be caused by the Board's decision. The Circuit Court further erred by not finding Karen is an aggrieved person under those facts. As this Court previously stated:

> A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction. *Benson v. State,* 2006 SD 8, ¶ 22, 710 N.W.2d 131, 141 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (*Lujan II*)). First, the plaintiff must establish that [s]he suffered an injury in fact—"an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan II,* 504 U.S. at 560, 112 S.Ct. at 2136, 119 L.Ed.2d 351 (internal citations omitted). Second, the plaintiff must show that there exists a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains. *Benson,* 2006 SD 8, ¶ 22, 710 N.W.2d at 141. The causal connection is satisfied when the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan II,* 504 U.S. at 560, 112 S.Ct. at 2136, 119 L.Ed.2d 351 (quoting *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976)). Finally, the plaintiff must show it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Benson,* 2006 SD 8, ¶ 22, 710 N.W.2d at 141.

Cable v. Union Cty. Bd. of Cty. Comm'rs, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825–26 (bracketed material supplied.)

Karen testified via Affidavit (SR-15) that she was the adjacent landowner to Lot 1, that the size of the Showroom would be overbearing on her property, block her access to sunlight, and result in drainage issues[2] due to the large Showroom roof depositing water in limited locations. APP-190, APP-197. Karen further alleged that selling boats[3] was an illegal use of property in LP-3 and that as an adjacent owner to property it would increase traffic near her property. Karen has also complained that the Showroom violates the covenants that run with the land.[4] APP-190, APP-197.

> As we explained in *Cable v. Union County Board of County Commissioners*, to be aggrieved, the person must show an injury in fact, namely "that the person suffered 'a personal and pecuniary loss not suffered by taxpayers in general, falling upon [the person] in [the person's] individual capacity,' " rather than one shared more generally by the body politic. 2009 S.D. 59, ¶ 26, 769 N.W.2d 817, 827 (citation omitted).

Sierra Club v. Clay Cty. Bd. of Adjustment, 2021 S.D. 28, ¶ 16, 959 N.W.2d 615, 621–22. As the adjacent landowner, it is Karen's property that is deprived of daylight because of the height *and length* of the Showroom. It is Karen's property that has the Showroom's gutter aimed at her property when it rains. It is Karen's property that is now subject to the increased traffic of having a retail sales showroom next to it. These are injuries in fact, actual, not hypothetical, caused by the Board's Decision to grant the Variance

[2] The Board requested Hodne produce a drainage plan at the April 17, 2018 hearing; that never happened.

[3] At the Board's remand hearing, Karen presented photographic evidence showing how overbearing the Showroom is on her property. She also presented documentary evidence that boats were being sold from the retail floor (i.e. the Showroom is not used simply to store commercial goods). However, the Circuit Court dismissed the case without requiring the Board to file the record of its remand hearing with the Circuit Court.

[4] The current version of the covenants require compliance with the Ordinance (i.e. if something violates the Ordinance it violates the covenants).

because the Showroom could not be the size it is without the Variance allowing reduction to the side and rear yards.

In 2019, this Court reviewed a Circuit Court's *sua sponte* decision to dismiss a SDCL 11-2 case for lack of subject matter jurisdiction. In that case, this Court ruled that the subject matter jurisdiction was invoked by a general allegation that the Hubers would suffer "unmanageable manure and odor control" on their property which was adjacent to the property seeking the CUP. *Huber v. Hanson Cty. Plan. Comm'n*, 2019 S.D. 64, ¶ 18, 936 N.W.2d 565, 571. Similarly to *Huber*, the imposition upon Karen's property creates an "injury in fact" sufficient to invoke subject matter jurisdiction. The Board knows this, which is why it required Hodne Homes to give Karen notice that he was seeking the Variance in the first place. SR-172.

(b) Circuit Court Applied The Wrong Standard To A Motion To Dismiss

While the Circuit Court's memorandum ruled that SDCL 15-6-12(b)(1) applied to a writ of certiorari under SDCL 11-2, the Circuit Court did not analyze Karen's claim under a motion to dismiss for lack of subject matter jurisdiction. Instead, the Circuit Court relied on the *Powers* decision to hold that Karen "did not provide evidence that she suffered a loss, as defined in *Powers*." APP-12. However, the Circuit Court should have treated Karen's alleged injuries as true and construed her petition in her favor.

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. E.g., *Jenkins v. McKeithen*, 395 U.S. 411, 421—422, 89 S.Ct. 1843, 1848—1849, 23 L.Ed.2d 404 (1969).

Warth v. Seldin[5], 422 U.S. 490, 501–02, 95 S. Ct. 2197, 2206–07, 45 L. Ed. 2d 343 (1975). Moreover, *Powers* dealt with a motion for summary judgment, not a motion to dismiss. A motion to dismiss for lack of subject matter jurisdiction (i.e. Rule 12(b)(1)) is not to be treated as a motion for summary judgment.

> The district court was correct in recognizing the critical differences between Rule 12(b)(1), which governs challenges to subject matter jurisdiction, and Rule 56, which governs summary judgment. Rule 12 requires that Rule 56 standards be applied to motions to dismiss for failure to state a claim under Rule 12(b)(6) when the court considers matters outside the pleadings. Fed.R.Civ.P. 12(b) & (c); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977) (Motion under Rule 12(b)(6) raising matters outside pleadings is converted to a Rule 56 motion). Rule 12 does not prescribe, however, summary judgment treatment for challenges under 12(b)(1) to subject matter jurisdiction where a factual record is developed. Nonetheless, some courts have held that Rule 56 governs a 12(b)(1) motion when the court looks beyond the complaint. *In re Swine Flu Immunization Prod. Liab. Litig.*, 880 F.2d 1439, 1442–43 (D.C.Cir.1989); *In re Swine Flu Prod. Liab. Litig.*, 764 F.2d 637, 642 (9th Cir.1985). We agree, however, with the majority of circuits that have held to the contrary. *See, e.g., Mortensen*, 549 F.2d at 891 (disputed issues of material fact will not prevent trial court from deciding for itself merits of jurisdictional claims); *Mims v. Kemp*, 516 F.2d 21, 23 (4th Cir.1975) (only motion under Rule 12(b) that can properly be converted to one for summary judgment is a motion filed under 12(b)(6)); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.) (district court has power to decide disputed factual issues in a motion under Rule 12(b)(1)), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981); *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir.1986) (jurisdictional issue must be resolved before trial); *Wheeler v. Main Hurdman*, 825 F.2d 257, 259 (10th Cir.) (as a general rule, 12(b)(1) motion may not be converted to one for summary judgment), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). Even if a motion to dismiss for lack of subject matter jurisdiction (as opposed to failure to state a claim) could be

[5] Cited with approval recently by this Court in *Sierra Club v. Clay Cty. Bd. of Adjustment*.

treated as a motion for summary judgment, the Circuit Court did not give the required notice to Karen.

> Where the court elects to treat a motion to dismiss [for failure to state a claim] as a motion for summary judgment, it must notify the parties of its intent and give them an opportunity to present matters pertinent to summary judgment. *Olson v. Molko*, 86 S.D. 365, 367, 195 N.W.2d 812 (1972).
>
> There is no evidence in the record that the circuit court followed such a procedure, even though it is mandatory. Therefore, it was error to treat the motion to dismiss as one for summary judgment, and it was error to grant such a motion.

Herr v. Dakotah, Inc., 2000 S.D. 90, ¶¶ 18-19, 613 N.W.2d 549, 553 (bracketed material supplied).

The Circuit Court also committed error by ruling that Karen's injuries that relate to the size of the Showroom were barred by the doctrine of *res judicata*. The doctrine of *res judicata* does not apply to a second appeal of the same lawsuit.

> [w]here successive appeals are taken in the same case there is no question of res judicata, because the same suit, and not a new and different one, is involved.

In re Pooled Advoc. Tr., 2012 S.D. 24, ¶ 24, 813 N.W.2d 130, 139. Moreover, the CUP and the Variance are both relevant to the size of the Showroom. The CUP was to increase the sidewall height. The Variance was to increase the width and length of the building; which required invasion into the side and rear yards. In other words, the Showroom could not be the size it is without the variance to the side and rear yards. If the Variance is found to violate the Ordinance, then the terms of the CUP are implicated:

> The Board specifically conditioned the approval of the CUP "upon compliance with all applicable provisions of the [Ordinance]". We express no opinion whether our reversal and remand of the variance decision impacts the conditional use approved by the Board.

Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, 943 N.W.2d 330, 338. Accordingly, the Circuit Court was legally incorrect that injuries based on the size of the Showroom were barred by *res judicata* and is factually incorrect to exclude the Variance from the analysis of whether Karen was injured by the size of the Showroom.

2. Whether the Lake County Board of Adjustment exceeded its authority and jurisdiction by granting the Variance to Hodne Homes, LLC.

The Board has issued its findings of fact and this Court can review those written findings as well as the Circuit Court on remand could. Accordingly, it requested that the Court make a ruling as a matter of law that Hodne Homes is not entitled a Variance under the facts of this case.

As stated in Argument 1, this Court reversed the Circuit Court's affirmance of the Board's granting of the Variance because the Board failed to consider whether "special conditions" existed on Lot 1 which necessitated granting a variance to the Ordinance. *Dunham v. Lake Cty. Comm'n*, 2020 S.D. 23, ¶ 20, 943 N.W.2d 330, 336.

> More specifically, the Board made no determination that because of a particular feature of the property at the time the Ordinance was enacted, or because of some "extraordinary and exceptional" situation on the property, a variance was necessary. The Board also failed to consider whether the denial of the variance to build a facility exceeding the setback requirements would create "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" on Hodne Homes.

Id. On remand, this Court ordered the Board to:

> meaningfully address the special conditions required by Section 505 for the Board to have authority to grant a variance.

Id. Section 505 of the Ordinance states:

> **Section 505. Powers and Jurisdiction Relating to Variances.** The Board of Adjustment shall have the power, where, by reason of exception, narrowness, shallowness or shape of a specific piece of property at the

time of the enactment of this Ordinance, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation under this Ordinance would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantially impairing the intent and purpose of this Ordinance.

1. The County Zoning Officer may require the applicant for a variance to notify property owners by certified or registered mail of the variance request or in lieu of this obtain written consent from adjoining landowners. Any party may appear in person, or by agent or by attorney; the Board of Adjustment shall make findings that the requirements of this section have been met by the applicant for a variance; the Board of Adjustment shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure; the Board of Adjustment shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

2. In granting any variance, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance and punishable under the terms of this Ordinance.

3. Under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district.

4. The concurring vote of four (4) members of the Board of Adjustment is required to pass any variance.

SR-066, App-22. The definition of 'variance' applicable to §505 under the Ordinance is:

A variance is a relaxation of the terms of the zoning ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship. As used in this ordinance, a variance is authorized only for height, area, and size of structure or size of yards and open spaces; establishment or expansion of a use otherwise prohibited

> shall not be allowed by variance, nor shall a variance be granted because of the presence of non-conforming in the zoning district or uses in an adjoining zoning district.

SR-057, App-21.

(a) Failure to Identify Particular Extraordinary/Exceptional Feature, Condition or Situation on Lot 1

The Board failed to consider or make findings regarding any particular feature of Lot 1 "at the time the Ordinance was enacted" that would make a variance necessary. The Ordinance was enacted prior to when Hodne Homes purchased Lot 1 in early 2018. At the time of Hodne Home's purchase of Lot 1, Lot 1 was in compliance with the Ordinance. After said purchase, Hodne Homes removed the conforming structure on Lot 1 and sought a variance to build a non-conforming structure. The Board only considered the state of Lot 1 after the date of Hodne Home's purchase of Lot 1.

Accordingly, the Variance is not based upon a "particular feature" of Lot 1 that existed "at the time the Ordinance was enacted."[6] Similarly, the Board failed to consider or make findings that there was an "'extraordinary and exceptional' situation <u>on the property</u> that makes a variance necessary. Instead, the Board looked to property adjacent to Lot 1 to justify a variance:

> The Board finds that the Applicant's LP-3 property being located adjacent to its commercial property creates an extraordinary or exceptional situation or condition on Applicant's property ....

SR-878, App-17. The Board's findings make it clear that the basis for granting a variance is based upon the commercial use of an adjacent property to Lot 1 that is owned by a different legal entity. The Ordinance specifically prohibits granting a variance because of "uses in an adjoining zoning district." Ordinance, pg 16. The ordinance

[6] Nor has any change occurred to Lot 1 since that time created a new feature or condition requiring a variance to avoid undue hardship to the property owner.

requires the need for the variance to be based upon "conditions peculiar to the property," not based on the zoning of property nearby. *Id*. Moreover, Hodne Homes removed the conforming structure on Lot 1 and sought to build a non-conforming structure. The Ordinance prohibits seeking a variance when the need for the variance is a "result of the actions of the applicant." *Id*.

The Board did not comply with the remand order from this Court and has again exceeded its authority to grant a variance under the Ordinance.

(b) Failure To Comply With § 505 of the Ordinance.

This Court also ordered the Board to make the findings required by § 505, which includes the expressly required findings found at §505(1) of the Ordinance. The Ordinance expressly states that the Board "shall" make these findings. While the Board made 15 findings of fact, it did not make the findings required by §§ 505(1) or (3), specifically:

The Board did not identify that the applicant satisfied the requirements of § 505. Petitioner alleges that it is not possible to make such a finding under the Ordinance when Hodne Homes removed the conforming storage structure so it could build a non-conforming structure. The Ordinance does not allow an applicant to seek a variance when the necessity of the variance is the "result of the actions of the applicant."

The Board also did not make a finding that the reasons set forth in the application justify granting a variance. In order for the Board to justify the variance, the Board would have needed to find a particular feature of Lot 1 or an extraordinary/exceptional situation on Lot 1, not the result of Hodne Homes' actions, that requires a variance. The Board did not find an extraordinary/exceptional situation on Lot 1, it cited alleged

contractual obligations for Sodak Marina that could apply to any piece of land. Moreover, said use is retail sales, which LP-3 property is not zoned for and cannot be granted by variance:

> Under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance.

The Board also did not make a finding that the variance it granted was the minimum variance that makes possible the reasonable use of the land. The Board did find that the size of Hodne Homes' Showroom was the smallest size it could be, but that is not based on any feature of the land, but was based upon alleged contractual obligations between boat manufacturers and Sodak Marina, Inc. Allowing a third-party contract to dictate the minimum variance is arbitrary and is a "result of the actions of the applicant," which violates the Ordinance. The undisputed fact is that Lot 1 does not require a variance for the reasonable use of land, as evidenced by the conforming storage structure that was already on Lot 1 when Hodne Homes purchased the lot in 2018.

The Board also failed to issue findings how the variance is not detrimental to the public welfare. Instead, the Board only found that some of the property owners did not object to the variance and that failure to grant the variance would be detrimental to Hodne Homes.

Lastly, the Board failed to make findings per § 505(3), despite the South Dakota Supreme order stating:

> In order to comply with Section 505(3) on remand, the Board must determine whether the variance will allow a use that is not permissible within LP-3.

Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, ¶ 23, 943 N.W.2d 330, 336. The Board, however, simply stated:

> Based upon the testimony presented to the Board of Adjustment at the remand hearing[7], that [sic] the storage and display of boats fits within the approved uses for oversized private and commercial storage facilities within the LP-3 district.

Board's FOF #15 (bracketed material supplied) App-18. While the Board failed to make meaningful findings per § 505(3), the Board did make it clear that the justification for the variance was "to facilitate the sale of boats made by manufacturers such as Crestliner and Manitou." Board's FOF #14, App-17. At the time the Board made this finding, it possessed documentation that the sales were occurring inside the Showroom on Lot 1.

For the foregoing reasons, the Board exceeded its authority in granting the Variance and "failed to meaningfully address the special conditions required by Section 505." *Dunham v. Lake Cty. Comm'n*, 2020 S.D. 23, ¶ 20, 943 N.W.2d 330, 336.

(c) Manufacturer Boat Requirements Are Not Conditions of Lot 1

Hodne Homes, the Applicant, did not identify in its application, or disclose in nearly two years' worth of litigation, that Sodak Marina, Inc. had contractual obligations to boat manufacturers that pre-determined the size of the showroom on Lot 1. Such an allegation is contrary to the undisputed fact that Hodne Homes had already reduced the width of the building from 48' to 47' feet and that Hodne Homes tried to negotiate with Petitioner for a smaller showroom in exchange for consent for retail sales on Lot 1. SR-778, Board Tr. 9:11-25. Nevertheless, without any evidence indicating what the alleged requirements from the boat manufacturers were, the Board arbitrarily found that, "the Applicant could not have made the building any smaller and still met such dealer requirements." The Board could not make this finding without knowing what the dealer requirements actually were.

[7] The transcript from the July 21, 2020 hearing is found at SR-846-875.

Even if there were boat manufacturer requirements, such requirements would be a contractual obligation of Sodak Marina, Inc. Contractual obligations to Sodak Marina are not "conditions peculiar to the property," or an extraordinary/exceptional situation *on the property* owned by Hodne Homes, LLC. Even if Sodak Marina's contractual obligations somehow bound Hodne Homes, LLC, a contractual obligation is, by definition, "the result of actions of the applicant" and the Ordinance does not authorize a variance under such circumstances.

Conclusion

WHEREFORE, Petitioner requests the Court reverse the Circuit Court's decision that Petitioner Karen Dunham lacked standing to challenge the Board's decision to grant the Variance. Petitioner further requests that this Court declare that the Board exceeded its authority and jurisdiction by granting the Variance to Hodne Homes and that under the facts of this case Hodne Homes is not entitled, as a matter of law, to a variance altering the side and rear yards of Lot 1.

Dated at Sioux Falls, South Dakota this the 7th day of July, 2021.

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Certificate of Compliance

The undersigned hereby certifies that this Brief of KAREN DUNHAM complies with the type volume limitations set forth in SDCL § 15-26A-66. This Brief is typeset in Times New Roman (12 point) and was prepared using Google Docs and Pages version 11.1. Based on the information provided by Pages version 11.1, this Brief contains 5,204 words and 30,508 characters (including spaces), excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials and any certificates of counsel.

Dated at Sioux Falls, South Dakota this the 7th day of July, 2021.

/s/Jimmy Nasser
Jimmy Nasser

Certificate of Service

The undersigned hereby certifies that the foregoing *Brief of Appellant Karen Dunham* was filed electronically with the South Dakota Supreme Court on July 7, 2021 and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, SD 57501-5070, within 5 days thereafter.

The undersigned further certifies that an electronic copy of *Brief of Appellant Karen Dunham* was served via email upon the attorneys set forth below on the 7th day of July, 2021.

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Attorneys for Appellee Hodne Homes, LLC

Dated at Sioux Falls, South Dakota this the 7th day of July, 2021.

/s/Jimmy Nasser
Jimmy Nasser

APPENDIX
TO APPELLANT'S BRIEF

APPENDIX
TO APPELLANT'S BRIEF

Exhibit A

2021-01-15 Judgment of Dismissal

STATE OF SOUTH DAKOTA) : SS.		IN CIRCUIT COURT
COUNTY OF LAKE)		THIRD JUDICIAL CIRCUIT
KAREN DUNHAM,	*	39 CIV 18-71
Petitioner,	*	
-vs-	*	
LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE LAKE COUNTY BOARD OF ADJUSTMENT,	*	**JUDGMENT OF DISMISSAL**
Respondents.	*	

Respondents Lake County Commission and Lake County Commission, sitting as the Lake County Board of Adjustment filed a Motion to Dismiss on October 26, 2020. The motion was fully briefed by the parties and came on for telephonic hearing on December 16, 2020, before the Honorable Kent A. Shelton, presiding. Petitioner appeared through her counsel, James Nasser. Respondents appeared through their counsel, Zachary W. Peterson. Hodne Homes, LLC, appeared through its attorney, Michael E. Unke.

The Court having heard the arguments of counsel, having examined the pleadings and other evidence which has been made part of the record, and the Court having rendered its decision in its *Letter Memorandum*, filed on December 28, 2020, which is incorporated by this reference, and otherwise being fully advised on the matter; now, therefore, it is hereby

ORDERED that the Respondents' Motion to Dismiss is GRANTED. It is further

ORDERED, ADJUDGED AND DECREED that this action is DISMISSED.

BY THE COURT: Signed: 1/14/2021 10:31:36 AM

Circuit Court Judge

Attest:
Klosterman, Linda
Clerk/Deputy

Exhibit B

2020-12-22 Judge Shelton Memorandum Decision

STATE OF SOUTH DAKOTA

THIRD JUDICIAL CIRCUIT COURT

KENT A. SHELTON
Circuit Judge
Beadle County Courthouse
450 3rd Street SW
Huron, SD 57350
(605) 353-7171
Kent.Shelton@ujs.state.sd.us

Counties
Beadle, Brookings, Clark
Codington, Deuel, Grant
Hamlin, Hand, Jerauld
Kingsbury, Lake, Miner
Moody and Sanborn

MARIE H. BALES
Court Reporter
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December 22, 2020

James Nasser
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RE: *Karen Dunham v. Lake County Commissioners, sitting as Lake County Board of Adjustment*, 39CIV18-71; Respondent's Motion to Dismiss

LETTER MEMORANDUM *By Email Only

Dear Counsel:

This matter has come before this Court by a Petition for Writ of Certiorari (Writ) filed on September 30, 2020. The parties contacted this Court by email and subsequent argument regarding the issue of standing of Petitioner. After several briefs, a Motion Hearing was held telephonically on December 16, 2020. The three issues in this case are (1) whether the Respondent County's Motion to Dismiss applies to this Writ; (2) if so, whether Petitioner has standing; and (3) whether the County waived any standing argument against Petitioner.

INTRODUCTION & STATEMENT OF FACTS

On April 17, 2018, the Lake County Board of Adjustment ("Board") granted Hodne Homes' application for a conditional use permit ("CUP") and a variance to the Lake County Ordinance ("Ordinance"). Importantly, the CUP application requested permission to exceed the height and square footage restrictions from the facility. Meanwhile, the variance requested a relaxation of the two-foot side yard (the south side of Applicant's Lot 1), and the ten-foot rear yard restrictions (the east side of Applicant's Lot 1). Petitioner's adjacent Lot 2 property lies along the north side of Applicant's Lot 1, where no variance was requested. On May 11, 2018, Petitioner Karen Dunham ("Petitioner") filed a Petition for Writ of Certiorari with this Court. On November 28, 2018, this Court filed its Memorandum Opinion affirming the Board's granting of both the CUP and the variance.

On April 29, 2020, the South Dakota Supreme Court *affirmed* this Court's ruling on the *CUP* (height and square footage restrictions), but *reversed* the ruling regarding the *variance* (setbacks on the east and south sides of Lot 1). *Dunham v. Lake Cty. Comm'n*, 2020 S.D. 23, 843 N.W.2d 330. Specifically, the Supreme Court found that the Board exceeded its authority on approving the variance by failing to follow the prescribed test within the Ordinance regarding "extraordinary and exceptional" situation on the property, and whether the denial would create a "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" on Hodne Homes. This remanded the case back to the Board for proceedings consistent with the Supreme Court's decision.

On May 29, 2020, Hodne Homes reapplied for the same variance. On July 21, 2020, the Board held a hearing regarding the variance once again and approved it once more. On

September 1, 2020, the Board issued findings of fact ("Board's FOF") and filed their decision with the Lake County Auditor.

On September 30, 2020, Petitioner filed a petition for the Court to issue a Writ of Certiorari directed to the Lake County Commission (sitting as Lake County Board of Adjustment or "Board"), for its decision on September 1, 2020 to issue a *variance* to Hodne Homes. On October 26, 2020, the Board moved to dismiss the Writ of Certiorari for the jurisdictional issue of lack of standing. On December 7, 2020, Petitioner submitted a reply brief in opposition to the Board's Motion to Dismiss. On December 15, 2020, the Board submitted a reply brief to Petitioner's reply brief, along with the Board's FOF of Hodne Homes' Variance Application (September 1, 2020), and Transcript of the motion hearing (October 30, 2018). On December 16, 2020, a hearing was held on the motion and petition.

The procedural issues in this case are (1) if the Board's Motion to Dismiss applies to a Petition for Writ of Certiorari; and (2) if it does, whether Petitioner has standing in appealing the Board's approval of the Hodne Homes variance; and (3) whether the Board waived its standing argument against Petitioner.

LAW AND ANALYSIS

1. Whether Respondent's Motion to Dismiss applies to a Ch. 11-2 Petition for Writ of Certiorari.

Effective July 1, 2020, South Dakota law provided the following procedure for writs of certiorari, in part:

> The petition shall be a petition for writ of certiorari presented to the court within thirty days after the filing of the decision in the office of the board of adjustment. The board of adjustment shall respond to the petition within thirty days of receiving the notice of the filing and shall simultaneously submit the complete record of proceedings of the board appealed from, in the form of a return on a petition for writ, without need for a court order or formal issuance of writ.

SDCL § 11-2-61 (West 2020).

Here, the Board's response was a Motion to Dismiss, in accordance with SDCL § 15-6-12(b)(1), stating that Petitioner does not have standing in this case because she is not *aggrieved* by the Board's decision, as required by SDCL § 11-2-61. No return was simultaneously filed within the thirty days of the petition, as the statute required. Petitioner argues that SDCL § 15-6-12(b)(1) does not apply.

South Dakota Ch. 15-6 states "this chapter governs the procedure in the circuit courts of the State of South Dakota in all suits of a civil nature, with the exceptions stated in § 15-6-81. It shall be construed to secure the just, speedy and inexpensive determination of every action." SDCL § 15-6-1. Accordingly, SDCL § 15-6-81(a) states "this chapter does not govern pleadings, practice, and procedure in the statutory and other proceedings included in but not limited to those listed in Appendix A to this chapter insofar as they are inconsistent or in conflict with this chapter."[1] Appendix A provides a list of chapters, but does not include South Dakota Ch. 11-2 among those listed.[2]

While this list is not exhaustive, its omission of South Dakota Ch. 11-2 shows that South Dakota Ch. 15-6 is not in conflict with South Dakota Ch. 11-2. This was also demonstrated in *Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning and Zoning Comm'n*, 2016 S.D. 48, 882 N.W.2d 307 (holding that the circuit court could not exercise its subject matter jurisdiction unless Petitioners had standing in a Ch. 11-2 action); *See also Powers v. Turner Cty. Bd. of Adjustment*, 2020 S.D. 60, 951 N.W.2d 284 (applying a South Dakota Ch. 15-6 statute to a Ch. 11-2 petition). Petitioner has not shown there is any conflict between Ch. 15-6 and 11-2, and the Supreme Court has repeatedly applied it to petitions for Writ of Certiorari. Therefore, SDCL

[1] SDCL § 15-6-81(c) states that "[t]his chapter does not supersede the provisions of statutes relating to appeals to the circuit courts."

§ 15-6-12(b)(1) is applicable to South Dakota Ch. 11-2 actions, and standing is an applicable defense to a Petition for a Writ of Certiorari in appealing a decision from a board of adjustment.

2. Whether Petitioner has standing in appealing the Board's approval of the Hodne Homes variance.

A. The version of SDCL section 11-2-61 to be applied for standing is the version that was in existence at the time of the original 2018 petition.

While statutes with procedural changes may be given retroactive effect, statutes that affect substantive rights do not. *See West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990). Petitioner Dunham argues that the statute for standing should be the version applicable at the time of the original 2018 petition. Meanwhile, the Board argues that the 2020 version should apply to the 2020 petition. During the motion hearing on December 16, 2020, Petitioner cited *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861.

In *Van Zanten*, in the summer of 1997, Applicants applied to the Lake County Board of Adjustment for a CUP to construct a hog-finishing unit. *Van Zanten*, ¶ 2. On August 19, 1997, the CUP was approved by the Board. The adjoining property owners appealed to the circuit court. *Id.* On January 6, 1998, the circuit court heard the matter. *Id.*, ¶ 3. In this hearing, the court found the legal description of the property was incorrect, and ordered the matter reversed and remanded back to the Board to correct the error. *Id.* While this was pending, on December 16, 1997, the County voted and approved zoning regulations affecting the locations of concentrated animal feeding operations (CAFOs). *Id.*, ¶ 4.

On January 20, 1998, the amendments became effective. *Id.* That *same day*, the Board met and approved Van Zanten's application for a CUP, using the regulations at the time of the *original* application, rather than the *recent* amendments. *Id.*, ¶ 5. On April 14, 1998, the circuit court determined that County was required to apply the *amended* regulations that went into effect

[2] *See* SDCL, Ch. 15-6 Appendix A Special Proceedings.

on January 20, 1998. *Id.*, ¶ 6. On appeal, the South Dakota Supreme Court disagreed and found that the remand was for:

> the limited purpose of correcting a technical flaw in the legal description. The court also indicated it would be helpful if, on remand, the County would enter more specific findings as to the ultimate issue whether the proposed building was a hog-confinement issue or feedlot under the zoning ordinance. The remand was thus limited in scope and was not for the purpose of retrying the case under any new ordinances.

Id., ¶ 11. The Court further stated that "when the scope of remand is limited, the entire case is not reopened, but rather, the lower tribunal is only authorized to carry out the appellate court's mandate." *Id.*, ¶ 13; *See also*, *State v. Bausch*, 2017 S.D. 86, ¶ 20, 905 N.W.2d 314, 319. The Court determined that "[n]o reapplication was required." *Id.*, ¶ 14. Finally, "requiring application of a new ordinance, which was adopted in the interim, went beyond the scope of the remand." *Id.*

Here, the procedural facts are similar to *Van Zanten*. On April 17, 2018, the Board approved Hodne's original application for variance. On May 11, 2018, Petitioner Dunham petitioned this court for a Writ of Certiorari. On April 29, 2020, after this court denied the writ, the Supreme Court upheld this court's denial of writ for the *CUP*, but reversed and remanded the *variance* issue back to the Board. *Dunham*, 2020 S.D. 23, ¶ 38. Specifically, the Court required the Board to have a finding of "special conditions" on the property to justify a variance, as well as "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" on Applicant Hodne. *Id.*, ¶ 20. Additionally, the Court ordered the Board to "determine whether the variance will allow a use that is not permissible within LP-3." *Id.*, ¶ 23.

On May 29, 2020, Applicant Hodne reapplied for the variance. On July 1, 2020, SDCL § 11-2-61 was amended. On July 21, 2020, the County held a remand hearing on the application. On September 1, 2020, the Board, after having taken testimony and hearing evidence, entered the Board's FOF in support of its motions to approve Hodne's application for a variance. On

September 30, 2020, Petitioner Dunham again petitioned this court for a Writ of Certiorari. Here, although the remand here was for more than a "technical flaw," it was specifically limited in scope by the Supreme Court, as mentioned above. As in *Van Zanten*, here Hodne was not required to reapply for a variance. Therefore, to be consistent with *Van Zanten*, the court shall apply SDCL § 11-2-61 as it was at the time of the original petition.

In 2018, at the time of Petitioner Dunham's original petition to this court, the statute read:

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

SDCL § 11-2-61 (West 2016)[3] (emphasis added).

B. Petitioner does not meet the aggrievance requirement for standing.

Recently, the Supreme Court had a similar case to these facts regarding standing. *Powers v. Turner County Board of Adjustment*, 2020 S.D. 60, 951 N.W.2d 284.[4] "A litigant must have standing in order to bring a claim in court." *Powers*, ¶ 13 (citing *Lippold v. Meade Cty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922). Further, "[a]though standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." *Id.* "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." *Id.* (quoting *Cable v. Union Cty. Bd. Of Cty. Comm'rs*, 2009 S.D. 59, ¶ 20, 769 N.W.2d 817, 825). The statute governing the Petitioners' application authorizes a particular class of plaintiffs to bring suit under SDCL chapter 11-2. *Id.*

In *Powers*, Schmeichel applied to the County for a CUP to operate a CAFO in March 2018. *Id.*, ¶ 2. The County Board held a hearing on this application, thereafter approving it. *Id.*

[3] 2016 South Dakota Laws Ch. 71 (H.B. 1140).

Powers petitioned the circuit court for a Writ of Certiorari under SDCL § 11-2-61. *Id.*, ¶ 3. The Petitioners owned land near the proposed CAFO and stated that they were aggrieved by the Board's approval, and alleged serious risks of pollution, increased odors and noise, and negative impact on their property values. *Id.*

The Petitioners filed a motion for summary judgment on their writ, asserting there were no material issues of fact in dispute. *Id.*, ¶ 4. The Schmeichels, joined by the County Board, filed a cross-motion for summary judgment, stating that the Petitioners lacked standing to appeal the Board's decision under SDCL § 11-2-61. *Id.* Their argument centered upon the assertion that Petitioners failed to allege a unique or personal injury. *Id.* Petitioners responded that the CAFO will devalue their own property from noxious odors and noise. *Id.*

The circuit court held a hearing on the issue of standing, and found that Petitioners failed to present sufficient evidence to establish standing, only that these were "allegations." *Id.*, ¶ 5. Petitioners made a timely request for discovery under SDCL § 15-6-56(f), and the court granted 45 days to submit additional evidence to show standing. *Id.* Next, the Petitioners submitted an expert report and affidavit from an appraiser demonstrating the devaluation of her property from the CAFO. *Id.*, ¶ 7.

Ultimately, the Supreme Court concluded that the Petitioners had set forth sufficient specific facts to show "a personal and pecuniary loss not suffered by taxpayers in general, falling upon a petitioner in an individual capacity, and not merely in the capacity as a taxpayer and member of the body politic of the county." *Id.*, ¶ 23; *See also Cable*, ¶ 26. The Petitioners had substantiated their allegations with expert opinions rather than relying on mere speculation, conjecture, or fantasy. *Id.* The Court further found the following:

---

[4] The *Powers* case also involved standing for the 2016 version of SDCL § 11-2-61.

> the Schmeichels argued that a Right to Farm Covenant established that the Petitioners' alleged inconveniences and discomforts are not personal or unique, namely because they are similarly suffered by other residents of the county, the Petitioners offered evidence in support of their allegation that the proposed CAFO will injure them beyond the inconveniences and discomforts related in the Covenant.

Id. In applying *Powers* to the present facts, Petitioner Dunham must show that she was "aggrieved" in order to have standing. Petitioner's Reply Brief to Respondent's Motion to Dismiss refers to the original Affidavit of (Petitioner) Karen Dunham ("Aff. Dunham"), which lists concerns of lack of daylight because of the size of the building, the covenants of other buildings in this development, and concerns of drainage and runoff as a result of a larger building.

However, any concerns of the size of the building (daylight and drainage) relate to the *CUP*, which requested permission to exceed the height and square footage restrictions from the facility. "Res judicata precludes relitigation of a claim or issue actually litigated or which could have been properly raised." *Shevling v. Butte Cty. Bd. of Comm'rs*, 1999 S.D. 88, ¶ 22, 596 N.W.2d 728, 731 (internal citations omitted). Here, the Board approved the CUP, this Court affirmed its approval, and the South Dakota Supreme Court upheld the decision that the CUP was approved properly. Thus, any issues that relitigate the *size* of the building are precluded under the doctrine of res judicata.

Regarding the covenant, Petitioner re-stated from her Affidavit that "[i]t is my understanding that all of the other buildings built in this development are built with the 5' setback and are at least 10 feet apart which follows the covenants as set forth when the lots were developed." *See* Aff. Dunham, Exhibit K. This mere understanding of a covenant does not demonstrate any injury or loss to Petitioner beyond the inconveniences and discomforts that are similarly suffered by other residents. The variance is not along her boundary with Applicant, and

any injuries resulting from the size of the building have already been decided upon as described above. Furthermore, Petitioner's Affidavit was written in concern of Applicant Hodne building within 1' of the lot line adjacent to Petitioner's lot.[5] This proposed variance was later changed by Hodne to conform with the 2' setback by the Ordinance, and no variance was requested along *this* lot line to the Board.

At the hearing, Petitioner Dunham stated that if necessary to prove standing, she would request discovery for an expert opinion, and produce evidence of injury to her property. Meanwhile, the Board argues that this case has been occurring for two years at this point. Furthermore, the CUP was approved, only the variance remains, and no injury can be shown by Petitioner. Here, the Board's argument is more persuasive. After two years of litigation, and despite her recent Petition for Writ of Certiorari and a Reply Brief to the Board's Motion to Dismiss, Petitioner has failed to provide evidence that she suffered a loss, as defined in *Powers*, that would occur as a result of the Board's granting of the *variance*. The injuries that she listed were either not injurious or were attributable to the CUP's approval. Therefore, the Court shall not grant a request for discovery in this case.

Ultimately, Petitioner has not articulated a personal and pecuniary loss. Without such a loss, Petitioner is not an aggrieved person under SDCL § 11-2-61. Without being an aggrieved person, Petitioner does not have standing for a Ch. 11-2 petition. Therefore, Respondent's SDCL § 15-6-12(b)(1) is a valid defense for lack of standing.

3. Whether the Board waived its argument of standing against Petitioner.

Petitioner argues that the Board raises the *new* argument that the Petitioner lacks standing and it should therefore be waived. The statute provides that a party may assert "lack of subject-

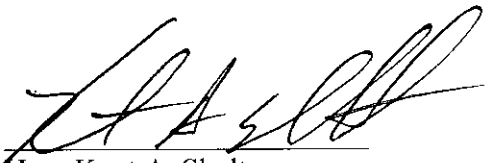
[5] The Affidavit continues in the last paragraph: "Based on this information and looking at the size of the structure being very overbearing on my lot/building, I cannot support your proposal to move the setback to 1' on your lot.

matter jurisdiction" as a defense by motion. SDCL § 15-6-12(b). Furthermore, regarding this defense, Rule 12 states that "*[w]henever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." SDCL § 15-6-12(h)(3)[6] (emphasis added). Here, the Board argues that case law has shown that the South Dakota Supreme Court saw the issue of standing as a prerequisite in determining subject matter jurisdiction. *See, e.g., Lake Hendricks Improvement Ass'n*, 2016 S.D. 48. South Dakota statute permits this defense "whenever," and the Supreme Court has not prohibited its use in several similar cases.

CONCLUSION

Petitioner does not have standing to petition for a Writ of Certiorari, a requirement for subject matter jurisdiction. For the aforementioned reasons, Respondent's Motion to Dismiss is GRANTED.

BY THE COURT:



Hon. Kent A. Shelton
Circuit Judge, Third Judicial Circuit

This building is just too large for the lot." Aff. Dunham, Exhibit K.

[6] This is similar to the Federal Rules of Civil procedure, which states that "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added).

Exhibit C

2020-09-01 Lake County Decision To Grant Variance

Findings of Fact
Remand to Board of Adjustment
Hodne Homes, LLC's Variance Application

Pursuant to the Order Remanding Matter to Lake County Board of Adjustment for Further Proceedings on Hodne Homes, LLC's Variance Application, filed on May 29, 2020 in Karen Dunham v. Lake County Commission, Lake County Commission Sitting as the Lake County Board of Adjustment, and Hodne Homes, LLC, File 39CIV18-71, this matter came before the Lake County Board of Adjustment on July 21, 2020. The Board having taken testimony and heard the evidence, the Board now enters the following Findings of Fact in support of its motions to approve the Petitioner's application for a Variance.

I, Kelli Wollmann, Chair of the Board of Adjustment, will read each finding out loud. At the end of each finding, I will pause. If any Board of Adjustment member disagrees with the finding or wishes to propose an amendment to the finding, that will be your opportunity to make your position known. Otherwise, I will continue on to the next finding. At the end of the list of findings, we will take a roll call vote.

1. Hodne Homes, LLC ("Applicant") filed application for a Variance on property legally described as: Lot 1 Dunham's & Hemmer's 1st Addition, SW ¼ SW ¼ Sec 25-106-52, Lakeview Township, Lake County, SD in the "LP 3" District.

2. Applicant requested a variance to build closer to the south side and rear yard lot line.

3. Applicant's lot is 50' wide with a 167' depth. The proposed building is 47' wide with a 120' depth.

4. Applicant seeks a 5' ft. variance from the rear yard setback. Also, Applicant seeks a 1' variance from the southern side yard lot lines. Applicant meets the northern side yard and front yard required setback. Applicant's building is constructed in a way that causes it to line up with the existing neighboring buildings on the front yard side of the building.

5. The Lake County Zoning Ordinance requires that a land owner go through the variance process if they cannot meet the setbacks.

6. Adjoining neighbors to the East and West and the township were contacted. They raised no objections to the Variance request. Their signatures were obtained in approval.

7. The adjoining neighbor to the North has been contacted and also notified via certified mail. Karen Dunham and her son, Chris, object to the variance request.

8. Initially the size of the building was proposed with a 48' width. Applicant changed its plans and reduced the size of the building to a 47' width to accommodate Mrs. Dunham's adjoining lot lines. Applicant is not asking for a variance from their adjoining lots, and will honor the required 2' setback.

9. The Board held a public hearing on the variance application on April 17, 2018. The Lake County Board of Adjustment granted the Applicant the requested Variance.

10. The Lake County Board of Adjustment's decision was appealed to the Third Judicial Circuit Court, Lake County, South Dakota, which affirmed the decision. The matter was then appealed to the South Dakota Supreme Court.

11. The South Dakota Supreme Court determined that additional proceedings were needed before the Lake County Board of Adjustment to address specific factors for a Variance under Section 505 of the Lake County Zoning Ordinance, which states:

    The Board of Adjustment shall have the power, where, by reason of exception, narrowness, shallowness or shape of a specific piece of property at the time of the enactment of this Ordinance, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation under this Ordinance would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantially impairing the intent and purpose of this Ordinance.

12. More specifically, the Supreme Court found that the Board made no determination that because of a particular feature of the property at the time the Ordinance was enacted, or because of some "extraordinary and exceptional" situation on the property, a variance was necessary. The Court also found that the Board also failed to consider whether the denial of the variance to build a facility exceeding the setback requirements would create "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" on the Applicant.

13. At the remand hearing, evidence was presented to the Board of Adjustment that the property at issue adjoins property to the south which is the location of Applicant's commercial building which houses the sales office, desks, and the repair shop. It is the only property in Lake County where there is a commercial property directly adjacent to an LP-3 property.

    The Board finds that the Applicant's LP-3 property being located adjacent to its commercial property creates an extraordinary or exceptional situation or condition on Applicant's property, such that the denial of the variance would create peculiar and exceptional practical difficulties or an exceptional and undue hardship for Applicant.

14. At the remand hearing, evidence was presented to the Board of Adjustment that, in order to facilitate the sale of boats made by manufacturers such as Crestliner and Manitou, Applicant has to demonstrate to those manufacturers that it has a sales office, a shop, and a sufficient display area to show the boats; and that the setback rules and limitations on the size of buildings in the LP-3 district would not accommodate a showroom large enough for storage of these boats and the Applicant could not have made the building any smaller and still met such dealer requirements.

The Board finds that, based upon the size of the lot in question and the limitations faced by Applicant's business in selling certain brands of boats, an extraordinary or exceptional situation or condition on Applicant's property exists, such that the denial of the variance would create peculiar and exceptional practical difficulties or an exceptional and undue hardship for Applicant.

15. The South Dakota Supreme Court also remanded for further consideration under Section 505(3) of the Lake County Zoning Ordinance, which provides that "[u]nder no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district."

The Board finds, based upon the testimony presented to the Board of Adjustment at the remand hearing, that the storage and display of boats fits within the approved uses for oversized private and commercial storage facilities within the LP-3 district.

Motion by Reinicke, second Johnson to approve the findings made today.

Roll call vote of 5 yes and 0 no. Motion carried.

Yes Wollmann Yes Hageman Yes Johnson Yes Reinicke Yes Slaughter

Motion by Johnson, second Reinicke that based on the findings just adopted, the variance is approved.

Roll call vote of 5 yes and 0 no. Motion carried.

Yes Wollmann Yes Hageman Yes Johnson Yes Reinicke Yes Slaughter

Kelli Wollmann, Chair
Lake County Board of Adjustment

Date Approved: September 1, 2020

Date Signed: September 1, 2020

Date Filed: September 1, 2020

Variance Number(s): #18-02

Exhibit D

Lake County Zoning Ordinance (pertinent parts)

ARTICLE I
SHORT TITLE AND APPLICATION

Section 101. Title. This Ordinance may be known and may be cited and referred to as the "Lake County Zoning Ordinance" to the same effect as if the full title were stated.

Section 102. Jurisdiction. Pursuant to SDCL 11-2, 1967, as amended, the provisions of this Ordinance shall apply within the unincorporated areas of Lake County, South Dakota, as established on the map entitled "The Official Zoning Map of Lake County, South Dakota."

Section 103. Provisions of Ordinance Declared to be Minimum Requirements. In their interpretation and application, the provisions of this Ordinance shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals, or general welfare. Wherever the requirements of this Ordinance are at variance with the requirements of any other lawfully adopted rules, Ordinances, ordinances, deed restrictions, or covenants, the most restrictive or that imposing the higher standards, shall govern.

structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. The term does not, however, include either:

a. Any project for improvement of a structure to comply with existing State or local health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions, or
b. Any alteration of a structure listed on the National Register of Historic Places or a State Inventory of Historic Places

Temporary Fireworks Sales Stand. A structure utilized for the licensed resale of fireworks during the time period allowed by South Dakota State Law.

Tree Farm. Land dedicated to the growing and management of forest crops for commercial purposes. For the purposes of this ordinance, a tree farm does not include a tree nursery.

Tree, Ornamental. A deciduous tree which is typically grown because of its shape, flowering characteristics, or other attractive features, and which grows to a mature height of about twenty-five (25) feet or less.

Truck Garden. A farm where fruit and vegetables are grown for market.

Variance. A variance is a relaxation of the terms of the zoning ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship. As used in this ordinance, a variance is authorized only for height, area, and size of structure or size of yards and open spaces; establishment or expansion of a use otherwise prohibited shall not be allowed by variance, nor shall a variance be granted because of the presence of non-conforming in the zoning district or uses in an adjoining zoning district.

Veterinary Clinic. A building or part of a building used for the care, diagnosis, and treatment of sick, ailing, infirm, or injured animals, and those who are in need of medical or surgical attention. Such clinics may or may not provide long-term lodging for ill or unwanted animals, or lodging for healthy animals on a fee basis.

Violation (In reference to Section 1112). The failure of a structure or other development to be fully compliant with the community's flood plain management regulations. A structure or other development without the elevation certificate, other certifications, or other evidence of compliance required in Section 1112 of this Ordinance is presumed to be in violation until such time as that documentation is provided.

Water surface elevation (In reference to Section 1112). The height, in relation to the National Geodetic Vertical Datum (NGVD) of 1929, (or other datum, where specified) of floods of various magnitudes and frequencies in the flood plains of coastal or riverine areas.

Wind Energy System (WES). A commonly owned and/or managed integrated system that converts wind movement into electricity. All of the following are encompassed in this definition of system:

1. Tower or multiple towers, including foundations;
2. Generator(s);
3. Blades;
4. Power collection systems, including padmount transformers;

Section 505. Powers and Jurisdiction Relating to Variances. The Board of Adjustment shall have the power, where, by reason of exception, narrowness, shallowness or shape of a specific piece of property at the time of the enactment of this Ordinance, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation under this Ordinance would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantially impairing the intent and purpose of this Ordinance.

1. The County Zoning Officer may require the applicant for a variance to notify property owners by certified or registered mail of the variance request or in lieu of this obtain written consent from adjoining landowners. Any party may appear in person, or by agent or by attorney; the Board of Adjustment shall make findings that the requirements of this section have been met by the applicant for a variance; the Board of Adjustment shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure; the Board of Adjustment shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

2. In granting any variance, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance and punishable under the terms of this Ordinance.

3. Under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district.

4. The concurring vote of four (4) members of the Board of Adjustment is required to pass any variance.

Section 506. Board of Adjustment has Powers of Administrative Officer on Appeals: Reversing Decision of Administrative Officer: In exercising the above-mentioned powers, the Board of Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appeal from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the office from whom the appeal is taken.

The concurring vote of four (4) members of the Board of Adjustment shall be necessary to reverse any order, requirement, decision or determination upon which it is required to pass under this Ordinance or to effect any variation in this Ordinance.

Section 507. Appeals to a Court of Record. Any person or persons, jointly or severally aggrieved by a decision of the Board of Adjustment or any taxpayer, landowner, or any officer, department, board, or bureau of the County may appeal as provided by State law.

Exhibit E

Dunham v. Lake County Commission (2020 SD 23)

#28842-aff in pt & rev in pt-SRJ
2020 S.D. 23

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

KAREN DUNHAM, Petitioner and Appellant,

v.

LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE LAKE COUNTY BOARD OF ADJUSTMENT, Respondent and Appellee,

and

HODNE HOMES, LLC, Respondent.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE THIRD JUDICIAL CIRCUIT
LAKE COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE KENT SHELTON
Judge

* * * *

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* * * *

CONSIDERED ON BRIEFS
AUGUST 26, 2019
OPINION FILED **04/29/20**

#28842

JENSEN, Justice

[¶1.] Hodne Homes, LLC purchased a lot in Lake County to build a facility to store and display boats. After the purchase, Hodne Homes sought a variance and conditional-use permit (CUP) from the Lake County Board of Adjustment (Board), because the proposed facility exceeded the setback and size restrictions for the lot under the Lake County Zoning Ordinance (Ordinance). The Board approved both requests over the objection of Karen Dunham, an adjoining landowner. Dunham then petitioned the circuit court for a writ of certiorari challenging the Board's decision. Hodne Homes was joined as an indispensable party to the certiorari proceedings. Following a hearing, the court denied the writ of certiorari. Dunham appeals the denial of the writ. We affirm in part and reverse in part.

Facts and Procedural History

[¶2.] In March 2018, Hodne Homes purchased Lot 1 of Dunham's and Hemmer's First Addition to Lake County (Lot 1). Dunham has owned Lot 2 in Dunham's and Hemmer's First Addition (Lot 2) since 2002. Lot 2 abuts the north side of Lot 1. Sodak Marina, LLC owns the lot adjoining the south side of Lot 1 and operates a business selling boats on the lot. Sodak Marina and Hodne Homes are both owned by Brandon and Jamie Hodne.

[¶3.] Lots 1 and 2 are located in the area that the Ordinance classifies as Lake Park 3 zoning district of Lake County (LP-3). Section 1105 of the Ordinance provided that LP-3 was "established to provide for oversized private and commercial storage facilities." The uses permitted within LP-3 included "private and commercial storage facilities containing no more than four thousand (4,000) square

feet and [which] do not have side walls with a height greater than fourteen (14) feet." The Ordinance also imposed minimum setback requirements of two feet on the side yard and ten feet in the rear yard for properties within LP-3.

[¶4.] Prior to purchasing Lot 1, Hodne Homes sought approval from adjoining landowners to construct an oversized facility on Lot 1 to display and store boats for Sodak Marina. The facility was proposed to be a 5,760-square-foot building with sixteen-foot side walls, exceeding the size and height restrictions permitted within LP-3. The proposed facility also exceeded the minimum setback requirements for Lot 1 by leaving only one foot on each side of the yard and five feet in the rear yard. The adjoining landowners, other than Dunham, consented to the proposed facility on Lot 1.[1]

[¶5.] Immediately after purchasing Lot 1, Hodne Homes applied for a variance and a CUP for the oversized facility. The variance request sought to relax the two-foot side yard and ten-foot rear yard restrictions. The CUP application

1. Lots 1 and 2 were also subject to a Declaration of Restrictive Covenants for Dunham's and Hemmer's First Addition dated November 27, 2000. The covenants provided that "no building or structure shall be erected, altered, placed or permitted to remain less than five (5) feet from the northerly, southerly, or easterly lot line." Dunham separately sued Hodne Homes for injunctive relief and damages alleging the building would violate the restrictive covenants. This action remains pending. Dunham argues that the Board should have applied the restrictive covenant when considering the zoning changes requested by Hodne Homes. However, Dunham did not present this issue to the Board, and the circuit court did not address the issue in the writ of certiorari proceedings. Because of our disposition and Dunham's failure to present the issue below, we decline to address the issue. *See Hall v. State ex rel. S.D. Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26; *Homestake Mining Co. v. S.D. Subsequent Injury Fund*, 2002 S.D. 46, ¶ 18, 644 N.W.2d 612, 616 ("We will not decide issues the circuit court has not had the opportunity to rule on.").

requested permission to exceed the height and square footage restrictions for the facility. Dunham objected, expressing that the facility would not comply with the Ordinance requirements for properties within LP-3, and that the facility was of nonconforming use because Hodne Homes intended to use the facility as a showroom. In response, Hodne Homes submitted a revised plan reducing the width of the facility to forty-seven feet. This change met the two-foot setback requirement on the side of Lot 1 adjoining Dunham's property but did not modify the setback distances on the south side and rear yard or the nonconforming size of the proposed facility. The Lake County Planning Board considered the revised plan at a public hearing on April 11, 2018, and recommended the approval of both the variance and the CUP.

[¶6.] The Board considered Hodne Homes' applications for a variance and CUP at another public hearing on April 17, 2018. The Board was provided staff reports drafted by a Lake County zoning officer on both requests, which recommended approving the applications and provided a potential list of findings supporting approval of the requests prefaced with the phrase, "if the [Board] grants the [variance/conditional use] it could use the following findings." A section of each report also provided findings the Board could consider if it denied the requests.

[¶7.] Dunham's son appeared before the Board in opposition. He expressed concerns with the size and use of the facility, as well as the lack of a drainage plan on Lot 1. The Board discussed the drainage issue and options available in the area. At the conclusion of the hearing, the Board approved Hodne Homes' requests,

adopted the "findings and specific conditions outlined in the staff report," and also required a drainage plan be developed for the facility.

[¶8.] On May 11, 2018, Dunham filed a petition for writ of certiorari with the circuit court alleging the Board's approval of the variance and the CUP were illegal and violated state statutes and the Ordinance. The circuit court granted Hodne Homes' motion for joinder in the certiorari proceedings. The court received written briefs and heard arguments but did not receive additional evidence. Applying a deferential standard of review, the circuit court denied Dunham's petition for writ of certiorari, determining the Board had jurisdiction to grant or deny the variance and CUP, and that both the variance and the CUP were granted in compliance with state statutes and the Ordinance.

[¶9.] Dunham now appeals the circuit court's order denying the writ. She raises several issues, which we state as follows:

1. Whether the Board exceeded its legal authority under the Ordinance when it approved the variance.

2. Whether the Board exceeded its legal authority under the Ordinance when it approved the CUP.

3. Whether Section 1105 of the Ordinance and the Board's CUP decision violated Dunham's due process rights.

4. Whether the Board committed other procedural errors in its consideration and approval of the variance and the CUP.

Standard of Review

[¶10.] As an initial matter, the parties disagree as to the appropriate standard of review for both this Court and the circuit court in considering a challenge by writ of certiorari. The scope of judicial review in writ of certiorari

proceedings is statutorily determined by SDCL 21-31-8.[2] We have interpreted this statute to limit certiorari review "to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it." *Wedel v. Beadle Cty. Comm'n*, 2016 S.D. 59, ¶ 11, 884 N.W.2d 755, 758 (quoting *Hines v. Bd. of Adjustment of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 234). We will sustain the lower tribunal's decision "unless it did some act forbidden by law or neglected to do some act required by law." *Id.* (quoting *Armstrong v. Turner Cty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 12, 772 N.W.2d 643, 648).

[¶11.] Dunham argues, however, that de novo review of a lower tribunal's decision is appropriate when a board or commission has "acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof." *Lamar Outdoor Advert. of S.D., Inc. v. City of Rapid City*, 2007 S.D. 35, ¶ 21, 731 N.W.2d 199, 205 (quoting *Cole v. Bd. of Adjustment of Huron* (*Cole I*), 1999 S.D. 54, ¶ 10, 592 N.W.2d 175, 177). Dunham submits that the Board's actions were done in willful disregard of the facts in this case and were contrary to the provisions of the Ordinance. As a threshold matter, Dunham failed to present evidence to the circuit court that the Board committed fraud, acted arbitrarily, or willfully disregarded undisputed facts or proof in its consideration of the variance and the CUP. Given

2. SDCL 21-31-8 provides:

> The review upon writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board, or officer, has regularly pursued the authority of such court, tribunal, board, or officer.

the lack of any such evidence, a deferential review of these certiorari proceedings is appropriate. Further, Dunham's arguments would logically expand the scope of review in every certiorari proceeding to consider whether a board of adjustment's findings were correct. "The interpretation of an ordinance presents a question of law which we review de novo." *Cole I*, 1999 S.D. 54, ¶ 4, 592 N.W.2d at 176. However, "[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding." *Hines*, 2004 S.D. 13, ¶ 10, 675 N.W.2d at 234.

[¶12.] Dunham also argues that a deferential standard of review only holds if there is not a "special and express statutory provision" establishing a contrary standard. *See State ex rel. Grey v. Circuit Court of Minnehaha Cty.*, 58 S.D. 152, 235 N.W. 509, 511 (1931). To this end, Dunham argues SDCL 11-2-64[3] and SDCL 11-2-65[4] permit de novo review of the merits.

[¶13.] These statutes do not direct de novo review of a decision granting or denying a variance or a CUP. We have recognized that petitions challenging a decision by a board of adjustment under SDCL 11-2-61 "are postured as writs of

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3. SDCL 11-2-64 provides:

> If upon the hearing it appears to the court that testimony is necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take such evidence as it may direct and report the evidence to the court with the referee's findings of fact and conclusions of law, which constitute a part of the proceedings upon which the determination of the court is made.

4. SDCL 11-2-65 provides in part:

> The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

certiorari; thus judicial review is limited." *Wedel*, 2016 S.D. 59, ¶ 11, 884 N.W.2d at 758. While SDCL 11-2-64 permits a court to receive evidence when "it appears to the court that testimony is necessary," the statute does not modify the scope of judicial review. Likewise, SDCL 11-2-65 addresses the authority of the courts to grant relief on a petition under SDCL 11-2-61, but this section does not pertain to the scope of review. Our prior decisions have consistently maintained this limited scope of review in certiorari proceedings, and Dunham's arguments do not support expanding our review in this case.

Analysis & Decision

1. Whether the Board exceeded its legal authority under the Ordinance when it approved the variance.

[¶14.] Dunham initially claims that the Board was not authorized to grant the variance sought by Hodne Homes to relax the setback requirements. Dunham points to the language in Article II of the Ordinance, defining a variance as

> a relaxation of the terms of the zoning ordinance where such variance will not be contrary to the public interest *and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship . . . .*

(Emphasis added.) Dunham argues that Hodne Homes failed to make any showing that the variance was necessary because of the peculiar conditions of the property or undue hardship on the owners. She claims that the variance was only requested because of Hodne Homes' decision to construct an oversized facility on Lot 1.

[¶15.] Dunham claims the Board exceeded its authority under the Ordinance because there were no unique, exceptional, or extraordinary features on Lot 1

providing a basis to grant a variance. Dunham relies on Section 505 of the Ordinance, which provides the Board with the power and jurisdiction to grant a variance as follows:

> The Board of Adjustment *shall have the power, where, by reason of exception, narrowness, shallowness or shape of a specific piece of property at the time of the enactment of this Ordinance, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property,* the strict application of any regulation under this Ordinance would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantially impairing the intent and purpose of this Ordinance.

(Emphasis added.)

[¶16.] The staff report, adopted as part of the findings by the Board, stated:

> The variance would not be injurious to the neighborhood or detrimental to the public welfare . . . . Granting the variance would not substantially impair the intent and purpose of the zoning ordinance . . . . There are special conditions or circumstances that exist which are peculiar to the land, structure, or building involved, and which are applicable to other land, structures or buildings in the same district.

Dunham argues these findings by the Board are mere boilerplate language and fail to provide any basis for the Board to grant a variance under the Ordinance.

[¶17.] The language of the Ordinance for variances is consistent with SDCL 11-2-53(2), which permits a board of adjustment to:

> Authorize upon appeal in specific cases such variance from terms of the ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary

> hardship and so that the spirit of the ordinance is observed and substantial justice done . . . .[5]

[¶18.] In *Hines*, this Court held that SDCL 11-2-53(2) creates a two-part test for granting a variance. "[F]or a [board of adjustment] to grant a variance, both the public interest prong and special conditions prong must be met." 2004 S.D. 13, ¶ 12, 675 N.W.2d at 234. *Hines* determined the board of adjustment improperly denied the variance under the first prong by only considering the objections of neighboring landowners rather than the proper test of whether the variance was "contrary to the public interest." *Id.* ¶ 16. In reversing the board's denial of the variance, the Court stated that the board's "failure to follow the test mandates the conclusion that the board exceeded the scope of authority granted" by the zoning ordinance. *Id.* ¶ 13.

[¶19.] Here, the Board found that the variance "would not be injurious to the neighborhood or detrimental to the public welfare." This finding satisfies the first prong required for a variance under the Ordinance and SDCL 11-2-53. While Dunham challenges this finding by the Board, "[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding." *Hines*, 2004 S.D. 13, ¶ 10, 675 N.W.2d at 234 (quoting *Cole I*, 1999 S.D. 54, ¶ 11, 592 N.W.2d at 177).

[¶20.] However, the Board failed to consider the second prong requiring the existence of special conditions to grant a variance. The Board made a terse finding that special conditions exist on the property but failed to meaningfully address the special conditions required by Section 505 for the Board to have authority to grant a

5. The 2020 Legislature made non-substantive changes effective July 1, 2020.

variance. More specifically, the Board made no determination that because of a particular feature of the property at the time the Ordinance was enacted, or because of some "extraordinary and exceptional" situation on the property, a variance was necessary. The Board also failed to consider whether the denial of the variance to build a facility exceeding the setback requirements would create "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" on Hodne Homes. The Board exceeded its authority by failing "to follow the prescribed test" within the Ordinance. *Hines,* 2004 S.D. 13, ¶ 13, 657 N.W.2d at 234.

[¶21.] For this reason, we reverse the circuit court's denial of certiorari relief to Dunham on the Board's decision granting a variance to Hodne Homes. However, we address Dunham's other separate challenges to the variance to provide the Board and parties with guidance on remand.

[¶22.] Dunham also maintains that by approving the variance, the Board authorized Hodne Homes to expand the business of Sodak Marina to begin selling boats on Lot 1, a use which is not permitted within the LP-3 district. Dunham argues that the Board exceeded its authority to grant a variance under Section 505 by permitting this nonconforming use on Lot 1. She cites to Section 505(3), which provides that "[u]nder no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district."

[¶23.] Hodne Homes' application for a variance stated that it intended to use the facility to store and display boats that would be sold at Sodak Marina, adjacent to Lot 1. Dunham claimed this use would exceed approved uses in LP-3 for "oversized private and commercial storage facilities." In granting the variance, however, the Board made no determination whether the proposed facility to store and display boats for Sodak Marina was within the approved uses for "oversized private and commercial storage facilities" within LP-3. In order to comply with Section 505(3) on remand, the Board must determine whether the variance will allow a use that is not permissible within LP-3.

[¶24.] Dunham also argues the variance for the rear and side yard setbacks within LP-3 was impermissible under Section 305 of Article III of the Ordinance.[6] She argues that the language "except hereinafter provided" in Section 305 means the Board could not reduce the setback requirements without specific authorization to do so. The Board responds that Section 305 sets a baseline for owners to follow and that the variance was appropriate for a relaxation of the requirements. The Board also argues Dunham's interpretation of the phrase "except as hereafter provided" is incorrect and the phrase actually means the size restrictions in Section

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6. The applicable portion of Section 305 provides:

> [e]xcept as hereafter provided:
> . . . .
> 4. The minimum yards and other open spaces, including lot area per family, required by this Ordinance for each and every building at the time of passage of this Ordinance or for any building hereafter erected shall not be encroached upon or considered as yard or open space requirements for any other buildings, nor shall any lot area be reduced beyond the district requirements of this Ordinance.

305 should be followed unless grounds exist to allow a deviation from these requirements.

[¶25.] We agree with the Board. A plain reading of Section 305 indicates that the lot restrictions must be adhered to within each district except as otherwise provided within the Ordinance. A variance under Section 505 is one such provision that authorizes the Board to relax the lot setback requirements. The Board's discretion to grant a variance under the Ordinance is broad. *Cole v. Bd. of Adjustment of Huron* (*Cole II*), 2000 S.D. 119, ¶ 17, 616 N.W.2d 483, 488. Dunham's interpretation of Section 305 would impose a restriction on the Board's ability to grant a variance that is not supported by the language of the Ordinance.

2. Whether the Board exceeded its legal authority under the Ordinance when it approved the CUP.

[¶26.] Dunham also challenges the Board's decision to grant Hodne Homes' application for a CUP allowing the construction of an oversized facility on Lot 1. Dunham initially argues the Board lacked the authority under the Ordinance to grant a CUP to increase the size of a proposed facility within LP-3. She cites to the prohibited uses set forth in Section 306 of the Ordinance, which provides that "[a]ll uses and structures not specifically listed as a permitted use or as a conditional use in a particular zoning district or overlay district shall be prohibited in said district." Dunham further argues that increasing the permitted *size* of a structure, as opposed to expanding or modifying the allowed *use* of such a structure is not encompassed within the statutory definition of a conditional use in SDCL 11-2-

17.4.[7] The Board responds that there is no language in the statute that prohibits the granting of a CUP to increase the size restriction on a building within a zoning district. The Board also cites to Section 1105 and argues that the Ordinance provides the Board broad discretion to permit other uses within LP-3.

[¶27.] The permitted uses of structures located in LP-3 are defined in Section 1105 of the Ordinance not only by the type of activity allowed therein (private and commercial storage facilities), but also by the *size* of such structures. Section 1105 allows the Board to permit conditional uses so long as the Board determines that they "are not detrimental to other uses and are in the general character of the other uses in LP-3" and otherwise comply with the Ordinance provisions. There is nothing in either Section 1105 or SDCL 11-2-17.4 that prohibits the Board from granting a CUP to modify the size restrictions for permitted uses within LP-3.[8] Dunham has therefore failed to establish that the Board was without authority to grant a CUP to permit the construction of an oversized storage facility in LP-3.

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7. SDCL 11-2-17.4 provides:

> A conditional use is any use that, owing to certain special characteristics attendant to its operation, may be permitted in a zoning district subject to the evaluation and approval by the approving authority specified in § 11-2-17.3. A conditional use is subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district.

8. Dunham also argues that SDCL 11-2-13 prohibits the Board from using a CUP to modify the size restriction for the construction of a building, but Dunham's reliance on SDCL 11-2-13 is ill-founded. This statute authorizes the Board to establish regulations concerning both size and use of structures, and there is no language in SDCL 11-2-13 limiting the Board's ability to grant a CUP application relating to either size or use restrictions.

[¶28.] Dunham also challenges the adequacy of the findings to grant the CUP application. In granting the CUP, the Board determined the oversized facility would not be detrimental to other uses and would be in the general character of uses in LP-3. The Board also made findings pursuant to Section 504, which requires the Board, before granting a CUP, to find the "granting of the conditional use will not adversely affect the public interest . . . ." Contrary to Dunham's claim, the Board also considered other criteria under Section 504, such as: access to the property, public safety, parking, utilities, noise and lighting from the use, the appearance of the property, and the "[g]eneral compatibility with adjacent properties and other property in the district."

[¶29.] The Board ultimately determined that the oversized storage facility would not adversely affect the public interest and was "compatible with other properties in [LP-3]." Specifically, this included a finding that there were other "oversized storage buildings in the area that are similar and on similar sized lots." The Board also found that other considerations within Section 504 had been satisfied. The Board's decision to grant the CUP allowing a larger facility on Lot 1 was within its discretion to modify or relax zoning requirements under the Ordinance. *See Cole II*, 2000 S.D. 119, ¶ 17, 616 N.W.2d at 488. We are limited to considering "whether it pursued in a regular manner the authority conferred upon it," not "whether the Board's decision was right or wrong." *Wedel*, 2016 S.D. 59, ¶ 11, 884 N.W.2d at 758 (citation omitted).

[¶30.] Therefore, Dunham failed to establish that the Board exceeded its authority by granting the CUP for the construction of an oversized storage facility

on Lot 1. *See Hines*, 2004 S.D. 13, ¶ 13, 675 N.W.2d at 234. Under our deferential review, the Board had "jurisdiction over the matter and . . . it pursued in a regular manner the authority conferred upon it." *Wedel*, 2016 S.D. 59, ¶ 11, 884 N.W.2d at 758 (quoting *Hines*, 2004 S.D. 13, ¶ 10, 675 N.W.2d at 234). We affirm the circuit court's denial of certiorari relief to Dunham on the Board's CUP decision.[9]

3. Whether Section 1105 of the Ordinance and the Board's CUP decision violated Dunham's due process rights.

[¶31.] Dunham next argues that Section 1105 allowing for a CUP that is "not detrimental to other uses and [is] in the general character of the other uses in the LP-3 district" creates ambiguity and leaves the determination to the arbitrary opinion of the Board in each instance. She claims the lack of any criteria to consider a CUP within this section violated her due process rights. To succeed on her claim, she must overcome the presumption that county ordinances are valid by showing that the ordinance is "arbitrary, capricious, and unconstitutional." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 13, 855 N.W.2d 836, 840 (quoting *City of Brookings v. Winker*, 1996 S.D. 129, ¶ 4, 554 N.W.2d 827, 829).

[¶32.] As discussed above, Section 504 of the Ordinance outlines a detailed list of specific criteria the Board must consider before granting a CUP, in addition to the considerations in Section 1105. The Board made findings on the considerations in Section 504 before granting the CUP. Dunham has failed to show

9. The Board specifically conditioned the approval of the CUP "upon compliance with all applicable provisions of the [Ordinance]". We express no opinion whether our reversal and remand of the variance decision impacts the conditional use approved by the Board.

that the criteria for granting a CUP under the Ordinance was vague, or otherwise arbitrary, capricious, or unconstitutional.

4. ***Whether the Board committed other procedural errors in its consideration and approval of the variance and the CUP.***

[¶33.] Dunham argues the Board's approval of the variance and the CUP applications violated the procedural requirements of the Ordinance. Specifically, Dunham claims the Board failed to make proper findings and identify the members of the Board approving the variance and the CUP applications. She further alleges that the Board improperly relied upon staff recommendations rather than exercising its own discretion and its staff had improper ex parte contact with Hodne Homes prior to the hearing.

[¶34.] In challenging the Board's findings, Dunham points Section 501 of the Ordinance, which requires the Board maintain minutes of its proceedings and examinations. However, the language of the Ordinance does not require the Board to make a verbatim record of its proceedings. While the record maintained by the Board is minimal, we are not convinced the Board failed to comply with the Ordinance.

[¶35.] Dunham also claims the Board failed to properly exercise its discretion by adopting wholly the recommended findings by Board staff. She cites *Hines*, 2004 S.D. 13, ¶ 16, 675 N.W.2d at 236, in support of her claim that this was an improper delegation of the Board's decision making authority. However, *Hines* did not address or limit the ability of a board of adjustment to rely on the expertise and investigation of staff when making a zoning decision. Dunham fails to cite any other authority to support her claim that the Board could not adopt the

recommended findings of its staff in its decision. Moreover, Dunham has failed to present evidence that any individual member of the Board failed to exercise his or her own discretion in voting to approve the variance and the CUP.

[¶36.] Dunham also argues that the recommendations by Board staff were tainted by ex parte discussions with representatives from Hodne Homes prior to the hearing. However, Dunham has failed to identify any specific communications or show how they affected the neutrality of the Board. "Decision makers 'are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances.'" *In re Drainage Permit 11-81*, 2019 S.D. 3, ¶ 38, 922 N.W.2d 263, 274.

[¶37.] Finally, Dunham argues that the Board failed to record each individual member's vote on the variance and the CUP as required by the Ordinance. Dunham does not claim the votes were insufficient to approve the variance and the CUP or that any procedural irregularities prejudiced her. "[C]ertiorari will not lie to review technical lack of compliance with law or be granted to correct insubstantial errors which are not shown to have resulted in prejudice or to have caused substantial injustice." *Adolph v. Grant Cty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381 (quoting *State ex rel. Johnson v. Pub. Utils. Comm'n of S.D.*, 381 N.W.2d 226, 230 (S.D. 1986).

Conclusion

[¶38.] We reverse the circuit court's decision denying certiorari relief on the Board's decision granting the variance because the Board exceeded its authority in granting the variance. We remand the variance application to the Board for further

proceedings consistent with this opinion. We affirm the circuit court's denial of the writ of certiorari as to the Board's CUP decision as well as the other claims of error asserted by Dunham in the proceedings before the Board.

[¶39.] GILBERTSON, Chief Justice, and KERN, SALTER, DEVANEY, Justices, concur.

Exhibit F

Appellants Brief, dated April 25, 2019

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28842

KAREN DUNHAM**,**
PETITIONER / APPELLANT,

vs.

LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE LAKE COUNTY BOARD OF ADJUSTMENT & HODNE HOMES, LLC
RESPONDENTS / APPELLEES.

Appeal from the decision of the Lake County Board of Adjustment and the decision of the Circuit Court, Third Circuit, Lake County, South Dakota, The Honorable Kent A. Shelton, Circuit Court Judge, Circuit Court Judge Presiding

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BRIEF OF APPELLANT

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NOTICE OF APPEAL FILED DECEMBER 18, 2018

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PRELIMINARY STATEMENT

Citations to the settled record in this matter appear as "SR-" followed by the page number assigned by the Lake County Clerk of Court in its indices. References to the transcript for the oral argument before the Circuit Court will be denoted as "Tr.," followed by the page and line numbers as they appear in the transcript. References to the Lake County Zoning Ordinance will be denoted as "Ordinance." References to documents included in the Appendix of this Brief will be denoted as "App-" followed by the assigned document number. References to the Lake County Commission, Lake County Commission Sitting as the Lake County Board of Adjustment will be denoted as "Board."

JURISDICTIONAL STATEMENT

Petitioner/Appellant, Karen Dunham ("Karen") appeals from the whole and all parts of the Board Decision and the Circuit Court's *Order Affirming Decision of Lake County Board of Adjustment to Grant Conditional Use Permit and Variance to Hodne Homes, LLC*, dated November 28, 2018 ("Affirming Order"), in the matter numbered 39CIV18-71, in the Third Judicial Circuit of South Dakota, the Honorable Kent A. Shelton, Circuit Judge, presiding, following an oral argument after which the Circuit Court found in favor of Respondents/Appellees, Board and Hodne Homes, LLC ("Hodne Homes"). SR-640, App-29. Notice of Entry of Orders was filed on November 29, 2018. SR-642. Notice of Appeal was filed on December 18, 2018. SR-648. This Court has jurisdiction pursuant to SDCL 15-26A-3(1) and SDCL 15-26A-3(4).

STATEMENT OF THE ISSUES

Scope of Review

A. De Novo Review of Issues of Law
   - *Lamar Outdoor Advert. of S. Dakota, Inc. v. City of Rapid City*, 2007 S.D. 35, ¶ 12, 731 N.W.2d 199, 203.

B. De Novo Review of Correctness of Decision Under Recognized Exceptions
   - *State ex rel. Grey v. Circuit Court of Minnehaha Cty.*, 58 S.D. 152, 235 N.W. 509, 511 (1931)
   - *Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 40, 866 N.W.2d 149, 163
   - *Ageton v. Jackley*, 2016 S.D. 29, ¶ 14, 878 N.W.2d 90, 93–94
   - SDCL § 11-2-64
   - SDCL § 11-2-65

1. The Board Did Not Regularly Pursue Its Authority When Granting Hodne Homes' Application for Variance

   The Trial Court affirmed the Board's decision to grant the Variance.

C. The Board illegally ignored the definition of Variance.
   - Article 2 of Ordinance, definition of "variance"

D. The Board Illegally Reduced The Minimum Rear and Side Yards in LP-3
   - Article 3 § 305(4) of Ordinance
   - Article 3 § 306 of Ordinance
   - Lake Park District 3 Schedule of Regulations of Ordinance

E. The Board Illegally Failed To Follow Article 5.
   - *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 233–34.
   - *Armstrong v. Turner Cty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 33, 772 N.W.2d 643, 655.
   - *Toft v. Toft*, 2006 S.D. 91, ¶ 12, 723 N.W.2d 546, 550.
   - Article 5 § 501
   - Article 5 § 505

F. The Board Illegally Refused to Determine Most Restrictive Standard
   - Article 1 § 503
   - Declaration of Restrictive Covenants

2. The Board Exceeded its Jurisdiction by Granting the CUP.

   The Trial Court affirmed the Board's decision to grant the CUP.

   A. Ordinance Does Not Allow CUP To Increase Size Of Structure In LP-3
      - SDCL 11-2-17.3
      - SDCL 11-2-17.4
      - Article 11 § 1105 of the Ordinance.
   B. It is a Variance That Can Increase A Size of A Structure in LP-3, not a CUP
      - SDCL § 11-2-13
      - SDCL § 11-2-17.3
      - Article 2 definition of "conditional use"
      - Article 2 definition of "variance"
   C. The Board Did Not Comply With Article 5 § 504.
      - Article 5 § 501
      - Article 5 § 504

3. Petitioner's Due Process Rights were violated by the Board's arbitrary exercise of Power and the Lack of Ascertainable Standards Governing its Actions.

   The Trial Court found no due process violation.

   - *Wedel v. Beadle Cty. Comm'n*, 2016 S.D. 59, 884 N.W.2d 755.
   - *Jackson Holdings, LLC v. Jackson Twp. Planning Bd.*, 414 N.J. Super. 342, 998 A.2d 530 (App. Div. 2010).
   - SDCL § 11-2-17.3

4. The Declaration Revoking Restrictive Covenants can Retroactively Modify Article 1 § 103 of the Ordinance.

   Issue not presented to Trial Court because revocation of the covenants occurred after Board's decision to grant the CUP and Variance.

   - *Lamar Outdoor Advert. of S. Dakota, Inc. v. City of Rapid City*, 2007 S.D. 35, 731 N.W.2d 199.

STATEMENT OF THE CASE

This case arises from the decision of the Board to grant a conditional use permit and variance to Hodne Homes, over Karen's objections, on April 17, 2018, at Lake County, South Dakota. SR-547, App-5. Karen filed a *Petition For Writ of Certiorari* on May 11, 2018, with the Third Judicial Circuit Court of South Dakota, Lake County, the Honorable Kent A. Shelton, presiding. SR-1. Judge Shelton granted the *Writ of Certiorari* on July 11, 2018 and held oral argument on October 30, 2018. SR-333, Tr., pg. 1. Following oral argument, Judge Shelton took the matter under advisement. Tr. pg. 27, lines 22-23. On November 6, 2018, Judge Shelton issued a *Memorandum* opinion affirming the decision of the Board to grant the conditional use and variance to Hodne Homes. SR-617, App-12. The Circuit Court entered its Judgment on November 28, 2018. SR-640. *Notice of Entry of Orders* was filed on November 29, 2018. SR-642. *Notice of Appeal* was filed on December 18, 2018. SR-648.

STATEMENT OF THE FACTS

1. On March 2, 2018, Hodne Homes purchased real property located at:

   > Lot 1 of Dunham's & Hemmer's First Addition in the Southwest Quarter (SW1/4) of the Southwest Quarter (SW1/4) of Section Twenty-Five (25), Township One Hundred Six (106) North, Range Fifty-Two (52), West of the 5th P.M., Lake County, South Dakota.

   (hereinafter "Lot 1") SR-19, 22, 284.

2. Hodne Homes is owned by Brandon and Jamie Hodne. SR-536, App 55, Tr., p. 4, lines 10-11.

3. Since October 25, 2002, Karen has been the owner of the real property located directly north of Lot 1 (hereinafter "Lot 2"). SR-23.

4. Sodak Marina, LLC ("Sodak Marina"), another entity owned by Brandon and Jamie Hodne, is located on property directly south of Lot 1 ("Sodak Marina Lot"). SR-536, App-55.

5. On February 27, 2018, Sodak Marina emailed Karen's son, Christopher Dunham ("Chris"), its plan to construct a 5,760 square foot (48' wide x 120' long) "showroom" with 16 foot sidewalls on Lot 1 ("Oversized Showroom"), which left one foot of side yard between Lots 1 and 2 (north lot line of Lot 1), one foot of side yard between Lot 1 and Sodak Marina Lot (south lot line of Lot 1) and five feet for a rear yard (east lot line of Lot 1). SR-518[1], 519, App-53.

6. Lots 1 and 2 are both located in Dunham's and Hemmer's First Addition in Lake County (SR-18) which were subject to the *Declaration of Restrictive Covenants* for Dunham's and Hemmer's First Addition, which was filed with the Lake County Register of Deeds on November 27, 2000, and states in pertinent part:

> No building or structure shall be erected, altered, placed or permitted to remain less than five (5) feet from the northerly, southerly, or easterly lot line.

SR-214.

7. Lots 1 and 2 are also both zoned as Lake Park District 3 (hereinafter "LP-3") under the Ordinance, where the only permitted use of property is "Private and Commercial Storage Facilities." SR-381, 461.

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[1] SR-519 is a drawing of Lots 1 and 2 made by Hodne Homes. The 167 foot length of Lot 1 is in question as the distances between the east and west boundary lines total 150 feet (5 foot rear yard plus 120 foot building plus 25 foot front yard).

8. The Lake Park District 3 Schedule of Regulations of the Ordinance requires a "Minimum Side Yard" to be two feet (i.e. the north/south yards of Lot 1) and the "Minimum Rear Yard" to be ten feet (i.e. the east yard of Lot 1). SR-383, App-47.
9. Article 1 § 103 of the Ordinance states that when a covenant and requirement of the Ordinance conflict, "the most restrictive or that imposing the higher standards, shall govern." SR-339, App-35.
10. The most restrictive standard for the north and south lot lines of Lot 1 are the five foot yards required by the *Declaration of Restrictive Covenants* and the most restrictive standard for the east lot line of Lot 1 is the ten foot "Minimum Rear Yard" under the Ordinance. SR-214, 383.
11. The Article 2 definition of "variance" does allow, in certain circumstances, for a variance to alter the size of yards (SR-354, App-38), however, Article 3, states: "Except as hereafter provided: [...] 4. The minimum yards [...] required by this ordinance [...] for any building hereafter erected shall not be encroached upon." SR-357 - 358, App-41 -42 (bracketed material supplied).
12. As indicated above, in LP-3 the "Minimum Side Yard" is two feet and the "Minimum Rear Yard" is ten feet. SR-383, App-47.
13. LP-3 only provides for a variance below the minimum yard to the "Minimum *Front* Yard," which can result in a lowering from 20 to 12 feet. SR-383, App-47.
14. The Article 2 definition of "variance" states:

> A variance is a relaxation of the terms of the zoning ordinance where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the

> applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship. As used in this ordinance, a variance is authorized only for height, area, and size of structure or size of yards and open spaces; establishment or expansion of a use otherwise prohibited shall not be allowed by variance, nor shall a variance be granted because of the presence of non-conforming in the zoning district or uses in an adjoining zoning district.

SR-354, App-38 (underlining supplied).

15. Brandon & Jamie Hodne, Hodne Homes, and Sodak Marina have stated that their intent is to build a "showroom" (SR-518, App-53), to allow for "retail sales" (SR-517, App-52), and that the "need for the additional size is to accommodate large and small boats in a professional manner ... so that Sodak's Marina, LLC may continue to grow and serve the Lakes area." SR-524, App-54.

16. Hodne Homes did not identify a condition "peculiar" to Lot 1 where "a literal enforcement of the ordinance would result in unnecessary and undue hardship." SR-354, App-38 (underlining supplied).

17. The Lake County Comprehensive Plan ("Comprehensive Plan"), states:

> ... it is the intent of Lake County to encourage commercial and industrial development to occur within municipalities and the confines of unincorporated villages .... Map 5 denotes the locations of commercial/ industrial sites.

SR-479.

18. Lot 1 is not in the area on Map 5 of the Comprehensive Plan. SR-480.

19. Hodne Homes, LLC has not sought a change in zoning to allow for retail sales of boats in LP-3. SR-515, 516.

20. The Oversized Showroom also exceeded the maximum allowable size for a structure in LP-3, which is limited under Article 11 § 1105 to 4,000 square feet and sidewalls with a maximum height of 14 feet. SR-381, App-46.

21. Hodne Homes did not request a variance to increase the height and size of structure, it sought a conditional use permit. SR-515.

22. The definition of "Conditional Use" in Article 2 of the Ordinance does not grant the Board the power to alter the size of a building using a conditional use permit:

> A conditional use is a use that would not be appropriate generally or without restriction throughout the zoning division or district, but which, if controlled as to number, area, location, or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. Such uses may be permitted in such zoning division or district as conditional uses, as specific provisions for such uses is made in this zoning Ordinance. Conditional uses are subject to evaluation and approval by the Board of Adjustment and are administrative in nature.

SR-343, App 37 (underlining supplied).

23. The "Conditional Use" provision in Article 11 § 1105 of the Ordinance also does not grant the Board the power to alter the size or height of a building, it permits "other uses which in its opinion are not detrimental to other uses and are in the general character of the other uses in the LP-3 District." SR-381, App-46.

24. Under Article 2, it is the "variance" that can alter "height" and "size of structure." SR-354, App-38.

25. On March 2, 2018, Hodne Homes attempted to apply to the Board for a conditional use permit ("CUP") to increase the *height* and *size* of allowable structures in LP-3

and a variance ("Variance") to decrease the minimum side and rear yards in LP-3. SR-515 - 522.

26. On March 7, 2018, Karen sent written objection of the Oversized Showroom to Hodne Homes. SR-523.

27. On March 19, 2018, Hodne Homes emailed Chris a revised plan of the Oversized Showroom that reduced the width of the Oversized Showroom from 48 feet to 47 feet; which increased the side yard between Lots 1 and 2 to two feet. SR-529 - 533.

28. On March 30, 2018, the Trial Court found that the Board published notice of both the April 11, 2018 meeting before the Lake County Planning Commission ("Commission") and the April 17, 2018 meeting before the Board. SR-601, 638. Tr., pg. 4, line 13 through pg. 9, line 20.

29. On April 11, 2018, a hearing on Hodne Homes' request for CUP and Variance was held before the Commission. SR-536 - 538, App-55-57.

30. The Lake County Zoning Officer, Mandi E. Anderson, ("Zoning Officer"), was present at the April 11, 2018 Commission Hearing. SR-516, 536.

31. The minutes from the April 11, 2018 hearing state that the Zoning Officer informed the Commission that Hodne Homes requested a CUP to increase the allowable *height* and *size* of an LP-3 structure (from the 4,000 square feet with 14 foot side walls to 5,640 square feet with 16 foot sidewalls) and that Hodne Homes was also requesting a variance from the "Minimum Side Yard[2]" (from two feet to one foot) and "Minimum Rear Yard" (from ten feet to five feet). SR-536, App-55.

---

[2] The variance for the minimum side yard is between Lot 1 and Sodak Marina Lot.

32. The Commission possessed the documentation confirming Hodne Homes' intent to construct a "showroom" on Lot 1 for "retail sales" of boats for Sodak Marina. SR-517, 518, 524, App-52-54.

33. The Zoning Officer confirmed to the Commission that "Brandon also owns several other oversized buildings in the same area[3] which he sells[4] his boats out of currently" and that he intends to utilize the Oversized Showroom for "Storage and display for their adjacent business, Sodak's Marina, LLC." SR-537, App-56 (underlining supplied).

34. The Zoning Officer erroneously informed the Commission that the Ordinance allows a conditional use permit to exceed the size and height restrictions in LP-3 and that Karen could not object to the CUP or Variance:

> Zoning Officer reminds the board and also applicant and proponent that with a conditional use request for a larger and taller building the decision isn't made by the neighbor wither [sic] or not they can or cannot build it. It's the variance request that the neighbor can object to if they are asking for a lesser setback on the shared lot line from which the current Lake County Ordinance requires. In this case Brandon isn't requesting a variance from Dunham's and their lot. He is requesting a variance from Park's Marina and Gary Avise which he obtained approval on.

SR-537, App-56.

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[3] Dunham's and Hemmer's *2nd* Addition is also zoned LP-3 and is used for "retail sales" of boats. SR-461, 517, App-48, 52. See also *Petition for Writ of Certiorari*, ¶ 49. SR-9.

[4] Article 11 § 1105 of the Ordinance states that the only "Permitted Use" of LP-3 property is "Private and Commercial Storage Facilities." SR-381, App-46. Article 3 § 306 of the Ordinance prohibits, "all uses and structures not specifically listed as a permitted use or as a conditional use in a particular zoning district." SR-358, App-42.

35. The Commissioners refused to apply Article 1 § 103 to determine the more restrictive standard was the five foot side yard found in the *Declaration Revoking Restrictive Covenants*:

> Several commissioners brought up the fact that there are more than handful of buildings out in that development that the covenants have not been enforced on. County does not enforce covenants.

SR-537, App-56.

36. The Commission voted unanimously to recommend approval of the CUP and Variance to the Board. SR-537, 538, App-56, 57.

37. On April 17, 2018, a hearing on Hodne Homes' request for CUP and Variance was held before the Board. SR-543, App 1.

38. The Zoning Officer was also present at this meeting. SR-546, App 4. The minutes of the April 17, 2018 Board meeting state:

> **#18-02 Brandon & Jamie Hodne (Hodne Homes, LLC) variance**- Lot 1 Dunham's & Hemmer's 1st Addition SW1/4SW1/4 Section 25-106-52 and **#18-01 Brandon & Jamie Hodne (Hodne Homes, LLC) conditional use**- Lot 1 Dunham's & Hemmer's 1st Addition SW1/4SW1/4 Section 15-106-52. Brandon & Jamie Hodne and their builder, Rick Sagness, were present to discuss their request to build a 47x120x16 (5,640 sq/ft) storage building on property recently purchased and their request to build closer to the south side and rear yard lot line. The building will be used for display and storage for their adjacent business, Sodak's Marina LLC. Brandon Hodne discussed options for drainage and presented pictures of the property to the board. Christopher Dunham was present in opposition to the project. He presented a drawing of the project. Dunham has concerns with the following: significance [sic] difference in size and use of the building, expansion of commercial use/changing use, covenants should be enforced, a drainage plan is needed, and concerned with the increased traffic. Commissioner Hageman would like to see a drainage plan. Options for drainage in the project area were discussed. Motion by Reinicke, second by Johnson, to approve variance #18-02 and conditional use #18-01 for Brandon and Jamie Hodne (Hodne Homes LLC) and adopt

the findings and specific conditions outlined in the staff report and require a drainage plan[5]. Motion carried.

SR-547, App-5.

39. Article 5 § 501(4) of the Ordinance states:

> All meetings of the Board of Adjustment shall be open to the public. The Board of Adjustment shall keep minutes of its proceedings and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Auditor and shall be public record. The Board of Adjustment shall keep record in the minutes showing the vote of each member upon each question or if absent or failing to vote, indicating that fact.

SR-361, App-43 (underlining supplied).

40. The Lake County Auditor confirmed that he only documentation indicating that the Board approved the CUP and Variance are the minutes from the April 17, 2018 meeting. SR-207, App-49.

41. Article 5 § 504(6) requires four votes from Board members to approve a conditional use permit and Article 5 § 505(4) requires four votes from Board members to approve a variance. SR-362, 363, App-44, 45.

42. The Board's April 17, 2018 minutes do not indicate, other than Board Members Reinicke and Johnson, how the other Board members voted regarding the CUP and

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[5] The Board's *Return to Writ of Certiorari* does not include documentation indicating whether a drainage plan was ever produced by Hodne Homes nor approved by the Board. This is noteworthy because the Board sought to modify the record to include an affidavit of publication after Brandon Hodne had already filed an affidavit indicating that construction of the Oversized Showroom was complete. SR-286.

Variance or whether there were four votes[6]. SR-547, App-5. Tr. pg. 26 line 24 through pg. 27 line 18.

43. Article 5 § 504, *Powers and Jurisdiction Relating to Conditional Uses,* states, "A conditional use shall not be granted by the Board of Adjustment unless and until:" the Board complies with all the subsections of § 504. SR- 362.

44. Article 5 § 504 (1) of the Ordinance requires the Application to indicate, "the section of this Ordinance under which the conditional use is sought and stating the grounds on which it is requested." SR-362, App-44.

45. The Hodne Homes CUP Application does not identify the section number in the Ordinance, but states, "Requesting a Conditional Use for a private and commercial storage building with greater dimensions than 4,000 sq/ft and taller than 14' sidewalls." SR-515.

46. As stated above, the grounds for seeking the CUP was so Hodne Homes/Sodak Marina could build a "showroom" (SR-518, App-53), to allow "retail sales" (SR-517, App-52), and that the "need for the additional size is to accommodate large and small boats in a professional manner ... so that Sodak's Marina, LLC may continue to grow and serve the Lakes area." (SR-524, App-54).

47. Article 5 § 504 (4) of the Ordinance states:

> The Board of Adjustment shall make a finding that it is empowered under the section of this Ordinance described in the application to grant the conditional use, and that the granting of the conditional use will not adversely affect the public interest.

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[6] While "Motion carried" can infer there were four votes, there is no review possible to confirm the same.

SR-362, App-44.

48. Article 5 § 504(5) of the Ordinance states:

> Before granting any conditional use, the Board of Adjustment shall make written findings certifying compliance with the specific rules governing individual conditional uses and that satisfactory provision and arrangements have been made concerning the following, where applicable: [...]

SR-362, App-44 (bracketed material supplied).

49. The Board did not make any written findings of its own regarding the CUP. SR-207, App-49.

50. The minutes from the April 17, 2018 meeting state that the Board, "adopt[s] the findings and specific conditions outlined in the staff report and require a drainage plan" but the minutes do not indicate whether the contents of the CUP Staff Report were discussed or even known by the Board. SR-547, App-5 (bracketed material supplied).

51. There is no record indicating the Board considered whether it can increase the *height* and *size* of structure via CUP and the CUP Staff Report and Zoning Officer indicated the Ordinance requires "a landowner to go through the conditional use process." SR-553, App-11.

52. The CUP Staff Report was created prior to the April 17, 2018 meeting. SR-547, 553, App-5, 11.

53. The CUP Staff Report, does not find that the Board was "empowered under the section of this Ordinance described in the application." SR-553, App-11.

54. The CUP Staff Report does not find that "the granting of the conditional use will not adversely affect the public interest." SR-553, App-11.

55. The CUP Staff Report states one potential finding of the Board could be that:

> The granting of the conditional use would not be in harmony with the purpose and intent of the zoning ordinance.

SR-553, App-11.

56. The CUP Staff Report does not state that prior to the granting of the CUP what "satisfactory provision and arrangements have been made" but instead restates some of the subsections of Article 5 § 504(5). SR-553, App-11.

57. Article 5 § 505, *Powers and Jurisdiction Relating to Variances,* states:

> The Board of Adjustment shall have the power, where, by reason of exception, narrowness, shallowness or shape of a specific piece of property at the time of the enactment of this Ordinance, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation under this Ordinance would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantially impairing the intent and purpose of this Ordinance.
>
> 1. The County Zoning Officer may require the applicant for a variance to notify property owners by certified or registered mail of the variance request or in lieu of this obtain written consent from adjoining landowners. Any party may appear in person, or by agent or by attorney; the Board of Adjustment shall make findings that the requirements of this section have been met by the applicant for a variance; the Board of Adjustment shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure; the Board of Adjustment shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this

Ordinance, and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

2. In granting any variance, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this Ordinance. Violation of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance and punishable under the terms of this Ordinance.

3. Under no circumstances shall the Board of Adjustment grant a variance to allow a use not permissible under the terms of this Ordinance in the district involved, or any use expressly or by implication prohibited by the terms of this Ordinance in said district.

4. The concurring vote of four (4) members of the Board of Adjustment is required to pass any variance.

54. The Board did not make any written findings of its own regarding the Variance. SR-207, App-49.

55. The minutes from the April 17, 2018 meeting state that the Board, "adopt[s] the findings and specific conditions outlined in the staff report and require a drainage plan" but the minutes do not indicate whether the contents of the Variance Staff Report were discussed or even known by the Board. SR-547, App-5(bracketed material supplied).

56. The Variance Staff Report is not signed, but concludes:

- The variance would not be injurious to the neighborhood or detrimental to the public welfare.
- The two adjoining landowners and township do not object to the variance request.
- The variance is the minimum variance that will make possible the reasonable use of the land.
- Granting the variance would not substantially impair the intent and purpose of the zoning ordinance

- There are special conditions or circumstances that exist which are peculiar to the land, structure, or building involved, and which are applicable to other land, structures, or buildings in the same district.
- The reasons set forth justify the granting of the variance.

SR-552, App-10.

57. On June 23, 2018, Hodne Homes and the owners of Lot 3 in Dunham's & Hemmer's First Addition signed a *Declaration Revoking Restrictive Covenants*[7]; which purported to revoke the *Declaration of Restrictive Covenants* retroactive to March 2, 2018 (the date Hodne Homes purchased Lot 1) and to "rely on the zoning regulations of Lake County." SR-293.

ARGUMENTS AND AUTHORITIES

SCOPE OF REVIEW

A. De Novo Review of Issues of Law

This Court has stated that "[w]e review questions of law de novo." *Lamar Outdoor Advert. of S. Dakota, Inc. v. City of Rapid City,* 2007 S.D. 35, ¶ 12, 731 N.W.2d 199, 203.

In certiorari proceedings, the general rule is that the "initial scope of review" is "not [to] review whether the board's decision is right or wrong," but to determine whether the inferior courts, officers, tribunals or Board(s) had authority to take the action under review, or "regularly pursued [its] authority" under SDCL 21-31-8 (bracketed material supplied). *Id.* Under this standard, the reviewing court has the power to "give judgment either affirming or annulling or modifying the *proceedings* below. SDCL 21-31-7 (emphasis supplied). It is an all or nothing approach, the Board either "regularly pursued [its] authority," or it did not.

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[7] Karen has also filed a civil action against Hodne Homes, LLC (39CIV18-80).

B. De Novo Review of Correctness of Decision Under Recognized Exceptions

This Court has recognized exceptions which do allow for de novo review of the merits of the Board's findings under the writ of certiorari standard of review:

> Unless by virtue of special and express statutory provision, certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, at least in the absence of fraud, or willful and arbitrary disregard of undisputed and indisputable, proof wherein credibility of witnesses is not involved.

State ex rel. Grey v. Circuit Court of Minnehaha Cty., 58 S.D. 152, 235 N.W. 509, 511 (1931)(underlining supplied). Some form of this quote has been cited on several occasions by this Court (focusing on the latter exception):

> Courts must not review the merits of a petition or evidence for the purpose of determining the correctness of a finding, in the absence of a showing that the Board "acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof."

Lamar Outdoor Advert. of S. Dakota, Inc. v. City of Rapid City, 2007 S.D. 35, ¶ 21, 731 N.W.2d 199, 205 (underlining supplied), citing *Willard v. Civil Serv. Bd. of Sioux Falls,* 75 S.D. 297, 298, 63 N.W.2d 801, 801 (1954); *State ex rel. Grey v. Circuit Court of Minnehaha Cty.*, 58 S.D. 152, 235 N.W. 509, 511 (1931); *See also Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 32, 866 N.W.2d 149, 161.

B.1."Arbitrary or Willful Disregard of Undisputed Proof" Exception Applies

The *Statement of Facts* above evidences the Board's "arbitrary or willful disregard of undisputed and indisputable proof," which requires this Court to conduct a de novo review of whether the Board's decision was correct. *Lamar Outdoor Advert. of S. Dakota, Inc. v. City of Rapid City*, 2007 S.D. 35, ¶ 21, 731.

B.2. "Special and Express Statutory Provision" Exception Applies

Karen contends that this case falls within the exception for "special and express statutory provision[s]," opening the door to the Court's review of whether the Board's decision was correct.[8] The Legislature's 2000 enactment of SDCL 11-2-64 and SDCL 11-2-65 are "special and express statutory provision[s]," as referenced in *State ex rel. Grey v. Circuit Court of Minnehaha Cty.*, 58 S.D. 152, 235 N.W. 509, 511 (1931), which allow de novo review of whether the Board's decision was correct.

With the enactment of SDCL 11-2-64, the Legislature authorized the Court to determine whether to take further evidence to ensure the "proper disposition of the matter." This "is clearly triggered by the court's determination of need, not by a party's." *Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 40, 866 N.W.2d 149, 163. This duty of the court is necessary to determine how to exercise the court's expanded authority to "reverse or affirm, wholly or partly, or may modify the decision brought up for review." SDCL 11-2-65 (underlining supplied). This differs from the writ of certiorari standard where the court may only "give judgment either affirming or annulling or modifying the proceedings below," SDCL 21-31-7 (underlining supplied), and there is a presumption that, "the Legislature does not insert surplusage into its enactments, and "this court will not construe a statute in a way that renders parts to be ... surplusage." *Hollman v. S. Dakota Dep't of Soc. Servs.*, 2015 S.D. 21, ¶ 9, 862 N.W.2d 856, 859.

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[8] This Court has also found that statutes that add additional criteria can alter the scope of review on a writ of certiorari. See A*geton v. Jackley,* 2016 S.D. 29, ¶ 14, 878 N.W.2d 90, 93–94.

> We are guided by the principle that a court should construe multiple statutes covering the same subject matter in such a way as to give effect to all of the statutes if possible. *Kinzler v. Nacey*, 296 N.W.2d 725, 728 (S.D. 1980) (citations omitted). In addition, the rules of statutory construction dictate that "statutes of specific application take precedence over statutes of general application." *Cooperative Agronomy Services v. South Dakota Department of Revenue*, 2003 SD 104, ¶ 19, 668 N.W.2d 718, 723.

Schafer v. Deuel Cty. Bd. of Comm'rs, 2006 S.D. 106, ¶ 10, 725 N.W.2d 241, 245. Accordingly, because the writ of certiorari statutes in SDCL 11-2 are more specific than those found in SDCL 21-31, those found in SDCL 11-2 must take precedence. The applicability of SDCL 11-2-64 and SDCL 11-2-65 introduce additional criteria for the reviewing court to consider, which was not done in the proceedings below, due to the Trial Court's incorrect application of SDCL 11-2-61.1.[9]

Based on the foregoing, this Court has de novo review of all questions of law, and de novo review of the merits of the Board's decision, should this Court find that the Board's actions were "arbitrary or willful disregard of undisputed and indisputable proof," *Lamar v. City of Rapid City*, 2007 S.D. 35, ¶ 21, 731, or, that SDCL 11-2-65 is a "special and express statutory provision" that allows for such de novo review. *State ex rel. Grey v. Circuit Court of Minnehaha Cty.*, 58 S.D. 152, 235 N.W. 509, 511 (1931).

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[9]The 2018 Legislature enacted SDCL § 11-2-61.1, but it is not applicable to this case because it became effective on July 1, 2018; after both the Board's April 17, 2018 decision and Karen's May 11, 2018 *Petition for Writ of Certiorari*. See *Lamar Advert. of S. Dakota, Inc. v. Zoning Bd. of Adjustment of City of Rapid City*, 2012 S.D. 76, 822 N.W. 2d 861, 862.

1. THE BOARD DID NOT REGULARLY PURSUE ITS AUTHORITY WHEN GRANTING HODNE HOMES' APPLICATION FOR VARIANCE

A. The Board Illegally Ignored the Definition of Variance.

A variance can only be considered if owing to "conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of the ordinance would result in unnecessary and undue hardship." SR-354, App-38 (underlining supplied). The record reflects that the variance was sought because Hodne Homes/ Sodak Marina desired to create a showroom[10] for the display and sale of boats on Lot 1. SR, 517, 518, 524, App 91-92, 98. That is precisely what the definition of variance prohibits. Troublingly, the Staff Report states "[T]here are special conditions or circumstances that exist which are peculiar to the land..." SR-552, App-10. However, the record does not indicate there is anything peculiar about Lot 1 so as to allow the Zoning Officer to include that statement in the Staff Report. In fact, the Staff Report from the April 11, 2018 Commission hearing stated a potential finding was:

> There are no special conditions or circumstances that exist which are peculiar to the land, structure, or building involved, and which are applicable to other land, structures, or buildings in the same district.

SR-538, App-57. This provision was removed from the April 17, 2018 Staff Report and there are no findings in the record as to why. There is also no reference in the April 17, 2018 minutes to indicate the Board discussed or found that there was a condition peculiar to Lot 1 necessitating a variance.

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[10] The Merriam-Webster definition for "showroom" is, "a room where merchandise is exhibited for sale or where samples are displayed." https://www.merriam-webster.com/dictionary/showroom (last visited April 24, 2019).

Similarly, the Staff Report states, without a factual basis, that "[T]he variance is the minimum variance that will make possible the reasonable use of land." SR-552, App-10. There is no evidence that constructing the Oversized Showroom is the only use of Lot 1 that will make it a reasonable use of land. Notably, the record reflects that Hodne Homes voluntarily chose to withdraw seeking a variance between Lots 1 and 2 simply because Karen would not consent to the Variance. There is also nothing in the record that indicates the variance is necessary or that Hodne Homes would suffer undue hardship unless the variance is granted. Again, Hodne Homes had no difficultly revising the width of the Oversized Showroom from 48 feet to 47 feet simply to avoid having to get a variance between Lots 1 and 2.

The record evidences that the Zoning Officer, Commission, and Board (which is the County Commission) were all aware that Hodne Homes/Sodak Marina was selling boats on LP-3 zoned property at the April 17, 2018 and Hodne Homes had sought a Variance because he desired to sell more boats out of LP-3 on Lot 1. Such a use of property is not permitted in LP-3, which only allows for "Private and Commercial Storage." SR-381, App-46. Moreover, the definition of variance specifically prohibits:

> establishment or expansion of a use otherwise prohibited ... nor shall a variance be granted because of the presence of non-conforming in the zoning district or uses in an adjoining zoning district.

SR-354, App-38. Further, "[a]ll uses ... not specifically listed as permitted or as a conditional use ... shall be prohibited in said district." SR-381, App-46. The record is clear that the Board acted with "willful disregard of undisputed and indisputable proof"

that Hodne Homes sought a variance solely to expand its personal desire to illegally sell boats on LP-3.

For the foregoing reasons, the Board unlawfully ignored the Ordinance's definition of variance and the Variance should be reversed in its entirety. Based on the conduct of the Board and the absence of evidence to support the content of the Staff Report, de novo review of the Board's actions is warranted.

B. The Board Illegally Reduced The Minimum Rear and Side Yards in LP-3

The Article 2 definition of "variance" allows for a variance to the size of yard, but Article 3 prohibits such a variance if it reduces the size of the yard below the "[T]he minimum yards ... required by this ordinance." SR-357 - 358, App-41 -42. However, Article 3 does state "Except as hereafter provided," which would indicates that the Ordinance does allow a variance below the minimum yard size, but only if the Ordinance so provides.

Under Article 11, LP-3 does allow for reduction below the "Minimum Front Yard." SR-383, App-47. However, there is no provision that allows for a reduction to the "Minimum Side Yard" or the "Minimum Rear Yard," which are the variances requested by Hodne Homes. In LP-3 the "Minimum Side Yard" is two feet and the "Minimum Rear Yard" is ten feet. SR-383, App-47. Hodne Homes sought a one foot "Minimum Side Yard" and a ten foot "Minimum Rear Yard."

Under the Ordinance, the Board has no authority to grant the Variance requested by Hodne Homes. Accordingly, the Board's granting of the Variance was illegal and the Board's decision to approve the Variance should be reversed in its entirety.

C. The Board Illegally Failed To Follow Article 5.

This Court has stated, "[w]e interpret zoning ordinances in accord with the rules of statutory construction supplemented by any rules of construction within the ordinances themselves." *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W. 2d 231, 233–34. "[T]his court will not construe a statute in a way that renders parts to be ... surplusage." *Hollman v. S. Dakota Dep't of Soc. Servs.*, 2015 S.D. 21, ¶ 9, 862 N.W.2d 856, 859.

Article 2 of the ordinance states, "the word "shall" is mandatory and not discretionary." SR-340, App-36. Article 5 § 501 states that the Board:

> shall keep minutes of its proceedings and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Auditor and shall be public record. The Board of Adjustment shall keep record in the minutes showing the vote of each member upon each question or if absent or failing to vote, indicating that fact.

SR-361, App-43. See also SDCL 11-2-52. To interpret Article 5 § 501 so as to allow the minutes to be the sole record of the Board's examination and other official actions would render "and shall keep records of its examinations and other official actions" meaningless. Moreover, the final sentence of the quote above states that the minutes are to include the vote of each member. Had the Ordinance intended for the minutes to contain the record of the Board's examinations and other actions of the Board, the Ordinance would so state. Accordingly, the Ordinance required the Board to keep: (1) Minutes of the April 17, 2018 hearing; (2) a record of its examinations; and (3) records of other official actions. The decision to grant the Variance is an official action that required

a record separate and apart from the minutes and the Board violated Article 5 § 501 by failing to so comply.

The Lake County Auditor confirmed, that other than the minutes, there was no other record of the Board's examination or approval of the CUP or Variance. SR-207, App-49.

In addition to the requirements stated in the Article 2 definition of "variance," Article 5 § 505, *Powers and Jurisdiction Relating to Variances*, states:

> The Board of Adjustment shall have the power, where by reason of exception, narrowness, shallowness or shape of a specific piece of property at the time of the enactment of this Ordinance, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation under this Ordinance would result in peculiar and exceptional practical difficulties to, or exception and undue hardships upon, the owner of such property, to authorize upon an appeal relation to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantially impairing the intent and purpose of this Ordinance.

SR-363, App-45. Again, there is no record of the Board's "examinations and other official actions" that would indicate the Board made any of the findings regarding Lot 1 that could satisfy the Board's duties under Article 2 and Article 5 § 505.

The Trial Court erroneously found that the Board's adoption of the Staff Report (SR-552, App-10) constitutes the findings of the Board. First, as a matter of law the Board cannot delegate its duty to make findings to the Zoning Officer who created the Staff Report (prior to the hearing no less). Second, the Staff Report does not contain findings of fact, it contains only a boiler plate list of some of the topics the Board must find under Article 5 § 505(1). SR-363, 552, App-10, 45.

The Board is not allowed to delegate the duty to create findings to the Zoning Officer who merely confirmed that a couple of neighbors of Lot 1 consented to the Variance.

> We have condemned this type of arbitrary decision-making in the past. In *Cary v. City of Rapid City*, 1997 SD 18, 559 N.W.2d 891, we struck down a statute that rested "the ultimate determination of the public's best interest" with a group of neighbors. Id. ¶ 23. There we reasoned, "The ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners." Id. Because the Constitution protects a landowner's right to use land for any legitimate purpose, we are wary of decisions that are based on "whims of neighboring landowners." Id. ¶ 22. This is so because their decisions may be lacking "any standards or guidelines," leading to decisions that may be arbitrary or capricious. Id. Worse, their opinions may be wholly self-serving.
>
> Understanding the need for standards and guidelines in the variance procedure, our Legislature requires that boards of adjustment determine whether requests are contrary to the public interest. See SDCL 11–2–53(2). The discretion of a board to decide such matters however is not limitless. To base a decision solely on the opinion of neighbors was arbitrary and beyond its jurisdiction. The Board argues that,
>
> > The neighbors did not make the decision nor did the board delegate the power and authority to make that decision to the neighbors. The board made its decision based on the board's concerns and the legitimate concerns of the neighbors which could adversely affect the City of Miller if the board were to approve Hines' variance request and thereby, repudiate the legitimate concerns of the neighbors.
>
> We find no showing in the record of any independent thought on the part of the board.

Hines v. Bd. of Adjustment of City of Miller, 2004 S.D. 13, ¶ 16, 675 N.W.2d 231, 236 (underlining supplied). It is also important to note that the Zoning Officer likely had communication with Hodne Homes during the application process. If the Zoning Officer is also the individual responsible for drafting findings of fact for the Board, then Karen

was deprived of a fair and impartial adjudication by the Board, which is a violation of due process:

> Unless required for the disposition of ex parte matters authorized by law, members of the governing board or officers or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

Armstrong v. Turner Cty. Bd. of Adjustment, 2009 S.D. 81, ¶ 33, 772 N.W.2d 643, 655 (underlining supplied).

The Trial Court was also erroneous in its finding that the Staff Report contains findings. It is "[a] well-established rule is that the findings of fact must support the conclusions of law. *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292, 297 (S.D. 1982).

> The purpose of findings of fact is threefold: to aid the appellate court in reviewing the basis for the trial court's decision; to make it clear what the court decided should estoppel or res judicata be raised in later cases; and to help insure that the trial judge's process of adjudication is done carefully.

Toft v. Toft, 2006 S.D. 91, ¶ 12, 723 N.W.2d 546, 550. The Trial Court refused to review the alleged findings stating, "this Court may not weigh upon the correctness of those findings under a certiorari review." SR-631, App-26. Respectfully, the Trial Court did not have to determine whether the alleged findings were correct in order to determine whether facts existed that supported the conclusions in the Staff Report. Reviewing the alleged findings was necessary so that a reviewing court can determine whether the Board's decision was legal, and not arbitrary.

Finally, Article 5 § 501 required the "concurring vote of four (4) members of the Board of Adjustment" to pass the Variance. The minutes simply state Board Members Reinicke and Johnson moved to approve the Variance and that the "Motion carried." This Court might infer that there were four affirmative votes, but Article 5 § 501(4) of the Ordinance states:

> The Board of Adjustment shall keep record in the minutes showing the vote of each member upon each question or if absent or failing to vote, indicating that fact.

SR-361, App-43.

D. Board Illegally Refused to Determine Most Restrictive Standard

Article 1 § 103 of the Ordinance states that when a covenant and requirement of the Ordinance conflict, "the most restrictive or that imposing the higher standards, shall govern." SR-339, App-35. LP-3 requires that the "Minimum Side Yard" be two feet (SR-383, App-47) and the *Declaration of Restrictive Covenants* states the north and south side yards must be five feet. SR-214. The April 11, 2018 minutes indicate the Commission expressly refused to apply the five foot side yard covenant, and the record does not indicate the Board applied or considered the five foot side yard covenant. Accordingly, the Board failed to follow Article 1 § 103 of the Ordinance, and the Variance was illegally granted.

2. THE BOARD EXCEEDED ITS JURISDICTION BY GRANTING THE CUP.

A. Ordinance Does Not Allow CUP To Increase Size Of Structure In LP-3

It violates the Ordinance for the Board to grant a CUP to increase the size of a structure beyond 4,000 square feet with sidewalls in excess of 14 feet. Under Article 11 § 1105, the only permitted use of property zoned LP-3 is "Private and Commercial Storage" and the only permitted structures in LP-3 are:

> Storage Facilities containing no more than four thousand (4,000) square feet and do not have sidewalls with a height greater than fourteen (14) feet.

SR-381, App-46. The Ordinance states that a conditional use "is a use that... may be permitted in such zoning division or district as conditional uses, as specific provisions for such uses is made in this zoning Ordinance." SR-343, App-37 (underlined supplied). Article 3 § 306 prohibits "all uses and structures not specifically listed as a permitted use or as a conditional use in a particular zoning district." SR-358, App-42 (underlining supplied). The Legislature has added the requirement that "[a] conditional use is subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district." SDCL § 11-2-17.4 (underlining supplied).

Since there is only one permitted use in LP-3, in order to grant the CUP herein, LP-3 must specifically list a conditional use that is subject to requirements that are different from the permitted use in LP-3 that allows for a building in excess of 4,000 square feet with 14 feet sidewalls. The sole conditional use in LP-3 is:

> The Board of Adjustment may permit other uses in which in its opinion are not detrimental to other uses and are in the general character of the other uses in the LP-3 District.

SR-343, App-37. This LP-3 conditional use does not "specifically list" a structure larger than 4,000 square feet with 14 feet sidewalls. Moreover, the LP-3 conditional use does not identify requirements that are different from the LP-3 permitted use; except the board's opinion which is not an objective "criteria for evaluating each conditional use." SDCL 11-2-17.3. The Trial Court found:

> An oversized private and commercial storage facility of a differing size and dimension to that specifically permitted pursuant to § 1105, as requested here by Hodne, is clearly a use or structure "specifically listed ... as a conditional use in a[n] [LP-3 District]," as described in § 306.

SR-630, App-25. The Trial Court took the "Permitted Use" in LP-3 to authorize a "Conditional Use" that is not specifically listed in the Ordinance. Respectfully, the Trial Court's analysis does not satisfy the "specific provision" language found in the Article 2 definition of "conditional use," the "specifically listed" prohibition in Article 3 § 306, or SDCL § 11-2-17.4; which mandates that the requirements of a conditional use be different from those of a permitted use.

It is important to note how big a facility the Oversized Showroom is. Article 11 § 1105 states the purpose of LP-3 is for oversized storage facilities. The Ordinance defined the largest of such oversized facilities as 4,000 square feet with 14 feet sidewalls. A 4,000 square foot storage facility with 14 feet sidewalls has a volume of (4000 square feet times 14 feet side walls, which equals) 56,000 cubed feet^3. In comparison, Hodne Homes building has a volume of (5,640 square feet times 16 feet sidewalls, which equals) 90,240 feet^3. This 34,240 feet^3 increase in volume is 61% more than the maximum allowed volume of 56,000 feet^3 (i.e. 161% the maximum volume of an LP-3 facility). The Board, without reciting any facts as to why, or using or stating any specified criteria, granted a

CUP for a building that is 161% of the allowable volume in the LP-3 District. While the Board can argue that 161% difference in volume is, in its opinion not detrimental to other uses in LP-3, that would be the definition of an arbitrary decision absent a record to actually explain the Board's decision.

For the foregoing reasons, the granting of the CUP was not authorized by the Ordinance.

B. It is a Variance That Can Increase A Size of A Structure in LP-3, Not a CUP

The Ordinance states that,"a variance is authorized only for height, area, and size of structure or size of yards and open spaces." SR-354, App-38. These are all measurements, not uses. A variance under the Ordinance cannot alter use because "use variance" has been prohibited:

> establishment or expansion of a use otherwise prohibited shall not be allowed by variance, nor shall a variance be granted because of the presence of non-conforming in the zoning district or uses in an adjoining zoning district.

SR-354, App-38. Both SDCL 11-2-17.3 and Article 2 of the Ordinance define a "conditional use" as a "use." Neither the Legislature or the Ordinance define "use." Merriam-Webster's online dictionary defines use as "the fact or state of being used." https://www.merriam-webster.com/dictionary/use. In 1941, the Legislature enacted the primary statute that authorizes zoning ordinances, SDCL 11-2-13, which distinguished the size of a building from the use of buildings:

> For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of

> buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

SDCL 11-2-13 (underlining supplied). The Legislature has grouped together size of yards, spaces and buildings, because those are all dimensions or measurements, not uses. If a conditional use that is not "specifically listed" in LP-3 can be used to alter a size of structure, yard or space, then a variance has no meaning in LP-3.

The CUP and Variance in this case are contradicting; Hodne Homes sought the Variance to alter the size of the side and rear yards, but a CUP to alter the size of the building. For the same reasons set forth under Argument 1, had Hodne Homes sought a variance, it could not legally be granted.

C. The Board Did Not Comply With Article 5 § 504.

Incorporated herein by reference are the arguments made under Argument 1 relating to the lack of a written decision, examinations, identification of number of votes from the Board, and the lack of findings by the Board and/or Staff Report, and violating the prohibition of allowing sales "use" in LP-3. Specifically regarding the CUP, Article 5 § 504 requires the Board to:

> make a finding that it is empowered under the section of this Ordinance described in the application to grant the conditional use, and that the granting of the conditional use will not adversely affect the public interest.

SR-362, App-44. Given how there is conditional use specifically listed in LP-3 that allows for a structure, the Board's finding of empowerment to grant the CUP is crucial. The record reflects no "independent thought" of the Board that it possessed the authority under the Ordinance to grant the CUP. The sole conditional use in LP-3 requires an "opinion" of the Board and some comparison to other uses that are not detrimental to uses

in LP-3. SR-343, App-37. Again, the Staff Report (SR-553, App-11) recites boiler plate items from Article § 504 (5), but identifies no facts to support that the Board even discussed the conclusions in the Staff Report, let alone made "written findings certifying compliance with the specific rules governing individual conditional uses." *Id*.

The Board also violated Article 3 § 306's prohibition of allowing for sales in LP-3. SR- 358.

3. <u>PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE BOARD'S ARBITRARY EXERCISE OF POWER AND THE LACK OF ASCERTAINABLE STANDARDS GOVERNING ITS ACTIONS.</u>

SDCL 11-2-17.3 states, in pertinent part:

> A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify [...] the criteria for evaluating each conditional use, and any procedures for certifying approval of certain conditional uses. The approving authority shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and its relevant zoning districts when making a decision to approve or disapprove a conditional use request.

SDCL 11-2-17.3 (bracketed material supplied). This Court has stated:

> The due process requirements of SDCL chapter 11–2 'serve several important functions including: <u>safeguarding against the arbitrary exercise of power</u>; informing the decision makers; affording the affected landowners with the opportunity to formally voice their concerns and present evidence in opposition to opposed measures; and provide an avenue for expression of public opinion.' *Schafer v. Deuel Cty. Bd. of Commr's*, 2006 S.D. 106, ¶ 13, 725 N.W.2d 241, 246. If the county does not adopt the ordinance in accordance with this chapter, the body charged with granting the CUP lacks the jurisdiction to grant a CUP.

Wedel v. Beadle Cty. Comm'n, 2016 S.D. 59, ¶ 14, 884 N.W.2d 755, 759 (underlining supplied).

The sole Conditional Use in LP-3 states:

> The Board of Adjustment may permit other uses in which in its opinion are not detrimental to other uses and are in the general character of the other uses in the LP-3 District.

SR-343, App-37. In this case, the Ordinance does not safeguard against the arbitrary exercise of power because Article 11 § 1105 merely requires the Board to render an opinion that a use of property "[is] not detrimental to other uses and [is] in the general character of the other uses in the LP-3 District" in order to grant a CUP. SR-343, App-37 (bracketed material supplied).

> If a governing body adopts a zoning ordinance that purports to authorize a planning board to approve conditional uses without providing the required "definite specifications and standards" to guide the board's discretion, N.J.S.A. 40:55D–67(a), the ordinance is "void" and therefore does not confer authority upon the board to approve a use of land thereunder.

Jackson Holdings, LLC v. Jackson Twp. Planning Bd., 414 N.J. Super. 342, 349-50, 998 A.2d 530, 534 (App. Div. 2010).

For the foregoing reasons the "Conditional Use" section of Article 11 § 1105 allows for the Board to exercise power arbitrarily; which results in violation of due process to challenge the use of said power. Such an arbitrary exercise of power violates due process under the Constitution and therefore is not in accord with SDCL 11-2 and the Board had no jurisdiction to grant the CUP herein.

4. <u>THE DECLARATION REVOKING RESTRICTIVE COVENANTS CANNOT RETROACTIVELY MODIFY ARTICLE 1 § 103 OF THE ORDINANCE.</u>

Hodne Homes and the owners of Lot 3 in Dunham's & Hemmer's 1st Addition attempted to retroactively revoke the *Declaration of Restrictive Covenants*. In essence, after Karen filed her Petition and Hodne Homes discovered it had violated both the Ordinance and the Covenants, it sought to cure that violation retroactively as if such

violation never happened in the first place. The result of which is that Hodne Homes and the owners of Lot 3 conspired to deprive Karen of vested property rights.

While the legality of the *Declaration Revoking Restrictive Covenants* can be litigated in 39CIV18-80, what is relevant here is that the Board was required to determine under Article 1 § 103 of the Ordinance whether a covenant and requirement of the Ordinance conflict. SR-339, App-35. The Board was then to apply "the most restrictive or that imposing the higher standards." *Id.* Hodne Homes attempted to change that standard after the Board made its decision.

> This Court has held that zoning laws may not be retroactively applied so as to deprive property owners of prior vested rights by preventing a use that was lawful before the enactment of zoning laws.

Lamar Outdoor Advert. of S. Dakota, Inc. v. City of Rapid City, 2007 S.D. 35, ¶ 25, 731 N.W.2d 199, 205. Accordingly, the *Declaration Revoking Restrictive Covenants* cannot be utilized by the Board to retroactively modify the applicable standard under Article 1 § 103 of the Ordinance so as to deprive Karen's of her vested property rights.

CONCLUSION

Based upon the foregoing, the Board did not pursue its regular authority under the Ordinance when it approved Hodne Homes' application for a CUP or Variance and is therefore illegal.

It is requested that this matter be reversed instead of remanded to the Board due to the fact that the record unambiguously shows that under the Ordinance, Hodne Homes cannot seek a variance for the "Minimum Side Yard" and "Minimum Rear Yard" in property zoned LP-3. Further, the Ordinance states that a variance cannot be the result of

actions taken by the applicant, and the record unambiguously demonstrates that the sole reason the variance was sought is a personal desire of Hodne Homes/Sodak Marina, and not a peculiar condition of Lot 1. Due to the fact that it is a variance that must be requested to increase the size of a structure in LP-3, for the same reasons, the CUP does not require remand to the Board and should be reversed in its entirety.

WHEREFORE, PETITIONER Karen Dunham respectfully requests that the decisions of the Circuit Court and the Board to grant the CUP and Variance be reversed in their entirety.

REQUEST FOR ORAL ARGUMENT

PETITIONER/Appellant hereby requests Oral Argument.

Dated at Sioux Falls, South Dakota this the 25th day of April, 2019.

NASSER LAW FIRM, P.C.

/s/ James M. Nasser

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Karen Dunham complies with the type volume limitations set forth in SDCL § 15-26A-66. This Brief is typeset in Times New Roman (12 point) and was prepared using Pages version 8.0 (6194). Based on the information provided by Pages version 8.0 (6194), this Brief contains 9,932 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials and any certificates of counsel.

Dated at Sioux Falls, South Dakota this the 25th day of April, 2019.

/s/Jimmy Nasser
Jimmy Nasser

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Karen Dunham" was filed electronically with the South Dakota Supreme Court on April 25, 2019, and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, within 5 days thereafter.

The undersigned further certifies that an electronic copy of "Brief of Karen Dunham" was email to the attorneys set forth below on the 25th day of April, 2019.

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Dated at Sioux Falls, South Dakota this the 25th day of April, 2019.

/s/Jimmy Nasser
Jimmy Nasser

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

KAREN DUNHAM, Petitioner / Appellant, vs. LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE BOARD OF ADJUSTMENT & HODNE HOMES, LLC, Respondents / Appellees.	**No. 28842** **APPENDIX** **TO APPELLANT'S BRIEF**

Exhibit G

Karen Dunham Letter March 7 2018

March 7, 2018

Brandon and Jamie Hodne
Hodne Homes, LLC
Madison, South Dakota 57042

Dear Brandon and Jamie,

I have received the information from you on the proposed storage building that you want to build on the adjoining lot just south of mine in the Dunham and Hemmer Addition near Lake Madison.

In reviewing the information, I have great concern about several things:

1) *The size of this proposed building next to mine clearly demonstrates, I will not have any daylight in my building plus my walk-in door is on that side of the building.*
2) *It is my understanding that all of the other buildings built in this development are built with the 5' setback and are at least 10 feet apart which follows the covenants as set forth when the lots were developed.*
3) *The plans submitted to me do not address the complete drainage of the property. Currently the proposed lot and my lot have very little slope to accommodate the drainage such a building you propose will require since this is much larger than what is currently on the site. Second to that, the roof would need to be slopped to entirely direct water to the south. This would allow proper runoff to move down an elevation that could handle such an event of a heavy to moderate rain.*

Based on this information and looking at the size of the structure being very overbearing on my lot/building, I cannot support your proposal to move the setback to 1' on your lot. This building is just too large for the lot.

Respectfully,
Karen Dunham
Karen Dunham

Exhibit H

Dunham Complaints At Board Hearing

LAKE COUNTY COMMISSION MINUTES
APRIL 17, 2018

The Board of Lake County Commissioners met in regular session on April 17, 2018 at 9 a.m. in the commission meeting room at the Lake County courthouse. Chair Kelli Wollmann called the meeting to order. Auditor Janke called roll call: Commissioner Roger Hageman, Commissioner Aaron Johnson, Commissioner Deb Reinicke, Commissioner Dennis Slaughter and Chair Wollmann all present. The Pledge of Allegiance was recited.

AGENDA APPROVED:

Motion by Johnson, second by Slaughter, to approve the agenda of April 17, 2018. Motion carried.

MINUTES APPROVED:

Commissioner Reinicke asked that her response of no conflict be added to the Backhoe bid/Hwy Dept section of the April 3rd minutes. Motion by Slaughter, second by Reinicke, to approve the minutes of April 3 as corrected and April 10th, 2018. Motion carried.

2018 COUNTY BOARD MINUTES:

Motion by Reinicke, second by Johnson, to approve the 2018 County Board of Equalization minutes. Motion carried.

PAYROLL APPROVED:

Motion by Reinicke, second by Johnson, to approve the payroll of March 26-April 8, 2018. Motion carried. COMMISSIONERS: $5,025.83; AUDITORS OFC: $5,681.54; TREASURERS OFC: $4,040.02; STATES ATTORNEY OFC: $7,611.93; GOVT BLDGS: $4,238.24; DIR EQUALIZATION OFC: $5,656.01; REGISTER DEEDS OFC: $3,111.50; SHERIFF OFC: $13,327.80; JAIL: $13,354.66; CORONER: $622.32; 911 COMM CENTER: $9,769.73; 24/7: $1,058.10; ROAD & BRIDGE: $14,727.01; WELFARE: $54.08; CHN: $927.94; WIC: $284.07; EXTENSION: $1,641.20; ZONING; $1,458.45 GRAND TOTAL $92,590.43.

ACCOUNTS PAYABLE APPROVED:

Motion by Reinicke, second by Johnson, to approve the accounts payable of April 12, 13, and 18, 2018. Motion carried.

Accounts Payable 4-12-18 Auditor: CenturyLink, Apr Service/Late Pymt Fee, $68.93, **Treasurer:** CenturyLink, Apr Service, $32.82, **St Atty:** CenturyLink, Apr Service, $46.26, **Gvt Bldg:** CenturyLink, Apr Service, $33.10, Verizon Wireless, Service, $31.49, **DOE:** CenturyLink, Apr Service, $32.84, **ROD:** CenturyLink, Apr Service, $19.42, **VSO:** CenturyLink, Apr Service, $7.88, **Sheriff:** SD Dept of Revenue, Bl Alcohols, $305.00, **Jail:** CenturyLink, Apr Service, $73.10, **Coroner:** SD Dept of Revenue, Tox Screen, $100.00, **Support of Poor:** CenturyLink, Apr Service, $19.68, **CHN:** SD Dept of Revenue, 2nd Qtr Chn Pymt, $2,575.00, **Dev Disabled:** SD Dept of Revenue, HSC fees, $876.22, **Extension:** CenturyLink, Apr Service, $58.26, **Weed:** Verizon Wireless, Service, $31.49, **Zoning:** CenturyLink, Apr Service, $32.85, **Hwy Rd-Br:** MidAmerican Energy, Util/Ramona, $128.47, Xcel Energy, Util/Ramona, $12.95, CenturyLink, Apr Service, $46.26, Verizon Wireless, Service, $62.96, **911 Comm:** CenturyLink, Apr Service, $371.83, Itc, Service, $115.55, Triotel Communication, Service, $169.53, Verizon Wireless, Service, $61.49, **EMA:** CenturyLink, Apr Service, $44.64, Verizon Wireless, Service/Hotspot, $106.72, CenturyLink, Apr Service, $13.42, First Bank & Trust, Hp Z-Book/Camera Sys-HLS, $8,081.40, **St Remittance:** SD Dept of Revenue, Mar Fees, $335,604.40, **M&P Fund:** SDACO, Mar Rod Fees, $990.00, Grand Total: $350,153.96

Accounts Payable 4-13-18 General Withholding: Dakotaland Fed Cr Union, Cu, $75.00, Lake Co Treasurer, withholdings, $15,569.17, **Hwy Rd-Br:** Dakotaland Fed Cr Union, Cu, $200.00, Lake Co Treasurer, withholdings, $3,415.21, **911 Comm:** Lake Co Treasurer, withholdings, $2,346.62, **24/7:** Lake Co Treasurer, withholdings, $196.20, **Flex Spending:** One Recipient, $160.00, Grand Total: $21,962.20

Accounts Payable 4-18-18 Judicial: WITNESS-JUROR-APPEARANCE FEES/MILEAGE: Alverson, Cynthia, $56.72, Anderson, Paul, $58.40, Barnett, Montanna, $10.84, Falor, Nancy, $52.52, Fischer, Paul, $60.92, Hoff, Dana, $17.56, Johnson, Brenda, $10.84, Little Thunder, Rita, $13.36, Logan, Terry, $10.84, Oleson, Sheila, $12.52, Olson, Ann, $15.88, Petersen, Kathleen, $50.84, Reck, Kory, $18.40, Rozeboom, Jerilyn, $14.20, Schrepel, Roger, $56.72, Stratton, Scott, $19.24, Wetzbarger,

asked if there will be a buffer (shelterbelt) zone. Spencer Mann told the board he could plant trees on the west side of the project. Commissioner Slaughter would like to see a road haul agreement. VanZanten told the commissioners they have the equipment to maintain the road if they damage it. Zoning Officer Anderson told the board they could make the road haul agreement a condition of the conditional use permit. Adam VanZanten has concerns with them having a road plan agreement and others in the area not having one. Commissioner Reinicke told him the county has asked for road haul agreements from other CAFO applicants. Motion by Slaughter, second by Hageman, to approve conditional use #18-02 for Spencer Mann and Greg VanZanten, adopt the findings and specific conditions outlined in the staff report, and require a road haul agreement. Motion carried.

#18-03 Adam VanZanten, Wyatt Fischer, & Greg VanZanten conditional use—SW1/4 Section 31-105-51, Chester Township. Adam VanZanten, Wyatt Fischer, and Greg VanZanten were present to discuss their request to build a Class C concentrated animal feeding operation consisting of 999 animal units, 2,400 head of finishing swine. Motion by Reinicke, second by Slaughter, to approve conditional use #18-03 for Adam VanZanten, Wyatt Fischer, & Greg VanZanten, adopt the findings and specific conditions outlined in the staff report, and require a road haul agreement. Motion carried.

#18-02 Brandon & Jamie Hodne (Hodne Homes, LLC) variance—Lot 1 Dunham's & Hemmer's 1st Addition SW1/4SW1/4 Section 25-106-52 and **#18-01 Brandon & Jamie Hodne (Hodne Homes, LLC) conditional use—**Lot 1 Dunham's & Hemmer's 1st Addition SW1/4SW1/4 Section 15-106-52. Brandon & Jamie Hodne and their builder, Rick Sagness, were present to discuss their request to build a 47x120x16 (5,640 sq/ft) storage building on property recently purchased and their request to build closer to the south side and rear yard lot line. The building will be used for display and storage for their adjacent business, Sodak's Marina LLC. Brandon Hodne discussed options for drainage and presented pictures of the property to the board. Christopher Dunham was present in opposition to the project. He presented a drawing of the project. Dunham has concerns with the following: significance difference in size and use of the building, expansion of commercial use/changing use, covenants should be enforced, a drainage plan is needed, and concerned with the increased traffic. Commissioner Hageman would like to see a drainage plan. Options for drainage in the project area were discussed. Motion by Reinicke, second by Johnson, to approve variance #18-02 and conditional use #18-01 for Brandon & Jamie Hodne (Hodne Homes LLC) and adopt the findings and specific conditions outlined in the staff report and require a drainage plan. Motion carried.

REGULAR SESSION:

Motion by Reinicke, second by Hageman, to adjourn as a board of adjustment and return to the regular session. Motion carried.

PLATS/ZONING OFFICE:

Mandi Anderson, Zoning Officer, presented the following plats to the board.

Plat of Lot 1 of Spilde's Addition in the SW1/4SW1/4 of Section 16, Township 108 north, range 53 west of the 5th p.m. in Lake County, SD. Motion by Johnson, second by Reinicke, to approve the chair sign the plat as the plat meets Lake County regulations, taxes are paid in full and planning board recommends approval. Motion carried.

Plat of Lot 1 of Hoekman's Addition in the NW1/4 of Section 1, Township 107 north, range 52 west of the 5th p.m. in Lake County, SD. Motion by Reinicke, second by Slaughter, to approve the chair sign the plat as the plat meets Lake County regulations, taxes are paid in full and planning board recommends approval. Motion carried.

Plat of Lot 5 of Stoney Point Addition in government Lot 4 and the NW1/4 of the NW1/4 in Section 24, Township 106 north, range 52 west of the 5th principal meridian, Lake County, SD. Motion by Reinicke, second by Johnson, to approve the chair sign the plat as the plat meets Lake County regulations, taxes are paid in full and planning board recommends approval. Motion carried.

CONTRACTORS' EXCISE TAX:

Darrin Gerry, SD Dept of Revenue Business Tax Division, and Debbie Rowley, Hwy Dept Office Manager, met with the board to discuss contractors' excise tax. He told the board when the county is billing for services the county becomes a contractor. The contractor needs to bill the 2.041% excise tax. Gerry, Rowley and Auditor Roberta Janke have reconciled 2013-2017 to determine the total due

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

KAREN DUNHAM,

Petitioner/Appellant,

-vs-

LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE LAKE COUNTY BOARD OF ADJUSTMENT & HODNE HOMES, LLC,

Respondents/Appellees.

Appeal No. 29531

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

THE HONORABLE KENT A. SHELTON,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE LAKE COUNTY COMMISSION

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NOTICE OF APPEAL FILED
FEBRUARY 5, 2021

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

In this brief, the Appellant, Karen Dunham, will be referred to as "Dunham." The Appellee, Lake County Commission sitting as the Lake County Board of Adjustment, will be referred to as "Board." Hodne Homes, LLC will be referred to as "Hodne." References to the transcript for the Board's hearing on July 21, 2020 will be denoted as "Board Tr." followed by the corresponding page and line numbers. References to the transcript of the December 16, 2020 hearing will be referred to as "T" followed by the corresponding page and line numbers. Citations to the settled record in this matter appear as "SR" followed by the page number.

JURISDICTIONAL STATEMENT

This is an appeal from the Circuit Court's *Judgment of Dismissal*, dated January 14, 2021, that dismissed Dunham's petition for writ of certiorari. (SR 877, 896.) Notice of Entry was served on January 15, 2021. (SR 897-898.) Dunham filed her Notice of Appeal on February 5, 2021. (SR 900-901.) This Court may exercise jurisdiction pursuant to SDCL § 15-26A-3(1), because the Circuit Court entered final judgment dismissing Dunham's petition for writ of certiorari due to her lack of standing.

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT CORRECTLY DISMISSED DUNHAM'S SECOND PETITION FOR WRIT OF CERTIORARI.

The Circuit Court determined that Dunham was not an aggrieved person under SDCL § 11-2-61 and, therefore, lacked standing to appeal.

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

Huber v. Hanson Cty. Planning Comm'n, 2019 S.D. 64, 936 N.W.2d 565.

Lake Hendricks Improvement Ass'n v. Brookings County Planning and Zoning Com'n, 2016 S.D. 48, 882 N.W.2d 307.

Sierra Club v. Clay Cty. Bd. of Adjustment, 2021 S.D. 28, 959 N.W.2d 615.

SDCL § 11-2-61.

II. WHETHER THIS COURT CONSIDERS ISSUES NOT DECIDED BY THE CIRCUIT COURT.

The Circuit Court dismissed the petition for writ of certiorari without ruling on the merits of Dunham's second petition.

Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, 943 N.W.2d 330.

Hines v. Bd. of Adjustment of Miller, 2004 S.D. 13, 675 N.W.2d 231.

Steiner v. Cty. of Marshall, 1997 S.D. 109, 568 N.W.2d 627.

SDCL § 11-2-61.

STATEMENT OF THE CASE

In Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, 943 N.W.2d 330, this Court affirmed the Circuit Court's denial of certiorari relief as to the Board's decision regarding Hodne's conditional use permit ("CUP") and remanded for further proceedings as to the Board's variance decision. Id. at ¶ 38,

943 N.W.2d at 339. Following remand, the Board held a hearing on July 21, 2020, and again approved the variance sought by Hodne. (SR-791-800, Board Tr. 22:23-31:14.) The Board issued findings of fact and filed their decision with the Lake County Auditor on September 1, 2020. (SR 877-879.)

Dunham filed a second petition with the Circuit Court on September 30, 2020, seeking a writ of certiorari to challenge the Board's decision to grant Hodne's application for variance. (SR 761.) On October 26, 2020, the Board moved to dismiss Dunham's second petition for writ of certiorari. (SR 810.)

The Board served a Notice of Hearing on its Motion to Dismiss on November 3, 2020. (SR 819-820.) The hearing was scheduled for December 16, 2020. (Id.) On December 7, 2020, Dunham served a Notice of Hearing, purporting to schedule her petition for "a hearing on the merits." (SR 830.)

The Board's Motion to Dismiss came on for hearing on December 16, 2020. At the start of the hearing, the Circuit Court, the Honorable Kent A. Shelton, presiding, specified that "[a]t this time, I'm only going to take up the motion to dismiss. I'll wait to see how this hearing turns out before I make further determination on the merits of the case." (T5:18-21.)

Judge Shelton agreed with the Board, ruling in his *Letter Memorandum* dated December 28, 2020, that Dunham lacked standing to petition for a writ of certiorari. (SR 895.)

STATEMENT OF FACTS

This zoning appeal, now in its second chapter with this Court, concerns a request by Hodne for a setback variance to allow it to build an oversized storage building closer to two lot lines - neither of which adjoin Dunham. The Hodne storage building sits among a series of other storage buildings near Lake Madison, South Dakota.

Hodne filed an application for a variance on property in Lake County, South Dakota, located in the LP-3 District. (SR 877.) Hodne requested a variance to build closer to the south side and rear yard lot lines. (Id.) It sought a 5' variance from the rear yard setback and a 1' variance from the south side yard lot line. (Id.) The adjoining property owners to the east and west were contacted and did not object. (Id.)

Dunham owns a storage unit on property directly north of Hodne. (SR 190.) Initially, Hodne's building was proposed with a 48' width. (SR 877.) Hodne changed its plans and reduced the size of the building to a 47' width to accommodate Dunham's adjoining lot line. (Id.) Hodne meets the north side yard requirement for the property line it shares with Dunham. (Id.) The variance does not move Hodne's building closer to Dunham - it moves it closer to property holders who did not object to the variance. Nonetheless, Dunham objected to Hodne's variance request.

Pursuant to the Order Remanding Matter to Lake County Board of Adjustment for Further Proceedings on Hodne Homes, LLC's Variance Application, filed on May 29, 2020, the variance application was reheard by the Board on July 21, 2020. (CR 757.) Evidence was presented that the property at issue adjoins Hodne's commercial building to the south which houses the sales office, desks, and the repair shop. (SR 878.) It is the only property in Lake County where there is a commercial property directly adjacent to an LP-3 property. (Id.) The Board found that Hodne's LP-3 property being located adjacent to its commercial property creates an extraordinary or exceptional situation or condition on Hodne's property, such that the denial of the variance would create peculiar and exceptional difficulties or an exceptional and undue hardship for Hodne. (Id.)

Evidence was also presented that in order to facilitate the sale of boats made by manufacturers such as Crestliner and Manitou, Hodne had to demonstrate to those manufacturers that it has a sales office, a shop, and a sufficient display area to show boats. (Id.) The setback rules and limitations on the size of buildings in the LP-3 district would not accommodate a showroom large enough for storage of these boats. (Id.) Hodne could not have made the building any smaller and still met such dealer requirements. (Id.) Again, the Board found that an extraordinary or exceptional situation or condition exists on

Hodne's property, such that denial of the variance would create peculiar and exceptional practical difficulties or an exceptional and undue hardship for Hodne. (SR 879.)

Lastly, based on the testimony, the Board found that the storage and display of boats fit within the approved uses for oversized private and commercial storage facilities within LP-3. For the second time, the Board unanimously approved Hodne's variance application. At its September 1, 2020 meeting, the Board entered Findings of Fact, and they were filed the same day. (SR 877.)

Dunham filed a second petition for Writ of Certiorari on September 30, 2020, again challenging the Board's decision. Dunham makes no allegation in her second petition that the Board's decision caused her any harm or injury. (Id.)

ARGUMENT

I. Dunham Lacks Standing to Challenge the Variance Granted by the Board of Adjustment.

"The Legislature, in SDCL § 11-2-61, has expressed four procedural elements for appealing a board of adjustment decision by writ of certiorari." Huber v. Hanson Cty. Planning Comm'n, 2019 S.D. 64, ¶ 15, 936 N.W.2d 565, 570. Each element must be met to confer jurisdiction to the circuit court. Id. (citing Elliott v. Bd. of Cty. Com'nrs of Lake Cty., 2005 S.D. 92, ¶ 16, 703 N.W.2d 361, 368). Those elements include: "(1) **the person(s) must have standing**; (2) the petition must be duly

verified; (3) the petition must set forth the grounds for the alleged illegality; and (4) the petition must be presented to the court within 30 days after the board of adjustment's decision." Id. (Emphasis added.). Dunham cannot satisfy the first required element to confer jurisdiction to the circuit court.

"A litigant must have standing to bring a claim in court." Lippold v. Meade Cty. Bd. Of Com'rs, 2018 S.D. 7, ¶ 18, 906 N.W.2d 922 (citing Cable v. Union Cty. Bd. of Cty. Commn'rs, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825-26). Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject matter jurisdiction unless the parties have standing. Id. (citing Lake Hendricks Improvement Ass'n v. Brookings County Planning and Zoning Com'n, 2016 S.D. 48, ¶ 19, 882 N.W.2d 307, 313). This Court has stated:

> Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." Cable, 2009 S.D. 59, ¶ 20, 769 N.W.2d at 825 (quoting In re Koch Expl. Co., 387 N.W.2d 530, 536 (S.D. 1986)). It "can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ." Id.
>
> When "the right to an appeal is purely statutory ... no appeal may be taken absent statutory authorization. An attempted appeal from which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it." Elliott v. Bd. of Cty. Com'nrs of Lake Cty., 2005 S.D. 92, ¶ 15, 703 N.W.2d at 368

(quoting Appeal of Lawrence Cty., 499 N.W.2d 626, 628 (S.D. 1993)). And "when procedure is prescribed by the [L]egislature for reviewing the action of an administrative body, review may be had only on compliance with such proper conditions as the [L]egislature may have imposed." Id. (quoting Appeal of Heeren Trucking Co., 75 S.D. 329, 330-31, 64 N.W.2d 292, 293 (1954)). Here, the Legislature identified certain classes of plaintiffs entitled to bring suit under SDCL chapter 11-2. So, absent being one of the classes of plaintiffs the Legislature authorized to petition the circuit court, "review may not be had" because there is no compliance with the conditions imposed by the Legislature. See id.

Lake Hendricks, 2016 S.D. 48, ¶¶ 15-16, 882 N.W.2d at 312.

Dunham argues the Circuit Court erred by "exceeding the scope of remand by re-examining the facts that constitute the injuries [Dunham] alleged would be caused by the Board's decision." (Appellant's Br., P. 4, ¶ 1.) However, "jurisdiction must exist at every stage of litigation." Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 639 (5th Cir. 2014)[1];

[1] When construing a rule equivalent to a Federal Rule of Civil Procedure, "the decisions of the federal courts and other states with the Federal Rules are looked to for analytical assistance

see also Stawski Distrib. v. Kociecki, No. 12 C 50117, 2013 U.S. Dist. LEXIS 115138, at *15 (N.D. Ill. Aug. 14, 2013) ("Subject matter jurisdiction must be examined by a court at every stage of the litigation.").

Under the 2004 version of SDCL § 11-2-61, this Court determined that the petitioners in Lake Hendricks had standing as county taxpayers to appeal a board of adjustment's decision, even if not aggrieved. Id. at ¶ 22, 882 N.W.2d at 313. However, the Legislature amended the statute in 2016, limiting standing to persons or entities specifically **aggrieved**: "person, taxpayer, or entity challenging a zoning decision who is '**aggrieved** by any decision of the board of adjustment.'" Huber, 2019 S.D. 64, ¶ 15, 936 N.W.2d at 570 (quoting SDCL § 11-2-61) (Emphasis added.).

The Legislature again amended the statute in 2020 by completely removing a taxpayer's right to appeal a board's decision, limiting standing to any person or entity aggrieved by a decision by the board. The statute currently reads, in pertinent part: "Any person or persons, jointly or severally, or any officer, department, board or bureau of the county, **aggrieved** by any decision of the board of adjustment may present to a court of record a petition duly verified, setting forth

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in interpreting the South Dakota rule." Moore v. Michelin Tire Co., 1999 S.D. 152, ¶ 24, 603 N.W.2d 513, 520 (citing Miller v. Hernandez, 520 N.W.2d 266, 269 (S.D. 1994)).

that the decision is illegal, in whole or in part, specifying the grounds of the illegality." SDCL § 11-2-61 (Emphasis added.) Under either the 2016 or 2020 iteration, a petitioner must "plead and prove a unique injury not suffered by taxpayers in general." Id. (citing Cable, 2009 S.D. 59, ¶ 26, 769 N.W.2d at 827). In other words, Dunham was required to show she was specifically aggrieved.

In 2020, the Legislature also added the following statutory requirements in determining whether a person is "aggrieved":

> For the purposes of this chapter, a person aggrieved is any person directly interested in the outcome of and aggrieved by a decision or action or failure to act pursuant to this chapter who:
>
> (1) Establishes that the person suffered an injury, an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical;
>
> (2) Shows that a causal connection exists between the person's injury and the conduct of which the person complains. The causal connection is satisfied if the injury is fairly traceable to the challenged action, and not the result of the independent action of any third party not before the court;
>
> (3) Shows it is likely, and not merely speculative, that the injury will be redressed by a favorable decision, and;
>
> (4) Shows that the injury is unique or different from those injuries suffered by the public in general.

SDCL § 11-2-1.1.

These factors are traceable to the Cable decision, where

this Court stated:

> The right to appeal by a "person aggrieved" required a showing that the person suffered "a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county[.]" Id. at 137-38. "[O]nly such persons as might be able affirmatively to show that they were aggrieved in the sense that by the decision of the board they suffered the denial of some claim of right, either of person or property, or the imposition of some burden or obligation in their personal or individual capacity, as distinguished from any grievance they might suffer in their capacities as members of the body public." Cuka v. School Bd. of Bon Homme School Dist. No. 4-2 of Bon Homme County, 264 N.W.2d 924, 926 (S.D. 1978) (quoting Camp Crook Independent School Distr. No. 1 v. Shevling, 65 S.D. 14, 26, 270 N.W. 518, 524 (1936); Blumer v. School Board of Beresford Ind. Sch. Dist. No. 68 of Union County, 250 N.W.2d 282, 284 (S.D. 1977)). When the threatened injury "will affect not only the other freeholders besides the plaintiffs, but all the inhabitants of that local district, whether they are freeholders or not[,] the injury is not personal but rather an injury to all citizens and members of the community." Wood v. Bangs, 46 N.W. 586, 588, 1 Dakota 179 (Dakota Terr. 1875).

Cable, 2009 S.D. 59, ¶ 26, 769 N.W.2d at 825.

Per this Court's prior decision, the only issue remanded to the Board related to the variance. Dunham, 2020 S.D. 23, ¶ 38, 943 N.W.2d at 339 ("We remand the variance application to the Board for further proceedings consistent with this opinion."). The Board's decision regarding Hodne's application for a conditional use permit was, in all respects, *affirmed*. Id. at ¶ 30, 943 N.W.2d at 338 ("We affirm the circuit court's denial of certiorari relief to Dunham on the Board's CUP decision."). Hodne's conditional land use is authorized

under this Court's decision, and that became the law of the case. "[A] question of law decided by [the Court] on a former appeal becomes the law of the case in all its subsequent stages and will not ordinarily be considered or reversed on a second appeal when the facts and the questions of law presented are substantially the same." In re Estate of Siebrasse, 2006 S.D. 83, ¶ 16, 722 N.W.2d 86, 90 (quoting Jordan v. O'Brien, 70 S.D. 393, 396, 18 N.W.2d 30, 31 (1945)). "The 'law of the case' doctrine is intended to afford a measure of finality to litigated issues." Id. at ¶ 17 (quoting W. States Land & Cattle Co. v. Lexington Ins. Co., 459 N.W.2d 429, 435 (S.D. 1990)).

Dunham argues her injuries include the size of the showroom being overbearing on her property, blocked access to sunlight, drainage issues due to the showroom roof depositing water in limited locations, and an increase in traffic around her property. (Appellant's Br., P. 5, ¶ 1). These alleged injuries relate to the CUP and have nothing to do with the setback variance. Dunham cannot use this appeal to challenge the land use next door. That chapter is closed. The sole effect of the Board's determination on Hodne's variance request is the adjustment of the rear and southern side yard setbacks. (SR 175.) It is undisputed that the variance granted by the Board did not affect the two-foot side yard setback requirement on the side of Hodne's lot adjoining Dunham's property.

Dunham also argues the showroom violates the covenants

that run with the land, but neither pleads nor argues an injury resulting from such violation. (Id.) Dunham also fails to inform the Court that covenants mandating a larger setback were revoked in 2018. (SR 292-295.)

Dunham relies upon Huber to argue that a general allegation of harm is sufficient to satisfy the "injury in fact" threshold. However, Dunham's second petition alleges no unique or personal injury traceable to the Hodne variance. She cannot simply rely on the fact that she is an adjoining property owner. She must establish some particularized, actual injury that is unique to her because of the Board's variance. There is none.

Dunham also argues that the Circuit Court should have treated her undescribed injuries as true and construed her petition in her favor. (Appellant Br. p. 6, ¶ 2). In essence, Dunham construes the Board's motion to dismiss as a facial attack on Dunham's petition for writ of certiorari. When a motion to dismiss is treated as a facial attack, "general allegations suffice and must be accepted as true." Sierra Club v. Clay Cty. Bd. of Adjustment, 2021 S.D. 28, ¶ 6, 959 N.W.2d 615, 619. Dunham's argument is unsurprising, since she presented absolutely no evidence to the Circuit Court that the variance granted to Hodne caused an "invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical." SDCL 11-2-1.1. However, even if the Board's motion to dismiss is deemed to be a "facial attack," Dunham's arguments fail.

In Sierra Club, the Mocklers applied for a CUP and the Clay County Board of Adjustment granted the permit. Id. at ¶ 2, 959 N.W.2d at 618. Sierra Club filed a petition in circuit court under SDCL chapter 11-2 seeking a writ of certiorari to reverse the Commission's decision. Id. at ¶ 3, 959 N.W.2d at 618. Rather than respond to the writ, the Mocklers and the Clay County Board of Adjustment filed motions to dismiss Sierra Club's petition under SDCL 15-6-12(b)(1), arguing that Sierra Club failed to establish standing as a person aggrieved. Id. at ¶ 4, 959 N.W.2d at 618. The Circuit Court construed the motion to dismiss as a facial attack, yet still dismissed Sierra Club's petition because it did not "allege any actual harm to support that Sierra Club was directly aggrieved by the Board's decision." Id. at ¶ 8, 959 N.W.2d at 619.

This Court found that the circuit court did not err in treating Mockler's motion to dismiss as a facial attack on Sierra Club's petition. Id. at ¶ 25, 959 N.W.2d at 625. The Court agreed that Sierra Club failed to show that they were aggrieved. Id. at ¶ 16, 959 N.W.2d at 621. Specifically, Sierra Club failed to show an "injury in fact, namely, that the person suffered a personal and pecuniary loss not suffered by taxpayers in general . . ." Id. (quoting Cable, 2009 S.D. 59, ¶ 26, 769 N.W.2d at 825)(internal quotations omitted).

Dunham's second petition fails to show she is aggrieved because it lacks any allegation of a pecuniary loss or injury.

(SR 761.) In fact, not a single injury is alleged in the second petition. Dunham points to alleged injuries in Appellant's Brief, which she also argued below in her briefing, but "[a] party is not entitled to amend [her] complaint through [her] memoranda." Butvin v. DoubleClick, Inc., 99 Civ. 4727 (JFK), 2000 U.S. Dist. LEXIS 8772, at *39 (S.D.N.Y. June 26, 2000) (citing Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir 1998) (holding that complaint did not state a cause of action where plaintiff had alleged the elements of a claim for the first time in a memoranda opposing defendant's motion to dismiss)).

Moreover, her alleged injuries include lack of access to daylight, drainage concerns, and failure to adhere to covenants. Those alleged "injuries" have already been discussed at length above and have nothing to do with the Board's consideration of the rear variance and side yard variance. Again, Dunham must allege a concrete and particularized injury or loss caused by the *variance*, not the CUP. Even if the Court treats the Board's motion to dismiss as a facial attack of Dunham's petition, Dunham fails to allege she is aggrieved.

II. This Court Cannot Review Issues Neither Addressed nor Decided by the Circuit Court.

Dunham filed her petition for writ of certiorari on September 30, 2020. In lieu of making its return, the Board

filed a motion to dismiss in accordance with SDCL § 15-6-12(b)(1) on October 26, 2020. The Circuit Court heard argument on the motion to dismiss in December 2020. The Circuit Court granted the motion to dismiss shortly after the hearing. The Circuit Court never reached the merits of Dunham's second petition because the Court agreed that Dunham lacks standing.

Although the Circuit Court never reached the merits of Dunham's second petition, Dunham attempts to appeal to this Court the Board's decision to grant the variance following remand. Dunham's sole issue on appeal to the Supreme Court ought to be whether the Circuit Court erred by dismissing the petition for lack of standing, *and that issue alone*. Instead, Dunham barnacled her appeal to the Supreme Court with arguments regarding the merits of her petition, i.e., that the Board exceeded its authority and jurisdiction by granting the variance to Hodne. This completely flies in the face of established caselaw in South Dakota and other jurisdictions that says issues not decided or ruled on by the trial court will not be considered or addressed by an appellate court. Steiner v. Cty. of Marshall, 1997 S.D. 109, ¶ 27, 568 N.W.2d 627, 633 (citing City of Watertown v. Dakota, Minn., & E. R.R., 1996 S.D. 82, ¶ 26, 551 N.W.2d 571, 577).[2] It is clearly established law that

[2] See Also Schull Constr. Co. v. Koenig, 80 S.D. 224, 229, 121,

appellate courts will not review issues that were not addressed or decided by the trial court. This Court cannot review whether the Board's decision to grant the variance exceeded the Board's authority and jurisdiction because the Circuit Court never decided this issue.

In State ex rel. Midview Local Sch. Dist. Bd. of Educ. v. Ohio Sch. Facilities Comm'n'n, 2015-Ohio-435, 28 N.E.3d 633

N.W.2d 559, 561 (1963) ("A reviewing court will not consider matters not properly before it or matters not determined by the trial court"); Keegan v. First Bank, 519 N.W.2d 607, 615 (S.D. 1994) (issue not ruled on by trial court would not be addressed by Supreme Court; State v. Nunes, 260 Conn. 649, 658, 800 A.2d 1160, 1167 (2002) ("Because our review is limited to matters in the record, we will not address issues not decided by the trial court."); Hughes v. Hosemann, 68 So.3d 1260, 1265 (Miss. 2011) ("This Court repeatedly has held that we cannot and will not rule upon issues not decided by the trial court below."); Tricon Metals & Servs., Inc. v. Topp, 516 So.2d 236, 239 (Miss. 1987) ("Logic is strained at the thought of an appellate court affirming or reversing a decision never made."); Bottum v. Herr, 83 S.D. 542, 162 N.W.2d 880, 883 (1968) (a party cannot now assert error on matters not considered by or ruled upon in the trial court); Crest Pontiac Cadillac, Inc. v. Hadley, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims neither addressed nor decided by court below are not properly before appellate tribunal); Bevill v. Owen, 364 So.2d 1201, 1203 (Ala. 1979)) ("It is a fundamental rule of appellate procedure that, regardless of [the] merits of [the] appellant's contentions, appellate courts will not review questions not decided by the trial court.") See also, Fullmer v. State Farm Ins. Co., 514 N.W.2d 861, 866 (S.D. 1994) ("We have repeatedly stated that we will not decide an issue in this court until the trial court has had an opportunity to pass upon it."); Boever v. South Dakota Bd. of Accountancy, 526 N.W.2d 747, 751 ("Generally this court will not decide an issue until the trial court has had an opportunity to pass on it.") (internal quotes omitted); In re Guardianship of Petrik, 1996 S.D. 24, ¶ 11, 544 N.W.2d 388, 390 ("This Court has repeatedly stated it will not decide issues until the circuit court has had the opportunity to pass upon them").

(Ct. App.), an Ohio case that differs substantively but is similar procedurally, the plaintiff filed a three-count complaint against the defendant. Id. at ¶ 5, 28 N.E.3d at 636. In response, the defendant filed a motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim. Id. The trial court concluded that the plaintiff lacked subject matter jurisdiction and dismissed the complaint. Id. On review, the Ohio appellate court only considered the defendant's motion to dismiss claim and not the plaintiff's claims in the original complaint. Id. at ¶ 8, 28 N.E.3d at 637. The court noted that whether the plaintiff "can succeed on any of its claims is not before us." Id. The only issue before the court *at that time* was the motion to dismiss for lack of subject matter jurisdiction.

Similarly, here, the Circuit Court determined that Dunham lacked standing, and without standing, the Court lacked subject matter jurisdiction. (SR 891-894.) For this reason alone, the trial court dismissed Dunham's second petition for a writ of certiorari. (SR 895-6.) The trial court neither addressed nor decided whether the Board exceeded its authority and jurisdiction by granting the variance to Hodne. This is acknowledged by Dunham herself in Brief of Appellant. (Appellant Br., P. iv) ("The Circuit Court declined to address the issue.").

This Court cannot review that which has not been decided

by the trial court. The only issue before this court is whether Dunham lacked standing - not whether the Board exceeded its authority and jurisdiction in granting the variance.

A. Should this Court consider the merits of the decision, Dunham's arguments fail.

The Board is hesitant to even "take the bait" and argue the merits in this brief, because the issue is not ripe for determination. However, even if this Court decides to consider the merits of the second petition for writ of certiorari, Dunham's arguments fail. This Court gave specific instructions, and the Board followed those instructions and made all required findings. Under the applicable standard, it is not the place of the Circuit Court or this Court to critique the Board's findings for correctness.

This Court found in 2020 that the Board's CUP decision was proper and remanded the variance application to the Board for further proceedings consistent with the opinion. Dunham, 2020 S.D. 23, ¶ 38, 943 N.W.2d at 339. The Court analyzed the two-part test from Hines v. Bd. of Adjustment of Miller, 2004 S.D. 13, ¶ 18, 675 N.W.2d 231, 234. The two part-test requires that "both the public interest prong and special conditions prong must be met." Id. This Court found the first prong satisfied, but not the second prong. Dunham, 2020 S.D. 23, ¶¶ 19-20, 943 N.W.2d at 335. The Court remanded to the Board with instructions to consider the second prong.

Specifically, the Board was to make a determination whether "because of a particular feature of the property at the time the Ordinance was enacted, or because of some extraordinary and exceptional situation on the property, a variance was necessary." Id. (internal quotations omitted.) The Board also had to consider whether "the denial of the variance to build a facility exceeding the setback requirements would create peculiar and exceptional practical difficulties or an exceptional and undue hardship on Hodne Homes." Id. Lastly, the Board was required to determine whether the proposed facility to store and display boats for Sodak Marina was within the approved uses for oversized and commercial storage facilities within LP-3 to comply with Section 505(3). Id. at ¶ 23, 943 N.W.2d at 336.

The Board satisfied the requirements set by this Court. First, the Board considered whether there is an extraordinary or exceptional situation on the property that requires a variance, and that there are peculiar and exceptional practical difficulties, or an exceptional and undue hardship that will be placed on Hodne Homes if the variance isn't granted. (SR 793, Board Tr. 24:5-20.) It also discussed whether the variance would allow the use that Hodne intended to make of the building, i.e., that the use would be permissible within LP-3 so as not to be detrimental to others' uses and to be in the general character of the others uses in the LP-3 district. (SR 794,

Board Tr. 25:12-25.) The Board ultimately voted that the special conditions had been met and that a denial of the variance would create peculiar and exceptional undue hardship on Hodne. (SR 797, Board Tr. 28: 1-23.) The Board then voted that an extraordinary and exceptional situation on the property necessitated the variance. (SR 798, Board Tr. 29:3-24.) Lastly, the Board voted that the variance allowed a use that is permissible within LP-3, and that the conditional use is not detrimental to other uses and is in the general character of the other uses in the LP-3 district. (SR 799-800, Board Tr. 30-31: 2-16.)

While Dunham predictably challenges these findings, as previously stated by the Court, "[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding." Dunham, 2020 S.D. 23, ¶ 19, 943 N.W.2d at 335 (quoting Hines, 2004 S.D. 13, ¶ 10, 675 N.W.2d at 234) (quoting Cole v. Bd. of Adjustment, 1999 S.D. 54, 592 N.W.2d 175, 177). The Board satisfied what was required

by this Court, and there is absolutely no basis for reversal in this record.

CONCLUSION

For these reasons, the Board respectfully urges the Court to affirm the Circuit Court's dismissal.

Respectfully submitted this 20th day of August 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 23 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 5,177 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 20th day of August, 2021.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellee Lake County Commission, hereby certifies that on the 20th day of August, 2021, a true and correct copy of **BRIEF OF APPELLEE LAKE COUNTY COMMISSION** was electronically transmitted to:

(james@nasserlaw.com)
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and the original and two copies of **BRIEF OF APPELLEE LAKE COUNTY COMMISSION** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 20th day of August, 2021.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29531

KAREN DUNHAM**,**
PETITIONER / APPELLANT
vs.

LAKE COUNTY COMMISSION, LAKE COUNTY COMMISSION SITTING AS THE LAKE COUNTY BOARD OF ADJUSTMENT & HODNE HOMES, LLC
RESPONDENTS / APPELLEES.

Appeal from the decision of the Lake County Board of Adjustment and the decision of the Circuit Court, Third Circuit, Lake County, South Dakota, The Honorable Kent A. Shelton, Circuit Court Judge, Circuit Court Judge Presiding

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REPLY BRIEF OF APPELLANT

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NOTICE OF APPEAL FILED FEBRUARY 5, 2021

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Table of Authorities

Preliminary Statement

Appellant incorporates by reference the *Preliminary Statement* contained in *Appellant's Brief* at pg. iii. In addition, references to the *Brief of Appellee* appear as "Board's Brief," followed by the page number of said brief.

Reply to the Board's Argument & Authorities

1. Whether Karen has standing to challenge the variance granted by the Board.

A. Karen's Alleged Injuries Survived Dunham I.

The Board's argument is that Karen's alleged injuries were solely related to the CUP and since this Court affirmed the CUP, Karen no longer has standing to challenge the Variance granted by the Board. Board's Brief, pg. 12, 13. This is simply not true. One of Karen's allegations is that retail sales are unlawful in the LP-3 District and that she would be harmed by increased traffic from such use. SR-190, App-91. Neither of these injuries are related to the *size* of the building on Lot 1, which was the scope of Hodne Home's Application[1]. The *use* of Lot 1 as a result of the Variance is one of the issues this Court remanded in Dunham I:

> In order to comply with Section 505(3) on remand, the Board must determine whether the variance will allow a use that is not permissible within LP-3.

[1] The Application states Hodne Homes is:

> Requesting a Conditional Use for private and commercial storage building with greater dimensions than 4,000 sq. ft and taller than 14' sidewalls. Requesting a Variance from the minimum required rear and side yard setbacks.

SR 516.

Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, ¶ 23, 943 N.W.2d 330, 336. Moreover, the size of Hodne Home's building is still at issue since the length and width of the building are what required the Variance to the side and rear yard setbacks. Nevertheless, the Board continues to claim that the "Board's decision regarding Hodne's application for a conditional use permit was, in all respects, *affirmed*." The Board's Brief, pg. 10 (emphasis in original). This claim contradicts the language in Dunham I that recognized the lawfulness of the CUP may be dependent on the lawfulness of the Variance:

> The Board specifically conditioned the approval of the CUP "upon compliance with all applicable provisions of the [Ordinance]". We express no opinion whether our reversal and remand of the variance decision impacts the conditional use approved by the Board.

Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, 943 N.W.2d 330, 338. Accordingly, Karen's allegations that relate to the size of the building were not fully resolved in Dunham I.

B. 2020 Amendments to SDCL 11-2.

The Trial Court rejected application of the 2020 amendments to SDCL 11-2 as applying to this case. This Court has previously held that SDCL § 15-26-22 applies to cross-appeals under SDCL 11-2:

> Therefore, unless service of the notice of review is made on all other parties, this Court acquires no jurisdiction and dismissal of the cross-appeal is required.

Lake Hendricks Improvement Ass'n v. Brookings Cty. Plan. & Zoning Comm'n, 2016 S.D. 17, ¶ 6, 877 N.W.2d 99, 102–03. The Board did not file a notice of review and the 2020 amendments to SDCL 11-2 are not before this Court on appeal.

For the reasons stated herein and the reasons stated in the *Brief of Appellant*, Karen has standing to maintain her case on remand from this Court's decision in Dunham I.

2. Whether the Lake County Board of Adjustment exceeded its authority and jurisdiction by granting the Variance to Hodne Homes, LLC.

The Board argues:

> This Court cannot review whether the Board's decision to grant the variance exceeded the Board's authority and jurisdiction because the Circuit Court never decided the issue.

Board's Brief, pg. 18. This is not a true statement in this case. The Circuit Court is not the judicial body charged with holding a hearing on the merits. By Statute, it is the Board who holds a hearing on the merits (SDCL §§ 11-2-53, 60) and the Circuit Court acts as an appellate court (SDCL §§ 11-2-61). This Court held in Dunham I that these statutes do not allow *de novo* review of the Board's decision:

> These statutes do not direct de novo review of a decision granting or denying a variance or a CUP. We have recognized that petitions challenging a decision by a board of adjustment under SDCL 11-2-61 "are postured as writs of certiorari; thus judicial review is limited." *Wedel*, 2016 S.D. 59, ¶ 11, 884 N.W.2d at 758.

Dunham v. Lake Cty. Comm'n, 2020 S.D. 23, ¶ 13, 943 N.W.2d 330, 334. There is no reason to remand the Board's findings to the Circuit Court that has no authority to disagree with them factually. Even if the Circuit Court did issue its own findings, this Court is not bound by them when reviewing the cold record of this case:

> The standard of review in an appeal to the Supreme Court from a trial court's appellate review of an administrative decision is de novo: unaided by any presumption that the trial court is correct.

Brown v. Douglas Sch. Dist., 2002 S.D. 92, ¶ 17, 650 N.W.2d 264, 269. Or stated more simply, "[w]e are not bound by the trial court's reading of the record. We can read it for ourselves." *Id*. Such is the case here.

Dunham I was remanded to the Board, not the Circuit Court, to procure findings of fact. Those findings as well as a transcript from the Board's hearing are in the record for this Court to review. Accordingly, this matter can be meaningfully reviewed by this Court and is ripe for determination.

Conclusion

WHEREFORE, Petitioner requests the Court reverse the Circuit Court's decision that Petitioner Karen Dunham lacked standing to challenge the Board's decision to grant the Variance. Karen further requests that this Court declare that the Board exceeded its authority and jurisdiction by granting the Variance to Hodne Homes and that under the facts of this case Hodne Homes is not entitled, as a matter of law, to a variance altering the side and rear yards of Lot 1.

Dated at Sioux Falls, South Dakota this the 17th day of September, 2021.

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Certificate of Compliance

The undersigned hereby certifies that this *Reply Brief of Karen Dunham* complies with the type volume limitations set forth in SDCL § 15-26A-66. This Brief is typeset in Times New Roman (12 point) and was prepared using Google Docs. Based on the information provided by Google Docs, this Brief contains 1016 words and 5845 characters (including spaces), excluding the table of contents, table of authorities, and any certificates of counsel.

Dated at Sioux Falls, South Dakota this the 17th day of September, 2021.

/s/Jimmy Nasser
Jimmy Nasser

Certificate of Service

The undersigned hereby certifies that the foregoing *Reply Brief of Appellant Karen Dunham* was filed electronically with the South Dakota Supreme Court on September 17, 2021 and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, SD 57501-5070, within 5 days thereafter.

The undersigned further certifies that an electronic copy of *Reply Brief of Appellant Karen Dunham* was served via email upon the attorneys set forth below on the 17th day of September, 2021.

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