Appeal No. 26859

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

In the Matter of Conditional Use Permit #13-08, Doug Hanson and Louise Hanson,

Petitioners and Appellants,

vs.

Minnehaha County Commission, Minnehaha County, South Dakota and Eastern Farmers Cooperative,

Respondents and Appellees,

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Robin J. Houwman, Circuit Court Judge Presiding

---

BRIEF OF APPELLANT

Attorney for Appellant

Rick L. Ramstad
CREW & CREW, P.C.
141 N. Main Ave, Ste. 706
Sioux Falls, SD 57104
Tel.: (605) 334-2734
Attorney for Appellants

Attorney for Appellees

Sara E. Show
Deputy State's Attorney
515 N. Dakota Ave
Sioux Falls, SD 57104
Tel.: (605) 367-4226
Attorney for Appellees
Minnehaha County

John H. Billion
MAY & JOHNSON, P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57108
Tel.: (605) 336-2565
Attorney for Eastern Farmers
Cooperative

NOTICE OF APPEAL FILED: NOVEMBER 12, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

South Dakota Administrative Rules (A.R.S.D.)

Code of the Federal Register (C.F.R.)

Cases

United States Supreme Court

Supreme Court of South Dakota

Other Jurisdictions

Pending Cases

Secondary Authorities

PRELIMINARY STATEMENT

The transcript of the hearing before the Minnehaha County Commission is referred to as H.T. The transcript of the trial is referred to as T.T. The record settled by the clerk of the circuit court is referred to as R.

JURISDICTIONAL STATEMENT

This matter was tried de novo to the Honorable Robin J. Houwman, in Minnehaha County in the Second Circuit. The trial commenced on July 31, 2013 and concluded that day. The trial court's Memorandum Decision was filed on September 26, 2013, incorporating its Findings of Fact and Conclusions of Law pursuant to SDCL 15-6-52(a). (R. 52). The parties filed timely objections thereto. (R. 91, 95 and 97). An Order and Entry of Judgment on Appeal was filed by trial court on October 11, 2013 (R. 99) and Notice of Entry of that document was served on October 15, 2013. (R. 103). A timely Notice of Appeal was filed and served on November 12, 2013. (R.105).

Jurisdiction for this appeal is pursuant to SDCL 15-26A-3(1), 15-26A-3(4) and at SDCL 15-26A-7.

ISSUES

1. Is Minnehaha County's failure to establish and consider criteria before making a decision to approve or disapprove a conditional use

permit in contravention of SDCL 11-2-17.3, rendering its approval of a conditional use permit arbitrary and capricious and in violation of due process of law?

The trial court held that general criteria set forth in the Comprehensive Plan satisfied the requirements of SDCL 11-2.17.3.

Apposite Cases

In re Cond. Use Permit Denied to Meier, 2000 SD 80, 613 NW 2d 526.

Jensen v. Lincoln County Bd. of Com'rs, 2006 SD 61, 718 NW 2d 606

Kirschenman v. Hutchinson County Bd., 2003 SD 4, 656 NW 2d 330

2. Was the vote of the Minnehaha County Commission to uphold the grant of a Conditional Use Permit in contravention of the Hanson's right to due process of law following the ex parte communication and investigation by one county commissioner with the applicants prior to his making a motion to approve the permit and upon his advocacy for approval toward other commissioners?

The trial court held that its disqualification of the vote of one member of the County Commission placed the Appellants in the same position as they occupied before the vote.

Apposite Cases

Armstrong v. Turner Co. Bd. of ADJ., 2009 SD 81, 772 NW 2d 643

Hanig v. City of Winner, 2005 SD 10, 692 N.W.2d at 210

STATEMENT OF THE CASE

This is an appeal of a de novo trial in circuit court following Eastern Farmer's Cooperative's (EFC) application for a conditional use

permit to construct an agronomy center to handle, store, and distribute anhydrous ammonia in Minnehaha County, South Dakota.

On January 28, 2013, the Minnehaha County Planning Commission unanimously approved the application for Eastern Farmer's conditional use permit. On January 29, 2013, the Petitioners appealed the Planning Commission's decision to grant the conditional use permit to the Minnehaha County Commission. The appeal was considered on February 19, 2013.

At both hearings the Hansons argued that because Minnehaha County had not established any criteria for evaluating the conditional uses it had identified under its zoning ordinances as required by SDCL 11-2-17.3, approving the use would be arbitrary and capricious and in violation of Petitioner's right to due process of law. H.T. 28:21. Prior to the County Commission's vote on the matter one commissioner revealed that he had taken an ex-parte tour of a different facility operated by Eastern Farmer's in Worthing, South Dakota. All four commissioners present voted in favor of approving the action of the Planning Commission.

The Hansons sought de novo review of the decision in circuit court pursuant to SDCL 7-8-30.

At trial the court held that the criteria set forth in the Comprehensive Plan satisfied the requirements of SDCL 11-2-17.3, but ruled that Commissioner Kelly's ex-parte investigation disqualified his vote. The trial court found no evidence of influence in the other three votes. The trial court held that the Hansons would remain in the same position as they would have if Kelly had not voted.

STATEMENT OF THE FACTS

This matter begins with Eastern Farmer's Cooperative's (EFC) application for a conditional use permit to construct an agronomy center to handle, store, and distribute among other things, a variety of fertilizer products, specifically to include anhydrous ammonia in Minnehaha County, South Dakota. T.T. at Ex. 3 (Staff Report). The real property which is the subject of the application is presently zoned A-1 Agriculture. *Id.* The proposed site is approximately three miles north of Colton, South Dakota. *Id.* The Appellants, Doug and Louise Hanson, reside directly north across a county road traversing the properties. H.T. 43:9.

Pursuant to Minnehaha County Revised Zoning Ordinance (MCRZO) Art. 3.04 (X) and (BB), "Agriculturally related operations involving the handling, storage and shipping of farm products" and

"Facilities for the storage and distribution of anhydrous ammonia" are established as conditional uses of property zoned A-1 Agricultural, respectively. T.T. at Ex. 5. The ordinance scheme does not establish any criteria to be used to decide whether or not to permit such a conditional use.

Anhydrous ammonia is commonly used as a nitrogen fertilizer in agriculture. "Anhydrous" ammonia means that the ammonia is "without water." The United States Environmental Protection Agency has characterized anhydrous ammonia as follows:

> Anhydrous ammonia is very corrosive, and exposure to it may result in chemical-type burns to skin, eyes, and lungs. It may also result in frostbite, since its boiling point is -28°F. Ammonia is *hygroscopic*, which means it has a high affinity for water, and migrates to moist areas like the eyes, nose, mouth, throat, and moist skin. Released anhydrous ammonia will rapidly absorb moisture from air and form a dense, visible white cloud. This dense cloud tends to travel along the ground on a cool day.
>
> If there is no visible cloud, you can still detect an ammonia release by its pungent odor when it is present in the concentration of 5 to 50 parts per million (ppm*). Exposure to anhydrous ammonia between 5 and 50 ppm can cause headaches, loss of the sense of smell, nausea, and vomiting. Concentrations above 50 ppm result in irritation to the nose, mouth, and throat causing coughing and wheezing. Concentrations of 300 to 500 ppm are immediately dangerous to life and health. People will generally leave the area due to lung irritation, coughing, and shortness of breath. Higher exposures can cause fluid in the lungs (pulmonary edema), and

> severe shortness of breath. Ammonia is also flammable and explosive. It can be ignited by something as common as the electric flash from a switch.

U.S. Environmental Protection Agency, *Accident Prevention and Response Manual*, 3rd Add. (March 2006) [1]

Transportation of anhydrous ammonia is regulated by the United States Department of Transportation when it's in air or rail or highway or pipeline. *Congressional Research Service, Regulation of Fertilizers: Ammonium Nitrate and Anhydrous Ammonia* (May 2013). Workplace safety is governed by OSHA regulations. *Id.* The State of South Dakota has adopted the standards for the construction of anhydrous ammonia facilities through incorporation of the Code of Federal Regulations and ANSI standards. SDCL 38-19-36.1, S.D.A.R. 12:44:03:01, (citing 29 C.F.R. § 1910.111 and ANSI K61.1-1999 (T.T. at Ex. 7)).

In certain instances ANSI standards prohibit the location of anhydrous facilities. T.T. at Ex. 7, p. 14. However, no state or federal regulations specify any criteria to consider with respect to locating

[1] Available at: http://www.epa.gov/region7/toxics/pdf/accident_prevention_ammonia_refrigeration.pdf.

anhydrous ammonia storage and handling facilities with respect to residential homes. T.T. at Ex. 3.

On January 28, 2013, the Minnehaha County Planning Commission unanimously approved the application for Eastern Farmer's conditional use permit over the concerns of the Hansons and other neighboring property owners that the staff analysis of the proposal had not been subjected to sufficient review regarding the danger of placing a chemical storage within close proximity to residential neighbors.

On January 29, 2013, the Petitioners appealed the Planning Commission's decision to grant the conditional use permit to the Minnehaha County Commission. *Id*. The appeal was considered on February 19, 2013.

Before the County Commission, the Hansons and their neighbors again urged the Minnehaha County Commission to consider the dangers of locating a fertilizer plant in close proximity to residential neighbors, a daycare and a church. H.T. pp. 25-50. The time to present the case was strictly limited by the Commission Chair: "I'd like to keep this within an hour total, and I think we should have no problem in doing that. Frankly, I will limit the number of minutes that the opponents will speak

since there's many more of you than there is of the proponents." T.T. 9:25. No testimony was received by the Commission under oath. No opportunity was provided for any party to call witnesses or cross examine opposing views.

At both hearings the Hansons argued that because Minnehaha County had not established any criteria for evaluating the conditional uses it had identified under its zoning ordinances as required by SDCL 11-2-17.3, approving the use would be arbitrary and capricious and in violation of Petitioner's right to due process of law. H.T. 28:21.

The Hansons and several other neighbors expressed concerns regarding the caustic nature of anhydrous ammonia and the dangers associated with its handling and storage. H.T. 29:3. Examples of previous catastrophic accidents were identified and documents were presented detailing the aftermath of these incidents. T.T. at Ex. 2. The Hansons expressed specific concerns concerning surface water naturally flowing from the proposed site across their property, making it more likely that an anhydrous ammonia spill or leak would also drift or travel directly across their property. H.T. 29:4.

The Hansons submitted a diagram depicting a model plume analysis in the event of a discharge of anhydrous ammonia from the site. T.T. at Ex.

2. The computer based model demonstrated that due to their close proximity to the site, the Hanson property would be engulfed in an ammonia plume in the event of a significant discharge. H.T. 37:19. The Hansons urged the Commission to study this issue further and requested the County request its emergency management office to analyze the impact of a potential spill or leak before it made its decision. HT 31:1.

In its discussion of the matter, the Commission noted that safety was a concern, but moved to proceed with its approval of the Planning Commission's decision without further analysis. Commissioner Barth had earlier inquired as to the amount of the capital investment which would be made in the facility and while acknowledging that there had been some previous disasters, commented that he believed that the Hansons had overstated their safety concerns. "It's not exactly like areas of our county have been depopulated by this stuff." H.T. 56:8.

Commissioner Kelly echoed Barth's sentiments regarding safety:

> Mr. Ramstad, you made some points. First is the plumes you showed and -- was that a worst-case scenario situation? I'm going to ask a couple of questions and then let you answer them. The other is have you been down to the facility down at Worthing and seen the safety equipment that is on the anhydrous ammonia and what -- or have you been to any facility where you've seen what they have for safety measures, the breakaway valves, the stops, the emergency – there's cords I know that you can quickly pull and will shut every valve and

> -- have you looked at any of that? You've told us all the bad things about the ammonia, but the possibility of the leak is getting less and less and less from what I saw up in Worthing so –

H.T. 57:9.

Commissioner Beninga called for a vote, noting that the commission "had over an hour of input. We'd like to move on." H.T. 59:15. With four of the five voting members of the Commission present, Commissioner Kelly moved the approval of the Planning Commission's action and Commissioner Barth seconded the motion. H.T. 59:17.

Following his "second", Barth suggested that perhaps there should be "national" action taken to address the hazards presented, but upon consideration of two intersecting paved roads along a railroad concluded "If not there, then where? . . . [T]he location is as good as it gets." H.T. 60:16.

Following Barth's comments, Commissioner Kelly, revealed that he had visited a different facility operated by Eastern Farmer's in Worthing, South Dakota the previous day:

> Well, I think a lot of the spills that were acknowledged in the newspaper articles and stuff, I think a lot of them were a result of rail -- derailments, not at a processing plant or at a facility such as this. I went down and visited Worthing yesterday. I called them up and asked them if they'd take me through, and they were glad to. I really wanted to see one. I didn't know

> exactly what an agronomy facility was, but the safety measures I was very impressed with. The other items that -- where they mixed the fertilizers and things like that are all -- I mean there's catch basins, and the requirements they work under are very, very strict, and I think, you know, I think they're enforced. Now, Mr. Ramstad alluded to that we don't have a good plan in our emergency management. I would argue with that, but I think that, again, I know when they told me down at Worthing they'd worked with the fire departments down there because in some of these areas you don't want to pour water on it, and all the fire departments around there know how to handle the fire if they come into the plant.

H.T. 61:15.

Commissioner Beninga used the "Chair's privilege to advocate for approval":

> I certainly support economic development in this county, and I do appreciate the fact that this is a significant investment and the number of people it employs. I think if, in fact, if the petitioner – or the applicant can take into consideration a couple of the suggestions that was made by one of the candid people who spoke about the daycare issues and the proximity to the landowners and the housing development, that would make it much easier for me to support. If those could be moved to the other end of the property, so to speak, if that potentially possible, by still keeping the railroad crossing available, I think that is important.

H.T. 65:10.

All four commissioners present voted in favor of approving the action of the Planning Commission. The Hansons sought de novo review of the decision in circuit court pursuant to SDCL 7-8-30 (R.1).

At trial in this matter Scott Anderson testified regarding his role as the Minnehaha County planning and zoning director in reviewing applications for conditional use permits and making recommendations. T.T. 28:10. Anderson testified that it is his practice to evaluate all conditional use permits using five general administrative criteria:

1. The effect on use and enjoyment of other property in the immediate vicinity;

2. The effect upon the normal and orderly development and improvement of surrounding vacant properties for uses predominant in the area;

3. That utilities, access roads, drainage and/or other necessary facilities are provided;

4. That off street parking and loading requirements are met; and

5. That measures are taken to control offensive odor, fumes, dust, noise, vibration, and lighting, so that none of these will constitute a nuisance.

T.T. Ex. 3.

Anderson testified that these administrative criteria were not published as part of the official zoning ordinance and were not unique to any particular conditional use. T.T. 25:8 - 36:15.

With respect to the first criteria, Anderson summarily concluded that it would be unlikely that there would be any significant impact on the use

and enjoyment of other property in the immediate vicinity because of the agricultural character of the area. At trial Anderson acknowledged that the area was also populated with dwellings used for residential use and a church. T.T. 37. His report identified three existing farmsteads and a church within one-half mile of the site. *Id.* at Ex. 3.

In his report, Anderson noted that there would be sensitive material stored at the site, but did not specify the nature of the material. *Id.* At trial he specifically identified anhydrous ammonia, pesticides, herbicides, chemicals used for coating seeds, gasoline and diesel fuel as supporting his recommendation that the site maintain a six foot perimeter fence for security purposes. Anderson stated that with a background in urban planning, he had no expertise in securing storage facilities and did not seek outside expertise in making his recommendation. T.T. 39:10. Anderson could offer no opinion that his proposed fence would abate a chemical leak or spill. *Id.* at 39:18.

In making his recommendations, Anderson admitted that although he knew that anhydrous ammonia is a potentially deadly chemical, he had not made any determinations with respect to the specific hazards it presented or if there were any wells in the area. T.T. pp. 41-42.

Lynn DeYoung presented testimony at trial regarding his role as the Director of Emergency Management for Minnehaha County. T.T. p. 74 DeYoung is responsible for conducting hazard analysis, developing updates, plans for emergency preparedness, response, recovery, and hazard mitigation for Minnehaha County. T.T. 74:3. DeYoung testified that he had been specially trained in responding to hazardous chemical spills, including certification as a hazardous materials technician, hazardous material operation and hazardous material awareness as part his previous and current job duties, and had approximately fifteen years of experience in the field. T.T. 77:1

DeYoung testified that his only tasked role in evaluating Eastern Farmer's conditional use application was to prepare a memorandum for the County addressing the general ability of emergency responders to respond to hazardous material incidents. T.T. 74:15, Ex. 3. DeYoung's report generalizes various available County resources in the event of the need for an emergency response, but makes no reference to anhydrous ammonia or other farm chemicals and does not assess the proposed Eastern Farmers facility or its potential impact of its site placement. *Id*. at Ex. 3.

DeYoung went on to describe the hazards associated with an anhydrous ammonia spill:

> Typically what is released from the container of anhydrous ammonia is a gas product. It usually comes out -- usually, you know, inside of a tank, it's liquid and then when it comes out, turns to gas rather quickly, so it's -- when you see it escaping as a white gas.
>
> Typically it's heavier and lays forward to the ground so it's a heavy, heavy gas.

T.T. 84:19.

DeYoung explained that the standard in emergency planning is to establish worse case scenarios and likely scenarios to plan around a response. DeYoung noted that the Colton Volunteer Fire Department, located approximately three and a half miles to four miles south of the facility would be the first responder to the proposed EFC site. T.T. 78:1. DeYoung had no information regarding the Colton department's qualifications to deal with hazardous waste situations as first responders. T.T. 78:6. DeYoung testified that the response time from the Sioux Falls units to Colton would be approximate 40 minutes. T.T. 96:3.

DeYoung identified a leak of 55 gallons as considered large under the 2012 Emergency Response Guidebook. T.T. 96:7. DeYoung could not determine if a response from Sioux Falls would be required to react to such a leak or whether or not the local volunteer fire department was trained or equipped to respond to such an event. T.T. 96:19. DeYoung noted the legal reporting requirements regarding hazardous materials such as anhydrous

ammonia, but stated that because the proposed site was not an actual facility, no reports were presently required.

DeYoung testified that computer modeling software was available which can identify the potential for various chemicals to "put off plumes" in the environment and that emergency planners use these computer software programs to model such plumes in disaster preparedness and response activities:

> Basically in plume analysis, you look at, you know, the various point on the map which might be any facility and then you add into that terrain, temperature, humidity, the various aspects of the chemical. And then typically you put it into your computer program, and then it spits out a plume basically on all those factors.

T.T. 79:9.

DeYoung testified that he had used the software from the Sioux Falls Fire Department in the past, but that he had not been asked to conduct a plume analysis with respect to the Eastern Farmers facility. T.T. 80:5.

At trial, Commissioner Dick Kelly affirmed that prior to his vote on the conditional use permit he called Eastern Farmers and requested a tour of a similar facility in Worthing, South Dakota. T.T. 103:2. Kelly was given a tour on the Monday prior to the Tuesday commission meeting. T.T. 103:10.

Kelly did not advise the other commissioners of his intentions or provide any public notice that he was conducting his own investigation. T.T.103:21.

While at the Eastern Farmer's facility, Kelly toured the interior and exterior of the plant and was advised concerning safety procedures and apparatus related to the storage of anhydrous ammonia. T.T. 104:8. From his tour, Kelly concluded that "I thought the likelihood of any problems was very, very, very remote" and that he was impressed with the safety measures. T.T. 107:19. Kelly admitted that he did not have any special knowledge regarding the safe handling and storage of anhydrous ammonia, but distinguished lessened safety concerns in retail operations than those involving railway accidents. T.T. 108:7.

Kelly's tour also convinced him that local fire departments were capable of responding to an accident based upon representations that Eastern Farmers had engaged in discussions regarding response techniques for first responders. "I had no reason to believe they were lying to me." T.T. 111:1.

In describing his contact with an Eastern Farmer's representative, Kelly offered an equivocal characterization of the meeting:

> Q. The person who gave you the tour at Worthing, did that person lobby you at all -- lobby you or advocate for your vote on this matter?

A. Well, I would guess maybe somewhat, but I think if there was a lobbying, it was simply here's what we do, here's what we take to mitigate the problems.

Q. Commissioner Kelly, your role in going to Worthington (sic) waived (sic) in favor of your decision to vote to approve this conditional use permit, didn't it?

A. Um, I was -- I saw what they do. I saw what their safety precautions were. There are other factors that had to be taken into consideration other than just what I saw down at Worthing and I believe this was a part of my decision-making process. It wasn't the only factor.

Q. You stated at the commission meeting that, "the safety measures, I was very impressed with" quote. Is that fair to say?

A. Yes.

T.T. 129-130.

Kelly discounted the County Commission's failure to further analyze the potential hazard to the Hansons and other neighbors through the use of plume analysis as him being just "one of five votes" and without knowledge of how a leak at the proposed Eastern Farmer's facility may impact its neighbors. T.T. 112:1.

In defending his vote in favor of the facility, Kelly acknowledged that the plume analysis presented in opposition to the plant was relevant, but noted that the issue was given a limited amount of time and that he was but one vote. T.T. p.116. Instead Kelly stressed his belief that the plant would

be safe based upon his own observations and the economic impact to the County of a ten million dollar investment which might employ 20 to 25 people. In declining to explain why he weighed economic benefit over safety considerations, Kelly deferred to the appeals process: "I'm not a scientist. We're sent there to make decisions and if they don't like our decisions there's an appeal process which we're in right now – can't possibly know everything."

> I talked about the fact that I saw what -- and I didn't know that before I went into this thing, their protections against gas leaks and spills, that still doesn't prevent an airplane from crashing into it and causing it blow up, but the safety precautions, to me, seemed they were redundant and I thought they were effective.

T.T. 122.

Kelly noted that his purpose in discussing his impressions with respect to safety issues was to persuade a favorable vote for Eastern Farmers among other commissioners:

> Safety had been brought up at the commission meeting and then testimony, and so I guess, I thought it was relevant that my observations, my perception of their safety was information that I would imply on the rest of the commission.

T.T. 122-123.

Although voting in favor of approving the conditional use permit, Commissioner Jeff Barth acknowledged that the commission had not

considered any criterion in determining the location of the facility as compared to existing residential structures.

> Q. Do you know if the county was using any standards with respect to locating this facility next to the residential structure?
>
> A. No. I think that clearly it was something we needed to consider.

T.T. 138

> Q. You didn't base your consideration upon any particular standard related to where fertilizer plants should or shouldn't be as it relates to other structures or property or people?
>
> A. I took it into consideration there were neighbors.
>
> Q. But did you use any particular standards to guide you?
>
> A. I would say no.

T.T. 158:24.

Commissioner John Pekas testified that he had relied upon the general purpose of zoning laws to protect the health, safety and welfare of the community to guide his decision, but acknowledged that no particular criterion existed to consider the conditional uses applicable to the proposed use like those specifically applicable to concentrated livestock feeding operations. T.T. 169:5.

In rejecting the Hanson's claim that the County had failed to establish criteria to consider, the trial court found that the comprehensive plan

established six criteria for the county to consider. In the comprehensive plan, these "criteria" fall under the bold heading and sub heading "**Commercial/Industrial - Agriculturally related businesses.**" The plan establishes general considerations for agriculturally related business in commercial/industrial zones:

> Adjacent to county and state highways.
> Rail access for industrial uses.
> Controlled access on to major roadways.
> Adequate buffering from neighboring uses.
> Convenient siting of commercial uses for customers.
> Hard surfaced driveways and parking areas.

M.C.C.P § 4-2. (cited as §4.9 in the trial court's memorandum).

The trial court found that these general location and design criteria outlined in the Comprehensive plan for future planning in the County's commercial and industrial areas (as opposed areas zoned agricultural) met the statutory requirement that zoning ordinances authorizing conditional uses establish criteria for each conditional use established. SDCL 11-2-17.3.

In ruling on the issue of Commissioner Kelly's ex-parte investigation, presented, the trial court disqualified Kelly's vote. The trial court found no evidence that the other three votes were invalidated upholding Commissioner Barth's vote despite his admission that that he had not

considered any particular standard with respect to the location of the proposed facility and neighboring properties and upholding Commissioner Pekas' vote despite his assertion that he relied only upon the general considerations of health, safety and welfare in casting his vote.

The trial court found that with three votes in favor and one vote disqualified, the vote tally reflected a majority of the five member commission and that upon vacating Commissioner Kelly's vote, the Hansons would remain in the same position as they would have if Kelly had not voted.

ANALYSIS AND ARGUMENT

A. Standards of Review

In 2004 the South Dakota Legislature modified SDCL Ch 11-2 to eliminate the power of a board of adjustment to approve conditional use permits. SDCL 11-2-53. 2004 SD Sess. Laws Ch 101, § 2-4 (striking the phrase "conditional use(s)" throughout). This change created inconsistent and contradictory processes which confuse and create anomalies in the legal holdings in conditional use cases:

> Prior to 2004, the law provided that a county board of adjustment had the authority to approve conditional use permits and variances. The law also specified that appeals from a board of adjustment went directly to circuit court by way of a writ of certiorari. *See id.* ¶ 20, 764 N.W.2d at 711

> (citing *Jensen* v. *Turner Cty. Bd. of Adjustment*, 2007 SD 28, ¶ 4, 730 N.W.2d 411, 412-13); *see also Elliott v. Board of County Comm'rs of Lake County,* 2005 SD 92*, ¶* 14*,* 703 N.W.2d 361, 367. In 2004, the legislature removed the provision in the law that gave a County board of adjustment the authority to approve conditional use permits. In its place, the legislature passed a new law giving the power to the County to designate the entity responsible for approving conditional use permits. SDCL 11-2-17.3. Although the legislature left intact the appeal procedure from a board of adjustment, the legislature omitted any reference to an appeal procedure if the county designated entity was not a board of adjustment. The effect of the omission has created inconsistencies in the appeal process depending on which entity a county designates as the approving authority. Thus, the same action of approving or denying a conditional use permit may have a different appeal procedure depending on which entity approves the permit.

Armstrong v. Turner County Bd. of Adj, 2009 SD 81 ¶ 10, 772 NW 2d 643, 647

The inconsistencies and distinctions in the various processes necessary to challenge decisions regarding conditional use permits have been specifically addressed by the this Court. *Goos RV Center v. Minnehaha County Commission*, 2009 SD 24, 764 N.W.2d 704 (Involving a conditional use request for the excavation of gravel).

Minnehaha County zoning ordinances state that a conditional use permit is applied for in the first instance with the Planning Commission. *Id.* citing MCRZO Article 19.01. Like *Goos,* in this case, the Minnehaha

County Planning Commission approved an application for a conditional use permit. Again like *Goos*, pursuant to Minnehaha County's zoning ordinance scheme, an appeal of the Planning Commission's decision was heard by the Minnehaha County Commission. *Id.* citing Article 19.06.

Under Minnehaha County's zoning scheme, upon appeal from the Planning Commission, the County Commission's choice is to "uphold, overrule or amend the decision of the Planning Commission." *Id.* Appeals from the County Commission to circuit court are "heard" and "determined" by de novo review in circuit court pursuant to SDCL 7-8-30.

In *Schrank v. Pennington County Bd. of Comm'rs*, 1998 SD 108, ¶ 15, 584 N.W.2d 680, 682, this Court concluded this standard means "the circuit court should determine anew the question . . . independent of the County Commissioner's decision." In this regard, this Court has also noted that "the circuit court should determine the issues before it on appeal as if they had been brought before the court originally." *Tri County Landfill v. Brule County*, 535 NW 2d 760, 763 (S.D. 1995).

In addressing the issue of de novo review, this Court has stated:

> While we said the trial court should determine the question anew, we did not mean the court should sit as a "one man Board of Adjustment" and determine if it would issue a conditional use permit in the first instance. As we also said in

> *Coyote Flats*, 1999 SD 87 at ¶ 42, 596 N.W.2d at 356-57, "[t]his Court [*i.e.,* the Supreme Court] is not warranted in directing the manner in which the Commission should exercise its legal discretion." The trial court is instructed to determine anew all matters of fact without ascribing any presumption of correctness to the Board's findings on the evidence. Once the trial court finds the facts, it is to determine if the actions of the Board were arbitrary or capricious, *i.e.,* whether the actions of the Board were "based on personal, selfish, or fraudulent motives, or on false information, [or] ... characterized by a lack of relevant and competent evidence to support the action taken."

Coyote Flats, L.L.C. v. Sanborn County Commission, 1999 SD 87 at ¶ 14. *In re Conditional Use Permit Denied to Meier*, 2000 SD 80 ¶ 22, 613 NW 2d 523. "A decision is [also] arbitrary and capricious when it is 'not governed by any fixed rules or standard.'" *Smith v. Canton Sch. Dist. No*. 41-1, 1999 SD 111, ¶ 9, 599 N.W.2d 637, 639-40 (quoting *Black's Law Dictionary* 104 (6th ed. 1990)).

The construction of a statute and application of the facts present questions of law which this Court reviews de novo. *Kern v. City of Sioux Falls*, 1997 S.D. 19 974, 560 N.W.2d 236,237.

B. The Constitutional Dimensions of Conditional Uses

This Court has recognized that the issuance of conditional use permits is of Constitutional dimensions:

> The Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be deprived of life, liberty,

> or property, without due process of law[.]" US Const. amend. V. The United States Supreme Court has long held that invasion of private property by the government is not unlimited. *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed. 842 (1928) (citing *Euclid v. Ambler Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). Zoning restrictions are allowed "for the purpose of promoting health, safety, or the general welfare of the county." SDCL 11-2-13. Zoning ordinances serve to limit the use of private property. "Although it is axiomatic that private property cannot be taken without due process of law, this limitation does not shield private property from regulations, such as zoning, which are implemented under the police power.' *Schafer v. Deuel County Bd. of Comm'rs*, 2006 SD 106, ¶ 11, 725 N.W.2d 241, 245 (citations omitted). Conditional uses within a zoning district are authorized by ordinance and "owing to certain special characteristics attendant to its operation," must be evaluated and approved separately. SDCL 11-2-17.4. The nature of the evaluation and approval as it applies to specific individuals or situations is quasi-judicial. *See Schafer*, 2006 SD 106, ¶ 16, 725 N.W.2d at 249. Thus, a local zoning board's decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints. As such, the "'constitutional right to due process includes fair and impartial consideration' by a local governing board." *Hanig* v. *City of Winner*, 2005 SD 10, ¶ 10, 692 N.W.2d 202, 205 (quoting *Riter* v. *Woonsocket Sch. Dist.*, 504 N.W.2d 572, 574 (S.D.1993)).

Armstrong v. Turner County Board of Adjustment, 2009 SD 81 ¶ 19, 772 N.W.2d 643, 650-651.

C. South Dakota's Conditional Use Standards

Pursuant to South Dakota law, "the County has a duty to administer and enforce its own zoning ordinances." *Jensen v. Lincoln County Bd. of Com'rs*, 2006 SD 61, ¶11, 718 NW 2d 606, 611(citing SDCL 11-2-25 ('The

board [of county commissioners] *shall* provide for the enforcement of the provisions of this chapter and of ordinances, resolutions, and regulations made thereunder")). "It also has a duty to specify in its ordinances 'each category of conditional use requiring such approval, the zoning districts in which a conditional use is available, and the criteria for evaluating each conditional use.'" *Id.* quoting SDCL 11-2-17.3.

South Dakota law defines a conditional use as "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." SDCL 11-2-17.4.

In the context of conditional use permits, South Dakota law requires:

> A county zoning ordinance . . . that authorizes a conditional use of real property shall specify the approving authority, each category of conditional use requiring such approval, the zoning districts in which a conditional use is available, and the criteria for evaluating each conditional use. 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."

In re Conditional Use Permit Denied to Meier, 2000 SD 80, 613 NW 2d 526.

In enacting its ordinance scheme, Minnehaha County has established numerous conditional uses within agriculture districts. MCRZO 3.04, T.T. at Ex. 5. While all are subject to standardized requirements regarding issues such as signage, parking and density, the County has established additional criteria related to uses of a general industrial nature. *Id.* at (A) (Rock, sand, or gravel extraction in conformance with Article 12.08); (B). Mineral exploration in conformance with Article 12.04 (also conditional uses in General Industrial District under Article 8.) Likewise, certain "special" agricultural uses are constrained by specific criteria attendant to their use. *Id.* at Article 3.03 (I). Concentrated Animal Feeding and (J.) Concentrated animal feeding operation (existing). However, MCRZO Art. 3.04 (X) and (BB), (Agriculturally related operations involving the handling, storage and shipping of farm products and Facilities for the storage and distribution of anhydrous ammonia) have no identified criteria attendant to the grant of such a use.

While the trial court found that the general considerations with relation to buffering legally sufficient under SDCL 11-2-17.3, this conclusion cannot be reconciled with the jurisprudence of this Court.

Meier, 2000 SD 80, 613 NW 2d 526. *Meier*, reveals the contrast between a county's conditional use scheme in compliance with the mandates of SDCL 11-2-17.3 as opposed to the ad hoc procedure used by the Minnehaha County Commission in this case. The ordinance at issue provided:

> Before any conditional use is issued, the Board of Adjustment shall make written findings certifying compliance with the specific rules governing individual conditional uses and that satisfactory provisions and arrangement has been made concerning the following [general conditions applicable to all conditional uses]."

Id. See also, Armstrong v. Turner Co. Bd. Of Adj, 2009 SD 63, 81¶ 18 772 NW 2d 643, 650 (noting that "Turner County zoning ordinances set forth the procedure for the board of adjustment when considering a conditional use application" (quoting the ordinance, providing that "[b]efore any Conditional Use Permit shall be granted, the Board of Adjustment shall make written findings certifying compliance with the specific rules governing individual Conditional Use Permits . . . ")).

In *Meier*, this Court wrote approvingly of the Aurora County conditional use scheme and its meaningful adherence to the requirement of having fixed rules upon which conditional use permits must be considered:

> Section 515 establishes specific standards that one must meet either before the issuance of a permit or after, but it does not preclude other considerations. We interpret factors (c) through (f) of § 515 as being conditions that must be met prior to

> issuance of the permit and factors (a) and (b) as ones which must be met prior to the operation of an animal feeding operation. Our conclusions are supported by the very concept of a conditional use which is "a land use which because of its unique nature is compatible with the permitted land uses in a given zoning district only upon a determination that the *external effects* of the use in relation to the existing and planned uses of adjoining property and the neighborhood *can be mitigated through imposition of standards and conditions."* Alan C. Weinstein, *Anderson's American Law of Zoning* § 34.23, at 572-573 (4th ed. 1997). (emphasis added).

Id. at ¶ 12.

While the Minnehaha County Zoning Ordinance at issue in this case authorizes the Planning Commission to grant or deny conditional use permits for "[a]griculturally related operations involving the handling, storage and shipping of farm products" and "facilities for the storage and distribution of anhydrous ammonia", uses which by their very nature implicate heavy truck and train traffic, together with the storage of an extremely hazardous chemical, the ordinance lays out no criteria upon which the Planning Commission can rely in determining whether to allow these facilities.

Analogous to this Court's observation in *Kirschenman*, "[t]his ordinance is simply an open-ended statement that the [planning commission] is allowed to grant or deny a use permit for [these uses]". *Kirschenman v. Hutchinson County Bd.*, 2003 SD 4 ¶ 9, 656 NW 2d 330,

344. "There are no standards or conditions for determining where, when or how such a facility would be allowed." *Id.* (rejecting the contention that approval of a 3,200-head hog confinement facility was an administrative act when the zoning ordinance provided no conditions specifying the number of permitted animals, proximity to residences, water sources, or other clear objective criteria).

In *Kirschenman,* this Court reasoned: "In fact, it is impossible to 'put [a plan] into execution' where there is no plan already adopted by the governing body." *Id.* This rational is equally applicable here. In the absence of criteria establishing the standards under which an agronomy facility and the hazardous chemicals associated with its use might be located to its neighbors, affords no due process. Minnehaha County, by granting its Planning Commission the blanket power to grant or deny conditional use permits, governed only by its own notion of what is in the health safety and welfare of the public, has assumed unfettered discretion, subject only to its own stamp of approval. This ad hoc process denies the Hansons and their neighbors a fair hearing based upon predetermined criteria.

Adapting the language of *Kirschenman*, "the fact that the ordinance lays out the possibility of allowing such uses [does] nothing to put the [Hansons] on notice that such a use would ultimately be allowed, or, even if

it did, that it [might] permit" such a use, unrestricted in size, location and nature. When conditional use criteria is determined on an ad hoc basis by the vague standards of health safety and welfare, the process becomes the subject of political whims and any effort to raise legitimate concerns regarding the need to consider the risks and benefits of the proposal can be ignored with impunity. Consideration of an issue in the absence of some criteria for a decision on an issue of whether or not a use is compatible with other lawful uses is not due process.

Requiring established criteria for grants of conditional use permits is the duty of the County. By requiring that land uses be established and requests for conditional uses be considered under pre-established criterion, the Legislature has checked the ability of counties to use their zoning authority in an arbitrary and capricious nature. SDCL 11-2-17.3. When a county fails to establish criteria for each category of conditional uses, it has usurped the intention of the legislature.

The use of the word "shall" in the language of SDCL 11-2-17.3 denotes its mandatory application. "A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify . . . each category of conditional use requiring such approval . . . and the criteria for evaluating each conditional use." *Id.* Pre-established

criteria for each conditional use is not optional. And, "[t]he approving authority shall consider the stated criteria . . ." Fashioning criteria on an ad hoc basis is not an option.

Recognizing the application of SDCL 11-2-17.3 to rock, sand, and gravel extraction mineral exploration and concentrated animal feeding operations, demonstrates that Minnehaha County is well aware of its duty. Under the "arbitrary and capricious" standard, the question is not merely whether a decision was made upon "personal, selfish, or fraudulent motives, or on false information . . ." The question is also whether or not the decision is the result of an arbitrary and capricious process. The authority delegated by the Legislature to exercise zoning authority is restrained by this rule. Likewise, the power of the legislature is constrained by the Fifth Amendment and South Dakota's constitutional prohibition against the taking of private property rights without due process of law. Under the scrutiny of the law, the conditional use permit issued in this case is void as unlawful.

D. The Constitutional Right to a Fair Trial in a Fair Tribunal

That the protections of the Fifth Amendment to the United States Constitution protecting against the deprivation of life, liberty and or property, without due process of law apply to zoning proceedings has been

long recognized by the United States Supreme Court. The authority of the government to invade private property rights is limited. *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed. 842 (1928) (citing *Euclid v. Ambler Co*., 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). While zoning restrictions are allowed "for the purpose of promoting health, safety, or the general welfare" of the county, because they restrain the use of private property by regulations implemented under the police power of the state, conditional uses within a zoning district are "owing to certain special characteristics attendant to its operation," and are evaluated and approved separately. SDCL 11-2-17.4.

This evaluation and approval as it applies to specific individuals or situations is quasi-judicial. *Schafer v. Deuel County Bd. of Comm'rs*, 2006 SD 106, ¶ 16, 725 N.W.2d 241, 249. As such, a local decision regarding the issuance of a conditional use permit is quasi-judicial, subject to a "'constitutional right to due process include[ing] fair and impartial consideration' by [the] local governing board." *Hanig v. City of Winner*, 2005 SD 10, ¶ 10, 692 N.W.2d 202, 205 (quoting *Riter v. Woonsocket Sch. Dist*., 504 N.W.2d 572, 574 (S.D.1993)). Due process is "particularly important when individual property rights are affected." *Armstrong v. Turner Co. Bd. of ADJ.*, 2009 SD 81, 772 NW 2d 643. This consideration

applies to both the property owner seeking the conditional use permit as well as the property owners affected by the proposed exception to the zoning district. *Id.*

This Court has stated:

> A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well [as] to courts. Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness.

Hanig, at ¶ 10, 692 N.W.2d at 205-06 (quoting *Strain v. Rapid City Sch. Bd.*, 447 N.W.2d 332, 336 (S.D.1989)).

In *Armstrong,* this Court opined that, "[b]ecause a [local zoning board] functions as an adjudicatory body when it hears requests for conditional use permits, members of the board must be free from bias or predisposition of the outcome and must consider the matter with the appearance of complete fairness." A fair and impartial hearing depends on "whether there was actual bias or an unacceptable risk of actual bias." *Armstrong,* 2009 SD 81 ¶ 21, 772 NW 2d at 651(quoting *Hanig*, *supra* at ¶ 11, 692 N.W.2d at 206 (citing *Voeltz v. John Morrell & Co.*, 1997 SD 69, ¶ 12, 564 N.W.2d 315, 317)). "A reviewing court must consider 'whether the record establishes either actual bias on the part of the tribunal or the

existence of circumstances that lead to the conclusion that an unacceptable risk of actual bias or prejudgment inhered in the tribunal's procedure.'" *Id.* *(quoting Strain*, 447 N.W.2d at 336*)*(internal quotation marks omitted).

The *Armstrong* Court went on to state:

> It should be noted that the standard for disqualification in a quasi-judicial proceeding is stricter than in a regulatory or rule-making proceeding. *Northwestern Bell Tel. Co., Inc. v. Stofferahn*, 461 N.W.2d 129, 133 (S.D.1990) (citing *Application of Union Carbide Corp.*, 308 N.W.2d 753, 757 (S.D.1981)). The standard for disqualification in a regulatory or rule-making proceeding "is that the official should be disqualified only when there has been a clear and convincing showing the official has an unalterably closed mind on matters critical to the disposition of the proceeding." *Id.* at 133-34 (citing *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151 (D.C.Cir.1979)).
>
> The due process standard for disqualification in a quasi-judicial proceeding is that an official "must be disinterested and free from bias or predisposition of the outcome and the 'very appearance of complete fairness' must be present." *Id.* at 132-33 (quoting *Mordhorst v. Egert*, 88 S.D. 527, 223 N.W.2d 501, 505 (1974)). Decision makers "are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances." *Id.* at 133. However, where actual bias or an unacceptable risk of actual bias or prejudgment exists, the decision maker must be disqualified from participating. *Id.*
>
> Determining disqualifying interest does not involve hyper-technical analysis. The interest must be "different from the interest of members of the general public." *Hanig*, 2005 SD 10, ¶ 20, 692 N.W.2d at 209. If the interest is different, then the question is whether a reasonably-minded citizen would conclude that the official's interest or relationship creates a potential to influence the official's impartiality. *See Barrett v.*

> *Union Twp. Comm.*, 553 A.2d 62, 67, 230 N.J.Super. 195, 204-05 (1989). A disqualifying conflict of interest may exist even if the official has not acted upon it. *Id.* However, if "the circumstances [] could reasonably be interpreted as having the likely capacity to tempt," the official should be disqualified. *Voeltz*, 1997 SD 69, ¶ 13, 564 N.W.2d at 318. We have recognized that "personal or pecuniary interests" in the outcome of a proceeding have the potential to influence a decision maker's judgment. *Id.* Likewise, employment relationships or potential employment relationships with parties involved in the proceeding may cause a disqualifying conflict. *Id.*

Id at ¶¶ 22-24.

In *Hanig,* the Court found a disqualifying conflict of interest following a letter from a council member's employer opposing the renewal of a liquor license of a competitor and upon the admission of the member that the issue could affect her tip wages. 2005 SD 10, ¶ 20, 692 N.W.2d at 209. It was determined that this interest was "different from the interest of members of the general public," and "of sufficient magnitude ... [to] disqualif[y] her from participating in the decision." *Id.* The Court stated that: "Consequently, the circumstances and facts of each situation should control whether disqualification is required. If circumstances show a likely capacity to tempt the official to depart from his duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the official." *Id.* ¶ 15.

Ex-parte communications have also led to findings of bias or conflict of interest when zoning board members have communicated ex-parte with parties involved in the matter before the board. *Armstrong,* 2009 SD 81 ¶ 26, 772 NW 2d at 652 (citing *Eacret v. Bonner County,* wherein the Idaho Supreme Court held that a county commissioner's ex-parte communication with a zoning variance applicant and viewing of the property in question resulted in a due process violation. 139 Idaho 780, 787, 86 P.3d 494, 501 (2004)).

The Idaho Supreme Court reasoned that "[a] quasi-judicial officer must confine his or her decision to the record produced at the public hearing," and "[a]ny ex parte communication must be disclosed at the public hearing, including a 'general description of the communication.'" *Id.* at 786, 86 P.3d 494 (citations omitted). *Id.*

In *Armstrong*, this Court also recognized a decision of the Indiana Court of Appeals as persuasive when it found bias after an interested party contacted a member of the zoning board on at least two occasions and discussed the importance of opposing a proposed zoning variance. *Id.* (citing *City of Hobart Common Council v. Behavioral Inst. of Ind., LLC*, 785 N.E.2d 238, 253-54 (Ind. App.2003)).

In *Armstrong* this Court relied upon the South Dakota Administrative Procedure Act, SDCL 1-26-26 as a persuasive authority for the generally accepted prohibition against ex-parte communications as guidance for quasi-judicial local entities. The statute prohibits officials who participate in adjudicatory proceedings from ex-parte communications:

> 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. If one or more members of a board or commission or a member or employee of an agency, who is assigned to render a decision in a contested case, took part in an investigation upon which the contested case is based, he shall not participate in the conduct of the hearing nor take part in rendering the decision thereon . . . A person assigned to render a decision:
>
> (1) May communicate with other members of the agency; and
>
> (2) May have the aid and advice of one or more personal assistants.

Id. quoting SDCL 1-26-26. (emphasis deleted, ellipses added)(noting that "the problem with ex-parte communications is that the opposing parties have no notice or opportunity to respond." (citing *State v. Wilson*, 2008 SD 13, ¶ 19, 745 N.W.2d 666, 672 wherein it was held that a judge's ex-parte

communication with one party without notice to the opposing party and an opportunity to be heard would "not comport with basic understandings of due process." and *State v. Thorsby*, 2008 SD 100, ¶ 13, 757 N.W.2d 300, 304)).

In this case, the question of an alleged bias or risk of bias centers on the distinction between serving as an elected county commissioner under a scheme which also uses the County Commission as the first level of "de novo appellate review" of zoning decisions. A county commissioner wears a different hat when serving on a local zoning board or, as in this case, the final authority for the approval of the actions of a local zoning board. In one instance the commissioner is looking out for the county's best interests and in the other instance the commissioner is tasked to maintain impartiality towards the interests of all of the individuals appearing before him. Certainly Commissioner Kelly would have concerns about the economic development of the county, but would be asked to set aside those interests for the sake of the rights of the other individuals involved.

While these inherently conflicting roles are not per se problematic, Kelly's self-initiated and self-conducted investigation while performing his role as the approval authority for the actions of the Planning Commission

impaired his ability to be a fair and impartial adjudicator for the rights of all of the parties.

Even though Kelly asserts no personal financial interest in the outcome of the proceedings, his ex-parte investigation reveals a deep personal interest in the outcome of the proceedings. This interest, while not for pecuniary gain, serves to disqualify him as a quasi-judicial decision maker. A disqualifying condition exists when a reasonably-minded person would conclude that Kelly's personal interest in the proceedings had the potential to influence his impartiality. Given that the whole of the proceedings from the Petitioner's perspective revolved around issues of safety efficacy, Kelly's conclusion that the safety of the proposed facility was not significant enough to warrant further inquiry, his ability to be impartial after his ex-parte investigation is axiomatic.

Due process requires fair and impartial consideration. The circumstances here reveal actual bias. "If an ex parte communication is invited or initiated by the judge, no prejudice needs to be shown." *O'Connor v. Leapley*, 488 N.W.2d 421, 423 (S.D.1992). That Kelly self-initiated these actions impartiality is per se prejudice. Kelly should have disqualified himself from these proceedings.

Even though the vote was unanimous among the four of the five members present, Kelly's position as the only member who had physically examined a similar facility and spoken with its manager about safety concerns conceivably carried weight with the other county commissioners. Because of Kelly's intended influence on the other votes, the entirety of the vote is suspect and the conditional use permit should be vacated. "When a due process violation exists because of a board member's disqualifying interest, the remedy is to "place the complainant in the same position had the lack of due process not occurred." *Hanig*, 2005 SD 10, ¶ 22, 692 N.W.2d at 210 (citations omitted). The only way to accomplish this with certainty is to vacate the conditional use permit to begin anew.

Despite the trial court's finding that there was no evidence that Commissioner Kelly's extra-judicial investigation affected the votes of other commissioners, in the absence of any findings and conclusions of the commission, it is readily inferred that Kelly's opinions regarding the supposed safety of the Worthing plant influenced the votes of other commissioner's. In their deliberative process, with the exception of Kelly, each noted the location as a concern, but ultimately cast their vote in favor of approval.

No commissioner identified criterion which would establish a basis to conclude that the danger in proximity to the various adjacent uses had been given any meaningful consideration. Considering the plume analysis submitted by the Hansons and the testimony of their own emergency manager that computer analysis was a recognized science in planning for emergency response, their wholesale refusal to request their own employee to evaluate the Hanson's concerns evidences a bias against any measure of risk analysis.

The trial court's factual finding against bias by the three remaining commissioners is inconsistent with both the record and this Court's prior rulings on this issue. *Armstrong v. Turner Co. Bd. of ADJ.*, 2009 SD 81, 772 NW 2d 643 ("Because of the possible influence on the other board members' votes, the permit should be vacated and a new hearing conducted"). As was the case in *Armstrong*, Commissioner Kelly was an active participant in the proceedings and advocated for approval based upon his own ex-parte investigation. By Commissioner Kelly's own admission at trial he had had no particular expertise in judging the safety of such a facility. Likewise Commissioner Barth's trial testimony acknowledges reservations about the safety of the facility after his vote. Commissioner Barth's reservations were specifically developed at trial through his

testimony recanting his assertion that the need to maintain chemical safety gear in proximity to the proposed site was an over statement of the risks associated with the facility.

Holding that three qualified members of the County Commission was a lawful quorum resulted in a lawful act of the County Commission further strains constitutional scrutiny. A similar issue was addressed in *Jensen v. Turner County Board of Adjustment*, 2007 SD 28, 730 NW 2d 411. In *Jensen*, this Court held that SDCL 11-2-59 "abrogated the common-law rule . . . ." and required "a concurring vote of two-thirds of the members of the board" in approving a conditional use permit when a board of adjustment is designated as the approval authority. This holding begs the question of whether or not the Legislature intended different measures of a majority depending upon the status of the body hearing the issue.

Distinct from *Jensen*, in this case, the County Planning Commission was the original approval authority. Under Minnehaha County's ordinance scheme the County Commission itself assumed the role of a "reviewing" body. By designating itself as this quasi appellate authority, Minnehaha County has created a level of review abrogating the statutory rule requiring a 2/3rds majority to approve a conditional use permit.

An analogous situation is presented in *Tyler v. Grant County Board of Adjustment*, (In Circuit Court, Third Judicial Circuit, Grant County CIV 13-0015), (*consolidated appeals pending, Teton, LLP v. Grant Co. Bd of Adj.*, (S.D. Appeal #26837); *Tyler v. Grant Co. Bd. of Adj.*, (S.D. Appeal #26826)). In *Tyler*, Judge Timm ruled that parts of SDCL 11-2 were unconstitutional insofar as some citizens would be entitled to de novo review of conditional use cases but others are only afforded the more limited review provided under a writ of certiorari. Judge Timm found this distinction without a rational basis and in violation of the equal protection of the laws.

While inverse of *Tyler*, being afforded de-novo review, under the trial court's vote counting methodology, the Hansons received neither true de novo review nor the super majority mandated by SDCL 11-2-59. There is no rational basis in protecting a citizen of one county with the requirement of a super majority vote on applications or appeals regarding conditional use permits, while holding applicants and challengers of another county to a different standard. Just as neither the trial court nor this Court should sit as a "one man board of adjustment", the determination in this case based upon a de facto three person board of adjustment cannot be reconciled with a

statute requiring a two-thirds majority of the whole of a five person board which can be overturned by a two person board.

CONCLUSION

The Appellant respectfully requests that the court reverse the judgment of the trial court in all respects.

Dated this 28th day of March, 2014.

/s/ Rick L Ramstad
Rick L. Ramstad
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing "Brief of Appellant were served via e-mail, upon the following:

Sara E. Show
Deputy State's Attorney
515 N. Dakota Ave
Sioux Falls, SD 57104

John H. Billion
MAY & JOHNSON, P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57108

On this 28th day of March, 2014.

/s/ Rick L. Ramstad
Rick L. Ramstad

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 9706 words from the Statement of Case through the Conclusion. I have relied on the word count of a word processing program to prepare this certificate.

Dated this 28th day of March, 2014.

/s/ Rick L. Ramstad
Rick L. Ramstad

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26859

In the Matter of Conditional Use Permit #13-08

DOUG HANSON AND LOUISE HANSON,

Petitioners and Appellants,

v.

MINNEHAHA COUNTY COMMISSION AND MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondents and Appellees,

EASTERN FARMERS COOPERATIVE,

Intervenor and Appellee.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN J. HOUWMAN
CIRCUIT COURT JUDGE

BRIEF OF THE RESPONDENTS AND APPELLEES

ATTORNEYS FOR RESPONDENTS
AND APPELLEES:

AARON MCGOWAN
MINNEHAHA COUNTY STATE'S
ATTORNEY

Kersten A. Kappmeyer
Sara E. Show
Deputy State's Attorneys
415 N. Dakota Ave.
Sioux Falls, SD 57104
Telephone: (605) 367-4226
E-mail: sshow@minnehahacounty.org

ATTORNEY FOR PETITIONERS AND APPELLANTS:

Rick L. Ramstad
Crew & Crew, P.C.
P.O. Box 2343
Sioux Falls, SD 57101-2343
Telephone: (605) 335-5561
E-mail: rick@crewandcrew.com

ATTORNEY FOR INTERVENORS AND APPELLEE

John H. Billion
May & Johnson, P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57108
Tel.: (605) 336-2565
E-mail: jbillion@mayjohnson.com

NOTICE OF APPEAL FILED: NOVEMBER 12, 2013
NOTICE OF REVIEW FILED: NOVEMBER 26, 2013

Table of Authorities

CASES

STATE STATUTES

Table of Contents

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF CONDITIONAL USE PERMIT # 13-08, DOUG HANSON AND LOUISE HANSON, Petitioners/Appellants, vs. MINNEHAHA COUNTY COMMISSION, MINNEHAHA COUNTY, SOUTH DAKOTA, Respondents/Appellees, EASTERN FARMERS COOP, Intervenors/Appellees.	Appeal No. 26859

PRELIMINARY STATEMENT

Throughout this brief, Petitioners and Appellants, Doug and Louise Hanson, will be referred to as "the Hansons." Respondents and Appellees, Minnehaha County Commission and Minnehaha County, South Dakota will be referred to as "the County." Intervenors, Eastern Farmers Coop will be referred to as "EFC." The settled record in the underlying appeal at the circuit court level, *In the Matter of Conditional Use Permit #13-08,* Minnehaha County Civil File No. 13-761, will be referred to as "R." Material contained within the Appendix to this brief will be referenced as "APP." Exhibits from the circuit court trial on July 31, 2013 will be

referred to as "Ex." References to the Hanson's brief will be stated as "HB." Finally, the transcripts from the evidentiary hearing on July 31, 2013 will be referred to as "AT." Furthermore, the County hereby incorporates the arguments set forth in EFC's brief and adopts those arguments as if set forth herein.

JURISDICTIONAL STATEMENT

This matter was tried *de novo* to the Honorable Robin J. Houwman, in Minnehaha County in the Second Circuit. The one-day trial commenced and concluded on July 31, 2013. On September 26, 2013, the trial court filed its Memorandum Decision. R. 44-52. The circuit court incorporated this decision into its Findings of Fact and Conclusions of Law pursuant to SDCL 15-6-52(a). R. 52. The parties filed timely objections to these Findings of Fact and Conclusions of Law. R. 91, 95 and 97. An Order and Entry of Judgment on Appeal was filed by trial court on October 11, 2013 and Notice of Entry of that document was served on October 15, 2013. R. 99 and 103. A timely Notice of Appeal was filed and served on November 12, 2013. R.105. A timely Notice of Review was filed on November 26, 2013.

This Court has jurisdiction for this appeal under SDCL 15-26A-3(1) and SDCL 15-26A-7.

STATEMENT OF THE ISSUES

I. Do the Minnehaha County Ordinances contain criteria as required by SDCL 11-2-17.3?

   The trial court held that criteria set forth in the Minnehaha County Ordinances, including those set forth in the Comprehensive Plan, satisfied the requirements of SDCL 11-2.17.3.

- *State v. Ducheneaux*, 2003 S.D. 131, 671 N.W.2d 841.

- *Schrank v. Pennington Cnty. Bd. of Comm'rs*, 1998 S.D. 108, 584 N.W.2d 680.

- *Daily v. City of Sioux Falls*, 2011 S.D. 48, 802 N.W.2d 905.

II. Were the Hansons entitled to a new hearing based upon the disqualification of Commissioner Kelly's vote?

The trial court held that its disqualification of the vote of one member of the County Commission placed the Appellants in the same position as they occupied before the vote and therefore, no new hearing was necessary.

- *Armstrong v. Turner Co. Bd. of ADJ.*, 2009 S.D. 81, 772 N.W.2d 643.

- *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202.

- *Goos RV Center v. Minnehaha County Com'n*, 2009 S.D. 24, 764 N.W.2d 704.

III. Does *ex parte* communication constitute a *per se* due process violation where the elected official discloses the *ex parte* communication at the hearing on the record?

The trial court disqualified Commissioner Kelly's vote finding that because Commissioner Kelly was basing his decision, in part, on his tour of the agronomy plant that he gave the appearance that he was impartial and predisposed to the outcome.

- *Armstrong v. Turner Co. Bd. of ADJ.*, 2009 S.D. 81, 772 N.W.2d 643

- *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202.

- *Smith v. Fair Haven Zoning Bd. of Adjustment*, 761 A.2d 111, 116 (N.J. App. Div. 2000).

STATEMENT OF THE CASE

The Hansons appealed from a *de novo* appeal in circuit court. EFC applied to the Minnehaha County Planning and Zoning Commission ("the Planning Commission") for a conditional use permit to allow the storage and sale of certain farm products including anhydrous ammonia. Ex. 3. On January 28, 2013, the Planning Commission unanimously approved the application for EFC. Ex. 3. The Hansons timely appealed the Planning Commission's decision. Ex. 3. The Minnehaha County Commission ("the Commission") considered the appeal on February 19, 2013. Exs. 3 and 4. The Commission unanimously affirmed the Planning Commission's decision in a 4-0 vote. Ex. 1 at 66. The Hansons then appealed to circuit court under SDCL 7-8-30. On July 31, 2013, the Honorable Robin J. Houwman heard the appeal *de novo*. *See generally* AT.

The circuit court issued a memorandum decision on September 25, 2013 that was filed on September 26, 2013. R. 44-52. The circuit court held that the Minnehaha County Ordinances had criteria. R. 45-48. The circuit court also held that Commissioner Kelly violated the Hanson's due process rights by visiting the Worthing Agronomy Plant and disqualified his vote. R. 48. The circuit court upheld the Commission's 3-0 decision with Commissioner Kelly's vote disqualified. R. 44-45, 48.

STATEMENT OF THE FACTS

In January 2013, EFC applied for a conditional use permit to allow an agriculturally related operation with storage and distribution of anhydrous ammonia.

Ex. 3. The proposed layout of the site would cover around 60 acres including a railroad looped in an oval around the property to allow trains to load and unload farm products. Ex. 3. This property is located at 46389 245th Street and is 2.75 miles north of Colton, South Dakota (the "subject property"). Ex. 3. EFC plans to build this new state-of-the-art facility to replace the ageing facilities in Baltic and Crooks. Ex. 3. Minnehaha County Ordinances ("the Ordinances") sections 3.04(X) and (BB) require a conditional use permit in order to store and sell agriculturally related farm products and anhydrous ammonia. Ex. 5 at 3.04.

The subject property, as well as the neighboring property, is zoned A-1 Agricultural. Ex. 3; AT at 51. According to the zoning ordinances, the intent of the A-1 Agricultural District is "to provide for a vigorous agricultural industry by preserving for agricultural production those agricultural lands beyond areas of planned urban development." Ex. 5 at 3.01. The Ordinances also recognize that "because of the nature of both agricultural activities and residential subdivisions, [ ]these two uses are generally poor neighbors and therefore a concentration of housing in the A-1 Agricultural District shall be discouraged." Ex. 5 at 3.01.

In preparation for the Planning Commission meeting, the Planning and Zoning Department, through its director, Scott Anderson ("Anderson"), reviewed EFC's application for a conditional use permit. Ex. 3. Anderson recommended to the Planning Commission that the permit be approved. Ex. 3. Before recommending approval, Anderson visited the site and viewed the layout of the land as well as the proximity of homes and businesses to the proposed site. Ex. 3. He

noted that three farmsteads were located within a half mile of the site. Ex. 3. The Hansons' property lies to the north of the subject property. Ex. 3. During his assessment, Anderson also contacted the highway department to discuss any possible impacts upon the highway system. Ex. 3. At the Planning Commission hearing, Anderson noted that according to the County Highway Department, this was the most underutilized highway in Minnehaha County. Ex. 3. Anderson examined inter-departmental areas related to the health, safety, general welfare, and Comprehensive Plan. Ex. 3, AT at 35, 53-54. Ultimately, Anderson recommended approval of the conditional use permit with ten conditions. Ex. 3.

On January 28, 2013, the Planning Commission held a hearing to review the application for the conditional use permit. Ex. 3. The Hansons appeared at this hearing in opposition to the conditional use permit. Ex. 3. The Planning Commission heard public testimony from the Hansons' attorney and other neighbors near the subject property. Ex. 3. At the end of the hearing, the Planning Commission voted unanimously to approve the conditional use permit with the ten stated conditions. Ex. 3. As a member of the Planning Commission, Commissioner Barth voted to grant the conditional use permit at this hearing. Ex. 3, AT at 135. On January 29, 2013, the Hansons appealed the Planning Commission's decision to the Commission. Ex. 3. A hearing was scheduled and held on February 19, 2013. Exs. 1 and 3.

Commissioners Dick Kelly, Jeff Barth, Gerald Beninga, and John Pekas were present at the February 19, 2013 hearing.[1] Ex. 1. The testimony[2] presented at the hearing primarily concerned the safety of anhydrous ammonia and the potential noise, light, and aesthetic affect this plant would have on the surrounding neighbors. Ex. 1. Several residents testified at the hearing or through written documentation provided to the Commission.[3] Ex. 1 at 25-49, Ex. 3. Both Louise Hanson and her attorney, Rick Ramstad, spoke at the hearing. Ex. 3. The opponents to the conditional use permit submitted several documents, including a plume analysis and several newspaper articles concerning anhydrous ammonia. Ex. 2. After hearing testimony and reviewing materials from both sides, the commissioners unanimously voted to uphold the Planning Commission's approval of the conditional use permit. Ex. 1 at 66.

In voting to uphold the Planning Commission's decision, Commissioners Barth, Kelly, and Pekas disclosed the rationale behind their decisions. Commissioner

---

[1] Commissioner Cindy Heiberger was not present and did not vote at the February 19, 2013 hearing.

[2] While the Hansons criticize the process because the testimony was not under oath, they never requested that the testimony be taken under oath or that they be allowed to cross-examine any witness. *See* Ex. 1. Furthermore, this is not required in a quasi-judicial hearing. *See Kletschka v. Le Sueur Cnty. Bd. of Comm'rs*, 277 N.W.2d 404, 405 (Minn. 1979) (in a quasi-judicial hearing, basic rights of procedural due process do not invoke the full panoply of procedures required in regular judicial proceedings).

[3] The Hansons assert that the time to present at the hearing was strictly limited by the Commission Chair, however, the evidence demonstrated that the Hansons, their attorney, and all the other opponents were allowed sufficient time and were not prevented from making their argument in any way. Ex. 1, *See also Kletschka*, 277 N.W.2d at 405. Interestingly, the same argument can be made that the South Dakota Supreme Court limits oral argument time and therefore, a due process violation allegedly occurs.

Barth stated, "[w]e're on two paved highways. If not there, then where? Certainly, there are people that live next door, but there's also – the population is less dense than some other places." Ex. 1 at 60. Commissioner Kelly further stated:

> COMMISSIONER KELLY: Well, I think a lot of the spills that were acknowledged in the newspaper articles and stuff, I think a lot of them were a result of rail – derailments, not at a processing plant or at a facility such as this.
>
> I went down and visited Worthing yesterday. I called them up and asked them if they'd take me through, and they were glad to. I really wanted to see one. I didn't know exactly what an agronomy facility was, but the safety measures I was very impressed with. The other items that – where they mixed the fertilizers and things like that are all – I mean there's catch basins, and the requirements that they work under are very, very strict, and I think, you know, I think they're enforced.
>
> …
>
> But I do think, on the other hand, with the rail line going right up alongside there, I don't think the dangers in this plant are going to be any different than what already exists with a rail line and a possible derailment of a car going north and south.
>
> So I would encourage that we – I would encourage one, that they work closely with the Hansons to alleviate any – you know, to try and maintain – with evergreen trees or something like that you can create a pretty good barrier there. It looked like there was one down in the corner already.
>
> And the other is I think – I think this is a $10 million investment, and it's going to employ about 20, 25 people, and it's an item that's used widely in agriculture in that area. I would encourage you to approve it.

Ex. 1 at 61-64. Commissioners Pekas and Beninga both indicated their concern with the placement near homes, a church, and a daycare but ultimately voted to uphold the Planning Commission's approval of the conditional use permit. Ex. 1 at 64-65. Commissioner Pekas echoed Commissioner Barth's comments of if not here then

where. Ex. 1 at 65. After the Commission unanimously voted to uphold the approval of the conditional use permit, the Hansons filed an appeal under SDCL 7-8-27. R.1.

A. Commissioner Kelly

On July 31, 2013, the circuit court heard that appeal including testimony from Commissioners Kelly, Barth and Pekas.[4] AT at 101-90. Commissioner Kelly testified that he reviewed Anderson's report as well as all of the items submitted with Anderson's report. AT at 118, Ex. 3. Commissioner Kelly further testified that he listened to the testimony presented by the Hansons and the other neighbors that were opposed to the conditional use permit. AT at 118 -119. He further took into account the plume analysis submitted by the Hansons' attorney. Ex. 2, AT at 119. His undisputed testimony is that he considered both sides in making his decision and took into consideration all evidence presented. AT at 124, 127. He had no preconceived notions going into the February 19, 2013 County Commission hearing. AT at 124.

In addition to the information the Hansons and Anderson provided, however, Commissioner Kelly visited the Worthing Agronomy Plant. Exs. 2-3, Ex. 1 at 61-62, AT at 120. He grew up in the city and had no experience with an agronomy plant; his reason for visiting the Worthing plant was to see how an agronomy plant worked and get a three-dimensional view of the plant. Ex. 1 at 61; AT at 120. The Worthing

[4] The Hansons indicated before the hearing that they would not be calling Commissioner Beninga and did not make any arguments at the July 31, 2013 hearing that Commissioner Beninga was biased or his vote was influenced in any way. *See generally* AT.

plant was an agronomy plant that Commissioner Kelly had driven past several times. AT at 120. He could not say whether he knew at the time he visited the Worthing plant that EFC owned the plant. AT at 120-121. It is possible that at the time he visited the Worthing Agronomy Plant, he did not know that EFC owned that plant. AT at 121, 131.

During the tour, Commissioner Kelly had an EFC employee with him, however, during the tour, but this employee did not discuss the conditional use permit[5] and simply acted as a tour guide. AT at 121-22. The tour lasted around an hour. AT at 120. Commissioner Kelly stated on the record at the Commission meeting everything he remembered seeing and learning from the tour that was factoring into his decision. AT at 122-23. He did not stand to gain anything personally from the approval of the conditional use permit. AT at 124-25. He did not receive any gifts or monetary compensation from EFC. AT at 125.

B. Commissioner's Beninga, Pekas, and Barth.

Commissioners Pekas and Barth also testified at the July 31, 2013 hearing that they reviewed the materials and testimony submitted by the opponents and considered both sides. AT at 149-51, 170-72. Commissioners Barth and Pekas further considered the safety of the neighbors, including the possibility and dangers

[5] While the Hansons assert that the EFC employee "lobbied" Commissioner Kelly, it is clear from his testimony that he is not using the term "lobby" to mean that they discussed and persuaded him as to the conditional use permit. HB at 17-18. Instead, Commissioner Kelly defines the term "lobby" in his answer that the employee showed him what they do at the Worthing plant and the safety precautions that they take. AT at 128. This is consistent with his previous testimony that they did not discuss the conditional use permit. AT at 121-22.

of a large spill of anhydrous ammonia. AT at 149-50, 168, 171. Commissioner Barth testified that the rationale behind his decisions and statements about the location of this facility was that this was a place where there were two highways and a railroad and the population was less dense in this area than many other areas within the county. Ex. 1 at 60-61. It is undisputed that Commissioners Barth and Pekas did not stand to gain personally from the grant of the conditional use permit. AT at 153, 171. Furthermore, there is no evidence that Commissioner Beninga received any compensation or had any personal motive for seeing the conditional use permit granted.

SCOPE OF REVIEW

South Dakota law limited the scope of review at the circuit court level. While statutorily the appeal is *de novo*, this did not mean that the circuit court could put itself in the place of the Minnehaha County Commission. *See Chavis v. Yankton Cnty.*, 2002 S.D. 152, ¶ 7-8, 654 N.W.2d 801, 804. Instead, under SDCL 7-8-30, the circuit court had to limit the scope of review to whether the Commission's decision was arbitrary and capricious. *Id.*

Three issues are presented on this appeal. The issues presented by the Hansons and the Appellees are questions of law that this Court reviews *de novo*. *See Smith v. Tripp Cnty.*, 2009 S.D. 26, ¶ 10, 765 N.W.2d 242, 246 ("The interpretation of statutes and the application of statutes to given facts is a question of law (or a mixed question of law and fact) that we review *de novo*") (additional citations omitted).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT THE MINNEHAHA COUNTY ORDINANCES HAVE CRITERIA IN COMPLIANCE WITH SDCL 11-2-17.3.

The circuit court correctly held that the Ordinances, when taken in their entirety, contain proper criteria for evaluating conditional use permits. R. 45-48. This is an issue of first impression for this Court. While the Hansons claim that the Ordinances do not have any criteria, they fail to review them as a whole. Furthermore, the Hansons' citation to *Kirschman v. Hutchinson County Bd.*, 2003 S.D. 4, ¶ 9, 656 N.W.2d 330, 344 (abrogated by *Bechen v. Moody Cnty. Bd. of Comm'rs*, 2005 S.D. 93, 703 N.W.2d 662) is misplaced.

The *Kirschman* Court was not addressing SDCL 11-2-17.3 or its predecessor, but instead was determining whether a board of commissioners' grant of a conditional use permit was a legislative act subject to referendum or administrative act not subject to referendum. *Id.* at ¶¶ 4-9, 656 N.W.2d at 332-33. The Court ultimately determined that the grant of a conditional use permit was a legislative act, however, that decision was later overturned. *Id.* at ¶ 9, 656 N.W. 2d at 333 (abrogated by *Bechen*, 2005 S.D. 93, 703 N.W.2d 662). The issue of criteria came in the context of putting the voters on notice at the time the ordinance was enacted to challenge the ordinance. *Id.* The county was arguing that the citizens should have taken action at the time the ordinance was passed, not at the time the ordinance was used to grant a conditional use permit, and the Court held that the citizens did not have enough notice of the magnitude that the conditional use allowed. *Id.*

Ultimately, the Court overruled portions of the *Kirschman* decision finding that the commission's decision was administrative and not legislative. *See Bechen*, 2005 S.D. 93, 703 N.W.2d 662. The fact remains, however, that the *Kirschman* decision is not controlling authority.

A. The circuit court correctly held that South Dakota law only requires general criteria for determining the issuance of conditional use permits, not specific criteria.

South Dakota statutory law only requires that the county enact general criteria for determining the issuance of conditional use permits. The plain meaning of SDCL 11-2-17.3 does not require specific criteria. In 2004, the Court enacted SDCL 11-2-17.3 and repealed SDCL 11-2-17.2. Reviewing the change in this statute is important to the determination of this issue.

i. SDCL 11-2-17.2 required more specific criteria than the current statute.

The Ordinances were enacted under the prior statutory scheme, SDCL 11-2-17.2. This statute read:

> …Each ordinance providing for such conditional use shall establish standards and criteria sufficient to enable the board of adjustment to approve or disapprove proposed land development projects and to issue or deny appropriate permits pursuant to §§ 11-2-53 and 11-2-58 to 11-2-60, inclusive. Such standards and criteria shall include both general requirements for all conditional uses and, *insofar as practicable, requirements specific to each designated conditional use.*

Id. (emphasis supplied). The plain language of this statute required both general criteria for all conditional uses and specific criteria for some conditional uses. This language likely is the reason why some ordinances have specific conditions and others

do not. *See generally* Ex. 5 at 3.04. In 2004, however, the South Dakota Legislature repealed this statute and enacted SDCL 11-2-17.3, which controls here.

ii. SDCL 11-2-17.3 only requires general criteria.

The Legislature in SDCL 11-2-17.3 removed the language requiring specific criteria. SDCL 11-2-17.3 states:

> A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify the approving authority, each category of conditional use requiring such approval, the zoning districts in which a conditional use is available, *and the criteria for evaluating each conditional use.* 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.

Id. (emphasis supplied). The plain language of this statute does not require specific criteria, but merely requires some criteria for evaluating each conditional use. *See State v. Ducheneaux*, 2003 S.D. 131, ¶ 9, 671 N.W.2d 841, 843 (The Court determines "the intent of a statute from the statute as a whole, from its language, and by giving it its plain, ordinary and popular meaning"). The Legislature could have made this statute say "specific criteria" but apparently chose not to require specific criteria. Therefore, the Ordinances need only to have general criteria.

B. The circuit court correctly held that the Minnehaha County Ordinances provide criteria for evaluating conditional use permits.

The circuit court correctly held that the Ordinances provide criteria for evaluating conditional use permits. While the Hansons allege that sections 3.04 (x) and (bb) do not have criteria for evaluating conditional use permits under those sections, they fail to consider the Ordinances as a whole. HB at 28. When reviewing

the Ordinances as a whole, the Ordinances do provide criteria for evaluating conditional use permits. Section 19.01 provides:

> 19.01 PROCEDURE. The Planning Commission may authorize by conditional use permit the uses designated in this ordinance when located in a zoning district allowing such use. The Planning Commission shall impose such conditions as are appropriate and necessary to insure compliance with the Comprehensive Plan and to protect the health, safety, and general welfare in the issuance of such conditional use permit.

Ex. 5. As the circuit court correctly held, the criteria for evaluating conditional use permits as stated in this portion of the Ordinances includes: the health, safety, general welfare, and Comprehensive Plan. R. 45-48. The Comprehensive Plan outlines more specific criteria for land use location and design. Section 5-9 of the Comprehensive Plan provides the following:

> Agriculturally related businesses: adjacent to county and state highways, rail access for industrial uses, controlled access on to major roadways, adequate buffering from neighboring uses, convenient siting of commercial uses for customers, hard surfaced driveways and parking areas.

Ex. 8 at 5-9. The circuit court correctly held that these criteria for evaluating conditional use permits meet the requirements under SDCL 11-2-17.3. Thus, the circuit court was correct in holding that the Ordinances are in compliance with state law.

C. The Hansons' due process rights were not violated.

At the hearing, the parties agreed that the circuit court's determination of whether or not the Minnehaha County Ordinances have criteria and are compliant with SDCL 11-2-17.3 is a question of law and no facts are necessary to determine this

question of law. AT at 12. The Hansons, however, argue the Commissioners' alleged failure to consider any criteria in evaluating the requested conditional use permit in this case violates their due process rights. These are two separate arguments. Whether the Ordinances are compliant with SDCL 11-2-17.3 is separate and distinct from whether a due process violation occurred for an alleged failure to consider any criteria. A violation of SDCL 11-2-17.3 does not necessarily equate to a due process violation.

i. SDCL 11-2-17.3 does not require the Commission to consider criteria, only the Planning Commission.

While a violation of SDCL 11-2-17.3 does not equate to a due process violation, even if SDCL 11-2-17.3 were applied, the statute only requires the Planning Commission to consider criteria, not the Commission which is the appellate body.[6] Under SDCL 11-2-17.3, the "approving authority" must take into consideration the criteria as enumerated in the county ordinances:

> 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.

Id. The approving authority is required to be defined by the county ordinances. *Id.* Here, the approving authority is defined by section 19.01 as the Planning Commission in Minnehaha County. Ex. 5 at 19.01. Under the plain language of

[6] The Planning Commission also considered the criteria in section 19.01. Anderson presented information to the Planning Commission that took into account the criteria stated in section 19.01. Ex. 3; AT at 53-54. The evidence demonstrates that the Planning Commission did consider the health, safety, general welfare, and Comprehensive Plan. *See* Ex. 3.

SDCL 11-2-17.3, the Planning Commission is required to consider the criteria enumerated in the Ordinances, not the Commission as the reviewing body. Therefore, the Hansons' argument that the Commission did not consider the proper criteria under SDCL 11-2-17.3 resulting in a due process violation is unpersuasive.[7]

ii. Due process does not require the Commission to consider criteria.

Due process does not require any appellate body, including this Court, to apply criteria. To hold otherwise would put a substantial burden on the reviewing courts. As this Court has held, "[d]ue process requires only reasonable notice and an opportunity to be heard at a 'meaningful time and in a meaningful manner.'" *Schrank v. Pennington Cnty. Bd. of Comm'rs*, 1998 S.D. 108, 584 N.W.2d 680, 682 (additional citations omitted)). In evaluating whether a due process violation occurred, the Court should not look at SDCL 11-2-17.3, a statutory requirement, but instead, to general due process standards. Based upon these general due process requirements, criteria do not need be applied.[8] Due process only requires the Commission to give reasonable notice and the opportunity to be heard, which happened in this case. *Id.*

---

[7] The Hansons did not argue to the circuit court that the Planning Commission allegedly did not consider criteria. Therefore, the Hansons have waived any argument that the Planning Commission allegedly did not consider criteria. *See Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29.

[8]The Hansons argue that a due process violation occurred because the commissioners did not apply standards. HB at 28-33. The Hansons, however, do not cite any statute or case law holding that a due process violation occurs where criteria are not applied in an appellate proceeding. Thus, this argument is waived. *See Veith*, 2007 S.D. 88, at ¶ 50, 739 N.W.2d at 29 ("failure to cite supporting authority on appeal is a violation of SDCL 15–26A–60(6) and the issue is thereby waived") (citations omitted).

This Court has set forth several factors for determining what process is due in a particular case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Daily v. City of Sioux Falls, 2011 S.D. 48, ¶ 18, 802 N.W.2d 905, 912 (additional citations omitted). The private interest affected by the official action was the Hansons' interest in a fair and impartial hearing that had the possibility of affecting their property. The procedures used did not risk an "erroneous deprivation" because the Hansons were given the opportunity to speak at length at the two hearings and had the circuit court hear their case. *Id.* While the Hansons assert that criteria are necessary, even without criteria, it is unlikely that there would be an "erroneous" deprivation of rights because the Hansons were given an opportunity to be heard, multiple times, and had the opportunity for review by several bodies.

The imposition of the consideration of criteria by an appellate body such as the Commission would only hinder the appellate procedure for conditional use permits. If due process requires that the Commission consider criteria, then this Court, being an appellate body, would likewise have to consider the same criteria as well as the circuit court. The administrative burden that would be placed on the appellate bodies by requiring consideration of criteria would be substantial. Furthermore, if this Court were to require criteria, then the Commission would need

to issue findings of fact and conclusions of law demonstrating that they considered each criterion and what their decision is on each of those. Because there are five commissioners, each commissioner would need to issue their own findings of fact and conclusions of law. This would slow down the process substantially.

As the Minnesota Supreme Court recognized, a quasi-judicial hearing such as this does not require strict application of the typical procedural rules. *See Kletschka,* 277 N.W.2d at 405 ("Because the governing body, in considering an application for a conditional-use permit pursuant to a zoning ordinance, acts in a quasi-judicial capacity, basic rights of procedural due process require reasonable notice of hearing and a reasonable opportunity to be heard; but such hearing does not invoke the full panoply of procedures required in regular judicial proceedings"). Therefore, criteria are not necessary and the Hansons received the process they were due.

iii. No due process violation occurred because the Minnehaha County Commissioners considered criteria in evaluating the conditional use permit.

The Minnehaha County Commissioners considered the health, safety, general welfare, and Comprehensive Plan in evaluating the requested conditional use permit. Anderson testified that his report addressed the health, safety, and general welfare of the community as well as took into account the Comprehensive Plan. AT at 48-51. The record demonstrates that the commissioners all applied the general standards of health, safety, general welfare, and Comprehensive Plan, some by taking into consideration Anderson's report, which addressed several interdepartmental criteria

relating to the health, safety, general welfare, and Comprehensive Plan.[9] AT at 118, 149, 169-70, 172.

As the circuit court properly found, it is undisputed that the evidence and testimony presented to the County Commission concerned the health of the nearby residents and community and the safety of using anhydrous ammonia. R.45-46. Additionally, the consideration by the Commissioners of business interests and jobs in the community was relevant to the general welfare of the county as a whole and was properly considered under that criteria. Finally, the Commissioners that testified in this appeal all stated that they considered the Comprehensive Plan[10] in their evaluation of the conditional use permit. AT at 124, 151-52, 172. Commissioners Barth and Kelly also testified that they took into consideration the standards imposed on these facilities under state and federal law. AT at 127, 157.

Based upon the evidence in the record, the commissioners were using standards that were contained within the Ordinances, more specific departmental

---

[9] The Hansons argue that Commissioner Pekas "acknowledged that no particular criterion existed to consider the conditional uses applicable to the proposed use like those specifically applicable to concentrated livestock feeding operations." HB at 20. While it is undisputed that Section 3.04 does not contain specific criteria to evaluate conditional use permits for anhydrous ammonia and farm products, the Hansons do acknowledge that Commissioner Pekas used the criteria set forth in Section 19.01 of the Ordinances when evaluating this conditional use permit application. HB at 20.

[10] Several sections of the Comprehensive Plan are applicable in this matter including: § 6-6, which states, "Due to the limited amount of land with rail access, it is especially important to protect these areas from land uses that are incompatible with industrial development"; § 4-14, which states, "As further rural development occurs, agricultural areas stand to lose their identity to these nonfarm uses. By preventing the over development of rural areas, agricultural identity can be preserved and community identity strengthened"; § 5-9, which states that agriculturally related businesses should be located close to county and state highways and with rail access.

criteria related to the health, safety, general welfare, and Comprehensive Plan, and the state and federal statutes to evaluate this conditional use permit application.[11] AT at 124, 151-52, 172. The Hansons were aware of such standards. Exs. 3, 5, and 8. Therefore, the evidence supports the circuit court's finding that the Commissioners did evaluate the conditional use permit using criteria, including the criteria stated in section 19.01, and no due process violation occurred. Ex. 5.

II. THE CIRCUIT COURT DID NOT ERR IN UPHOLDING THE 3-0 VOTE OF THE COMMISSION.

A. The Hansons failed to raise or contemporaneously object to any alleged due process violations and therefore, waived these issues.

At the circuit court level, the Hansons raised several due process violations for the first time on appeal. It is undisputed that they did not contemporaneously object to these alleged due process violations at the time of the Planning Commission hearing or at the County Commission hearing. Exs. 1 and 3. Because they failed to object and are raising a new issue for the first time on appeal, the Hansons have

---

[11] While the Hansons assert that Commissioner Barth did not consider any criteria in making a decision on this conditional use permit, the record shows otherwise. HB at 19-20. The Hansons cite Commissioner Barth's testimony where he stated that he did not think that the county was using any standards with respect to locating this facility next to a residential structure. AT at 138. This statement by Commissioner Barth does not demonstrate that he was not applying any standard, but instead, demonstrates that he did not know of a specific standard related to locating this facility next to a residential structure. It is undisputed that the Comprehensive Plan has standards with regard to location of these facilities and Commissioner Barth testified that he took into account the Comprehensive Plan when making his decision. Ex. 8 at 5-9, AT at 152-153. If anything, Commissioner Barth's testimony is unclear. While he cannot point to specific standards that he used, it is clear from his testimony that he did consider the standards set forth in the Ordinances i.e. health, safety, general welfare, and Comprehensive Plan as well as the state and federal standards. AT at 149, 151-55.

waived these issues. *See Veith,* 2007 S.D. 88, at ¶ 35, 739 N.W.2d at 26 (citing *Bakker v. Irvine,* 519 N.W.2d 41, 47 (S.D.1994) (holding that a party failing to make a timely objection to evidence at trial cannot, as a matter of law, be heard to complain on appeal that its admission is error constituting an irregularity in the proceeding); *Anderson v. Johnson,* 441 N.W.2d 675, 677 (S.D.1989) (holding that the plaintiff waived his right to argue an issue on appeal by failing to object below, thereby denying the trial court the opportunity to correct its mistakes); *see also Hepper v. Triple U Enterprises Inc.,* 388 N.W.2d 525 (S.D.1986); *State v. Carlson,* 392 N.W.2d 89 (S.D.1986); *Johnson v. John Deere Company,* 306 N.W.2d 231 (S.D.1981); *Till v. Bennett,* 281 N.W.2d 276 (S.D.1979)).

Here, the Hansons never argued that the disqualification of Commissioner Kelly's vote would defeat the two-thirds majority allegedly required for such a vote. R. 53-91. Furthermore, neither the Hansons nor any other opponent ever requested Commissioner Kelly's recusal or objected to his voting on this issue. *See generally* Exs. 1 and 4. Therefore, the circuit court should have held that the Hansons failure to raise any alleged due process violation at the Commission meeting resulted in a waiver of this issue. Additionally, because the Hansons' failed to argue that a two-thirds majority was required, they have waived this issue.[12] R. 53-91.

[12] The Hansons did make an argument regarding a two-thirds majority in their objections to the circuit court's decision, however, this argument was not made before the circuit court's decision. R. 53-91.

B. Only a majority vote is required to uphold a Planning Commission decision.

As this Court held in *Goos RV Center v. Minnehaha County Com'n*, 2009 S.D. 24, ¶ 21, 764 N.W.2d 704, 711, reliance upon authority concerning board of adjustment appeals is not persuasive. While the issue was different in *Goos*, the same rationale can be applied here. *Id.* The Hansons claim that SDCL 11-2-59 requires a two-thirds majority vote of the County Commission and the 3-0 vote does not meet such requirement. This argument is not persuasive in light of this Court's holding in *Goos* and SDCL Ch. 7-8. *Id.*

SDCL 11-2-50 states that the planning and zoning commission may act as a board of adjustment if the county so chooses. Minnehaha County has appointed the Planning Commission to act as a board of adjustment to hear variances and appeals from decisions of the planning director. Ex. 5 at 21.01. Under the Minnehaha County Ordinances, the planning and zoning commission makes the decision concerning a conditional use permits and appeals of those decisions go to the Commission. *See* Ex. 5 at 19.01 and 19.06. Here, just as in *Goos*, neither the Planning Commission nor the Commission was acting as a board of adjustment.[13] 2009 S.D. 24, at ¶ 21, 764 N.W.2d at 711.

SDCL 11-2-59 requires a two-thirds majority when a *board of adjustment* hears an issue:

---

[13] In reviewing SDCL §§ 11-2-49, 11-2-50, and 11-2-60, as well as *Goos*, it does not appear that any of these statutes require the appointment of a board of adjustment to hear conditional use permit requests. 2009 S.D. 24, at ¶ 21, 764 N.W.2d at 711.

> The concurring vote of two-thirds of the members of the *board of adjustment* is necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in the ordinance.

(emphasis supplied). SDCL 11-2-59 is not applicable because Minnehaha County does not have a board of adjustment under that statutory scheme. Instead, Minnehaha County follows the county ordinances and SDCL Ch. 7-8 for appeals. *See Goos*, 2009 S.D. 24, at ¶¶ 17-20, 764 N.W.2d at 710-11. Therefore, neither the Planning Commission, nor the Commission was acting as a board of adjustment. *Id.*

Had the Commission been acting as a board of adjustment, then the appeal to the Circuit Court should have required a writ of certiorari. *Id.* at ¶ 20, 764 N.W.2d at 711; *see also Hay v. Bd. of Comm'rs for Grant Cnty.,* 2003 S.D. 117, ¶¶ 6-9, 670 N.W.2d 376, 378-79. In fact, the Hansons' own action in bringing an appeal pursuant to Ch. 7-8 instead of a petition for writ of certiorari pursuant to Ch. 11-2 demonstrates their own understanding that the Commission was not acting as a board of adjustment. By their apparent procedural strategy of affording themselves the broader scope of review in a direct circuit court appeal under SDCL 7-8-27, et al., while at the same time insisting on the two-thirds supermajority majority approval under SDCL 11-2-59, they seek to hold the Commission to a supermajority standard while at the same time seeking to avoid the more stringent requirements of prevailing on a writ of certiorari. The Hansons should not be allowed to choose the procedural standards that favor their position.

If the Court applies SDCL Ch. 7-8, a majority is required to make a decision and not two-thirds of the members. SDCL 7-8-18. While the laws in SDCL Ch. 7-8 do not directly address the requirements for a decision, SDCL 7-8-18 requires a majority vote if there is a tie amongst the commissioners:

> When the board of county commissioners is equally divided on any question, it shall defer a decision until the next meeting of the board and the matter shall then be decided by a majority of the board.

Therefore, under the requirements of SDCL Ch. 7-8, a majority vote of the board is required and not a two-thirds majority vote. *Id.* Here, even if the Court disqualified Commissioner Kelly's vote, a 3-0 majority vote still existed. Based upon the statutory scheme of SDCL Ch. 7-8 and this Court's precedent, the Hansons' argument that a two-thirds majority is required under SDCL Ch. 11-2 is unpersuasive. Thus, the County respectfully asks that this Court apply the majority standard of SDCL Ch. 7-8 instead of the supermajority standard of SDCL Ch. 11-2 and affirm the circuit court's decision upholding the 3-0 vote.

Finally, under SDCL 11-2-60, if the Commission is acting as a board of adjustment, then a two-thirds majority is only required to reverse the decision, or to decide in favor of an appellant i.e. reversing a decision:

> …The concurring vote of at least two-thirds of the members of the board as so composed is necessary to *reverse any order, requirement, decision, or determination of any administrative official*, or to decide *in favor of the appellant* on any matter upon which it is required to pass under any zoning ordinance, or to effect any variation in the ordinance.

SDCL 11-2-60 (emphasis supplied). Here, the Minnehaha County Commission did not reverse a determination of an administrative official and did not decide in favor

of the appellant. Therefore, a two-thirds majority was not required, and the majority 3-0 was properly upheld by the circuit court.

C. The circuit court properly held that a new hearing was not necessary.

The circuit court properly held that a new hearing was not necessary in this case and the 3-0 vote of the Commission should be upheld. As this Court noted in *Armstrong*, the remedy if a board member has a disqualifying interest is to "place the complainant in the same position had the lack of due process not occurred." *Armstrong*, 2009 S.D. 81 at ¶ 32, 772 N.W.2d at 654 (citations omitted). This Court in *Hanig* further decided that instead of crafting a bright line rule allowing a new hearing or voiding a vote, the rule in South Dakota is that the Court looks to several factors in deciding whether a new hearing is warranted or whether a vote may simply be invalidated when a member is disqualified. *Hanig*, 2005 S.D. 10, at ¶¶ 21-23, 692 N.W.2d at 209-210. These factors include: whether the required majority exists without the vote of the qualified member, whether the board member had disclosed a conflict, the influence of the conflicted member in the decision, and the extent of the member's interest. *Id.* at ¶ 21, 692 N.W.2d at 209-210.

i. <u>There was no evidence that Commissioner Kelly had any influence on the other members of the Minnehaha County Commission.</u>

The evidence presented to the circuit court weighed in favor of simply disregarding Commissioner Kelly's vote instead of granting a new hearing. As the circuit court found, "[t]here was no evidence… that the comments or statements of Commissioner Kelly had any impact on the decision of the other three

commissioners." R. 48. The Hansons argue that "Kelly's position as the only member who had physically examined a similar facility and spoken with its manager about safety concerns conceivably carried weight with the other county commissioners." HB at 42. The Hansons, however, fail to cite any testimony, exhibit, or other evidence in the record demonstrating that Commissioner Kelly's statements carried any weight with the other commissioners.

The commissioners clearly stated their rationale behind voting to uphold the Planning Commission's decision. Ex. 1 at 56-65. Furthermore, Commissioner Barth had already voted for the grant of the conditional use permit as a member of the Planning Commission *before* Commissioner Kelly ever visited or discussed his visit to the Worthing Agronomy Plant. Ex. 3. Commissioner Barth also made his statements supporting the grant of this conditional use permit *before* Commissioner Kelly disclosed his visit to the Worthing Agronomy Plant. Ex. 1 at 60-61. Thus, the evidence, at least for Commissioner Barth's vote, demonstrates that he was not persuaded by Commissioner Kelly's visit to the Worthing Agronomy Plant.

Additionally, nothing in Commissioner Beninga's or Commissioner Pekas's statements at the February 19, 2013 hearing or at the July 31, 2013 trial demonstrate that they relied on Commissioner Kelly or the statements about his visit to the Worthing Agronomy Plant as a basis for their decision. Commissioner Pekas seemed to be persuaded by Commissioner Barth's comments of "if not here then where" rather than anything Commissioner Kelly said. Ex. 1 at 65. As the circuit court correctly held, there is simply no evidence in the record to support the Hansons'

contention that the other commissioners relied upon Commissioner Kelly's visit to the Worthing Agronomy Plant as a basis for their decision.

ii. The required majority did exist to allow passage of the conditional use permit.

The required majority did exist allowing the passage of the conditional use permit. The vote of the Commission was a unanimous 4-0 vote. Even without Commissioner Kelly's vote, a unanimous 3-0 vote still stands. As the Appellees thoroughly discussed above, a two-thirds majority was not required and a majority was simply required under the statutory scheme. SDCL 7-8-18.

iii. Commissioner Kelly disclosed the evidence he obtained by visiting the agronomy plant.

Commissioner Kelly disclosed the evidence he obtained by visiting the agronomy plant. Even if the Court applies the APA,[14] section 1-26-26 allows a voting member of a body to conduct a site visit and report to the full governing body about the information gained from such a site visit. That voting member then is disqualified from voting. Thus, Commissioner Kelly did not *improperly* influence the other Commission members and even if his vote is disqualified, his statements to the Commission were proper.

Furthermore, there is no evidence on the record demonstrating that Commissioner Kelly had any influence on the votes of the other Commissioners. R. 48; Ex. 1 at 60-65. To the contrary, it appears that the other Commissioners had very distinct reasons for voting to uphold the conditional use permit approval, and no

[14] The County is not conceding that the APA applies; however, this is used by way of example.

evidence exists that Commissioner Kelly's statements and vote had any effect on the other Commissioner's vote. *See* Ex. 1 at 60-65.

iv. Commissioner Kelly did not have any interest in the outcome of the conditional use permit application.

Commissioner Kelly did not have any interest in the outcome of the conditional use permit hearing. It is undisputed that Commissioner Kelly did not stand to gain anything personally from the grant of this conditional use permit. AT at 124-25. He did not receive any gifts or monetary compensation from EFC. AT at 125. While the Hansons assert that Commissioner Kelly had a "deep personal interest in the outcome of the proceeding," there is simply no evidence in the record demonstrating such a personal interest, and the Hansons fail to cite to the record in making this allegation. HB at 41. Based upon the evidence and testimony presented at the July 31, 2013 hearing, the circuit court correctly found that Commissioner Kelly did not have any interest in the outcome of the conditional use permit application. R. 48; Ex. 1 at 60-65.

The circuit court correctly held that the Commission's unanimous vote in favor of upholding the grant of the conditional use permit, even absent Commissioner Kelly's vote, placed the Hansons in the same position that they would have been absent any *ex parte* communication by Commissioner Kelly. *Armstrong*, 2009 S.D. 81 at ¶ 32, 772 N.W.2d at 654 (citations omitted). Therefore, the County respectfully requests that the Court affirm the circuit court's decision to uphold the vote of the Commission.

III. THE CIRCUIT COURT ERRED WHEN IT DISQUALIFIED COMMISSIONER KELLY'S VOTE AND FOUND THAT HIS *EX PARTE* COMMUNICATION RESULTED IN *PER SE* BIAS.

A. Commissioner Kelly did not violate the Hansons' due process rights by visiting a similar plant.

The circuit court held that Commissioner Kelly based his decision, in part, on his tour of the Worthing Agronomy Plant and his observations made during his tour of that plant, which is undisputed. R. 48. The circuit court, however, further held that Commissioner Kelly should have recused himself because his actions gave the "appearance that he was not impartial and that he was predisposed to the outcome." R. 48. This finding is contrary to the evidence and testimony presented at trial. Commissioner Kelly testified at that he did not have any "preconceived notions" going into the February 19, 2013 hearing and that he weighed all of the evidence that he was provided. AT at 124, 127. The circuit court further found that Commissioner Kelly had in his possession information that the Worthing facility was part of EFC; however, Commissioner Kelly testified that he looked through the reports just before the February 19, 2013 meeting and that he was not sure whether he knew at the time he toured the facility that EFC owned the Worthing Plant. AT at 118, 120-21, 131.

As Commissioner Kelly testified, he visited the agronomy plant to view it in person and to see the federal safety standards in action. AT at 120, 132. The standard that the circuit court applied to this issue of an alleged due process violation included whether "actual bias or an unacceptable risk of actual bias" existed at the time of the hearing. *Hanig v. City of Winner*, 2005 S.D. 10, ¶ 11, 692 N.W.2d 202, 206.

In *Hanig*, this Court cited the New Jersey Supreme Court with approval and identified four types of situations requiring disqualification:

> (1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a direct financial gain;
> (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
> (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and
> (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

Id. at ¶ 19, 692 N.W.2d at 208-09. This Court stated that these categories "can serve as guidance to South Dakota officials and courts in determining whether an actual bias or an unacceptable risk of actual bias exists." *Id.* at ¶ 19, 692 N.W.2d at 209.

Here, contrary to the circuit court's finding, no actual bias or *unacceptable* risk of bias existed because none of these categories applied to this case. The evidence clearly demonstrated that Commissioner Kelly did not have any pecuniary or personal interests in this case. AT 124-25. Furthermore, the turning point of *Armstrong* and *Hanig* was whether the voting member's interest is "different from the interest of the members of the general public." *Hanig*, 2005 S.D. 10, at ¶ 20, 692 N.W.2d at 209. At the February 19, 2013 hearing, Commissioner Kelly did not have a different interest from the general public, and the Hansons never presented any evidence showing that his interest was any different from the public's interest. *Id.* The Hansons, instead,

have simply made allegations about a personal interest without citation to the record. *See* HB at 41. The circuit court found that there was no evidence of a personal interest or bias; instead, the circuit court found that the appearance of complete fairness was not present in this case because of Commissioner Kelly's visit to the Worthing Agronomy Plant. R. 48-49. Essentially, the circuit court held that *ex parte* communication or a site visit is *per se* bias.

i. The circuit court erred in finding that Commissioner Kelly's visit to the agronomy plant created unacceptable risk of bias.

Commissioner Kelly's visit to the agronomy plant in Worthing did not create actual bias or an *unacceptable* risk of bias. This Court has not addressed a situation where a commissioner visits a similar site before the hearing and discloses that review at the hearing. This Court has discussed other cases where local officials conducted site visits. *See Armstrong*, 2009 S.D. 81, at ¶ 26, 772 N.W.2d at 652. The facts in *Armstrong*, however, did not involve a site visit.

In *Armstrong*, the majority looked to the Administrative Procedures Act, SDCL 1-26, as a guide. *Id.* at ¶ 27. The Legislature, however, has clearly rejected the notion of the Administrative Procedures Act applying to a local government, as the *Armstrong* court correctly noted. *See* SDCL 1-26-1 ("The term [agency] does not include the Legislature, the Unified Judicial System, *any unit of local government*, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute") (emphasis supplied); *Armstrong*, 2009 S.D. 81, ¶ 27, 772 N.W.2d at 652.

Chief Justice Gilbertson and Justice Zinter both wrote separate concurring opinions in *Armstrong* concerning the application of the Administrative Procedures Act to local officials, which are persuasive. Chief Justice Gilbertson recognized that "a due process violation does not occur simply because a person serves in two roles." *Armstrong*, 2009 S.D. 81, ¶ 44, 772 N.W.2d at 657 (Gilbertson, CJ, concurring). Furthermore, the Chief Justice recognized that:

> Such contacts alone will not require the official to recuse him or herself from serving as a quasi-judicial official in another capacity. It is only when the official's authority, statements, or actions regarding the issue while serving in one role create an unacceptable risk of bias when serving in the other that they must do so, i.e. when a reasonably-minded person would conclude that the official's interests in the matter had the likely potential to influence his impartiality in its resolution.

Id.

Armstrong involved a county commissioner who had an interest different from that of the public, in that, he was concerned that the county may be civilly liable and was working to avert liability. *Id.* at ¶ 30, 772 N.W.2d at 654. Here, there is no evidence on the record that Commissioner Kelly's interest was different from any other citizen. He merely toured another agronomy plant. The record is unclear whether he knew that the agronomy plant was owned by EFC at the time he toured it. AT at 120-22, 131. As Chief Justice Gilbertson recognized, a due process violation does not occur simply because a commissioner receives citizen input prior to a hearing. *Armstrong*, 2009 S.D. 81, ¶ 45, 772 N.W.2d at 657. Here, Commissioner Kelly merely received citizen input before the hearing, which he disclosed on the record at the hearing.

Other courts that have addressed similar situations have held that a site visit does not violate due process rights, where disclosure of the visit is made on the record. *See Smith v. Fair Haven Zoning Bd. of Adjustment*, 761 A.2d 111, 116 (N.J. App. Div. 2000); *Cole v. Planning & Zoning Comm'n of Town of Cornwall*, 671 A.2d 844, 849 (Conn. App. 1996) ("The disclosure of the information concerning technological advances and of the site visit at the October 11, 1990 public hearing provided the plaintiffs with a full opportunity to cross-examine Potter."); *In re Quechee Lakes Corp.*, 580 A.2d 957, 962 (Vt. 1990) (collecting cases). This Court in *Armstrong* cited with approval an Idaho case that discussed the fact that disclosure of *ex parte* communication on the record can cure an alleged due process violation. *Armstrong*, 2009 S.D. 81, ¶ 26, 772 N.W.2d at 652 (citing *Eacret v. Bonner*, 86 P.3d 494, 501 (Idaho 2004)). Here, the only evidence on the record is that Commissioner Kelly disclosed all of the facts he learned and took into account in his decision, thus, making those facts a part of the record. AT at 122-23, 128-29. The circuit court did not address Commissioner Kelly's disclosure of this information on the record and, instead, held that the site visit constituted a *per se* due process violation. R. 48-49. The County respectfully requests that this Court reverse that decision and hold that a site visit is not a *per se* due process violation where no evidence of a personal interest is present.

B. Any alleged *ex parte* communication was innocuous and disclosed; therefore, no due process violation occurred.

Because the communications were disclosed and made a part of the record, the County respectfully disagrees with the holding that Commissioner Kelly's actions amounted to a due process violation. As Commissioner Kelly testified, he and the

EFC employee did not talk about the pending application for a conditional use permit. AT at 121-22. The EFC employee was essentially a tour guide showing Commissioner Kelly the layout of an agronomy plant and the safety measures that were put into place in that agronomy plant. *Id.*

In a similar case, the New Jersey Supreme Court discussed *ex parte* communication during a site visit with local officials. *See Smith v. Fair Haven Zoning Bd. of Adjustment*, 761 A.2d 111, 116 (N.J. App. Div. 2000). In *Smith*, several members of the zoning board inspected a property subject to an upcoming decision on a variance request. *Id.* at 118-19. The board members testified that they made no observations that were not discussed at the public hearings. *Id.* at 119. The discussions that the board members had with one of the parties did not go beyond the arguments and allegations advanced in the course of proceedings. *Id.* In holding no due process violation occurred, the New Jersey court noted, "it makes good sense not to straightjacket a board of adjustment with all of the rigid procedural standards imposed upon trial judges." *Id.* The same is true here.

The parties do not dispute that the discussions between Commissioner Kelly and the EFC employee involved the safety standards employed at the Worthing Agronomy Plant and did not involve Commissioner Kelly's vote on the appeal of the conditional use permit. AT at 121-22. Commissioner Kelly's discussions with the EFC employee during the tour of the agronomy plant did not cause actual bias or the unacceptable risk of actual bias because the discussions were disclosed and made a part of the record. *See* Ex. 1; AT at 61-63, 128-29. The circuit court held that use of

the information was outside the record, and therefore, created a bias. R. 48-49. Commissioner Kelly's disclosure, however, made this information part of the record and, therefore, he and the other commissioners should have been free to consider this information along with all the other evidence presented. The disclosure also allowed the Hansons to rebut such evidence. *See Smith*, 761 A.2d at 116 ("the knowledge gained from a site inspection must be placed on the record so that the essence of a fair hearing is provided and a full reviewable record is made"). Therefore, like in *Smith*, Commissioner Kelly's vote should not have been disqualified due to innocent conversation between an EFC's employee and Commissioner Kelly about the safety standards that was put on the record. AT at 122-23, 128-29.

Because Commissioner Kelly testified that he listened to the testimony presented at the hearing from both sides and that his site visit was simply to visually see, in person, the federal regulations and other safety information presented at the hearing, the Hansons failed to present evidence that Commissioner Kelly had a closed mind at the hearing. AT at 120, 132. In fact, all the evidence presented at the hearing demonstrates that Commissioner Kelly kept an open mind. AT at 124, 126-28. Additionally, while he did use his site visit as part of his decision, it was not the entirety of his decision and was made part of the record by his disclosure. AT at 129-30; Ex. 1 at 61. Because the Hansons were provided with all the information Commissioner Kelly learned from his site visit and discussion with an EFC employee during that site visit and Commissioner Kelly kept an open mind at the hearing, there was no due process violation. The County respectfully requests that the Court find

that a site visit is not a *per se* due process violation and that Commissioner Kelly's site visit did not violate the Hansons' due process rights.

CONCLUSION

The circuit court did not err in holding that the Minnehaha County Ordinances have criteria. South Dakota law does not require specific criteria for determining whether a conditional use should be allowed, but only requires that criteria be part of the ordinances. Here, the Commission previously adopted several criteria for the evaluation of conditional use permits including the health, safety, general welfare, and Comprehensive Plan. Thus, the ordinances under which this conditional use was granted are valid and enforceable. Additionally, the circuit court did not err in finding that no due process violation occurred when the commissioners applied criteria in deciding this conditional use permit. Finally, the circuit court erred in holding that Commissioner Kelly violated the Hansons' due process rights and should be disqualified where he disclosed all *ex parte* communication on the record.

For all the foregoing reasons, the County respectfully requests that the Court affirm the circuit court's decision upholding the vote of the Commission and finding that the Minnehaha County Ordinances comply with SDCL 11-2-17.3. Additionally, the County respectfully requests that this Court find that the circuit court erred when it disqualified Commissioner Kelly's vote and find that no actual bias or unacceptable risk of bias resulted from Commissioner Kelly visiting the Worthing Agronomy Plant. Alternatively, the County respectfully requests that this Court find that he cured any alleged due process violations by stating, on the record, all of the

information he learned by visiting the agronomy plant and the substance of his conversations with the EFC employee, thus, making such information a part of the record.

Dated this 12th day of May, 2014.

/s/ Sara E. Show
SARA E. SHOW
Deputy State's Attorney for Minnehaha County
415 N. Dakota Ave.
Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

Sara E. Show, Deputy State's Attorney for Minnehaha County, hereby certifies that a true and correct copy of the foregoing **Appellee's Brief and Appendix** in the above-entitled matter was served via email, upon the following individuals:

ATTORNEY FOR PETITIONERS AND APPELLANTS:

Rick L. Ramstad
Crew & Crew, P.C.
P.O. Box 2343
Sioux Falls, SD 57101-2343
Telephone: (605) 335-5561
E-mail: rick@crewandcrew.com

ATTORNEY FOR INTERVENORS AND APPELLEE

John H. Billion
May & Johnson, P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57108
Tel.: (605) 336-2565
E-mail: jbillion@mayjohnson.com

Dated this 12th day of May, 2014.

/s/ Sara E. Show
Sara E. Show

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 9833 words from the Statement of Case through the Conclusion. I have relied upon the word count of a word processing program to prepare this certificate.

Dated this 12th day of May, 2014.

/s/ Sara E. Show
Sara E. Show

Appendix Table of Contents

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26859

IN THE MATTER OF CONDITIONAL USE PERMIT #13-08

DOUG HANSON and LOUISE HANSON,

Petitioners /Appellants

vs.

MINNEHAHA COUNTY COMMISSION,
MINNEHAHA COUNTY, SOUTH DAKOTA

Respondents/Appellees

EASTERN FARMERS CO-OP,

Intervenor/Appellee

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

The Honorable Robin Jacobson Houwman
Circuit Court Judge

BRIEF OF INTERVENOR AND APPELLEE, EASTERN FARMERS CO-OP

Rick L. Ramstad
Crew & Crew
141 N. Main Avenue
Suite 706
Sioux Falls, SD 57101

Attorneys for
Petitioner/Appellant

Sara E. Show
Minnehaha County State's
Attorney's Office
415 N. Dakota Avenue
Sioux Falls, SD 57101

Attorneys for
Respondent/Appellee

John H. Billion
May & Johnson, P.C.
6805 S. Minnesota Ave., #100
P.O. Box 88738
Sioux Falls SD 57109-8738

Attorneys for
Intervenor/Appellee

NOTICE OF APPEAL FILED NOVEMBER 12, 2013

NOTICE OF REVIEW FILED NOVEMBER 26, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Transcript of the hearing before the Minnehaha County Commissioner is referred to as HT. The Transcript of the Trial to the Circuit Court is referred to as TT. Citations to the Settled Record compiled by the Clerk of the Circuit Court is referred to as SR. Citations to the Brief of Appellant will be referred to as HB.

In this Brief, Petitioners/Appellants Doug Hanson and Louise Hanson will be referred to as "Hanson." Respondents/Appellees Minnehaha County Commission and Minnehaha County will be referred to as "County." Intervenor/Appellee Eastern Farmers Co-op will be referred to as "EFC."

Citations to the Minnehaha County Ordinances will be referred to as "MCZO" followed by the appropriate section designation or ordinance number.

JURISDICTIONAL STATEMENT

EFC accepts and adopts the Jurisdictional Statement set forth by the County.

STATEMENT OF ISSUES PRESENTED

I. Whether Minnehaha County's Ordinances Comply With the Requirements of SDCL § 11-2-17.3 for Criteria for Evaluating Conditional Uses?

The Trial Court held the MCZO provided the criteria for evaluating each conditional use in compliance with SDCL § 11-2-17.3.

II. Whether the Minnehaha County Commission Decision to Uphold the Conditional Use Permit in This Matter Was Proper?

The Trial Court found that even with Commissioner Kelly's vote disqualified there was no evidence that comments or statements by Kelly impacted the remaining Commissioners and that the County properly affirmed the Planning Commission's approval of the conditional use permit on the remaining 3-0 vote.

STANDARD OF REVIEW

EFC accepts and adopts the Standard of Review set forth by the County.

STATEMENT OF THE CASE

EFC accepts and adopts the Statement of the Case set forth by the County.

STATEMENT OF FACTS

EFC submitted an application for a conditional use permit ("CUP") allowing them to build and operate an agronomy center to include the storage and distribution of anhydrous ammonia and fertilizer products. TT Ex. 3. The rural location for the facility was uniquely suited for EFC's operation, including the presence of two intersecting county highways and an existing railroad line. TT 3 and Ex. 3. EFC desired to replace two aging facilities in Crooks and Baltic and to replace those with a new *state-of-the-art* facility at the property to the CUP would apply. TT 10 and Ex. 3.

The site location for the new EFC facility is zoned A-1 agricultural. TT Ex. 3. MCZO promote and provide for a vigorous agricultural industry, promote use of rail line infrastructure, and are otherwise consistent with EFC's desire to build a new plant and the philosophy of an A-1 agricultural district. TT Ex. 5.

EFC acknowledges that certain *potential risks* may arise with the operation of an agronomy center, including the storage and distribution of anhydrous ammonia. TT 149, 154-155. Hanson has presented the *potential risks* before the Planning Commission, County Commission and Trial Court as a near certainty to occur. See generally HT and TT. Hanson takes the same posture in their statement of facts. HB 4-22. Be that as it may, the record clearly demonstrates that *potential risks* were considered at each step of the proceeding. TT 57.

The *potential risks* and safety concerns of the Hansons and their similarly situated neighbors have been vetted at every public hearing held in this matter. *Id.* These include

concerns of an anhydrous ammonia spill, accidents, or possibility of a train derailment. *Id.* Deliberations by Commissioners show that arguments by proponents and opponents alike were considered and weighed. HT 56, 60, 64; TT 149, 157-158, 170-171. Although Commissioner Beninga did comment that presentations at the Commission hearing may be limited, the comments and presentations by Hanson, Hansons' attorney, and their neighbors were never restricted in any way. HT 10. Chairman Beninga commented at the Commission hearing that the Commission accepted over an hour of input on EFC's CUP application (which was in addition to receiving numerous pages of written materials). HT 59. At no time were the Hansons or their neighbors cut off. TT 175.

EFC selected the proposed site based in part on a desire to move away from the population centers of Sioux Falls, Colton and Baltic. HT 12. Additionally, the new *state-of-the-art* facility was intended to replace aging outdated facilities in Colton and Baltic which would then be torn down. HT 11, 14. Throughout the stages of this proceeding, various safety information, regulations, and protocol were brought to the attention of the reviewing body. HT 15-16, p. 20. This includes various state and federal regulations set forth under the Code of Federal Regulations and South Dakota statutes. TT Ex. 3, p. 9 and 12 and Ex. 7. Moreover, the new *state-of-the-art* facility would have redundant safety equipment in place, including a 3-valve system referred to at the Commission hearing as "pop and lock." HT 52. In addition to various set back requirements, the state and federal regulations required a final inspection before the EFC facility would be approved for operation followed by bi-annual inspections thereafter based on the presence of various fertilizers. HT 20, TT Ex. 7. The presence of

anhydrous ammonia would also trigger required annual inspections by the South Dakota Department of Agriculture. HT 20, TT Ex. 3, p. 9.

Ultimately, after weighing all the evidence and arguments for and against the CUP, Commissioners determined that the safety protocol in place adequately reduced or off-set the *potential risks* cited by the Hansons. HT 58-59, 60, 64. The following excerpts demonstrate that Commissioners properly weighed the Hansons' concerns together with the responsive position of EFC:

> Q. Okay. And so that consideration of those factors, as I understand it, included things such as the dangers of anhydrous ammonia and the risks of anhydrous ammonia, and that sort of information that was offered in opposition to the conditional use permit?
>
> A. Yes. And what they used to remediate the risk or to lessen the risk.
>
> Q. Yep. And that's kind of where I'm going, Commissioner, is that, is it fair to say that you considered both sides, the pros and cons when you deliberated and made your decision?
>
> A. Yes. I understand the homeowner's concerns too.
>
> Q. Homeowner concerns and that included things such as this plume analysis or the accident articles and the neighbors' oppositions itself, either through statements or letters or exhibits; correct?
>
> A. Yes.
>
> Q. That was considered?
>
> A. Yes.
>
> Q. And you balanced all of that against the other factors, the likelihood of a risk, those procedural safeguards and the federal regulations and the state regulations?
>
> A. Yes.

Commissioner Kelly testimony TT 127.

* * *

Q. Prior in the hearings -- were you able to see the plume analysis submitted by Mr. Ramstad?

A. I was.

Q. Did you consider the statements made by the Hansons and their neighbors when making your decision?

A. Yes, I did.

Q. Did you consider the effect on the neighbors when making this decision?

A. Yes, I did.

* * *

Q. Did you consider what could happen if there was an accidental spill of anhydrous ammonia?

A. Yes.

Q. Did you weigh that with all the other evidence that was submitted to you?

A. I tried, yes.

Q. There's been an allegation in this case, Commissioner Barth, and I'm going to go to it here, you did not consider the evidence submitted by the petitioner with respect to the dangers of anhydrous ammonia. Is that a true or false statement?

A. I believe it should be false, but I can't answer for a perception.

Q Not necessarily with perception, but that statement itself, did you consider?

A. I seriously considered every part of it.

* * *

Q. Now, you're aware, are you not, Commissioner, that there are -- South Dakota has adopted state and federal regulations on the location of placement of anhydrous ammonia tanks?

A. I assume so.

Q. And do you recall any discussion in these proceedings about setbacks and distances from certain structures?

A. I think I recall some setback comment, but I can't remember specifically.

Q. Okay. And is it your understanding and expectation that Eastern Farmers Co-Op be in compliance with all of those standards?

A. Absolutely. Yes.

Q. So if this site is undergoing inspection or permitting and those federal authorities are there, you would anticipate and expect approval only if they were in compliance with those state and federal regulations and setbacks?

A. That would be my expectation.

Q. Commissioner, as I understand your testimony today, in your answers to Mr. Ramstad and Ms. Show, you considered all of the dangers or potential dangers presented to you at the hearing?

A. Yes.

Q Okay. And at the same time you considered the safety measures and likelihood of a potential spill?

A. Yes.

Q. Considered the regulations and state of the art construction of this new facility?

A. Yes.

Q. Together with considering the placement near the rail lines and the highways and this being an agriculture area?

A. Yes.

Q. Did you consider the fact that this location was rural and perhaps less populated than other rural areas?

A. Yes.

Q. And did you balance all of those factors when you came together to make your decision?

A. That's what I tried to do, yes.

Q. Are you aware of any false evidence or testimony presented in conjunction with this conditional use permit?

A. No.

Commissioner Barth testimony TT 149, 150, 157-158.

* * *

Q And did you review the minutes of the planning and zoning commission that were included in Scott Anderson's report?

A. I did.

Q. Did you review the evidence that was presented by Mr. Ramstad and his clients?

A. Absolutely.

* * *

Q. You considered the statements made by the Hansons and their neighbors in making this decision?

A. Absolutely.

Q. Did you consider the effect on the neighbors in making this decision?

A. Yes.

Commissioner Pekas testimony TT 170-171.

As part of the balancing of competing interests in this matter, the Commissioners ultimately felt safety regulations satisfactorily controlled and reduced the risk to the point where it was a proper exercise of discretion to grant the CUP. HT 58-59, 60, 64. TT 127, 149-150, 154-155, 157, 158, 170-171. Commissioner Barth acknowledged that the *potential risks* in this case were not unlike many other common *potential risks* present in our modern society that are deemed acceptable where safety regulations and procedures are in place to minimize those risks. TT 154-155. Barth agreed risks of a leak or contamination accompany things such as gasoline, oil, or nuclear energy. TT 154. In turn, Barth acknowledged that regulations and safety protocols are in place such that we allow these activities to occur as part of our modern society. TT 155. Barth viewed anhydrous ammonia as a similar *potential risk* with "adequate safety measures in place to reduce that risk to a manageable level." TT 155.

It should also be noted that clarifying testimony was presented to the Trial Court distinguishing between storage and distribution of anhydrous ammonia, which would be allowed under the CUP, as opposed to the more volative and risky storage and distribution of ammonia nitrate, which would not be allowed under the CUP. TT 181-182.

ARGUMENT

I. The Minnehaha County Ordinances Comply With the Requirements of SDCL § 11-2-17.3 and Properly Set Forth Criteria for Evaluating Conditional Uses.

As a threshold matter, EFC adopts and incorporates by this reference those arguments and authority offered by the County in opposition to Hanson. Hanson argued to both the County Commission and Circuit Court that the MCZO did not contain proper

criteria for evaluating EFC's CUP. The Circuit Court held the MCZO did in fact provide sufficient criteria for evaluating the CUP when the ordinances were considered in their entirety as intended and stated in the MCZO. SR. 99-100, 57.

Hanson continues to urge that SDCL § 11-2-17.3 requires specific and detailed criteria with respect to evaluating a CUP for EFC's agronomy facility as an agricultural operation under MCZO 3.04(X) and (BB). This argument fails for two reasons. First, SDCL § 11-2-17.3 only requires general criteria to be stated. Second, the MCZO must be considered in its entirety, and when it is, the ordinances provide the required criteria.

a. SDCL § 11-2-17.3 only requires general criteria.

SDCL § 11-2-17.3 provides:

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

The statute only calls for inclusion of "the criteria for evaluating each conditional use." There is no requirement for or other language to support Hansons' claim for specific, detailed criteria for the subcategory of agricultural facilities.[1]

b. MCZO contain the criteria called for in SDCL § 11-2-17.3.

[1] Hansons' theory is misplaced and appears based in part on SDCL § 11-2-17.2 which has since been repealed. The Circuit Court held that prior to 2004, "specific criteria" under SDCL § 11-2-17.2 were only encouraged, *when practical*, but were never required; specific criteria became a non-issue after SDCL § 11-2-17.2 was repealed and replaced by SDCL § 11-2-17.3. SR 57. EFC adopts the Circuit Court's holding and the County's argument and authority regarding the repeal of SDCL § 11-2-17.2 and how the former statutes calling for specific criteria are not mandatory nor otherwise applicable in this case.

To the extent criteria is required, sufficient criteria is set forth within the MCZO. It is undisputed that the Comprehensive Plan and the MCZO are to be read and interpreted together. TT 69. MCZO § 19.01 directs the Planning Commission, when authorizing CUPs, to impose "conditions as are appropriate and necessary to ensure compliance with the Comprehensive Plan and to protect the health, safety, and general welfare in the issuance of such conditional use permit." MCZO § 19.01. TT Ex. 5. Accordingly, the County's zoning scheme provides that health, safety, and general welfare are threshold criteria for each and any CUP. Other areas of the Comprehensive Plan go on to provide additional criteria. TT 49-54.[2]

The shortcoming of Hansons' argument for specific detailed criteria for each and every CUP category can be seen in the logical extension of their argument. The Hansons' presentation at each stage of these proceedings clearly indicates that the specific criteria they are arguing for would involve safety matters including a plume analysis, equipment requirements, and/or further traffic study.[3] Logically, these factors already fall under the criteria of health, safety, and general welfare. If the MCZO specifically provided for safety matters, plume analysis, or traffic studies as specific criteria under MCZO 3.04(X) and (BB), Hanson would likely argue that even more specific criteria were needed. Hanson may then call for specific criteria details with respect to a plume analysis or other environmental study. Similarly, he may suggest the need for more specific criteria related to traffic study; any criteria's requirement for a traffic study would cause an opponent to argue for more

[2] These include addressing sections of the Comprehensive Plan involving rail access under Section 5-5, promotion of agri business under Section 5-6, rail access points under Section 6-6, and agricultural land use under Section 4-2.

[3] It is worth noting that the desired criteria urged and implied by Hanson were in fact considered at each stage of the proceedings.

specific, detailed criteria addressing traffic counts, traffic flow, signed placement, average of vehicle weights, impact on road construction, and maintenance should be included. Any CUP applied for or granted by the County would be subject to attack by any opponent based on demands for more and more specific criteria.

Ultimately, the Circuit Court correctly held the MCZO provided proper criteria for evaluating the CUP in this matter under the requirements of SDCL § 11-2-17.3. Therefore, the Circuit Court correctly held the MCZO in compliance with state law.

c. Hansons' due process arguments are misplaced or have been waived.

As part of their challenge of the MCZO, Hanson also alleges a due process violation. EFC incorporates by reference and adopts the arguments and authority offered by the County opposing the existence of any due process violation.

d. Hansons' displeasure with the outcome is not grounds to appeal.

A fair reading of the record in this matter together with Hansons' Appellate Brief , show that Hanson is merely dissatisfied that the decision of the Planning Commission, County Commission, and Circuit Court were not in line with Hansons' desired outcome. The scope of review on appeal does not allow the Appellate Court to substitute its discretion for the County Commissions unless shown to be arbitrary to capricious. *Chavies v. Yankton Co.,* 2002 S.D. 152, ¶ 7-8, 654 N.W.2d 801, 804. Because both the Planning Commission and County Commission, as well as the Circuit Court, considered all of the competing evidence for and against the CUP, and properly balanced the same, it is improper grounds to appeal merely because Hanson is dissatisfied with the outcome.

Hanson has continuously presented the *potential risks* as a near certainty to occur in an effort to sway the reviewing body and otherwise misdirect the proper review and

balancing of competing factors. It is true that there are *potential risks* of an anhydrous ammonia leak. At the same time, as acknowledged by Commissioner Barth, those are tempered and otherwise reduced to an acceptable level in light of certain safety protocols. TT 154-155. As with petroleum transportation or distribution facilities or even nuclear energy, *potential risks* are managed to socially acceptable levels when proper protocol and safety regulations are in place. Similarly, state and federal regulations exist with regard to anhydrous ammonia. HT 20, TT Ex. 3, pgs. 9 and 12. The County did not ignore the safety concerns presented by Hanson, but instead, after considering and balancing all factors, the Commission felt the *potential risks* were addressed to an acceptable level.

Ultimately, the Hansons' concerns were not ignored, but were fully considered. In a proper exercise of discretion, the County Commission and Circuit Court upheld the CUP.

II. The Minnehaha County Commission Decision to Uphold the Conditional Use Permit in This Matter Was Proper, With or Without the Supporting Vote of Commissioner Kelly.

Hanson challenges the Circuit Court ruling affirming the CUP on a 3-0 vote claiming a due process violation. Hansons' argument is difficult to discern but appears to be as follows: after the Circuit Court disqualified Commissioner Kelly, the County Commission 3-0 vote failed to provide a two-thirds majority vote. Hansons' claim fails for various reasons:

a. Hanson waived any claims resulting from Commissioner Kelly's disqualification.

Hanson argued to the Circuit Court that Commissioner Kelly should be

disqualified for his visit to the Worthing, South Dakota, facility.[4] Similarly, Hanson attempted to discredit or void the vote of other Commissioners for being biased or for failing to properly consider various safety concerns presented by Hanson and their neighbors. SR 53-54. However, Hanson never asserted a due process violation based on the number of valid Commissioner votes. Specifically, Hanson never argued to the Circuit Court that once Commissioner Kelly's vote was voided, that affirmation of the CUP failed a required two-thirds majority. SR 53-60.

Because Hanson failed to object or present any argument to the Circuit Court regarding the 3-0 vote or the lack of a two-thirds majority vote, those issues are now waived. It is well settled that a failure to object during underlying proceedings results in a waiver where a party attempts to raise new issues for the first time on appeal. *People in the interest of M.S.*, 2014 S.D. 17, ¶17 n. 4, --- N.W.2d --- (*quoting In re Estate of Smid,* 2008 S.D. 82, ¶ 43 n. 15, 756 N.W.2d 1, 15 n. 15 (Konenkamp, J., dissenting)). (It is the Court's "standard policy" that "failure to argue a point waives it on appeal.") See also *Veith v. O'Brien*, 2007 S.D. 88, ¶67, 739 N.W.2d 15, 34; *State v. Carlson*, 392 N.W.2d 89 (S.D. 1985). Because Hanson never raised the alleged due process violations, asserted now for the first time on appeal, such claims are waived.

b. Hansons' claim that a two-thirds majority vote is required is erroneous.

As part of Hansons' alleged due process violation, they claim a two-thirds majority vote of the County Commission was required under SDCL § 11-2-59, and in turn, that the ultimate 3-0 vote remaining following the Circuit Court's decision falls

[4] EFC does not concede on appeal that Commissioner Kelly's visit was improper but relies on the argument and authority submitted by the County validating that visit.

short of this requirement. A two-thirds majority vote is not required under the facts and procedural history of this case.[5]

Hanson points to SDCL § 11-2-59 in support of the claim for a required two-thirds majority vote. This statute provides:

> The concurring vote of two-thirds of the members of the board of adjustment is necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in the ordinance.

SDCL § 11-2-59.

The facts and procedural history of this case do not involve a board of adjustment and the County Commission was not sitting as a board of adjustment. Instead, the County Commission was fulfilling its appellate role under SDCL § 7-8. Under the framework established for Minnehaha County by the MCZO, CUPs are first ruled on by the Planning Commission with any appeals of those decisions going to the County Commission. TT Ex. 5 at 19.01 and 19.06.

The two-thirds vote requirement under SDCL § 11-2-59 is only applicable to action by a board of adjustment. If the County Commission had been acting as a board of adjustment, Hansons' appeal would have been initiated under SDCL § 11-2-61 and 11-2-62, using a writ of certiorari. Hansons' appeal was brought pursuant to SDCL § 7-8. HB 3, SR 105. Accordingly, Hansons' reliance on SDCL § 11-2-59 is misplaced.

Considering the County Commission was acting as an appellate body and not sitting as a board of adjustment, a simple majority is all that is required under SDCL § 7-8. See also SDCL § 7-8-18. Again, assuming arguendo that SDCL § 11-2 applies to

[5] It should be noted that if Commissioner Kelly's vote is reinstated on appeal (pursuant to the County's notice of review), Hansons' two-thirds vote argument becomes moot.

these proceedings, Hanson mistakenly points to SDCL §11-2-59 where SDCL § 11-2-60 would be the applicable statute. That statute provides:

> In lieu of appointing the board of adjustment provided by § 11-2-49, the board of county commissioners having adopted and in effect a zoning ordinance may act as and perform all the duties and exercise the powers of the board of adjustment. The chair of the board of county commissioners is chair of the board of adjustment as so composed. *The concurring vote of at least two-thirds of the members of the board as so composed is necessary to reverse any order, requirement, decision, or determination of any administrative official, or to decide in favor of the appellant on any matter* upon which it is required to pass under any zoning ordinance, or to effect any variation in the ordinance.

SDCL § 11-2-60 (emphasis added).

If the County Commission was acting as a board of adjustment in this matter,[6] then a two-thirds vote would be required only "to reverse" the planning commission "or to decide in favor of the [Hansons]." SDCL § 11-2-60. The County Commission did not reverse the CUP nor rule in Hansons' favor. Accordingly, under a plain reading of the statute, a two-thirds vote is not required.

CONCLUSION

The Circuit Court properly held the Minnehaha County zoning ordinances include the proper criteria called for under South Dakota law for the consideration of conditional use permits. The criteria set forth in the ordinances include the health, safety and general welfare provisions. These criteria apply to evaluation of a conditional use permit as well as other general criteria set forth in the County's comprehensive zoning plan.

Furthermore, the Circuit Court properly held that Hanson failed to establish a due process violation. Lastly, a two-thirds majority vote is not required under the factual and procedural background of this case, such that the Circuit Court's affirmation of the CUP

[6] Which EFC and the County dispute.

should be upheld even on a 3-0 vote. EFC requests that Commissioner Kelly's vote be reinstated pursuant to the County's Notice of Review.

For the foregoing reasons, EFC respectfully requests that the Court affirm the Circuit Court's decision upholding the CUP and that the Court reinstate the vote of Commissioner Kelly.

Dated this 13th day of May, 2014.

MAY & JOHNSON, P.C.

By /s/ John H. Billion
John H. Billion
6805 S. Minnesota Avenue, Suite 100
P.O. Box 88738
Sioux Falls, SD 57109-8738
(605) 336-2565
Attorneys for Intervenor/Appellee
Eastern Farmers Co-op

CERTIFICATE OF SERVICE

John H. Billion, attorney for Intervenor/Appellee Eastern Farmers Co-op, hereby certifies that a true and correct copy of the foregoing **Brief of Appellee and Appendix** were served via e-mail upon the following:

Rick L. Ramstad
Crew & Crew
141 N. Main Avenue, Suite 706
Sioux Falls, SD 57101
E-mail: rick@crewandcrew.com
Attorneys for Petitioner/Appellant

Sara E. Show
Deputy State's Attorney
Minnehaha County State's Attorney's Office
415 N. Dakota Avenue
Sioux Falls, SD 57101
E-mail: sshow@minnehahacounty.org
Attorneys for Respondent/Appellee

Dated this 13th day of May, 2014.

MAY & JOHNSON, P.C.

By /s/ John H. Billion
John H. Billion

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Intervenor's/Appellee's Brief has been produced using Microsoft Word 12-point proportionally spaced typeface, which contains 3,883 words from the Statement of Case through the Conclusion, and that the foregoing complies with the Court's type-volume limitations under SDCL § 15-26A-66(b)(4).

Dated this 13th day of May, 2014.

MAY & JOHNSON, P.C.

By /s/ John H. Billion
John H. Billion

APPENDIX TABLE OF CONTENTS

Appeal No. 26859

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

In the Matter of Conditional Use Permit #13-08, Doug Hanson and Louise Hanson,

Petitioners and Appellants,

vs.

Minnehaha County Commission, Minnehaha County, South Dakota and Eastern Farmers Cooperative,

Respondents and Appellees,

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Robin J. Houwman, Circuit Court Judge Presiding

---

REPLY BRIEF OF APPELLANT

Attorney for Appellant

Rick L. Ramstad
CREW & CREW, P.C.
141 N. Main Ave, Ste 706
Sioux Falls, SD 57104
Tel.: (605) 334-2734
Attorney for Appellants

Attorney for Appellees

Sara E. Show
Deputy State's Attorney
515 N. Dakota Ave
Sioux Falls, SD 57104
(605) 367-4226
Attorney for Appellees
Minnehaha County

John H. Billion
MAY & JOHNSON, P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57108
Tel.: (605) 336-2565
Attorney for Eastern Farmers
Cooperative

NOTICE OF APPEAL FILED: NOVEMBER 12, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

Cases

Supreme Court of South Dakota

Issue for Reply

Did the circuit court err in upholding the 3-0 vote of the Commission?

Argument in Reply

Appellee and the Interveners argue that the Hansons waived the issue of a due process violation by failing to preserve the issue of the validity of the 3-0 vote at the planning commission or at the county commission. This argument defies the procedural history of the case. Commissioner Kelly's vote was first disqualified by circuit court at a denovo trial. The issue would never have existed but for the circuit court's decision to disqualify Commissioner Kelly's vote while allowing the decision to stand.

Despite the contention to the contrary, this issue was raised immediately following the memorandum decision issued by the trial court and prior to the filing of its judgment and order. Specifically, the written objections relevant to this issue provided:

> 3. Petitioner objects to the Court's conclusion of law that the presence of three qualified members of the County Commission is a lawful quorum or that the affirmative vote of those three members results in a lawful act of the County Commission when considering a conditional use permit. A similar issue was addressed in *Jensen v. Turner County Board of Adjustment*, 2007 SD 28, 730 N.W. 2d 411. In that case, the Supreme Court held that SDCL 11-2-59 "abrogated the common-law rule . . . ." and

required "a concurring vote of two-thirds of the members of the board" in approving a conditional use permit.

In this case, the County Planning Commission was the approval authority and the County Commission sat as the "reviewing" body. By designating itself as this quasi appellate authority, the County has effectively deprived the Hansons of the right to review and consideration by a 2/3rds majority of a board, simply by not characterizing the "Planning Commission" as a "Board of Adjustment" and vesting itself with full authority to review the decision. An analogous situation presented in *Tyler v. Grant County Board of Adjustment*, (In Circuit Court, Third Judicial Circuit, Grant County CIV 13-0015). In *Tyler*, Judge Timm ruled that parts of SDCL 11-2 were unconstitutional insofar as some citizens would be entitled to de novo review of conditional use cases but others are only afforded the more limited review provided under a writ of certiorari. Judge Timm found this distinction without a rational basis and in violation of the equal protection of the laws. (See Exhibit C hereto).

In this case, the Hanson's were afforded de-novo review, but not afforded the requirement of 2/3rds majority in the consideration of their case. The Supreme Court has specifically held that in exercising the quasi-judicial functions of a Board of Adjustment when considering conditional use permits, the Legislature abrogated the common law rule of the simple majority vote.

There is no rational basis in protecting a citizen of one county with the requirement of a super majority vote to approve a conditional use permit and denying the same privilege to the citizens of another county, regardless of the level of judicial scrutiny to be afforded later. Just as this Court should not sit as a "one man board of adjustment", the determination of a three man board of adjustment is as equally flawed when the law requires a 2/3rds majority of the whole of a five man board.

4. Petitioner Objects to the Court's legal conclusion that *Sate Ex Rel., Wilcox v. Strand*, 442 N.W. 2d 256-259, (S.D. Supreme Court, 1989) is authority for the waiver of any issue in this case.

> *Wilcox* was an appeal to the South Dakota Supreme Court under the rules of appellant procedure. This was a trial de novo pursuant to statute. No rule of civil procedure applicable to this case creates a waiver as contemplated in *Strand*. The Court's conclusion in this regard is directly contrary to SDCL 15-26A-7: "On appeal from a judgment the Supreme Court may review any order, ruling, or determination of the trial court, including an order denying a new trial, and whether any such order, ruling, or determination is made before or after judgment involving the merits and necessarily affecting the judgment and appearing upon the record."

In the present case the trial court was presented with an objection to its conclusion that the 3-0 vote was insufficient and afforded an opportunity to correct any error. As such, this issue was preserved for review before this Court and may be properly considered.

Conclusion

The Appellant respectfully requests that the court reverse the judgment of the trial court in all respects.

Dated this 19th day of May, 2014.

/s/ Rick L Ramstad
Rick L. Ramstad
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing "Reply Brief of Appellant were served via e-mail, upon the following:

Sara E. Show
Deputy State's Attorney
515 N. Dakota Ave
Sioux Falls, SD 57104

John H. Billion
MAY & JOHNSON, P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57108

On this 19th day of May, 2014.

/s/ Rick L. Ramstad
Rick L. Ramstad

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 754 words from the Issue for Reply through the Conclusion. I have relied on the word count of a word processing program to prepare this certificate.

Dated this 19th day of May, 2014.

/s/ Rick L. Ramstad
Rick L. Ramstad