IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26792

SAVE OUR NEIGHBORHOOD – SIOUX FALLS; BONITA SCHWAN; DAN WRAY; GALE WRAY; RICHARD V. WILKA; MITCHELL ARENDS; ERIN ARENDS; REBEKKA KLEMME; NEIL KLEMME; DANA VAN BEEK PALMER; ANNE RASMUSSEN; and DUANE O'CONNELL,

Petitioners and Appellants,

vs.

CITY OF SIOUX FALLS; and SIOUX FALLS CITY COUNCIL,

Respondents and Appellees.

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

THE HONORABLE STUART L. TIEDE
CIRCUIT JUDGE

BRIEF OF APPELLANTS

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Notice of Appeal Filed on August 21, 2013

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index will be to the designation (R). References to the appendix will be to the designation (App.). References to the transcript of the August 1, 2013 Petitions for Writ of Certiorari and Prohibition Hearing will be to the designation (HT). Any references to the hearing exhibits will be to the designation (Ex.).

STATEMENT OF JURISDICTION

The Petitioners appeal from the trial court's Order Denying Petition signed on August 5, 2013 and filed on August 8, 2013. (R. 126). Notice of entry of the order was served by the Respondents upon the Petitioners by U.S. mail on August 14, 2013. (R. 131). The Petitioners filed their notice of appeal on August 21, 2013. (R. 133). This Court has jurisdiction pursuant to SDCL 15-26A-3(1), (2) and/or (4).

REQUEST FOR ORAL ARGUMENT

The Petitioners respectfully request the privilege of appearing for oral argument before this Court.

STATEMENT OF THE ISSUES

I. Under the plain meaning of the text of SDCL 9-4-5, is a municipal resolution annexing unplatted territory subject to county approval irrespective of whether the annexation process is initiated by landowner petition or by the municipality?

The trial court determined that SDCL 9-4-5 was ambiguous and examined legislative history in holding that SDCL 9-4-5 does not apply to "voluntary" annexations initiated pursuant to SDCL 9-4-1.

- *Esling v. Krambeck*, 2003 S.D. 59, 663 N.W.2d 671
- *Rhodes v. City of Aberdeen*, 50 N.W.2d 215 (S.D. 1951)
- *Smith v. City of Rapid City*, 307 N.W.2d 598 (S.D. 1981)

II. Should the petition for writs of certiorari and prohibition have been granted?

Based upon its interpretation of the statutes, the trial court denied the petitions.

- *Parris v. City of Rapid City*, 2013 S.D. 51, 834 N.W.2d 850
- *Lamar Advertising of South Dakota, Inc. v. Zoning Board of Adjustment of City of Rapid City*, 2012 S.D. 76, 822 N.W.2d 861
- *Esling v. Krambeck*, 2003 S.D. 59, 663 N.W.2d 671

STATEMENT OF THE CASE

This appeal asks this Court to clarify the proper legal procedure for a municipality to annex surrounding property under the current statutes enacted by the Legislature to govern that process.

On July 10, 2013, Petitioners Save Our Neighborhood – Sioux Falls, Bonita Schwan, Dan Wray, Gale Wray, Richard V. Wilka, Mitchell Arends, Erin Arends, Rebekka Klemme, Neil Klemme, Dana Van Beek Palmer, Anne Rasmussen, and Duane O'Connell filed an Affidavit and Verified Petition for Writ of Certiorari and Writ of Prohibition in Minnehaha County Circuit Court of the Second Judicial Circuit. (R. 65). The petition contended that SDCL 9-4-5 required that before the Sioux Falls City Council could legally adopt a resolution to annex unplatted agricultural land, it was required to obtain the approval of Lincoln County, in which the land was situated. (App. 17-18).

On July 23, 2013, the City of Sioux Falls and Sioux Falls City Council, as Respondents, filed their opposition. (R. 112).

The parties entered into and filed a stipulation of facts. (R. 122).

On August 1, 2013, a hearing was convened at the Minnehaha County Courthouse before the Honorable Stuart L. Tiede, Circuit Judge.

At the close of the hearing, the circuit court issued its oral ruling denying the petitions. (App. 4-9) (HT 91-96). In so doing, the circuit court held that the statute was ambiguous. (App. 5-6). After examining the statutory scheme as it existed in 1955 and as discussed in this Court's 1951 decision in *Rhodes v. City of Aberdeen*, the

circuit court held that no approval of the country commission is required for an annexation resolution adopted as the result of a voluntary petition brought pursuant to SDCL 9-4-1. (App. 6, 8). The circuit court further held that this Court's contrary statements in *Esling v. Krambeck* were mere dicta. (App. 6-7).

On August 5, 2013, the circuit court signed its Order Denying Petition, which was filed on August 8, 2013. (R. 126).

This appeal followed.

STATEMENT OF THE FACTS

The real property that is the subject of this petition ("Property") consists of approximately 39 acres, is located in Lincoln County, South Dakota, and described as follows:

> The NE1/4 of the NE1/4 and a portion of the SE1/4 of the NE1/4 of Section 22, T100N, R50W, 39.17 acres, more or less, including Lot H-1, Lincoln County, South Dakota, to be platted as Lots 1-8 and Outlot A, Block 1, Springdale Development Addition, containing 39.17 acres, more or less, to the City of Sioux Falls, Lincoln County, South Dakota.

(R. 122). The Property is owned by Springdale Development LLC and is unplatted territory zoned by Lincoln County for agricultural use. (R. 122).

The Petitioners in this action are residents of the City of Sioux Falls and Lincoln County who live in a residential neighborhood next to this unplatted farmland. (R. 120).

On January 22, 2013, Springdale Development, the owner of the Property, presented an Annexation Petition (Petition Number 2013-01-03) to the Sioux Falls

City Council seeking to have the Property annexed into the City of Sioux Falls. (R. 117, 121). At the time that the Annexation Petition was presented to the City Council, the Property was contiguous to the City of Sioux Falls. (R. 121). The Annexation Petition was signed by Springdale Development. (R. 117, 121).

At the time that the Annexation Petition was presented to the City Council, the Property had not been platted by a duly recorded plat and it was agricultural land as defined by SDCL 10-6-31. (R. 122). The Property thus was "unplatted territory" as defined by SDCL 9-4-5.

On Tuesday, April 2, 2013, the City Council adopted Resolution No. 25-13 to annex the Property into the City of Sioux Falls. (R. 121). The annexation of the Property described in Resolution No. 25-13 into the City was not approved by the Lincoln County Board of County Commissioners before the Sioux Falls City Council's adoption of the resolution. (R. 121).

On Wednesday, April 3, 2013, the City Planning Commission, Advisory Committee to the City Council on Land Use and Zoning, voted to recommend to the Sioux Falls City Council that it approve rezoning of the Property described in Resolution 25-13 from Agricultural to Commercial. (R. 121).

On Wednesday, June 5, 2013, the City Planning Commission voted to recommend to the Sioux Falls City Council that it approve rezoning of the Property described in the Resolution No. 25-13 from Agricultural to Commercial. (R. 120-21).

On Tuesday, June 18, 2013, the Sioux Falls City Council had its first reading of an ordinance, based upon the recommendation of the City Planning Commission,

to rezone the Property described in Resolution No. 25-13 from Agricultural to Commercial. (R. 120). At this meeting, the City Council voted to set the hearing, second reading, and final vote upon the ordinance to rezone the Property for August 6, 2013 at 7:00 p.m. (R. 120).

STANDARD OF REVIEW

The interpretation of statutes present a question of law that this Court reviews de novo. *See In re B.Y. Development, Inc.*, 2010 S.D. 57, ¶ 7, 785 N.W.2d 296, 299; *Verry v. City of Belle Fourche*, 1999 S.D. 102, ¶ 6, 598 N.W.2d 544, 546. This Court's "review of certiorari proceedings is limited to whether the challenged court, officer, board, or tribunal had jurisdiction and whether it regularly pursued its authority." *Parris v. City of Rapid City*, 2013 S.D. 51, ¶ 10, 834 N.W.2d 850, 854 (quoting *Lamar Advertising of South Dakota, Inc. v. Zoning Board of Adjustment of City of Rapid City*, 2012 S.D. 76, ¶ 7, 822 N.W.2d 861, 863).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DENYING THE WRITS OF CERTIORARI AND PROHIBITION.

A. A writ of certiorari is appropriate to invalidate a municipality's annexation of land not done in compliance with the law.

In this appeal, the Petitioners respectfully contend that the Sioux Falls City Council exceeded its jurisdiction and acted in irregular pursuit of its authority when it passed a resolution to annex the Property in question without first obtaining the approval of Lincoln County, in which it is situated, pursuant to SDCL 9-4-5. There is no dispute that the Petitioners have standing to bring such a challenge. SDCL 9-1-6

expressly provides that "[a]ny citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision" of Title Nine (Municipal Government).

This Court has held on several occasions that where a city fails to adhere to the statutory requirements for annexation, the resolution in question should be declared invalid. *See City of Rapid City v. Anderson*, 2000 S.D. 77, ¶ 15, 612 N.W.2d 289, 294; *Smith v. City of Rapid City*, 307 N.W.2d 598, 605 (S.D. 1981); *Big Sioux Township v. Streeter*, 272 N.W.2d 924, 926-27 (S.D. 1978); *Rhodes v. City of Aberdeen*, 50 N.W.2d 215, 221 (S.D. 1951).

This Court has further made clear that a writ of certiorari is an appropriate remedy where a municipality has exceeded its jurisdiction or acted in irregular pursuit of its authority. *See Parris*, 2013 S.D. 51 at ¶ 10, 834 N.W.2d at 854; *Lamar Advertising*, 2012 S.D. 76 at ¶ 7, 822 N.W.2d at 863; *Esling v. Krambeck*, 2003 S.D. 59, ¶ 10, 663 N.W.2d 671, 677; SDCL §§ 21-31-1, 8. Upon certiorari review, municipal action thus should be invalidated where the city has done "some act forbidden by law or neglected to do some act required by law." *Esling*, 2003 S.D. 59 at ¶ 10, 663 N.W.2d at 677; *Save Centennial Valley Ass'n, Inc. v. Schultz*, 284 N.W.2d 452, 454 (S.D. 1979).

Further, a writ of prohibition is appropriate to desist or refrain a municipal entity from acting in excess of its proper authority, such as to preclude the Sioux Falls City Council from acting to rezone property where it has not been lawfully annexed. *See Rapid City Journal v. Delaney*, 2011 S.D. 55, ¶ 1, 804 N.W.2d 388, 390 n.1; SDCL §§ 21-30-1, 2, 4.

B. A municipality must strictly comply with statutes granting annexation powers.

The extension of the boundaries of a city or town is a legislative function entirely within the power of the state legislature to regulate. *McQuillin: The Law of Municipal Corporations*, § 7.10 (2013). As this Court has explained, "[a] municipality of this state," including the City of Sioux Falls, "has no power to extend its boundaries other than that granted to it by the South Dakota Legislature." *Rhodes*, 50 N.W.2d at 20. "Such power of annexation as conferred on a municipality is an extraordinary power which must be exercised by a municipality in strict compliance with the statutes conferring such power." *Id.*; *see also Smith*, 307 N.W.2d at 601; *County of Sarpy v. City of Gretna*, 727 N.W.2d 690, 694 (Neb. 2007); *McQuillin*, *supra*, at § 7.13.

C. Sioux Falls City Council Resolution No. 25-13 is invalid because it was passed without prior approval of the Lincoln County Commission in violation of SDCL 9-4-5.

1. Legal standard for interpreting statutes

The legal question in this case concerns the present restrictions placed by the Legislature upon the City's annexation powers. It depends upon the interpretation of statutes. Statutory interpretation, of course, is a question of law. *In re B.Y. Development*, 2010 S.D. 57 at ¶ 7, 785 N.W.2d 296 at 299.

When interpreting the words of a statute, courts are instructed to give its language paramount consideration, with emphasis toward its plain meaning. *See id.* (citing *Esling*, 2003 S.D. 59 at ¶ 6, 663 N.W.2d at 675-76); *Lamar Advertising*, 2012 S.D. 76 at ¶ 13, 822 N.W.2d at 864 ("It is fundamental to statutory interpretation that we give the language used its plain meaning").

As this Court has explained, "[t]he intent of a statute is determined from what the Legislature said, rather than what we think it should have said." *Esling*, 2003 S.D. 59 at ¶ 6, 663 N.W.2d at 676. As summarized by Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). As a result, "[w]ords and phrases in a statute must be given their plain meaning and effect." *Esling*, 2003 S.D. 59 at ¶ 6, 663 N.W.2d at 676.

And importantly, only when statutory language is unclear or ambiguous do courts employ canons of construction or otherwise depart from a textual analysis. *See B.Y. Development, Inc.*, 2010 S.D. 57 at ¶ 7, 785 N.W.2d at 299. In particular, attempts to employ a statute's perceived purpose in contravention of its plain language are disfavored. *See Harris v. Commissioner*, 178 F.2d 861, 864 (2d Cir. 1949) (L. Hand, C.J) ("It is always a dangerous business to fill in the text of a statute from its purposes").

2. Read in context, the plain meaning of the text of SDCL 9-4-5 requires county approval for resolutions annexing unplatted land as determined by this Court in *Esling v. Krambeck*.

SDCL Chapter 9-4 is entitled "Change of Municipal Boundaries." This Chapter sets forth two methods by which a municipality may annex land pursuant to an annexation resolution: (1) by a resolution made pursuant to a petition by voters and landowners (voluntary annexation); and (2) by a resolution without a petition initiated by the City (annexation without petition). Regarding the first method, SDCL 9-4-1 provides:

> The governing body of a municipality, upon receipt of a written petition describing the boundaries of any territory contiguous to that

> municipality sought to be annexed to that municipality, may by resolution include such territory or any part thereof within such municipality if the petition is signed by not less than three-fourths of the registered voters and by the owners of not less than three-fourths of the value of the territory sought to be annexed to the municipality.
>
> For purposes of this section, the term, contiguous, includes territory separated from the municipality by reason of intervening ownership of land used as a golf course, railroad, or any land owned by the State of South Dakota or any subdivisions thereof.

SDCL 9-4-1 (emphasis supplied); *see also* SDCL 9-4-1.1.

The second method of annexation, done by a city without an originating petition, is set forth in SDCL 9-4-4.1 through 9-4-4.11.

In SDCL 9-4-5, the City's power to pass *any* annexation resolution has been circumscribed by the South Dakota Legislature for certain types of land. In its entirety, SDCL 9-4-5 provides:

> **Annexation of unplatted territory subject to approval by county commissioners.**
>
> No such resolution describing unplatted territory therein may be adopted until it has been approved by the board of county commissioners of the county wherein such unplatted territory is situate. For the purposes of this section, unplatted territory is any land which has not been platted by a duly recorded plat or any agricultural land as defined in § 10-6-31.

SDCL 9-4-5 (emphasis supplied). Thus, as this Court has held in construing this statute, "Municipal annexation is subject to approval by the county commissioners if the territory is unplatted, as it was in this case. SDCL 9-4-5." *Esling*, 2003 S.D. 59 at ¶ 26, 663 N.W.2d at 680.

The *Esling* decision is directly on point. The issue on appeal from the denial of a writ of certiorari was whether "the City of Spearfish lawfully annexed territory

under a voluntary petition for annexation." *Id.* at ¶ 1, 663 N.W.2d at 674. Just as in the present case, the City of Spearfish was presented with "[a] petition for voluntary annexation under SDCL 9-4-1" regarding land situated in Lawrence County. *Id.* at ¶ 2, 663 N.W.2d at 674.

Just like the Property in dispute here, the property sought to be voluntarily annexed by Spearfish pursuant to SDCL 9-4-1 consisted of "unplatted lands" as defined by SDCL 9-4-5. *Id.* at ¶ 26, 663 N.W.2d at 680.

As a result, under the plain language of SDCL 9-4-5, the City was prohibited from passing an annexation resolution until it had secured the approval of the Lawrence County Commission. Only after the Lawrence County's approval was obtained could the City's annexation resolution be adopted:

> At the same time, under SDCL 9-4-5, the Lawrence County Commission passed a motion approving the city's annexation of unplatted lands described in the petition. A week later, the Spearfish Planning Commission scheduled a hearing on the voluntary annexation petition, and published a notice of public hearing on the matter. Approximately one month later, the Spearfish Planning Commission held its public hearing. Despite objections to the annexation by the applicants here, the commission unanimously recommended that the City Council approve the annexation petition. After published notices, the City Council held three public hearings on the voluntary annexation. The actions were adopted unanimously: Resolution 2001-33 for annexation, Ordinance 904 for zoning, and Ordinance 905 for the rural service district.

Id. at ¶ 3, 663 N.W.2d at 674.

Just as in the present case, the City of Spearfish's annexation of the unplatted territory in question was challenged in court and sought to be invalidated pursuant to a petition for writ of certiorari. *See id.* at ¶ 5, 663 N.W.2d at 675.

On appeal, this Court considered whether the City had properly exercised its powers in rezoning the annexed territory in contravention of existing Lawrence County zoning ordinances. *See id.* at ¶ 25, 663 N.W.2d at 680.

In answering that question, this Court first turned to the predicate question of whether the property had been properly annexed pursuant to SDCL Ch. 9-4 and, specifically, SDCL 9-4-5. *See id.* at ¶ 26, 663 N.W.2d at 680.[1] It held that the rezoning was proper because the City had obtained the approval of Lawrence County prior to adopting the annexation resolution for the property that was the subject of the voluntary petition as required by SDCL 9-4-5:

> Under SDCL ch 9-4, a city has authority to annex contiguous territory. Municipal annexation is subject to approval by the county commissioners if the territory is unplatted, as it was in this case. SDCL 9-4-5. The Lawrence County Commissioners had the authority to approve the annexation.

Id. Because the City had properly obtained the County's approval pursuant to SDCL 9-4-5 prior to adopting its annexation resolution, the City was free to rezone the annexed property within its corporate limits without further involvement of the County. *See id.* (citing SDCL Ch. 11-2 and SDCL Ch. 11-4); *Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977).

This Court's construction of the plain language of SDCL 9-4-5 in *Esling* is equally binding here. SDCL 9-4-1 permits the city to annex contiguous territory

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[1] This Court's construction of SDCL 9-4-5 thus was essential to its holding that the annexation in question was valid. Thus, it cannot be accurately characterized as meaningless "dicta," as the City successfully urged below.

pursuant to a resolution when a petition is filed that is signed by the owner or owners of at least three-fourths of the territory in question. SDCL 9-4-4.1 to 4.11 then establish a method of annexation by resolution without a landowner petition. But SDCL 9-4-5 unambiguously provides that "no such resolution" may be adopted for unplatted territory without first obtaining the approval of the county commission in which the land is situated.

If the Legislature had intended to preserve an exception to the requirement of county approval for annexation of unplatted territory in the language now embodied in SDCL 9-4-5, it would have done so in clear language. As it stands, without any such exception now appearing in the plain text of the governing statutes, this Court should presume that the Legislature meant what it has said, "rather than what we think it should have said." *Esling*, 2003 S.D. 59 at ¶ 6, 663 N.W.2d at 676.[2]

There is no dispute that the Property in question here is "unplatted territory" as defined by SDCL 9-4-5 and that the City did not secure the approval of the Lincoln County Commission prior to passing its resolution. As a result, under the plain language of the statutes, the resolution was adopted in violation of SDCL 9-4-5.

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[2] *See also Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("Courts must take statutes as they find them. … They are not the law-making body. They are not responsible for omissions in legislation"); *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.) ("To supply omissions transcends the judicial function"); 1 James Kent, *Commentaries on American Law* 467 (1826) ("The English judges have frequently observed, in answer to the remark that the legislature meant so and so, that they in that case have not so expressed themselves, and therefore the maxim applied, *quod voluit non dixit* [What it wanted it did not say]").

3. SDCL 9-4-5's requirement of county approval for resolutions annexing its unplatted land makes sense.

As Justice Cardozo wrote: "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). Even so, the Legislature's inclusion of a role for the County when property sought to be annexed is unplatted makes perfect sense. "The purpose of zoning is not to … permit the maximum possible enrichment of a particular landowner. Rather, zoning is designed to benefit a community generally by sensible planning of land uses." *Parris*, 2013 S.D. 51 at ¶ 12, 834 N.W.2d at 854 (citation omitted). When land has been properly platted, the County will have already been consulted and the County Commission played its required role in that process to address whatever concerns it may have related to the property's use, including such concerns as they may relate to zoning, drainage, safety, traffic, and other issues. Thus, there is no statutory requirement under SDCL 9-4-5 that a city obtain county approval to annex *platted* or non-agricultural lands pursuant to a voluntary annexation petition brought under SDCL 9-4-1.

If the Legislature's statutory scheme were to be construed in the manner suggested by the City, as allowing some unplatted territory to be annexed without approval of the governing County Commission, then the County would be stripped of its zoning jurisdiction over that land without being accorded its proper role in the process. (HT 39, 41). As this Court has explained:

> Here, then, the initiated county zoning ordinance ceased to apply once the territory was removed from the county's jurisdiction by annexation. For this reason, it matters not whether the city zoned the land as agricultural or as residential. The city properly exercised its authority.

Esling, 2003 S.D. 59, ¶ 27, 663 N.W.2d at 681. Thus, although this Court generally does not inquire as to the wisdom of a particular legislative enactment, the statutory scheme as interpreted by this Court in *Esling* is perfectly logical.

4. Neither legislative history nor the *Rhodes* decision's analysis of statutes now amended or repealed nullifies the plain meaning of the statutory text.

Although this Court's existing interpretation of the governing language is controlling, that construction is further supported by examining the legislative history of the statutes in question in comparison with the modern statutory framework. The law regarding municipal annexation has been substantially revised, with different statutes having been amended, enacted, and repealed over the years. In adopting the City's proposed interpretation of SDCL 9-4-5, the circuit court looked to a statutory scheme described by this Court in its 1955 decision in *Rhodes v. City of Aberdeen* that no longer exists in the same form.

1887 Territorial Code

The process for municipal annexation was first adopted by the Territorial Legislature in 1877. The original statute only permitted annexation upon the presentation of a petition signed by at least "three fourths of the legal voters" *and* "the owners of not less than three fourth (in value) of the property" in the territory sought to be annexed. 1887 Dakota Territory Session Laws, Chapter 104 (App. 37).

1919 Revised Code

By 1919, there were three different methods of municipal annexation and the statutory framework provided for no distinction between platted and unplatted territory where an annexation petition had been filed. 1919 South Dakota Revised Code, Article 4, § 6559 (Including Territory by Petition), § 6560 (Including Platted Ground Without Petition), § 6561 (Including Unplatted Ground Without Petition) (App. 41-42). At that time, the section entitled "Including Unplatted Ground Without Petition" required county approval for the annexation of unplatted territory within its boundaries for which there was no voluntary petition:

> When any municipal corporation shall desire to include contiguous territory, not platted, laid out, or recorded, the governing body of such corporation shall present to the board of county commissioners a petition setting forth the reasons for such annexation and shall accompany the same with a plat accurately describing the metes and bounds the territory proposed to be included, which shall be verified by affidavit. . . .

S.D. Rev. Code, § 6561 (App. 42).

1939 South Dakota Code

That same framework was carried over into the 1939 South Dakota Code, although the separate statutes related to annexing unplatted territory without a petition were consolidated into a single statute, SDC 45.2907. (App. 44).

1951: Rhodes v. City of Aberdeen

In 1951, the same statutory scheme present in the 1939 Code was analyzed by this Court in *Rhodes v. City of Aberdeen*, 50 N.W.2d 215 (S.D. 1951). As this Court

noted, at that time the statutes had not changed substantially since the 1877 Territorial Code:

> The provisions of SDCL 45.2906 have been a part of the statutory law of this state relating to the extension of the corporate limits of a municipality without change in substance since the adoption of the original source statute, Section 48, Chapter 24, of the Code of 1877. Like provisions were carried forward into the Revised Political Code of 1903 in Sections 1378, 1379 and 1462. Section 6560 of the Revised Code of 1919 is almost identical with SDC 45.2906. Such section is classified under Part 8 'Municipal Corporations,' Chapter 15 'Plats, Boundaries and Dissolution,' Article 4 'Changing Corporate Limits.'

Rhodes, 50 N.W.2d at 218-19. This Court then identified the three different methods of annexation in existence at the time and noted that county approval was only necessary under the third method involving the annexation of unplatted lands without a landowner-initiated petition:

> We have pointed out above the three methods by which additional territory may be annexed to a municipality. When the method is that of a petition by legal voters and owners as provided by SDC 45.2905, it is not material whether the land is platted or unplatted. But SDCL 45.2907 sets out a procedure for inclusion of 'contiguous territory not platted, laid out, or recorded' upon petition of the municipality to the Board of County Commissioners after notice and hearing.

Rhodes, 50 N.W.2d at 220 (emphasis supplied). Thus, if the statutory scheme as constituted in 1951 remained in place today, the City of Sioux Falls would *not* have needed Lincoln County's approval to annex the unplatted Property in question since it was initiated by a petition from the property owner.

1955 S.D. Session Laws

But that statutory framework has vanished. In 1955, four years after the *Rhodes* decision, SDC 45.2907 – the statute construed in that decision – was repealed.

1955 South Dakota Session Laws, Chapter 215, § 3. (App. 45). In its place, SDCL 45.2906 was amended to address resolutions by a municipality to annex both platted and unplatted territory. *See id.* at § 1. (App. 45). That amendment further provided that a resolution by a municipality of its intent to annex territory pursuant to SDC 45.2906 involving unplatted territory could not be adopted without county approval: "No such resolution describing unplatted territory therein shall be adopted until the same has been approved by the board of county commissioners of the county wherein such unplatted territory is situate." *Id.* (App. 45).

SDCL Ch. 9-4 (1967)

By 1967, when the South Dakota Codified Laws were organized, SDC 45.2906 was reorganized into SDCL 9-4-2 to 5. (App. 47-49). The first statute provided:

> **9-4-2. Annexation authorized without petition. –** Whenever there shall be a territory either platted or unplatted adjoining any municipality, the governing body may by resolution so extend the boundary of such municipality as to include such territory, in the manner set forth in §§ 9-4-3 to 9-4-5, inclusive.

SDCL 9-4-2 (emphasis supplied) (App. 47). The latter statute provided:

> **9-4-5. Annexation of unplatted territory subject to approval by county commissioners. –** No such resolution describing unplatted territory therein shall be adopted until the same has been approved by the board of county commissioners of the county wherein such unplatted territory is situate.

SDCL 9-4-5 (App. 49). That statutory scheme remained in place until 1979.

1979 S.D. Session Laws

In 1979, the Legislature enacted what amounted to a nearly complete overhaul of SDCL Chapter 9-4. 1979 South Dakota Session Laws, Chapter 47 (H.B. 1006).

(App. 58-61). House Bill 1006 repealed SDCL 9-4-2, SDCL 9-4-3, and SDCL 9-4-4. (App. 61). The Legislature's repeal of SDCL 9-4-2 was particularly significant, since it *eliminated* the provision requiring that an "Annexation authorized without petition" be conducted "in the manner set forth in §§ 9-4-3 to 9-4-5, inclusive." Thus, the requirement of county approval for annexation of unplatted lands set forth in SDCL 9-4-5 was deliberately unlinked from the procedures for annexation without petitions and now existed only as a free-standing requirement. (App. 34). Where the legislature deliberately amends a prior statutory scheme and repeals multiple provisions, those substantial textual changes must be presumed to connote a change in intended meaning.[3]

In addition, House Bill 1006 completely revamped the requirements for annexations without petitions. In so doing, the Legislature made clear that the study that the process now required was not needed for voluntary annexations done pursuant to SDCL 9-4-1 ("Except as provided by § 9-4-1, before a municipality may extend its boundaries to include contiguous territory, the governing body shall conduct a study to determine the need for the contiguous territory and to identify the resources necessary to extend the municipal boundaries"). (App. 82). This legislation pointedly did *not*, however, exempt annexation resolutions passed as the result of a voluntary petition brought pursuant to SDCL 9-4-1 from the now-independent

[3] As Chief Justice Marshall wrote, a statute is "alterable when the legislature shall please to alter it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "[O]ne legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.).

requirement that "No such resolution describing unplatted territory therein may be adopted until it has been approved by the board of county commissioners of the county wherein such unplatted territory is situate." SDCL 9-4-5.

1981: Smith v. Rapid City

In 1981, this Court first construed the new statutory scheme governing municipal annexations in *Smith v. Rapid City,* 307 N.W.2d 598 (S.D. 1981). "This appeal," the *Smith* decision observed, "brings the 1979 amendments to the annexation statutes to this Court for the first time." *Id.* at 599. The *Smith* decision discussed the statutes concerning annexation without a petition set forth in SDCL 9-4-4.1 to 4.10 in great detail from beginning to end. *See id.* at 600-01. Conspicuously, however, the opinion did not address the requirement of county approval now set forth separately in SDCL 9-4-5. Presumably, that was because SDCL 9-4-5, having been decoupled by the Legislature from the annexation without petition process set forth in SDCL 9-4-4.1 to 4.10, now unambiguously provided that county approval was needed for any such resolution involving unplatted territory. As this Court explained regarding one of the other new requirements passed by the 1979 amendments, "[w]e must give credence to the fact that the legislature saw a need to amend the annexation statutes…" *Id.* at 602.

1982 S.D. Session Laws

In 1982, the present requirement that resolutions to annex unplatted territory need county approval set forth in SDCL 9-4-5 was independently amended and recodified by the Legislature as a separate, free-standing requirement. 1982 South

Dakota Session Laws, Chapter 71, § 1 (Senate Bill 159). (App. 62). Tellingly, SDCL 9-4-1 was amended to its (almost) current form in the same legislation, demonstrating the Legislature's consideration of the entire revised legislative scheme at that time. *See id.* at § 2. (App. 62).

2003: Esling v. Krambeck

Finally, as discussed above, this Court analyzed the present statutory scheme in *Esling v. Krambeck*, 2003 S.D. 59, 663 N.W.2d 671. In so doing, this Court looked to the plain language of the present statutes and held regarding a voluntary annexation brought pursuant to SDCL 9-4-1 that "[m]unicipal annexation is subject to approval by the county commissioners if the territory is unplatted, as it was in this case. SDCL 9-4-5. The Lawrence County Commissioners had the authority to approve the annexation." *Esling*, 2003 S.D. 59 at ¶ 26, 663 N.W.2d at 680. (App. 91).

In construing SDCL 9-4-5 in *Esling*, this Court had no need to consult legislative history or resort to canons of construction because the meaning of the language employed by the Legislature was clear. As a matter of statutory interpretation, that rightfully ended the inquiry. Should a future Legislature disagree with this Court's interpretation of the plain meaning of the present statutory scheme, the matter could be easily remedied with new legislation inserting the exception that the City wishes had been preserved in the current statutes, but was not.

In addition, the circuit court's isolation of the word "*such*" contained in SDCL 9-4-5 and determination that it renders the statute "ambiguous" and open to interpretation in the manner suggested by the City does not withstand scrutiny.

Without the word "such" the statute would contain no reference to the surrounding chapter. The full identifying phrase "*No* such resolution," reasonably read in its entire context with the surrounding statutes as they now exist, makes clear that the prohibition applies to *any* resolution involving unplatted territory.

This Court's construction of the plain language of SDCL 9-4-5 in *Esling* as applicable to all such resolutions governed by SDCL Ch. 9-4 is further supported by the Legislature's enactment of other statutes in that chapter that apply to annexation resolutions regardless of whether they are initiated by an annexation petition. *See, e.g.,* SDCL 9-4-11 (providing that annexed territory be recorded with the county register of deeds whenever the city limits are change by "a resolution of the governing body or by a decree of court").

CONCLUSION

In sum, the requirement that Lincoln County approve the annexation of unplatted territory into the City of Sioux Falls pursuant to SDCL 9-4-5 is a ministerial act and prerequisite that must occur prior to the City Council adopting a resolution to change its boundaries and bring unplatted territory into its corporate limits. *See Esling*, 2003 S.D. 59 at ¶ 26, 663 N.W.2d at 680.

Therefore, when the City failed to obtain approval from the Lincoln County Commission prior to annexing the Property here, it acted in excess of its jurisdiction and in an irregular pursuit of its authority. *See Lamar Advertising*, 2012 S.D. 76 at ¶ 17, 822 N.W.2d at 866; *Smith*, 307 N.W.2d at 605 (explaining that "[b]ecause the city

failed to meet the statutory requirements for annexation of the Deadwood Avenue area **…** the annexation resolution is invalid").

As a result, the circuit court erred in denying the petitions for writ of certiorari and prohibition and in declining to hold that the City's purported annexation of the Property in question embodied in Annexation Resolution No. 25-13 adopted by the Sioux Falls City Council on Tuesday, April 2, 2013 was unlawful, in excess of its jurisdiction, done in an irregular pursuit of its authority, and therefore, invalid.

WHEREFORE, the Petitioners respectfully request that this Honorable Court reverse the Order Denying Petitions and remand with instructions to:

1. Grant a writ of certiorari declaring that the annexation of the unplatted territory embodied in Resolution No. 25-13 was legally invalid; and

2. Grant a writ of prohibition to arrest the proceedings of the Respondents to prohibit them from taking any action to rezone the unplatted property until they have complied with the requirements of SDCL 9-4-5.

Dated this 26th day of November, 2013.

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BY_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing brief and all appendices were served by U.S. Mail, first class, postage prepaid, upon the following:

James E. Moore
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on this 26th day of November, 2013.

_____
Ronald A. Parsons, Jr.

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 5,687 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

_____
Ronald A. Parsons, Jr.

APPENDIX **Page**

APPENDIX (Cont.) **Page**

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

_____

No. 26792

_____

SAVE OUR NEIGHBORHOOD - SIOUX FALLS; BONITA SCHWAN; DAN WRAY; GALE WRAY; RICHARD V. WILKA; MITCHELL ARENDS; ERIN ARENDS; REBEKKA KLEMME; NEIL KLEMME; DANA VAN BEEK PALMER; ANNE RASMUSSEN; and DUANE O'CONNELL,

Petitioners/Appellants,

vs.

CITY OF SIOUX FALLS; and SIOUX FALLS CITY COUNCIL,

Respondents/Appellees.

_____

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE STUART L. TIEDE
CIRCUIT COURT JUDGE

_____

APPELLEES' BRIEF

_____

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Notice of Appeal filed August 21, 2013

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Jurisdictional Statement

The circuit court's order denying a writ of certiorari or a writ of prohibition is dated August 5, 2013, and was filed August 8, 2013. (SR 126.) Notice of entry of the order was made on August 14, 2013. (SR 131.) Petitioners filed a timely notice of appeal on August 21, 2013. (SR 133.)

Statement of the Issues

1. The first sentence of SDCL § 9-4-5 states that "*[n]o such resolution* describing unplatted territory therein may be adopted until it has been approved by the board of county commissioners of the county wherein such unplatted territory is situate (emphasis added)." SDCL Ch. 9-4 refers to two kinds of resolutions, one enacted by a municipality to complete an annexation voluntarily started by a landowner (SDCL § 9-4-1), and another adopted to start an involuntary annexation based on the municipality's "intent to extend its boundaries" (SDCL §§ 9-4-4.2 and 9-4-4.11). Is the reference in SDCL § 9-4-5 to "no such resolution" ambiguous?

   The circuit court held that the reference "no such resolution" in SDCL § 9-4-5 is unclear, and that the statute is ambiguous.

   Zoss v. Schaefers, 1999 S.D. 105, ¶ 6, 598 N.W.2d 550, 552
   SDCL §§ 9-4-5, 9-4-1, 9-4-4.2, 9-4-4.11

2. The circuit court relied on legislative history and this Court's decision in *Rhodes v. City of Aberdeen*, 74 S.D. 179, 50 N.W.2d 215 (S.D. 1951), to conclude that the reference to "no such resolution" in SDCL § 9-4-5 is to the "resolution of intent" adopted by the municipality in an involuntary annexation proceeding, and not to the resolution approving a voluntary annexation initiated by a landowner. The court relied on Section 45.2906 of the 1939 Code, which stated the procedure for a municipality to initiate an annexation proceeding, and which makes clear that the antecedent of "no such resolution" is the kind of resolution referred to in SDCL §§ 9-4-4.2 and 9-4-4.11. Did the circuit court correctly construe SDCL § 9-4-5?

The circuit court held that "no such resolution" in SDCL § 9-4-5 refers to a resolution of intent under SDCL §§ 9-4-4.2 and 9-4-4.11, not to a resolution under SDCL § 9-4-1.

S.D. Code §§ 45.2905, 45.2906, 45.2907
1955 S.D. Session Laws, Chapter 215
Rhodes v. City of Aberdeen, 74 S.D. 179, 50 N.W.2d 215 (S.D. 1951)

3. This Court stated in *Esling v. Krambeck* that "[m]unicipal annexation is subject to approval by the county commissioners if the territory is unplatted, as it was in this case. SDCL 9-4-5." 2003 S.D. 59, ¶ 26, 63 N.W.2d 671, 680. The decision does not discuss the language or legislative history of SDCL § 9-4-5, and the issue in the case was not whether the language "no such resolution" referred to the kind of resolution in SDCL § 9-4-1, the kind of resolution in SDCL §§ 9-4-4.2 and 9-4-4.11, or both. Did the circuit court err in concluding that the reference in *Esling* was dicta and therefore not dispositive?

The circuit court held that the reference in *Esling* to SDCL § 9-4-5 was dicta because it was not significant to the holding in the case and was not part of the holding of the case. (Tr. at 94.)

Moeller v. Weber, 2004 S.D. 110, ¶ 44 n.4, 689 N.W.2d 1, 15 n.4
Hohm v. City of Rapid City, 2008 S.D. 65, ¶ 37 & n.10, 753 N.W.2d 895, 909-10 & n.10 (Konenkamp, J., concurring)

Statement of the Case

On July 10, 2013, Appellants Save Our Neighborhood–Sioux Falls, and eleven of its members (collectively "Save Our Neighborhood"), filed a verified

petition in circuit court seeking writs of certiorari and prohibition. (SR 2.) Save Our Neighborhood asked the court to invalidate an annexation resolution adopted by the Sioux Falls City Council dated April 2, 2013, annexing property located in south central Sioux Falls that is proposed to be developed for a Wal-Mart store. Save Our Neighborhood also asked the court to prohibit the City from rezoning the property. The City of Sioux Falls and the Sioux Falls City Council ("the City") opposed the petition. (SR 112.) The circuit court, the Honorable Stuart L. Tiede, set a hearing for July 25, 2013.

Two days before the hearing, the parties filed a joint stipulation of facts. (SR 122.) That same day, the City filed an opposition to the petition (SR 112), and Save Our Neighborhood submitted a pre-hearing brief.

The circuit court held an evidentiary hearing on July 25, 2013, beginning at 3:00 p.m., at which Jeff Schmitt, the Chief Planning and Zoning Official for the City, and Dave Pfeifle, the City Attorney, both testified. At the conclusion of the hearing, the circuit court stated its decision on the record. The court entered an order denying the petition dated August 5, 2013 (SR 126), and notice of entry of the order was made on August 14, 2013 (SR 131).

Save Our Neighborhood filed a notice of appeal on August 21, 2013. (SR 133.)

Statement of the Facts

The named members of Save Our Neighborhood live in a neighborhood located northwest of the intersection of 85th Street and Minnesota Avenue in south central Sioux Falls. The real property that is the subject of this litigation is located on the west side of Minnesota Avenue and south of 85th Street. It is located in Lincoln County, was zoned for agricultural use, and was unplatted. (SR 122 ¶¶ 1, 3.) On January 22, 2013, its owner submitted a voluntary petition to the City of Sioux Falls asking that it be annexed. (*Id*. ¶ 4.) The City's annexation process distinguishes between voluntary annexations initiated by a request from the landowner, and involuntary annexations started by the City. (Hearing Tr. at 6, 7-8.) As was its standard practice in a voluntary annexation, the City notified Lincoln County of the owner's request and asked for comment, but did not seek approval from the Lincoln County Board of County Commissioners. (Tr. at 20-22.)

On April 2, 2013, the City adopted Resolution No. 25-13, which annexed the real property into the City. (SR 122 ¶ 7, Ex. B.) The approved resolution was filed with the Lincoln County Register of Deeds. (*Id.*) The City of Sioux Falls follows the same procedure for all landowner-initiated annexations and has received no objections dating as far back as 1995 in the 100-plus annexations it completed during that time. (Tr. at 16, 19.) In 2005, the City adopted ordinances, which are based on and consistent with state law, governing its

annexation processes. (Tr. at 19-20.) Lincoln County has never objected to the City's process for voluntary annexations and did not object in this case. (Tr. at 19, 22.) The annexation process was routine. (*Id*. at 24.)

After the City adopted the annexation resolution, the City Planning Commission voted to recommend to the City Council that it approve rezoning of the property. (SR 122, ¶ 9.) A hearing and second reading of the ordinance to rezone the property was set for August 6, 2013. (*Id*. ¶ 12.) An approved ordinance becomes effective 20 days after publication, per SDCL § 9-19-13.

Standard of Review

On certiorari, this Court's review of the City's process is the same as the circuit court's. "Our review of certiorari proceedings is limited to whether the challenged court, officer, board, or tribunal had jurisdiction and whether it regularly pursued its authority." *Lamar Advertising of S.D. v. Zoning Board of Adjustment*, 2012 S.D. 76, ¶ 7, 822 N.W.2d 861, 863. Stated differently, a "city's 'action will be sustained unless in its proceedings it did some act forbidden by law or neglected to do some act required by law.'" *Esling v. Krambeck*, 2003 S.D. 59, ¶ 10, 663 N.W.2d 671, 677 (*quoting Save Centennial Valley Ass'n v. Schultz*, 284 N.W.2d 452, 454 (S.D. 1979)). Whether certiorari was appropriate therefore depended on whether the City followed the annexation statutes. Because the circuit court found that SDCL § 9-4-5 was ambiguous, this Court must construe

the statute, which involves a question of law. *See, e.g., In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814 N.W.2d 141, 143 ("[q]uestions of law such as statutory interpretation are reviewed by the Court de novo").

Argument

The central statute in this appeal is SDCL § 9-4-5, the first sentence of which provides: "No such resolution describing unplatted territory therein may be adopted until it has been approved by the board of county commissioners of the county wherein such unplatted territory is situate." Save Our Neighborhood argued below that SDCL § 9-4-5 applies to all annexation petitions and requires that the county in which unplatted land is located approve the annexation petition. The City argued that because SDCL Chapter 9-4 includes two different processes for annexation--one for voluntary annexations under SDCL § 9-4-1, and another for annexations initiated by the municipality, which are governed by SDCL §§ 9-4-4.1 through 9-4-4.11--the requirement of county approval in SDCL § 9-4-5 applies only to involuntary annexations of unplatted land initiated by the city.

The circuit court concluded: (1) that the issue raised by the certiorari petition was whether the City followed the law in annexing the property; (2) that the reference in SDCL § 9-4-5 to "[n]o such resolution" was ambiguous, and required that the court consider legislative history; (3) that the reference to "no such resolution" in the 1955 legislation makes clear that the reference was to a

resolution of intent used to initiate an involuntary annexation proceeding; (4) that the decision in *Rhodes v. City of Aberdeen* supports this understanding; and (5) that the reference to SDCL § 9-4-5 in *Esling v. Krambeck* is dicta. (Hearing Tr. at 91-94.) The circuit court's reasoning is logical, based on legislative history and the plain language of the statutes, and consistent with this Court's decisions.

1. SDCL § 9-4-5 is ambiguous.

Save Our Neighborhood agrees that SDCL Ch. 9-4 includes two different processes for annexation, one voluntarily initiated by a landowner, and one initiated by the municipality, which is involuntary from the landowner's perspective. (Appellant's Br. at 9.) The first process is addressed in SDCL § 9-4-1, as quoted in Appellant's Brief, and refers to a resolution by which the municipality approves the annexation. The second process, an involuntary or city-initiated annexation, is addressed in SDCL §§ 9-4-4.1 through 9-4-4.11. SDCL § 9-4-4.2, which is captioned "Resolution of intent to annex–Contents for large municipalities," refers to a resolution of intent by which the municipality starts an annexation. SDCL § 9-4-4.11 similarly outlines the required content of a resolution of intent to annex, but for "small municipalities." "Based on the study provided for in § 9-4-4.1, the governing body may adopt a resolution of intent to extend its boundaries." SDCL § 9-4-4.11. The statute goes on to enumerate the content of such a resolution, which is different from the sort of resolution referred

to in SDCL § 9-4-1.

The first sentence of SDCL § 9-4-5, which immediately follows SDCL § 9-4-4.11, begins with a reference to "[n]o such resolution." "Such" is a demonstrative adjective in this context, and must have an antecedent. Bryan Garner, A DICTIONARY OF MODERN LEGAL USAGE at 849 (2d ed. 1995) ("*such* is a DEICTIC TERM that must refer to a clear antecedent"). The antecedent is not within the statute itself. The question is thus whether "such resolution" in SDCL § 9-4-5 means a resolution of annexation as used in § 9-4-1, a resolution of intent as used in §§ 9-4-4.2 and 9-4-4.11, or both. The answer is not obvious from the text of § 9-4-5, and Save Our Neighborhood does not argue otherwise.

Its only argument on this point, tucked in at the end of the brief, is that "such" means that "the prohibition applies to *any* resolution involving unplatted territory. (Appellants' Br. at 21-22.) This is neither grammatical nor logical. The statute would have the same meaning if "such" were omitted. This Court, however, avoids construction that renders language mere surplusage. *See*, *e.g.*, *Heumiller v. Heumiller*, 2012 S.D. 68, ¶ 25, 821 N.W.2d 847, 853-54. Thus, the statute is reasonably susceptible of more than one meaning, and is therefore ambiguous. *See Zoss v. Schaefers*, 1999 S.D. 105, ¶ 6, 598 N.W.2d 550, 552 ("A statute is ambiguous when it is reasonably capable of being understood in more than one sense.").

2. The legislative history clarifies the antecedent of "no such resolution."

In construing an ambiguous statute, a court may consider legislative history, title, and the entirety of the legislation. *Zoss*, 1999 S.D. 105, ¶ 6, 598 N.W.2d at 552. Again, Save Our Neighborhood does not argue that the circuit court erred in considering the legislative history of SDCL § 9-4-5. To the contrary, it argued legislative history to the circuit court, and it argues legislative history on appeal. (Appellants' Br. at 15-19.)

The circuit court correctly construed the legislative history of SDCL § 9-4-5. Although Save Our Neighborhood presents a lengthy discussion on appeal, the history can be stated more succinctly.

a. The 1939 Code

In the 1939 Code, Chapter 45.29 was entitled "Changing Corporate Limits." (Appellants' App. at 43.) Section 45.2905 is entitled "Including territory by petition," and it provides that the governing body may annex property pursuant to a voluntary petition signed by not less than three-fourths of the voters and by the owners of not less than three-fourths in value of the property. (*Id.*) This section is the predecessor to SDCL § 9-4-1. (*Id.* at 46.) The 1939 Code also provided for city-initiated annexation, and distinguished in that context between platted and unplatted land. (*Id.* at 44.) In Section 45.2906, the legislature provided that the governing body could annex property by resolution if it was platted. (*Id.* at 43.)

By contrast, in Section 45.2907, the legislature provided that if a municipality wanted to annex "contiguous territory not platted," the governing body would have to present a petition to the board of county commissioners, and the county commissioners, not the municipality, would decide whether annexation was appropriate. (*Id*. at 44.)

Thus, there were three paths to annexation:

(1) a voluntary petition by the landowner (Section 45.2905);

(2) a resolution initiated by the city for platted land (Section 45.2906); and

(3) a petition to the county commission for unplatted land (Section 45.2907).

An involuntary annexation under the 1939 Code could be initiated by a municipality for either platted or unplatted land, but if the land were unplatted, the annexation decision could be made only by the county commission. The distinction between platted and unplatted land was irrelevant, however, to a voluntary annexation initiated by the landowner under Section 45.2905.

b. The 1955 amendments

In 1955, the legislature addressed the process for involuntary annexations. It repealed Section 45.2907, and amended Section 45.2906. (Appellants' App. at 45.) The legislature amended Section 45.2906 to give the municipality authority to annex platted as well as unplatted land without a voluntary petition by a

landowner. (*Id*.) In the case of unplatted land, the county commissioners were no longer the decision-maker, but were required to give their approval. (*Id*.) The ambiguous language found today in SDCL § 9-4-5 dates to the 1955 amendment of Section 45.2906: "No such resolution describing unplatted territory therein shall be adopted until the same has been approved by the board of county commissioners of the county wherein such unplatted territory is situate." (*Id*. (1955 S.D. Session Laws, Ch. 215, Section 1).)

Section 45.2906 as amended in 1955 is very clear. It provides that "[w]henever there shall be territory either platted or unplatted adjoining any municipality, the governing body may *by resolution* so extend the boundary of such municipality as to include such territory, in the following manner: . . ." (*Id*. (emphasis added).) The statute specifies the steps. First, the governing body "shall declare in a proper resolution its intention of so annexing said territory." Second, "[s]uch resolution shall be published once a week for two consecutive weeks." Third, at the time specified in "said resolution," the governing body "shall consider any objections to such proposed resolution and may adopt such resolution with or without amendment. . . ." Finally, "[n]o such resolution describing unplatted territory therein shall be adopted until the same has been approved by the board of county commissioners of the county wherein such unplatted territory is situate." (*Id*.)

It is readily apparent that the reference to "no such resolution" in the amendment to Section 45.2906, like the five other references to "such resolution" or "said resolution," was to a resolution initiated by the municipality. Notably, the reference to "no such resolution" in section 45.2906 cannot refer to anything in section 45.2905 governing voluntary annexations, because that section was not addressed in the 1955 amendments.

c. The 1967 Code and after

When the South Dakota Codified Laws was published in 1967, the current statutory framework appeared in Chapter 9-4, Change of Municipal Boundaries. (*Id*. at 46.) Section 9-4-1 addresses a voluntary annexation, and corresponds to Section 45.2905 of the 1939 Code. (*Id*.) Section 45.2906 was broken into Sections 9-4-2 (Annexation authorized without petition), 9-4-3 (Resolution of intention to annex without petition), 9-4-4 (Publication of resolution of intention–Hearing and adoption by governing body), and 9-4-5 (Annexation of unplatted territory subject to approval by county commissioners).[1] (*Id*. at 47-49.) The language of Sections 9-4-2 through 9-4-5 was taken directly from Section 45.2906. Thus, Section 9-4-5, even as its own numbered statute, is relevant only to the procedure outlined in former Section 45.2906 for annexations without a

[1] Sections 9-4-2, 9-4-3, and 9-4-4 were repealed in 1979, when the legislature added the study requirement for annexations initiated by a municipality. The new provisions were codified as SDCL §§ 9-4-4.1 through 9-4-4.10. 1979 Session

voluntary petition. Notably, Section 9-4-2 makes apparent that Sections 9-4-3 to 9-4-5 describe the manner in which a governing body may annex territory without a petition. (*Id*. at 47.) The Legislature had thus kept approval of county commissioners relevant only to annexations without a voluntary petition.

In 1982, SDCL § 9-4-5 was amended to define "unplatted territory," and SDCL § 9-4-1 was amended to define "contiguous." (*Id*. at 62-63 (1982 S.D. Session Laws, Chapter 71).) The Legislature made no other changes. Accordingly, SDCL § 9-4-5 is and has always been part of the process for involuntary annexations initiated by a municipality, and has never been part of the procedure for voluntary petitions initiated by a landowner.

d. This history limits "no such resolution" to involuntary annexations.

Save Our Neighborhood's argument to this Court about the legislative history is flawed in several respects. First, Save Our Neighborhood does not explain why the circuit court's adoption of the legislative history as outlined above was wrong. Second, when Save Our Neighborhood argues that the statutory framework in the 1939 Code "has vanished" (Appellants' Br. at 17), it misconstrues history for dramatic effect. The statutory framework has not vanished, as shown here:

Laws, Chapter 47 (Appellants' App. at 059-61).

1939 Code	1955 Amendments	Current Code
§ 45.2905: voluntary initiation by landowner	No change	§ 9-4-1
§ 45.2906: involuntary initiation by city, for platted land	revised to include procedures from § 45.2907, including for unplatted land, and including present language of SDCL § 9-4-5	§§ 9-4-4.1 to 9-4-4.11 and § 9-4-5
§ 45.2907: involuntary initiation by city, for unplatted land	repealed, but unplatted land provisions included in part in § 45.2906	

Third, Save Our Neighborhood's discussion of legislative history all but ignores what matters most–the 1955 amendments to Section 45.2906. The central issue here is to what "no such resolution" in Section 9-4-5 refers. The 1955 amendments reveal that the reference must be to an annexation initiated by a municipality. Save Our Neighborhood, however, devotes but a single paragraph to the 1955 legislation (Appellants' Br. at 17-18), and does not describe the clear context for the language "no such resolution," which is evident from a reading of page 45 of Appellants' Appendix.

Thus, the legislative history of SDCL § 9-4-5 establishes that the language "no such resolution" refers to a resolution of intent to annex property through an involuntary proceeding, not a resolution concerning a voluntary annexation

initiated by a landowner.

3. The decision in *Rhodes v. City of Aberdeen* supports the judgment.

The circuit court relied on *Rhodes v. City of Aberdeen,* 74 S.D. 179, 50 N.W.2d 215 (S.D. 1951), as support for its interpretation of SDCL § 9-4-5. In *Rhodes*, this Court considered an appeal involving the involuntary annexation of platted properties by the City of Aberdeen. Because the 1939 Code distinguished between the procedures for platted and unplatted property that was involuntarily annexed, at issue was whether the properties had been "platted" within the meaning of Section 45.2906. This Court ultimately held that the properties had not been "platted" within the meaning of Section 45.2906, and that the annexation proceedings under that section were therefore invalid. *Id.* at 221. In so holding, the Court stated that there were three methods by which property could be annexed, and that "[w]hen the method is that of petition by legal voters and owners as provided by SDC 45.2905, it is not material whether the land is platted or unplatted." *Id.* at 220. Thus, this Court recognized a clear statutory distinction that still exists today between involuntary and voluntary annexation proceedings. Because this case involves a voluntary proceeding, and because in a voluntary proceeding it does not matter whether the land is platted or unplatted, SDCL § 9-4-5, which by its terms applies only to unplatted land, cannot apply.

4. The reference in *Esling v. Krambeck* is dicta and not controlling.

Save Our Neighborhood relies almost entirely on *Esling v. Krambeck*, 2003 S.D. 59, ¶ 26, 663 N.W.2d 671, 680, as support for its argument that county approval is required by SDCL § 9-4-5 in a case involving a voluntary annexation initiated by a landowner under SDCL § 9-4-1. Even though the annexation discussed in *Esling* was voluntarily initiated by the landowner, it was approved by the Lawrence County Commission. This Court noted that "[m]unicipal annexation is subject to approval by the county commissioners if the territory is unplatted, as it was in this case. SDCL 9-4-5. The Lawrence County Commissioners had the authority to approve the annexation." *Id.* ¶ 26, 663 N.W.2d at 680. The decision is silent about why the issue was submitted to the Lawrence County Commission, although the property to be annexed included the county airport, meaning that the County owned part of the property and therefore had to take official action showing its support for the voluntary annexation. The decision is further silent about why the Commission "authorized its chairperson to sign the voluntary annexation petition," and, at the same time, passed a motion approving the annexation before it had even been considered by the City of Spearfish. *Id.* ¶ 3, 663 N.W.2d at 674. It makes sense, however, that the county did those things as a property owner. More importantly, the decision contains no analysis of whether SDCL § 9-4-5 is ambiguous, no discussion of legislative

history, and no consideration of caselaw.

Whether SDCL § 9-4-5 requires county approval in all annexations involving unplatted land was not the issue in *Esling*. Rather, the landowners who objected argued that: "(1) 'The city and county exceeded their authority in accepting the values used in the voluntary annexation petition.' (2) 'The city exceeded its authority since the annexed area is not contiguous.' (3) 'The change of zoning in the annexed area is contrary to the initiated ordinance.'" *Id.* ¶ 5, 663 N.W.2d at 675. The headings in the decision indicate that this Court addressed "Value of the Territory," "Contiguous Territory," and "Zoning." *Id.* 663 N.W.2d at 676, 679, 680. The language on which Save Our Neighborhood relies is found in the discussion on zoning, in which the Court considered the contention "that the city's change of designation from A-1 Agriculture zoning to an AG Agricultural Conservation District in the annexed area is contrary to the initiated county zoning ordinance." *Id.* ¶ 25, 663 N.W.2d at 680. In other words, the objecting landowners argued that the Lawrence County Commission lacked the authority to act because of the county's initiated zoning ordinance. This Court both relied on SDCL § 9-4-5 as authority for the Commission's action, and held that after annexation, the City of Spearfish had exclusive zoning jurisdiction, meaning that the property was "no longer subject to the initiated county zoning ordinance." *Id.* ¶ 28, 663 N.W.2d at 681.

Save Our Neighborhood argues that "[t]he *Esling* decision is directly on point." (Appellants' Br. at 10.) But the issue in *Esling* was not the meaning of "no such resolution," and this Court did not consider whether the statute was ambiguous, did not discuss the statutory language, and did not consider legislative history. While this Court has stated that dicta "may have great weight," that is so only when the dicta result from full consideration of the issues: "[j]udicial dicta are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision.'" *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 37 & n.10, 753 N.W.2d 895, 910 & n.10 (Konenkamp, J., concurring). The central issue in this case was not briefed, argued, considered, or decided in *Esling*, and the resolution of that case would not change if the quoted language on which Save Our Neighborhood relies were omitted. Thus, as the circuit court concluded, the statement on which Save Our Neighborhood relies is not dispositive. *See, e.g., Moeller v. Weber*, 2004 S.D. 110, ¶ 44 & n.4, 689 N.W.2d 1, 15 n.4 ("Dicta are pronouncements in an opinion unnecessary for a decision on the merits."); *In re Estate of Erdman*, 447 N.W.2d 356, 359 (S.D. 1989) (concluding that dicta is not controlling).

Ultimately, the decision in *Esling* cannot bear the weight of Save Our Neighborhood's argument that SDCL § 9-4-5, which is ambiguous, applies to all annexations involving unplatted property. That issue should be resolved in this

case based on the language of the statutes and legislative history.

Conclusion

The issue presented in this appeal has not been decided before by this Court. It can be resolved with reference to a few documents: the current version of SDCL Ch. 9-4; Chapter 45.29 from the 1939 Code; Chapter 215 from the 1955 Session Laws; and the decisions in *Rhodes* and *Esling*. Because after considering all of these sources the circuit court reached the correct conclusion that the reference in SDCL § 9-4-5 to "no such resolution" is only to a resolution of intent to annex in an involuntary proceeding under SDCL §§ 9-4-4.2 or 9-4-4.11, the City of Sioux Falls respectfully requests that the judgment denying writs of certiorari or prohibition be affirmed.

Dated this 10th day of January, 2013.

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X6, Times New Roman, Font 13, and contains 4,317 words, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 10th day of January, 2013.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore
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Certificate of Service

I hereby certify that on the 10th day of January, 2013, I sent by e-mail transmission, a true and correct copy of the foregoing Appellees' Brief, to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26792

SAVE OUR NEIGHBORHOOD – SIOUX FALLS; BONITA SCHWAN; DAN WRAY; GALE WRAY; RICHARD V. WILKA; MITCHELL ARENDS; ERIN ARENDS; REBEKKA KLEMME; NEIL KLEMME; DANA VAN BEEK PALMER; ANNE RASMUSSEN; and DUANE O'CONNELL,

Petitioners and Appellants,

vs.

CITY OF SIOUX FALLS; and SIOUX FALLS CITY COUNCIL,

Respondents and Appellees.

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

THE HONORABLE STUART L. TIEDE
CIRCUIT JUDGE

REPLY BRIEF OF APPELLANTS

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Notice of Appeal Filed on August 21, 2013

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REPLY ARGUMENT

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DENYING THE WRITS OF CERTIORARI AND PROHIBITION.

The City's essential argument is that this case is controlled by legislative history and the interpretation of the statutory scheme for municipal annexation as it existed in 1951 and was construed by this Court in *Rhodes v. City of Aberdeen*, 50 N.W.2d 215 (S.D. 1951). On the other hand, we are told that this Court's interpretation of the annexation statutes as they currently exist in *Esling v. Krambeck*, 2003 S.D. 59, 663 N.W.2d 671, must be ignored as irrelevant "dicta" because the issue in *Esling* was not the meaning of the statutory phrase "no such resolution" in SDCL 9-4-5. Of course, that also was not the issue in *Rhodes*. If this Court's interpretation of the current statutes in *Esling* constitutes dicta that should be ignored, the *Rhodes* decision's analysis of repealed and amended statutes should be deemed even further removed from the analysis.

The City also places great weight upon the grammatical definition of "such" as requiring an antecedent. But that observation simply begs the point. In order to determine the antecedent one must examine the text of SDCL Ch. 9-4 as it presently exists and, reading the statutes together, determine the plain meaning of the text. In prior incarnations of the statutory scheme, the requirement of county approval was explicitly limited to annexation resolutions brought without a petition. In 1967, accordingly, when the South Dakota Codified Laws were organized, SDCL 9-4-2 provided that annexations done without a petition were to be conducted "in the manner set forth in §§ 9-4-3 to 9-4-5, inclusive." (App. 47).

In 1979, however, the Legislature repealed SDCL 9-4-2, the statute linking SDCL 9-4-5 to annexations initiated without a petition. (App. 61). By this affirmative act, the requirement of obtaining county approval prior to adopting a resolution to annex unplatted or agricultural lands was intentionally unlinked from the process for annexing land without a petition and set forth as a free-standing requirement for all such resolutions involving the municipal annexation of land pursuant to SDCL Ch. 9-4. That is presumably why, when this Court looked to the text of SDCL 9-4-5 in *Esling*, its plain meaning was readily ascertained:

> Under SDCL ch 9-4, a city has authority to annex contiguous territory. Municipal annexation is subject to approval by the county commissioners if the territory is unplatted, as it was in this case. SDCL 9-4-5. The Lawrence County Commissioners had the authority to approve the annexation.

2003 S.D. 59 at ¶ 26, 663 N.W.2d at 680. The plain meaning of SDCL 9-4-5 was understood by simply reading the statute's text.

Tracing the legislative history of the various statutes as they have been enacted, amended, and repealed over the years is not necessary when the plain meaning of a statute's text is clear. But even when one examines legislative history regarding the statutes authorizing municipalities to annex land pursuant to a resolution, the Legislature's repeal of SDCL 9-4-2 indicates that SDCL 9-4-5 was intended to apply to all such resolutions within that chapter's scope.

CONCLUSION

As a result, the circuit court erred in denying the petitions for writ of certiorari and prohibition and in declining to hold that the City's purported annexation of the

Property in question embodied in Annexation Resolution No. 25-13 adopted by the Sioux Falls City Council on Tuesday, April 2, 2013 was unlawful, in excess of its jurisdiction, done in an irregular pursuit of its authority, and therefore, invalid.

WHEREFORE, the Petitioners respectfully request that this Honorable Court reverse the Order Denying Petitions and remand with instructions to:

1. Grant a writ of certiorari declaring that the annexation of the unplatted territory embodied in Resolution No. 25-13 was legally invalid; and

2. Grant a writ of prohibition to arrest the proceedings of the Respondents to prohibit them from taking any action to rezone the unplatted property until they have complied with the requirements of SDCL 9-4-5.

Dated this 28th day of January, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing brief was served electronically and by U.S. Mail, first class, postage prepaid, upon the following:

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on this 28th day of January, 2014.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

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 668 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.