

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

PUFFY'S, LLC, a South Dakota) #30554
Limited Liability Company,)
Applicant/Appellee,)
vs.) APPELLANT'S BRIEF
)
STATE OF SOUTH DAKOTA,)
DEPARTMENT OF HEALTH)
Respondent/Appellant.)

APPEAL FROM THE
CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA.
THE HON. JOSHUA HENDRICKSON
JUDGE PRESIDING

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The Department of Health is the Appellant in this brief and will be referred to as "Department of Health" or simply "Department". Puffy's, LLC is the Appellee in this brief and will be referred to as "Puffy's".

The Order Regarding Peremptory Writ of Mandamus, dated November 17, 2023, is attached hereto as "Exhibit A".

JURISDICTIONAL STATEMENT

This appeal is appropriately brought before this Court pursuant to SDCL 15-26A-3(2).

This is an appeal of the circuit court's Order Regarding Peremptory Writ of Mandamus, dated November 17, 2023, denying the Department of Health's Motion to Dismiss or, in the alternative, Motion to Quash Alternative Writ of Mandamus and, simultaneously, granting a Peremptory Writ of Mandamus. The court order was issued by Hon. Joshua Hendrickson of the Seventh Judicial Circuit Court in the case of *Puffy's, LLC, a South Dakota Limited Liability Company vs. State of South Dakota, Department of Health*, Pennington County file number: 51 CIV 23-937.

The motion hearing was held on November 6, 2023 and the Department of Health appeared via a Notice of Special Appearance, which was filed on September 5, 2023.

The Notice of Appeal and Statutory Stay, along with Appellant's Docketing Statement, was filed and served on December 11, 2023. An Order for Transcript

was filed and served on December 20, 2023.

The parties entered into a Stipulation for Extension of Time to File Appellant's Brief on March 6, 2024. The Department of Health filed an Application for Extension of Time to File Appellant's Brief on March 28, 2024 - this application was granted pursuant to an Order Extending Time to Serve and File Appellant's Brief, dated and filed on April 17, 2024.

LEGAL ISSUES

I.

THE DEPARTMENT OF HEALTH'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO QUASH ALTERNATIVE WRIT OF MANDAMUS SHOULD HAVE BEEN GRANTED.

The circuit court denied the Motion to Dismiss or, in the alternative, Motion to Quash Alternative Writ of Mandamus.

Most relevant cases and statutes:

Dollar Loan Center of South Dakota, LLC v. Department of Labor and Regulation, 920 N.W. 2d 321 (SD 2018)

McElhaney v. Anderson, 1999 SD 78

Netter v. Netter, 2019 SD 60

SDCL 1-26-30

II.

THE CIRCUIT COURT SHOULD HAVE ALLOWED AN OPPORTUNITY FOR AN EVIDENTIARY HEARING.

The circuit court made a final ruling based on arguments made at the motion hearing, without providing

the parties with the opportunity to present evidence on the merits.

Most relevant cases and statutes:

Boddie v. Connecticut, 401 U.S. 371 (1971)

Yankton Ethanol, Inc. vs. Vironment, Inc., 1999 SD 42

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STATEMENT OF THE CASE AND FACTS

CASE HISTORY

This matter was heard in the Circuit Court of the Seventh Judicial Circuit, Hon. Joshua Hendrickson, presiding. Department of Health filed a pre-trial Motion to Dismiss or, in the alternative, Motion to Quash Alternative Writ of Mandamus. A motion hearing was held on November 6, 2023. The circuit court entered a final Order Regarding Peremptory Writ of Mandamus, dated November 17, 2023, without providing the parties with an opportunity for an evidentiary hearing. The Peremptory Writ of Mandamus was dated and filed on November 30, 2023. See, Exhibit B, attached hereto.

STATEMENT OF FACTS

Medical cannabis became a legalized industry in South Dakota pursuant to Initiated Measure 26 that passed on the November, 2020 ballot and was codified as

SDCL Chapter 34-20G, with an effective date of July 1, 2021.¹ Pursuant to **SDCL 34-20G-72**, the Department of Health promulgated administrative rules for the medical cannabis program. The initial rules package was passed and became effective on October 5, 2021.²

Under the authority of **SDCL 34-20G-72(2)** and the relevant administrative rules, when more medical cannabis establishments apply for certification than are allowed by a local jurisdiction, the South Dakota Department of Health establishes a scoring system. If all the applicants have an equal score, a random drawing is to be held to determine which applicants will receive the registration certificates. See, ARSD 44:90:03:15 and 44:90:03:16.

Three local jurisdictions that had more applicants apply for registration certificates than were allowed by local ordinances opted to have the South Dakota Department of Health hold a random drawing to award the limited number of certificates. These three local jurisdictions are: North Sioux City, Rapid City, and Yankton.³

In 2021, the City of Rapid City passed Ordinance No. 6505, wherein the number of medical cannabis dispensary licenses was limited to one for each five thousand (5,000) of population of the City.⁴ When Rapid City opened up its application process, it

¹ See, generally, SDCL 34-20G

² See, generally, ARSD 44:90

³ <https://medcannabis.sd.gov/Establishments/LotteryInformation.aspx>

⁴ codified as 5.74.070A and found at: <https://rapidcity.municipal.codes/RCMC/5.74>

received 47 applicants for only 15 allowable dispensary certificates.⁵ This actuated the lottery rules and the City of Rapid City requested that the South Dakota Department of Health conduct the statutory lottery.

On March 9, 2022, the Department held a random drawing on behalf of the City of Rapid City, to determine which of the 47 applicants would receive the 15 allowable certificates for medical cannabis dispensaries in Rapid City. Puffy's submitted 23 applications for the 15 available certificates and had its name drawn for seven (7) of those registration certificates within the municipal boundaries of Rapid City, South Dakota. See, Exhibit C, attached hereto. The remaining sixteen (16) applications submitted by Puffy's received various placements on the alternative list, including the first alternate position. See, Exhibit C, attached hereto.

Pursuant to the applicable administrative rules, all establishments that were awarded registration certificates under the state lottery process were required to be operational within one (1) year of receiving their registration certificate. See, ARSD 44:90:03:16. Greenlight Dispensary, a third-party establishment that had been awarded three of the original 15 certificates in the Rapid City lottery draw, was not operational at one of its locations within the one (1) year timeline. This establishment had until March 10, 2023 to become operational. Because

⁵ https://medcannabis.sd.gov/docs/RapidCityDispensaryLottery_DrawOrder.pdf

it was not going to become operational within that timeline, Greenlight Dispensary filed a request for extension pursuant to ARSD 44:90:03:16. The Department of Health sent two letters to Greenlight Dispensary -- the first one dated March 16, 2023 and the second one dated April 21, 2023. Both letters denied the request for extension and the April 21, 2023 correspondence further advised that the decision was a final action by the Department, subject to the contested case procedures pursuant to SDCL chapter 1-26. If an establishment does not appeal the denial for its extension request, the certificate is to be awarded to the first alternate. See, ARSD 44:90:03:16.

On July 19, 2023, Puffy's filed a Verified Application for Alternative Writ of Mandamus. SDCL 21-29-5 lays out the distinction for issuance of the two types of writs (alternative and peremptory), which is dependent on whether prior notice is given to the adverse party.⁶ By filing for an alternative writ, this meant the Department of Health did not receive notice of the filing until the Alternative Writ of Mandamus (signed on July 26, 2023) was served on the Attorney General's Office and the South Dakota Department of Health on August 3, 2023.⁷

⁶ SDCL 21-29-5. Alternative writ issued without notice--Minimum notice required for peremptory writ. When the application for writ of mandamus to the court is made without notice to the adverse party, and the writ be allowed, the alternative writ must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory writ may be issued in the first instance. The notice of the application, when given, must be at least ten days.

⁷ See Pennington County Civil Case File 51CIV23-000937

Greenlight Dispensary did not file an appeal on the denial of its extension request, so the Department sent notice on August 18, 2023 to Puffy's advising of the right to proceed with the application process for that certificate. *See, Exhibit D, attached hereto.*

Puffy's thereafter contacted the Department and advised of its intent to move forward with the application process for that certification, and also stated it had mailed a check for the application fee associated with that certification.⁸

Because the purported check for the application fee was never received, completion of the application for the registration certificate could not be fulfilled. Had Puffy's followed through with its professed action of sending the application fee and updating its application information, Puffy's could have received the state-issued registration certification by now.

Each applicant for a registration certification must complete the application process, including payment of the registration fees, at both the local and state levels. *See, SDCL §§ 34-20G-55 and 34-20G-60.* Puffy's has completed the process at the local level, as evidenced by the February 9, 2024 letter from the City of Rapid City and the subsequent issuance of a Form E by the City of Rapid City, *see, Exhibit E,*

⁸ This information was given to the then-acting program administrator, Jennifer Seale, who unexpectedly passed away in October, 2023

attached hereto, but refuses to submit the registration fee to the state.

ISSUES

THE DEPARTMENT OF HEALTH'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

The circuit court denied the Department of Health's Motion to Dismiss or, in the alternative, Motion to Quash Alternative Writ and simultaneously granted the Peremptory Writ of Mandamus.

STANDARD OF REVIEW

The standard of review for motions to dismiss is well settled.

"The 'standard of review of a trial court's grant or denial of a motion to dismiss is the same as our review of a motion for summary judgment—is the pleader entitled to judgment as a matter of law?' 'We review issues regarding a court's jurisdiction as questions of law under the de novo standard of review.' Furthermore, 'statutory interpretation is a question of law, reviewed de novo.'"

Id. (citations omitted)

Upell v. Dewey County Commission, 2016 SD 42, ¶ 6, citing, AEG Processing Center. No. 58, Inc. v. S.D. Department of Revenue and Regulation, 2013 S.D. 75, ¶ 7 n.2, 838 N.W.2d 843, 847 n.2.

See also, Yankton Ethanol, Inc. vs. Vironment,

Inc., 1999 SD 42, ¶6 ("As this presents a question of law, we review the trial court's decision de novo, with no deference given to the trial court's legal conclusions." (citing Thompson v. Summers, 1997 SD 103, ¶5, 567 NW2d 387, 390 (citing City of Colton v. Schwebach, 1997 SD 4, ¶8, 557 NW2d 769, 771))).

The Department of Health filed a Notice of Special Appearance concomitant with its motion to dismiss, for the purpose of contesting subject matter jurisdiction.⁹ Because this matter involves the issues of court jurisdiction and statutory interpretation, the standard of review that applies here is the de novo standard.

ARGUMENT

I.

THE DEPARTMENT OF HEALTH'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

A.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The circuit court lacked subject matter jurisdiction because Puffy's failed to exhaust all administrative remedies.

In McElhaney v. Anderson, 1999 SD 78, the Court held that "in administrative law cases any judicial relief will require the exhaustion of administrative remedies, such as an appeal from a final agency

⁹ See Pennington County Civil Case File 51CIV23-000937

decision, before an extraordinary writ may be issued." (emphasis in original) citing, Rapid City Area Sch. Dist. v. de Hueck, 324 NW2d 421, 422-3 (SD 1982).

"This is because any claim for judicial relief, concerning a cause over which an administrative agency has jurisdiction, constitutes a jurisdictional defect to the claim for judicial relief." Id., citing, Jansen v. Lemmon Federal Credit Union, 1997 SD 44, ¶7, 562 NW2d 122, 124 (citing Matter of Notice & Demand to Quash, etc., 339 NW2d 785, 786 (SD 1983)). "In addition, any claim over which an administrative agency had jurisdiction that is raised and rejected by the agency, is subsequently barred from being retried on the merits in the courts under the doctrine of res judicata." Id., citing, Johnson v. Kolman, 412 NW2d 109, 113 (SD 1987).

The Department has not denied Puffy's the ability to pursue the dispensary certification. As stated above, the Department has provided notification to Puffy's and has received a response from Puffy's. The Department is awaiting action from Puffy's to assure its application is current and the mandatory fee is paid. Not only has there not been a final action by the Department that is adverse to Puffy's, but even if there was, Puffy's would need to exhaust its administrative remedies before filing any action for relief in circuit court.

A very recent Eighth Circuit Court of Appeals case concluded "that the district court did not err in

dismissing the complaint as to [Defendants/Appellees], as the complaint made no allegations concerning exhaustion of administrative remedies." Watkins v. Smithfield Packaged Meats Corp., et al., No. 23-2649, August 24, 2023 unpublished opinion (CA8, 2023). In the present case, Puffy's made no allegations in its application for a writ of mandamus of its efforts to exhaust administrative remedies. Indeed, Puffy's can make no such claim because it made no efforts to exhaust administrative remedies.

In addition to well-settled case law, a number of statutes and regulations require the exhaustion of administrative remedies prior to seeking an extraordinary remedy of a writ of mandamus. For example, under SDCL chapter 1-26, the right to judicial review arises only after a person has exhausted all administrative remedies available within any agency or a party is aggrieved by a final decision in a contested case. The first sentence in SDCL 1-26-30 states: "A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." (emphasis added). SDCL 1-26-30.2 states that "[a]n appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency." SDCL 1-26-30.4 further supports this by stating: "The sections of this chapter on appeals to circuit courts shall govern civil appeals to the

circuit courts of South Dakota from *final decisions, rulings, or actions of agencies pursuant to chapter 1-26.*" (emphasis added). And, the final sentence in ARSD 44:90:03:16 states that "notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26."

Puffy's is well aware of its requirement to exhaust administrative remedies because it has sought an administrative remedy in a companion case. Specifically, in DOH 23-08, 09, 10, 11, and 12, Puffy's has sought administrative review by the Office of Hearing Examiners in relation to the denial of extension requests for 5 of its dispensary certificates.

In Dollar Loan Center of South Dakota, LLC v. Department of Labor and Regulation, 920 N.W. 2d 321, 322-23 (S.D. 2018), our Supreme Court upheld a lower court's decision that it lacked jurisdiction due to the applicant's lack of a statutory appeal right until its administrative remedies were exhausted. The South Dakota Supreme Court held that the Circuit Court lacked jurisdiction for three reasons. First, the Court noted that SDCL 1-26-30 only grants Circuit Court jurisdiction after "a final decision in a contested case[.]" Id. (citing SDCL 1-26-30) and that "licensing" matters under SDCL 1-26-1(2) are not "contested cases" until after the license holder "had

an opportunity for a hearing[.]'" Id. (citing SDCL 1-26-1(2)), and "it [was] only after this administrative hearing that the [Department of Labor] w[ould] issue a final decision in this matter." Id., at 326. As such, the applicant's "appeal was not taken from a *final decision in a contested case*." Id. (emphasis added).

In its reasoning, the Court explained that "the administrative process must run its course," citing that the Department of Labor had "conducted its own investigation," but until some hearing occurs "there is no evidentiary record," which ties an appellate court's hands, as "judicial review is confined to the administrative record" under SDCL 1-26-35. Id., at 326. Further, the input from the specialized agency meant for licensing different fields is an invaluable tool necessary for an appellate court's final determination. Id.

Here, Puffy's failed to exhaust its administrative remedies. Just like the Dollar Loan applicant, Puffy's filed a matter in Circuit Court before it has been "aggrieved by a final decision in a contested case" under SDCL 1-26-30 because a contested case does not exist until after a license holder "had an opportunity for a hearing." Dollar Loan, at 324; SDCL 1-26-1(2). Under both Dollar Loan and SDCL 1-26-1(2), Puffy's must fully exhaust its administrative remedies prior to availing itself of the Circuit Court, which currently lacks subject matter jurisdiction, because no record yet exists for the appeal. See, Dollar Loan, at 325-26.

Because Puffy's failed to exhaust its administrative remedies, this Court lacks subject matter jurisdiction and this matter should be dismissed under **SDCL 15-6-12(b)(1)** -- permitting a Court to dismiss a case when there is a "[l]ack of jurisdiction over the subject matter."

In a similar matter, Puffy's filed an Application for Writ of Prohibition.¹⁰ The Department filed a Motion to Dismiss or, in the alternative, Motion to Quash and the circuit court upheld that motion and dismissed the action for failure to exhaust administrative remedies. In the Writ of Prohibition case, Puffy's had already initiated an administrative action. Albeit an administrative action had not been filed in the present matter, it should have been. A party cannot circumvent its obligation to exhaust administrative remedies by simply ignoring that obligation and filing an action directly in circuit court.

i) SEPARATION OF POWERS

The Department of Health is an agency that is within the executive branch of government. Under the Separation of Powers doctrine, one judicial branch cannot encroach on the power of another judicial branch.

In addressing this issue, the South Dakota Supreme Court in Gray v. Gienapp, 2007 SD 12, ¶17, citing State

¹⁰ Pennington County Case No. 51CIV 23-807

v. Moschell, 2004 SD 35, ¶14, 677 N.W.2d 551, 558,
stated:

Article II of the South Dakota Constitution provides: The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.

Article II explicitly states the separation of powers doctrine and encompasses three prohibitions:

- (1) no branch may encroach on the powers of another,*
- (2) no branch may delegate to another branch its essential constitutionally assigned functions, and*
- (3) quasi-legislative powers may only be delegated to another branch with sufficient standards.*

To summarize, "[e]ach branch, so long as it acts within the limitations set by the constitution, may exercise those powers granted to it by the constitution without interference by the other branches of government."

Id., citing State ex rel. Walter v. Gutzler, 249 N.W.2d 271, 273 (S.D.1977).

Puffy's needs to exhaust its administrative remedies before a circuit court can obtain subject matter jurisdiction, and the Department is entitled to due deference for completion of the administrative process. Upon the conclusion of the administrative process, if Puffy's disagrees with the outcome and has a legal basis for contesting it, the appeal rights under SDCL 1-26 can be invoked.

As the South Dakota Supreme Court recognized in Gray v. Gienapp, 2007 SD 12, ¶24, it is the final product of [a separate branch of government] that is subject to judicial review. ("Where the legislature is concerned, it is only the final product of the legislative process that is subject to judicial review: It is the final product of the legislature that is subject to review by the court, not the internal procedures." citing a Florida case) Still citing the Florida case of General Motors Acceptance Corp. v. State, 152 Fla 297, 303, 11 So2d 482, 485 (1943), it further recognized that "[w]hen the circuit court entered its order barring the Florida Senate from convening a scheduled public hearing it 'contravened the internal workings of the Legislature' and 'impinged on the sovereignty of a co-equal branch of government.'" Likewise, in the current case, the administrative process was not concluded prior to Puffy's filing its application for writ of mandamus. Once the administrative process is complete, the parties have the option of further pursuing judicial relief through SDCL 1-26. The remedy recognized by our codified laws for persons feeling aggrieved by an action of the Department of Health is to file an appeal pursuant to SDCL 1-26. See, SDCL 34-1-26 where it states: "Any person feeling aggrieved by any action of the Department of Health shall have the right to appeal pursuant to chapter 1-26."

B.

AN ADEQUATE REMEDY AT LAW EXISTS

"A court may issue a writ 'where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' SDCL 21-29-2. The issuance of a Writ of Mandamus is an 'extraordinary remedy' that will occur only 'when the duty to act is clear.'" Pitts v. Larson, 2001 SD 151, ¶11, citing Baker v. Atkinson, 2001 SD 49, ¶16, 625 NW2d 265, 271. "[A]n applicant for a writ of [prohibition] must show that he or she has no 'plain, speedy and adequate remedy in the ordinary course of law' available to them." Rapid City Journal v. Callahan, 2022 SD 38, ¶10, citing Cummings v. Mickelson, 495 N.W.2d 493, 495 (S.D. 1993) (quoting SDCL 21-30-2). There is a plain, speedy, and adequate remedy in the ordinary course of law available to Puffy's. SDCL 34-1-26 and ARSD 44:90:03:16, referencing the administrative process under SDCL 1-26, state remedies at law for an aggrieved person to appeal a final action by the Department of Health.

"Because mandamus may only be granted under exceptional circumstances which require a drastic remedy, it must be shown entitlement to the writ was clear and indisputable." Sorrels v. Queen of Peace Hospital, 1998 SD 12, ¶7, citing generally, Crowley v. Spearfish Indep. Sch. Dist., No. 40-2, 445 NW2d 308 (SD 1989); Anderson v. City of Sioux Falls, Minnehaha County, 384 NW2d 666, 668 (SD 1986) (mandamus not an

absolute right, but a matter of sound discretion); Bailey, 2 SD at 536, 51 NW at 332 (1892).

Further, "[t]o prevail on a writ of mandamus or prohibition, [p]etitioners must show 'a clear legal right to performance of the specific duty sought to be compelled and the [respondent] must have a definite legal obligation to perform that duty.'" Id., citing Cheyenne River Sioux Tribe v. Davis, 2012 S.D. 69, ¶13, 822 N.W.2d 62, 66 (citation omitted). The specific duty Puffy's seeks to compel here is to have the Department grant the available dispensary registration certification. The Department has sent notice to Puffy's of its right to proceed with the application process (see, Exhibit D) and Puffy's has responded to that letter, so the Department has already performed its duty. To seek to have the judicial branch of government demand that the Department issue the certificate without allowing for further vetting in accordance with the administrative rules is to have one branch of government substitute its opinion with respect to a separate branch.

In McElhaney v. Anderson, 1999 SD 78, this Court made it clear that extraordinary writs are not to be issued when there is another remedy at law. "We have consistently held to the position that extraordinary writs are not to be issued where the applicant has another remedy at law. Cummings, 495 [sic] at 495-6 (writ of prohibition); Tibbetts v. State, 336 NW2d 658 (SD 1983) (no writ of habeas corpus available where the

administrative procedures provides an alternate remedy); Dollard v. Hughes County Commissioners, 1 SD 292, 46 NW 1127 (1890) (writ of certiorari)."
McElhaney, at fn. 2.

The McElhaney case also stated:

"In South Dakota Bd. of Regents v. Heege, 428 NW2d 535 (SD 1988), we were faced with a similar question as is now before us.⁽²⁾ There the circuit court issued a writ of prohibition against the Board of Regents based on a claim by a teachers' union that the Regents were guilty of unfair labor practices. Id. at 536. We reversed, holding a writ of prohibition is an extraordinary remedy reserved for situations where the applicant has no other remedy in the ordinary course of law. Id. at 539. We held that jurisdiction would ordinarily initially rest with the Department of Labor under the Administrative Procedures Act except in certain instances which were not applicable. Id. Those exceptions are no more applicable in the case now before us than they were in Heege.⁽³⁾ We concluded in Heege that the writ of prohibition should be quashed and any disputes considered by the Department of Labor. Id. Allowing the case to proceed through administrative avenues conserves judicial resources and is in accord with our duty to harmonize relations with executive branch agencies operating under legislative authority. Id.⁽⁴⁾"

The exceptions referenced in the Heege case, which were also enumerated by the circuit court in the current case, are:

"(1) Exhaustion is not required where a person, through no fault of his own, does not discover the purported wrong until after the time for application of administrative relief.

(2) Exhaustion is not required where the agency fails to act.

(3) Exhaustion is not required where the agency does not have jurisdiction over the subject matter or parties.

(4) Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had.

(5) Exhaustion is not required in extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief."

Heege, 428 NW2d at 539.

None of these exceptions are present in the current case because: 1) there has been no claim by Puffy's that they discovered the purported wrong after the time for application of administrative relief. As a matter of fact, the application for a writ was filed prior to the timeline for applying for administrative relief; 2) the Department of Health did not fail to act. To the contrary, the Department of Health did act by notifying Puffy's of their right to proceed with applying for the available certificate; 3) subject matter and personal jurisdiction rests with the Department of Health; 4) the Department of Health has not improperly made a decision prior to a hearing, nor is the Department of Health biased so as to prevent a fair and impartial hearing. Rather, the Department of

Health has been attempting to work with Puffy's in getting the registration certificate awarded; and 5) there has been no showing of irreparable harm of a protected right. The delay in getting the application for the registration certificate processed rests solely in the hands of Puffy's.

In oral arguments for a companion case, to-wit: Pennington County Case 51CIV23-000807, Puffy's acknowledged that a proceeding before the Department constitutes a contested case proceeding under the Administrative Procedures Act and that a circuit court would have jurisdiction over an appeal of such a proceeding. *See, Exhibit F*, attached hereto. Puffy's cannot be heard to acknowledge the existence of a contested case proceeding under the Administrative Procedures Act in one instance and then be allowed to completely ignore that process in a similar case only one month later.

The circuit court erred in denying the Department's motion to dismiss Puffy's application for an alternative writ of mandamus when an adequate remedy at law existed.

C.

THE APPLICATION FOR A WRIT OF MANDAMUS WAS A MOOT ISSUE

The circuit court never had jurisdiction because the alleged controversy is moot. "Mootness is a jurisdictional question because the Court is not

empowered to decide moot questions or abstract propositions." North Carolina v. Rice, 404 U.S. 244, 246 (1971); see also, Smith v. United States, 921 F.2d 136, 138 (8th Cir. 1990) ("Mootness goes to the very heart of Article III jurisdiction, and any party can raise it at any time.")

The application for a writ of mandamus was moot because the Department sent notice to Puffy's of its right to proceed with the application process for the available dispensary certificate, see, *Exhibit D*, attached hereto, and Puffy's responded with an affirmative response.

In the case of Netter v. Netter, 2019 SD 60, the South Dakota Supreme Court stated that

"[t]his Court renders opinions pertaining to actual controversies affecting people's rights." Id., at ¶9, citing Skjonsberg v. Menard, Inc., 2019 S.D. 6, ¶ 12, 922 N.W.2d 784, 787. "The Court will generally not rule on an issue if a decision 'will have no practical legal effect upon an existing controversy.'" Netter, at ¶9, citing Skjonsberg at ¶ 14, 922 N.W.2d at 788. "In other words, the Court will not decide a moot case. (fn omitted) 'A moot case is one in which there is no real controversy or which seeks to determine an abstract question which does not rest on existing facts or rights, with the result that any judicial determination would have no practical or remedial effect.'" Netter, at ¶9, citing 1A C.J.S. Actions § 75 (2019). See also, Sullivan v. Sullivan, 2009 S.D. 27, ¶ 11, 764 N.W.2d 895, 899 (a case is moot when "there has been a change of circumstances or the occurrence of an event by which the actual controversy ceases and it becomes impossible for the [court] to grant effectual relief.") Id. "No matter how vehemently the parties continue to dispute the [issue] that precipitated the lawsuit,

the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights."

Netter, at ¶11, citing Skjonsberg, 2019 S.D. 6, ¶ 14, 922 N.W.2d at 788.

Since the sole subject matter of the alternative writ of mandamus is Puffy's request to receive the available certificate, there is no real controversy as Puffy's has received the notification of its ability to move forward with the application process and Puffy's has advised the Department that it wishes to do so. The ball is squarely in Puffy's court - all it has to do is update its application information and pay the registration fee. Ergo, this matter is a moot point. To proceed forward with a counterfeit controversy whose full and complete resolution rests fully in the hands of the complaining party is a waste of judicial resources.

The circuit court stated that a controversy exists because Puffy's position is that it is entitled to the certificate without further action. This argument gets into the merits of the case and the Department would have put on evidence to show the impracticality of merely issuing a certificate without proper vetting had an evidentiary hearing been provided. Moreover, it is telling that, after the hearing in this matter, Puffy's completed the required steps (resubmitting full application documents and application fees) at the

local level, see, *Exhibit E*, but refuses to do so at the state level.

D.

**FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED**

SDCL 15-6-12 (b) (5) allows for dismissal of an action upon failure to state a claim upon which relief can be granted.

Puffy's has not stated a claim upon which relief can be granted because the Department of Health has not acted improperly or outside the scope of its authority. The Department has provided notice to Puffy's of its right to proceed with the application process for the available dispensary certificate. Moving forward with the application process now rests fully in the hands of Puffy's. Hence, there is no claim to be made against the Department of Health here.

In order to survive a motion to dismiss for failure to state a claim, a plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings. See, Nygaard v. Sioux Valley Hospitals & Health System, 731 N.W.2d 184, 198, 2007 SD 34, ¶ 39. There is not a factual predicate here that is concrete enough to warrant further proceedings because first, Puffy's did not exhaust its administrative remedies and second, the ball is squarely in Puffy's court when it comes to moving forward with the application for the available

certificate. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. See, Kaiser Trucking, Inc. v. Liberty Mutual Fire Insurance Co., 981 N.W.2d 645, 2022 SD 64, ¶ 26.

II.

THE CIRCUIT COURT SHOULD HAVE ALLOWED AN OPPORTUNITY FOR AN EVIDENTIARY HEARING.

In the event it is determined that the circuit court did have proper jurisdiction to hear the writ of mandamus action, it is paramount to justice that the parties be afforded the opportunity to present evidence.

The right to present evidence in its own defense is a right prescribed to, and enjoyed by, all litigants. At its most basic level, in the context of disputes resolved through legal process, due process guarantees a "fair hearing in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). In 1972, the Supreme Court of the United States recognized that "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a

meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864) and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (other citations omitted). Due Process requires 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) ("Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged").

The Supreme Court has held that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982). Due process "has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" Id., at 429-430, quoting Boddie v. Connecticut, 401 U.S. 371, 380 (1971). In fact, as a matter of the related fundamental right to access to the courts, the Boddie Court held "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Id. at 377.

In addition to the constitutional due process rights, SDCL §§ 21-29-4 and 21-29-8 through 21-29-13 contemplate that an evidentiary hearing will be held in a case involving a writ of mandamus. These statutes encompass language such as:

- ". . . The case must be heard by the court, whether the adverse party appear or not." (SDCL 21-29-4)
- "If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue only immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing the case." (SDCL 21-29-8)
- "On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency and may countervail it by proof, either in direct denial or by way of avoidance." (SDCL 21-29-9)
- ". . . the court may, in its discretion, order the question to be tried before a jury, and postpone the hearing until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him." (SDCL 21-29-10)
- "If no notice of a motion for a new trial be given or, if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial, after which either party may bring on the hearing on the application, upon reasonable notice to the adverse party." (SDCL 21-29-11)

- "The motion for a new trial must be made in the court in which the issue of fact is made." (SDCL 21-29-13)

(emphasis added)

All of the emphasized language points to the fact that a distinct hearing, and potentially a jury trial, must be set to allow for the presentation of evidence by the parties.

In the present case, the Department of Health had not yet even filed a formal answer because it appeared by Notice of Special Appearance to object on jurisdictional grounds. The Department of Health believed that if jurisdiction was determined to be valid, it would have had an opportunity to file a formal answer and proceed with an evidentiary hearing to address the merits of the case. A hearing on a motion to dismiss is limited to the pleadings, and does not incorporate the authority to make a judgment on the merits of the evidence. "A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it." Yankton Ethanol, Inc. vs. Vironment, Inc., 1999 SD 42, ¶6, citing, Estate of Billings v. Deadwood Congregation, 506 NW2d 138, 140 (SD 1993) (citing Hunt v. Hunt, 309 NW2d 818, 820 (SD 1981)).

To require the Department of Health to automatically award the certificate, without further vetting to ensure an applicant still qualifies, is requiring the Department of Health to violate its own

rules. The whole of the rules must be read together, see, Kayser v. South Dakota State Elec. Comm'n, 512 NW2d 746, 747 (SD 1994) ("We read statutes as a whole along with the enactments relating to the same subject") and the administrative rules provide instances where an applicant is disqualified, such as if a principal officer or board member has a disqualifying felony¹¹ or has had a registration certificate revoked¹². Other examples where an application may no longer be valid is when the local jurisdiction has changed its zoning ordinances¹³, a landlord is no longer interested in leasing the property¹⁴, a change in ownership interest has occurred¹⁵, or the applicant has moved on to other business interests and no longer desire to operate a medical cannabis establishment¹⁶. In addition to meeting specific requirements, the registration fee must be paid on an annual basis.¹⁷

All of this would have been provided as evidence at a trial on the merits. Hence, an evidentiary hearing should have been offered to the parties.

¹¹ ARSD 44:90:03:14

¹² ARSD 44:90:03:13

¹³ This was being discussed in a local jurisdiction in northwest South Dakota

¹⁴ This occurred in one of the lottery locations

¹⁵ This occurred in one of the lottery locations

¹⁶ This occurred in one of the lottery locations

¹⁷ ARSD 44:90:03:17

CONCLUSION

Because Puffy's did not exhaust its administrative remedies, there was an adequate remedy at law, and the issue really was moot, the Alternative Writ of Mandamus was not ripe and the circuit court should have dismissed the action for lack of jurisdiction.

For all the reasons aforestated, the Department hereby respectfully requests that this Court reverse the order of the circuit court and enter an order dismissing and/or quashing the alternative writ of mandamus.

Dated this 10th day of May, 2024.

/S/ Tamara Lee
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CERTIFICATE OF E-FILING AND SERVING

I hereby certify that on May 10, 2024, I caused a true and accurate copy of the foregoing Appellant's Brief to be electronically served, via the South Dakota Odyssey program, on the following:

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Dated on this 10th day of May, 2024.

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EXHIBIT A

STATE OF SOUTH DAKOTA)
COUNTY OF PENNINGTON)
PUFFY'S, LLC, a South Dakota)
Limited Liability Company,)
Applicant,)
v.)
STATE OF SOUTH DAKOTA,)
DEPARTMENT OF HEALTH,)
Respondent.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FILE NO. 51 CIV 23-937
ORDER REGARDING PEREMPTORY
WRIT OF MANDAMUS

Puffy's, LLC (Puffy's) was granted an alternative writ in this matter on July 26, 2023. The South Dakota Department of Health (the Department) filed a Motion to Dismiss or, in the Alternative, Motion to Quash on September 5, 2023. A hearing was held on November 6, 2023.

FACTS

Puffy's is a company that operates medical cannabis dispensaries in South Dakota. The Department administers the South Dakota Medical Cannabis program. On March 9, 2022, the Department held a random draw process to issue 15 registration certificates for medical cannabis in Rapid City, SD. There were 47 applicants for the 15 allowable certificates. Those who did not receive a certificate were placed on an ordered list of alternates (the waitlist). Puffy's received several certificates and the first alternate position on the waitlist.

Greenlight Dispensary also received a registration certificate. Greenlight was unable to become operational within one year. On April 20, 2023, the Department denied Greenlight's request for an operation extension, causing Greenlight's certificate to become void under the department's administrative rules. Greenlight did not appeal the denial, and Greenlight's registration certificate became available for an alternate. There is no dispute that Puffy's has priority to receive the certificate

over other applicants on the waitlist. Puffy's alleges that the Department refuses to issue the certificate despite a clear legal requirement to do so.

Puffy's filed an application for writ of mandamus on July 19, 2023. The Court issued an alternative writ on July 26, 2023. In a letter dated August 18, 2023, the Department notified Puffy's that it may proceed with the registration process relating to the available registration certificate. The Department acknowledges in its brief that "the Department, has sent notice to Puffy's, LLC of its right to proceed with the application process for the available dispensary certificate." Despite the letter, the Department has not issued the certificate to Puffy's, as of the date of this memo. Puffy's alleges that the Department refuses to issue the certificate until and unless Puffy's completes the application process again.

LEGAL DISCUSSION

I. The Court has jurisdiction to issue a writ against the Department.

The Department argues that the Court is categorically prohibited from issuing a writ against the Department of Health. The Department is incorrect.

As a general matter, district courts have jurisdiction to grant writs of mandamus and of prohibition. SDCL § 16-6-15 ("The circuit court has the power to issue writs of . . . mandamus . . . and all other writs necessary to carry into effect its judgments, decrees, and orders, and to give to it a general control over inferior courts, officers, boards, tribunals, corporations, and persons."). "The granting of a writ of mandamus is not a matter of absolute right, but is vested in the sound discretion of the court[.]" *Asper v. Nelson*, 2017 S.D. 29, ¶ 11, 896 N.W.2d 665, 668.

A. The Court can issue a writ against the Department.

The Department argues that SDCL § 16-6-15 does not specifically state that a writ can be granted against a state department, but the Department cites no authority other than the plain language of the statute for this proposition. The South Dakota Supreme Court has affirmed writs of mandamus

issued by district courts against state departments. *S. Dakota Trucking Ass'n, Inc. v. S. Dakota Dep't of Transp.*, 305 N.W.2d 682 (S.D. 1981) ("This is an appeal from a declaratory judgment and writ of mandamus entered in favor of appellees. We affirm."); *Krsnak v. S. Dakota Dep't of Env't & Nat. Res.*, 2012 S.D. 89, 824 N.W.2d 429 (citing SDCL 21-29-1 and applying the analysis for reviewing a writ to actions by the DENR). Therefore, this Court has jurisdiction to grant a writ of mandamus compelling action from the Department.

B. The exhaustion of administrative remedies requirement is not applicable.

It is true that, generally, "[f]ailure to exhaust administrative remedies where required is a jurisdictional defect." *S. Dakota Bd. of Regents v. Heege*, 428 N.W.2d 535, 539 (S.D. 1988). "It is a settled rule of judicial administration that 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Id.* However, there are exceptions to the requirement of exhaustion of administrative remedies." *Id.*

(1) Exhaustion is not required where a person, through no fault of his own, does not discover the purported wrong until after the time for application of administrative relief. *Lick v. Dahl*, 285 N.W.2d 594 (S.D.1979).

(2) Exhaustion is not required where the agency fails to act. *Waltz v. Board of Education of Scotland*, 329 N.W.2d 131 (S.D.1983) (footnote 1).

(3) Exhaustion is not required where the agency does not have jurisdiction over the subject matter or parties. *Johnson*, *supra* at 112.

(4) Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had. *Mordborst v. Egert*, 88 S.D. 527, 223 N.W.2d 501 (S.D.1974).

(5) Exhaustion is not required in extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief. *Mordborst*, *supra*; *Johnson*, *supra*.

Id. Here, Puffy's falls within the second exception. Puffy's seeks a writ compelling the Department to act when it has failed to do so. Therefore, contrary to the Department's argument, the Court has jurisdiction to act; the exhaustion of administrative remedies requirement does not prohibit the Court from issuing a writ here.

C. Puffy's has met the requirements of SDCL § 21-29-2.

The Department argues that Puffy's application is defective under SDCL § 21-29-2. SDCL § 21-29-2 states that a writ "must be issued upon affidavit, upon the application of the party beneficially interested." The affidavit requirement is a "mandatory predicate" and failing to satisfy this requirement makes the application "fatally flawed." *Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 2007 S.D. 6, 727 N.W.2d 288.

In *Elliott*, the Supreme Court recognized the mandatory nature of the affidavit requirement in SDCL § 21-29-2. Elliott filed a pleading titled "Petition Contesting Denial of Building Permit and Notice of Appeal." *Id.* at ¶ 4. The pleading was signed by Elliott's attorney but was neither verified nor accompanied by an affidavit. *Id.* at ¶ 10. The circuit court dismissed the case for lack of jurisdiction. On appeal, Elliot argued that his pleading was sufficient and could "be construed either as a writ of certiorari or a writ of mandamus." *Id.* at ¶ 10. The Supreme Court interpreted SDCL § 21-31-2¹ by likening it to the SDCL 21-29-2. *Id.* at ¶ 12. The Court noted "[a]n application for a writ of mandamus includes a similar mandatory predicate: 'The writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested.' " SDCL 21-29-2. The Court's discussion makes clear that the "must" language in the writ of mandamus statute, SDL 21-29-2, means that the Court has no jurisdiction over the matter in absence of an affidavit. The Court held that Elliott's pleading was "fatally flawed" and the lower court's determination that it lacked jurisdiction was correct. *Id.* at ¶ 18.

In the present case, Puffy's began the case by filing a "Verified Application for Alternative Writ of Mandamus." The application included a VERIFICATION section, signed by Puffy's attorney

¹ "The application for a writ of certiorari must be made on affidavit by the party beneficially interested." *Elliott*, 2007 S.D. at ¶ 12 (quoting SDCL § 21-31-2).

and notarized. However, SDCL 21-29-2 requires an affidavit, not a verified petition.² The question becomes, whether Puffy's pleading can be construed as an affidavit.

The South Dakota Supreme Court has said "[a]n affidavit is merely oral evidence reduced to writing." *Studi v. Black Hills Fed. Credit Union*, 2015 S.D. 33, ¶ 14, 864 N.W.2d 513, 517. "The true test of the sufficiency of an affidavit is whether it has been drawn in such a manner that perjury could be charged thereon, if any material allegation therein is false." *Olson v. Advance-Runnely Thresher Co.*, 43 S.D. 518, 180 N.W. 961, 963 (1921) ("this affidavit, because it contains the mere opinion of affiant as to the material fact, fails to meet the one universal test applicable to all affidavits."). Other Courts have also described the nature of an affidavit. *OneWest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187, ¶ 45, 968 N.E.2d 726, 737 ("[A]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths."); *Wood v. Bediako*, 272 Mich. App. 558, 562, 727 N.W.2d 654, 657 (2006) ("To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."); *Hass v. Neth*, 265 Neb. 321, 334, 657 N.W.2d 11, 24 (2003) ("An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."); *Com. v. Brown*, 767 A.2d 576, 582 (Pa. Super. Ct. 2001) ("By definition an affidavit is a statement of facts confirmed by oath before a judicial officer having authority to administer the oath."); *Thomas v. Greenwood Leflore Hosp.*, 970 So. 2d 273, 277 (Miss. Ct. App. 2007) ("An affidavit is 'a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'") (quoting *Black's Law Dictionary* 58 (7th Edition 1999)); *Scarborough*

² In *Elliot*, the court noted south Dakota statutes permit a writ to be issued by affidavit or verified petition. *Elliot*, 2007 S.D. at ¶ 11-12.

Wright, 871 A.2d 937, 938–39 (R.I. 2005) (“An affidavit is a written statement that has been sworn to by the affiant before a person authorized to administer oaths.”); *Mugavero v. Kengler*, 317 Ill. App. 3d 162, 165, 739 N.E.2d 979, 982 (2000) (“An affidavit is ‘a declaration, on oath, in writing, sworn to before some person who has authority under the law to administer oaths.’”).

Puffy’s “Verified Petition” is a declaration of facts. Numbers 5-16 fall under the subheading entitled “FACTS.” The statements contained therein are factual assertions, describing the events and circumstances of the case at hand. Before Cwach’s signature, the document states “AFFIANT FURTHER SAYETH NOT,” thereby describing Cwach as an affiant. The document is notarized, and bears the following verification:

Ryan D. Cwach, the undersigned, being first duly sworn on oath, depose and states that the undersigned is the attorney for the Applicant named in the foregoing Application, that the undersigned has read it, know the contents therein, and that the facts therein contained are accurate and complete to the best of the undersigned’s knowledge and belief.

Therefore, the affiant’s statements appear to be under oath and in writing. Puffy’s has met the affidavit requirement of SDCL § 21-29-2, and there is no jurisdictional defect on these grounds.

II. The issue is not moot.

The Department argues that the issue is moot because the Department issued a letter to Puffy’s on August 18, 2023. It is true that “the Court will not decide a moot case.” *Netter v. Netter*, 2019 SD 60, ¶ 9. “[A] moot case is one in which there is no real controversy or which seeks to determine an abstract question which does not rest on existing facts or rights, with the result that any judicial determination would have no practical or remedial effect.” *Id.* However, the doctrine of mootness is inapplicable here.

The Department argues that there is no dispute following the letter dated August 18, 2023, but the Department still refuses to issue the certificate. The letter indicates that Puffy’s “may proceed with the application process for a lottery dispensary certificate that has recently become available.” What the Department has failed to recognize is that Puffy’s’ position is that it is entitled to the

certificate without further action. If the Department's position is that Puffy's is entitled to the certificate, but only if Puffy's reapplies, then there exists a controversy over whether Puffy's is presently entitled to the registration certificate. Puffy's seeks to compel the Department to issue the registration certificate. The certificate has not been issued. Therefore, a controversy still exists and the issue is not moot.

III. Puffy's has demonstrated that it is entitled to a peremptory writ.

Puffy's seeks a peremptory writ to compel the Department to issue a registration certificate for Puffy's dispensary.

South Dakota law allows a trial court to issue a writ of mandamus where no plain, speedy, and adequate remedy exists in the ordinary course of law. A writ of mandamus is an extraordinary remedy that will issue only when the duty to act is clear. A writ of mandamus commands the fulfillment of an existing legal duty, but creates no duty itself, and "does not act upon ... doubtful or unsettled law. To prevail on a writ of mandamus or prohibition, Petitioners must show a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.

Mandamus may only be used to compel ministerial duties, not discretionary duties. When public officials have a mandatory duty to perform mandamus may require performance but mandamus may not dictate details when there is discretion in how the duty is to be performed. Further, an application for a writ of mandamus in the form of an affidavit is sufficiently analogous to a complaint in a civil action to permit a defendant to move to quash the alternative writ if a plaintiff's application is found insufficient.

Krmak v. S. Dakota Dep't of Env't & Nat. Res., 2012 S.D. 89, ¶¶ 9-10, 824 N.W.2d 429, 433-34 (cleaned up) (citations omitted).

A. Puffy's has demonstrated a clear, mandatory duty to act.

ARSD 44:90:03:16³ was promulgated by the Department and describes the procedures for awarding registration certificates. In this case, more establishments applied for registration certificates

³ **44:90:03:16. Department awarding of certification – Tiebreaking procedures – Notice to unsuccessful applicants.** The department shall award certification as follows:

- (1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;
- (2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;
- (3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

than are allowed by a local government. The Department assigned scores to each applicant and held a random draw for registration certificates. The applicants who did not receive a registration certificate were placed on a prioritized waitlist. Puffy's received the first position on that waitlist.

Recently, a registration certificate became available. Greenlight Dispensary's license was determined void by the Department on April 20, 2023 after Greenlight failed to become operational within one year, as required by ARSD 44:90:03:16. The administrative rules clearly indicates that when an entity holding a registration certificate fails to become operational within one year, "the certificate is deemed void and *must* be awarded to the next applicant on the waiting list." ARSD 44:90:03:16 (emphasis added). The language of the rule is "clear, certain, and unambiguous." *Citibank, N.A. v. S. Dakota Dep't of Revenue*, 2015 S.D. 67, ¶ 20, 868 N.W.2d 381, 390. "When the language in a [rule] is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed." *Id.* See also *Westmed Rehab, Inc. v. Dep't of Soc. Servs.*, 2004 S.D. 104, ¶ 8, 687 N.W.2d 516, 518 ("Administrative regulations are subject to the same rules of construction as are statutes. When regulatory language is clear, certain and unambiguous, our function is confined to declaring its meaning as clearly expressed."). The Court "need not engage in canons of statutory construction to determine the meaning of the regulation." *Id.*

-
- (4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants must be ranked via the lottery system to establish the order and a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Greenlight's license was deemed void on April 20, 2023, when Greenlight failed to become operational. As of now, the Department has failed to issue Greenlight's registration certificate to Puffy's. This is not an issue of timing. The issue is whether the Department refuse to issue the certificate until Puffy's reapplies. It appears the Department does not intend to issue the certificate in absence of further action from Puffy's. The Department's failure to act is a violation of a clear duty under ARSD 44:90:03:16.

Reapplication is not contemplated by ARSD 44:90:03:16. The language of the rule does not suggest any additional action by a waitlisted applicant before the Department "must" issue the registration certificate. Indeed, if the applicant is required to reapply, it seems a waitlist would be of little value. Thus, the Department had a mandatory duty to issue the registration certificate to Puffy's after voiding Greenlight's certificate.

B. Puffy's has no other plain, speedy, and adequate remedy.

As discussed above, the Department has failed to act. There is no Department action for which Puffy's can seek agency review. The fact that such a situation is expressly exempt from the exhaustion of administrative remedies requirement supports the conclusion that Puffy's has no other recourse but to seek relief from this Court in a writ. Puffy's is entitled to such relief. The Department must grant Puffy's the registration certificate.

IV. The operational within one year requirement found in ARSD 44:90:03:16 is valid. Therefore, the clear duty found in ARSD 44:90:03:16 is enforceable by this Court.

Puffy's argues the duty described in the previous section should only be enforced if ARSD 44:90:03:16 is valid. Puffy's position is that ARSD 44:90:03:16 is invalid, and the Court should not enforce the duty described therein. This Court disagrees.

"[A]n administrative regulation cannot adopt requirements that 'expand upon the statute that it purports to implement.'" *In re Adoption of A.A.B.*, 2016 S.D. 22, ¶ 6, 877 N.W.2d 355, 359–60 (quoting *In re Luff Expl.*, 2015 S.D. 27, ¶ 17, 864 N.W.2d 4, 9). See also *Red Bear v. Cbryenne River Sioux Tribe*,

336 N.W.2d 370, 371 (S.D. 1983). “[R]ules adopted in contravention of statutes are invalid.” *Id.* ARSD 44:90:03:16 implements SDCL § 34-20G-72. ARSD 44:90:03:16 does not expand this statute and is not invalid.

The South Dakota legislature delegated authority to the Department to promulgate rules relating to registration certificates in SDCL § 34-20G-72. The statute states, in relevant part:

The department shall promulgate rules pursuant to chapter 1-26:

- (1) Establishing the form and content of registration and renewal applications submitted under this chapter;
- (2) Establishing a system to numerically score competing medical cannabis establishment applicants, in cases where more applicants apply than are allowed by the local government, that includes analysis of:
 - (a) The preference of the local government;
 - (b) In the case of dispensaries, the suitability of the proposed location and its accessibility for patients;
 - (c) The character, veracity, background, qualifications, and relevant experience of principal officers and board members; and
 - (d) The business plan proposed by the applicant, that in the case of a cultivation facility or dispensary shall include the ability to maintain an adequate supply of cannabis, plans to ensure safety and security of patrons and the community, procedures to be used to prevent diversion, and any plan for making cannabis available to low-income registered qualifying patients;

SDCL § 34-20G-72.

The portion of ARSD 44:90:03:16 in dispute is as follows:

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The Legislature delegated authority to the Department for the purpose of “[e]stablishing the form and content of registration and renewal applications” and “[t]he business plan proposed by the applicant.” SDCL § 34-20G-72. ARSD 44:90:03:16 falls within the scope of this delegation. In essence, the operational within one year requirement is an element of the applicant’s business plan. The Department clearly has authority to establish the content required in a registration application, as well as a renewal application. Although the Department treats the renewal and operational within one year requirement as separate processes, the operational within one year requirement corresponds to the timeline of renewal. The Court views the operational requirement content of the renewal application.

That the Legislature permits the Department to craft a scoring system that considers the applicant’s business plan evidences the Legislature’s intent that the Department should prioritize well-planned and functional cannabis establishments. The scoring system is used “in cases where more applicants apply than are allowed by the local government.” Therefore, the Legislature envisioned a system whereby applicants can be selected for a registration certificate, in part, by the strength of their business plan. It is reasonable that part of the business plan envisioned by the Legislature is that the applicant will become operational in a timely manner. That the certificates renew on a yearly basis indicates that this time period is reasonable to become operational. On this rationale, ARSD 44:90:03:16 does not expand upon SDCL § 34-20G-72 and is not invalid.

ORDER


Considering the foregoing, it is hereby:


ORDERED that the Department’s Motion to Dismiss or, in the Alternative, Motion to Quash is **DENIED**; and it is further

ORDERED that the Department shall issue a state medical cannabis dispensary certificate to Puffy’s LLC for location 3308 Campbell St., Rapid City.

Dated this 17th day of November 2023.

BY THE COURT


The Honorable Joshua Hendrickson
Circuit Court Judge
Seventh Judicial Circuit


ATTEST:
AMBER WATKINS
CLERK OF COURTS

By 
Deputy
(SEAL)



FILED
Pennington County, SD
IN CIRCUIT COURT

NOV 16 2023

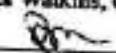
Amber Watkins, Clerk of Courts
By  Deputy

EXHIBIT B

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

:SS

COUNTY OF PENNINGTON

)

SEVENTH JUDICIAL CIRCUIT

PUFFY'S, LLC, a South Dakota Limited
Liability Company,

Applicant,

Vs.

STATE OF SOUTH DAKOTA,
DEPARTMENT OF HEALTH,

Respondent.

51CIV23-000937

PEREMPTORY WRIT OF MANDAMUS

TO THE ABOVE-NAMED RESPONDENT

The Applicant, having filed an Application for a Writ of Mandamus seeking to command the South Dakota Department of Health to issue a state medical cannabis dispensary certificate for its location at 3308 Cambell St., Rapid City, South Dakota; and upon review of the Application, the briefs of the parties, and upon further hearing, the Court hereby finds that Applicant is beneficially interested; has no other plain, speedy, and adequate remedy available in the ordinary course of law; and is entitled to the issuance of an Peremptory Writ of Mandamus pursuant to South Dakota Chapter 21-29

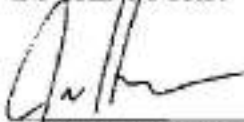
NOW, THEREFORE,

IT IS ORDERED AND COMMANDED that the South Dakota Department of Health shall forthwith issue a state medical cannabis dispensary certificate to Puffy's LLC for location 3308 Cambell St., Rapid City, within Seven (7) days of service of this Writ upon the Department.

IT IS ORDERED that, in accordance with SDCL § 21-29-6, service of this Writ shall be completed by providing a copy of this Writ of Mandamus to the Respondent's attorney of record.

11/30/2023 4:50:56 PM

BY THE COURT:



The Honorable Joshua Hendrickson
Circuit Court Judge
Seventh Judicial Circuit

Attest:
Shaw, Heather
Clerk/Deputy



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EXHIBIT C



Order	Number Drawn	Name	Address
1	25	Puffy's LLC	3324 Cambell St
2	39	Puffy's LLC	4024 Biernbaum Ln Bldg B
3	38	Puffy's LLC	4024 Biernbaum Ln Bldg A
4	46	Rapid City Cannabis	3075 North Plaza Dr Unit B & C
5	12	Genesis Farms, LLC	609 Mountain View Rd
6	34	Puffy's LLC	2120 W Main St Unit 3
7	16	Genesis Farms, LLC	2205 N La Crosse St
8	23	Puffy's LLC	3310 Cambell St
9	19	Greenlight Dispensary	840 Timmons Blvd Suite 6A
10	22	Hive Collective LLC	918 E North St
11	20	Greenlight Dispensary	840 Timmons Blvd Suite 7B
12	30	Puffy's LLC	902 E Main St
13	21	Greenlight Dispensary	840 Timmons Blvd Suite 7
14	27	Puffy's LLC	4025 Biernbaum Ln
15	7	CC Health	1624 Discovery Cir
Alternate 1	24	Puffy's LLC	3308 Cambell St
Alternate 2	17	Genesis Farms, LLC	3440 Universal Dr
Alternate 3	15	Genesis Farms, LLC	3250 Eglin St
Alternate 4	9	Dakota Pharm	1440 Luna Ave
Alternate 5	2	Black Hills Cannabis Care	1810 Rand Rd
Alternate 6	45	Puffy's LLC	1740 E North St
Alternate 7	33	Puffy's LLC	2120 W Main St Unit 1
Alternate 8	13	Genesis Farms, LLC	615 Mountain View Rd
Alternate 9	26	Puffy's LLC	3316 Cambell St
Alternate 10	28	Puffy's LLC	399 East Watts Ln Unit #11
Alternate 11	47	Starbuds	1141 Deadwood Ave Suite 6
Alternate 12	1	11 Leaf Dispensary, LLC	1616 Camden Dr.
Alternate 13	3	Black Hills Cannabis Care	1820 Rand Rd
Alternate 14	6	Black Hills Cannabis Care	1810 RAND Rd Suite 1
Alternate 15	36	Puffy's LLC	2120 W Main St Unit 5
Alternate 16	43	Puffy's LLC	2020 Deadwood Ave Suite 103
Alternate 17	32	Puffy's LLC	1770 E North St
Alternate 18	31	Puffy's LLC	1750 E North St
Alternate 19	10	From The Hills	840 Timmons Blvd
Alternate 20	40	Puffy's LLC	4024 Biernbaum Ln Bldg C
Alternate 21	35	Puffy's LLC	2120 W Main St Unit 4

Rapid City Medical Cannabis Dispensary Lottery Draw | March 9, 2022



Alternate 22	5	Black Hills Cannabis Care	1820 Rand Rd Suite 1
Alternate 23	44	Puffy's LLC	2460 Deadwood Ave
Alternate 24	29	Puffy's LLC	1935 Samco Rd
Alternate 25	41	Puffy's LLC	2020 Deadwood Ave Suite 105
Alternate 26	18	Greenlight Dispensary	840 Timmons Blvd Suite 6
Alternate 27	42	Puffy's LLC	2020 Deadwood Ave Suite 104
Alternate 28	14	Genesis Farms, LLC	501 Deadwood Ave
Alternate 29	37	Puffy's LLC	4024 Biernbaum Ln Bldg AA
Alternate 30	4	Black Hills Cannabis Care	1820 Rand Rd Suite 2
Alternate 31	11	Genesis Farms, LLC	601 Mountain View Rd
Alternate 32	8	CC Health	2421 Elderberry Blvd

EXHIBIT D



**SOUTH DAKOTA
MEDICAL CANNABIS PROGRAM**

600 EAST CAPITOL AVENUE
PIERRE, SD 57501-2536

PHONE: 605.773.3361 | EMAIL: MCQuestions@state.sd.us | WEB: medcannabis.sd.gov

08/18/2023

Puffy's LLC
ATTN: Kittrick Jeffries
1732 Mesa Drive
Rapid City, SD 57702

RE: Dispensary Certificate for Lottery Alternate

Dear Puffy's, LLC:

The Department is hereby notifying you that Puffy's, LLC may proceed with the application process for a lottery dispensary certificate that has recently become available. As the first alternate in the Rapid City lottery draw, Puffy's, LLC is receiving this notice relative to the site location of 3308 Cambell St., Rapid City, SD.

Please notify the Department in writing by Thursday, August 31, 2023, if Puffy's is interested in moving forward with the process of certification for this dispensary establishment. Notification of interest may be sent to the medical cannabis program administrator either through USPS mail or via email at jennifer.seale@state.sd.us.

If written notification is not received by 5:00 p.m. CT (central time) on August 31st, the next alternate on the lottery list will be notified of the availability of the dispensary certificate.

Thank you,

Jennifer Seale

Administrator | Medical Cannabis Program

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EXHIBIT E



CITY OF RAPID CITY

Office of the City Attorney

300 Sixth Street

Rapid City, South Dakota 57701-2724

Telephone: 605-394-4140

E-mail: attorney@rcgov.org

www.rcgov.org

February 9, 2024

Puffy's LLC
c/o Kittrick Jeffries
1732 Mesa Drive
Rapid City, SD 57702

RE: Medical Cannabis Dispensary License

Dear Kittrick,

The City of Rapid City has one medical cannabis dispensary license available, pursuant to Rapid City Municipal Code 5.74.070, due to the nonrenewal of a previous license. Based on the lottery conducted in March of 2022, Puffy's LLC is next in line for this available license at 3308 Cambell Street in Rapid City. If you are interested in obtaining this license, please submit your full application documents, including approval from the Community Development Department and application fees, to the City Finance Office no later than 30 days from the date of this letter.

If we have not received an application from you within 30 days, we will move to the next applicant in line and the license will no longer be available to you.

Please reach out to me if you have any questions.

Regards,

Justin L. Williams
Assistant City Attorney

cc: Ryan Cwach, Attorney for Puffy's LLC



FORM E

South Dakota Medical Cannabis Program LOCAL GOVERNMENT COMPLIANCE CERTIFICATION

The purpose of this form is to collect the necessary information from applicants who seek a medical cannabis establishment registration certificate pursuant to ARSD 44:90:03:10 and ARSD 44:90:03:11

SECTION I. Establishment Information

Please provide the following information for the prospective medical cannabis establishment. For each establishment you are certifying within your jurisdiction, please provide a separate local government compliance certification form.

Legal Business Name Puffy's Dispensary		Type of Establishment(s) <input type="checkbox"/> Cultivation <input checked="" type="checkbox"/> Dispensary <input type="checkbox"/> Manufacturing <input type="checkbox"/> Testing	
Establishment Physical Address 3308 Cambell St		Apartment or Suite #	
City Rapid City	County Pennington	State SD	ZIP Code 57701

SECTION II. Ordinance Compliance

- Are there Ordinances limiting the number of medical cannabis establishments within the jurisdiction?
Yes ☒ (Go to question 2)
No ☐ (Go to question 4)
- How many of each establishment type are allowed by ordinance in the jurisdiction?
 - Cultivation _____
 - Manufacturing _____
 - Testing _____
 - Dispensary 15
- When was the effective date for this ordinance?
Effective Date 10/02/2021
- Are there Zoning ordinances in effect relating to medical cannabis establishments?
Yes ☒ (Go to question 5)
No ☐ (Go to question 6)
- Is the proposed location in compliance with zoning ordinances pertaining to medical cannabis? Yes ☒ No ☐
- Does the jurisdiction require the applicant to obtain any local permits, licenses, or registrations pertaining to medical cannabis?
Yes ☒ (Go to question 7)
No ☐ (Sign and certify this form)
- Has the applicant obtained the required local permits, licenses, or registrations pertaining to medical cannabis? Yes ☒ No ☐

SECTION III. Attachments

Please attach all ordinances related to medical cannabis with this form. If submitting multiple local government compliance certification forms, only attach local ordinances once.

SECTION IV. Certification

I certify that the above-mentioned medical cannabis establishment meets all applicable jurisdiction requirements.

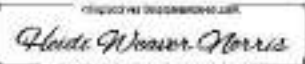
Full Name (Printed) Heidi Weaver Norris	Title Sr. Admin Coordinator	Jurisdiction City of Rapid City
Full Name (Signature) 		Date 03-06-2024

EXHIBIT F

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF PENNINGTON) SS SEVENTH JUDICIAL CIRCUIT

3
4 PUFFY'S, LLC, a South Dakota)
Liability Company,)

5 Applicant,)

6 V.)

7 STATE OF SOUTH DAKOTA,)
8 DEPARTMENT OF HEALTH,)

9 Respondent.)

MOTIONS HEARING
CIV23-807

10
11 BEFORE: THE HONORABLE JOSHUA HENDRICKSON
CIRCUIT COURT JUDGE
12 PENNINGTON COUNTY COURTHOUSE
RAPID CITY, SOUTH DAKOTA
13 OCTOBER 2, 2023

14
15
16 APPEARANCES:

17 FOR THE APPLICANT:

MR. RYAN CWACH
Attorney at Law
202 West 2nd Street
Yankton, South Dakota

20 FOR THE RESPONDENT:

MS. TAMARA LEE
Attorney at Law
South Dakota Department of
Health
600 E. Capitol Avenue
Pierre, South Dakota

1 remedy or exhaust administrative remedies. That's well
2 covered in my brief, too.

3 The Department is clearly a lower tribunal here, Your
4 Honor, in that it is a contested case proceeding under
5 the Administrative Procedures Act which this Court has
6 jurisdiction over -- would have jurisdiction over if
7 there was an appeal either Puffy's or by the
8 Department, you know, if that proceeding were to
9 actually occur, and so that argument I think fails.

10 Similarly, they're arguing that you don't have
11 jurisdiction; the Court doesn't have jurisdiction to
12 hear this writ. I'm arguing this writ is necessary
13 because they do not have jurisdiction, and so that is
14 one of the reasons why we do not have to consider the
15 administrative exhaustion argument from the Department.

16 And, Your Honor, what I have here, I have the
17 relevant statutes printed out, and what I thought what
18 would be good, because this is a new area of law for a
19 lot of people -- I've been in it now for about two
20 years. There is no case law on it. If I may, I have
21 them printed out. I would like to hand them to you and
22 to Ms. Lee for the balance of my argument.

23 THE COURT: You may.

24 MR. CWACH: Thank you, Your Honor, for allowing me to
25 approach.

EXHIBIT G

[SDCL SECTIONS]

1-26-30. Right to judicial review of contested cases--Preliminary agency actions.

A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Source: SL 1966, ch 159, § 15 (1); SL 1972, ch 8, § 26; SL 1977, ch 13, § 12; SL 1978, ch 13, § 9; SL 1978, ch 15.

1-26-30.2. Appeal from final action in contested case.

An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency.

Source: SL 1975, ch 17, § 1.

1-26-30.4. Scope of sections on appeals to circuit courts.

The sections of this chapter on appeals to circuit courts shall govern civil appeals to the circuit courts of South Dakota from final decisions, rulings, or actions of agencies pursuant to chapter 1-26.

Source: Supreme Court Rule 82-35.

21-29-2. Writ issued when ordinary remedy inadequate--Application and affidavit.

The writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested.

Source: CCivP 1877, § 696; CL 1887, § 5518; RCCivP 1903, § 765; RC 1919, § 3007; SDC 1939 & Supp 1960, § 37.4502.

21-29-4. Grant of writ on default prohibited.

The writ of mandamus cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

Source: CCivP 1877, § 698; CL 1887, § 5520; RCCivP 1903, § 767; RC 1919, § 3009; Supreme Court Rule 611, 1939; SDC 1939 & Supp 1960, § 37.4503.

21-29-8. Hearing by court when no answer made or no questions of fact raised.

If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue only immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing the case.

Source: CCivP 1877, § 704; CL 1887, § 5526; RCCivP 1903, § 773; RC 1919, § 3015; Supreme Court Rule 613, 1939; SDC 1939 & Supp 1960, § 37.4506.

21-29-9. Objections and proof countervailing answer introduced by applicant at trial.

On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency and may countervail it by proof, either in direct denial or by way of avoidance.

Source: CCivP 1877, § 701; CL 1887, § 5523; RCCivP 1903, § 770; RC 1919, § 3012; Supreme Court Rule 614, 1939; SDC 1939 & Supp 1960, § 37.4507.

21-29-10. Discretionary jury trial and postponement--Statement of question to be tried--Assessment of damages.

If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of which allegation the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the hearing until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

Source: CCivP 1877, § 700; CL 1887, § 5522; RCCivP 1903, § 769; RC 1919, § 3011; Supreme Court Rule 615, 1939; SDC 1939 & Supp 1960, § 37.4508.

21-29-11. Verdict transmitted to court--Hearing on application.

If no notice of a motion for a new trial be given or, if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial, after which either party may bring on the hearing on the application, upon reasonable notice to the adverse party.

Source: CCivP 1877, § 703; CL 1887, § 5525; RCCivP 1903, § 772; RC 1919, § 3014; Supreme Court Rule 616, 1939; SDC 1939 & Supp 1960, § 37.4509.

21-29-13. Motion for new trial.

The motion for a new trial must be made in the court in which the issue of fact is made.

Source: CCivP 1877, § 702; CL 1887, § 5524; RCCivP 1903, § 771; RC 1919, § 3013; SDC 1939 & Supp 1960, § 37.4511.

[ARSD SECTIONS]

44:90:03:16. Department awarding of registration certificate – Tiebreaking procedures – Notice to unsuccessful applicants. The department shall award a registration certificate as follows:

- (1) If more establishments apply than are allowed by a local government, the department must award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;
- (2) If the local government has enacted an overall limit on the number of establishments, the department must award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;
- (3) If the local government has enacted a limit on establishments by establishment type, the department must award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;
- (4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public must have the opportunity to view, in person or via videoconference, a random lottery to determine the successful applicants. The department shall rank each applicant via the lottery system to establish the order and a waiting list.

Any establishment issued a registration certificate pursuant to this section must become operational within one year, defined as three hundred sixty-five days, or, if a leap year, three hundred sixty-six days, of the date of issue or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for up to an additional year from the date of expiration of the

certificate based upon the amount of time reasonably necessary for the establishment to become operational. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03-02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021; 49 SDR 47, effective November 22, 2022; 50 SDR 62, effective November 27, 2023.

General Authority: SDCL 34-20G-72(2).

Law Implemented: SDCL 34-20G-56, 34-20G-72(2), 34-20G-72(4)(a).

NO. #30554

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PUFFY'S, LLC, a South Dakota Limited Liability Company,

Applicant-Appellee,

v.

STATE OF SOUTH DAKOTA, DEPARTMENT OF HEALTH

Defendant-Appellant.

Appeal from an order of Circuit Court, Seventh Judicial Circuit, Pennington County
The Honorable Joshua Hendrickson, Circuit Court Judge

BRIEF OF APPELLEE

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Notice of Appeal filed on December 11, 2023

Notice of Review filed on December 22, 2023

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STATEMENT OF JURISDICTION

The Department appeals the circuit court's order regarding preemptory writ of mandamus dated November 17, 2023.

The circuit court entered an order of preemptory writ of mandamus on November 30, 2023. The Department did not appeal this order.

The Department filed a notice of appeal on December 11, 2023.

On December 22, 2023, Puffy's filed a Notice of Review seeking review of the portion of the circuit court's November 17, 2023 order finding that the Department had constitutional and legal jurisdiction to create and impose S.D. Admin. R. § 44:90:03:16.

The circuit court's holding that the Department had the constitutional and legal authority to create and administer S.D. Admin. R. § 44:90:03:16 is appealable under SDCL § 15-26-A-3(2).

STATEMENT OF LEGAL ISSUES

1. S.D. Admin. R. § 44:90:03:16 is unconstitutional and exceeds the statutory authority granted to the Department to issue rules for the medical cannabis program.

Circuit Court:

The circuit court found that S.D. Admin. R. § 44:90:03:16 was a legal and valid exercise of statutory authority under SDCL § 34-20G-72(2)(d). Puffy's Appx. 1:9-11.

Cases:

Behms v. Burke, 89 S.D. 96, 229 N.W.2d 86 (S.D. 1975).

Cheyenne River Sioux Tribe Tel. Auth. v. PUC, 1999 S.D. 60, 595 N.W.2d 604 (S.D. 1999).

Citibank, N.A. v. S.D. Dep't of Revenue, 2015 S.D. 67, 868 N.W.2d 381 (S.D. 2015).

Statutes:

SDCL § 34-20G-55

SDCL § 34-20G-57

SDCL § 34-20G-72

Administrative Rules:

S.D. Admin. R. § 44:90:03:16

2. The Department had a mandatory duty to issue the state certificate to Puffy's immediately after Greenlight Dispensary's state certificate voided.

Circuit Court:

The Circuit Court found that S.D. Admin. R. § 44:90:03:16 was clear and unambiguous.

The rule imposes a mandatory duty on the Department to issue a state certificate to the next applicant on the waiting list without further action of the applicant. Puffy's Appx.

Ex. 1:7-9.¹

Cases:

Citibank, N.A. v. S.D. Dep't of Revenue, 2015 S.D. 67, 868 N.W.2d 381 (S.D. 2015).

In re Estate of Flaws, 2012 S.D. 3, 811 N.W.2d 749, 753 (S.D. 2012).

Westmed Rehab, Inc. v. Dep't of Soc. Servs., 2004 S.D. 104, 687 N.W.2d 516.

¹ If an exhibit previously had page numbers from start to finish, these page numbers are referenced. If the exhibit did not have page numbers prior to, page numbers for such exhibits are in the bottom left corner.

Statutes:

SDCL § 21-29-1

SDCL § 34-20G-72

Administrative Rules:

S.D. Admin. R. § 44:90:03:01

S.D. Admin. R. § 44:90:03:05

S.D. Admin. R. § 44:90:03:09

S.D. Admin. R. § 44:90:03:16

3. Puffy's did not have an available administrative remedy to exhaust, or any other plain, speedy, or adequate remedy.

Circuit Court:

The circuit court found that S.D. Admin. R. § 44:90:03:16 did not provide an administrative remedy for successful applicants because the Department failed to act when it was required to do so. Puffy's Appx. Ex. 1:7. The circuit court found that Puffy's is beneficially interested, but had no other plain, speedy, or adequate remedy. Puffy's Appx. Ex. 1:7-9.

Cases:

South Dakota Bd. Of Regents v. Hegge, 428 N.W.2d 535, 540 (S.D. 1988).

Wertz v. Scotland Board of Education, 329 N.W.2d 131 (S.D. 1983).

Krsnak v. S. Dakota Dep't of Env't & Nat. Res., 2012 S.D. 89, 824 N.W.2d 429.

Statutes:

SDCL § 21-29-1

SDCL § 21-29-2

SDCL § 34-20G-72

Administrative Rules:

S.D. Admin. R. § 44:90:03:01

S.D. Admin. R. § 44:90:03:15

S.D. Admin. R. § 44:90:03:16

4. The Court did not need to conduct an additional evidentiary hearing in order to issue the writ of mandamus.

Circuit Court:

The circuit court issued the writ of mandamus after a hearing on Puffy's application for writ of mandamus, and the Defendant's motion to dismiss, or in the alternative, to quash.

Puffy's Appx. Ex. 1:11.

Cases:

Robinson v. Glover, 244 N.W. 322, 323 (1932).

Baker v. Atkinson, 2001 S.D. 49, ¶ 18, 625 N.W.2d 265, 271.

Statutes:

SDCL § 21-29-4

SDCL § 21-29-8

SDCL § 21-29-10

Administrative Rules:

S.D. Admin. R. § 44:90:03:16

STATEMENT OF CASE

Puffy's filed a verified application for a writ of mandamus in the Pennington County circuit court on July 19, 2023. Judge Jeff Connolly issued an alternative writ of mandamus on July 26, 2023. The Hughes County Sheriff's Office served copies of the Application and the Alternative Writ of Mandamus on the South Dakota Attorney General's Office and the South Dakota Department of Health on August 03, 2023.

The case was subsequently re-assigned to Judge Joshua Hendrickson. In response to the alternative writ of mandamus, the Department filed a motion to dismiss, or alternatively to quash the writ on September 05, 2023. A hearing was held on the application for writ of mandamus and the motion to dismiss on November 06, 2023. After hearing, the circuit court issued an Order Regarding Peremptory Writ of Mandamus that ruled in favor of Puffy's on November 28, 2023, and issued the Court's Peremptory Writ of Mandamus on November 30, 2023. To date, the Department has not complied with the circuit court's mandate.

The Department filed notice of appeal on December 11, 2023. Puffy's filed a notice of review on December 22, 2023.

STATEMENT OF FACTS

Puffy's is a South Dakota limited liability company that operates medical cannabis dispensaries in Rapid City, Meade County, and Sturgis. Through the South Dakota Medical Cannabis program, Puffy's is authorized to sell cannabis and cannabis products to persons having a valid South Dakota medical cannabis card.

The Department administers the South Dakota Medical Cannabis program. SDCL Ch. 34-20G and S.D. Admin. R. Ch. 44:90 govern the South Dakota Medical Cannabis program, including the renewal of state registration of medical cannabis establishments.

On October 05, 2021, the South Dakota Department of Health adopted administrative rules to govern the implementation of IM-26, the voter approved initiated measure for a state medical cannabis program. See Puffy's Appx. Ex. 9:1. This appeal centers around the validity, interpretation, and application of S.D. Admin. R. § 44:90:03:16, which is the Department's administrative rule indicating how the Department would award state medical cannabis certificates to establishments in local jurisdictions that have approved more local applicants to apply for a state certificate than the number of available local licenses. See Puffy's Appx. Ex. 8:1-2. When S.D. Admin. R. § 44:90:03:16 was first adopted, the Department cited SDCL 34-20G-72(3) (2021) as its general authority and SDCL 34-20G-56 and 34-20G-72(3) as the law being implemented.² Puffy's Appx. Ex. 9:8.

² The legislature struck the original subsection (1) and renumbered the remaining subsections in 2023, so this reference to subsection (3) would be to current law

The City of Rapid City was one of those jurisdictions. Local jurisdictions must allow at least one dispensary in its jurisdiction but may limit the total number of dispensaries. *See* SDCL §§ 34-20G-56 & 34-20G-59. The City of Rapid City limited the number of medical cannabis dispensaries to “1 for each 5,000 of population of the City.” Puffy’s Appx. Ex. 15:1. At the time of initial licensure in 2022, this limited the number of local medical cannabis dispensary licenses to 15. However, the City of Rapid City approved 47 applications.

All 47 applicants applied for a state medical cannabis dispensary certificate. Puffy’s filed an application for its location at 3308 Cambell St. and paid an initial application fee of \$5,000. The Department determined that all 47 applications, including Puffy’s application at 3308 Cambell St., submitted applications that contained all the necessary information for an initial application. S.D. Admin. R. § 44:90:03:01. The Department gave the same score under S.D. Admin. R. § 44:90:03:15 to all applicants. Puffy’s Appx. Ex. 5:5 (Int. No. 9).³ As a result, all 47 applications were submitted to a Department-run lottery to draw the 15 applicants who would receive a state certificate and a waiting list order for the remaining 32 applicants in the event a license became available. S.D. Admin. R. § 44:90:03:16(4). Puffy’s Appx. Ex. 4.

Puffy’s location at 3308 Cambell was selected as Alternate #1. Puffy’s Appx. Ex. 4. In this position, Puffy’s did not get a license, but if any license became available, for

subsection (2). *See* Senate Bill 1, 2023 South Dakota Legislature, 98th Legislative Session.

³ Puffy’s Appx. Ex. 4 was admitted as Ex. 1 and Ex. 5 was admitted as Ex. 2 at the trial court hearing. *See* Puffy’s Ex. 2:8:14-9:16.

whatever reason, Puffy's location at 3308 Cambell would be the first to receive the state certificate.

In November 2022, the Department amended S.D. Admin. R. § 44:90:03:16 because numerous certificate holders were not going to meet the operational requirement. Puffy's Appx. Ex. 10:1-3. The amended rule now created a new "operational extension request" option where an initial certificate holder could get an additional year to become operational. The text of the new rule language is:

If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted.

Prior to the Department's adoption of this rule, the South Dakota Code Counsel warned the Department lacked the authority to impose an operational requirement or an ability to extend registration certificates for certain license holders. *See Puffy's Appx. Ex. 5:20*. In addition, none of the critical terms, such as operational, secure, equipment, services, or timely manner are defined. *See Puffy's Appx. Ex. 5:5, 9-10 (Int. Nos. 12, 16, 17, 18, & 19)*. In fact, the Department cannot even conclude if dispensaries that presently sell cannabis and cannabis products are operational. *See Puffy's Appx. Ex. 5:11 (Int. No. 27)*.

Greenlight Dispensary applied for an operation extension for one of its locations, but the Department did not extend/renew a certificate for Greenlight Dispensary. The Department provided Notice of Denial to Greenlight Dispensary on April 20, 2023. The stated reason for denial was that Greenlight Dispensary did not meet the criteria for an operational renewal extension request under S.D. Admin. R. § 44:90:03:16. Greenlight Dispensary did not appeal pursuant to its rights under the last sentence of S.D. Admin. R. § 44:90:03:16. As a result, Puffy's location at 3308 Cambell St., Rapid City became entitled to a state certificate as "Alternate #1" in the state's lottery drawing.

Nearly 90 days later, the Department provided no communication and no certificate to Puffy's for its location at 3308 Cambell St., Rapid City. Puffy's filed a writ for alternative and peremptory writ of mandamus on July 19, 2023. After service but prior to the circuit court's order, the Department sent a letter to Puffy's informing Puffy's that Puffy's, LLC "may proceed with the application process for a lottery dispensary certificate that has recently become available." Puffy's Appx. Ex. 5:36. The Department later informed Puffy's LLC that the "application process" meant a re-application as well as a second initial payment of \$5,310 dollars to renew.

While this lawsuit was pending, the Department again amended S.D. Admin. R. § 44:90:03:16. This change clarified the term "one year", which added the language "defined as three hundred sixty-five days, or, if a leap year, three hundred sixty six days" as opposed to a mandatory one year extension. Puffy's Appx. Ex. 11:3-4. The change also now allowed the Department to limit the extension to less than a year. Puffy's Appx. Ex. 11:3-4. The Department changed the general authority to SDCL 34-20G-72(2)

(2023)⁴ and the law being implemented to SDCL 34-20G-56 and 34-20G-72(4)(a).

Puffy's Appx. Ex. 11:4.

The medical cannabis law allows local governments to have separate and unique criteria for the issuance of a local medical cannabis licenses that can be different from the state criteria for issuance of a state medical cannabis certificate. *See* SDCL §§ 34-20G-58 & 34-20G-58.1. In this case, the Department determined that Greenlight Dispensary *was not* operational; however, the City of Rapid City, under its ordinance, found that Greenlight Dispensary *was* operational under its ordinance. *See* Puffy's Appx. Ex. 15:2. Greenlight Dispensary could not operate where the State denied an operation extension request. Yet, Puffy's could not operate without the local license. This conflict between local and state law resulted in a situation where only 14 of the 15 licenses could actually operate from April 2023 to the end of the year.

At the beginning of 2024, the City of Rapid City issued a local medical cannabis dispensary license to Puffy's at 3308 Cambell St. However, the Department refuses to issue a state certificate to Puffy's so Puffy's still cannot legally operate.

ARGUMENT

OVERVIEW

Puffy's argument will begin with an analysis of how S.D. Admin. R. § 44:90:03:16 violates the equal protection clause because it treats medical cannabis certificate holder's differently for no rational reason. Next, the argument will demonstrate that the rule further exceeds the statutory authority of the Department. There is no law

⁴ *See* footnote 1.

that allows the Department to require certain state certificates to be operational or receive extensions of state certificates based on how the state certificate was awarded.

However, in the event that the Court were to determine that rule was constitutional and within the authorities of law, the clear, plain meaning of the rule requires the Department to award the initial state certificate to Puffy's without any further action on the part of Puffy's. Puffy's does not need to re-apply or pay an additional fee. The lower court did not abuse its discretion when it made this determination and further determined that a writ of mandamus was necessary.

Lastly, the Department attempts to argue that the matter is moot, or alternatively, that the Department should have been afforded an evidentiary hearing. There is a clear and present controversy between the parties regarding how this state certificate is to be awarded under S.D. Admin. R. § 44:90:03:16. The matter is not moot. The lower court also did not abuse its discretion in making its decision after the first hearing. There are no facts in dispute, and even if so, the mandamus laws afford the trial court broad discretion to make a determination on the application after a hearing.

The Department does not give this Court any clear justifications to overturn the lower court under the de novo legal analysis standard or the abuse of discretion standard, as applicable. The Court has two clear options: (1) strike down the rule for being unconstitutional or exceeding statutory authority, or both, or (2) require the Department to follow the clear, plain meaning of the rule.

STANDARD OF REVIEW

The circuit court determined that S.D. Admin. R. § 44:90:03:16 was a proper exercise of delegated legislative authority. Puffy's challenges this ruling. The South Dakota

Supreme Court reviews issues regarding a “court’s jurisdiction as questions of law under the de novo standard of review.” Grajczyk v. Tasca, 2006 SD 55, ¶ 8, 717 N.W.2d 624, 627 (internal citations omitted). “Statutory interpretation and application are questions of law that we review de novo.” State v. Goulding, 2011 S.D. 25, ¶ 5, 799 N.W.2d 412, 414. The construction and interpretation of an administrative rule is subject to the de novo standard of review as well. Westmed Rehab. Inc. v. Dep’t of Soc. Servs., 2004 S.D. 104, ¶ 5, 687 N.W.2d 516, 518.

The circuit court granted Puffy’s request for a peremptory writ of mandamus. “This Court reviews the decision to grant or deny a writ of mandamus under an abuse of discretion standard.” Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Comm’rs, 2011 S.D. 5, ¶ 6, 794 N.W.2d 462, 464 (citing Vitek v. Bon Homme Cnty. Bd. of Comm’rs, 2002 S.D. 45, ¶ 5, 644 N.W.2d 231, 233). “An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” Argus Leader v. Hagen, 2007 S.D. 96, ¶ 7, 739 N.W.2d 475, 478 (quoting Schafer v. Deuel Cnty. Bd. of Comm’rs, 2006 S.D. 106, ¶ 4, 725 N.W.2d 241, 243). It has also been described as a “fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration, is arbitrary or unreasonable.” Field v. Field, 2020 S.D. 51, ¶ 15, 949 N.W.2d 221, 224.

The circuit court denied the Department’s motion to dismiss. The standard of review of a grant or denial of a motion to dismiss “is the same as our review of a motion for summary judgment – is the pleader entitled to judgment as a matter of law? All reasonable inferences of fact must be in favor of the *non-moving party* and we give no

deference to the trial court's conclusions of law." Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496 (internal citations omitted) (emphasis added).

The circuit court denied the Department's motion to quash. The standard of review for the circuit court's decision to quash is an abuse of discretion. Bruggeman by Black Hills Advocate, LLC v. Ramos, 2022 S.D. 16, ¶ 34, 972 N.W.2d 492, 504.

1. S.D. ADMIN. R. § 44:90:03:16 IS UNCONSTITUTIONAL AND EXCEEDS THE STATUTORY AUTHORITY GRANTED TO THE DEPARTMENT TO ISSUE RULES FOR THE MEDICAL CANNABIS PROGRAM.

A. The Equal Protection Clause mandates that similarly situated persons be treated similarly unless the State can demonstrate a rational relationship between the different classifications. None exist here.

The Department is imposing different standards on medical cannabis establishment's based on the locations and decision making of local authorities.

The Fourteenth Amendment equal protection clause "[denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Behrens v. Burke, 89 S.D. 96, 101, 229 N.W.2d 86, 88 (S.D. 1975) (internal citations omitted).

The South Dakota Supreme Court has "adopted a two-pronged test 'regarding equal protection when legitimacy, suspect classes and fundamental rights are not involved: (1) Whether the statute does set up arbitrary classifications among various persons subject to it. (2) Whether there is a rational relationship between the classification and some legitimate legislative purpose.'" Cheyenne River Sioux Tribe Tel. Auth. v. PUC, 1999 S.D. 60, ¶ 46, 595 N.W.2d 604, 614.

The operational after one year and extension language of S.D. Admin. R. § 44:90:03:16 creates arbitrary classifications that are based on criteria unrelated to the

objective of the medical cannabis law. This provision of the rule treats certificate holders differently based solely on how the certificate was drawn. How the certificates are drawn is highly dependent on decisions of local government in how they select their local licenses, but those local decisions do not change the character, nature, or type of a state certificate.

If the state certificate was drawn in a state-run lottery, a certificate holder must be operational within one year. However, all other state certificate holders do not have to be operational. A certificate holder in Vermillion, which has no local limit on the number of medical cannabis dispensaries within its jurisdiction, can renew its state certificate forever without any sort of state oversight of whether it is operational. See Puffy's Appx. Ex. 12. The City of Sturgis medical cannabis ordinance authorizes the City Finance Officer to inactivate a cannabis license that is inactive for 14 consecutive days or 28 cumulative days in a year. See Puffy's Appx. Ex. 13:6 (Ord. 39-17). However, even though more applicants applied for a Sturgis medical cannabis dispensary license than were available in Sturgis, the Department does not impose an operational requirement on Sturgis certificate holders. This is because the City of Sturgis itself picked the order in which local applicants would get to apply for a state certificate through a City of Sturgis run lottery.³ See Puffy's Appx. Ex. 14:4.

There is no state rule requiring that these jurisdiction's medical cannabis establishments be operational within 365 days. S.D. Admin. R. § 44:90:03:16 *only*

³ Puffy's is one of two license holders for a medical cannabis dispensary in the City of Sturgis.

applies to state certificates in jurisdictions where a state lottery was conducted.⁶ All the other state laws, rules, and requirements to operate a medical cannabis establishment are the same in every part of South Dakota but for this arbitrary imposition to demonstrate the establishment became operational or could not despite timely efforts to obtain necessary equipment and services. Terms that are all undefined and highly subjective. Puffy's Appx. Ex. 5:5, 9-10 (Int. Nos. 12, 16, 17, 18, & 19).

The second prong requires the court to determine if there is some sort of "rational relationship between the classification and the state interest." Cheyenne River, *supra*. S.D. Admin. R. § 44:90:03:16 is implementing SDCL § 34-20G-56. The operational and extension framework in the administrative rule are not rationally related to promoting local preferences, which are better evidenced through local ordinances and local government decision-making. It bears no relationship to SDCL § 34-20G-72(2) dealing with numerically scoring applicants. The Department cannot reasonably contend that this is necessary to force dispensaries to open because this requirement is not imposed equally in all local jurisdictions. What compelling rationale is there for establishments to be operational within a year in Rapid City but not in Sioux Falls? Do medical cannabis patients in Rapid City need a guaranteed access to cannabis and cannabis products that Sioux Falls patients do not have? Puffy's state certificate is the same in Meade County, Sturgis, and Rapid City in all ways except this additional obligation is being imposed on the Rapid City licenses.

⁶ For medical cannabis dispensaries, this rule applies only to dispensaries in the City of Rapid City and the City of Yankton.

B. The Department exceeded its statutory authority by imposing the operational framework of S.D. Admin. R. § 44:90:03:16.

An administrative agency may only implement administrative rules that are within the confines of the law, otherwise, the administrative rule is invalid. See Citibank, N.A. v. S.D. Dep't of Revenue, 2015 S.D. 67, ¶ 17, 868 N.W.2d 381, 389 (internal citations omitted). "A rule may also not expand upon the statute that it proposes to implement." Id. (citing State Div. of Human Rights, ex rel. Ewing v. Prudential Ins. Co. of Am., 273 N.W.2d 111, 114 (S.D. 1978)).

"The power of an administrative officer or board to administer a . . . statute and prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of [the legislative body] as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Id. (citing Dixon v. United States, 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L. Ed. 2d 223 (1965)).

The legislature mandated that all administrative agencies must submit the general authority and law implemented as part of a proposed rules. SDCL § 1-26-6.2. For this administrative rule, the Department presently cites SDCL §§ 34-20G-56, 34-20G-72(2), and 34-20G-72(4)(a) as the laws implemented. This portion of the brief shall analyze the administrative rule within the context of each of these statutes. The Department's cited general authority is SDCL § 34-20G-72(2).

SDCL § 34-20G-56 states, "If a local government has enacted a numerical limit on the number of medical cannabis establishments in the locality and a greater number of applicants seek registration, the Department shall solicit and consider input from the local government as to its preference for registration." Nothing in S.D. Admin. R. § 44:90:03:16 relates to how the Department will solicit or consider input from a local government as to its preferences for registrants. The statute further does not authorize the

Department to impose operational requirements when there is no local input. Indeed, if this was the case, the Department would have actually issued a renewed state certificate to Greenlight Dispensary for this certificate and Puffys for its other five state certificates since the City of Rapid City had issued a local license to Greenlight Dispensary and Puffy's for 2024. The issuance of a local license through the end of the year would be the best evidence of a local government's desired state certificate holder; otherwise, why would the license holder hold a local license through 2024?

The Department's operational requirement and the operational extension request has no tangential relationship to local preference for registrants. But can SDCL §§ 34-20G-72(2) or 34-20G-72(4)(a) justify the operational requirement and operational extension request? SDCL 34-20G-72(2) authorizes the Department to establish:

- a system to numerically score competing medical cannabis establishment applicants, in cases where more applicants apply than are allowed by the local government, that includes analysis of:
- (a) The preference of the local government;
- (b) In the case of dispensaries, the suitability of the proposed location and its accessibility for patients;
- (c) The character, veracity, background, qualifications, and relevant experience of principal officers and board members; and
- (d) The business plan proposed by the applicant, that in the case of a cultivation facility or dispensary shall include the ability to maintain an adequate supply of cannabis, plans to ensure safety and security of patrons and the community, procedures to be used to prevent diversion, and any plan for making cannabis available to low-income registered qualifying patients.

This cited authority clearly justifies the first half of the administrative rule, but does not authorize the subsequent creation of an operational requirement. In its order, the circuit court found that the operational within one year requirement was an "element of the applicant's business plan" under subparagraph (d), so therefore, the Department did have authority to impose this post-issuance operational requirement. Puffy's Appx. Ex. 1:9-

11. The circuit court erred, however, because this finding ignores the first part of the statute that subsections (a)-(d) are what the Department must analyze to score medical cannabis applications when there are more applicants for a state certificate than available local licenses prior to issuance of the state certificates. Whether a certificate holder becomes operational *after* the Department has issued the state certificates does not relate the system to numerically score competing applicants of SDCL § 34-20G-72(2). The Department could weigh that information during its review of the application, but not after the issuance of the state certificate.

The circuit court's rationale also ignores the very limited renewal requirements of the chapter. The circuit court rationalizes that it is "reasonably part of the business plan envisioned by the Legislature [...] that the applicant will be operational in a timely manner. That the certificates renew on a yearly basis indicates that this time period is reasonable to become operational." Puffy's Appx. Ex. 1:11. This analysis does not withstand statutory analysis. The business plan can only be weighed in an application when there are too many competitive applications. SDCL § 34-20G-72(2). The application itself does not require a business plan to secure cannabis, etc. *Compare* SDCL § 34-20G-72(2) *with* SDCL § 34-20G-55 *and* S.D. Admin. R. § 44:90:03:01.

The circuit court's analysis also failed to reconcile S.D. Admin. R. § 44:90:03:16 with SDCL § 34-20G-57, which states, "the department *shall* issue a renewal registration certificate [...] if the establishments registration certificate is not under suspension and has not been revoked." SDCL § 34-20G-57 (emphasis added). The law confines the Department's discretion on renewals to suspension or revocation. *Id.* The law makes no provision for the requirement that an establishment be operational. *Id.* The Department

contends that this is something in addition to those requirements, but additional requirements are not statutorily allowed. S.D. Admin. R. § 44:90:03:16 exceeds statutory authority and conflicts with the renewal statute. *Compare* S.D. Admin. R. § 44:90:03:16 with SDCL § 34-20G-57.

In the recent rule change at the end of 2023, the Department added SDCL § 34-20G-72(4)(a) as a law implemented. Prior to 2023, the Department never cited this as a law that S.D. Admin. R. § 44:90:03:16 was implementing. *Compare* Puffy's Appx. Exs. 9, 10, and 11. This recent rule change was limited to clarifying the length of a year to 365 days, 366 days in a leap year and also authorized the Department to provide less time to become operation after the first year if an extension request was granted. SDCL § 34-20G-72(4)(a) however authorizes the Department to establish administrative rules for "oversight requirements" solely for the purpose of ensuring "the health and safety of qualifying patients and [preventing] diversion and theft without imposing an undue burden or compromising the confidentiality of a cardholder." Whether a medical cannabis establishment is operational provides no oversight of health, safety, diversion or theft prevention. This is too extreme of a tangential leap to justify the non-renewal of a medical cannabis establishment license that is not under suspension or has not been revoked. Finally, it makes no sense that this type of oversight is necessary for state certificates issued after a state run lottery but for no other state certificates.

2. PUFFY'S DEMONSTRATED A CLEAR, MANDATORY DUTY TO ACT AND HAS NO PLAIN, SPEEDY, AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

- A. The language of the administrative rule is clear and unambiguous. The plain meaning of the statute requires the Department to award a state certificate to Puffy's as alternative no. 1 with no further action by Puffy's.**

Under the Department's administrative framework, Puffy's only recourse is a writ of mandamus. A writ of mandamus compels an "inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station[.]" SDCL § 21-29-1. It commands the fulfillment of an existing legal duty after a showing of a clear legal right to performance of such duty. Krsnak v. S. Dakota Dep't of Env't & Nat. Res., 2012 S.D. 89, ¶¶ 9-10, 824 N.W.2d 429, 434 (internal citations omitted). The duty to act must be ministerial and not discretionary. Id. (internal citations omitted). The duty must be clear. Id. A writ of mandamus may not "dictate the details when there is discretion in how the duty is to be performed." Id. (internal citations omitted).

Here, S.D. Admin. R. § 44:90:03:16 places an affirmative duty on the Department to issue a state certificate to Puffy's for its 3308 Cambell St. location. When administrative rules are "clear, certain, and unambiguous, [the Court's] function is confined to declaring its meaning as clearly expressed. Words and phrases ...must be given their plain meaning and effect." Westmed Rehab, Inc. v. Dep't of Soc. Servs., 2004 S.D. 104, ¶¶ 8-9, 687 N.W.2d 516, 518-19. If a rule is ambiguous, the Court may look to the object of the rule and apply a reasonable construction to accomplish the object. Id.

A close, textual analysis of the administrative rule shows that the circuit court did the correct plain meaning analysis. The relevant sentence does not revoke Greenlight Dispensary's state certificate; instead, it is "deemed void"⁷ as if it was never even issued

⁷ The reason the "deemed voided" terminology is used is because a person cannot get a future license in the event one has been revoked under SDCL § 34-20G-55(2). The Department did not want to prohibit someone from a future license because of this operational requirement. Alternatively, it would make sense for this rule to actually read that the license would "not be renewed" if not operational within one year. This language

to Greenlight Dispensary and “must be awarded” to Puffy’s instead. In other words, Puffy’s is supposed to receive the original state certificate. This is a legal fiction, but the meaning and intent is clear.

The circuit court’s legal analysis of the administrative rule was correct. Even if there was a plausible alternative interpretation, the circuit court’s decision to issue a writ was not clearly a fundamental error in judgment. Must means must. The Department has a mandatory obligation by its own rule to issue a state certificate to Puffy’s at 3308 Cambell St.

B. Puffy’s does not have to first exhaust an administrative remedy that does not exist.

The Department asserts that the matter should be dismissed because administrative remedies have not been exhausted; however, there are no administrative remedies available. The Department’s argument relies extensively on S.D. Chapter 1-26 in support of this argument, but this is not a situation where administrative procedures come into play. This is not a contested case. Only *unsuccessful applicants* have the right to appeal under a contested case procedures under S.D. Admin. R. § 44:90:03:16. Puffy’s at its 3308 Cambell St. location was a successful applicant, which is why it was included in the lottery. Puffy’s cannot request an administrative hearing to adjudicate this issue. The sole issue is whether “must” also means “may” in the administrative rule.

This Court has recognized five exceptions to the exhaustion of administrative requirements. The five exceptions are:

proves difficult however because it so clearly conflicts with SDCL § 34-20G-57, which requires that the state certificate be renewed unless it is revoked or under suspension.

- (1) Exhaustion is not required where a person, through no fault of his own, does not discover the purported wrong until after the time for application of administrative relief.
- (2) Exhaustion is not required where the agency fails to act.
- (3) Exhaustion is not required where the agency does not have jurisdiction over the subject matter or parties.
- (4) Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had.
- (5) Exhaustion is not required in extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief.

South Dakota Bd. Of Regents v. Hegge, 428 N.W.2d 535, 540 (S.D. 1988) (internal citations omitted). Here, exhaustion exception two applies since the agency has failed to act to issue the certificate when issuance is mandatory. The Department's administrative rule requires the Department to void the certificate given to Greenlight Dispensary and give it to Puffy's. The Department did the first mandatory action of voiding the certificate, but it has not done the second mandatory action.

The Department relies on Dakota Loan Center of South Dakota, LLC v. Department of Labor Regulation, 2018 S.D. 77, 920 N.W.2d 321 to support its contention that administrative remedies have not been exhausted. The factual circumstances that gave rise to the Court's decision in Dollar Loan are not present here. This is important because Dollar Loan is actually a narrow ruling. The specific statutory laws addressed in Dollar Loan are also not relevant to these specific proceedings.

Pursuant to its statutory authority under SDCL § 1-26-29, the South Dakota Division of Banking ("Division") issued an emergency revocation order to immediately revoke Dollar Loan Center of South Dakota, LLC's (hereinafter "DLC") money lending license for offering financial products that violated S.D. Codified Laws § 54-4-4. Id. at

322. SDCL § 1-26-29 allows the order to be issued first followed by an administrative hearing when public health, safety, or welfare require it.

The Division scheduled a hearing for October 17, 2017. Id. ¶ 9. DLC appeared in that administrative proceeding on October 05, 2017 to request the hearing be continued to April 12, 2018, which was granted. Id. ¶ 10. Seven days later, on October 12, 2018, while the administrative hearing was pending, DLC filed an appeal of the emergency revocation order to the circuit court. Id. ¶ 11.

The circuit court dismissed the appeal under SDCL § 1-26-30, finding that the emergency revocation order was not a “final agency action” or an “intermediate agency action or ruling.” Id. ¶ 12. The sole issue on appeal to the South Dakota Supreme Court was whether an emergency revocation order under SDCL § 1-26-29 is a “final agency decision” or an “intermediate agency decision that was immediately reviewable,” under SDCL § 1-26-30. Id. ¶ 13. The South Dakota Supreme Court upheld the circuit court. While the exhaustion of administrative remedies was discussed in the South Dakota Supreme Court’s order, the Court’s holding was that the emergency revocation order was not an order “issued in a contested case” under SDCL § 1-26-30, and therefore not a final agency decision, and was also not “an intermediate agency ruling that was immediately reviewable.” Id. ¶¶ 18 & 27.

A call for a writ of mandamus or prohibition raises jurisdictional questions about the lower entity’s authority. Before a court can determine if administrative remedies should be exhausted in a mandamus or prohibition proceeding, the court must first determine if the administrative action or proceeding has authority. If the administrative act or proceeding does not have authority, the writ must be issued. On the other hand, if

the administrative act or proceedings does have authority, the question of administrative remedy exhaustion can be raised and considered. Dollar Loan does not have any analysis on these particular issues, and to the extent it touches on administrative remedies, it is within the context of what constitutes an administrative order and when that order can be appealed under SDCL § 1-26-30.

The Department previously admitted in the circuit court that the Department has not taken any final action that would entitle Puffy's to invoke a contested case proceeding. Puffy's Appx. Ex 2 at 7:16-8:3 (The Court: [...] It's different than the first case that we had where there was a pending appeal on a failure to extend a deadline. [...] in your view has there been an administrative decision made that Puffy's has the ability to appeal an administrative process in this instance? Ms. Lee: No, I don't believe so, Your Honor.").

The administrative rule does not provide for any form of administrative relief nor is the Department's letters and emails about Puffy's ability to reapply at a later date an action that could even have an administrative hearing. These statements also do not constitute a "final agency action" or an "intermediate agency action that is immediately reviewable" to require a Dollar Loan analysis by the Court.

C. In addition to no administrative remedy, there is no other plain, speedy, or adequate remedy available to Puffy's.

In order to get a writ of mandamus, the applicant must demonstrate that there is "no plain, speedy, and adequate remedy in the ordinary course of law," SDCL § 21-29-1. The circuit court did not abuse its discretion in determining that there was not another speedy remedy available. Puffy's has no administrative remedy.

The Department's brief further insinuates that Puffy's is attempting to have it both ways because Puffy's acknowledged in a separate proceeding regarding Puffy's five dispensary state certificates in dispute are eligible to an administrative contested case proceeding. Puffy's previously filed an application for writ of prohibition in a case known as Puffy's v. State of South Dakota, Department of Health, CIV23-807 (7th Judicial Circuit). The application for writ of prohibition alleged that the circuit court should issue a writ to prohibit the Department from holding contested case proceedings under S.D. Admin. R. § 44:90:03:16 because the rule was beyond constitutional and statutory authority. In that particular instance, the circuit court dismissed the application for a writ of prohibition because the circuit court determined that Puffy's needed to exhaust its administrative remedies first. The circuit court acknowledged, "Now, you still have the administrative remedy at that point and then you can appeal from that if you need be, or I imagine you can appeal this if you wanted to as well. I might be wrong. So I'll leave that; see how you want to decide that." Puffy's Appx. Ex. 3:35:13-17. Knowing the arguments concerning constitutional and statutory authority could be raised through the administrative and, if necessary, appellate process, Puffy's elected to continue the administrative process for those state certificates.

In that situation, Puffy's was entitled to the contested case procedures as "an unsuccessful applicant" of a "final department action." S.D. Admin. R. § 44:90:03:16. Here, Puffy's is not an "unsuccessful applicant" and has not received notice of a "final department action." *Id.* Puffy's is the first alternate entitled to a state certificate in the City of Rapid City.

Puffy's has no administrative or other remedy. A writ of mandamus is the only available option because the administrative rule mandates the Department to do something that the Department will not do.

3. THE DEPARTMENT'S RULE REQUIRES THE DEPARTMENT TO ISSUE A CERTIFICATE TO THE ALTERNATIVE. THE DEPARTMENT HAS NOT ISSUED THE CERTIFICATE TO PUFFY'S. THE CONTROVERSY IS NOT MOOT.

The Department contends that the matter is moot because the Department sent notice after the litigation commenced that Puffy's could apply for a state certificate if a local one becomes available. Puffy's did receive a local license after the circuit court's order. However, the Department still has not issued a state certificate even though the Department's rule requires it. Puffy's wants the certificate (as evidenced by the prior commencement of a lawsuit seeking it), but the parties still disagree about whether the statutory and administrative framework requires Puffy's to (1) resubmit its application which was already approved by the Department and (2) pay an additional \$5,310.00 for the initial application fee even though Puffy's paid an initial application fee, which was not refunded, when it applied but did not receive a certificate through the initial lottery.

The Department's position completely ignores the administrative framework that the Department developed only three years ago. S.D. Admin. R. § 44:90:03:16 must be read after S.D. Admin. R. §§ 44:90:03:01, 44:90:03:05, and 44:90:03:09. If the medical cannabis dispensary satisfies those requirements *and* the local community had no limits on dispensaries, the applicant would be entitled to a state certificate. Puffy's Appx. Ex. 4:1.

However, if there is a local limit *and* there are more applications for a state certificate than allowed under the local limit, S.D. Admin. R. § 44:90:03:15 comes into

play. S.D. Admin. R. § 44:90:03:15 requires the Department to score all applicants who have met the initial application requirements. Puffy's Appx. Ex. 4:1. It can be interpreted as a form of heightened scrutiny to sort out better applications. S.D. Admin. R. § 44:90:03:15 allows an applicant to get an extra 5 points on the application.

If multiple dispensaries get the same score and the local limit is still exceeded, the state conducts a lottery pursuant to S.D. Admin. R. § 44:90:03:16(4). Puffy's Appx. Ex. 4:1. The important point here is that if S.D. Admin. R. § 44:90:03:16 is invoked, all applicants in that lottery have demonstrated that they meet the requirements to have a state certificate under S.D. Admin R. §§ 44:90:03:01, 44:90:03:05, and 44:90:03:09. In fact, these applications may be even stronger than applications in other jurisdictions that do not have to go through the scoring rubric of S.D. Admin. § 44:90:03:15. S.D. Admin. R. § 44:90:03:16 says an state certificate *must* be issued to the next alternate because these applications were already approved and vetted. This is why the Department's contention that Puffy's can, in effect, "reapply" is without grounds.

The administrative rule also does not contemplate a second application process. The language is clear: "Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and *must be awarded to the next applicant on the waiting list.*" S.D. Admin. R. § 44:90:03:16. (emphasis added). There is no discretion under the Department's own administrative rule. As the next applicant on the waiting list, the Department must give Puffy's a certificate without a reapplication and without a second application fee.

This is why the matter is not moot. The Department still has not issued the certificate despite South Dakota's well-recognized principle that the word "must" makes

an action obligatory. This Court instructs that the use of “may,” “shall,” or “must” “is the single most important textual consideration determining whether a statute or administrative rule is mandatory or discretionary. In re Estate of Flaws, 2012 S.D. 3, ¶ 18 811 N.W.2d 749, 753. But here, the Department has converted a “must” phrase to a “may” or “on condition on reapplication and additional payment,” which is well beyond the authority of the administrative rule. There is also no delayed timeframe contemplated in this administrative rule.

A matter becomes moot when “there is no real controversy or which seeks to determine an abstract question which does not rest on existing facts or rights, with the result that any judicial determination would have no practical or remedial effect.” Netter v. Netter, 2019 S.D. 60, ¶ 1, 935 N.W.2d 789, 790. “This court will not dismiss an appeal upon the ground that the questions involved have become moot unless it appears clearly and convincingly that actual controversy has ceased; it must appear that the only judgment which could be entered would be ineffectual for any purpose and would be an idle act so far as concerns rights involved in the action.” Dodds v. Bickle, 85 N.W.2d 284, 286 (1957). There is clear and convincing evidence of an actual controversy here. The administrative rule states that the Department *must* give Puffy’s a state certificate based on its initial application. The Department interprets this to mean that Puffy’s must re-apply on the location and pay an additional \$5,310, so that the fee to have this first state certificate would be in effect \$10,310. The Department’s position against its own rules creates a clear controversy to Puffy’s detriment. But for the Department’s violation of its own administrative rules, Puffy’s would have a state certificate.

4. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY NOT HAVING AN ADDITIONAL EVIDENTIARY HEARING.

One of the purposes of a writ of mandamus is to get a speedy resolution for the applicant. The respondent is supposed to file an answer to the application and alternative writ. In this situation, the Department chose not to file an answer within 30 days.

Trials are necessary to determine questions of fact. While no answer was filed, a hearing was still held. SDCL § 21-29-8. The case is then heard on the “papers of the applicant.” *Id.* If there is no answer, or only immaterial statements, not affecting substantial rights of the parties, the Court can hear and rule on the case. *Id.* Further, even if there is a question of fact in dispute, and even if it affects a substantial right of a party, the trial judge still has the discretion to either (a) rule on the question of fact or (b) submit it to a jury at a later hearing. SDCL § 21-29-10. In this situation, the circuit court did not abuse that discretion by denying the motion to dismiss and ruling on the merits of the application because (1) no answer was filed despite being commanded, (2) there is no factual dispute, (3) this dispute centers only around the interpretation of S.D. Admin. R. 44:90:03:16, and (4) a further evidentiary hearing was not going to resolve the central question of whether “must be awarded” means “must be awarded” or “may be awarded after re-approval and additional payment of \$5,310.”

This situation is similar to Baker v. Atkinson, 2001 S.D. 49, ¶ 18, 625 N.W.2d 265, 271 where the circuit court ruled on a writ of mandamus based upon the briefs and oral arguments of the parties. The Supreme Court noted therein that the legal duty to act was not in dispute among the parties. *Id.* The dispute centered on the appropriate form of an initiative and referendum petition. *Id.* Since this was the only issue, no remand for further hearing was required and this Court ruled on the appeal. *Id.* Similarly, the

Department and Puffy's do not dispute whether the Department has a legal duty to give Puffy's the state certificate, but the exact manner of how that is to be done under S.D. Admin. R. § 44:90:03:16 is in conflict.

The Department acknowledges in writing that Puffy's is the only person entitled to the available state certificate for the City of Rapid City. *See Puffy's Appx. Ex. 5:36.* Puffy's wants the state certificate. In its brief, the Department claims that it has to re-review the application to see if Puffy's still qualifies under many state laws and rules other than S.D. Admin. R. § 44:90:03:16.⁸ The administrative rule so clearly does not authorize the Department to do that.

Contrary to the Department's assertion that this necessitates an evidentiary hearing, it is actually an excellent argument for why S.D. Admin. R. § 44:90:03:16 exceeds the constitutional and statutory authority of the Department. The administrative rule's requirement that the applicant be operational within a year or the certificate *must* be awarded to the next alternate on the waiting list a year after approval so clearly conflicts with the meaning, interpretation, and implementation of other more important provisions of the medical cannabis legal and regulatory framework that this Court should do the Department a favor and strike it down.

CONCLUSION

The circuit court erred in determining that S.D. Admin. R. § 44:90:03:16 was an appropriate exercise of the Department's constitutional and statutory authority. The implementation of the rule violates the equal protection clause of the constitution.

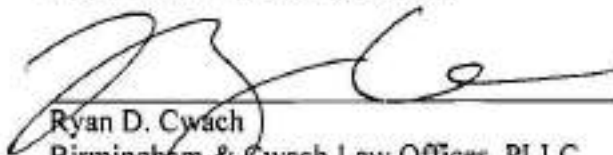
⁸ Presently, Puffy's has four other active state medical cannabis dispensary certificates.

Medical cannabis establishments are treated different for no apparent state purpose.

Additionally, the administrative rule lacks legal authority.

However, if the Court determines that the circuit court did not err on the legality of the rule, the circuit court did correctly interpret the plain meaning of the rule that the Department is required to issue a state certificate to Puffy's without further action of Puffy's.

Dated this 24th day of June 2024.

A handwritten signature in black ink, appearing to read 'Ryan D. Cwach', is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

Ryan D. Cwach, the undersigned attorney, hereby certifies that the Appellee's Brief complies with the word and character limits of SDCL § 15-26A-66(b). Appellee's Brief consists of 8,019 words as determined by the word count feature of the word processing software Microsoft Word. The brief also complies with the type face requirements.

A handwritten signature in black ink, appearing to read 'R. Cwach', is written over a horizontal line.

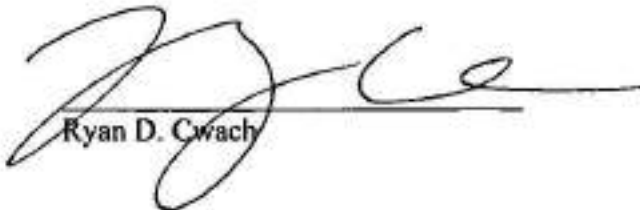
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PROOF OF SERVICE

I certify that one original of the foregoing Brief of Appellee and Appendix was served by certified mail, postage prepaid to the office of the Clerk of the South Dakota Supreme Court Clerk at 500 E. Capitol Ave., Pierre, SD 57501.

I further certify that a true and correct copy of the foregoing Brief of Appellee and Appendix was electronically filed with the South Dakota Supreme Court and also provided to the Appellant's attorney Tamara Lee, Tamara.Lee@state.sd.us, via email.

Executed this 24th day of June 2024.



Ryan D. Cwach

APPENDIX
TO
APPELLEE PUFFY'S BRIEF

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STATE OF SOUTH DAKOTA)
COUNTY OF PENNINGTON)
PUFFY'S, LLC, a South Dakota)
Limited Liability Company,)
Applicant,)
v.)
STATE OF SOUTH DAKOTA,)
DEPARTMENT OF HEALTH.)
Respondent.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FILE NO. 51 CIV 23-937
**ORDER REGARDING PEREMPTORY
WRIT OF MANDAMUS**

Puffy's, LLC (Puffy's) was granted an alternative writ in this matter on July 26, 2023. The South Dakota Department of Health (the Department) filed a Motion to Dismiss or, in the Alternative, Motion to Quash on September 5, 2023. A hearing was held on November 6, 2023.

FACTS

Puffy's is a company that operates medical cannabis dispensaries in South Dakota. The Department administers the South Dakota Medical Cannabis program. On March 9, 2022, the Department held a random draw process to issue 15 registration certificates for medical cannabis in Rapid City, SD. There were 47 applicants for the 15 allowable certificates. Those who did not receive a certificate were placed on an ordered list of alternates (the waitlist). Puffy's received several certificates and the first alternate position on the waitlist.

Greenlight Dispensary also received a registration certificate. Greenlight was unable to become operational within one year. On April 20, 2023, the Department denied Greenlight's request for an operation extension, causing Greenlight's certificate to become void under the department's administrative rules. Greenlight did not appeal the denial, and Greenlight's registration certificate became available for an alternate. There is no dispute that Puffy's has priority to receive the certificate



over other applicants on the waitlist. Puffy's alleges that the Department refuses to issue the certificate despite a clear legal requirement to do so.

Puffy's filed an application for writ of mandamus on July 19, 2023. The Court issued an alternative writ on July 26, 2023. In a letter dated August 18, 2023, the Department notified Puffy's that it may proceed with the registration process relating to the available registration certificate. The Department acknowledges in its brief that "the Department, has sent notice to Puffy's, LLC of its right to proceed with the application process for the available dispensary certificate." Despite the letter, the Department has not issued the certificate to Puffy's, as of the date of this memo. Puffy's alleges that the Department refuses to issue the certificate until and unless Puffy's completes the application process again.

LEGAL DISCUSSION

I. The Court has jurisdiction to issue a writ against the Department.

The Department argues that the Court is categorically prohibited from issuing a writ against the Department of Health. The Department is incorrect.

As a general matter, district courts have jurisdiction to grant writs of mandamus and of prohibition. SDCL § 16-6-15 ("The circuit court has the power to issue writs of . . . mandamus . . . and all other writs necessary to carry into effect its judgments, decrees, and orders, and to give to it a general control over inferior courts, officers, boards, tribunals, corporations, and persons."). "The granting of a writ of mandamus is not a matter of absolute right, but is vested in the sound discretion of the court[.]" *Asper v. Nelson*, 2017 S.D. 29, ¶ 11, 896 N.W.2d 665, 668.

A. The Court can issue a writ against the Department.

The Department argues that SDCL § 16-6-15 does not specifically state that a writ can be granted against a state department, but the Department cites no authority other than the plain language of the statute for this proposition. The South Dakota Supreme Court has affirmed writs of mandamus

issued by district courts against state departments. *S. Dakota Trucking Ass'n, Inc. v. S. Dakota Dep't of Transp.*, 305 N.W.2d 682 (S.D. 1981) ("This is an appeal from a declaratory judgment and writ of mandamus entered in favor of appellees. We affirm."); *Krimak v. S. Dakota Dep't of Env't & Nat. Res.*, 2012 S.D. 89, 824 N.W.2d 429 (citing SDCL 21-29-1 and applying the analysis for reviewing a writ to actions by the DENR). Therefore, this Court has jurisdiction to grant a writ of mandamus compelling action from the Department.

B. The exhaustion of administrative remedies requirement is not applicable.

It is true that, generally, "[f]ailure to exhaust administrative remedies where required is a jurisdictional defect." *S. Dakota Bd. of Regents v. Hergg*, 428 N.W.2d 535, 539 (S.D. 1988). "It is a settled rule of judicial administration that 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Id.* However, there are exceptions to the requirement of exhaustion of administrative remedies." *Id.*

(1) Exhaustion is not required where a person, through no fault of his own, does not discover the purported wrong until after the time for application of administrative relief. *Lick v. Dahl*, 285 N.W.2d 594 (S.D.1979).

(2) Exhaustion is not required where the agency fails to act. *Weltz v. Board of Education of Scotland*, 329 N.W.2d 131 (S.D.1983) (footnote 1).

(3) Exhaustion is not required where the agency does not have jurisdiction over the subject matter or parties. *Johnson*, *supra* at 112.

(4) Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair and impartial hearing cannot be had. *Mordborst v. Egert*, 88 S.D. 527, 223 N.W.2d 501 (S.D.1974).

(5) Exhaustion is not required in extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief. *Mordborst*, *supra*; *Johnson*, *supra*.

Id. Here, Puffy's falls within the second exception. Puffy's seeks a writ compelling the Department to act when it has failed to do so. Therefore, contrary to the Department's argument, the Court has jurisdiction to act; the exhaustion of administrative remedies requirement does not prohibit the Court from issuing a writ here.

C. Puffy's has met the requirements of SDCL § 21-29-2.

The Department argues that Puffy's application is defective under SDCL § 21-29-2. SDCL § 21-29-2 states that a writ "must be issued upon affidavit, upon the application of the party beneficially interested." The affidavit requirement is a "mandatory predicate" and failing to satisfy this requirement makes the application "fatally flawed." *Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 2007 S.D. 6, 727 N.W.2d 288.

In *Elliott*, the Supreme Court recognized the mandatory nature of the affidavit requirement in SDCL § 21-29-2. *Elliott* filed a pleading titled "Petition Contesting Denial of Building Permit and Notice of Appeal." *Id.* at ¶ 4. The pleading was signed by Elliott's attorney but was neither verified nor accompanied by an affidavit. *Id.* at ¶ 10. The circuit court dismissed the case for lack of jurisdiction. On appeal, Elliott argued that his pleading was sufficient and could "be construed either as a writ of certiorari or a writ of mandamus." *Id.* at ¶ 10. The Supreme Court interpreted SDCL § 21-31-2¹ by likening it to the SDCL 21-29-2. *Id.* at ¶ 12. The Court noted "[a]n application for a writ of mandamus includes a similar mandatory predicate: 'The writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested.' " SDCL 21-29-2. The Court's discussion makes clear that the "must" language in the writ of mandamus statute, SDCL 21-29-2, means that the Court has no jurisdiction over the matter in absence of an affidavit. The Court held that Elliott's pleading was "fatally flawed" and the lower court's determination that it lacked jurisdiction was correct. *Id.* at ¶ 18.

In the present case, Puffy's began the case by filing a "Verified Application for Alternative Writ of Mandamus." The application included a VERIFICATION section, signed by Puffy's attorney

¹ "The application for a writ of certiorari must be made on affidavit by the party beneficially interested." *Elliott*, 2007 S.D. at ¶ 12 (quoting SDCL § 21-31-2).

and notarized. However, SDCL 21-29-2 requires an affidavit, not a verified petition.² The question becomes, whether Puffy's pleading can be construed as an affidavit.

The South Dakota Supreme Court has said "[a]n affidavit is merely oral evidence reduced to writing." *Stadt v. Black Hills Fed. Credit Union*, 2015 S.D. 33, ¶ 14, 864 N.W.2d 513, 517. "The true test of the sufficiency of an affidavit is whether it has been drawn in such a manner that perjury could be charged thereon, if any material allegation therein is false." *Olson v. Advance-Ranchy Thrasher Co.*, 43 S.D. 518, 180 N.W. 961, 963 (1921) ("this affidavit, because it contains the mere opinion of affiant as to the material fact, fails to meet the one universal test applicable to all affidavits."). Other Courts have also described the nature of an affidavit. *OneWest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187, ¶ 45, 968 N.E.2d 726, 737 ("[A]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths."); *Wood v. Bediako*, 272 Mich. App. 558, 562, 727 N.W.2d 654, 657 (2006) ("To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."); *Haus v. Neb.*, 265 Neb. 321, 334, 657 N.W.2d 11, 24 (2003) ("An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."); *Com. v. Brown*, 767 A.2d 576, 582 (Pa. Super. Ct. 2001) ("By definition an affidavit is a statement of facts confirmed by oath before a judicial officer having authority to administer the oath."); *Thomas v. Greenwood Leflore Hosp.*, 970 So. 2d 273, 277 (Miss. Ct. App. 2007) ("An affidavit is 'a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'") (quoting *Black's Law Dictionary* 58 (7th Edition 1999)); *Scarborough*

² In *Ellert*, the court noted south Dakota statutes permit a writ to be issued by affidavit or verified petition. *Ellert*, 2007 S.D. at ¶ 11-12.

Wright, 871 A.2d 937, 938–39 (R.I. 2005) (“An affidavit is a written statement that has been sworn to by the affiant before a person authorized to administer oaths.”); *Mugavero v. Kmgler*, 317 Ill. App. 3d 162, 165, 739 N.E.2d 979, 982 (2000) (“An affidavit is ‘a declaration, on oath, in writing, sworn to before some person who has authority under the law to administer oaths.’”).

Puffy’s “Verified Petition” is a declaration of facts. Numbers 5-16 fall under the subheading entitled “FACTS.” The statements contained therein are factual assertions, describing the events and circumstances of the case at hand. Before Cwach’s signature, the document states “AFFIANT FURTHER SAYETH NOT,” thereby describing Cwach as an affiant. The document is notarized, and bears the following verification:

Ryan D. Cwach, the undersigned, being first duly sworn on oath, depose and states that the undersigned is the attorney for the Applicant named in the foregoing Application, that the undersigned has read it, know the contents therein, and that the facts therein contained are accurate and complete to the best of the undersigned’s knowledge and belief.

Therefore, the affiant’s statements appear to be under oath and in writing. Puffy’s has met the affidavit requirement of SDCL § 21-29-2, and there is no jurisdictional defect on these grounds.

II. The issue is not moot.

The Department argues that the issue is moot because the Department issued a letter to Puffy’s on August 18, 2023. It is true that “the Court will not decide a moot case.” *Netter v. Netter*, 2019 SD 60, ¶ 9. “[A] moot case is one in which there is no real controversy or which seeks to determine an abstract question which does not rest on existing facts or rights, with the result that any judicial determination would have no practical or remedial effect.” *Id.* However, the doctrine of mootness is inapplicable here.

The Department argues that there is no dispute following the letter dated August 18, 2023, but the Department still refuses to issue the certificate. The letter indicates that Puffy’s “may proceed with the application process for a lottery dispensary certificate that has recently become available.” What the Department has failed to recognize is that Puffy’s’ position is that it is entitled to the

certificate without further action. If the Department's position is that Puffy's is entitled to the certificate, but only if Puffy's reapplies, then there exists a controversy over whether Puffy's is presently entitled to the registration certificate. Puffy's seeks to compel the Department to issue the registration certificate. The certificate has not been issued. Therefore, a controversy still exists and the issue is not moot.

III. Puffy's has demonstrated that it is entitled to a peremptory writ.

Puffy's seeks a peremptory writ to compel the Department to issue a registration certificate for Puffy's dispensary.

South Dakota law allows a trial court to issue a writ of mandamus where no plain, speedy, and adequate remedy exists in the ordinary course of law. A writ of mandamus is an extraordinary remedy that will issue only when the duty to act is clear. A writ of mandamus commands the fulfillment of an existing legal duty, but creates no duty itself, and "does not act upon ... doubtful or unsettled law. To prevail on a writ of mandamus or prohibition, Petitioners must show a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.

Mandamus may only be used to compel ministerial duties, not discretionary duties. When public officials have a mandatory duty to perform mandamus may require performance but mandamus may not dictate details when there is discretion in how the duty is to be performed. Further, an application for a writ of mandamus in the form of an affidavit is sufficiently analogous to a complaint in a civil action to permit a defendant to move to quash the alternative writ if a plaintiff's application is found insufficient.

Krznak v. S. Dakota Dep't of Env't & Nat. Res., 2012 S.D. 89, ¶¶ 9-10, 824 N.W.2d 429, 433-34 (cleaned up) (citations omitted).

A. Puffy's has demonstrated a clear, mandatory duty to act.

ARSD 44:90:03:16¹ was promulgated by the Department and describes the procedures for awarding registration certificates. In this case, more establishments applied for registration certificates

¹ 44:90:03:16. Department awarding of certification -- Tiebreaking procedure -- Notice to unsuccessful applicants. The department shall award certification as follows:

- (1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;
- (2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;
- (3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

than are allowed by a local government. The Department assigned scores to each applicant and held a random draw for registration certificates. The applicants who did not receive a registration certificate were placed on a prioritized waitlist. Puffy's received the first position on that waitlist.

Recently, a registration certificate became available. Greenlight Dispensary's license was determined void by the Department on April 20, 2023 after Greenlight failed to become operational within one year, as required by ARSD 44:90:03:16. The administrative rules clearly indicates that when an entity holding a registration certificate fails to become operational within one year, "the certificate is deemed void and *must* be awarded to the next applicant on the waiting list." ARSD 44:90:03:16 (emphasis added). The language of the rule is "clear, certain, and unambiguous." *Citibank, N.A. v. S. Dakota Dep't of Revenue*, 2015 S.D. 67, ¶ 20, 868 N.W.2d 381, 390. "When the language in a [rule] is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed." *Id.* See also *Westmed Rehab, Inc. v. Dep't of Soc. Servs.*, 2004 S.D. 104, ¶ 8, 687 N.W.2d 516, 518 ("Administrative regulations are subject to the same rules of construction as are statutes. When regulatory language is clear, certain and unambiguous, our function is confined to declaring its meaning as clearly expressed."). The Court "need not engage in canons of statutory construction to determine the meaning of the regulation." *Id.*

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- (4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants must be ranked via the lottery system to establish the order and a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Greenlight's license was deemed void on April 20, 2023, when Greenlight failed to become operational. As of now, the Department has failed to issue Greenlight's registration certificate to Puffy's. This is not an issue of timing. The issue is whether the Department refuse to issue the certificate until Puffy's reapplies. It appears the Department does not intend to issue the certificate in absence of further action from Puffy's. The Department's failure to act is a violation of a clear duty under ARSD 44:90:03:16.

Reapplication is not contemplated by ARSD 44:90:03:16. The language of the rule does not suggest any additional action by a waitlisted applicant before the Department "must" issue the registration certificate. Indeed, if the applicant is required to reapply, it seems a waitlist would be of little value. Thus, the Department had a mandatory duty to issue the registration certificate to Puffy's after voiding Greenlight's certificate.

B. Puffy's has no other plain, speedy, and adequate remedy.

As discussed above, the Department has failed to act. There is no Department action for which Puffy's can seek agency review. The fact that such a situation is expressly exempt from the exhaustion of administrative remedies requirement supports the conclusion that Puffy's has no other recourse but to seek relief from this Court in a writ. Puffy's is entitled to such relief. The Department must grant Puffy's the registration certificate.

IV. The operational within one year requirement found in ARSD 44:90:03:16 is valid. Therefore, the clear duty found in ARSD 44:90:03:16 is enforceable by this Court.

Puffy's argues the duty described in the previous section should only be enforced if ARSD 44:90:03:16 is valid. Puffy's position is that ARSD 44:90:03:16 is invalid, and the Court should not enforce the duty described therein. This Court disagrees.

"[A]n administrative regulation cannot adopt requirements that 'expand upon the statute that it purports to implement.'" *In re Adoption of A.L.B.*, 2016 S.D. 22, ¶ 6, 877 N.W.2d 355, 359–60 (quoting *In re Luff Expl.*, 2015 S.D. 27, ¶ 17, 864 N.W.2d 4, 9). See also *Red Bear v. Cheyenne River Sioux Tribe*,

336 N.W.2d 370, 371 (S.D. 1983). “[R]ules adopted in contravention of statutes are invalid.” *Id.* ARSD 44:90:03:16 implements SDCL § 34-20G-72. ARSD 44:90:03:16 does not expand this statute and is not invalid.

The South Dakota legislature delegated authority to the Department to promulgate rules relating to registration certificates in SDCL § 34-20G-72. The statute states, in relevant part:

The department shall promulgate rules pursuant to chapter 1-26:

- (1) Establishing the form and content of registration and renewal applications submitted under this chapter;
- (2) Establishing a system to numerically score competing medical cannabis establishment applicants, in cases where more applicants apply than are allowed by the local government, that includes analysis of:
 - (a) The preference of the local government;
 - (b) In the case of dispensaries, the suitability of the proposed location and its accessibility for patients;
 - (c) The character, veracity, background, qualifications, and relevant experience of principal officers and board members; and
 - (d) The business plan proposed by the applicant, that in the case of a cultivation facility or dispensary shall include the ability to maintain an adequate supply of cannabis, plans to ensure safety and security of patrons and the community, procedures to be used to prevent diversion, and any plan for making cannabis available to low-income registered qualifying patients;

SDCL § 34-20G-72.

The portion of ARSD 44:90:03:16 in dispute is as follows:

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The Legislature delegated authority to the Department for the purpose of “[e]stablishing the form and content of registration and renewal applications” and “[t]he business plan proposed by the applicant.” SDCL § 34-20G-72. ARSD 44:90:03:16 falls within the scope of this delegation. In essence, the operational within one year requirement is an element of the applicant’s business plan. The Department clearly has authority to establish the content required in a registration application, as well as a renewal application. Although the Department treats the renewal and operational within one year requirement as separate processes, the operational within one year requirement corresponds to the timeline of renewal. The Court views the operational requirement content of the renewal application.

That the Legislature permits the Department to craft a scoring system that considers the applicant’s business plan evidences the Legislature’s intent that the Department should prioritize well-planned and functional cannabis establishments. The scoring system is used “in cases where more applicants apply than are allowed by the local government.” Therefore, the Legislature envisioned a system whereby applicants can be selected for a registration certificate, in part, by the strength of their business plan. It is reasonable that part of the business plan envisioned by the Legislature is that the applicant will become operational in a timely manner. That the certificates renew on a yearly basis indicates that this time period is reasonable to become operational. On this rationale, ARSD 44:90:03:16 does not expand upon SDCL § 34-20G-72 and is not invalid.

ORDER


Considering the foregoing, it is hereby:


ORDERED that the Department’s Motion to Dismiss or, in the Alternative, Motion to Quash is **DENIED**; and it is further

ORDERED that the Department shall issue a state medical cannabis dispensary certificate to Puffy’s LLC for location 3308 Campbell St., Rapid City.

Dated this 17th day of November 2023.

BY THE COURT


The Honorable Joshua Hendrickson
Circuit Court Judge
Seventh Judicial Circuit



ATTEST:
AMBER WATKINS
CLERK OF COURTS

By: 
Deputy
(SEAL)



FILED
Pennington County, SD
IN CIRCUIT COURT

NOV 16 2023

Amber Watkins, Clerk of Courts
By:  Deputy

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2) SS.
 2 COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

3 51CIV23-000937

4
 5 PUFFY'S, LLC, a South Dakota)
 6 Limited Liability Company,)

7 Applicant,)

8 vs.)

MOTION HEARING

9 STATE OF SOUTH DAKOTA,)
 10 DEPARTMENT OF HEALTH,)

11 Respondent.)

12 BEFORE: THE HONORABLE JOSHUA K. HENDRICKSON
 13 Circuit Court Judge
 14 Pennington County Courthouse
 15 Rapid City, South Dakota
 16 November 6, 2023

17 APPEARANCES:

18 FOR THE APPLICANT:
 19 (ZOOM)

MR. RYAN CWACH
 Attorney at Law
 Yankton, South Dakota

20 FOR THE RESPONDENT:
 21 (Telephonic)

MS. TAMARA LEE
 Attorney at Law
 Pierre, South Dakota

22
 23 EXHIBIT

24 2

1 (Whereupon the following proceedings were
2 held in open court:)

3 THE COURT: Okay. Let's go on the record
4 in civil file 23-937, Puffy's, LLC, vs. South
5 Dakota Department of Health. This is a hearing set
6 on the Respondent Department of Health's motion to
7 dismiss or in the alternative quash the writ of
8 mandamus. The attorney for Puffy's, Mr. Cwach, is
9 appearing via Zoom. Ms. Lee, attorney for the
10 Department of Health, is appearing telephonically
11 as the Zoom link didn't appear to be working. Both
12 of those appearances are done with the approval of
13 the Court for this limited motion, and you can see
14 why I normally don't allow these type of Zoom
15 meetings, just for technical difficulties
16 sometimes, but given the situation I allowed it
17 here.

18 Ms. Lee, as it's your motion -- I'll note
19 that I've reviewed the motion and the brief in
20 support of it, the brief in support of the writ in
21 reply to the respondent's motion made by Puffy's as
22 well, and all accompanying materials.

23 Ms. Lee, go ahead and put anything you'd
24 like to on the record at this point, if you would
25 like. I would ask you to go slow and speak clearly

1 as we don't have a -- my court reporter doesn't
2 have a face to put with you here to help make a
3 record. So just go slow and speak clearly, please.

4 MS. LEE: Okay. Thank you, Your Honor.

5 Again, I apologize for the technical
6 difficulties and I understand what you are saying,
7 that sometimes technology just does that.

8 With regard to the motion, I will state
9 that I -- I'll incorporate all the argument that
10 was made in the brief that was submitted on behalf
11 of the Department and will quickly summarize two of
12 the points that were made therein.

13 First of all, the Department did file a
14 Notice of Special Appearance feeling that there is
15 not jurisdiction in the Circuit Court at this point
16 for the reason that Puffy's did not exhaust
17 Administrative remedies. The process just wasn't
18 moving as quickly as they wanted so they filed a
19 writ of mandamus, but SDCL 1-26 requires that
20 Administrative remedies be exhausted before
21 Judicial review becomes an option. There has been
22 no contested case proceedings in this matter under
23 SDCL 1-26, nor is there a final decision by the
24 Department that would trigger Judicial jurisdiction
25 at this point. A full record needs to be obtained,

1 and that occurs at the Administrative level, and
2 it's at that point then that Circuit Court could
3 end up with jurisdiction, but they'd also then have
4 an evidentiary record to review.

5 There is a case that applies here, the
6 Dollar Loan Center case, and that was cited in the
7 Department's brief. That stated that the Circuit
8 Court lacked jurisdiction because there was no
9 statutory appeal right until Administrative
10 remedies are exhausted. So because there's been no
11 final decision in a contested case hearing, there
12 is no jurisdiction by the Circuit Court here, and
13 we'd ask that the Court grant the dismissal based
14 on lack of jurisdiction.

15 Other points raised in the brief,
16 Your Honor, are the separation of powers, which
17 goes hand in hand with the Administrative remedies
18 argument in that the Department should be allowed
19 to conclude its Administrative process before
20 another branch of government intervenes in the
21 matter and before they even obtain jurisdiction as
22 I stated previously.

23 The other arguments, which I'll just rely
24 on the brief for stating the substance of it, is
25 that the procedure utilized here was improper

1 because the application for writ of mandamus wasn't
2 accompanied by an affidavit. There is an adequate
3 remedy of law. There's a plain, speedy and
4 adequate remedy via the contested case proceedings
5 through SDCL 1-26. Based on those there's a
6 failure to state a claim by Puffy's at this point.

7 In addition, Your Honor, this matter would
8 actually even be moot because of the fact that the
9 mandamus application asks for the Department to
10 issue the certificate for the registration -- let
11 me say that better -- to issue the registration
12 certificate for the dispensary that is available
13 out there in Rapid City currently. The Department
14 has sent notice to Puffy's and that notice was
15 dated August 18th of 2023. I did notice in looking
16 at my brief over the weekend that I put the date of
17 that letter was September 18th. I apologize. That
18 was a typo. It should say August 18th, as the
19 exhibit to the brief does show it was dated August.
20 The Department did send that to Puffy's and let
21 them know they are next in line. They have the
22 right to proceed with continuing to apply for this.
23 Puffy's did respond and they have commenced contact
24 with the Department in terms of moving forward with
25 this. Unfortunately, the individual in our

1 department with whom they were directly involved
2 has passed away tragically, but I was aware that
3 there was contact there.

4 At this point the Department's just
5 waiting for a Form E, which is something that every
6 applicant has to submit. That is a document that
7 comes from the local jurisdiction, whether it be a
8 municipality or a county, but they have to fill
9 that out and say they're in agreement and
10 everything is good on their end before the state
11 issues a certificate. We're dealing with
12 Rapid City in this case, and I know that Rapid City
13 is doing this on a calendar basis and will address
14 all of these come January. So the Department did
15 let Puffy's know that we will hold this until
16 January and let the municipality decide. If
17 they're going to issue the Form E, then we will
18 accept that and take that, and then there will have
19 to be a new fee submitted along with the
20 application as well, which is the same across the
21 board. This is the same process we use with
22 everybody that is on the alternate list in the
23 lottery. So because of that, Your Honor, the
24 process is well under way. There's no real
25 controversy here, and because there is no case or

1 controversy the issue is moot and there's nothing
2 for the Circuit Court to do even if jurisdiction
3 did apply at this point.

4 The last thing I'll say, Your Honor, is
5 that I don't believe that the brief that was
6 recently submitted on behalf of Puffy's and is
7 entitled Applicant's Brief in Support of Preemptory
8 Writ and in Reply to Respondent's Motion to Dismiss
9 or Quash, I don't believe that was timely filed
10 under SDCL 15-6-6(d) because that requires that the
11 supporting affidavit and brief be served along with
12 the motion. So under that I feel that that was not
13 properly served in a timely manner.

14 With that, Your Honor, I will end my oral
15 argument.

16 THE COURT: What -- in your opinion -- I
17 mean I reviewed the brief, but the argument's made
18 that they have not exhausted their Administrative
19 remedy. What is that in this case? It's different
20 than the first case that we had where there was a
21 pending appeal on a failure to extend a deadline.
22 There's not been, I guess, an Administrative -- is
23 there -- has there -- in your view has there been
24 an Administrative decision made that Puffy's has
25 the ability to appeal an Administrative process in

1 this instance?

2 MS. LEE: No, I don't believe so, Your
3 Honor. I think that what they should have done is
4 proceeded under 1-26 and filed something
5 administratively to say, *Hey, we want some action*
6 *in here. We need a final decision by the*
7 *Department, and move forward in that process.*
8 After that happened then the Circuit Court would
9 have jurisdiction.

10 THE COURT: All right.

11 Mr. Cwach, you can address your reply or
12 anything you want to put on the record at this
13 point.

14 MR. CWACH: Yes. Thank you, Your Honor.
15 Before I make argument, first, I would like to
16 offer just for the purposes of -- well, for the
17 hearing today, the Exhibit 1 attached to my
18 complaint, which is the Department's lottery
19 selection, I would like to offer that as Exhibit 1
20 at this time.

21 THE COURT: All right.

22 MS. LEE: I guess I will object,
23 Your Honor, due to timeliness. I don't think that
24 was timely submitted.

25 THE COURT: One moment. Is that the same

1 Exhibit 1 listed in the Department of Health brief?

2 MR. CWACH: Yes.

3 THE COURT: All right. It's already part
4 of the record, essentially. I'll receive it as
5 Exhibit 1, noting the objection.

6 Go ahead.

7 MR. CWACH: Thank you, Your Honor. Then
8 I'd also like to offer the -- my affidavit, the
9 affidavit of Ryan Cwach, which was sent more than
10 five days before this hearing, as Exhibit 2, sent
11 electronically to the opposing party and to the
12 Court.

13 THE COURT: I'll note that's part of the
14 court file as well and rely on that as Exhibit 2 --
15 I'll receive that as Exhibit 2.

16 MR. CWACH: Thank you, Your Honor.

17 THE COURT: Go ahead.

18 MR. CWACH: Well, Your Honor, this is
19 really an opportunity, I think, for my client
20 Puffy's to kind of highlight some of the issues
21 that, you know, we've identified with this
22 Administrative rule, which is 44:90:03:16. The
23 last hearing we had, which was the first Monday of
24 October, I believe we had a pretty thorough
25 statutory analysis done to show that there is no,

1 you know, authority for this rule. The Court
2 dismissed the writ of prohibition there for lack of
3 exhausting Administrative remedies, as there was an
4 underlying appeal. That part was never really
5 addressed on whether the Court actually has
6 jurisdiction under this rule. I provided some
7 additional evidence at this hearing, which was my
8 affidavit, which includes the South Dakota
9 co-counsel's opinion regarding this Administrative
10 rule, to show the Court that this is not just some
11 lawyer from Yankton's kind of, you know, unique
12 legal theory to get his client out of trouble.
13 This is actually something that the person in
14 charge of our laws, to make sure that they are kept
15 up to date and uniform, and also charged by law to
16 make sure the Administrative rules are supported by
17 law, providing his opinion before the rule was
18 adopted that the Department's stated authority and
19 law implemented does not allow the Department to
20 have this rule and this operational requirement. I
21 think that's an important thing for the Court to
22 weigh, for if that's true then a lot of this -- you
23 know, ultimately it all goes away and we have a
24 whole different thorny issue to work through.

25 But to the particular merits for the writ

1 of mandamus, should the Court find that it does
2 have the authority -- or the Department did have
3 the authority to implement this, I want to talk a
4 little bit briefly about the Administrative remedy
5 argument. My brief really outlines why I think
6 Dollar Loan is not applicable in this situation and
7 so I won't go through that, but what I want to
8 point out is there is nothing to exhaust here.
9 We're bringing this writ of mandamus request under
10 the rule, and that rule in this particular instance
11 does not grant my client the right to request a
12 contested case proceeding in the way that a denial
13 did on the other ones. A contested case proceeding
14 is a proceeding where there are legal rights and
15 duties or privileges of the party that are to be
16 determined. It can only occur -- a contested case
17 hearing, a ruling, can only occur after an
18 opportunity for a hearing.

19 Well, in this instance the rule doesn't
20 allow for a hearing and so there's nothing for us
21 to exhaust. We couldn't request that because the
22 statute is so plainly clear on what's supposed to
23 happen. We don't necessarily think that we've been
24 harmed -- or Puffy's doesn't think it's been harmed
25 by the Department, necessarily. What we're saying

1 is just that the Department is not doing something
2 that it's supposed to do by its own rule.

3 So if the Court does decide that, you
4 know, there's some lawful authority for this rule
5 then we have to look at it. And it's just
6 abundantly clear that what the rule says is that
7 when a license holder is determined not to be
8 operational, then the next person in line gets the
9 license. It says that they must -- the license is
10 deemed -- it's deemed voided as if it was never
11 actually received by the other recipient. Then
12 that certificate must go to the next person in
13 line, which is Puffy's. That's what the rule says.

14 You know, the South Dakota Supreme Court
15 has weighed on this issue numerous, numerous times,
16 that when you are looking at a statutory analysis,
17 what you are supposed to do with an Administrative
18 rule, the use of the word *shall* and *must* versus *may*
19 is the first place we start. Here it says they
20 must give it to Puffy's because the other person
21 isn't operational.

22 Now the question becomes *when*, so when
23 should Puffy's get that? Under the rule it doesn't
24 say when the next license becomes available at the
25 local level. What it says is when the other entity

1 is determined to be not operational, and no one's
2 disputing that that has been finally determined.
3 Greenlight Dispensary was determined not to be
4 operational. They didn't appeal to the
5 Administrative level. That is closed. When that
6 became closed, this license under the rule must go
7 to Puffy's.

8 Now what the Department has suggested is
9 that we can apply in January when the city license
10 is available, which is the unique kind of wrinkle
11 in this case. The City of Rapid City didn't revoke
12 Greenlight's local license, but the state revoked
13 its state license. So the Department's absolutely
14 correct, Puffy's cannot get a local license in
15 November, 2023, because the City of Rapid City has
16 given its 15th license to Greenlight and didn't
17 revoke. They found -- the city found Greenlight
18 was operational under their ordinance. So there is
19 conflict there, but that conflict is actually very,
20 very important here, and why this writ of mandamus,
21 should this rule be held to be in place, needs to
22 be issued is come January 01 there will be a local
23 license at the city level available that anyone can
24 apply for, including Puffy's, including Greenlight
25 Dispensary, and including Your Honor. It will be

1 open and available because there is no 44:90:03:16
2 controlling the local level. Well, my client at
3 the state level has this preference, and what we're
4 trying to avoid is a conflict of law where if we
5 have the state license, as required by 40:90:03:16,
6 now we can go to the city and we'll be the only
7 person to have that license, which is what the rule
8 says should happen, and we'll be able to get a city
9 one.

10 Now that seems kind of confusing, and it
11 is, and that kind of demonstrates the larger point
12 that I think Puffy's has made over these two
13 hearings, is that this rule, you know, wasn't
14 really put into place with thinking through the way
15 the South Dakota medical cannabis program was
16 designed to operate. It doesn't work within the
17 legal framework, because by this rule existing we
18 have this state and local conflict. But it might
19 be just irrelevant, Your Honor, for purposes of
20 determining whether this writ should be issued. I
21 mean the rule so clearly says that it must be
22 issued to the next person in line, and it doesn't
23 say when the next -- next calendar year. It says
24 when the other -- when the previous license holder
25 was determined to be not operational. So that

1 event has happened. The statute is mandatory -- or
2 the Administrative rule is mandatory and,
3 therefore, there should be no delay.

4 Additionally, there should be no
5 reapplication. This is important. The Department
6 has suggested we can reapply, but the phrase deemed
7 voided is meant to basically treat it as if that
8 other one was never issued, not that we get the
9 first opportunity to get it. We've already been
10 approved by the state for this location,
11 Your Honor. 3380 Cambell was eligible in the
12 lottery, so that meant we got approved at the local
13 level and at the state level at the time of the
14 lottery, but because of luck of the draw we didn't
15 get a spot at that location. Now luck has turned,
16 or Greenlight's misfortune, I guess, has been our
17 fortune, and we are entitled to that under this
18 rule. But we've met all the requirements of
19 statute to be a dispensary at this location, and
20 the only reason we don't have the state certificate
21 is simply because the state won't follow this
22 Administrative rule. So I would ask that the
23 Motion to Dismiss not be granted and that the Court
24 issue its writ of mandamus.

25 Thank you.

1 THE COURT: Okay. In tracking your
2 alternative argument, this rule is invalid, if the
3 Court finds that persuasive I can't grant your
4 writ, can I?

5 MR. CWACH: Yeah. Well, so you are
6 absolutely right, Judge Hendrickson, and that's
7 just -- a law is either valid or it's not valid, I
8 acknowledge that. That does have implications for
9 our other four licenses, and I think if my client
10 was on the stand right now, or the manager of it,
11 he would say that we'd rather have those four
12 licenses and not have this one. But, yeah, I
13 acknowledge that, but jurisdiction is the Court's
14 first obligation to consider.

15 THE COURT: Thank you.

16 Ms. Lee, any reply you'd like to make to
17 any argument made there?

18 MS. LEE: Yes, Your Honor. Thank you.

19 First of all, with regard to the challenge
20 to ARSD 44:90:03:16 I don't feel like this is the
21 appropriate place for that. I feel if there's
22 going to be a challenge to that, that needs to be
23 noticed out differently. If it's a Constitutional
24 challenge, obviously the AG needs to be served.
25 Plus this is a mandamus action. There was never

1 anything brought in that original petition with
2 regard to a challenge to this rule.

3 Again, I will underscore the fact that
4 there needs to be a final decision from an agency
5 before there could be Circuit Court jurisdiction.
6 Anybody can go under SDCL 1-26 and request a
7 contested case hearing. I don't believe they need
8 to specifically have permission from the Department
9 to do that. I think they can just go under the
10 statute themselves and file something.

11 And again, the Department's already done
12 what Puffy's is asking for. It's simply a wait on
13 the municipality, at this point, which is
14 Rapid City. So I guess, to me, Puffy's has more of
15 a beef with Rapid City and not with the Department.
16 Cities are doing things differently, and the
17 Department has no control over how the
18 municipalities handle their aspect of dealing with
19 these lottery situations.

20 The Department can do things from their
21 end, which is exactly what they did with Puffy's,
22 said, *Hey, you have the right to proceed here.*
23 And it's not so much of a reapplication,
24 Your Honor, as it is an update, because the state
25 doesn't just automatically hand that over. As I

1 stated earlier, there needs to be a Form E, which
2 is a verification from the municipality or the
3 local jurisdiction, that everything is squared away
4 with them. That's important because we have seen
5 zoning changes happen. Some of the municipalities
6 have changed their zoning laws and now some of
7 these locations may not fit within the zoning. So
8 things then would have to be worked on from that
9 angle. Also, we've seen people that just aren't
10 interested anymore. So we're not just going to
11 say, *Hey, here you go. This is yours*, when they've
12 moved on with life and have done something else
13 with a business interest so they don't even want it
14 anymore. Also, they may not qualify as there are
15 rules that say if you've ever had a certificate
16 revoked that you do not qualify. So in the
17 meantime if that's happened to somebody, they
18 wouldn't now qualify for a new registration
19 certificate.

20 So for all those reasons, Your Honor, and
21 for everything stated previously, the Department is
22 asking that the Court would grant the Motion to
23 Dismiss in this matter.

24 Thank you.

25 THE COURT: Thank you.

1 All right. I'll note that, first, I do
2 find this to be a substantially different issue
3 than the first case that we had on this matter.
4 After hearing arguments of counsel and the briefs
5 submitted, I want to take a little bit more time to
6 fully develop my thoughts on it. I'll plan to
7 issue a written ruling in the near future. I don't
8 have a timeframe on that, but it won't be real
9 long.

10 MS. LEE: Okay.

11 THE COURT: I'll have that out as quick as
12 I can and notify you once it's been, essentially,
13 filed and we'll go from there. I appreciate you
14 both appearing today, and I'll take your arguments
15 under consideration and have a written ruling out
16 in the near future.

17 MS. LEE: Thank you very much.

18 THE COURT: Thank you. With that we'll be
19 adjourned.

20 MR. CWACH: Thank you, Your Honor. Real
21 quick, I did just want to note during my argument I
22 saw Ron Jeffries appear. He is a member of
23 SCI Holdings, which owns Puffy's. I don't know if
24 you want to note that for the record or not. He
25 just came to listen in but wanted you to know he

1 was here.

2 THE COURT: All right. I saw someone poke
3 their head in, but they didn't come into the
4 courtroom proper so I don't know if he's still here
5 or not.

6 MR. CWACH: He's not. He's on Zoom,
7 Your Honor.

8 THE COURT: Oh, okay. I thought there was
9 someone that stuck their head in the courtroom as
10 well. So that's noted for the record. Thank you.

11 With that we'll be adjourned.

12 (End of proceedings.)
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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF PENNINGTON) SS. CERTIFICATE

3
4 I, BRIDGETTE R. BANKS, Official Court
5 Reporter, hereby certify that the foregoing pages
6 one through 21, inclusive, are a true and
7 correct transcript of my stenotype notes.

8 Dated at Rapid City, South Dakota,
9 this 26th day of January, 2024.

10
11
12
13 /s/ Bridgette R. Banks

14 _____
15 Bridgette R. Banks
16 Official Court Reporter
17 My commission expires: 3/14/2024
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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF PENNINGTON) SS SEVENTH JUDICIAL CIRCUIT

3
4 PUFFY'S, LLC, a South Dakota)
Liability Company,)

5 Applicant,)

6 v.)

7 STATE OF SOUTH DAKOTA,)
8 DEPARTMENT OF HEALTH,)

9 Respondent.)

MOTIONS HEARING
CIV23-807

10
11 BEFORE: THE HONORABLE JOSHUA HENDRICKSON
12 CIRCUIT COURT JUDGE
13 PENNINGTON COUNTY COURTHOUSE
14 RAPID CITY, SOUTH DAKOTA
15 OCTOBER 2, 2023

16 APPEARANCES:

17 FOR THE APPLICANT:

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24 EXHIBIT

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INDEX

EXHIBITS

MARKED

OFFERED

RECEIVED

State's Exhibits 1-7

5

6

State's Exhibit 8

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State's Exhibit 9

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1 THE COURT: Going on the record in Civil File 23-807,
2 Puffy's, LLC, versus State of South Dakota, Department
3 of Health.

4 Parties, please just state your appearance for the
5 record.

6 MR. CWACH: Thank you, Your Honor. Ryan Cwach,
7 attorney -- counselor for Puffy's, LLC, the applicant.

8 MS. LEE: And Tamara Lee for the Department of
9 Health.

10 THE COURT: All right.

11 This is the time set for a motions hearing regarding
12 -- the Plaintiff filed a motion -- Application for a
13 Writ; Order to Show Cause. There is also a -- the
14 State has filed a Motion to Dismiss; alternatively,
15 Quash the Writ of Prohibition.

16 I reviewed all of the submissions by the parties,
17 including both the motions, briefs in support, and
18 responses from each of the parties. I did receive an
19 email from the plaintiff's, additionally, that had the
20 reply to the State's brief as well as a Motion to
21 Strike the Affidavit of Cody Shippy.

22 It's not made part of the court file yet, but I did
23 review that. They all kind of go together, I think, to
24 a degree. So I'll just let the parties make argument
25 regarding the motions in general.

1 I don't think I need to address them individually
2 since the arguments are essentially tied together, and
3 -- well, given that, Mr. -- if I didn't pronounce your
4 name correctly, it's Cwach?

5 MR. CWACH: It's Cwach.

6 THE COURT: Okay.

7 MR. CWACH: It's a noble effort.

8 THE COURT: Okay. I'm sure I will get that wrong
9 again in the future.

10 MR. CWACH: It's my power play with the judges. I
11 walk in knowing they're going to ask me an embarrassing
12 question right away.

13 THE COURT: Go ahead, I'll let you make any record
14 you like regarding the motion in this case and in
15 response to the State's as well.

16 MR. CWACH: Sure. Your Honor, first, before I begin
17 argument, I had previously filed seven exhibits
18 attached to my Application for the Writ of Prohibition.
19 Those are filed with the Court, Exhibits 1, 2, 3, 4, 5,
20 6, 7, and, I guess, at this -- for purposes of making a
21 record at this time, I would move that those be
22 admitted.

23 THE COURT: Any objection?

24 MS. LEE: Yes. I think they are already part of the
25 record since they're submitted as part of the brief --

1 or the application, I mean, Your Honor.

2 THE COURT: I -- they are part of the court file, so
3 I'll just allow that. I'll just make note --

4 MR. CWACH: Okay. Thank you.

5 If I may, Your Honor, I have one more exhibit that
6 was not a part of that; that is the affidavit of Ryan
7 Cwach which I have with the court reporter identified
8 as Plaintiff's Exhibit 8. I previously provided this
9 to opposing counsel. It is largely their discovery --
10 the Department's discovery responses in a similar
11 proceeding, and if I may approach, I can hand that to
12 you.

13 THE COURT: You may.

14 Was that the one that was emailed to me last week?

15 MR. CWACH: I actually don't believe I did email
16 this.

17 THE COURT: Okay.

18 I think I have a copy of it, so --

19 MR. CWACH: Okay.

20 THE COURT: I think it was part of your email.

21 MS. LEE: May I respond to that real quick, Your
22 Honor.

23 THE COURT: Go ahead.

24 MS. LEE: I am going to object to the admission or
25 that for not being timely filed. If -- I believe

1 15-6-60 requires that a motion has to be served no
2 later than ten days and then opposing affidavits and
3 briefs have to be served five days before the hearing.
4 These were not served until Monday at like 4:15 p.m. I
5 noticed it about 4:30. Did not open it up until the
6 next morning, but, regardless, it was not served five
7 days prior to the hearing, and also I should have had
8 an opportunity to file a reply to it two days prior to
9 the hearing, but given the timing in which it was
10 filed, I did not have that time so I'm going to object
11 to its admission, Your Honor.

12 THE COURT: All right. I'll take -- note the
13 objection. I'm going to take it under advisement. I'm
14 going to reserve ruling on it currently. You can make
15 argument reference to it during your argument --

16 MR. CWACH: Thank you.

17 THE COURT: -- if you like but I'll take it under
18 advisement at this point.

19 MR. CWACH: Yeah, I -- yeah, it's an affidavit of
20 their own discovery responses, Your Honor. They came
21 from the Department.

22 THE COURT: I have reviewed it.

23 MR. CWACH: Thank you.

24 Your Honor, then the last bit I just wanted to
25 clarify here is exactly procedurally where we are at on

7
1 this matter. I would note that the Department has
2 filed a -- basically, a Motion to Dismiss, and then
3 they have, in addition to that, submitted an affidavit
4 of a former employee.

5 The Alternative Writ of Prohibition required the
6 Department to file an answer under oath within 30 days
7 as to why it should not issue. The motion is not an
8 answer under oath that was made. 15-6-12(a) requires
9 an answer within 30 days. It does allow for a Motion
10 to Dismiss be filed. That comes under 15-6-12(b), but
11 12(b) says, A motion making any of the defenses, such
12 as lack of jurisdiction raised there, under 12(b),
13 shall be made before a pleading if a further pleading
14 is permitted.

15 And as I understand the Court's prior order, that
16 alternative writ, there is no provision for a prior
17 pleading to be made. They are to answer within 30 days
18 and they have not done that.

19 And so for purposes of argument, I guess, I wanted
20 some clarification if we are going to find that the
21 Motion to Dismiss are -- or the Court is going to find
22 that the Motion to Dismiss is sufficient with the
23 requirements of South Dakota law and the Court's prior
24 order.

25 THE COURT: State want to respond?

1 MS. LEE: Thank you, Your Honor.

2 Along with the documents that were filed, the Motion
3 to Dismiss and the supporting affidavit and brief, was
4 a special appearance because the Department of Health
5 does not feel that jurisdiction is yet proper in this
6 Court. So -- also did not feel that an answer is
7 appropriate at this point because of the outstanding
8 issue whether or not there is even jurisdiction at this
9 point, Your Honor.

10 THE COURT: All right.

11 So to clarify that question, counsel, I believe the
12 State's response and motion that they filed is
13 sufficient in this instance. So, essentially -- your
14 application, essentially, is a failure to show cause
15 based upon non-responsive I find lacking, so denied in
16 that manner and address it, essentially, on the Motion
17 to Dismiss at this point.

18 MR. CWACH: Well, if I may, Your Honor.

19 THE COURT: Go ahead.

20 MR. CWACH: Just for further clarification, my
21 understanding where you're at with the proceedings, I
22 do agree with you that my motion for lack of answer was
23 -- was not timely. I was actually counsel for land
24 owners in those carbon pipeline disputes. I was in the
25 middle of a three-week trial while I was working on

1 that and I got my dates wrong and I withdraw that
2 motion, but my understanding where we are at is really
3 the fundamental question of whether or not this writ
4 should issue as a Peremptory Writ because 30 days have
5 gone by. They have provided some form of an answer to
6 it, and so to me, the issue is, does it get dismissed
7 or does the writ get issued? Is that my -- am I
8 understanding correctly?

9 THE COURT: Yes.

10 MR. CWACH: Thank you. I appreciate you allowing me
11 to go through that, and may I proceed with my argument.

12 THE COURT: Go ahead.

13 MR. CWACH: Thank you, Your Honor.

14 Well, I'm here today on behalf of Puffy's, LLC. They
15 are a medical cannabis dispensary licensed under the
16 South Dakota Department of Health and by the City of
17 Rapid City. Puffy's has invested over three million
18 dollars into the local economy during the last year;
19 mostly in construction activity and in employment
20 opportunities for residents here.

21 Sitting behind me I have two members of the company
22 as well as the manager, Kittrick Jeffries.

23 The Department has only filed a Motion to Dismiss in
24 this matter for lack of jurisdiction. So there is
25 nothing disputing what is in our pleadings regarding

1 the factual circumstances that gave cause to this
2 hearing, and so a state registration for a medical
3 cannabis dispensary was initially issued on March 10th,
4 2022, to Puffy's for 902 West Main Street using South
5 Dakota administrative rules and local rules of the City
6 of Rapid City.

7 This license was transferred to 910 West Main Street
8 in the late fall of 2022. Puffy's -- under the medical
9 cannabis program, licenses are to be renewed every
10 year. They are to be, basically, renewed automatically
11 under SDCL 34-20G-57 which states that they will be
12 renewed once a renewal application is submitted within
13 ten days of receipt unless the license -- or, excuse
14 me, the registration has been under suspension or has
15 been revoked. Those are the only two criteria in the
16 statutes that allows for a medical cannabis
17 establishment license not to be renewed, that's it,
18 under law.

19 And so on March 10th, 2023, the State issued a -- a
20 license to Puffy's, LLC, for the following year, and
21 that is Exhibit 4 to my application, and that clearly
22 states that they have a valid license for a medical
23 cannabis establishment at 910 West Main Street, through
24 March 10th, 2024.

25 41 days later after that was issued my client

1 received an operation extension letter denial which
2 essentially had the effect of revoking the license that
3 was previously issued on March 10th, 2023. Now, there
4 is no law or administrative rule that allows the
5 Department to revoke or cancel a license that was
6 already issued. The only way that license can be
7 revoked or suspended under the cannabis law is South
8 Dakota Codified Law 34-20G-8, but later in my argument
9 we will compare that law with the administrative rule
10 to see if it fits here. It clearly does not.

11 Regardless of whatever reason, operational, failure
12 to provide equipment services, and so forth that the
13 Department claims, they have no legal authority to do
14 what they did.

15 South Dakota Codified Law 34-20G-56 says that a
16 certificate may only be suspended or revoked for -- or
17 excuse me, this is 80, may only be suspended or revoked
18 for multiple negligent or reckless violations of laws
19 or administrative rules. There is no allegation in the
20 Department's extension letter that they have committed
21 those multiple violations or serious violations. This
22 only deals actually with the renewal, and I would --
23 the Motion to Dismiss and the Department's brief I feel
24 is mostly silent on these facts. The brief asks you to
25 dismiss for a lack of jurisdiction and failure to

1 remedy or exhaust administrative remedies. That's well
2 covered in my brief, too.

3 The Department is clearly a lower tribunal here, Your
4 Honor, in that it is a contested case proceeding under
5 the Administrative Procedures Act which this Court has
6 jurisdiction over -- would have jurisdiction over if
7 there was an appeal either Puffy's or by the
8 Department, you know, if that proceeding were to
9 actually occur, and so that argument I think fails.

10 Similarly, they're arguing that you don't have
11 jurisdiction; the Court doesn't have jurisdiction to
12 hear this writ. I'm arguing this writ is necessary
13 because they do not have jurisdiction, and so that is
14 one of the reasons why we do not have to consider the
15 administrative exhaustion argument from the Department.

16 And, Your Honor, what I have here, I have the
17 relevant statutes printed out, and what I thought what
18 would be good, because this is a new area of law for a
19 lot of people -- I've been in it now for about two
20 years. There is no case law on it. If I may, I have
21 them printed out. I would like to hand them to you and
22 to Ms. Lee for the balance of my argument.

23 THE COURT: You may.

24 MR. CWACH: Thank you, Your Honor, for allowing me to
25 approach.

1 So the first paper here is a true and correct copy of
2 the South Dakota Administrative Rule that the
3 Department is using to justify the denial extension
4 letter.

5 And so the first argument we make is, we already have
6 the license. They just can't get rid of it once they
7 give it to us. There is nothing in the law.

8 The second argument goes more towards the
9 jurisdiction whether or not this administrative rule
10 can actually exist. What the South Dakota Supreme
11 Court has said is that if a rule goes beyond the law it
12 is implementing, it is a nullity; it's not effective.
13 And so that's the question we are looking at as we
14 analyze this rule compared to the statutes that are
15 listed here. So the two paragraph statute.

16 And to me, Your Honor, the key thing to focus is on
17 the general authority and the law implemented on the
18 bottom, that is what the Department uses to justify why
19 it can impose this rule on medical cannabis
20 establishments.

21 So the first part of the rule, the subsections one
22 through four, are not really an issue. That relates
23 more so to how tie breaking gets done when a local
24 jurisdiction like the City of Rapid City sends too many
25 applicants above their limit. So an undisputed fact

1 hereto is that there were 47 applications sent from the
2 City of Rapid City for a license to the state and then
3 conducted a lottery. The City of Rapid City only
4 allowed for 15 to actually be within its jurisdiction,
5 and so that part, we are not contesting that, that top
6 part.

7 This operational component and this extra part
8 dealing with the extension, may -- is what we are
9 requesting. So when you look at the law that they're
10 implementing, the first law they implement is 34-22-56,
11 and so that's on the next page there. And it states
12 very clearly that the Department -- if the local
13 government has a limit numbers, which Rapid City does,
14 and a greater number seeks state registration, the
15 Department will solicit and consider the input from
16 local government as to its preference for registration.

17 Well, nothing in this second paragraph in the rule
18 has anything to do with local preference for who gets
19 it. It's a completely -- it's a third standard for
20 renewal when sub -- when Section 57, the renewal
21 provision says that there are only two ways a license
22 cannot be renewed. That's if it's not under -- if the
23 registration is under suspension or has been revoked.
24 Those are the only reasons it cannot be renewed. This
25 rule creates a third one that clearly has nothing to do

1 with local preference. If local preference were really
2 what this rule was trying to implement, then the
3 Department would have seen the exhibit attached, which
4 they did see because we provided it to them from the
5 City of Rapid City, finding first, that Puffy's had a
6 valid local license through this year because the City
7 of Rapid City's licenses operate on a calendar year,
8 and, two, they would have seen that the City of Rapid
9 City granted Puffy's an extension request under their
10 ordinance. And that -- if this was really what this
11 law was implementing, that should have been the end of
12 the debate, Your Honor, at that point. And so that law
13 is clearly not being implemented. It goes well beyond
14 that. It has nothing to do with local preference.

15 The second law that they propose that is being
16 implemented here is Section 72, Subsection 3, which
17 states that the Department can create rules governing
18 the manner in which the Department will consider
19 applications for and renewals of registry
20 identification cards.

21 The registry identification card is what a medical
22 cannabis patient gets when they bring in their doctor's
23 certificate. It has nothing to do with medical
24 cannabis establishments at all, and so they're clearly
25 not implementing that law here.

1 They also have to cite general authority, and they
2 rely on that Subsection 3 but also that Subsection 5,
3 Subsection 72, which deals with the procedure for
4 suspending or terminating a registry certificate or a
5 registry identification card. Card holders are medical
6 cannabis establishments.

7 Again, Your Honor, the only way a license can be
8 suspended or terminated is under Section 80 of the
9 cannabis law which requires the multiple violations and
10 that's provided to you on the last page here. The
11 Department can suspend or revoke for multiple negligent
12 or knowing violations or very serious annoying
13 violations. It's a high bar.

14 Well, they might say that's actually what we are
15 doing with this operational requirement, but that
16 doesn't hold true, because when you read Section 80, it
17 very clearly states that this can only be done after an
18 investigation and an opportunity for hearing. So if
19 they were actually trying to revoke the license as
20 opposed to just not renewing it, Puffy's is entitled
21 first to notice and opportunity to hearing, what
22 happened here, and then it can be revoked. What
23 happened here is the license was not renewed; we were
24 provided notice and opportunity for hearing on
25 question. That is not a procedure that is authorized

1 under Section 80. It's also not authorized under 72,
2 either on Subsection 3 or 5.

3 The last point I want to make here, Your Honor, is
4 that this language is pretty ambiguous, what is
5 operational. My client applied out of an abundance of
6 caution. It has invested over three million dollars in
7 its business operation here and it plans to invest
8 significantly more. It's created jobs in this
9 community.

10 You know, the reason we submitted it is the local
11 labor problems in this area were very true for my
12 client. They have ten dispensary licenses and a
13 cultivation and manufacturing license that they have to
14 get up and running. These local jurisdictions impose
15 one year requirements on their operations too, and
16 those we don't contest, you know, are illegal or
17 anything. I think the local jurisdiction has the
18 ability to do that.

19 Given those demands and the local labor market and
20 other supply issues, you know, choices had to be made,
21 but this is clearly an operational business and
22 operating. It wasn't open at this location, but plans
23 were in place, and the only reason -- the only reason
24 Puffy's does not have a building permit is because of
25 the Department's extension denial letter, but for that

1 being issued at the time it was issued, construction
2 would be largely complete at this time at that
3 location. This is pointed out and just amplified by
4 the discovery responses where the Department, you know,
5 acknowledges that locations that Puffy's has opened in
6 Sturgis and Meade may not be operational, but they
7 acknowledge they are open and operating but they cannot
8 say they're operational.

9 Well, that last point, Your Honor, what is
10 operational? It's those with employees. I just feel
11 like this is a moving target that's been imposed on my
12 client, and, frankly, he's being punished for having
13 been awarded, through a luck of the draw, numerous
14 licenses in the City of Rapid City.

15 Did you want me to address the Motion to Strike as
16 well during this or --

17 THE COURT: If you wish, you may.

18 MR. CWACH: Sure. Well, just briefly on that, I
19 would ask that the Court -- I know you're taking it
20 under advisement -- not allow the Motion to Strike --
21 or not allow the affidavit of Cody Shippy to be
22 admitted into evidence.

23 Number One, it contains numerous legal conclusions
24 that I believe are incorrect, and is outlaid in my --
25 my motion.

1 Two, in the discovery request, we asked the
2 Department to acknowledge that -- that oral contracts
3 are contracts under South Dakota law. Cody Shippy, who
4 is no longer an employee of the Department, answered
5 those requests, and she stated -- she objected to
6 answering that question because she's a lay person.
7 She's not able to give a legal opinion, and so we would
8 object to that being admitted under those
9 circumstances.

10 Two, it just contains a tremendous amount of hearsay
11 and doesn't establish sufficient foundation. In
12 particular, in certain instances, it puts not
13 necessarily words, but actions of Kittrick Jeffries in
14 there that can be read multiple different ways
15 depending on the word choice that Ms. Shippy used.
16 She's not here to be cross-examined on that word
17 choice.

18 In the alternative, Your Honor, I do have an
19 affidavit that's responsive to that from Mr. Jeffries,
20 and, I suppose, before I leave here for the day, I
21 should probably offer that as well. So we would ask
22 that that be rejected as -- for the reasons stated in
23 that Motion to Strike.

24 THE COURT: All right.

25 MR. CWACH: Lastly, Your Honor, I just want to close.

1 In the extension denial letter that they provided, I
2 think this is kind of a telling -- the Department
3 denies it, and this is Exhibit 7 to my application, and
4 at the end it says that the decision made to use
5 limited labor resources towards cultivation and
6 manufacturing to have enough cannabis to supply all ten
7 dispensaries that Puffy's has a registration for, while
8 that may be an apposite business decision, it is
9 incompatible with the law.

10 One of the things South Dakota is known for is it
11 keeps the government out of business decisions. That's
12 something we use to try to attract people here. Here,
13 the Department even acknowledges that this may have
14 been a sound judgment decision by Puffy's to do what it
15 did to have enough supply of product to sell at its
16 stores in this new emerging industry, but because of
17 this extra judicial -- extra jurisdictional rule, we
18 are being denied the opportunity to exercise sound
19 business judgment over this business, and it's
20 hampering the development of the company and hampering
21 the development of the medical cannabis program in the
22 City of Rapid City which was overwhelmingly supported
23 by its residence.

24 For all these reasons, and additional reasons, I
25 would ask that the Court grant the Peremptory Writ.

1 This goes well beyond what the Department is authorized
2 to do. It should be struck down for that reason.

3 Puffy's has a valid license. There is no authority, no
4 case law, that allows him to do that. In other states,
5 Court's have held that once a license is issued it
6 can't be revoked for a technicality or for some sort of
7 error that was claimed. Those are cited in my brief.
8 A great one is that Mississippi case where he had a
9 license and the Court said the administrative rule goes
10 beyond what the statute authorizes.

11 For those reasons, Your Honor, I would ask that you
12 reject the Motion to Dismiss. This is jurisdiction.
13 And then you do have jurisdiction and then issue the
14 additional writ. Thank you.

15 THE COURT: Thank you. The State.

16 MS. LEE: Thank you, Your Honor.

17 In response, I guess, I will start off by saying that
18 what I am hearing is that Puffy's wants to challenge
19 the constitutionality of the promulgation rule and the
20 rules that were brought forth thereunder. I do not
21 think this is the proper place to do that. I think
22 there is a whole procedure that if the
23 constitutionality of something is going to be
24 challenged, the attorney general has to be notified and
25 there is a process to go through, so I think that that

1 is not a proper place or time right now to be
2 discussing whether promulgated rule is Constitutional
3 under a statute that authorized it.

4 With regard to the motions -- first of all, the
5 motion to strike, I want to object to that in its
6 entirety. It was not timely filed. Under 15-6-6 Sub
7 D, a motion has to be served not later than ten days
8 before the hearing, and as I stated prior, Your Honor,
9 this Motion to Strike was received on -- it was emailed
10 at 4:15 p.m. on Monday, September 25th. That is less
11 than -- it's less than a week but also it's only four
12 business days prior to the hearing, and under
13 15-6-6(a), if the time -- if a time period is less than
14 11 days, you do not include the weekends or holidays,
15 and that's why I say -- say it the way I did. That was
16 only four business days. And so it did not provide
17 ample time for service or an opportunity for the
18 Department to file an opposing affidavit or brief in
19 response to it.

20 The proper way to go about that if they wanted more
21 time would have been to file a motion under 15-6-6 Sub
22 B, Sub 2, and that did not occur, Your Honor, so the
23 Department is requesting that the Motion to Strike --
24 the Motion to Strike be excluded from consideration in
25 its entirety.

1 As far as the Motion to Dismiss, Your Honor, I will
2 rely mostly on the brief that's already been submitted
3 and the supporting affidavit that was with it. I will
4 just do a quick recap summarization of the points that
5 were raised in that brief, Your Honor, and there was
6 five separate topics addressed as to why the motion for
7 alternative writ should be denied at this point.

8 Number one being that they did not exhaust
9 administrative remedies. I believe that the State laws
10 are replete with the fact that before any judicial
11 review is ripe, that all administrative remedies have
12 to be exhausted and there has to be a final decision by
13 the department or the agency involved. That has not
14 occurred here.

15 As the Court is aware, because it's stated in the
16 brief, Your Honor, is that if there is an
17 administrative process underway --

18 THE COURT: What's the status of that currently?

19 MS. LEE: It is currently on hold until this gets
20 resolved here. So depending on what happens today,
21 that will move forward, Your Honor.

22 THE COURT: All right. I was just curious, I think
23 there was a date set for a hearing in August; that
24 didn't happen?

25 MS. LEE: That is correct.

1 THE COURT: Okay.

2 MS. LEE: Yeah, it was set for August 22nd and 23rd,
3 if I recall, and the administrative law judge has
4 continued it and has put it on hold, essentially. We
5 don't have a new date at this point. She just wants to
6 wait and see the outcome of today's hearing
7 essentially.

8 THE COURT: All right.

9 MS. LEE: So in addition to that having been
10 scheduled, Your Honor, discovery has occurred in the
11 administrative law proceeding. Interrogatories,
12 requests for production and admissions have been served
13 by both sides and answers provided. The exhibits have
14 been disclosed and the list of witnesses has been
15 disclosed and we've had a prehearing conference, which
16 I think at one time in the brief I called it a
17 preconference hearing. Sorry, I flipped those two
18 words, but that has already occurred, so that needs to
19 happen first because, number one, it's the
20 administrative process, and, number two, and just as
21 importantly, is it creates the record then. Before a
22 Circuit Court can make a decision there needs to be
23 some type of a record set from the lower process, and
24 that needs to happen administratively, so that's why we
25 believe that it's not yet ripe before this Court.

1 In addition, and this goes hand in hand with it, Your
2 Honor, is the separation of powers statement that is in
3 the brief under Article II of the South Dakota
4 Constitution, for one branch of government should not
5 encroach on the other. That the executive branch,
6 being the Department of Health, in this particular
7 instance, needs to complete its process, which is the
8 administrative contested case process before the second
9 branch, the judiciary, would even get involved here.

10 Thirdly, Your Honor, was the procedure used in -- in
11 filing for -- in filing the application for the
12 alternative writ was not proper in that there was not
13 an affidavit to support the application and the
14 applicable statute does state that an affidavit needs
15 to accompany it. That was addressed in my brief as
16 well, Your Honor. So I will not go into that in any
17 more detail.

18 But, also, the argument within that topic heading
19 that DOH does not fit the definition of a tribunal,
20 corporation, board, or person, which is what the
21 process in the alternative writ is used for.

22 And lastly, Your Honor, along that argument, that a
23 Writ of Prohibition is not only an extreme remedy, but
24 it is a preventive remedy and that the rule of the
25 Circuit Court in this process is for corrective

1 purposes and not preventative, so we feel that the writ
2 in and of itself is not proper process at this time,
3 Your Honor.

4 Fourth, is that there is an adequate remedy at law,
5 and this all relates back again to the administrative
6 process. The law is clear that that is the process to
7 go. The notice is clearly stated in -- it's either the
8 administrative rule or the statute, but it was in the
9 denial letter that went to the applicant here letting
10 them know, advising them that that was a final action,
11 and that they had rights to go forward under SDCL 1-26,
12 which is the contested case proceedings, and so there
13 is clearly an adequate remedy that is stated in the
14 law, and that has to be utilized, and because it
15 exists, the Writ of Prohibition is not even a proper
16 remedy at this point in time.

17 And the last argument made in the brief, Your Honor,
18 is that there was a failure to state a claim due to the
19 fact that the Department of Health -- Department of
20 Health was well within its authority and had the rule
21 of authority as well as the statutory authority to deny
22 an extension request. They acted well within that so
23 there is no claim even to be stated here, Your Honor.

24 I know a couple of times the applicant has made
25 reference to the fact that they invested \$3,000,000

1 into the community, but that is not even relevant for
2 purposes of this discussion.

3 But, furthermore, as they stated, they have a
4 cultivation facility, a manufacturing facility, and a
5 dispensary licenses for, I believe, it's a total of ten
6 or maybe the whole amount is ten, so that \$3,000,000 is
7 not relevant at all, but it also is not in particular
8 to just this position or this location at 910 Main
9 Street that we are talking about today.

10 I also want to point out that there are two separate
11 steps to go through with maintaining a registration
12 certification. When an entity is awarded one, they
13 have to do an annual renewal which is every year for as
14 long as they have that. In addition, comes into play
15 the 44:90:03:16 request for an extension, which is what
16 we are dealing with here.

17 Puffy's had filed the extension request not only for
18 this one, but for a total of five of their seven
19 locations in Rapid City. All of those have been
20 denied. All of those five were denied and are subject
21 to the administrative process right now with the ALJ
22 hearing.

23 So I just don't want there to be confusion that makes
24 it sounds like the State granted that and then pulled
25 it back because that's not what happened. There was a

1 -- if you will, a clerical error or an unintentional
2 awarding of that, but within 72 business hours, the
3 Department personnel caught that and then noticed it
4 out through the Accela program which is the same way
5 they were notified of it in the first place that, Hey,
6 this was issued incorrectly. It's now in a different
7 status. It's not granted to you.

8 So I feel like the applicant is trying to ignore that
9 fact, and I think it's a very important fact that they
10 took no action on it. They were notified within 72
11 business hours. It was from a Friday at noon to a
12 Wednesday morning was the time period, and they took no
13 action and tried to -- or they can't try to claim that
14 they relied on that notice from the start, Your Honor.

15 And, any way, the one that was accidentally issued
16 was the renewal certificate, and if you don't have the
17 granting of the extension request, the renewal one
18 means nothing. You have to have them both. They go
19 hand-in-hand. So they can't claim that they had the
20 right to go forward with it.

21 And the last motion that was -- or the last -- not
22 sure if it's a motion, Your Honor. I guess, maybe it
23 was an application for a Peremptory Writ, and we did
24 file objections to that, and just to sum it up and get
25 it on the record, Your Honor, they had filed the

1 Application For Peremptory Writ claiming that the
2 Department did not timely file an answer to that. I
3 have filed the objection showing that the Department
4 did. The time line was August 10th and the answers
5 were filed within that time frame.

6 Puffy's is trying to claim that the time line ran
7 from July 6th, but if you read the sheriff's return,
8 that is when it came into the sheriff's hand, and they
9 did not actually serve it until July 11th, which is
10 when the time frame starts to go from date of service.
11 So that is the summary of what that objection is all
12 about, Your Honor.

13 And so for all of those reasons, and for everything
14 else that was stated in the brief that has been on
15 file, Your Honor, we are asking that the Court would
16 dismiss the Application for Writ of Prohibition in this
17 case and send this back to the administrative level and
18 let that process complete.

19 Thank you.

20 THE COURT: Thank you.

21 Counsel, I'll give you -- we are running out of time
22 here. Very briefly, your response.

23 MR. CWACH: Yeah, I appreciate that. Real quick, I
24 do want to offer -- may I approach?

25 THE COURT: You may.

1 MR. CWACH: Would you please mark this as Exhibit 9.

2 (Plaintiff's Exhibit 9 marked for identification.)

3 MR. CWACH: Your Honor, Exhibit 9 is the affidavit of
4 Kittrick Jeffries. I was not planning to offer this
5 unless certain things came up. They did come up in the
6 argument relating to this Accela Program, and it's
7 responsive to Cody Shippy's affidavit, which I want to
8 spend most of my rebuttal addressing. So I would offer
9 Exhibit 9 at this time.

10 THE COURT: All right. Okay.

11 MS. LEE: Thank you, Your Honor. I object to that as
12 not being timely served. I've not even it at all prior
13 to just now, and under the statute it is not a timely
14 service at all.

15 THE COURT: I don't find it to be timely. I'm going
16 to make it part of the court file. I will not receive
17 it at this time, but I'll include it in the court file.

18 MR. CWACH: I appreciate it, Your Honor, and to that
19 point -- I mean, it's a piece of evidence here, and
20 should the Court find that there is some merit to Cody
21 Shippy's argument on this at this point, I think that
22 calls for an evidentiary hearing in that situation
23 because there are clearly discrepancy going on.

24 The thing I want to point out in rebuttal, Your
25 Honor, related to Ms. Shippy's affidavit. She talks a

1 lot about this program, this Accela program. They
2 provided, actually, no evidence here that, one, that
3 that's binding on Puffy's; two, that Puffy's actually
4 received notice of this quote, unquote, amendment, and
5 they have that in the affidavit to Cody Shippy. If you
6 look, I think it's Exhibit 7, 8, and 9. It is a --
7 which lacks foundation, by the way, but it is a
8 printout allegedly of their version of Accela which we
9 have no evidence that that is the same as what Puffy's
10 is, and I would submit as a user of Accela myself, it
11 is not what we see on this side of the -- of Accela,
12 and what it says there is that the certificate was sent
13 on all those exhibits. It says the certificate was
14 sent March 10th, 2023. There is a supposed amendment
15 attached to it that was made. There is no evidence
16 that we received -- received that evidence -- or
17 received that notice, and that's not what happened
18 here, and Mr. Jeffries's affidavit, specifically,
19 addresses that issue of -- we'll get notice when they
20 make a little amendment in Accela.

21 The other point I would point out is that Accela is
22 merely for convenience. When the Court reviews the
23 medical cannabis laws and the administrative rules,
24 there is no requirement that Accela is some kind of
25 legally binding program on people, and it's not. That

1 is the law, Section 56 and Section 57.

2 And then Section 8, dealing with revocation, is
3 actually what govern and that process is what governs.
4 Accela is a mere convenience of how stuff gets
5 submitted and how stuff gets issued, but the actual law
6 is what governs the decision making process here.
7 There is just no authority that the Department can
8 after issues of license, regardless of the time, just
9 change something in a computer program and suddenly a
10 license is revoked. That's not how it works under the
11 medical cannabis laws and administrative rules.

12 Briefly, I want to touch on the issue of
13 administrative remedies, and -- and so forth -- and the
14 Motion to Strike is not being timely. It's an
15 evidentiary objection. Had she offered it here I would
16 have made the same objections orally to you, and I
17 think the Court can consider those. They are
18 evidentiary objections dealing with foundation, legal
19 argument, hearsay. She just didn't offer it today --
20 or, excuse me, the Department didn't offer it today and
21 I didn't have an opportunity to orally make those
22 objections. And so I -- I think the Court can consider
23 that and should weigh that when it looks at the hearsay
24 raised affidavit of Cody Shippy.

25 Lastly, Your Honor, procedure was proper. We

1 submitted an application of an -- essentially, it has
2 all the requirements of an affidavit. It's sworn under
3 oath by me. I followed the same procedure that was
4 used by the Sioux Falls Argus Leader in their Supreme
5 Court case, and I think that's appropriate.

6 And just, lastly, on this issue of jurisdiction, what
7 the Department said is, You're supposed to be
8 corrective. A writ is prohibition. A Writ of
9 Prohibition is preventative.

10 Our entire argument is that they are beyond their
11 jurisdiction. Sections 56 and Sections 57 of the
12 medical cannabis law don't allow -- allow the
13 Department to do what it did with its administrative
14 rule. It goes well beyond. It creates a third
15 criteria for renewal.

16 They try and call it an extension request of the
17 previous license but there is nothing in the cannabis
18 law that talks about extending the license. They are
19 issued and then they are renewed. There is no
20 extension. It goes beyond that process. Their rule
21 goes beyond that process. So they -- the Department is
22 without jurisdiction to do what it did, and that's why
23 we are seeking this writ. It is preventative. We
24 don't have an adequate legal remedy at law, because if
25 we made this same argument to the Department of Health,

1 they would tell you -- they would tell us what they
2 just told the Court, we have the authority to do this
3 because we did it. Well, that's not an adequate legal
4 remedy for us to pursue.

5 The only appropriate legal remedy for us is this Writ
6 of Prohibition; that Puffy's should not be required to
7 defend a license that was already issued, has not been
8 suspended or revoked, and, further, only has this cloud
9 hanging over it because of an administrative rule that
10 goes well beyond what they are authorized to do in
11 statute, which is not a constitutional issue. It's
12 simply an issue of the way the Administrative
13 Procedures Act is supposed to work, and the Supreme
14 Court has been clear, if an administrative rule goes
15 beyond the law it is implementing, it is a nullity.

16 For that reason, we would ask that the writ be
17 issued.

18 Thank you.

19 THE COURT: Thanks.

20 All right. Having reviewed the submissions of
21 counsel, and having heard arguments today, the Court is
22 going to make a ruling from the bench here.

23 I appreciate all the arguments from the plaintiff's
24 in the manner seeking the application for the writ.
25 However, I do find that the State's argument regarding

1 the failure to exhaust administrative remedies to be
2 more persuasive at this point. I rely primarily upon
3 the case cited by the State in that Dollar Loan Center
4 versus the Department of Labor and Regulation. That
5 cite for that -- I just had it written down here.
6 920 N.W. 2d 321. I do find that to be substantially
7 similar. I know it's a different type of issue, but
8 the guidance regarding the administrative remedies, I
9 do think that there are -- those haven't been exhausted
10 at this point.

11 For that reason, I'm going to grant the Motion to
12 Dismiss filed by the State.

13 Now, you still have the administrative remedy at that
14 point and then you can appeal from that if you need be,
15 or I imagine you can appeal this if you wanted to as
16 well. I might be wrong. So I'll leave that; see how
17 you want to decide that.

18 I'm going to receive the Plaintiff's Exhibit 8. I
19 did not receive Exhibit 9, but I'll make this part of
20 the court file.

21 As far as the other motions and -- it kind of -- I'll
22 grant the State's Motion to Dismiss. It goes without
23 saying anything, I'm denying the Defendant's Motion for
24 the Application for Writ and denying the Motion to
25 Strike as untimely.

1 State is asked to prepare an order in that regard.

2 All right?

3 MS. LEE: Yes, Your Honor.

4 THE COURT: You can submit that electronically.

5 Any questions on either side?

6 MR. CWACH: No, Your Honor.

7 MS. LEE: None, Your Honor. Thank you.

8 THE COURT: Thank you.

9 (No further proceedings.)

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COURT REPORTER'S CERTIFICATE

I, Valarie M. O'Day, an Official Court Reporter and Notary Public in the State of South Dakota, Seventh Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings of the above-entitled matter and that the foregoing pages 1 through 36, inclusive, are a true and correct copy, to the best of my ability, of said proceedings made and taken.

Dated this 10th day of December, 2023, at Rapid City, South Dakota.

/s/ Valarie M. O'Day

Valarie M. O'Day
Official Court Reporter
My Commission Expires: 9/26/26

**SOUTH DAKOTA
MEDICAL CANNABIS ESTABLISHMENT LOTTERY PROCESS**

I. PURPOSE

The medical cannabis establishment lottery is to be held on an as needed basis, when deemed necessary by the South Dakota Department of Health (DOH). The medical cannabis establishment lottery will be deemed necessary in the event that a local jurisdiction has enacted a limit on the number of medical cannabis establishments in that jurisdiction, and the number of eligible medical cannabis establishment applicants exceeds the number permitted in that jurisdiction.

These lottery guidelines have been established to ensure that each medical cannabis establishment lottery is conducted in an impartial and transparent manner, and that the integrity of the South Dakota Lottery is maintained at all times.

The Department of Health reserves the right to change and supersede any outlined procedures to handle unforeseen circumstances.

II. NECESSITY OF A MEDICAL CANNABIS ESTABLISHMENT LOTTERY

- A. The medical cannabis establishment lottery will determine the medical cannabis establishment applicant(s) that will receive a medical cannabis establishment registration certificate. The number of applicants involved in the lottery and the number of applicants ultimately selected in each lottery will vary, due to the varying number of applicants in any given local jurisdiction and the local jurisdiction's local limit on the number of medical cannabis establishments.
- B. Prior to the determination of whether the medical cannabis establishment lottery is deemed necessary, the DOH will first score medical cannabis establishment applications pursuant to ARSD 44:90:03:15. The score assigned to each application will determine if the registration certificate(s) must be awarded pursuant to ARSD 44:90:03:16 (1), (2), and (3).
- C. Only in the circumstance that multiple medical cannabis establishment applicants tie for the highest score, as provided in ARSD 44:90:03:16 (4), shall the DOH deem the medical cannabis establishment lottery necessary.

III. LOTTERY DEEMED NECESSARY

- A. The DOH will designate the date and time of the lottery and will provide notice of the necessity of a lottery to the South Dakota Department of Revenue, Lottery Division (LOTTERY), the local jurisdiction affected by the lottery, any applicants' who will be included in the lottery, and any other interested persons at least seventy-two (72) hours prior to the time set for the lottery. DOH will provide for a



livestream of the lottery for public viewing and permit the public to attend the lottery in person if desired.

- B. The DOH will provide to LOTTERY each of the applicant business names and the number of permitted establishments per establishment type for the local jurisdiction. The procedures described below will be repeated if necessary/applicable for each establishment type that requires a lottery.
- C. The DOH will list the applicant business names in alphabetical order and assign a number to each applicant starting with 1 for the first applicant in alphabetical order and so forth until each applicant has been assigned a number.
- D. The LOTTERY random number generator will be used to generate a series of numbers using the same numbers that were assigned to the establishments.
- E. The establishment applicants will then be linked to the number that they were originally assigned, in the order that the numbers were generated. Registration certificates will be awarded to the establishments beginning on the left side of the array of numbers. Moving right, the limit established by the local jurisdiction will determine how many certificates are issued.

Example: There are 12 establishment applicants in a jurisdiction that allows 5 establishments. The random number generator produces the following sequence of numbers, from left to right: 7 4 12 3 9 10 2 5 6 1 8 11. The successful establishment applicants who will be awarded a registration certificate are the establishments previously assigned the numbers 7, 4, 12, 3, and 9. The remaining applicants will be placed on a waiting list for that jurisdiction and will be ranked in the following order: 10, 2, 5, 6, 1, 8, 11. The establishment applicant assigned number 10 will be first on the waiting list, and establishment 11 will be last on the waiting list.

IV. DRAWING PROCEDURES

- A. The LOTTERY Drawing Manager, Drawing Security Officer, and Drawing Auditor shall conduct the Medical Cannabis Establishment Lottery that includes all the eligible entries.
- B. The Drawing Manager, in the presence of the Drawing Security Officer and the Drawing Auditor, shall conduct the lottery using the following process:

- ☒ Check Seals on the RNG Draw Machine
- ☒ Boot up RNG Draw Machine

- ☒ Drawing Manager Logs in to RNG Draw Machine
- ☒ Enter Name of Drawing Security Manager
- ☒ Enter Drawing Parameters
- ☒ Enter Auditor Name
- ☒ Perform Self-Test on RNG Draw Machine
- ☒ Pick Draw
- ☐ Print Report
- ☐ Log off RNG Draw Machine

The Drawing Security Officer shall match the winning entries selected by the RNG to the entries' corresponding numbers from the alphabetized list of establishment applicants provided by DOH. The Drawing Security Officer shall then match the remaining establishment applicants to be used as a ranked waiting list for the respective jurisdiction's registration certificates.

- C. The Drawing Security Officer shall record the medical cannabis establishment applicants who will receive a registration certificate and the remaining ranked wait list onto an official results form, which will then be delivered to the DOH official in attendance immediately following the conclusion of the drawing. The DOH official will certify that the official results form is a true and accurate representation of the Medical Cannabis Establishment Lottery.

V. STORAGE, TRANSPORTATION AND SECURITY OF DRAWING EQUIPMENT

- A. When not in use, the drawing equipment shall be kept in a secured area.
- B. When not in the secured area, the drawing equipment shall be under the control of LOTTERY security personnel.
- C. Drawing equipment will be moved, serviced, or otherwise handled only by those persons authorized by the LOTTERY Director of Security and Video Lottery or designee.

***Approval of Entry and Drawing Guidelines for
Medical Cannabis Establishment Lottery***

I attest I have reviewed these Medical Cannabis Establishment Lottery guidelines and approve of their issuance as shown in this document.



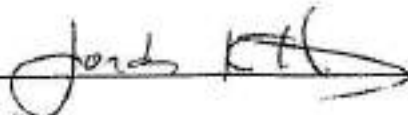
Geno Adams, Medical Cannabis Program Administrator
South Dakota Department of Health

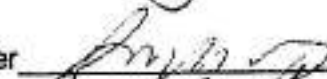
3-9-2022

Date

**Certification of Drawing Equipment for
Medical Cannabis Establishment Lottery**

I attest that I examined and tested the RNG thirty (30) minutes prior to commencement of the lottery and within thirty (30) minutes after the drawing and found the equipment to be in proper working order.

Drawing Security Officer  Date 3-9-22

Drawing Manager  Date 3-9-22

Drawing Auditor  Date 3-9-22

***Certification of Results for
Medical Cannabis Establishment Lottery***

Name of Local Jurisdiction: City of Rapid City

Type of Establishments in drawing: Dispensary

Number of Allowable Establishments in the Local Jurisdiction: 15

Total Number of Lottery Entries: 47

Assigned number (game spot associated with the dispensary, in alphabetical order):

Name	Address
1. 11 Leaf Dispensary, LLC	1616 Camden Dr.
2. Black Hills Cannabis Care	1810 Rand Rd
3. Black Hills Cannabis Care	1820 Rand Rd
4. Black Hills Cannabis Care	1820 Rand Rd Suite 2
5. Black Hills Cannabis Care	1820 Rand Rd Suite 1
6. Black Hills Cannabis Care	1810 RAND Rd Suite 1
7. CC Health	1624 Discovery Cir
8. CC Health	2421 Elderberry Blvd
9. Dakota Pharm	1440 Luna Ave
10. From The Hills	840 Timmons Blvd
11. Genesis Farms, LLC	601 Mountain View Rd
12. Genesis Farms, LLC	609 Mountain View Rd
13. Genesis Farms, LLC	615 Mountain View Rd
14. Genesis Farms, LLC	501 Deadwood Ave
15. Genesis Farms, LLC	3250 Eglin St
16. Genesis Farms, LLC	2205 N La Crosse St
17. Genesis Farms, LLC	3440 Universal Dr
18. Greenlight Dispensary	840 Timmons Blvd Suite 6
19. Greenlight Dispensary	840 Timmons Blvd Suite 6A
20. Greenlight Dispensary	840 Timmons Blvd Suite 7B
21. Greenlight Dispensary	840 Timmons Blvd Suite 7
22. Hive Collective LLC	918 E North St
23. Puffy's LLC	3310 Cambell St
24. Puffy's LLC	3308 Cambell St
25. Puffy's LLC	3324 Cambell St
26. Puffy's LLC	3316 Cambell St
27. Puffy's LLC	4025 Biernbaum Ln
28. Puffy's LLC	399 East Watts Ln Unit #11
29. Puffy's LLC	1935 Samco Rd
30. Puffy's LLC	902 E Main St
31. Puffy's LLC	1750 E North St
32. Puffy's LLC	1770 E North St
33. Puffy's LLC	2120 W Main St Unit 1
34. Puffy's LLC	2120 W Main St Unit 3
35. Puffy's LLC	2120 W Main St Unit 4
36. Puffy's LLC	2120 W Main St Unit 5
37. Puffy's LLC	4024 Biernbaum Ln Bldg AA
38. Puffy's LLC	4024 Biernbaum Ln Bldg A
39. Puffy's LLC	4024 Biernbaum Ln Bldg B
40. Puffy's LLC	4024 Biernbaum Ln Bldg C
41. Puffy's LLC	2020 Deadwood Ave Suite 105
42. Puffy's LLC	2020 Deadwood Ave Suite 104
43. Puffy's LLC	2020 Deadwood Ave Suite 103
44. Puffy's LLC	2460 Deadwood Ave
45. Puffy's LLC	1740 E North St
46. Rapid City Cannabis	3075 North Plaza Dr Unit B & C
47. Starbuds	1141 Deadwood Ave Suite 6

Ex. 4-07

The results of the Medical Cannabis Establishment Lottery conducted on March 9, 2022 is as follows:

<u>Order</u>	<u>Name of Establishment Applicant</u>
#1	25 Puffy's LLC 3324 Cambell St.
#2	39 Puffy's LLC 4024 Bierbaum Ln Bldg B
#3	38 Puffy's LLC 4024 Bierbaum Ln Bldg A
#4	46 Rapid City Cannabis 3075 N. Plaza Dr. Unit B & C
#5	12 Genesis Farms, LLC 609 Mountain View Rd
#6	34 Puffy's LLC 2120 W. Main St. Unit 3
#7	16 Genesis Farms, LLC 2205 N. La Crosse St.
#8	27 Puffy's LLC 3310 Cambell St.
#9	19 Greenlight Dispensary 840 Timmins Blvd Suite 6A
#10	22 Hive Collective LLC 918 E. North St.
#11	20 Greenlight Dispensary 840 Timmins Blvd Suite 7B
#12	30 Puffy's LLC 902 E. Main St.
#13	21 Green Light Dispensary 840 Timmins Blvd Suite 7
#14	27 Puffy's LLC 4025 Bierbaum Ln
#15	7 CC Health 1624 Discovery Circle
Alternate #1	24 Puffy's LLC 3308 Campbell St.
Alternate #2	17 Genesis Farms, LLC 3440 Universal Drive
Alternate #3	15 Genesis Farms, LLC 3250 Eglin St.
Alternate #4	9 Dakota Pharm 1440 Luna Ave.
Alternate #5	2 Black Hills Cannabis Care 1810 Rand Rd.
Alternate #6	45 Puffy's LLC 1740 E. North St.

Alternate #7	<u>33 Puffy's 2120 W. Main St. Unit 1</u>
Alternate #8	<u>13 Genesis Farms, LLC 615 Mountain View Rd</u>
Alternate #9	<u>26 Puffy's LLC 3316 Campbell St.</u>
Alternate #10	<u>28 Puffy's 399 East Watts Ln Unit #11</u>
Alternate #11	<u>47 Starbuds 1141 Deadwood Ave. Suite 6</u>
Alternate #12	<u>1 11 Leaf Dispensary, LLC 1616 Camden Dr.</u>
Alternate #13	<u>3 Black Hills Cannabis Care 1820 Rand Rd.</u>
Alternate #14	<u>6 Black Hills Cannabis Care 1810 Rand Rd. Suite 1</u>
Alternate #15	<u>36 Puffy's Puffy's 2120 W. Main St Unit 5</u>
Alternate #16	<u>43 Puffy's LLC 2020 Deadwood Ave. Suite 103</u>
Alternate #17	<u>32 Puffy's LLC 1770 E. North St.</u>
Alternate #18	<u>31 Puffy's LLC 1750 E. North St.</u>
Alternate #19	<u>10 From The Hills 840 Timmons BLVD</u>
Alternate #20	<u>40 Puffy's LLC 4024 Blernbaum Ln. Bldg C</u>
Alternate #21	<u>35 Puffy's 2120 W. Main St. Unit 4</u>
Alternate #22	<u>5 Black Hills Cannabis Care 1820 Rand Rd Suite 1</u>
Alternate #23	<u>44 Puffy's LLC 2460 Deadwood Ave</u>
Alternate #24	<u>29 Puffy's LLC 1935 Sanco Rd.</u>
Alternate #25	<u>41 Puffy's ^{LLC} Puffy's 2020 Deadwood Ave. Suite 105</u>
Alternate #26	<u>18 Greenlight Dispensary 840 Timmons Blvd Suite 6</u>
Alternate #27	<u>42 Puffy's LLC 2020 Deadwood Ave Suite 104</u>
Alternate #28	<u>14 Genesis Farms, LLC 501 Deadwood Ave.</u>
Alternate #29	<u>37 Puffy's LLC 4024 Brenbaum Ln Bldg AA</u>

Alternate #30

4 Black Hills Cannabis Care 1800 Rand Rd Suite 2
~~Black Hills Cannabis Care 1800 Rand Rd Suite 2~~ St. C. A.

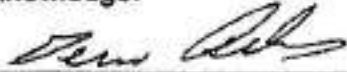
Alternate #31

11 Genesis Farms, LLC 601 Mountain View Rd

Alternate #32

8 CC Health 2421 Elderberry Blvd

I attest I personally witnessed the above-referenced Medical Cannabis Establishment Lottery and the results as described herein are true and accurate to the best of my knowledge.



Geno Adams, Medical Cannabis Program Administrator
South Dakota Department of Health

3-9-2022

Date

Rapid City Medical Cannabis Dispensary Lottery Draw | March 9, 2022



Order	Number Drawn	Name	Address
1	25	Puffy's LLC	3324 Cambell St
2	39	Puffy's LLC	4024 Biernbaum Ln Bldg B
3	38	Puffy's LLC	4024 Biernbaum Ln Bldg A
4	46	Rapid City Cannabis	3075 North Plaza Dr Unit B & C
5	12	Genesis Farms, LLC	609 Mountain View Rd
6	34	Puffy's LLC	2120 W Main St Unit 3
7	16	Genesis Farms, LLC	2205 N La Crosse St
8	23	Puffy's LLC	3310 Cambell St
9	19	Greenlight Dispensary	840 Timmons Blvd Suite 6A
10	22	Hive Collective LLC	918 E North St
11	20	Greenlight Dispensary	840 Timmons Blvd Suite 7B
12	30	Puffy's LLC	902 E Main St
13	21	Greenlight Dispensary	840 Timmons Blvd Suite 7
14	27	Puffy's LLC	4025 Biernbaum Ln
15	7	CC Health	1624 Discovery Cir
Alternate 1	24	Puffy's LLC	3308 Cambell St
Alternate 2	17	Genesis Farms, LLC	3440 Universal Dr
Alternate 3	15	Genesis Farms, LLC	3250 Eglin St
Alternate 4	9	Dakota Pharm	1440 Luna Ave
Alternate 5	2	Black Hills Cannabis Care	1810 Rand Rd
Alternate 6	45	Puffy's LLC	1740 E North St
Alternate 7	33	Puffy's LLC	2120 W Main St Unit 1
Alternate 8	13	Genesis Farms, LLC	615 Mountain View Rd
Alternate 9	26	Puffy's LLC	3316 Cambell St
Alternate 10	28	Puffy's LLC	399 East Watts Ln Unit #11
Alternate 11	47	Starbuds	1141 Deadwood Ave Suite 6
Alternate 12	1	11 Leaf Dispensary, LLC	1616 Camden Dr.
Alternate 13	3	Black Hills Cannabis Care	1820 Rand Rd
Alternate 14	6	Black Hills Cannabis Care	1810 RAND Rd Suite 1
Alternate 15	36	Puffy's LLC	2120 W Main St Unit 5
Alternate 16	43	Puffy's LLC	2020 Deadwood Ave Suite 103
Alternate 17	32	Puffy's LLC	1770 E North St
Alternate 18	31	Puffy's LLC	1750 E North St
Alternate 19	10	From The Hills	840 Timmons Blvd
Alternate 20	40	Puffy's LLC	4024 Biernbaum Ln Bldg C
Alternate 21	35	Puffy's LLC	2120 W Main St Unit 4

Ex. 4-11

Ex.4:11

Rapid City Medical Cannabis Dispensary Lottery Draw | March 9, 2022



Alternate 22	5	Black Hills Cannabis Care	1820 Rand Rd Suite 1
Alternate 23	44	Puffy's LLC	2460 Deadwood Ave
Alternate 24	29	Puffy's LLC	1935 Samco Rd
Alternate 25	41	Puffy's LLC	2020 Deadwood Ave Suite 105
Alternate 26	18	Greenlight Dispensary	840 Timmons Blvd Suite 6
Alternate 27	42	Puffy's LLC	2020 Deadwood Ave Suite 104
Alternate 28	14	Genesis Farms, LLC	501 Deadwood Ave
Alternate 29	37	Puffy's LLC	4024 Biernbaum Ln Bldg AA
Alternate 30	4	Black Hills Cannabis Care	1820 Rand Rd Suite 2
Alternate 31	11	Genesis Farms, LLC	601 Mountain View Rd
Alternate 32	8	CC Health	2421 Elderberry Blvd

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT
PUFFY'S, LLC, a South Dakota Limited Liability Company,		
Applicant,		51CIV23-000937
Vs.		AFFIDAVIT OF
STATE OF SOUTH DAKOTA, DEPARTMENT OF HEALTH,		RYAN CWACH
Respondent.		

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

COMES NOW, Ryan Cwach, after having been duly sworn upon oath, deposes and states as follows:

1. I am competent in all respects to testify regarding the matters set forth herein. I am over 18 years of age and have personal knowledge of the facts stated herein and know them to be true.
2. I am the attorney for the Applicant Puffy's, LLC.
3. The Department's Answers to Puffy's First Set of Interrogatories, Requests for Admissions, and Request for Production of Documents are attached and marked as Exhibit A.
4. I received Exhibit A on July 31, 2023 in an email from Tamara Lee to my email address ryan@birmcwachlaw.com. A copy of this email is attached and marked as Exhibit B.
5. An email communication between Department Attorney Tamara Lee and myself is attached as Exhibit C. These email communications occurred on September 05, 2023.
6. A copy of South Dakota Code Counsel September 27, 2022 Letter to the Department of Health with attachment is attached as Exhibit D. I obtained a copy of this public record from a State of South Dakota website, which shows the full history of the creation of the proposed rule. I last visited this website on October 25, 2023. The website is <https://rules.sd.gov/archivedetail.aspx?id=701>. The letter can be downloaded by clicking the link "LRC Letter – Recommended Edits."
7. A copy of the Department's August 18, 2023 letter notifying Puffy's LLC that it "may proceed with the application process for a lottery dispensary certificate" is attached as Exhibit E.

AFFIANT FURTHER SAYETH NOT.

Ex. 5-01



Executed this 26 day of October 2023.

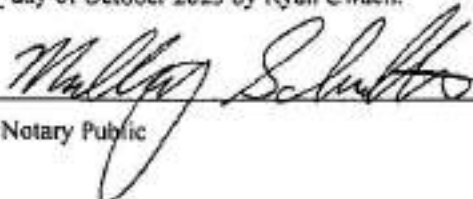
STATE OF SOUTH DAKOTA

COUNTY OF YANKTON

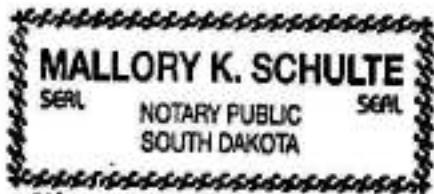


Ryan Cwach
)
:ss.
)

Subscribed and sworn before me on the 26 day of October 2023 by Ryan Cwach.



Notary Public



My commission expires 10-6-26

SOUTH DAKOTA DEPARTMENT OF HEALTH
through the
OFFICE OF HEARING EXAMINERS
BUREAU OF ADMINISTRATION
Pierre, South Dakota

IN THE MATTER OF THE DENIAL OF THE
REQUEST FOR EXTENSION OF PUFFY'S
REGISTRATION CERTIFICATIONS

DOH 23 - 08, 09, 10, 11, & 12

DEPARTMENT OF HEALTH'S
ANSWERS TO PUFFY'S FIRST SET
OF INTERROGATORIES, REQUESTS
FOR ADMISSIONS, AND REQUEST
FOR PRODUCTION OF DOCUMENTS

1. State the full name, present address, phone number, and occupation of all persons who answered or assisted in answering these Interrogatories, Requests for Admission, and Requests for Production.

ANSWER:

Tamara Lee
Attorney for Department of Health
600 E. Capitol Ave.
Pierre, SD 57501
(605) 773-3361

Cody Shippy
700 Governors Dr.
Pierre, SD 57501
Social Services Program Specialist I

2. Identify all persons whom you believe to have knowledge concerning the issues in Puffy's extension requests for certificate 22ESTC5635, 22ESTC9436, 22ESTC6030, 22ESTC5788, and 22ESTC0916.

ANSWER: Objection. This interrogatory is overly broad. Subject to and without waiving said objection, the Department responds as follows: Kittrick Jeffries, Ryan Cwach, Bailey Sahnaw, Chris Qualm, Melissa Johnson, Cody Shippy, Emily Raad, Jen Seale, Tamara Lee, Lynne Valenti.

3. What date was the South Dakota Medical Cannabis Program established within the South Dakota Department of Health?

ANSWER: Objection. This interrogatory seeks information that is equally available to the requesting party. Subject to and without waiving said objection, the Department responds as follows: see SDCL Chapter 34-20G

4. Since the establishment of the Medical Cannabis Program, please identify each person who has served as a program administrator, including the person's name, address, phone number, and length of service.



ANSWER: Objection. This interrogatory is irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objection, the Department responds as follows:

Geno Adams, 600 E. Capitol Ave., Pierre, SD 57501; (605) 773-3361; 07/24/21 – 08/23/22.

Chris Qualm, 2900 W. 11th St., Sioux Falls, SD 57104; (605) 773-3361; 10/09/22 – 02/23/23.

Jennifer Seale, 600 E. Capitol Ave., Pierre, SD 57501; (605) 773-3361; 03/21/23 – present.

5. Since the establishment of the Medical Cannabis Program, please identify each person who has served as a Secretary of Health, including the person's name, address, phone number, and length of service.

ANSWER: Objection. This interrogatory is irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objection, the Department responds as follows:

Kim Malsam-Rysdon, Department of Health, Pierre, SD 57501; 01/24/2015 – 01/07/2022

Joan Adam, Department of Health, Pierre, SD 57501; 03/24/2022 -12/23/2022

Melissa Magstadt, Department of Health, Pierre, SD 57501; 12/29/2022 -present

6. Did any of the persons identified in Interrogatory No. 4 and Interrogatory No. 5 have any prior experience or training for administering a medical cannabis program? If so, please identify each person and describe the prior experience or training.

ANSWER: Objection. This interrogatory is irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving said objection, the Department responds as follows: Geno Adams and Chris Qualm received training through CANNRA and METRC, and guidance from CCPC. It is unknown what other experience or training they, or any of the others listed above, had.

7. Did the Department review any of Puffy's initial applications for certificate registrations when reviewing any of Puffy's written documentation for any of its operational extension requests. If the Department's answer is yes, identify which material from the initial applications were considered.

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks and does not want to provide an answer based on a guess in determining what the requesting party is asking here.

8. Identify the persons in the Department who scored each medical cannabis establishment application for a dispensary only medical cannabis establishment certificate for the City of Rapid City jurisdiction.

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks. Subject to and without waiving said objection, the Department responds as follows: Geno Adam, Ali Schaeffbauer, Cody Shippy, Sakura Rohleder, and Morgan Maier.

9. What were the final scores for each of the 47 applications submitted for a dispensary only medical cannabis establishment certificate for the City of Rapid City jurisdiction?

ANSWER: All applicants received the same score under the scoring system established in ARSD 44:90:03:15.

10. Identify each medical cannabis establishment dispensary only certificate that was not operational by the certificate's one year anniversary regardless if S.D. Admin. R. 44:90:03:16 applied to such certificate.

ANSWER: Objection. This interrogatory requests information that is irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The question also asks for information deemed confidential under SDCL 34-20G-79, 34-20G-86, 34-20G-88.

11. Identify each medical cannabis establishment dispensary only certificate that was not operational by the certificates one year anniversary but was granted an extension by the Department under S.D. Admin. R. 44:90:03:16.

ANSWER: Objection. This interrogatory requests information that is irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The question also asks for information deemed confidential under SDCL 34-20G-79, 34-20G-86, 34-20G-88.

12. Identify all persons in the Department who have defined the term "operational."

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks. Subject to and without waiving said objection, the Department responds as follows: The term "operational" is defined by lexicographers and its definition depends on the context in which it is used. Nobody in the Department actually defines the term, they just apply the term to the application of the rule.

13. Identify all of the Department's past definitions and interpretations of operational?

ANSWER: See answer to Interrogatory No. 12.

14. What is the Department's current definition and interpretation of operational?

ANSWER: See answer to Interrogatory No. 12.

15. Did the Department provide the Department's definition and interpretation of operational in Interrogatory No. 14 to medical cannabis establishments? If yes, please identify when and how the definition and interpretation was provided to medical cannabis establishments?

ANSWER: See answer to Interrogatory No. 12. Subject to and without waiving the objection to this Interrogatory, the Department responds as follows: The Department disseminated information

about extension requests as a mass communication to all establishments that was sent via Accela. See, Exhibit 1.

16. Explain the Department's process for reviewing an operational extension request?

ANSWER: The Department reviews the application and any written documentation submitted with it.

a. Who reviewed the extension request?

ANSWER: Primarily, Cody Shippy reviewed the extensions requests and sometimes the Medical Cannabis Program team would review an extension request.

b. Who was the ultimate person responsible for denying Puffy's Operation Extension Request for certificate 22ESTC5635, 22ESTC9436, 22ESTC6030, 22ESTC5788, and 22ESTC0916?

ANSWER: There was not an "ultimate person". It was a team decision.

c. What, if any, criteria, check lists or rubrics were utilized when conducting a review for certificate 22ESTC5635, 22ESTC9436, 22ESTC6030, 22ESTC5788, and 22ESTC0916??

ANSWER: A checklist was utilized in reviewing all extension requests.

d. What, if any, facts is the Department looking for?

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks. Subject to and without waiving said objection, the Department responds as follows: The Department is looking for facts that would determine if the criteria set out in ARSD 44:90:03:16 are satisfied.

17. What, if any, weight was given to the shortage of skilled workers, contractors, and subcontractors in the City of Rapid City?

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks. Subject to and without waiving said objection, the Department responds as follows: all information submitted with an extension request was evaluated. In this particular situation, Puffy's made a business decision to focus on their cultivation and manufacturing establishments rather than their dispensaries.

18. How does the Department define secure?

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks. Subject to and without waiving said objection, the Department responds as follows: The term "secure" is defined by lexicographers and its definition depends on the context in which it is used. Nobody in the Department actually defines the term, they just apply the term to the application of the rule.

19. Please provide the authority that the Department may only review the applicant's efforts after March 10, 2022.

ANSWER: Objection. This interrogatory is vague and ambiguous. The Department is uncertain what information the requesting party seeks. Subject to and without waiving said objection, the Department responds as follows: the applicable rule states that an establishment has one year from the date of issuance of the registration certification to become operational. An establishment does not have any obligation to prove any progress towards becoming operational until their registration certification has been awarded; therefore, all action taken as of that date is what becomes relevant. If the establishment is in a stage of preparedness prior to being awarded its registration certification, by default that stage of preparedness will be factored in because it requires a lesser amount of work the establishment needs to do to become operational.

20. Please explain the difference between a site plan and a floor plan. See April 20, 2023 Operation Extension Request Denial Letter for No. 22ESTC5635, ¶4.

ANSWER: Objection. This interrogatory is vague and ambiguous. Subject to and without waiving said objection, the Department responds as follows: generally speaking, a site plan or a plot plan is a type of drawing used by architects, landscape architects, urban planners, and engineers which shows existing and proposed conditions for a given area, typically a parcel of land which is to be modified. And a floor plan is a technical drawing to scale, showing a view from above, of the relationships between rooms, spaces, traffic patterns, and other physical features at one level of a structure.

21. Does S.D. Admin. R. 44:90:03:16 require written documentation showing an estimated date of opening?

ANSWER: Objection. This interrogatory is argumentative. Subject to and without waiving said objection, the Department responds as follows: ARSD 44:90:03:16 does not specify, nor does it limit, the written documentation that must be submitted, reviewed, or requested when considering a request for extension.

22. Please explain how a photo constitutes written documentation under S.D. Admin. R. 44:90:03:16?

ANSWER: See answer to Interrogatory No. 21.

23. Identify all equipment and services that the Department contends are necessary to become operational under S.D. Admin. R. 44:90:03:16.

ANSWER: Objection. This interrogatory is argumentative. Subject to and without waiving said objection, the Department responds as follows: There is not a one-size-fits-all answer to this question, as it depends on the type of establishment involved and the status of the building structure that the establishment plans on operating from.

REQUESTS FOR ADMISSIONS

1. Admit that Puffy's timely submitted an operation extension request for certificate No. 22ESTC5635

RESPONSE: Admit

2. Admit that Puffy's timely submitted an operation extension request for certificate No. 22ESTC9436.

RESPONSE: Admit

3. Admit that Puffy's timely submitted an operation extension request for certificate No. 22ESTC6030.

RESPONSE: Admit

4. Admit that Puffy's timely submitted an operation extension request for certificate No. 22ESTC5788.

RESPONSE: Admit

5. Admit that Puffy's timely submitted an operation extension request for certificate No. 22ESTC0916.

RESPONSE: Admit

6. Admit that Puffy's provided a detailed timeline of its actions.

RESPONSE: Objection. This admission request is vague, ambiguous, and argumentative. It is unclear which of the Puffy's locations this question is referring to.

7. Admit that Puffy's written documentation shows Puffy's could not secure all necessary equipment and services before the deadline to become operational for certificate no. 22ESTC5635.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

8. Admit that Puffy's written documentation shows Puffy's could not secure all necessary equipment and services before the deadline to become operational for certificate no. 22ESTC9436.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

9. Admit that Puffy's written documentation shows Puffy's could not secure all necessary equipment and services before the deadline to become operational for certificate no. 22ESTC6030.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

10. Admit that Puffy's written documentation shows Puffy's could not secure all necessary equipment and services before the deadline to become operational for certificate no. 22ESTC5788.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

11. Admit that Puffy's written documentation shows Puffy's could not secure all necessary equipment and services before the deadline to become operational for certificate no. 22ESTC0916.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

12. Admit that the Department reviewed each of Puffy's operation extension requests individually, without regard to the fact that Puffy's has seven dispensary only medical cannabis establishment certificates in Rapid City and three dispensary only medical cannabis establishment certificates in other local jurisdictions.

RESPONSE: Admit, in part, and deny, in part. The Department treats each registration certificate as its own stand-alone establishment. In reviewing the extension requests, the Department was aware of the fact that Puffy's has multiple registration certificates.

13. Admit that the demand for contractors in the City of Rapid City and greater Black Hills region is greater than the supply.

RESPONSE: Objection. This admission request is irrelevant and argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

14. Admit that equipment, supplies, and services that are readily available are considered secured by the Department.

RESPONSE: Deny.

15. Admit that all Department issued dispensary only medical cannabis establishment certificates are alike in form and provide the same rights to each holder thereof.

RESPONSE: Objection. This admission request is vague and ambiguous. Subject to and without waiving said objection, the Department responds as follows: Admit.

16. Admit that there is no statute or administrative rule that defines the term "operational" in S.D. Admin. R. 44:90:03:16.

RESPONSE: Objection. This admission request is argumentative and disjunctive in that it asks if there is a statute within a rule. Subject to and without waiving said objection, the Department responds as follows: ARSD 44:90:03:16 does not define the term "operational".

17. Admit that there is no statute or administrative rule that defines the term "timely efforts" in S.D. Admin. R. 44:90:03:16.

RESPONSE: Objection. This admission request is argumentative and disjunctive in that it asks if there is a statute within a rule. Subject to and without waiving said objection, the Department responds as follows: ARSD 44:90:03:16 does not define the term "timely efforts".

18. Admit that there is no statute or administrative rule that defines the term "secure" in S.D. Admin. R. § 44:90:03:16.

RESPONSE: Objection. This admission request is argumentative and disjunctive in that it asks if there is a statute within a rule. Subject to and without waiving said objection, the Department responds as follows: ARSD 44:90:03:16 does not define the term "secure".

19. Admit that there is no statute or administrative rule that defines the term "equipment" in S.D. Admin. R.44:90:03:16.

RESPONSE: Objection. This admission request is argumentative and disjunctive in that it asks if there is a statute within a rule. Subject to and without waiving said objection, the Department responds as follows: ARSD 44:90:03:16 does not define the term "equipment".

20. Admit that there is no statute or administrative rule that defines the term "services" in S.D. Admin. R. 44:90:03:16.

RESPONSE: Objection. This admission request is argumentative and disjunctive in that it asks if there is a statute within a rule. Subject to and without waiving said objection, the Department responds as follows: ARSD 44:90:03:16 does not define the term "services".

21. Admit that it is a poor business decision to purchase or acquire certain necessary services and equipment when other certain necessary services and equipment cannot be purchased or acquired.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

22. Admit that labor for construction activities is a necessary service to be operational under S.D. Admin. R. 44:90:03:16.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

23. Admit that the delivery of cannabis or cannabis products is a necessary service to be operational under S.D. Admin. R. 44:90:03:16.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

24. Admit that the Department does not have the requisite expertise to determine which equipment and services are necessary to be an operational dispensary.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

25. Admit that S.D. Admin. R. 44:90:03:16 does not require the submission of a site plan.

RESPONSE: Objection. This interrogatory is argumentative. Subject to and without waiving said objection, the Department responds as follows: Admit, in part, and deny, in part. ARSD 44:90:03:16 does not specify, nor does it limit, the written documentation that must be submitted, reviewed, or requested when considering a request for extension.

26. For each location involved in this action, admit that Puffy's provided a site plan that was in compliance with S.D. Admin R. 44:90:03:05(2).

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Admit, in part, and deny, in part. Admit that an acceptable site plan was received at the time of the submission of the initial application. However, ARSD 44:90:03:05(2) applies to initial applications for registration certificates and ARSD 44:90:03:16 applies to requests for extension.

27. Admit that Puffy's has an operational dispensary in Sturgis and Meade County.

RESPONSE: Objection. This admission request is irrelevant and immaterial and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit, in part, and deny, in part. It appears from the information that is available to the Department that Puffy's has a dispensary in Sturgis, SD and one in Meade County, SD, and that both are open and operating. However, the Department has not inspected either of those physical locations, so it cannot say with certainty that either one is operational.

28. Admit that an affidavit is a form of written documentation.

RESPONSE: Objection. This admission request is irrelevant, immaterial, and argumentative. Subject to and without waiving said objection, the Department responds as follows: Admit that an affidavit is typically in the form of a written documentation.

29. Admit that South Dakota law allows for oral contracts and agreements.

RESPONSE: Objection. This admission request asks for a legal conclusion to be made by a lay person.

30. Admit that Puffy's had oral contracts with contractors, subcontractors, and suppliers to provide equipment and services necessary to become operational for all dispensary locations.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: The Department does not have sufficient evidence to be able to state that there are such contracts. Furthermore, not all of Puffy's dispensary locations are part of this litigation.

31. Admit that Puffy's contractors, subcontractors, and suppliers indicated to Puffy's that it was not possible to fully construct ten dispensaries simultaneously during Puffy's first certificate license year. See Attachments 2 & 3.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

32. Admit that a lack of cannabis and cannabis product caused delays in the construction timeline for Puffy's multiple dispensary only licenses. See Attachment 1.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

33. Admit that Puffy's has taken appropriate steps to secure sufficient quantities of cannabis and cannabis products for 10 dispensary locations. See Attachment 1.

RESPONSE: Objection. This admission request is irrelevant, immaterial, and argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny.

34. Admit that wait times for security-grade windows was 12-14 weeks. See Attachment 1.

RESPONSE: Objection. This admission request is irrelevant, immaterial, argumentative, vague, and ambiguous. It is unclear what is meant by the term "security-grade".

35. Admit that the wait times for packaging materials was approximately 14 weeks. See Attachment 1.

RESPONSE: Objection. This admission request is irrelevant, immaterial, argumentative, vague, and ambiguous. It is unclear what is meant by the term "packaging materials".

36. Admit the wait times for some of the critical path components was 50-60 weeks. See Attachment 2.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor asserts that the wait times for some of the critical path components was 50-60 weeks.

37. Admit that construction industry delays made forecasting specific project milestones difficult. See Attachment 2.

RESPONSE: Objection. This admission request is irrelevant, immaterial, and argumentative. Subject to and without waiving said objection, the Department responds as follows: Deny; the Department does not know what the requestor's meaning of "construction industry delays" is.

38. Admit that blueprints were being developed for Puffy's dispensary at 910 W. Main St. as of March 15, 2023. See Attachment 3.

RESPONSE: Objection. This admission request is argumentative. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor asserts that blueprints for Puffy's were worked on.

39. Admit that completing blueprints and attempting to construct seven dispensaries simultaneously is not practical. See Attachment 3.

RESPONSE: Objection. This admission request is argumentative and requests a lay person to give a professional opinion. Subject to and without waiving said objection, the Department responds as follows: Deny; the Department is not an engineer or architect.

40. Admit that the engineering for medical marijuana facilities in particular takes a long time. See Attachment 3.

RESPONSE: Objection. This admission request is argumentative and requests a lay person to give a professional opinion. Subject to and without waiving said objection, the Department responds as follows: Deny; the Department is not an engineer or architect.

41. Admit that conducting the engineering for projects in parallel would create more complications than working on one or two at a time. See Attachment 3.

RESPONSE: Objection. This admission request is argumentative and requests a lay person to give a professional opinion. Subject to and without waiving said objection, the Department responds as follows: Deny; the Department is not an engineer or architect.

42. Admit that there is a lack of available trades people in the Black Hills region. See Attachment 3.

RESPONSE: Objection. This admission request is argumentative and requests a lay person to give a professional opinion. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends there is a lack of trades people in the Black Hills area.

43. Admit that the failure of the state electrical inspector to timely inspect Puffy's Sturgis location prevented Puffy's contractor from starting work on other Puffy's dispensaries. See Attachment 4. See also Attachment 5.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends the state electrical inspector's failure to timely inspect Puffy's Sturgis location prevented the Puffy's contractor from starting work on other Puffy's dispensaries.

44. Admit that material purchase orders were ready but were not placed because final blueprints were not completed. See Attachment 4.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends that material purchase orders were ready but were not placed because final blueprints were not completed.

45. Admit that there were delays for hot water heaters, glass, and electrical supplies. See Attachment 4.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends there were delays for hot water heaters, glass, and electrical supplies.

46. Admit that weather caused delays to Puffy's projects and expanded timelines. See Attachment 4.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends that the weather caused delays to Puffy's projects and expanded timelines.

47. Admit that Puffy's contractors experienced delays and difficulties securing supplies for Puffy's projects. See Attachment 5.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends that Puffy's contractors experienced delays and difficulties securing supplies.

48. Admit that a labor shortage in the Black Hills prevented subcontractors from being able to quickly complete work on Puffy's projects. See Attachment 5.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends that a labor shortage in the Black Hills prevented subcontractors from being able to quickly complete work on Puffy's projects.

49. Admit that many of Puffy's subcontractors have re-scheduled because of delays such subcontractors were experiencing on other jobs. See Attachment 5.

RESPONSE: Objection. This admission request is argumentative and requires speculation. Subject to and without waiving said objection, the Department responds as follows: Admit only that the requestor contends that many of Puffy's subcontractors have re-scheduled because of delays they were experiencing on other jobs.

50. Admit that Puffy's projects experience delays in local government approvals dues to the nature of Puffy's projects. See Attachment 5.

RESPONSE: Objection. This admission request is convoluted and disjunctive in nature. The Department can neither admit nor deny this request because the Department does not understand what the request is stating.

51. Admit that Puffy's has engaged, either by written contract or oral contract, the 43 contractors, subcontractors, or other service providers, listed on Attachment 6 for all of its certificates.

RESPONSE: Objection. This admission request is argumentative and requires speculation. At the time of the request for extension, Puffy's did not provide the Department with documentation of written or oral contracts with all of the contractors listed on the referenced attachment, despite multiple requests to produce all relevant documentation of efforts.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please produce any and all documents identified in your answers to the above interrogatories or reviewed or relied upon in answering the above interrogatories.

ANSWER: Other than the Department's mass communication to establishments and checklist for extension requests, which are attached hereto as Exhibit 1 and Exhibit 2, all documents referred to in the answers have already been provided to Puffy's pursuant to the previous disclosure of evidence.

2. Please produce an organization charter for the Department's medical cannabis program.

ANSWER: Objection. This request is irrelevant and immaterial and is not likely to lead to the discovery of admissible evidence. Subject to and without waiving said objection, an organization chart is attached hereto as Exhibit 3.

3. Please provide a copy of each of the 47 applications submitted for a dispensary only medical cannabis establishment certificate in Rapid City.

ANSWER: Objection. This request for production is irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The question also asks for information deemed confidential under SDCL 34-20G-79, 34-20G-86, 34-20G-88.

4. Please provide any and all documents and communications surrounding the review of all Puffy extension requests.

ANSWER: Objection to the extent this requests attorney-client privileged documentation or communication. Without waiving said objection, the Department has provided all documents and communications to Ryan Cwach as part of the administrative discovery deadline.

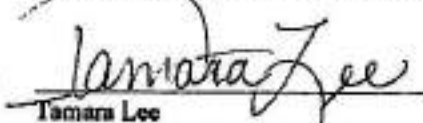
5. Please provide any and all copies of operation extension requests applications and supporting documentation that were granted to other medical cannabis establishment certificate holders.

ANSWER: Objection. This request for production is vague, ambiguous, irrelevant and immaterial to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. The question also asks for information deemed confidential under SDCL 34-20G-79, 34-20G-86, 34-20G-88.

The Department expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses or objections herein, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).

Dated this 28th day of July, 2023.

The undersigned hereby signs these answers and responses for the purposes of any objections made herein.

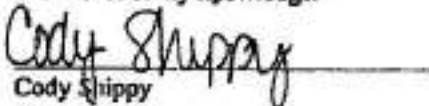


Tamara Lee

Attorney for the Department of Health, Medical Cannabis Program

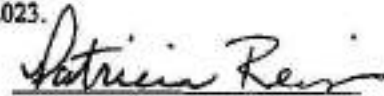
Dated this 31 day of July, 2023.

I, Cody Shippy, certify under penalty of perjury that I have read the Responses to Interrogatories, Requests for Admissions, and Requests for Production herein and that the facts as therein contained are true and correct to the best of my knowledge.



Cody Shippy

Subscribed and sworn to before me this 31 day of July, 2023.



Notary Public

(SEAL)

My Commission Expires:



From: Lee, Tamara Tamara.Lee@state.sd.us
Subject: DOH 23-0008, 09, 10, 11, & 12; Discovery
Date: July 31, 2023 at 2:12 PM
To: Ryan Gwach ryan@birmowachlaw.com



Attached are the Department's responses to Pully's discovery requests.



TAMARA L. LEE
Staff Attorney | Division of Licensure and Accreditation
SOUTH DAKOTA DEPARTMENT OF HEALTH
605.775.3551 600 E. Capitol Ave, Pierre
South Dakota Department of Health

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ANSWERS TO
DISCOVERY.pdf

Ex. 5-16



From: Lee, Tamara <Tamara.Lee@state.sd.us>
Subject: RE: Writ of Mandamus
Date: September 5, 2023 at 1:54 PM
To: Ryan Cwach <ryan@birmcwalaw.com>
Cc: Valenti, Lynne <Lynne.Valenti@state.sd.us>



I appreciate the effort to revise it, but I will not sign off on paragraph #4 (and language in some of the others) and still feel that #6 gives too much leeway. As I've said, the Department will give Puffy's the opportunity to apply for the certificate from the city and obtain the Form E, but will not hold that application indefinitely. Others are waiting in line, so Puffy's needs to apply as soon as the city opens up the application process. Also, since I've not yet filed an appearance, I do not want to sign off on a stipulation that would then require me to file an appearance. Puffy's can dismiss the action on its own due to the fact that the Department has given them the notice and is working with them on the application process.



TAMARA D. LEE
Staff Attorney | Division of Licensure and Accreditation
SOUTH DAKOTA DEPARTMENT OF HEALTH
605.778.3363 | 600 E Capitol Ave, Pierre, SD 57501
Email: Tamara.Lee@state.sd.us

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From: Ryan Cwach <ryan@birmcwalaw.com>
Sent: Tuesday, September 5, 2023 1:34 PM
To: Lee, Tamara <Tamara.Lee@state.sd.us>
Cc: Valenti, Lynne <Lynne.Valenti@state.sd.us>
Subject: Re: [EXT] Writ of Mandamus

Tamara,

I thought paragraph 6 was clear that it is only the reasonable opportunity that we are asking for. I also added that Puffy's has to move promptly to get a local license when it becomes available. I added a new paragraph 7. How is this?

There is nothing in law or rule about how this licensure process works in this situation, so the added clarity of the stipulation is beneficial to all parties involved. I'm frustrated, as I am sure that you are, that the City is choosing to let this essentially linger for several months.

Very Truly,

Ryan D. Cwach
Birmingham & Cwach Law Office, Prof. LLC
ryan@birmcwalaw.com
202 W. 2nd St.
Sioux Falls, SD 57107
605-260-4747

This message is protected by 18 USC Sec. 2510-21. Unauthorized usage is subject to statutory sanctions.

On Sep 5, 2023, at 12:51 PM, Lee, Tamara <Tamara.Lee@state.sd.us> wrote:

Ryan,

I am not comfortable signing the proposed stipulation because the state cannot guarantee what the city of Rapid City will do with the certifications and/or applications in January. The state has no authority over how local jurisdictions determine how or to whom they grant certifications. At the most, I will tell you that the state will hold onto Puffy's application until January (giving Puffy's time to submit the application to Rapid City) and if the city grants the application then and provides a Form E, the state will accept that as part of Puffy's state application. However, the state cannot make any promises that Puffy's will receive a Form E from the city of Rapid City, nor will the state hold on to the application indefinitely. If you will file a dismissal based on the letterhead from the state expressing the above, let me know; otherwise, I will be filing a motion to dismiss the alternative writ.

[image001.png](#)

TAMARA D. LEE
Staff Attorney | Division of Licensure and Accreditation
SOUTH DAKOTA DEPARTMENT OF HEALTH
605.778.3363 | 600 E Capitol Ave, Pierre, SD 57501
[image002.jpg](#) [image003.jpg](#) [image004.jpg](#)

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Ex. 5-17

From: Ryan Cwach <ryan@birminghamlaw.com>
Sent: Tuesday, September 5, 2023 11:38 AM
To: Lee, Tamara <Tamara.Lee@state.sd.us>
Subject: Re: [KCT] Writ of Mandamus

Tamara,

Here is a proposed stipulation and dismissal for your review. If this is agreeable with you, I will file immediately.

Very Truly,

Ryan D. Cwach
Birmingham & Cwach Law Office, Prol. LLC
ryan@birminghamlaw.com
202 W. 2nd St.
Yankton, SD 57078
605-260-4747

This message is protected by 28 USC Sec. 2510-21. Unauthorized usage is subject to statutory sanctions.

On Sep 5, 2023, at 9:52 AM, Lee, Tamara <Tamara.Lee@state.sd.us> wrote:

I'll call you a little after 10:00 am.

From: Lee, Tamara Tamara.Lee@state.sd.us
Subject: RE: Writ of Mandamus
Date: September 5, 2023 at 12:51 PM
To: Ryan Cwach ryan@birmcwalaw.com
Cc: Valenti, Lynne Lynne.Valenti@state.sd.us



Ryan,

I am not comfortable signing the proposed stipulation because the state cannot guarantee what the city of Rapid City will do with the certificates and/or applications in January. The state has no authority over how local jurisdictions determine how or to whom they grant certifications. At the most, I will tell you that the state will hold onto Puffy's application until January (giving Puffy's time to submit the application to Rapid City) and if the city grants the application then and provides a Form E, the state will accept that as part of Puffy's state application. However, the state cannot make any promises that Puffy's will receive a Form E from the city of Rapid City, nor will the state hold on to the application indefinitely. If you will file a dismissal based on the letterhead from the state expressing the above, let me know; otherwise, I will be filing a motion to dismiss the alternative writ.



TAMARA D. LEE
Staff Attorney | Division of Licensure and Accreditation
SOUTH DAKOTA DEPARTMENT OF HEALTH
605.773.3363 | 600 E Capitol Ave, Pierre, SD 57501
Email: Tamara.Lee@state.sd.us

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From: Ryan Cwach <ryan@birmcwalaw.com>
Sent: Tuesday, September 5, 2023 11:38 AM
To: Lee, Tamara <Tamara.Lee@state.sd.us>
Subject: Re: [EXT] Writ of Mandamus

Tamara,

Here is a proposed stipulation and dismissal for your review. If this is agreeable with you, I will file immediately.

Very Truly,

Ryan D. Cwach
Birmingham & Cwach Law Office, Prof. LLC
ryan@birmcwalaw.com
202 W. 2nd St.
Yankton, SD 57078
605-260-4747

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On Sep 5, 2023, at 9:52 AM, Lee, Tamara <Tamara.Lee@state.sd.us> wrote:

I'll call you a little after 10:00 am.

PRESIDENT PRO TEMPORE LEE SCHWENK, CHAIR | SPEAKER SPENCER GOSCH, VICE CHAIR
REED HOLMSEN, DIRECTOR | SUE OCHOA, DEPUTY DIRECTOR | JUSTIN GOETZ, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | info@legislature.gov



September 27, 2022

Ms. Doreen Kayser
Department of Health
600 East Capitol Avenue
Pierre, South Dakota 57501

Dear Ms. Kayser:

The Legislative Research Council received proposed rules from the Department of Health on September 9, 2022. In accordance with SDCL 1-26-6.5, the Council reviewed the proposed rules for form, style, clarity, and legality, and now returns them with recommended corrections.

Please find attached:

- Proposed Rules Review Research and Fiscal Checklists;
- The proposed rules with recommended form, style, and clarity corrections;
- Directions for Submitting the Final Draft of the Rules; and
- The Interim Rules Review Committee Rules Presentation Format.

In addition to the recommended corrections to form, style, and clarity included in the proposed rules, the Council identifies the following issues regarding legality:

- ARSD 44:90:03:16 proposes to allow the Department to extend the validity of a registration certificate of an establishment that is unable to become operational within one year of receiving a certificate. The General Authority citation only provides that the Department promulgate rules to "[establish] a system to numerically score competing medical cannabis establishment applicants, in cases where more applicants apply than are allowed by the local government". The citation does not provide authority that goes beyond establishing the scoring system for competitive applications and the factors the system must analyze. Moreover, the provided citation does not appear to authorize the Department to establish an expiration for a registration certificate, including consideration for whether the establishment is "operational" or not. Statute instead appears to envision the Department's ability to suspend or revoke based on negligent or knowing violations. See SDCL 34-20G-80. The extension of a registration certificate also appears to conflict with ARSD 44:90:03:02 that a renewal application for a registration certificate is required every twelve months.
- ARSD 44:90:13:02 states that "[a] qualifying medical condition shall be recognized through rules promulgated by the department pursuant to chapter 1-26." A rule cannot provide the authority for promulgating additional rules. Language is proposed to address this concern. Additionally, the cited General Authority and Law Implemented statutes direct the Department to promulgate rules including public notice and hearing for the opportunity to comment on a petition to add a medical condition. Neither section in chapter 44:90:13 lays out that process. While the current reference to recognize a condition through the rule-making process is perhaps intended to satisfy the opportunity for public participation, the statutes clearly indicate that the Department is to promulgate rules including public notice and opportunity to comment on the petition before the Department approves or denies it. The current rule only provides for any possible public comment after the petition is approved by the department. It would therefore appear that more provisions are needed regarding the procedure to recognize debilitating medical conditions.

Ex. 5-20



Under SDCL 1-26-4(4), the Department is required to adopt the recommended corrections, subject to an appeal to the Interim Rules Review Committee for the Committee's final determination.

Please do not hesitate to contact me if you have any questions or if you would like to discuss any of the recommendations.

Sincerely,



Justin J. Goetz
Code Counsel

Enclosures

CC: Joan Adam, Secretary, Department of Health

**Legislative Research Council
Proposed Rules Research Review Checklist**

Date Proposed Rules Received by LRC:	September 9, 2022
Date Public Hearing Scheduled:	October 11, 2022
Proposed Rules Reviewed by:	Anna Madsen
Fiscal Note Reviewed by:	Joey Knofczynski

No agency rule may be enforced by the courts of this state until it has been adopted in conformance with the procedures set forth in this chapter. (SDCL 1-26-6.8)

Staff:

Please review the proposed rules and supporting documents and submit them with this completed checklist to the Code Counsel within ten business days from the date the proposed rules are received by the LRC.

KEY			
ENTRY: MEANING:	"[Initials]" Reviewed by	"N/A" Not applicable	"[Initials]" Edit Recommended or Issue
1. Verify the rules packet includes (SDCL 1-26-4(2)):			
a. The proposed rules:			AM
i. Any incorporated material:			N/A
b. Notice of hearing (Form 6):			AM
2. Verify all documents have correct citations to the proposed rules provided in the packet.			AM
3. Verify the appropriate departmental secretary, bureau commissioner, public utilities commissioner, or constitutional officer approved the rules process to proceed. (SDCL 1-26-4(1))			AM
4. If the Department of Social Services is promulgating rules that are mandated by federal statute or regulation, use the DSS Federal Regulations Checklist.			
5. Review proposed rules for:			
a. Form, style, and clarity in accordance with the Administrative Rules Drafting Manual (including all existing language, not just amended language).			AM*
i. Verify the most recent rule is used. (Manual, pg. 5)			AM
ii. Verify all cross-references in text are current. (Manual, pg. 6)			AM
iii. Verify all affected sections are included. For repealed sections, verify all affected sections are amended. (Manual, pg. 6)			AM
iv. Verify any renumbering of rules is consistent with Administrative Rules Drafting Manual. (Manual, pg. 7)			AM

b. Legality, including:

- | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| i. Verify the General Authority statute provides rule-making authority (i.e., "... shall/may promulgate rules to ..."). (<u>Manual</u> , pg. 8) | AM* |
| ii. Verify the Law Implemented statute identifies the policy intended to be implemented. (<u>Manual</u> , pg. 8) | AM* |
| iii. If the proposed rule incorporates material by reference, verify the rule describes the exact section or portion of the material. (<u>SDCL 1-26-6.6</u> ; <u>Manual</u> , pg. 11) | N/A |
| For incorporated material that is not CFR, USC, Fed. Reg., Stat.: | |
| 1. Verify the proposed rule includes a reference note identifying the publication by title, date of publication, author, version/edition and where and at what cost the publication may be obtained. | N/A |
| 2. Verify there is a statement attached to the material that includes the agency's name, the section number of the rule that incorporates the material, and the date the proposed rule was served on the LRC. | N/A |
| iv. Verify the proposed rule does not incorporate or reiterate any statutory language other than definitions, and that the agency is not publishing or distributing statutory material. (<u>SDCL 1-26-6.1</u>) | AM |
| v. Verify the proposed rule does not restrict any right or privilege to carry or possess a concealed pistol under SDCL chapter 23-7. (<u>SDCL 1-26-6.10</u>) | AM |
| vi. Verify the agency does not delegate authority to a private association. (S.D. Const. art. III, §§ 23(9), 26) | AM |
| vii. Verify the rule does not allow the agency to circumvent the SDCL ch. 1-26 rulemaking process (e.g., authorizing it to make its own rules). (See <u>SDCL 1-26-4</u> , <u>1-26-6.5</u> , <u>1-26-6.6</u> , <u>1-26-38(2)</u>) | AM* |
| viii. Verify the rule does not contain the agency's internal processes or policy (e.g., personnel policies) or other matter that is not defined as a rule per <u>SDCL 1-26-1(8)</u> . | AM |
| ix. Verify the rule does not incorporate a future rule or regulation, or incorporate future amendments to an existing rule or regulation, of another state or the federal government. (<u>State v. Johnson</u> , 84 S.D. 556, 173 N.W.2d 894 (1970)) | AM |
| x. Verify only the rules being changed are included in the packet and that chapter indexes are updated as needed. (<u>Manual</u> , pg. 8) | AM |

6. Review Notice of Public Hearing (SDCL 1-26-4.1):

- | | |
|-------------------------------------------------------------------------------------------------------|----|
| a. Verify the LRC received the proposed rules at least 20 days prior to the scheduled public hearing. | AM |
|-------------------------------------------------------------------------------------------------------|----|

b. Verify the notice contains a narrative description of the effect of the proposed rule.	AM
c. Verify the notice contains the reason for adopting the proposed rule.	AM
d. Verify the notice contains the location, date, and time (Central or Mountain) of the hearing.	AM
e. Verify the notice contains information about how amendments, data, opinions, and arguments may be presented.	AM
f. Verify the notice contains a deadline for submission of comments.	AM
i. If the authority promulgating the rule is a secretary, commissioner, or officer, ensure the deadline is ten days after the public hearing. (SDCL 1-26-4(6))	AM
ii. If the authority promulgating the rule is a part-time citizen board, Commission, committee, or task force, ensure the deadline is at least 72 hours before the public hearing (not including hearing day). (SDCL 1-26-4(6)).	N/A
g. Verify the notice contains information for how the public may obtain copies of the proposed rules.	AM
7. For any proposed rule regarding professional or regulatory examination or licensing that is to be published in pamphlet form, review the pamphlet for style, form, and clarity in accordance with the Administrative Rules Drafting Manual. (SDCL 1-26-11)	AM

Reviewed by Code Counsel on 9/27/2022

**Legislative Research Council
Proposed Rules Fiscal Note Review Checklist**

Date Proposed Rules Received by LRC:	September 9, 2022
Date Public Hearing Scheduled:	October 11, 2022
Proposed Rules Reviewed by:	Anna Madsen
Fiscal Note Reviewed by:	Joey Knolczynski

"No agency rule may be enforced by the courts of this state until it has been adopted in conformance with the procedures set forth in this chapter." (SDCL 1-26-6.8)

Staff:

Please review the proposed rules and supporting documents and submit them with this completed checklist to the Code Counsel within ten business days from the date the proposed rules are received by the LRC.

KEY			
ENTRY:	"[Initials]" Reviewed by	"N/A" Not applicable	"[Initials]"* Edit Recommended or Issue
1. Verify the rules packet includes (SDCL 1-26-4(2)):			
a. Fiscal note (Form 5):			JPK
b. Small business impact statement (Form 14):			JPK
c. Housing Cost Impact Statement (Form 16), if applicable:			N/A
2. Review proposed rules for:			
i. If the rule increases a fee, verify the agency provided information regarding financial resources available to the agency: beginning fund balance, receipts, disbursements, and ending fund balance for each of the last two fiscal years, as well as beginning fund balance, projected receipts, projected disbursements, and ending balance for current and next fiscal years. (SDCL 1-26-4.8)			N/A
ii. If the rule increases a fee by a licensing board or commission, verify the fee increase is "reasonable and necessary" in accordance with SDCL 1-26-6.9.			N/A
3. Review the Fiscal Note (SDCL 1-26-4.2):			
a. Verify the Fiscal Note states whether the proposed rule will have any effect on the revenues, expenditures, or fiscal liability of the state, agencies, and subdivisions:			JPK
i. If there is an effect, verify the Fiscal Note includes an explanation of how the effect was computed?			N/A
ii. If there is an effect on subdivisions, is that effect described?			N/A

4. Review Small Business Impact Statement (SDCL 1-26-2.1):

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| a. Verify if the rule change has any small business impact based on readily available info; | JPK |
| i. If only INDIRECT, verify that a brief description of the impact is included. | N/A |
| ii. If DIRECT, review 4.b through 4.h: | |
| b. Verify the Impact Statement includes a narrative explanation in plain, easy-to-read language. | JPK |
| c. Verify the narrative explanation discusses the effect of the proposed rule on small business, including the basis for the rule's enactment and why the rule is needed. | JPK |
| d. Verify the narrative explanation includes an identification and estimated number of small businesses subject to the proposed rule. | JPK |
| e. Verify the Impact Statement includes the projected reporting and record-keeping required for compliance with the proposed rule. | JPK |
| f. Verify the Impact Statement includes the types of professional skills necessary for preparation of required reports or records. | JPK |
| g. Verify the Impact Statement includes a statement of the probable effect on impacted small business. | JPK |
| h. Verify the Impact Statement includes a description of any less intrusive or less costly alternative methods of achieving the proposed rule's purpose. | JPK |

5. Review Housing Cost Impact Statement (SDCL 1-26-2.3), if applicable:

- | | |
|------------------------------------------------------------------------------------------------------------------------------|-----|
| a. Verify that the agency has indicated what building sectors will be impacted by the rule change. | N/A |
| b. Verify a description of and explanation of necessity for each each standard and requirement is included. | N/A |
| c. Verify the statement includes the average estimated cost of each standard and requirement. | N/A |
| d. Verify that contact and estimate information is included for three licensed contractors or building trades professionals. | N/A |

Reviewed by Code Counsel on 9/27/2022

Style and Form

I

**CHAPTER 44:90:03
REGISTRATION CERTIFICATES**

Section

- 44:90:03:01 Initial application for registration certificate.
- 44:90:03:02 Certificate renewal -- Application.
- 44:90:03:03 Certificate location transfer -- Application.
- 44:90:03:04 Transfer of ownership.
- 44:90:03:05 Operating procedures -- Required contents -- All medical cannabis establishments.
- 44:90:03:06 Cannabis cultivation facility operating procedures -- Additional requirements.
- 44:90:03:07 Cannabis testing facility operating procedures -- Additional requirements.
- 44:90:03:08 Cannabis product manufacturing facility operating procedures -- Additional requirements.
- 44:90:03:09 Cannabis dispensary operating procedures -- Additional requirements.
- 44:90:03:10 Compliance with local zoning requirements -- Form of certification.
- 44:90:03:11 Local registration, license, or permit -- Department verification.
- 44:90:03:12 Deadline to submit initial applications for establishments.
- 44:90:03:13 No registration certificate revocation -- Department verification.
- 44:90:03:14 No disqualifying felonies -- Form of certification.
- 44:90:03:15 Department review of competitive applications -- Scoring criteria.
- 44:90:03:16 Department awarding of certification -- Tiebreaking procedures -- Notice to unsuccessful applicants.

Ex. 5-27

44:90:03:17 Fees for registration certificate -- Application and renewal.

44:90:03:16. Department awarding of certification -- Tiebreaking procedures -- Notice to unsuccessful applicants. The department shall award certification as follows:

(1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate:

(2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;

(3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type.

(4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants will must be ranked via the lottery system to establish the order and establish a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and will may be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, then it the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. Such The written documentation should

must include the steps action taken by the establishment to secure equipment and services necessary to become operational, as well as until the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the certificate-holder's establishment's documented timely efforts to procure all necessary equipment and services, ~~within equipment or work necessary to operate will not be available or complete~~ the establishment is unable to become operational by the one-year anniversary of the date of award certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension will be for one additional year from the date of expiration of the certificate, meaning the establishment must become operational within two years of the date of the initial award of certificate. No further extensions will may be granted.

Commented [AM2]: Clarify: "Timely" could be subjective.

Commented [AM3]: Clarify: Does this need to be further defined?

Commented [J24]: Clarify: Should this be "up to one year"? Otherwise the rule reads that all extensions must be one year.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(3).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

CHAPTER 44:90:04

ESTABLISHMENTS

Section

44:90:04:01 Change in management -- Day to report.

44:90:04:02 Corrective and preventive action -- Written procedures.

44:90:04:03 Duty to report criminal activity to department and law enforcement.

44:90:04:04 Co-location of medical cannabis establishments.

44:90:04:05 Lighting.

44:90:04:06 Doors and windows.

44:90:04:07 Placement of security cameras.

44:90:04:08 Recording by security cameras -- Access by department.

44:90:04:09 Storage of camera footage.

44:90:04:10 Alarm system.

44:90:04:11 Agent identification badges to be provided by establishments.

44:90:04:12 Agent identification badges to be displayed.

44:90:04:13 Controlled access -- Verification of identity.

44:90:04:14 Visitor badges to be worn by contractors performing work at a medical cannabis establishment.

44:90:04:15 Operation of agricultural, industrial, or other heavy equipment -- Training requirements.

44:90:04:16 Record-keeping -- Use of inventory tracking system -- Training requirements.

44:90:04:17 Security protocols -- Training requirements.

44:90:04:18 Vehicle requirements -- Establishments.

44:90:04:19 Transport manifests -- Form and content.

44:90:04:20 Separate transport manifest required.

44:90:04:21 Storage during transport.

44:90:04:22 Conduct during transport.

44:90:04:23 Transport incident notification.

44:90:04:24 Health and safety standards for storage.

44:90:04:25 Transportation to the Public Health Laboratory.

Commented [J05]: There is no period after the clause in the index. Only in the statute. See Manual, pgs. 23-28, 28.

44:90:04:11. Agent identification badges to be provided by establishments. A medical cannabis establishment shall provide an agent identification badge to each agent. The establishment shall include on the badge:

(1) The agent's photograph that meets the requirements of § subdivision 44:90:02-04(3), except that the photograph may be as small as 2 1/8 seven-eighths inch by one and five-thirty-seconds inches; and

Commented [J06]: See: Manual, pgs. 18, 19 - fractions are spelled out.

(2) In a plain black font not less than 24 sixteen point:

(a) The first and last name of the agent; and

(b) The name of the establishment.

Commented [J07]: Clarity. Shouldn't this be singular?

Each agent shall display this badge whenever on the premises of the establishment or transporting cannabis or cannabis products.

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-1(2)(5)(g).

Law Implemented: SDCL 34-20G-72(5).

44:90:04:25 Transportation to the Public Health Laboratory. A medical cannabis testing facility that is directed by the department to transfer cannabis to the Public Health Laboratory for testing pursuant to § 44:90:06-08 may transport the cannabis by use of a courier service designated by the Public Health Laboratory in tamper-resistant packaging, or as

Commented [J08]: Clarity: Does it make more sense to add this section to chapter 44:90:00 since it only pertains to testing facilities, and then cross-reference the applicable transportation rule sections that are exempted below?

Commented [J09]: Agreed that this makes more sense.

Commented [J10]: Clarity: SDCL 34-20G-1(2) defines "cannabis testing facility" or "testing facility".

Commented [J11]: Clarity: Is there a need to define this term, or alternatively, should the proper name be used - "South Dakota Public Health Laboratory." There is a "Public Health Laboratory" in Sioux Falls, for instance, that might otherwise create confusion.

otherwise directed by the Public Health Laboratory. The rules in this chapter pertaining to transport requirements are not retained ~~do not apply~~ when the cannabis is being transported to the Public Health Laboratory.

Commented [AM12]: Clarify. It may be helpful to list the sections that do not apply.

Commented [AS13R12]: Clarify. Further, there is a specific provision in this chapter regarding transport for testing purposes--AKSD-44-90:04-21. Would that provision not apply to PHL transport, despite its plain language?

Source:

General Authority: SDCL 34-20C-72(1)(f)

Law Implemented: SDCL 34-20G-72(5)

CHAPTER 44-90:07

CANNABIS PRODUCT MANUFACTURING FACILITIES

Commented [J814]: ~~Err:~~ As noted above in the first comment, please verify any chapter indexes where no corrections are being attended or provisions repealed/renumbered, etc., such as this one.

Section

- 44-90:07:01 Manufacturing practices.
- 44-90:07:02 Work environment.
- 44-90:07:03 Cannabis product nonusable.
- 44-90:07:04 Prohibited manufacturing activities.
- 44-90:07:05 Extraction -- Approved operating procedures.
- 44-90:07:06 Generally safe concentration methods.
- 44-90:07:07 Potentially hazardous extraction methods.
- 44-90:07:08 Extraction using inherently hazardous substances.
- 44-90:07:09 Edible cannabis products.

44:90:67:08. Extraction using inherently hazardous substances. Before performing extraction using an inherently hazardous substance, the establishment must have prior physical inspection and written approval by an engineer licensed pursuant to SDCL chapter 36-18A that the establishment's storage, preparation, electrical, gas monitoring, fire suppression, and exhaust systems are adequate for the extraction methods and substances used.

Any extraction method using inherently hazardous substances must be listed in the operating procedures on file with the department and use a substance of ~~99~~ ninety-nine percent or greater purity. The resulting extract must not exceed residual limits for the substance established by the department as part of testing requirements.

Commented [J615]: Style: Numbers and percentages are spelled out. Manual, pgs. 18, 19.

The following solvents may be used in approved inherently hazardous extraction:

- (1) Butane;
- (2) Propane;
- (3) Acetone;
- (4) Heptane; or
- (5) Pentane.

The use of any inherently hazardous substance other than butane, propane, acetone, heptane, or pentane requires written approval of the department, upon documentation of the safety and efficacy of the selected method. All flammable gas must be ~~edvised~~ properly stored and handled in accordance with all applicable safety standards contained in local ordinances, SDCL chapter 11-10, article 61:15, and chapter 20:44:22.

Commented [J616]: Clarify: Is "prior" a necessary modifier, or "written approval of the department prior is not,"?

Source: 48 SDR 46, effective October 5, 2021.

General Authority: SDCL 34-20G-72(5)(e)(h).

Law Implemented: SDCL 34-20G-72(5)

CHAPTER 44:90~~(1)~~ ³

PETITIONS TO RECOGNIZE DEBILITATING MEDICAL CONDITIONS

Section

44:90:13:01 Petitions -- Required forms.

44:90:13:02 Department's decision.

Commented [JG17]: Errata: As noted above in the first comment, please strike any chapter indices when no cautions are being recorded or provisions repeated/reinstated, etc., such as this one.

44:90:13:02. Department's decision. The department's written decision to approve or deny a petition shall be issued ~~within one hundred and eighty days of submission and must~~ include the factors supporting the decision, including whether the written petition, public testimony, written comments, peer-reviewed research, and consultation with practitioners support the following conclusions:

Commented [JG18]: Encl: Numbers are spelled out. Manual, pgs. 18, 19.

(1) The proposed medical condition is recognized by the medical profession as a serious and chronic medical condition; and

(2) ~~Treatments currently available for the proposed condition are either ineffective or produce harmful side effects and~~

(3) Medical use of cannabis will is likely to provide therapeutic or palliative benefits that outweigh the risks of cannabis use.

A qualifying medical condition ~~shall may only~~ be recognized through rules promulgated by the department pursuant to chapter 1-26.

Commented [AM19]: Legality: A rule cannot provide authority for promulgating additional rules.

Commented [JG20R19]: Legality: I think Anna is right here. To make it seem less like this language is establishing new authority, instead, the language in the left goes from a language of authorization to a language of limitation. In other words, this language is no longer suggestive of releasing authority per se.

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(1).

Law Implemented: SDCL 34-20G-26.



**SOUTH DAKOTA
MEDICAL CANNABIS PROGRAM**

600 EAST CAPITOL AVENUE
PIERRE, SD 57501-2536

PHONE: 605.773.3361 | **EMAIL:** MCQuestions@state.sd.us | **WEB:** medicannabis.sd.gov

08/18/2023

Puffy's LLC
ATTN: Kittrick Jeffries
1732 Mesa Drive
Rapid City, SD 57702

RE: Dispensary Certificate for Lottery Alternate

Dear Puffy's, LLC:

The Department is hereby notifying you that Puffy's, LLC may proceed with the application process for a lottery dispensary certificate that has recently become available. As the first alternate in the Rapid City lottery draw, Puffy's, LLC is receiving this notice relative to the site location of 3308 Cambell St., Rapid City, SD.

Please notify the Department in writing by Thursday, August 31, 2023, if Puffy's is interested in moving forward with the process of certification for this dispensary establishment. Notification of interest may be sent to the medical cannabis program administrator either through USPS mail or via email at jennifer.seale@state.sd.us.

If written notification is not received by 5:00 p.m. CT (central time) on August 31st, the next alternate on the lottery list will be notified of the availability of the dispensary certificate.

Thank you,

Jennifer Seale

Administrator | Medical Cannabis Program

Ex. 5-36



South Dakota Codified Laws

Title 1. State Affairs and Government (Refs & Annos)

Chapter 1-26. Administrative Procedure and Rules (Refs & Annos)

SDCL § 1-26-6.2

1-26-6.2. Uniform style for rules--Required contents

Contents.

The director shall prescribe a uniform style in which rules shall be prepared and the standard form to be used in filing rules pursuant to this chapter. Such form shall contain a provision for a reference to be made by the agency for each rule proposed by it, citing its general authority to promulgate rules and then refer to the section, subdivision, or subsection of statute which the rule is intended to implement, and direct the agency to identify prior rules amended or repealed.

Credits

Source: SDC 1939, § 65.0106, 2nd par; repealed SL 1966, ch 159, § 19; re-enacted SL 1972, ch 8, § 9; SL 1989, ch 16, § 8.

SDCL § 1-26-6.2, SD ST § 1-26-6.2

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

End of Document

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South Dakota Codified Laws

Title 1. State Affairs and Government (Refs & Annos)

Chapter 1-26. Administrative Procedure and Rules (Refs & Annos)

SDCL § 1-26-29

1-26-29. Notice and hearing required for revocation or suspension of license--Emergency suspension

Circumstances

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Credits

Source: SL 1966, ch 159, § 14 (3).

SDCL § 1-26-29, SD ST § 1-26-29

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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South Dakota Codified Laws

Title 1. State Affairs and Government (Refs & Annos)

Chapter 1-26. Administrative Procedure and Rules (Refs & Annos)

SDCL § 1-26-30

1-26-30. Right to judicial review of contested cases--Preliminary agency actions

Currentness

A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Credits

Source: SL 1966, ch 159, § 15 (1); SL 1972, ch 8, § 26; SL 1977, ch 13, § 12; SL 1978, ch 13, § 9; SL 1978, ch 15.

SDCL § 1-26-30, SD ST § 1-26-30

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-29. Writ of Mandamus

SDCL § 21-29-1

21-29-1. Power to issue writ--Purposes for which used

Circumstances

The writ of mandamus may be issued by the Supreme and circuit courts, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Credits

Source: CCivP 1877, § 695; CL 1887, § 5517; RCCivP 1903, § 764; RC 1919, § 3006; SDC 1939 & Supp 1960, § 37.4501.

S D C L § 21-29-1, SD ST § 21-29-1

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-29. Writ of Mandamus

SDCL § 21-29-4

21-29-4. Grant of writ on default prohibited

Current Status

The writ of mandamus cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

Credits

Source: CCivP 1877, § 698; CL 1887, § 5520; RCCivP 1903, § 767; RC 1919, § 3009; Supreme Court Rule 611, 1939; SDC 1939 & Supp 1960, § 37.4503.

S D C L § 21-29-4, SD ST § 21-29-4

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-29. Writ of Mandamus

SDCL § 21-29-8

21-29-8. Hearing by court when no answer made or no questions of fact raised

Circumstances

If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue only immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing the case.

Credits

Source: CCivP 1877, § 704; CL 1887, § 5526; RCCivP 1903, § 773; RC 1919, § 3015; Supreme Court Rule 613, 1939; SDC 1939 & Supp 1960, § 37.4506.

S D C L § 21-29-8, SD ST § 21-29-8

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-29. Writ of Mandamus

SDCL § 21-29-10

21-29-10. Discretionary jury trial and postponement--Statement of question to be tried--Assessment of damages

Circumstances

If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of which allegation the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the hearing until such trial can be had and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

Credits

Source: CCivP 1877, § 700; CL 1887, § 5522; RCCivP 1903, § 769; RC 1919, § 3011; Supreme Court Rule 615, 1939; SDC 1939 & Supp 1960, § 37.4508.

S D C L § 21-29-10, SD ST § 21-29-10

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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South Dakota Codified Laws

Title 34. Public Health and Safety (Refs & Annos)

Chapter 34-20g. Medical Cannabis (Refs & Annos)

SDCL § 34-20G-55

34-20G-55. Application for medical cannabis establishment--Contents and conditions--Time for registration

Effective: July 1, 2021

Cumulative

Not later than ninety days after receiving an application for a medical cannabis establishment, the department shall register the prospective medical cannabis establishment and issue a registration certificate and a random ten-digit alphanumeric identification number if all of the following conditions are satisfied:

(1) The prospective medical cannabis establishment has submitted all of the following:

(a) The application fee;

(b) An application, including:

(i) The legal name of the prospective medical cannabis establishment;

(ii) The physical address of the prospective medical cannabis establishment that is not within one thousand feet of a public or private school existing before the date of the medical cannabis establishment application;

(iii) The name and date of birth of each principal officer and board member of the proposed medical cannabis establishment; and

(iv) Any additional information requested by the department;

(c) Operating procedures consistent with rules for oversight of the proposed medical cannabis establishment, including procedures to ensure accurate record keeping and adequate security measures;

(d) If the city or county where the proposed medical cannabis establishment would be located has enacted zoning restrictions, a sworn statement certifying that the proposed medical cannabis establishment does not violate the restrictions;

- (e) If the city or county where the proposed medical cannabis establishment requires a local registration, license, or permit, a copy of the registration, license, or permit;
- (2) None of the principal officers or board members has served as a principal officer or board member for a medical cannabis establishment that has had its registration certificate revoked;
- (3) None of the principal officers or board members is under twenty-one years of age; and
- (4) At least one principal officer is a resident of this state.

Credits

Source: Initiated Measure 26, § 55, approved Nov. 3, 2020, eff. July 1, 2021.

S D C L § 34-20G-55, SD ST § 34-20G-55

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

South Dakota Codified Laws

Title 34. Public Health and Safety (Refs & Annos)

Chapter 34-20g. Medical Cannabis (Refs & Annos)

SDCL § 34-20G-56

34-20G-56. Local government limitation on number of medical cannabis establishments

Effective: July 1, 2021 to June 30, 2024

Currentness


If a local government has enacted a numerical limit on the number of medical cannabis establishments in the locality and a greater number of applicants seek registration, the department shall solicit and consider input from the local government as to its preference for registration.

Credits

Source: Initiated Measure 26, § 56, approved Nov. 3, 2020, eff. July 1, 2021.

S D C L § 34-20G-56, SD ST § 34-20G-56

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

South Dakota Codified Laws

Title 34. Public Health and Safety (Refs & Annos)

Chapter 34-20g. Medical Cannabis (Refs & Annos)

SDCL § 34-20G-57

34-20G-57. Renewal of medical cannabis establishment registration

Effective: July 1, 2021 to June 30, 2024

Current through

The department shall issue a renewal registration certificate within ten days of receipt of the prescribed renewal application and renewal fee from a medical cannabis establishment if the establishment's registration certificate is not under suspension and has not been revoked.

Credits


Source: Initiated Measure 26, § 57, approved Nov. 3, 2020, eff. July 1, 2021.

S D C L § 34-20G-57, SD ST § 34-20G-57

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

South Dakota Codified Laws

Title 34. Public Health and Safety (Refs & Annos)

Chapter 34-20g. Medical Cannabis (Refs & Annos)

SDCL § 34-20G-72

34-20G-72. Promulgation of rules--Violation of required or prohibited action as misdemeanor

Effective: July 1, 2023 to June 30, 2024

Current law

The department shall promulgate rules pursuant to chapter 1-26:

- (1) Establishing the form and content of registration and renewal applications submitted under this chapter;
- (2) Establishing a system to numerically score competing medical cannabis establishment applicants, in cases where more applicants apply than are allowed by the local government, that includes analysis of:
 - (a) The preference of the local government;
 - (b) In the case of dispensaries, the suitability of the proposed location and its accessibility for patients;
 - (c) The character, veracity, background, qualifications, and relevant experience of principal officers and board members; and
 - (d) The business plan proposed by the applicant, that in the case of a cultivation facility or dispensary shall include the ability to maintain an adequate supply of cannabis, plans to ensure safety and security of patrons and the community, procedures to be used to prevent diversion, and any plan for making cannabis available to low-income registered qualifying patients;
- (3) Governing the manner in which the department shall consider applications for and renewals of registry identification cards, that may include creating a standardized written certification form;
- (4) Governing medical cannabis establishments to ensure the health and safety of qualifying patients and prevent diversion and theft without imposing an undue burden or compromising the confidentiality of a cardholder, including:
 - (a) Oversight requirements;

- (b) Record-keeping requirements;
 - (c) Security requirements, including lighting, physical security, and alarm requirements;
 - (d) Health and safety regulations, including restrictions on the use of pesticides that are injurious to human health;
 - (e) Standards for the manufacture of cannabis products and both the indoor and outdoor cultivation of cannabis by a cultivation facility;
 - (f) Requirements for the transportation and storage of cannabis by a medical cannabis establishment;
 - (g) Employment and training requirements, including requiring that each medical cannabis establishment create an identification badge for each agent;
 - (h) Standards for the safe manufacture of cannabis products, including extracts and concentrates;
 - (i) Restrictions on the advertising, signage, and display of medical cannabis, provided that the restrictions may not prevent appropriate signs on the property of a dispensary, listings in business directories including phone books, listings in marijuana-related or medical publications, or the sponsorship of health or not-for-profit charity or advocacy events;
 - (j) Requirements and procedures for the safe and accurate packaging, labeling, distribution, and tracking of medical cannabis;
 - (k) Certification standards for testing facilities, including requirements for equipment and qualifications for personnel; and
 - (l) Requirements for samples of cannabis and cannabis products submitted to testing facilities, including batch sizes to not exceed fifty pounds of cannabis intended for retail sale, batch sizes for homogenous cannabis products intended for retail sale, and procedures to ensure representative sampling;
- (5) Establishing procedures for suspending or terminating the registration certificates or registry identification cards of cardholders and medical cannabis establishments that commit multiple or serious violations of this chapter;
- (6) Establishing labeling requirements for cannabis and cannabis products, including requiring cannabis product labels to include the following:

- (a) The length of time it typically takes for a product to take effect;
 - (b) Disclosing ingredients and possible allergens;
 - (c) A nutritional fact panel; and
 - (d) Requiring that edible cannabis products be clearly identifiable, when practicable, with a standard symbol indicating that it contains cannabis;
- (7) Establishing procedures for the registration of nonresident cardholders and the cardholder's designation of no more than two dispensaries, which shall require the submission of:
- (a) A practitioner's statement confirming that the patient has a debilitating medical condition; and
 - (b) Documentation demonstrating that the nonresident cardholder is allowed to possess cannabis or cannabis preparations in the jurisdiction where the nonresident cardholder resides;
- (8) Establishing the amount of cannabis products, including the amount of concentrated cannabis, each cardholder and nonresident cardholder may possess; and
- (9) Establishing reasonable application and renewal fees for registry identification cards and registration certificates, according to the following:
- (a) Application fees for medical cannabis establishments may not exceed five thousand dollars, with this upper limit adjusted annually for inflation;
 - (b) The total fees collected shall generate revenues sufficient to offset all expenses of implementing and administering this chapter;
 - (c) A sliding scale of patient application and renewal fees based upon a qualifying patient's household income;
 - (d) The fees charged to qualifying patients, nonresident cardholders, and caregivers shall be no greater than the costs of processing the application and issuing a registry identification card or registration; and
 - (e) The department may accept donations from private sources to reduce application and renewal fees.

A violation of a required or prohibited action under any rule authorized by this section is a Class 2 misdemeanor.

Credits

Source: Initiated Measure 26, § 72, approved Nov. 3, 2020, eff. July 1, 2021; SL 2022, ch 131, § 2; SL 2022, ch 133, § 1; SL 2023, ch 122, § 3.

S D C L § 34-20G-72, SD ST § 34-20G-72

Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-04

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Administrative Rules of South Dakota
Department of Health (Articles 44:06 to 44:90)
Article 44:90. Medical Cannabis
Chapter 44:90:03. Registration Certificates

ARSD 44:90:03:01

44:90:03:01. Initial application for registration certificate.

Effective: October 5, 2021

Currentness

An initial application for a registration certificate for any type of medical cannabis establishment must include:

- (1) A completed application form;
- (2) Operating procedures consistent with this article;
- (3) Proof of the property owner's consent to use the property for cultivation, manufacturing, dispensing, or testing cannabis, as applicable;
- (4) Certification of compliance from the local municipality or county, as applicable, ensuring applicant's proposed plans and location meet all local zoning and ordinance requirements;
- (5) Copies of all required registrations, licenses, or permits;
- (6) Photocopies of a valid form of identification issued in South Dakota, or its equivalent issued in another United States jurisdiction, for all principal officers and board members;
- (7) Photocopies of organizing documents, operating agreements, management agreements, bylaws, and other legal documents relating to the applicant's business structure;
- (8) Certification that background checks have been completed for all medical cannabis establishment agents; and
- (9) The applicable fee pursuant to § 44:90:03:17.

Credits

Source: Adopted 48 SDR 40, effective October 5, 2021.



44:90:03:01. Initial application for registration certificate., SD ADC 44:90:03:01

General Authority: SDCL 34-20G-72(2).

Law Implemented: SDCL 34-20G-55(1), 34-20G-57, 34-20G-61.

Current through rules published in the South Dakota register dated May 27, 2024. Some sections may be more current, see credits for details.

S.D. Admin. R. 44:90:03:01, SD ADC 44:90:03:01

End of Document

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Administrative Rules of South Dakota
Department of Health (Articles 44:06 to 44:90)
Article 44:90. Medical Cannabis
Chapter 44:90:03. Registration Certificates

ARSD 44:90:03:05

44:90:03:05. Operating procedures--Required contents--All medical cannabis establishments.

Effective: October 5, 2021

Current version

The operating procedures of any medical cannabis establishment must include:

(1) A management plan identifying the individuals who will be in charge of day-to-day operations of the establishment and their specific management roles;

(2) A site plan that must:

(a) Identify any areas in which cannabis will be cultivated, harvested, dried, stored, manufactured, tested, or destroyed;

(b) Indicate the types of activities that will take place in those areas;

(c) Identify a means of legal ingress onto property from the closest maintained public right of way;

(d) Demonstrate compliance with § 44:90:04:05;

(3) Operating days and hours;

(4) A workplace safety plan consistent with 29 C.F.R. § 1910.23 (November 18, 2016), 29 C.F.R. § 1910.123 (November 18, 2016) and 29 C.F.R. § 1200 (February 8, 2013), covering personal protective equipment, hazard assessment, safe equipment operation, proper application of agricultural chemicals, ladder use, and hazard communication;

(5) Plans for compliance with all applicable safety standards contained in local ordinance, SDCL chapter 11-10, article 61:15, and chapter 20:44:22;

(6) A security plan indicating all doors, windows, gates, exterior lights, alarm sensors, and cameras and describing how alarms and cameras will be monitored;

- (7) Any additional steps to ensure the safety of patrons and the community;
- (8) Plans for preventing the diversion of cannabis to noncardholders;
- (9) A waste management plan for disposal of cannabis waste, including:
 - (a) A description of how the cannabis waste will be rendered unrecognizable and unfit for use by grinding and mixing the waste with at least 50 percent other waste, including soil, sawdust, grease, food waste, yard waste, or shredded paper;
 - (b) A description of how the waste will be composted, if applicable; and
 - (c) A description of how the waste will be hauled from the premises;
- (10) A wastewater plan, including:
 - (a) For establishments connecting to a public wastewater system, a pretreatment industrial use permit or a determination by the Department of Agriculture and Natural Resources that no such permit is necessary; or
 - (b) For establishments using an onsite wastewater system, the applicant's certification of compliance with chapter 74:53:01;
- (11) Pre-employment screening procedures, including criminal background check; and
- (12) Processes for limiting access by unauthorized persons, including verification of identity for all vendors and contractors, issuance of a visitor badge, and closely monitoring all visitors.

Credits

Source: Adopted 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20C-72(2)(5).

Law Implemented: SDCL 34-20C-55(1), 34-20C-72(5).

Current through rules published in the South Dakota register dated May 27, 2024. Some sections may be more current, see credits for details.

S.D. Admin. R. 44:90:03:05, SD ADC 44:90:03:05

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Administrative Rules of South Dakota
Department of Health (Articles 44:06 to 44:90)
Article 44:90. Medical Cannabis
Chapter 44:90:03. Registration Certificates

ARSD 44:90:03:09

44:90:03:09. Cannabis dispensary operating procedures--Additional requirements.

Effective: October 5, 2021

Cannabis, so

The operating procedures for a dispensary must provide the department with sufficient detail to determine the establishment's compliance with this article and SDCL chapter 34-20G, including:

- (1) Plans to obtain an adequate supply of cannabis and cannabis products;
- (2) Types of products offered;
- (3) Verification of identification card and purchase limits;
- (4) Advertising plan, including onsite signs;
- (5) Training plan;
- (6) Point-of-sale software to be used, including documentation of its interoperability with the inventory tracking system;
- (7) Parking;
- (8) Accessibility to individuals with disabilities; and
- (9) Suitability of location for maximizing access by cardholders.

Credits

Source: Adopted 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(2)(5).

Law Implemented: SDCL 34-20G-55(1), 34-20G-72(5).

Current through rules published in the South Dakota register dated May 27, 2024. Some sections may be more current, see credits for details.

S.D. Admin. R. 44:90:03:09, SD ADC 44:90:03:09

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Administrative Rules of South Dakota
Department of Health (Articles 44:06 to 44:90)
Article 44:90. Medical Cannabis
Chapter 44:90:03. Registration Certificates

ARSD 44:90:03:11

44:90:03:11. Local registration, license, or permit--Department verification.

Effective: October 5, 2021

Cumulative

Each initial or renewal application must include either:

(1) A certification, on a form supplied by the department, that the applicant is not required to obtain any city or county registration, license, or permit; or

(2) Copies of all required registrations, licenses, or permits.

The department may contact the city or county to verify the absence of registration, licensing, or permitting requirements or to verify the form and content of such documents.

Credits

Source: Adopted 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(2).

Law Implemented: SDCL 34-20G-55(1).

Current through rules published in the South Dakota register dated May 27, 2024. Some sections may be more current, see credits for details.

S.D. Admin. R. 44:90:03:11, SD ADC 44:90:03:11

End of Document

2024 House & Senate Concurrent Resolution 1/54 Compensatory Work

Administrative Rules of South Dakota
Department of Health (Articles 44:06 to 44:90)
Article 44:90. Medical Cannabis
Chapter 44:90:03. Registration Certificates

ARSD 44:90:03:15

44:90:03:15. Department review of competitive applications--Scoring criteria.

Effective: October 5, 2021

Cumulative

In a case in which more medical cannabis establishments apply than are allowed by a local government, the department shall numerically score competitive applications according to the following criteria:

- (1) The local government, in response to the department's inquiry, has endorsed the application as beneficial to the community (1 point);
- (2) The local government has not informed the department that the location specified in the application is unsuitable for the proposed use due to zoning regulations or inaccessibility to the public (1 point);
- (3) All principal officers and board members have certified that they have not, in the previous ten years, in any United States jurisdiction:
 - (a) Been convicted of a criminal offense involving fraud or false statements to a unit of government (1 point); or
 - (b) Served as a principal officer or board member of any business that has had a license or permit suspended or revoked for violations of laws or regulations relating to cannabis, alcohol, tobacco, or gaming (1 point);
- (4) The applicant has submitted a floorplan with sufficient detail to enable the department to determine where all activities listed in the operating procedures will take place (1 point); and
- (5) The applicant has submitted a business plan outlining the details contained in SDCL 34-20G-72(3)(d) (1 point).

Credits

Source: Adopted 48 SDRC 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(3).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

44:90:03:15. Department review of competitive..., SD ADC 44:90:03:15

Current through rules published in the South Dakota register dated May 27, 2024. Some sections may be more current, see credits for details.

S.D. Admin. R. 44:90:03:15, SD ADC 44:90:03:15

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Administrative Rules of South Dakota
Department of Health (Articles 44:06 to 44:90)
Article 44:90. Medical Cannabis
Chapter 44:90:03. Registration Certificates

ARSD 44:90:03:16

44:90:03:16. Department awarding of registration certificate -- Tiebreaking procedures -- Notice to unsuccessful applicants,

Effective: November 27, 2023

44:90:03:16

The department shall award a registration certificate as follows:

- (1) If more establishments apply than are allowed by a local government, the department must award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;
- (2) If the local government has enacted an overall limit on the number of establishments, the department must award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;
- (3) If the local government has enacted a limit on establishments by establishment type, the department must award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;
- (4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public must have the opportunity to view, in person or via videoconference, a random lottery to determine the successful applicants. The department shall rank each applicant via the lottery system to establish the order and a waiting list.

Any establishment issued a registration certificate pursuant to this section must become operational within one year, defined as three hundred sixty-five days, or, if a leap year, three hundred sixty-six days, of the date of issue of the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for up to an additional year from the date of expiration of the certificate based upon the amount of time

Ex.8:1



reasonably necessary for the establishment to become operational. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Credits

Source: Adopted 48 SDR 40, effective October 5, 2021; 49 SDR 47, effective November 22, 2022; 50 SDR 62, effective November 27, 2023.

General Authority: SDCL 34-20G-72(2).

Law Implemented: SDCL 34-20G-56, 34-20G-72(2), 34-20G-72(4)(a).

Current through rules published in the South Dakota register dated May 27, 2024. Some sections may be more current, see credits for details.

S.D. Admin. R. 44:90:03:16, SD ADC 44:90:03:16

FORM 11
APPROVAL OF RULES

RECEIVED
SEP 15 2021
S.D. SEC. OF STATE

Following public hearing held on August 18, 2021, the following rules, attached, are approved and will become effective twenty days after filing with the Office of the Secretary of State:

65 44:90:01:01, 44:90:02:01, 44:90:02:02, 44:90:02:03, 44:90:02:04,
44:90:02:05, 44:90:02:06, 44:90:02:07, 44:90:02:08, 44:90:02:09, 44:90:02:10,
44:90:02:11, 44:90:02:12, 44:90:02:13, 44:90:02:14, 44:90:02:15, 44:90:02:16,
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44:90:12:05, 44:90:12:06, 44:90:12:07, 44:90:12:08, 44:90:13:01, 44:90:13:02

9/15/21
Date

9/14/2021
Date

Kim Malsam-Rysdon
SOUTH DAKOTA DEPARTMENT OF HEALTH
Kim Malsam-Rysdon
Secretary of Health

Scott G. G.
LEGISLATIVE RESEARCH COUNCIL

Ex.9:1



TITLE 44

DEPARTMENT OF HEALTH

Article

44:02	Lodging and food service.
44:03	Radiation safety.
44:04	Medical facilities.
44:05	Ambulance operation.
44:06	Children's special health services.
44:09	Public health statistics.
44:12	Tattooing, saline tattoo removal, and body piercing.
44:18	Health maintenance organizations.
44:19	Newborn screening.
44:20	Communicable disease control.
44:22	Cancer data collection.
44:23	Residential living centers.
44:58	Drug control.
44:59	Health laboratory.
44:62	Declaratory rulings.
44:63	J-1 visa waiver program.
44:65	Fetal alcohol syndrome.
44:66	Hospital charge reporting.
44:67	Abortion facilities.
44:68	State trauma care system.

44:69	Birth centers.
44:70	Assisted living centers.
44:71	Rural healthcare facility recruitment assistance program.
44:72	Redistribution of nursing facility beds.
44:73	Nursing facilities.
44:74	Nurse aide.
44:75	Hospital, specialized hospital, and critical access hospital facilities.
44:76	Ambulatory surgery center facilities.
44:77	Adult foster care.
44:78	Inpatient chemical dependency treatment facility.
44:79	Inpatient hospice facilities.
44:80	Residential hospice facilities.
44:81	Immunization requirements for school entry.
44:82	Community living home.
<u>44:90</u>	<u>Medical cannabis.</u>

ARTICLE 44:90

MEDICAL CANNABIS

Chapter

<u>44:90:01</u>	<u>Definitions.</u>
<u>44:90:02</u>	<u>Registry identification cards.</u>
<u>44:90:03</u>	<u>Registration certificates.</u>
<u>44:90:04</u>	<u>Establishments.</u>

- 44:90:05 Cannabis cultivation facilities.
- 44:90:06 Cannabis testing facilities.
- 44:90:07 Cannabis product manufacturing facilities.
- 44:90:08 Cannabis dispensaries.
- 44:90:09 Sampling and testing.
- 44:90:10 Packaging, labeling, and advertising.
- 44:90:11 Recordkeeping.
- 44:90:12 Enforcement.
- 44:90:13 Petitions to recognize debilitating medical conditions.

CHAPTER 44:90:01

DEFINITIONS

Section

44:90:01:01 Definitions.

44:90:01:01. Definitions. Terms defined in SDCL 34-20G-1 have the same meaning when used in this article. As used in this article:

(1) "Action level" means the level of a contaminate that triggers action to prohibit a cannabis product from being sold;

(2) "Age-restricted cardholder" means a cardholder or nonresident cardholder who is under 18 years of age or who is enrolled in an elementary, middle, or high school;

(3) "Agent identification badge" means a credential provided by an establishment for use

alcohol, tobacco, or gaming (1 point);

(4) The applicant has submitted a floorplan with sufficient detail to enable the department to determine where all activities listed in the operating procedures will take place (1 point); and

(5) The applicant has submitted a business plan outlining the details contained in SDCL 34-20G-72(3)(d) (1 point).

Source:

General Authority: SDCL 34-20G-72(3).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

44:90:03:16. Department awarding of certification – Tiebreaking procedures –

Notice to unsuccessful applicants. The department shall award certification as follows:

(1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;

(2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;

(3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

(4) If applicants are tied for one or more openings in a locality, the affected applicants

and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants will be ranked via the lottery system to establish the order and establish a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of date of award or the certificate is deemed void and will be awarded to the next applicant on the waiting list.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source:

General Authority: SDCL 34-20G-72(3).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

44:90:03:17. Fees for registration certificates – Application and renewal. The department shall charge and collect a non-refundable fee for an initial or renewal application for an establishment registration certificate of \$5,000. The fees imposed under this section shall increase annually based on the index factor.

Source:

General Authority: SDCL 34-20G-72(10).

Law Implemented: SDCL 34-20G-55, 34-20G-72(10).

CHAPTER 44:90:04

44:90:03:16. Department awarding of certification – Tiebreaking procedures -- Notice to unsuccessful applicants. The department shall award certification as follows:

(1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;

(2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;

(3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

(4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants will must be ranked via the lottery system to establish the order and ~~establish~~ a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and will must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a

finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(3), 34-20G-72(5).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

44:90:04:11. Agent identification badges to be provided by establishments. A medical cannabis establishment shall provide an agent identification badge to each agent. The establishment shall include on the badge:

(1) The agent's photograph that meets the requirements of ~~§~~ subdivision 44:90:02:04(3), except that the photograph may be as small as seven-eighths inch by one-and-five-thirty-seconds inches; and

(2) In a plain black font not less than ~~24~~sixteen point:



(a) The first and last name of the agent; and

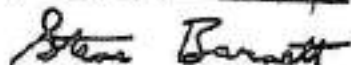
FORM 11
APPROVAL OF RULES

RECEIVED
NOV 02 2022
S.D. SEC. OF STATE

Following public hearing held on October 11, 2022, the following rules, attached, are approved and will become effective twenty days after filing with the Office of the Secretary of State:

§§ 44:90:03:16, 44:90:04:11, 44:90:04:25, 44:90:07:08, and 44:90:13:02.

<u>10/24/22.</u> [Date]	<u>11/01/2022</u> [Date]
 SD Department of Health Joan Adam, Secretary	 LEGISLATIVE RESEARCH COUNCIL

Filed this 2nd day of
November, 2022

SECRETARY OF STATE

Ex.10:1



44:90:03:16. Department awarding of certification – Tiebreaking procedures -- Notice to unsuccessful applicants. The department shall award certification as follows:

(1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;

(2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached:

(3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

(4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants ~~will~~ must be ranked via the lottery system to establish the order and ~~establish~~ a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and ~~will~~ must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline, The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a

finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(3), 34-20G-72(5).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

44:90:04:11. Agent identification badges to be provided by establishments. A medical cannabis establishment shall provide an agent identification badge to each agent. The establishment shall include on the badge:

(1) The agent's photograph that meets the requirements of ~~§~~ subdivision 44:90:02:04(3), except that the photograph may be as small as seven-eighths inch by one-and-five-thirty-seconds inches; and

(2) In a plain black font not less than ~~24~~sixteen point:

(a) The first and last name of the agent; and

FORM 11

APPROVAL OF RULES

Following public hearing held on September 28, 2023, the following rules, attached, are approved and will become effective twenty days after filing with the Office of the Secretary of State:

Revised
55 44:90:01:01, 44:90:02:16, 44:90:03:16, 44:90:03:17, 44:90:04:25, *Reverted* 44:90:06:01, 44:90:07:04, ~~44:90:07:10~~, 44:90:08:04, 44:90:09:01, ~~44:90:09:07:01~~, 44:90:10:01, 44:90:10:12, 44:90:11:01, 44:90:11:03, 44:90:11:06, 44:90:13:01; 44:90:13:02

11-01-23

[Date]


SD Department of Health
Melissa Magstadt, Secretary

11/7/2023

[Date]


LEGISLATIVE RESEARCH COUNCIL

Ex.11:1



CHAPTER 44:90:03

REGISTRATION CERTIFICATES

Section

- 44:90:03:01 Initial application for registration certificate.
- 44:90:03:02 Certificate renewal -- Application.
- 44:90:03:03 Certificate location transfer -- Application.
- 44:90:03:04 Transfer of ownership.
- 44:90:03:05 Operating procedures -- Required contents -- All medical cannabis establishments.
- 44:90:03:06 Cannabis cultivation facility operating procedures -- Additional requirements.
- 44:90:03:07 Cannabis testing facility operating procedures -- Additional requirements.
- 44:90:03:08 Cannabis product manufacturing facility operating procedures -- Additional requirements.
- 44:90:03:09 Cannabis dispensary operating procedures -- Additional requirements.
- 44:90:03:10 Compliance with local zoning requirements -- Form of certification.
- 44:90:03:11 Local registration, license, or permit -- Department verification.
- 44:90:03:12 Deadline to submit initial applications for establishments.
- 44:90:03:13 No registration certificate revocation -- Department verification.
- 44:90:03:14 No disqualifying felonies -- Form of certification.
- 44:90:03:15 Department review of competitive applications -- Scoring criteria.
- 44:90:03:16 Department awarding of ~~certification~~ registration certificate -- Tiebreaking procedures -- Notice to unsuccessful applicants.
- 44:90:03:17 Fees for registration certificate -- Application and renewal.

44:90:03:16. Department awarding of ~~certification~~ registration certificate -- Tiebreaking procedures -- Notice to unsuccessful applicants. The department shall award ~~certification~~ a registration

certificate as follows:

(1) If more establishments apply than are allowed by a local government, the department ~~shall~~ must award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;

(2) If the local government has enacted an overall limit on the number of establishments, the department ~~shall~~ must award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;

(3) If the local government has enacted a limit on establishments by establishment type, the department ~~shall~~ must award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

(4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public ~~shall~~ must have the opportunity to view, in person or via videoconference, a random drawing lottery to determine the successful applicants. ~~All applicants must be ranked~~ The department shall rank each applicant via the lottery system to establish the order and a waiting list.

Any establishment ~~granted~~ issued a registration certificate pursuant to this section must become operational within one year, defined as three hundred sixty-five days, or, if a leap year, three hundred sixty-six days, of the date of ~~award~~ issue or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant

an extension ~~for one~~ up to an additional year from the date of expiration of the certificate based upon the amount of time reasonably necessary for the establishment to become operational. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021; 49 SDR 47, effective November 22, 2022.

General Authority: SDCL 34-20G-72(3)(2), ~~34-20G-72(5)~~.

Law Implemented: SDCL 34-20G-56, 34-20G-72(3)(2), ~~34-20G-72(4)(a)~~.

44:90:03:17. Fees for registration certificates -- Application and renewal. The department shall ~~charge and~~ collect a non-refundable fee for an initial or renewal application for an establishment registration certificate of ~~\$5,000~~ five thousand three hundred and ten dollars. ~~The fees imposed under this section shall increase annually based on the index factor.~~

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(10)(9).

Law Implemented: SDCL 34-20G-55(1)(a), 34-20G-72(10)(9)(a).

ORDINANCE 1435

AN ORDINANCE AMENDING CITY OF VERMILLION CODE OF ORDINANCES TITLE XI BUSINESS REGULATIONS, BY ADDING CHAPTER 123, WHICH ENACTS LICENSING REGULATIONS FOR MEDICAL CANNABIS ESTABLISHMENTS

BE IT ORDAINED, by the Governing Body of the City of Vermillion, South Dakota that the following sections of Chapter 123 be enacted as follows:

§ 123.01 DEFINITIONS.

The following words and phrases, when used in this section, shall have the meanings ascribed to them. In addition to the definitions contained in this section, other terms used in this section shall have the meaning ascribed to them in SDCL § 34-20G-1 and SDCL § 22-42-1, and such definitions are hereby incorporated into this section by this reference.

Applicant. Any person or entity who has submitted an application for a license or renewal of a license issued pursuant to this Chapter. If the applicant is an entity and not a natural person, applicant shall include all persons who are the members, managers, officers, directors, and shareholders of such entity.

Cannabis cultivation facility. An entity registered with the South Dakota Department of Health that acquires, possesses, cultivates, delivers, transfers, transports, supplies, or sells cannabis and related supplies to a medical cannabis establishment.

Cannabis product manufacturing facility. An entity registered with the South Dakota Department of Health that acquires, possesses, manufactures, delivers, transfers, transports, supplies, or sells cannabis products to a medical cannabis establishment.

Cannabis products. Any concentrated cannabis, cannabis extracts, and products that are infused with cannabis or an extract thereof and are intended for use or consumption by humans. The term includes edible cannabis products, beverages, topical products, ointments, oils, and tinctures.

Cannabis testing facility. An independent entity registered with the South Dakota Department of Health to analyze the safety and potency of cannabis.

Cardholder. Any person who has been issued and possesses a valid registry identification card pursuant SDCL Chapter 34-20G.

City. The City of Vermillion, South Dakota, its governing body, officers, employees and agents.

Disqualifying felony offense. A crime that was classified as a felony in the jurisdiction where the person was convicted.

Initial application. The first application filed by a person or entity for a medical cannabis establishment license.

Ex.12:1



Licensed premises. The building within which the establishment operates.

Licensee. Any person or business entity that has been issued and holds a valid, current license pursuant to this Chapter. If the licensee is an entity and not a natural person, licensee shall encompass all persons who are the members, managers, officers, directors, shareholders, partners or associates of such entity.

Medical cannabis or cannabis. Marijuana as defined in SDCL § 22-42-1.

Medical cannabis establishment or "establishment". An entity registered with the South Dakota Department of Health pursuant to this chapter that acquires, possesses, stores, delivers, transfers, transports, sells, supplies, or dispenses cannabis, cannabis products, paraphernalia, or related supplies and educational materials to cardholders.

Medical cannabis establishment. A cultivation facility, a cannabis testing facility, a cannabis product manufacturing facility, or a establishment.

Registry identification card. A document issued by South Dakota Department of Health that identifies a person as a registered qualifying patient or registered designated caregiver, or documentation that is deemed a registry identification card pursuant to SDCL §§ 34-20G-29 to 34-20G-42, inclusive.

§ 123.02 PURPOSE AND INTENT.

The purpose of this Chapter is to provide for licensing of medical cannabis establishments within the jurisdictional limits of the City of Vermillion in the interest of public health, safety, and general welfare. Nothing in this Chapter is intended to promote or condone the sale, distribution, possession, or use of marijuana in violation of any applicable law. Compliance with the requirements of this Chapter shall not provide a defense to criminal prosecution under any applicable law unless permitted by SDCL Chapter 34-20G.

§ 123.03 OTHER LAWS.

If the South Dakota Department of Health or South Dakota legislature adopts or enacts any stricter regulation or statute governing a medical cannabis establishment than set forth in this Chapter, the stricter regulation or statute shall control the establishment or operation of any medical cannabis establishment in the City. A licensee shall be required to demonstrate, upon demand by the City, or by law enforcement officers, that the source and quantity of any cannabis found upon the licensed premises are in full compliance with applicable state regulation. If the South Dakota Department of Health or South Dakota legislature subsequently prohibits the sale or other distribution of medical cannabis, any license issued under this Chapter shall be deemed immediately revoked by operation of law, with no ground for appeal or other redress by the licensee. The issuance of any license pursuant to this Chapter shall not be deemed to create an exception, defense or immunity to any person or entity in regard to any potential criminal liability

the person or entity may have for the cultivation, possession, sale, distribution, or use of marijuana except to the extent permitted by SDCL Chapter 34-20G.

§ 123.04 AUTHORITY.

The governing body or designee shall have authority pursuant to the SDCL Chapter 34-20G and this Chapter to grant or deny licenses and to have a designee inspect the licensed premises and business of a medical cannabis establishment to confirm compliance with all licensure requirements.

Applications for a license to operate a medical cannabis establishment as defined by SDCL 34-20G-1 shall not be accepted until the South Dakota Department of Health has promulgated regulations as required by SDCL 34-20G-72.

§ 123.05 MEDICAL CANNABIS ESTABLISHMENT LICENSE REQUIRED.

No person or business entity shall operate a medical cannabis establishment within the jurisdictional limits of the City unless that person or business entity has first obtained a medical cannabis establishment license from the City. Such license shall be kept current at all times and the failure to maintain a current license shall constitute a violation of this Chapter.

§ 123.06 TERM OF LICENSE.

Each license issued under this Chapter shall be effective upon issuance and shall terminate on the last day of December of the year issued.

§ 123.07 LICENSE NOT TRANSFERRABLE.

Licenses issued under this chapter shall not be transferable to any other person, business entity, or location and shall lapse automatically upon a change of ownership or location. A license issued under this Chapter is not a property right.

§ 123.08 ESTABLISHMENT REQUIREMENTS.

A medical cannabis establishment licensee is subject to the following requirements:

(A) Any owner, LLC member or manager, corporation shareholder, director, officer, partnership or association member who has served as an owner, LLC member or manager, corporation shareholder, director, officer, partnership or association member for a medical cannabis establishment that has had its state registration certificate or any local, municipal, or county license revoked is disqualified as a licensee.

(B) Any owner, LLC member or manager, corporation shareholder, director, officer, partnership or association member who is under 21 years of age is disqualified as a licensee.

(C) A licensee is prohibited from employing any employee convicted of a disqualifying felony offense.

- (D) A licensee is prohibited from employing any employee under 21 years of age.
- (E) A medical cannabis establishment shall not share office space with or refer a patient to a practitioner pursuant to SDCL § 34-20G-67.
- (F) A medical cannabis establishment shall not permit any person to consume cannabis upon the property of the licensed premises pursuant to SDCL § 34-20G-68.
- (G) At least one of the owners, LLC members, or shareholders shall be a resident of the state of South Dakota.
- (H) The licensed premises shall be located only within City zones as addressed by Chapter 158 of the City of Vermillion Code of Ordinances.
- (I) The licensed premises shall be located no less than 1,000 feet from the nearest property line of any public or private school. Distances shall be measured from the closest point of the property lines.
- (J) The licensed premises shall remain in compliance with applicable federal, state, and local laws and building codes.

§ 123.09 APPLICATION FOR MEDICAL CANNABIS ESTABLISHMENT LICENSE

To obtain a medical cannabis establishment license, or to renew a license previously issued under this Chapter, the applicant shall file in the office of the City Finance Officer an application on a form furnished by the City Finance Officer or the City Finance Officer's designee a written sworn application signed by the applicant containing the following information:

- (A) The name, address, and date of birth of person or entity members, managers, shareholders, directors, officers, partners or associates of the proposed medical cannabis establishment, as well as the name, address, and date of birth of any current employees at the time such application is filed.
- (B) A copy of the deed or lease reflecting the applicant's ownership or right of possession to the proposed licensed premises for the proposed use.
- (C) A "to scale" sketch of the floor plan of the proposed licensed premises reflecting compliance with the South Dakota Department of Health regulations pursuant to SDCL Chapter 34-20G.
- (D) Any other additional information as the City Manager or City Manager's designee may deem necessary for an investigator to evaluate the character and business responsibility of the applicant in compliance with the South Dakota Department of Health regulations pursuant to SDCL Chapter 34-20G.

§ 123.10 APPLICATION FEE

At the time an applicant files an application according to § 123.09, applicant shall pay a non-refundable fee to the City in an amount established by resolution to defray the costs incurred by the City for background investigations, review of the application, inspection of the proposed premises, and any other costs and labor associated with processing the application.

§ 123.11 ANNUAL LICENSE FEE

Within 30 days of receiving a cannabis establishment registration from the South Dakota Department of Health pursuant to SDCL Chapter 34-20G, and at the time an applicant files a renewal application, the licensee shall tender to the City an annual license fee in an amount established by resolution. The annual license fee is in addition to the initial application fee required pursuant to § 123.10. The annual license fee shall be paid on the basis of a full calendar year regardless of the date of issuance, and no proration or discount shall be given.

§ 123.12 ADDITIONAL PERMITS AND LICENSES

A license issued pursuant to this Chapter is in addition to and does not eliminate the need for the licensee to obtain other required permits or licenses related to the operation of the medical cannabis establishment including, without limitation, the registration issued by the South Dakota Department of Health pursuant to SDCL Chapter 34-20G, zoning permits, plat approvals, or building or construction permits required by the City of Vermillion Code of Ordinances or South Dakota law.

§ 123.13 INSPECTIONS AND FACILITY STANDARDS

During review of the application and at all reasonable times after a license is issued, the City Manager or City Manager's designee may enter and inspect the licensed premises contained in the application or license to determine if the licensed premises meet or continue to meet the requirements of all City ordinances and state statutes, and is being maintained in accordance with the following facility standards:

- (A) Security requirements;
- (B) Structural design requirements;
- (C) Lighting; and
- (D) Cameras/layout.

§ 123.14 APPROVAL PROCESS

(A) Upon receipt of a complete application, the City Manager or the City Manager's designee shall circulate the application to all affected service areas and departments of the City to determine whether the application is in full compliance with all applicable laws, rules, and regulations. No

license shall be sufficient for the City's governing body consideration until after the City Manager or the City Manager's designee has caused the proposed premises to be inspected to determine compliance of the premises with all applicable requirements of this Chapter and the City of Vermillion Code of Ordinances, and with the plans and descriptions submitted as part of the application. No license shall be approved by the City's governing body until after the City Manager or the City Manager's designee has completed a background check of the owners or entity members, managers, officers, directors, shareholders, partners or associates and proposed employees of the proposed establishment. The City's governing body or designee shall deny any application that does not meet the requirements or limitations of this Chapter, and shall deny any application that contains any false, misleading, or incomplete information.

(B) If the City's governing body or designee has determined that all requirements for an establishment license are met and upon payment of the application fee in advance by the applicant, the City's governing body or designee may, in their discretion, approve the issuance of a license if the City's governing body or designee believes the issuance to be in the public's best interest. When the City's governing body or designee considers an establishment application, they may consider all contents and proposals within the application, the observations and results of any inspection undertaken pursuant to § 123.13, the impact to the public that may result, whether the proposed establishment is located in a zone that permits its operation, the manner in which the applicant previously operated an establishment or other business licensed by the City, and history of compliance with city ordinances and state law.

(C) Within 30 days after the completion of the investigation of the application, the City's governing body or designee shall issue a written decision approving or denying the application for licensure, which decision shall state the reason(s) for the decision and be sent via first-class U.S. mail and via certified mail to the applicant at the address shown in the application.

(D) If approved, the City Manager or City Manager's designee shall issue to the applicant a cannabis license certificate specifying the date of issuance, the period of licensure, the name of the licensee, the physical address of the licensed premises, and a sworn statement certifying that the licensed establishment as proposed does not violate the City's enacted zoning regulations as required under SDCL 34-20G-55(1)(d). The City Manager or City Manager's designee shall also promptly transmit a copy of the license certificate to the South Dakota Department of Health to satisfy SDCL 34-20G-55(1)(e).

§ 123.15 PRELIMINARY APPROVAL AND ISSUANCE OF LICENSE

If approved, the City's issuance of a license following an initial application shall be provisional and subject to automatic termination if:

(A) The licensee does not receive or fails to qualify for the state registration certificate required under SDCL Chapter 34-20G within 120 days of issuance of the license; or

(B) The licensee fails to pay the annual license fee to the City within 30 days of the issuance of the state registration certificate in accordance with § 123.11, or

(C) The licensee fails to obtain a certificate of occupancy from the City in accordance with § 123.16 within 180 days of issuance of the state registration certificate issued under SDCL Chapter 34-20G.

No licensee may engage in the sale of cannabis products under a provisional license.

§ 123.16 CERTIFICATE OF OCCUPANCY

Licensee shall not begin operation until it receives from the City a certificate of occupancy. The City shall not issue a certificate of occupancy until the City Manager or the City Manager's designee has fully inspected the licensed premises and determined that the establishment satisfies all requirements of licensure as set forth in this Chapter, all applicable zoning regulations, and all other applicable federal, state, and local laws and building codes, and that the licensed establishment is ready for occupancy with such equipment and security measures in place as may be necessary to comply with the applicable provisions of this Chapter and state law. The City shall not issue a certificate of occupancy until the licensee provides written evidence that the licensee has paid the annual license fee under § 123.11, and all registration application fees due in connection with the South Dakota Department of Health's review of the application.

§ 123.17 ANNUAL LICENSE FEE REFUNDABLE

If a provisional license is automatically terminated by operation of § 123.15, the annual license fee paid pursuant to § 123.11 shall be refunded to applicant. The initial application fee paid pursuant § 123.10 shall not be refunded. If a license is revoked pursuant to § 123.19, the annual license fee shall not be refunded.

§ 123.18 MEDICAL CANNABIS ESTABLISHMENT LICENSE RULES OF OPERATION

Each medical cannabis establishment shall be operated only in accordance with the following rules:

(A) Each licensee shall display the license issued by the City in a prominent location within the licensed premises.

(B) Each establishment shall be owned, operated, kept, and maintained in accordance with the establishment requirements set forth in § 123.08 and facility standards set forth in § 123.13.

(C) Each establishment shall operate in accordance with all applicable local and state laws concerning medical cannabis.

§ 123.19 LICENSE REVOCATION, PENALTIES AND REINSTATEMENT

(A) Any medical cannabis establishment license may be revoked, cancelled or suspended for noncompliance with this Chapter, South Dakota Department of Health registration revocation,

cancellation, suspension, or noncompliance with federal, state or City laws, regulations, or ordinances.

(B) Any person operating a medical cannabis establishment without a license is subject to a civil fine of up to \$500. Each day an establishment is operated without a license shall be a separate offense.

(C) Operation of an establishment without a license shall be deemed a public nuisance and subject to the provisions of Chapter 90 of the City of Vermillion Code of Ordinances. Such nuisance may be abated in any manner permitted by Chapter 90, SDCL Chapter 21-10, or other applicable laws, including, but not limited to, an action for injunctive relief.

(D) Revocation by operation of law will occur whenever a licensee or any of its employees or agents has been convicted of selling a cannabis product to any non-cardholder.

(E) In order to reinstate a license to active status following revocation, suspension or cancellation the applicant must tender a reinstatement fee of \$10,000 for the first revocation, suspension or cancellation under this Chapter, or \$15,000 for the second such revocation, suspension or cancellation. Upon the third such revocation, suspension or cancellation, the license shall automatically terminate and may not be reinstated or renewed.

§ 123.20 NO CITY LIABILITY; INDEMNIFICATION; NO DEFENSE

(A) By accepting a license issued pursuant to this Chapter, the licensee waives any claim concerning, and releases the City, its officers, elected officials, employees, attorneys, and agents from any liability for injuries or damages of any kind that result from any arrest or prosecution of licensee, cardholders, licensed premises owners, licensee operators, employees, clients, or customers for a violation of state or federal laws, rules, or regulations.

(B) By accepting a license issued pursuant to this Chapter, all licensees, jointly and severally if more than one, agree to indemnify, defend and hold harmless the City, its officers, elected officials, employees, attorneys, agents, insurers and self-insurance pool against all liability, claims and demands on account of any injury, loss or damage, including without limitation claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever arising out of or in any manner connected with the operation of the medical cannabis establishment that is the subject of the license.

(C) The issuance of a license pursuant to this section shall not be deemed to create an exception, defense or immunity for any person in regard to any potential criminal liability the person may

have under state or federal law for the cultivation, possession, sale, distribution, or use of marijuana unless permitted by SDCL Chapter 34-20G.

Dated at Vermillion, South Dakota this 7th day of June, 2021.

THE GOVERNING BODY OF THE CITY
OF VERMILLION, SOUTH DAKOTA

BY Kelsey Coughlin-Wise
Kelsey Coughlin-Wise, Mayor

ATTEST:

BY Michael D. Carlson
Michael D. Carlson, Finance Officer

First Reading: May 27, 2021
Second Reading: June 7, 2021
Published: June 18, 2021
Effective: July 8, 2021



TITLE 39

AN ORDINANCE CREATING LICENSING REGULATIONS
FOR CANNABIS ESTABLISHMENTS.

BE IT ORDAINED BY THE CITY OF STURGIS, SOUTH DAKOTA AS FOLLOWS:

Section 1.

That SECTION I. TEMPORARY ORDINANCE – APPLICATION FOR LOCAL PERMIT/LICENSE be REMOVED from the Sturgis City Code under Title 39 – Medical Cannabis and be replaced– to read as follows:

Section 1 – Cannabis Establishments

39-1-1: Intent

The City council of the City of Sturgis hereby enacts the following licensing ordinances in order to ensure that cannabis establishments within the municipal boundaries of the City operate in a manner which complies with state laws and regulations, protects the health, safety, and welfare of the general public, prevents potential conflicts and issues arising from ownership and employees, recognizes certain safety and security considerations, and minimizes risk of unauthorized use or access of cannabis by the general public.

39-1-2: Definitions

Unless an alternative definition is explicitly stated in this section, this chapter utilizes the definitions for cannabis related terms which are defined by SDCL 34-20G-1.

APPLICANT: a person or entity seeking or renewing a cannabis establishment license.

CANNABIS (or MARIJUANA): all parts of any plant of the genus cannabis, whether growing or not, in its natural and unaltered state, except for drying or curing and crushing or crumbling. The term includes an altered state of marijuana absorbed into the human body. The term does not include fiber produced from the mature stalks of such plant, or oil or cake made from the seeds of such plant. The term does not include the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis.

CANNABIS CULTIVATION FACILITY: a licensed entity that acquires, possesses, cultivates, delivers, transfers, transports, supplies, or sells cannabis and related supplies to a cannabis establishment.

CANNABIS DISPENSARY: a licensed entity that acquires, possesses, stores, delivers, transfers, transports, sells, supplies, or dispenses cannabis, cannabis products, paraphernalia, or related supplies and educational materials.

CANNABIS PRODUCT MANUFACTURING FACILITY: a licensed entity that acquires, possesses, manufactures, delivers, transfers, transports, supplies, or sells cannabis products to a cannabis dispensary.

CANNABIS TESTING FACILITY: a licensed entity authorized to analyze the safety and potency of cannabis.

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CANNABIS ESTABLISHMENT: a cannabis cultivation facility, a cannabis testing facility, a cannabis product manufacturing facility, or a cannabis dispensary.

CANNABIS ESTABLISHMENT LICENSE or LICENSE: a license issued pursuant to this chapter for the purpose of operating a type of cannabis establishment.

CITY: the City of Sturgis, South Dakota.

CITY COUNCIL: the City council of the City of Sturgis, South Dakota.

FINANCE OFFICER: the finance officer of the City of Sturgis, South Dakota.

LICENSEE: a person, people, or entity in possession of a cannabis establishment license issued pursuant to this chapter.

MAYOR: the mayor of the City of Sturgis, South Dakota.

MENTAL HEALTH FACILITY: an entity engaged in diagnosing, treating, caring for, or counseling people requiring mental health services, including substance abuse disorders, but which does not regularly provide other types of personal health services.

RETAIL AREA: the area of a cannabis establishment where a customer can view and/or purchase cannabis or cannabis products.

SECURED AREA: all parts of a cannabis dispensary except an unsecured waiting room where people may gather before entering the verification lobby or after leaving the secured exit.

SECURED EXIT: the controlled location of a cannabis dispensary located between the retail area of a cannabis dispensary and the non-secured area or exterior with a secured door at both its entrance and exit which allows eligible persons to exit the retail area.

STATE: the state of South Dakota.

VERIFICATION LOBBY: the controlled location of a cannabis dispensary located between the non-secured area or exterior of a cannabis dispensary and the retail floor with a secured door at both its entrance and exit which allows eligible persons to enter the retail area.

39-1-3: Cannabis Establishment License Required

- A. **Classes of License:** Each cannabis establishments shall have its own class of license. The four license classes are Cannabis Cultivation License, Cannabis Dispensary License, Cannabis Product Manufacturing License, and Cannabis Testing License.
- B. **License Required:** It shall be unlawful for any person or entity to create or operate a cannabis establishment in the City without first having obtained a license from the City and a registration certificate from the State for each cannabis establishment to be operated in connection with such business. Such license and certification shall be always kept current, and the failure to maintain a current license and certification shall constitute a violation of this section.
- C. **Multiple Licenses:** A person or entity who intends to conduct activities which would meet the definition of multiple cannabis establishments must, prior to operating such cannabis establishments,

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obtain a license for each class of cannabis establishment. A person or entity may hold more than one class of license except when otherwise prohibited by this chapter.

- D. **License Location:** Each license shall authorize a single cannabis establishment to operate at a single location. Licenses of different classes may overlap except when otherwise prohibited by this chapter.
- E. **License Duration:** Each license issued is effective from January 1 through December 31, regardless of the time of year such license is approved. Each license expires at 11:59:59 P.M. on December 31 unless, prior to the expiration, the City Council has approved, or conditionally approved, the renewal of such license for the following calendar year.

39-1-4: Number of Licenses Restricted

- A. The number of cannabis establishment licenses shall be restricted by license class. For Cannabis Dispensary Licenses, the number of licenses is limited to two. **The City may hold both Cannabis Dispensary Licenses and operate such dispensaries in any manner provided by state law.** For all other cannabis establishment licenses, the number of licenses is unlimited. The numerical limits for each class of cannabis establishment may be altered at any time by resolution of the City Council.
- B. In the event the numerical cap is lowered to an amount less than the number of the existing licenses in that class, no existing licensee shall be prevented from continuing operation during the license term, requesting modifications to application information, from renewing such license for consecutive, subsequent years, or from transferring such license, on the basis that the numerical limit would otherwise prohibit the issuance of a license to a new applicant. However, this exception shall not prevent a license from being suspended or revoked, nor shall it prevent a license from not being renewed or a transfer approved, based upon grounds other than the numerical limit being exceeded.

39-1-5: Application Process

- A. **Application for License:** An applicant must submit a signed application, using the City's online portal, to the Planning and Permitting Office using the form established by the City. Such application must include:
 - 1. The legal name of the applicant.
 - 2. The physical address of the applicant.
 - 3. The name and date of birth of each principal officer and board member of the applicant entity.
 - 4. Previous experience operating a legal cannabis establishment, if any.
 - 5. Summary of operating procedures, including procedures to ensure accurate record keeping, adequate security measures, sufficient fire and building code considerations, and compliance with all other requirements of this chapter.
 - 6. Confirmation that none of the principal officers or board members has served as a principal officer or board member for a medical cannabis establishment that has had governmental license or certification revoked in any jurisdiction.
 - 7. Confirmation that none of the principal officers or board members is under twenty-one years of age.
 - 8. Confirmation that the applicant has conducted a background check into the criminal history of each principal officer, board member, agent, volunteer, or employee involved in the operation at the time of application.
 - 9. Proof that at least one principal officer is a resident of this state.
 - 10. Payment of the applicable license fee.
 - 11. A copy of the applicant's sales tax license.
 - 12. Proof that all property taxes, business improvement district taxes, and pending assessments relating to the cannabis establishment location have been paid.

13. Proof of financial responsibility in the amounts and manner established in this chapter below.
14. A sworn statement that the application contains no false statements made or omissions of any material matter in any application for a license.
15. The applicant's notarized signature.
16. **An application submitted by the City is entitled to preference.**

B. Action by City Council:

1. The City Council will consider a completed application at the next available City Council meeting following submittal, provided that such application must be submitted at least 15 days in advance of a City Council meeting. Applications are generally processed on a first come, first served basis except as further provided by this chapter.
2. The City Council may approve or deny an application in full or on condition. Such action of the City Council must take place within thirty (30) days after the application's first presentment to the City Council.
3. If approved, the mayor and finance officer will endorse the application and notify the applicant of approval within 3 days of the City Council's approval. If the Council imposes any conditions, such conditions shall be listed on the license at the time of issuance. No approved application shall become effective, and no license shall be issued until the applicant provides to the finance officer a copy of the applicant's certificate of registration from the state relating to the cannabis establishment for which the license was approved.
4. If denied, the City Council must state the basis on which the application was denied, which may include, but is not limited to: incorrect application information, missing required application criteria, insufficient detail in application, nonpayment of any obligation, proposed activity would violate City ordinance (including zoning), proposed activity would violate state law or regulations, no license available due to maximum number already issued, proposed location not zoned properly, proposed location does not comply with an applicable buffer zone, or concerns over potential building, fire, or nuisance code issues.

C. Special Procedures for Capped Licenses:

1. For license classes where the Council has established a numerical cap, applications shall be accepted by the special procedures provided in this section.
2. These special procedures shall apply whenever a license becomes available in a capped license class.
3. When such availability occurs, the City shall publish an invitation for applications on the City's website stating the deadline to apply, and the location applications may be submitted. No application for a capped license class will be accepted prior to publication of the invitation nor after the deadline established in the invitation.
4. Applications submitted pursuant to an invitation must be submitted in writing and sealed. An applicant may not supplement their application after the deadline has passed.
5. Once the deadline has passed, the finance officer shall open the applications and review each application for completeness. Complete applications shall be forward to the City Council. Applications which may are only substantially complete shall be forwarded to the City Council. City Council to determine whether such applications contain sufficient information for further consideration.
6. The finance officer shall determine by lottery the order in which the City Council considers the applications, **however an application submitted by the City must be considered before the consideration of any other application.**
7. The merits of the applications will then be considered by City Council. The City Council will approve or deny applications in the established order but may review all applications before deciding on any individual application. The City Council will approve or deny the applications in order until all applications have been acted on or the numerical cap has been reached. If the

numerical cap has been reached and there are still applications which have not been acted on, such undecided applications shall be deemed rejected.

8. If no applications are received following an invitation for applications, or if the numerical cap is not reached pursuant to an invitation for applications, these special rules shall no longer apply and applications may be received, processed, and considered on a first come, first served basis beginning at open of business the day following the City Council meeting at which the last application was acted upon pursuant to the invitation for applications. Such applications must be delivered in writing to the finance office no earlier than the time specified above and applications received before such time are deemed rejected.
9. If the numerical cap is then reached while using the first come, first served system, and a license subsequently lapses making a license available, these special procedures shall apply to issuing the license.

D. Renewal Process:

1. A person or entity operating pursuant to a license must apply for renewal of such license at least 45 days but not more than 90 days prior to the expiration of such license using the form provided by the City finance office. Such application must include payment of the renewal application fee.
2. The City Council will consider renewal applications using the same factors and timelines applicable to new applications. In addition, the City Council may consider in approving, denying, or conditionally approving a renewal application, any changed information from prior applications, concerns over actual operations or violations, nonpayment of obligations, or any other information reasonably related to the continued operation of the cannabis establishment.
3. Preference may be granted to existing license holders based on a dispensary's community involvement, facility upkeep and investment, days and hours of operation, history of interactions with law enforcement.
4. The renewal application must specify if any information has changed from its prior application.
5. The renewal application must be accompanied by all payments relating to the renewal application as well as a copy of the licensee's state certification.
6. The renewal application must re-confirm or prove all the requirements applicable to new applications remain met.
7. An applicant is not entitled to renewal of their license and the license will only be renewed by City Council after consideration of the facts and circumstances pertaining to each individual license. **An applicant does not have a protected property interest in a license issued by the City pursuant to this chapter.**

39-1-6: Transfer or Modification of License

- A. No license shall be transferred or modified except with the approval of the City Council.
- B. Prior to any transfer of a license from a licensee to an unaffiliated person, people, or entity, the licensee and the proposed transferee must complete a transfer application. Such transfer application must include all information required for a new application as to the proposed transferee and pay a transfer application fee. The City Council shall then approve, deny, or conditionally approve the proposed transfer using the same factors and timetables as apply to renewal applications. A transferred license is subject to all provisions and timelines applicable to a new or renewed license.
- C. Prior to any modification of ownership or management of a licensed cannabis establishment, the licensee must provide 30 days' notice to the finance officer in writing of the proposed changes.
- D. Prior to any modification of location or layout of a licensed cannabis establishment, the licensee must provide 30 days' notice to the finance officer in writing of the proposed changes.

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- E. In relation to a change in ownership, management, location, or layout, the mayor may approve minor changes administratively and charge an administrative modification fee. However, if the mayor determines the proposed changes are not minor and substantially alter the operation of the cannabis establishment as previously approved, the mayor shall direct the matter to be placed on the agenda of the next available City Council meeting. The City Council shall then approve, deny, or conditionally approve the proposed changes using the same factors and timetables as apply to renewal applications. For changes referred to the City Council, applicant shall also pay a full modification fee.
- F. Transfers or modifications of a license shall not extend the term of any license so modified or transferred.
- G. Transfers, modifications, and renewals occurring simultaneously for the same license require separate applications and payment of separate fees. However, the City council may waive one or more, but not all, of the fees and consider the matters as a joint application.

39-1-7: License to Remain Active

Every license issued pursuant to this chapter must remain in continuous, active use. A license that is not being actively used for a period of more than 14 consecutive days or for 28 cumulative days per year may be deemed inactive by the City finance officer. Active use includes times where the licensee is open and available to conduct business, but such business cannot occur due to factors outside of the control of the licensee.

39-1-8: Fees Established

Fees relating to cannabis establishment licenses are established as provided by this section. The fees apply to each class of cannabis establishment license unless expressly stated otherwise. All amounts set for fees in this section may be modified at any time by resolution of the City Council. The types and amounts of fees are as follows:

- New cannabis establishment application fee - \$7,500.00
- Renewal cannabis establishment application fee - \$7,500.00
- Transfer cannabis establishment application fee - \$7,500.00
- Administrative modification fee - \$50.00
- Full modification fee - \$500.00.

39-1-9: General Obligations of Licensee

- A. The following obligations shall apply to each licensee and cannabis establishment:
 - 1. Each licensee must keep any information stated in an approved application current and up to date.
 - 2. Each licensee must maintain any eligibility criteria or certifications required by this chapter for an application.
 - 3. All cannabis establishments must conduct all business activities within an enclosed structure except such loading and unloading which is incidental to such indoor activities.
 - 4. No cannabis or related paraphernalia may be displayed or kept in a business so as to be visible from outside the cannabis establishment.
 - 5. No cannabis establishment may emit any gas, vapors, odors, smoke, dust, heat, or glare that is noticeable at or beyond the property line of the cannabis establishment. Sufficient measures and means of preventing the escape of such substances from a cannabis establishment must be provided at all times. If any gas, vapors, odors, smoke, dust, heat, or glare or other substances exit a cannabis establishment, the owner of the premises and the licensee are jointly and severally liable for such conditions and are responsible for immediate, full clean-up and correction of such

condition. The licensee must properly dispose of all such materials, items, and other substances in a safe, sanitary, and secure manner and in accordance with all applicable federal, state, and local laws and regulations.

6. Each licensee must retain all books and records necessary to show fully the business transactions of the licensee for a period of the current tax year and the three immediately prior tax years. Such records shall be maintained in a manner which, if released to the City, would not contain information protected by state law. Such records must be provided to the City upon request.
7. No cannabis establishment may employ any person who is not at least 21 years of age.
8. Each licensee must provide adequate security to prevent criminal activity on cannabis establishment premises, including parking areas.
9. A licensee must pay all delinquent court judgments arising out of their dispensary and dispensary operations.
10. A licensee must not permit the general public to access any part of a cannabis establishment except where such access is permitted by law. A licensee must put in place reasonable security measures to prevent such access.
11. A licensee must operate as provided in the application, comply with any conditions attached to their license, and comply with all state and local laws.
12. A person or entity may not take any actions for which a license is required without holding both a license issued under this chapter and a corresponding state license.

B. Additional Requirements for Cannabis Dispensaries

1. No cannabis dispensary may share any physical location with any other type of business or land use type. A cannabis dispensary may only sell cannabis, cannabis products, and paraphernalia aiding in the consumption of these items and may not sell any other item or service.
2. Entry to a cannabis dispensary must be restricted. Each cannabis dispensary must have a verification lobby and secured exit. The verification lobby and the secured exit must be separate from each other.
3. When granting access to non-employees, the licensee shall unlock the entry door to the verification lobby, allow the person or people to enter the verification lobby, and then verify that each person in the verification lobby is legally permitted to access and purchase cannabis or cannabis products. If any person is found to be ineligible, that person must leave the verification lobby before the verification lobby exit door is opened into the retail area. Once all individuals in the verification lobby have been confirmed to be eligible to enter the retail area, the entry door to the verification area must be closed and locked. Then the door of the verification lobby into the retail area may be unlocked and the individuals may enter the retail area. The exit door of the verification lobby must locked after all individuals leave and before allowing other individuals into the verification lobby. At all times the exit door of the verification lobby is unlocked the entry door to the verification area must be closed and locked.
4. Individuals must leave the retail area through a secured exit. The entry door to the secured exit must remain locked until needed for use. The licensee shall then unlock the entry door to the secured area to allow individuals to enter the secured exit from the retail area, ensure that the entry door is closed and locked, and then unlock the exit door of the secured exit. Once all individuals have left the secured exit, the exit door to the secured exit must be closed and locked.
5. A licensee must not permit a non-employee to access any secured area of a cannabis dispensary other than the verification lobby, retail area, and secured exit.
6. A cannabis dispensary may be open to the public only between the hours of 8:00 a.m. and 8:00 p.m. daily.
7. A cannabis dispensary must not maintain any quantity of cannabis in excess of the amount permitted by State law.
8. All sales of cannabis must be made in person, directly to the purchaser, within the retail area of the cannabis dispensary. No sales may be made via telephone, internet, or other means of remote purchase. Deliveries must occur in person to the purchaser at the time of purchase within the

retail area of the medical cannabis dispensary. No drive-up windows or other similar delivery process may be allowed.

9. All cannabis dispensaries licensed under this ordinance must maintain their medical cannabis dispensary and premises within the following minimum requirements:
 - a. Every dispensary licensee must inspect their premises from lot line to lot line, all adjacent streets, sidewalks and alleys adjoining their premise, and sidewalks and alleys within one hundred (100) feet of such premise lot lines and shall remove any litter and debris found there on a daily basis to prevent the accumulation of litter and debris and the accidental or uncontrolled release of cannabis or cannabis products.
 - b. All solid waste and recyclable materials must be stored in refuse containers made of metal or approved plastic and shall be equipped with secure lids or covers, and such covers must remain closed to prevent the intrusion of storm water or vermin.
 - c. Refuse storage containers must be enclosed on all four sides by screening compatible with the principal structure and not less than two feet higher than the refuse container or must be otherwise effectively screened from the street and adjacent properties.
- C. Crossover of Other Cannabis Establishments:
 1. A cannabis testing facility may share a physical location with testing facilities that are authorized to handle other types of controlled substances.
 2. A cannabis testing facility, cannabis cultivation facility, and a cannabis product manufacturing facility may share a physical location and the licensed area for each may overlap each other. However, a cannabis testing facility may not share a physical location with other types of cannabis establishments if the cannabis testing facility conducts activities other than cannabis testing.

39-1-10: Fire and Building Regulations

- A. Licensees must comply with all applicable provisions of the City's fire and building codes.
- B. The building code official is authorized to require and apply standards applicable to any use and occupancy classifications to a cannabis establishment regardless of the cannabis establishment's classification when application of such other standard is substantially related to mitigating a unique hazard presented by a cannabis establishment.
- C. The fire code official is authorized to require and apply standards applicable to any use and occupancy classifications to a cannabis establishment regardless of the cannabis establishment's classification when application of such other standard is substantially related to mitigating a unique hazard presented by a cannabis establishment.
- D. All cannabis cultivation facilities, cannabis product manufacturing facilities, and cannabis dispensaries must be equipped with a fire sprinkler system throughout the entire licensed area.

39-1-12: Financial Responsibility

- A. An applicant or licensee must file with the City finance officer certificates or policies of insurance issued by a responsible insurer in the amounts and for the purposes established below. The applicant must list the City as an additional insured on each policy.
- B. The applicant or licensee must maintain a commercial general liability policy, or equivalent, with a limit of not less than two million dollars (\$2,000,000.00) for each occurrence. If such insurance contains a general aggregate limit, it must be no less than double the occurrence limit.
- C. Upon request, the City may demand, and the applicant or licensee must provide proof of any other type of insurance required by law.

39-1-13: Unauthorized Conduct relating to Cannabis

- A. No person may engage in any of the following conduct:
1. Undertake any task under the influence of cannabis, when doing so would constitute negligence or professional malpractice.
 2. Possessing cannabis or otherwise engage in the medical use of cannabis in any correctional facility.
 3. Smoke cannabis on any form of public transportation, in any public place or any place that is open to the public, or on the property of any cannabis establishment.
 4. Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, train, or motorboat while under the influence of cannabis.

39-1-14: Signage and Advertising

- A. Cannabis establishments must apply for a sign permit with the Planning and Permitting Department. All such meet the standards established in the City code.
- B. A cannabis establishment may not advertise in a manner that is misleading, deceptive, false, or is designed to appeal to minors.
- C. The owner or operator of a cannabis dispensary, must post in a conspicuous location a legible sign containing the following warnings:
1. A warning that the use of cannabis may impair a person's ability to drive a motor vehicle or operate machinery, and that it is illegal under state law to drive a motor vehicle or operate machinery when under the influence of or impaired by cannabis; and
 2. A warning that possession and distribution of cannabis is a violation of federal law; and
 3. A warning that consumption of cannabis on the property of a cannabis establishment is prohibited by law; and
 4. A warning that the smoking cannabis in public or on any form of public transportation is prohibited by law.
- D. Except as otherwise provided in this section it shall be unlawful to advertise any cannabis establishment or any cannabis product anywhere within the City where the advertisement is in plain view of, or in, a place open to the general public, including advertising utilizing any of the following media: any billboard or other outdoor general advertising device as defined by the zoning code; any sign mounted on a vehicle; any hand-held or other portable sign; or any handbill, leaflet, or flier directly handed to any person in a public place, left upon a motor vehicle, or posted upon any public or private property. The prohibition in this section does shall not apply to:
1. Any sign located on the licensed premises of a cannabis establishment which exists solely for the purpose of identifying the location of the premises and which otherwise complies with this Code and any other applicable City laws and regulations; or
 2. Any advertisement contained within a newspaper, magazine, or other periodical of general circulation within the City or on the internet.
- E. A cannabis establishment must not distribute or allow the distribution of any cannabis without charge within a cannabis establishment or at any other place for purposes of promotion, advertising, or any other purpose.

39-1-15: Suspension and Revocation

- A. A license may be revoked or suspended for, among reasons, the following:
1. Violation of any provision of this ordinance.

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2. The license has been deemed inactive.
 3. Nonpayment of any obligation, including utilities.
 4. Failure to maintain proof of financial responsibility.
 5. Inadequate or faulty security measures or surveillance cameras.
 6. Public safety concerns have been identified which may or may not rise to the level of a violation.
- B. Upon determination by the mayor that grounds exist for the suspension or revocation of a license, a notice of suspension or revocation shall be physically delivered and posted at the licensed location. Such notice shall state the grounds for the suspension or revocation, the time and date of a hearing with the City Council if the licensee wishes to contest the suspension or revocation, and whether or not the license is temporarily suspended pending the outcome of such hearing. Upon issuance of the notice, the mayor shall direct that a hearing be scheduled for the next available City Council meeting to consider the suspension or revocation of the license.
- C. In deciding whether a license will be suspended or revoked, the City Council shall consider all facts and circumstances relating to the grounds alleged in the notice to warrant suspension or revocation of the license. At the close of the hearing, the City Council may uphold the suspension or revocation or reverse the suspension or revocation. If the suspension or revocation is reversed, the City Council may impose any additional conditions on the license which are reasonably calculated to ensure that the aggrieved conduct does not reoccur.
- D. In the event a licensee's state certification is suspended or revoked, the licensee's City license shall automatically be suspended until such time as the state certification returns to good standing. If such state certification status persists long enough for the City license to be deemed inactive, such inactivity may serve as independent grounds for revocation of the City license.

39-1-16: Liability and Indemnification

- A. By accepting a license issued pursuant to this chapter, the licensee, the licensee's employees and all principal officers and board members thereof, waive and release the City, its officers, elected officials, employees, attorneys, and agents from any liability for injuries, damages or liabilities of any kind that result from any arrest or prosecution of business owners, operators, employees, clients, or customers for a violation of state or federal laws, rules, or regulations.
- B. By accepting a license issued pursuant to this chapter, each licensee agrees to indemnify, defend, and hold harmless the City, its officers, elected officials, employees, attorneys, agents, and insurers against all liability, claims, and demands on account of any injury, loss or damage, including, without limitation, claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever arising out of or in any manner connected with the operation of the cannabis establishment that is the subject of the license.

39-1-17: Compliance with other applicable laws.

- A. Except as may be otherwise provided in this ordinance, any law or regulation adopted by the state governing the cultivation, production, possession, or distribution of cannabis use shall also apply to cannabis establishments licensed by the City.
- B. If the state prohibits the sale or other distribution of medical cannabis through cannabis establishments, any license issued hereunder is revoked by operation of law, with no ground for appeal or other redress on behalf of the licensee.

- C. The issuance of any license pursuant to this chapter does not create an exception, defense, or immunity for any person or entity in regard to any potential criminal liability the person or entity may have under federal law for the cultivation, possession, sale, distribution, or use of cannabis.

39-1-18: Enforcement, Penalty, and Nuisance

- A. Any person or entity violating a provision of this chapter shall be subject to the general penalty provisions of Title 12 of the Sturgis City Code.
- B. No person, while acting as an agent of a licensee, shall take any action, or fail to take any action, that would cause a licensee to violate the provisions of this chapter. Such person causing a violation shall be subject to the general penalty provisions of Title 12 of the Sturgis City Code.
- C. In addition to any other remedy, the City attorney may apply to a court of competent jurisdiction for an injunction to prohibit the continuation of any violation of this chapter. Continued violations of this chapter are deemed to be a public nuisance. Such application for relief may include seeking a temporary restraining order, temporary injunction, and permanent injunction.
- D. In the event of a violation, suspension, or revocation where the licensee may no longer legally possess cannabis, cannabis products, or other restricted items, the licensee shall be responsible to pay the costs incurred by the City for securing, storing, safeguarding, transferring, or disposing of any cannabis, cannabis products, or other restricted items.

39-1-19: Severability

If any section, sentence, clause, or phrase of this chapter is held to be invalid, unenforceable, or unconstitutional by a decision of any authority or court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this code and the remainder shall remain in full force and effect.

Section 4.

The City Finance Officer shall cause notice of adoption of this ordinance to be published in the official newspaper and twenty (20) days after the completed publication, unless the referendum is invoked, this ordinance shall become effective.

(Title 39 revised with Ordinance 2021-06, effective 10/18/2021)

**ORDINANCE 2021-02
MEDICAL CANNABIS
A TEMPORARY ORDINANCE REGARDING THE ISSUANCE OF LOCAL MEDICAL
CANNABIS ESTABLISHMENT PERMITS AND/OR LICENSES.**

WHEREAS, a local government may enact an ordinance not in conflict with SDCL Chapter 34-20G, governing the time, place, manner, and number of medical cannabis establishments in the locality. A local government may establish civil penalties for violation of an ordinance governing the time, place, and manner of a medical cannabis establishment that may operate in the locality. A local government may require a medical cannabis establishment to obtain a local license, zoning permit, or registration to operate, and may charge a reasonable fee for the local license, zoning permit, or registration.

WHEREAS, the Municipality of Sturgis, SD ("Municipality"), makes a preliminary finding that the Municipality's current regulations and controls may not adequately address the unique needs and impacts of medical cannabis establishments as defined in SDCL 34-20G-1;

WHEREAS, medical cannabis state laws under SDCL 34-20G are effective July 1, 2021. The South Dakota Department of Health shall promulgate rules pursuant to chapter 1-26 not later than October 29, 2021, as defined by SDCL 34-20G-72. During the time between July 1, 2021 and potentially as late as October 29, 2021, local units of government will not yet know standards for medical cannabis and will not be able to adequately assess the local zoning and licensing requirements necessary to approve local permits and to better ensure applicants have a more predictable permitting process and avoid stranded investments.

WHEREAS, the Municipality makes a preliminary finding that the Municipality needs further study of the relationship of medical cannabis establishments to the City of Sturgis Comprehensive Plan and Zoning Ordinance. The public interest requires that the Municipality study, analyze, and evaluate the impacts of medical cannabis establishments and to fully explore the impacts of any proposed regulations regarding medical cannabis establishments.

WHEREAS, the Municipality makes a preliminary finding that it would be inappropriate for the Municipality to issue a local permit or license to a medical cannabis establishment prior to the South Dakota Department of Health's promulgation of regulations governing the same;

WHEREAS, the Municipality hereby exercises its authority under SDCL 11-4-3.1 and/or SDCL 9-19-13, to establish a temporary ordinance regarding the issuance of any local permits/licenses for medical cannabis establishments within the Municipality;

WHEREAS, a temporary ordinance will ensure that more comprehensive zoning ordinance and building permit changes, licensing permits, and any proposed amendments to the Municipality's Comprehensive Plan can be completely examined with adequate public input from citizens, business interests, and medical cannabis industry representatives;

WHEREAS, the Municipality finds that a temporary ordinance is reasonable to preserve the status quo and prevent significant investment pending the outcome of the above study and any proposed regulations emanating there from;

WHEREAS, the Municipality finds that the following ordinance is necessary to protect and immediately preserve the public health, safety, welfare, peace and support of the municipal government and its existing public institutions;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY, OF STURGIS, SD:

Section 1. Temporary Ordinance – Application for Local Permit/License

A medical cannabis establishment desiring to operate in the Municipality shall be required to apply for a permit and/or license from the Municipality. Applications for a local permit and/or license to operate a medical cannabis establishment, as defined by SDCL 34-20G-1, shall not be accepted until the South Dakota Department of Health has promulgated regulations as required by SDCL 34-20G-72. Any application received prior to such regulations being promulgated shall be denied.

Section 2. Prohibited Public Use

It shall be a violation of this ordinance for any person to smoke Marijuana, as such activity is defined in state statute, within any area or on any property owned by the City of Sturgis, or public right of way, or other property generally open to or used by members of the general public.

Section 3. Immediate Effect.

This ordinance is necessary to protect and immediately preserve the public health, safety, welfare, peace, and support of the municipal government and its existing public institutions pursuant to SDCL 11-4-3.1 and SDCL 9-19-13.

Adopted this 21st day of June 2021.

Effective: Immediately

PROCEEDINGS OF THE STURGIS CITY COUNCIL

The Common Council of the City of Sturgis met in regular session starting at 6:00 p.m. on Monday, December 20, 2021, at the Sturgis City Hall Council Meeting Room. Present: Mayor Mark Carstensen, Alderpersons Jason Anderson, Mike Bachand, Kevin Forrester (joined at 8:30 pm by phone) Aaron Jordan, David Martinson, Dean Sigman and Beki Zerbst. Also present: City Manager Daniel Ainslie and City Attorney Mark Marshall. Absent: Angela Wilkerson.

Motion by Martinson, second by Bachand and carried with all members present unanimously voting yes to approve the agenda with the change of cannabis applications first then the Lakeside Park report second.

Motion by Bachand, second by Zerbst and carried with all members present unanimously voting yes to go into executive session for three legal cases, three contracts and two personnel at 6:01 pm.

Motion by Sigman, second by Jordan to return to regular session at 6:23 pm.

Motion by Zerbst, second by Martinson and carried with all members present unanimously voting yes to approve the agreement with Kenny Price for use of the Samson building year around.

Mayor Mark Carstensen led everyone in the Pledge of Allegiance.

Informational Reports:

- Planning Commission meeting minutes

Announcements:

- For the next two weeks the Thursday garbage will be picked up on Wednesday and the Friday garbage will be picked up the following Monday.
- Christmas trees drop off is on Ball Park Road and Exit 32.
- At the City Christmas party, the employees raised \$632 for the Sturgis Optimist Club.

COUNCILOR'S UPDATE: Aaron Jordan

- Discussed his experience being on the Council. He has had opportunities to have conversations with the citizens, which has been a good experience.
- He commented that the City staff has a great team dynamic in each department and how much he was impressed with the employees and what they get done for the City.
- He also commented about his fellow Councilors and the good things that they do for the City of Sturgis.
- He wants to see more unity within the City.
- The new information system for the agenda/minutes will bring more transparency to the citizens. He would also like to look at the committees and make them better.
- The number one priority for Councilor Jordan is raising your family in this town and what it takes to do that correctly.

City Manager Ainslie reported:

1. The sales tax update for General Sales Tax and Capital Improvement Tax for October collected in November was up 14.2% month over month and year over year 13.5%. The Gross Receipts Tax (triple B) was up 32% month over month and year over year up 27.2%.
2. City Manager Ainslie introduced the 2021 Employee and Volunteer of the year: Corlea Tibbetts and Travis Parker, respectively.
3. Payroll wage changes: within budget
 - a. Animal Shelter - Mallory Lyons - volunteer

Motion by Anderson, second by Zerbst and carried with all members present unanimously voting yes to approve the following items on the consent calendar:

1. Consideration to approve minutes from regular Council meeting on December 6, 2021.
2. Consideration to approve 2021 Utility Department write-offs.
3. Consideration to approve write-off of the 2020 checks.
4. Consideration to approve Resolution 2021-53 - a plat for the City of Sturgis - Plat of Vacation of Right of Way for an Existing 66' ROW.

RESOLUTION 2021-53
RESOLUTION APPROVING PLAT

WHEREAS, the statutes of the State of South Dakota require that plats of property within the jurisdiction of the City of Sturgis be submitted to the governing body for approval before the same are recorded in the Office of the Register of Deeds; and

Ex.14:1



WHEREAS, the City of Sturgis Planning and Zoning have presented to the Common Council of the City of Sturgis a plat of the following described real property for City of Sturgis:

PLAT OF VACATION OF RIGHT OF WAY
AN EXISTING 66' RIGHT OF WAY
LOCATED IN THE NW1/4 SW1/4 AND THE NE1/4 SW1/4 OF SECTION 5, T5N, R5E,
B.H.M.
STURGIS, MEADE COUNTY, SOUTH DAKOTA

WHEREAS, said plat meets the requirements of the statutes.

WHEREAS, that the municipality approves the plat, and that the written certification of the City's approval will be affixed to the plat, by the Mayor.

BE IT RESOLVED by the Common Council of the City of Sturgis, South Dakota, that the within and foregoing plat is hereby approved as provided herein.

Dated this 26th day of December 2021.

Published: 12-28-2021

Effective: 01-18-2022

5. Consideration to approve Resolution 2021-54 - a plat for Dan and Trisha Roe - Hurley Subdivision.

**RESOLUTION 2021-54
RESOLUTION APPROVING PLAT**

WHEREAS, the statutes of the State of South Dakota require that plats of property within the jurisdiction of the City of Sturgis be submitted to the governing body for approval before the same are recorded in the Office of the Register of Deeds; and

WHEREAS, the City of Sturgis Planning and Zoning have presented to the Common Council of the City of Sturgis a plat of the following described real property for Dan and Trisha Roe:

Plat of
Lot 5H1-ROE Revised and Lot 5A Revised of Hurley Subdivision
Formerly a portion of Lot 5A and 5H1 - ROE of Hurley Subdivision.
All Located in the NW 1/4 of the NE 1/4 of the NW 1/4 of Section 16,
Township 5 North, Range 5 East, Black Hills Meridian, City of Sturgis,
Meade County, South Dakota.

WHEREAS, said plat meets the requirements of the statutes.

WHEREAS, that the municipality approves the plat, and that the written certification of the City's approval will be affixed to the plat, by the Mayor.

BE IT RESOLVED by the Common Council of the City of Sturgis, South Dakota, that the within and foregoing plat is hereby approved as provided herein.

Dated this 20th day of December 2021.

Published: 12-28-2021

Effective: 01-18-2021

6. Consideration to approve Resolution 2021-55 - a plat for Russ Ullerich (Ullerich Brother's Trust) Lot 1 and 2 of Harvest Springs Estates.

**RESOLUTION 2021-55
RESOLUTION APPROVING PLAT**

WHEREAS, the statutes of the State of South Dakota require that plats of property within the jurisdiction of the City of Sturgis be submitted to the governing body for approval before the same are recorded in the Office of the Register of Deeds; and

WHEREAS, the City of Sturgis Planning and Zoning have presented to the Common Council of the City of Sturgis a plat of the following described real property for Ullerich Brother's Trust, Managing Member Russ Ullerich:

Plat of Lot 1 and 2 of Harvest Springs Estates
Formerly Lots 5H, 5J, 5K, 5L and 5M of Lot 5 of the NW1/4SE1/4 of Section 9.
Located in the NW1/4SE1/4 of Section 9, Township 5 North, Range 5 East, Black Hills Meridian,
City of Sturgis, Meade County, South Dakota.

WHEREAS, said plat meets the requirements of the statutes.

WHEREAS, that the municipality approves the plat, and that the written certification of the City's approval will be affixed to the plat, by the Mayor.

BE IT RESOLVED by the Common Council of the City of Sturgis, South Dakota, that the within and foregoing plat is hereby approved as provided herein.

Dated this 20th day of December 2021.

Published: 12-28-2021

Effective: 01-18-2021

7. Consideration to approve Resolution 2021-56 - Plat for William Phillip, Shanon Vasknetz and Kyle Treloar - Utility Lot 1 in Harvest Meadows Estates.

RESOLUTION 2021-56 RESOLUTION APPROVING PLAT

WHEREAS, the statutes of the State of South Dakota require that plats of property within the jurisdiction of the City of Sturgis be submitted to the governing body for approval before the same are recorded in the Office of the Register of Deeds; and

WHEREAS, the City of Sturgis Planning and Zoning have presented to the Common Council of the City of Sturgis a plat of the following described real property for William E. Phillips, Shanon Vasknetz, and Kyle Treloar:

UTILITY LOT 1 IN HARVEST MEADOWS ESTATES LOCATED IN THE SE ¼ NW ¼, SECTION 5, T5N, R5E, B.H.M. STURGIS, MEADE COUNTY, SOUTH DAKOTA

WHEREAS, said plat meets the requirements of the statutes.

WHEREAS, that the municipality approves the plat, and that the written certification of the City's approval will be affixed to the plat, by the Mayor.

BE IT RESOLVED by the Common Council of the City of Sturgis, South Dakota, that the within and foregoing plat is hereby approved as provided herein.

Dated this 20th day of December 2021.

Published: 12-28-2021

Effective: 01-18-2021

Motion by Zerbat, second by Sigman and carried with all members present unanimously voting yes to approve the following claims:

WAGES - Ambulance \$35,208.56; Attorney \$8271.15; Auditorium \$203.07; Buildings \$1229.20; Cemetery \$2364.30; City Manager \$10,035.61; Community Center \$12,762.40; Downtown Bid \$279.08; Finance Office \$4610.19; Fire Department \$179.83; Fleet \$7595.77; Human Resource \$6260.51; Library \$11,650.33; Liquor \$8107.12; Mayor and Council \$4046.71; Parks \$11,031.09; Planning & Permitting \$7643.48; Police \$53,895.99; Rally \$10,348.39; Recreation \$4267.42; Sanitary Service \$17,450.31; Streets \$13,030.48; Wastewater \$12,746.23; Water \$19,586.07; Federal Withholding \$24,561.65; FICA \$18,712.04.
GENERAL - Baker & Taylor, \$382.63, sup; Black Hills Chemical, \$3962.15, sup; Black Hills Energy, \$13601.02, util; Nathan Borg, \$126.43, sup; Randy Brennick, \$132.72, util benefit; Bricks R Us, \$310.20, resale; CBH, \$18267.32, sup; Cengage Learning, \$74.22, sup; Epic Outdoor Advertising, \$1200.00, rent; Equipment Blades, \$7244.45, sup; Ken Groesch, \$132.72, util benefit; Jim's Auto Salvage, \$2500.00, rep; KC's Auto Repair, \$4535.66, rep; Adam Lalicker, \$132.72, util benefit; Lynn's Dakotamart, \$60.88, sup; MasterCard, \$81247.44, sup; Meade County Sheriff's Office, \$57.00, prof fee; MDU, \$8061.11, util; Microsoft, \$450.00, prof fee; Alora Murray, \$132.72, util benefit; Joel Ortiz, \$132.72, util benefit; Park Avenue Car Wash, \$49.00, sup; Travis Parker, \$132.72, util benefit; Powerplan, \$11.20, rep; Purchase Power, \$500.00, sup; Rushmore Office Supply, \$199.51, sup; SD Police Chiefs Assn, \$110.00, other;

Sheet Construction, \$6318.30, sup; Sturgis Strikers, \$850.00, other; Sturgis Volunteer Fire Dept, \$843.70, travel; Tom's T's, \$608.00, sup; U Drive Technology, \$337.26, util.

SPECIAL SALES TAX – Black Hills Energy, \$67.40, util; MasterCard, \$473.42, util; MDU, \$76.95, util.

CAPITAL IMPROVEMENTS – Helms & Associates, \$11859.61; Interstate Engineering, \$12850.50; MAC Construction, \$131382.04; MasterCard, \$158411.63.

BUSINESS IMPROVEMENT DISTRICT – Lynn Biek, \$10.00, downtown market; Rose Byars, \$538.00, downtown market; Corrine Chapinski, \$271.00, downtown market; Mark Chaplin, \$401.00, downtown market; City of Sturgis, \$134.00, downtown market; Kyle Cox, \$416.00, downtown market; Michelle Cruise, \$444.00, downtown market; Doreen Creed, \$518.00, downtown market; Amanda Culver, \$95.00, downtown market; Tami Desjarlais, \$545.00, downtown market; Shawn Fischer, \$20.00, downtown market; Amanda Gottlob, \$79.00, downtown market; Michelle Grosek, \$222.00, downtown market; Kayla Hale, \$178.00, downtown market; Bonnie Jones, \$374.00, downtown market; Jessica Kerlin, \$49.00, downtown market; Barb Koster, \$243.00, downtown market; Lynn's Dakotamart, \$5.97, sup; Gwn Martin, \$96.00, downtown market; MasterCard, \$570.71, sup; Rhonda McPherson, \$185.00, downtown market; Ashley Meiners, \$365.00, downtown market; MDU, \$304.82, other; Tanya Paradise, \$625.00, downtown market; Lacey Parson, \$124.00, downtown market; Kimberly Petersen, \$331.00, downtown market; Amy Red Owl, \$156.00, downtown market; Rushmore Office Supply, \$30.00, other;

Mikelle Schmit, \$655.00, downtown market; Christina Steele, \$460.00, downtown market; Tammy Stolle, \$121.00, downtown market; Kayla Trujillo, \$398.00, downtown market; Lisa Werlager, \$84.00, downtown market; Mikayla Wilson, \$246.00, downtown market.

HOTEL OCCUPANCY TAX DISTRICT – MasterCard, \$349.43, other.

TIF #21 HIDDEN ESTATES – Advanced Engineering & Environmental, \$5419.60, cap imp.

LIQUOR – Arctic Glacier, \$174.30, resale; Black Hills Chemical, \$264.66, sup; Cash-Wa Distributing, \$1144.94, resale; Cash & Cork, \$991.66, resale; CBH, \$156.01, resale; Coca Cola, \$698.00, resale; Dakota's Best, \$291.40, resale; Desjarlais Farms, \$216.00, resale; Fisher Beverage, \$6367.62, resale; Gold Pan Pizza, \$58.44, refund; Johnson Western Wholesale, \$20517.84, resale; Lynn's Dakotamart, \$101.88, sup; MasterCard, \$7958.93, sup; MDU, \$183.17, util; Pepsi Cola, \$41.00, resale; Quality Brands, \$12041.84, resale; Republic, \$29698.36, resale; Rushmore Office Supply, \$400.90, sup; Sawyer Brewing, \$253.00, resale; Southern Glazer's of SD, \$8411.33, resale; Sturgis Coffee, \$8.93, refund; The Good Witch Cake Shop, \$180.00, resale; True Brands, \$116.28, resale; Voss Distributing, \$99.50, resale.

WATER – Black Hills Energy, \$788.60, util; Corn & Main, \$96.55, sup; Legendary Electric, \$1224.49, rep; MasterCard, \$30854.04, sup; MDU, \$311.74, util; Oberle's Radiators & Repairs, \$125.00, rep; South Dakota 811, \$107.52, prof fee; Speedy Lube, \$55.69, sup.

WASTEWATER – Advanced Engineering & Environmental, \$31968.15, cap imp; Blake's Trailer Sales & Repair, \$12.50, rep; Carl's Trailer Sales, \$21.45, rep; Lynn's Dakotamart, \$8.34, sup; MasterCard, \$4515.52, sup; MDU, \$56.00, util; Speedy Lube, \$48.19, sup; Warnco Lab, \$2000.00, prof fee.

SANITATION – Black Hills Energy, \$15.00, util; CBH, \$1863.63, sup; City of Belle Fourche, \$27346.13, other; Lynn's Dakotamart, \$15.38, sup; MasterCard, \$3629.56, sup; Meade County Weed & Pest Management, \$3162.67, other; Northern Truck Equipment, \$370.55, rep.

AMBULANCE – CBH, \$1722.63, sup; MasterCard, \$21181.29, sup; MDU, \$156.08, util; Natl Assn of EMS Educators, \$490.00, travel.

The Finance Officer, Fay Busco, presented to the council the Cannabis applications that were submitted by November 23rd. A lottery drawing was held to select the winners of the two conditional licenses that are available with the following results:

Motion by Jordan, second by Zerbst and carried with Carstensen, Anderson, Bachand, Jordan, Martinson and Zerbst voting yes, Sigman voting no, to award the first conditional license to Puffy's for a cannabis dispensary in the City of Sturgis.

Motion by Martinson, second by Zerbst and carried with Carstensen, Anderson, Bachand, Jordan, Martinson and Zerbst voting yes, Sigman voting no, to award the second conditional license to NH Alternative cannabis dispensary in the City of Sturgis.

Gene Fennel, Fennel Design, Matt Fridell of Tall Grass Architecture and Ron Romens of Commercial Recreation Specialists (by phone) presented to the Council a draft preliminary design report for the Lakeside Adventure Park. The following items are within this report: Site Analysis; Stakeholder meetings summary; Case Studies; Elements of Design, Conceptual design; Opinions of Probable Costs; Areas of Concern Facts; Operations and Human Management. There will be another Special Council meeting on January 10th to go over the possibilities with the Council and the Lakeside Adventure Park committee.

Motion by Zerbst, second by Bachand and carried with all members present unanimously voting yes to approve the purchase of two (2) patrol cars off of the State bid from Wagner Auto of Pierre SD for the Police Department for 2022 in the amount of \$55,902.

Motion by Zerbst, second by Jordan and carried with all members present unanimously voting yes to approve Resolution 2021-52 – Supplemental Appropriation – Contingency Transfer, Grants, and Insurance.

**RESOLUTION 2021-52
SUPPLEMENTAL APPROPRIATIONS
CONTINGENCY, INSURANCE AND GRANT SUPPLEMENTS
2021 FISCAL BUDGET**

WHEREAS it appears that there will be insufficient funds in the 2021 Budget, to carry out the indispensable functions of government. It is proposed that the following Supplemental Contingency Transfer Appropriations and Grants supplements be adopted. This will become effective immediately upon passage.

CONTINGENCY:

Finance Department: 101-4142-42200 – Prof. Fees - \$9,000 – extra audit work- ambulance grant, TIF #12 and Federal audit

Buildings: 101-4192-42800 – Utilities - \$8,000

Fleet Management: 101-4196-41111 – Wages \$15,000

Rally: 101-4199-45200 – Merchandise for resale - \$15,000

Airport: 101-4350-42600 – Airport Fuel - \$20,000

GRANTS:

Police: 101-4211-4111 – Wages - \$53,684. Equipment - \$7,876

Airport: 101-4350-4111 – Wages - \$13,000

INSURANCE:

Street Lighting - 101-4316-42500 – Repairs & Maintenance - \$14,067

Police - 101-4211-42500 – Repairs & Maintenance - \$19,013

Dated this 20th day of December 2021.

Published: 12-28-2021

Effective: Immediately upon passage

Amanda Anglin, Director of SEDC, gave the Council a presentation on the process of how SEDC goes about purchasing buildings and helping entrepreneurs get a business started. The bowling alley came up for sale and SEDC has decided to purchase this building with the help of the City's economic development loan fund. SEDC is partnering with the City to keep this business open and help new management keep this business in our City.

Motion by Sigman, second by Jordan and carried with all members present unanimously voting yes to approve first reading of Ordinance 2021-12 – Title 7 – Re-districting- Version 6.

Forrester joins meeting by phone at 8:30 pm.

Motion by Forrester, second by Jordan and carried with Carstensen, Anderson, Bachand, Forrester, Jordan, Martinson and Sigman voting yes, Zerbst voting no, to table the 3-Mile Area Policy agreement with Meade County.

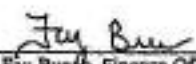
Any other business:

- Petitions for change of Government was submitted to the City Finance Officer on December 16th.
- Councilor Zerbst thanked everyone for the work on all the Holiday Events in town these past weeks.
- Brenda Vasknetz asked when the Council will act on the petitions? The Council will act on this when the process is completed.

Motion by Martinson, second by Bachand and carried with all members present unanimously voting yes to go into executive session for personnel and contracts at 8:50 pm.

Motion by Martinson, second by Anderson to return to regular session at 9:40 pm.

Motion by Sigman, seconded by Jordan and carried with all members present unanimously voting yes to adjourn the meeting at 9:41 pm.

ATTEST: 
Fay Buech, Finance Officer

APPROVED: 
Mark Carstensen, Mayor

Published once at the total approximate cost of \$205.13.

5.74.070 Numerical limits for dispensary licenses.

A. *Dispensary numerical limits.* Under the authority granted by SDCL 34-20G-56, the number of medical cannabis dispensary licenses shall not exceed 1 for each 5,000 of population of the city. The population shall be determined on July 1 of each year by the city's Community Development Department. No medical cannabis establishment already licensed by the city may be denied a license renewal solely because of the numerical limitation being met.

B. *No numerical limits for other establishments.* The city does not adopt any numerical limits for cannabis testing facilities, cultivation facilities, or cannabis product manufacturing facilities.

C. *Special procedures for license issuance upon availability.* Dispensary licenses, when they become available, shall be issued according to the following policy:

1. The Finance Office shall publish on the city's website an invitation for applications stating that a medical cannabis dispensary license is available and stating the deadline to apply. No applications shall be accepted prior to this publication, nor may any application be accepted or modified after the application deadline.
2. Applications must comply with the provisions in § 5.74.030 and shall include an application fee of \$1,500 or as set by resolution of the Common Council.
3. After the application deadline has passed, the Finance Director shall open the applications and, following the provisions in § 5.74.040, review the applications and approve or deny each application for a provisional license. Those applications granted provisional licenses may submit an application for a registration certificate to the South Dakota Department of Health. Those applicants receiving a provisional license from the city and a registration certificate from the South Dakota Department of Health may obtain an annual medical cannabis establishment license after paying the annual license fee as provided in § 5.74.050.

These special procedures shall not apply to the initial issuance of licenses upon adoption of this chapter. The special procedures shall be utilized only after dispensary licenses equal to the applicable numerical limit have been issued and a dispensary license becomes available.

(Ord. 6505, 2021)

The Rapid City Municipal Code is current through Ordinance 6618, passed May 20, 2024.

Disclaimer: The city has the official version of the Rapid City Municipal Code. Users should contact the city for ordinances passed subsequent to the ordinance cited above.

City Website: www.rcgov.org

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Ex. 15:1

The Rapid City Municipal Code is current through Ordinance 6618, passed May 20, 2024.



5.74.110 Active use of dispensary license.

A. *Commencement of operations.* A medical cannabis dispensary shall begin operation of the licensed establishment for the purposes provided in this chapter no later than 1 year after the city's issuance of the annual license. However, for licenses issued in 2021 or 2022, the Finance Director may extend a licensee's timeline to commence operations for an additional one year upon good cause shown by the licensee. In the event that a medical cannabis dispensary does not timely commence operations pursuant to this section, the license shall be deemed forfeited and the business shall not operate.

B. *Continuous operation.* A medical cannabis dispensary shall continuously and actively conduct business licensed under this chapter. Any medical cannabis dispensary license not actively used for a period of more than 60 cumulative days per calendar year may be deemed inactive by the city; days where the license is suspended by the city shall not be used for purposes of calculating inactivity. The Finance Director may request, and the licensee shall provide, sufficient proof of the licensee's continuous operation. If the licensee has not actively used the license, the city may revoke the license or may deny a renewal application on the basis of nonuse.

(Ord. 6553, 2022; Ord. 6505, 2021)

The Rapid City Municipal Code is current through Ordinance 6618, passed May 20, 2024.

Disclaimer: The city has the official version of the Rapid City Municipal Code. Users should contact the city for ordinances passed subsequent to the ordinance cited above.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

PUFFY'S, LLC, a South Dakota) #30554
Limited Liability Company,)
Applicant/Appellee,)
vs.) APPELLANT'S
) REPLY BRIEF
STATE OF SOUTH DAKOTA,)
DEPARTMENT OF HEALTH)
Respondent/Appellant.)

APPEAL FROM THE
CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA.
THE HON. JOSHUA HENDRICKSON
JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

Tamara D. Lee
Special Asst Atty. Gen.
SD Department of Health
600 E Capitol Ave.
Pierre, SD 57501
605.773.3361
Attorney for Respondent

Ryan Cwach
Birmingham and Cwach
202 W. 2nd St.
Yankton, SD 57078
605.260.4747
Attorney for Applicant

Notice of Appeal/Stay Filed: December 11, 2023
Application for Extension Granted: April 17, 2024

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PRELIMINARY STATEMENT

The Department of Health is the Appellant in this brief and will be referred to as "Department of Health" or simply "Department". Puffy's, LLC is the Appellee in this brief and will be referred to as "Puffy's".

The Order Regarding Peremptory Writ of Mandamus, dated November 17, 2023, is attached as "Exhibit A" to the Appellant's Brief, on file herein.

JURISDICTIONAL STATEMENT

The jurisdictional statement as stated in the Appellant's Brief is hereby incorporated as if fully restated herein.

LEGAL ISSUES

I.

CONSTITUTIONALITY OF ARSD 44:90:03:16

The circuit court ruled that ARSD 44:90:03:16 is constitutional and a proper use of delegated authority under the promulgation statute.

Most relevant cases and statutes:

Black Bear v. Mid-Cent. Educ. Coop., 2020 S.D. 14
Cid v. State Dept. of Social Services, 1999 SD 108
Johnson v. City of Minneapolis, 152 F.3d 859 (8th Cir. 1998)
Matter of Z.B., 2008 S.D. 108
Powers v. Turner County Board of Adjustment, 2022 S.D. 77

ARSD 44:90:03:16

II.

THE DEPARTMENT OF HEALTH'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO QUASH ALTERNATIVE WRIT OF MANDAMUS SHOULD HAVE BEEN GRANTED.

See Appellant's Brief

III.

THE CIRCUIT COURT SHOULD HAVE ALLOWED AN OPPORTUNITY FOR AN EVIDENTIARY HEARING.

See Appellant's Brief.

STATEMENT OF THE CASE AND FACTS

The case history and statement of facts as stated in the Appellant's Brief are hereby incorporated as if fully restated herein.

ISSUES

THE DEPARTMENT OF HEALTH'S MOTION TO DISMISS
SHOULD HAVE BEEN GRANTED.

The circuit court denied the Department of Health's Motion to Dismiss or, in the alternative, Motion to Quash Alternative Writ and simultaneously granted the Peremptory Writ of Mandamus.

STANDARD OF REVIEW

The standard of review argument as stated in the Appellant's Brief is hereby incorporated as if fully restated herein.

ARGUMENT

I.

CONSTITUTIONALITY OF ARSD 44:90:03:16

A. Waiver of Constitutionality Argument

The constitutionality of ARSD 44:90:03:16 and whether it is a proper promulgation is being challenged, but Puffy's did not address this issue in the application for alternative writ of mandamus, the brief for the November 6, 2023 hearing, or the oral arguments at the motion hearing. See, filings in 51CIV23-000937 and Motion Hearing transcript for 51CIV23-000937, attached as Exhibit 2 to appellee's brief. The brief submitted by Puffy's for the circuit court motion hearing contained a couple paragraphs arguing that the Department did not have authority to implement ARSD 44:90:03:16, but the constitutionality issue was never raised. Nor did the circuit court address it.

Ordinarily an issue not raised before the trial court will not be reviewed at the appellate level. The trial court must be given an opportunity to correct any claimed error before we will review it on appeal. To preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons. Failing to raise an issue, thereby allowing the circuit court an opportunity to correct the claimed error, results in waiver of the issue. State v. Gard, 2007 SD 117, ¶15, 742 N.W.2d 257, 261 (citations omitted). See also Fed. Land Bank of Omaha v. Jensen, 415 N.W.2d 155, 159 (S.D.1987)

("Not having been presented to the trial court for ruling, it simply is not preserved for appeal[.]")

In re: M.D.D., 2009 S.D. 94, ¶11.

Because the constitutionality issue was not raised in the lower court action, Puffy's waived its right to address it on appeal. Nonetheless, the substance of the constitutionality claim will be addressed to show it is without merit.

B. Equal Protection Analysis

1) No Standing

It is a well-understood legal maxim that a party must have standing before being allowed to bring a legal cause of action. In addressing this issue, this Court, in Powers v. Turner County Board of Adjustment, 2022 S.D. 77, ¶7, stated:

"litigant[s] must have standing in order to bring a claim in court." Powers I, 2020 S.D. 60, ¶ 13, 951 N.W.2d at 289-90 (quoting Lippold v. Meade Cnty. Bd. of Comm'rs, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922). And "[a]lthough standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." Id. (alteration in original) (quoting Lippold, 2018 S.D. 7, ¶ 18, 906 N.W.2d at 922). "Whether a party has standing to maintain an action is a question of law reviewable by this Court de novo." Pickernel Lake Outlet Ass'n v. Day Cnty., 2020 S.D. 72, ¶ 7, 953 N.W.2d 82, 86 (quoting Howlett v. Stellingwerf, 2018 S.D. 19, ¶ 11, 908 N.W.2d 775, 779).

Accord, Thom & Miller v. Barnett et al./Election Contest as to Amendment A, 2021 S.D. 65. The circuit

court did not address the issue of standing, but because it is a critical threshold issue, it needs to be addressed.

South Dakota courts follow the same principles as federal courts regarding standing. "For a court to have subject matter jurisdiction over a case, the plaintiff must establish standing as an aggrieved person." Black Bear v. Mid-Cent. Educ. Coop., 2020 S.D. 14, ¶ 11, citing Cable v. Union Cty. Bd. of Cty. Comm'rs, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825. "Standing to sue is part of the common understanding of what it takes to make a justiciable case." Id., at ¶11, citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998). "To establish standing:

First, the plaintiff must establish that he suffered an injury in fact—'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, the plaintiff must show that there exists a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains. The causal connection is satisfied when the injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Finally, the plaintiff must show it is likely, and not merely speculative, that the injury will be redressed by a favorable decision."

Id., at ¶11, citing Cable, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825-26 (internal citations omitted).

Puffy's has no standing because it has not, nor

can it, prove the first element - injury. Puffy's cannot prove a concrete and particularized injury, because there is none. As a matter of fact, applying the administrative rule as written actually serves as a benefit to Puffy's because it places them first in line for a registration certificate that has become available. Without the language in this administrative rule, Puffy's would be back at square one - competing against a multitude of other persons interested in obtaining the available registration certificate. Through its own admission, Puffy's even said they have not suffered any harm here. During the circuit court motion hearing in this matter, Puffy's' attorney stated on the record that "[w]e don't necessary think that we've been harmed - or Puffy's doesn't think it's been harmed by the Department, necessarily." See, Motion Hearing transcript, pg. 11, ln. 23-25 (Exhibit 2 to appellee's brief).

Because there is no injury, the second and third elements, by default, are also not present. Ergo, Puffy's does not have standing to bring a claim. Even if Puffy's could show standing, the requisite elements for an equal protection claim are not present.

2) Not Similarly Situated

"To state an equal protection claim, [a plaintiff] must have established that he was treated differently from others similarly situated to him." Johnson v. City of Minneapolis, 152 F.3d 859, 862 (8th Cir. 1998),

citing, Klinger v. Dep't of Corrections, 31 F.3d 727, 731 (8th Cir. 1994). Similarly situated refers to one class of persons being alike in all relevant ways to another class for purposes of a particular decision or issue. www.law.cornell.edu/wex/similarly_situated

Puffy's fails to demonstrate that it was treated differently than others similarly situated. Applicants that are part of a medical cannabis lottery jurisdiction are distinguishable from applicants in a medical cannabis non-lottery jurisdiction for the very substantial reason that there are other applicants waiting their turn for a chance to obtain a registration certification in a lottery jurisdiction, but there is no such waitlist in a non-lottery jurisdiction. Applicants in a lottery jurisdiction must wait for a certificate to become available and for their turn on the waitlist to arise, plus no further applications can be submitted until all the waitlist applicants have had their opportunity. To the contrary, applicants in a non-lottery jurisdiction can apply at any time for a registration certificate - there is no waiting for others to be given first opportunity.¹ Thus, the two types of applicants are not similarly situated.

In its brief, Puffy's asks why a Rapid City establishment should be "treated differently" than a Sioux Falls establishment by requiring it to become

¹ ARSD 44:90:03:16 also addresses scoring systems. The same logic being stated here applies to a scoring system, but since this case deals with a lottery system, that is what is addressed in this brief.

operational within a year. Puffy's misunderstands. As stated in Appellant's Brief, on file herein, some local jurisdictions chose to conduct their own lottery for a certificate when more applicants applied than there were allowable certificates. Sioux Falls was one of those jurisdictions that ran its own lottery.² In addition, local jurisdictions, including the City of Sioux Falls, enacted their own set of ordinances for medical cannabis establishments. The City of Sioux Falls enacted Ordinance 105-21, which passed on September 7, 2021.³ Under the ordinance, a permissible medical cannabis establishment must obtain a license from the city, a current state registration certificate issued by the South Dakota Department of Health, and a certificate of occupancy.⁴ In section 121.003(e), the language states that

"Any license issued under this chapter must remain in continuous, active use. A licensee shall have 60 days after issuance of the certificate of occupancy to begin active use of the license. Any license not actively used within those 60 days shall be deemed inactive. Once an initial annual license is in active use or any annual renewal license is issued, any license not actively used for a period of more than 60 cumulative days per calendar year may be deemed inactive by the city. Active use means times where the licensee is open and available to conduct business authorized by the license. However, days where the license is suspended by the city shall not be used for purposes of calculating inactivity. The city may

² <https://www.dakotanewsnow.com/2021/11/18/five-sioux-falls-businesses-win-lottery-marijuana-dispensary-licenses/>

³ https://codelibrary.amlegal.com/codes/siouxfalls/latest/siouxfalls_sd/0-0-0-76935

⁴ City of Sioux Falls, Ord. 105-21, § 121.003 (a)(1)

not reissue or renew any medical cannabis establishment license issued pursuant to this chapter to the same licensee if the license has not been actively used by the licensee." (emphasis added)

Therefore, comparatively, the Department's administrative rule that is being challenged gives much more liberty to establishments than the Sioux Falls ordinance does - under the administrative rule, establishments get 365 days (366 days during a leap year). This is more than six times (or 600%) what is given by the City of Sioux Falls.

Like its counterpart on the eastern side of the state, the City of Rapid City also passed an ordinance addressing a timeline for becoming operational and staying active in business⁵ that adopts a one-year timeline just like the Department's rule, but then imposes a more restrictive approach by requiring the establishment to not have more than 60 cumulative days

⁵ 5.74.110 Active use of dispensary license. A. *Commencement of operations. A medical cannabis dispensary shall begin operation of the licensed establishment for the purposes provided in this chapter no later than 1 year after the city's issuance of the annual license.* However, for licenses issued in 2021 or 2022, the Finance Director may extend a licensee's timeline to commence operations for an additional one year upon good cause shown by the licensee. *In the event that a medical cannabis dispensary does not timely commence operations pursuant to this section, the license shall be deemed forfeited and the business shall not operate.*

B. *Continuous operation. A medical cannabis dispensary shall continuously and actively conduct business licensed under this chapter. Any medical cannabis dispensary license not actively used for a period of more than 60 cumulative days per calendar year may be deemed inactive by the city;* days where the license is suspended by the city shall not be used for purposes of calculating inactivity. The Finance Director may request, and the licensee shall provide, sufficient proof of the licensee's continuous operation. *If the licensee has not actively used the license, the city may revoke the license or may deny a renewal application on the basis of nonuse.* (emphasis added)

Rapid City Ordinance No. 6505, §5.74.110.

of being inactive.

Hence, in this case, even if the state didn't have a rule requiring the establishment to become operational within one year, the city of Rapid City does. And the Rapid City ordinance goes even further in requiring an establishment to not become inactive for more than 60 cumulative days. In the event of such inactivity, Rapid City can revoke or deny the renewal of such license. This, too, is more burdensome than the Department's rule.

As can be seen by these comparative ordinances, the rule adopted by the Department is akin to the language of the city ordinances, but the Department's rule is less burdensome.

3) Rational Basis

The rational basis test is a standard of judicial review that examines whether a legislature had a reasonable and not an arbitrary rationale for enacting a particular statute. In the context of equal protection, the rational basis test is used to examine laws that make a distinction between different groups of people.

This Court has upheld statutes under the rational basis test while demonstrating that it is a deferential standard of review that presumes the constitutionality of the law and recognizes the legislature's broad discretion in enacting laws.

In recognizing the deferential standard, the South

Dakota Supreme Court has enunciated the presumption of constitutionality. "There is a strong presumption a statute is constitutional." Matter of Z.B., 2008 S.D. 108, ¶5, quoting, Meinders v. Weber, 2000 SD 2, ¶28, 604 NW2d 248, 260 (citing State v. Laible, 1999 SD 58, ¶10, 594 NW2d 328, 331 (other citation omitted)). "Only when a statute plainly and unmistakably violates a constitutional provision will we declare it unconstitutional." Id., quoting Meinders. "When deciding the constitutionality of a statute we do not determine whether the 'legislative act is unwise, unsound, or unnecessary,' but only if it is constitutional." Id., citing, State v. Allison, 2000 SD 21, ¶5, 607 NW2d 1, 2. In an equal protection challenge, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Lehnhausen v. Lake Shore Auto Parts Co., 410 US 356, 364, 93 S.Ct 1001, 1006, 35 LEd2d 351 (1973) (citations omitted). See also, Matter of Certain Territorial Elec. Boundaries, Etc., 281 N.W.2d 65, 69 (S.D. 1979) at 69 (the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision).

For purposes of a rational basis analysis, Cid v. State Dept. of Social Services, 1999 SD 108, pronounced that "[t]his Court has established a two-prong test for analyzing equal protection issues under rational basis

scrutiny. The Court must determine:

- (1) [W]hether the [rule] does set up arbitrary classifications among various persons subject to it.
- (2) [W]hether there is a rational relationship between the classification and some legitimate legislative purpose."

citing, CRSTTA v. PUC of South Dakota, 1999 SD 60, ¶46, 595 NW2d 604, 614 (citing Lyons v. Lederle Lab., 440 NW2d 769, 771 (SD 1989)).

ARSD 44:90:03:16 does not set up an arbitrary classification. This administrative rule only addresses scoring and lottery situations and applies to applicants in a state-run scoring or lottery, so there are no separate classifications of persons or entities in this rule. And all state-run lotteries are treated the same, regardless of the location within the state. Further, even if there was an imagined classification for the sake of argument, it is not arbitrary because lottery applicants are substantively distinguishable from non-lottery applicants for the reasons noted in the Department's briefs. "Arbitrary" is defined as "[n]ot supported by fair, solid, and substantial cause, and without reason given."⁶ As explained, there is solid rationale for distinguishing between a lottery applicant and a non-lottery applicant when it comes to operational timelines.

Because there is no arbitrary classification,

⁶<https://thelawdictionary.org/arbitrary/>

under the rational basis analysis, the equal protection argument fails and application of the second element does not need to be examined. Regardless, an argument on the second element will be addressed herein to show that neither element of a rational basis analysis is met in this case.

ARSD 44:90:03:16 was promulgated for the purpose of addressing the operation of a state-run lottery when more applicants apply for a registration certificate than a local jurisdiction has allocated as allowed. In doing this, the Department of Health addressed the protocol to follow once the certificates were awarded, and also modified the rule to address the issue of the economic slowdown created by the COVID-19 pandemic. If the Department would not have put in a one-year timeline for the establishments to become operational, an establishment could hold onto the certificate indefinitely, without any intention of opening a medical cannabis business, to the detriment of the applicants on the waitlist as well as to the detriment of the local economy and the other medical cannabis establishments that count on their counterparts to open up and engage in business-to-business transactions. This would also create the opportunity for an establishment enterprise to create a monopoly if they were awarded several of the lottery certificates (such as was the case in the Rapid City lottery) and to barricade competition.

In the Cid case, *supra*, the court determined that

a rational relationship existed because the agency (DSS) had a legitimate interest in implementing the nation's immigration policy. The court held that DSS's promulgation and implementation of rules furthered the State's (DSS's) legitimate interest. Therefore, the DSS rule passed rational basis scrutiny, and its implementation did not constitute a denial of equal protection under the law.

Likewise, in the instant case, the Department has a legitimate interest in implementing the state medical cannabis program and creating uniform rules that are fair to all the existing and potential establishments. Because the subject rule is rationally related to this legitimate government purpose, the second element of the rational basis test is met.

This Court has recognized the ability of administrative agencies to adapt to the current environment. "...we note that as an administrative agency the PUC 'is not bound by stare decisis, and therefore it can redefine its views to reflect its current view of public policy regarding the utility industry.'" Ehlebracht v. Crowned Ridge Wind, LLC, 2022 S.D. 46, ¶29, citing In re W. River Elec. Ass'n, Inc., 2004 S.D. 11, ¶ 25, 675 N.W.2d at 230. See also Yellow Robe v. Bd. of Trustees of South Dakota Ret. Sys., 2003 S.D. 67, ¶ 14, 664 N.W.2d 517, 520 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances." Fn 12.) This aligns with the fact that the Department needed to

modify the language of **ARSD 44:90:03:16** to adapt to the economic slowdown created by the COVID-19 pandemic. As background to the reasoning behind the language modification, the Department was asked by the industry to look at the one-year requirement to be operational due to supply chain issues as a result of the pandemic. There was testimony that businesses had ordered and paid for necessary equipment to open their business and, due to those supply chain issues, could not open their business within that time period. Thus, the need to create the additional one-year timeframe to become operational.

C. Proper Promulgation of Authority

The circuit court held that **ARSD 44:90:03:16** falls within the scope of delegation in SDCL 34-20G-72, that it does not impermissibly expand upon SDCL 34-20G-72, and it is not invalid. See, Order Regarding Peremptory Writ of Mandamus, pg. 11, on file herein.

The initial version of **ARSD 44:90:03:16** became effective on October 5, 2021. Exhibit A, attached hereto. This rule was subsequently modified by adding language to allow an additional one-year extension for an establishment to become operational, if the establishment provided written documentation of timely efforts to become operational. The modified version of the rule became effective on November 22, 2022. Exhibit B, attached hereto. This modified version was crafted

as a compromise with the medical cannabis industry due to the economic slowdown that resulted from the COVID-19 pandemic.

The constitutionality of the modified version was not questioned during the rules review process, even though the interim rules review committee has the authority to question the constitutionality of a proposed rule that comes before it. See, **SDCL 1-26-38**. Notably, Mr. Cwach, the attorney for Puffy's herein, was a voting member of the Interim Rules Review Committee ("IRRC") when both the initial version of **ARSD 44:90:03:16** in 2021 and the modified version in 2022 were presented to, and approved by, the IRRC. As a member of the committee, Mr. Cwach ("Cwach") asked several questions about medical cannabis rules during the September 13, 2021 meeting but never questioned the constitutionality of any of the rules and, after several of the other rules were reverted, voted aye to the motion that the review of the remaining rules was complete. If Cwach felt the administrative rule was unconstitutional, he had authority, as a member of the Interim Rules Review Committee, to motion to suspend the rule and have a hearing thereon.⁷ Not only did Cwach not do that, but

⁷ **1-26-38. Suspension of provisional rules by interim committee--Hearing on suspension--Filing and duration of suspension.** The Interim Rules Review Committee may, by an affirmative vote of not less than a majority of the members of the committee, suspend provisional rules or rules which have not become effective. To suspend a rule, the committee shall:

- (1) Give the agency which promulgated the rule at least two weeks notice of a hearing on the proposed suspension;
- (2) Hold a hearing, which may be in conjunction with a regular committee meeting. At the hearing, the burden of proof that the rule is necessary and does not violate any constitutional or statutory provision or the legislative intent when authority to promulgate the rule was given, is on the agency;

when the modified version of the rule was before the IRRC, Mr. Cwach was the board member that made the motion that the review of the rules proposed by the Department of Health was complete. Mr. Cwach also voted aye to that motion. See, Exhibits C (pp. 6, 10-12) and D (pp. 3-5), attached hereto.

As a rule addressing awarding of registration certificates during a lottery scenario, the rule is within the parameters of the statute delegating promulgation authority to the Department.

SDCL 34-20G-72 is the general delegation statute. Subsection (2) of that statute delegates authority to the Department to promulgate rules regarding the lottery system.⁸

First, the language setting out the 4 subsets does not create an all-inclusive list. The use of the term "includes" is illustrative and not exhaustive.

The South Dakota Supreme Court has "noted that

[3] File an appropriate resolution of such action with the secretary of state. The suspension is effective from the date of such filing. A suspended rule shall remain suspended until July first of the year following the year in which it became, or would have become, effective, and may not be enforced during that period.

⁸"Establishing a system to numerically score competing medical cannabis establishment applicants, in cases where more applicants apply than are allowed by the local government, that includes analysis of:

- (a) The preference of the local government;
- (b) In the case of dispensaries, the suitability of the proposed location and its accessibility for patients;
- (c) The character, veracity, background, qualifications, and relevant experience of principal officers and board members; and
- (d) The business plan proposed by the applicant, that in the case of a cultivation facility or dispensary shall include the ability to maintain an adequate supply of cannabis, plans to ensure safety and security of patrons and the community, procedures to be used to prevent diversion, and any plan for making cannabis available to low-income registered qualifying patients;"

language describing a general subject followed by language 'including' specific examples is not intended to be an exclusive list." DeHaven v. Hall, 2008 S.D. 57, ¶ 50, 753 N.W.2d 429, 444-45, citing, Peterson v. Peterson, 2000 SD 58, 610 N.W.2d 69; Hautala v. Hautala, 417 N.W.2d 879 (S.D.1988). See also, Crawford v. Schulte, 2013 S.D. 28.

And a book co-authored by a U.S. Supreme Court Justice includes a section on semantic canons that discusses the presumption of the term "include" as a nonexclusive term. An excerpt from that book states:

15. Presumption of Nonexclusive "Include"
The verb to include introduces examples, not an exhaustive list.
In normal English usage, if a group "consists of " or "comprises" 300 lawyers, it contains precisely that number. If it "includes" 300 lawyers, there may well be thousands of other members from all walks of life as well. That is, the word include does not ordinarily introduce an exhaustive list, while comprise—with an exception that we will discuss shortly—ordinarily does. That is the rule both in good English usage¹ and in textualist decision-making.² Some jurisdictions have even codified a rule about include.³
(footnotes omitted)

Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

Second, establishing the proper protocol for lottery-obtained registration certificates is an essential aspect of drafting this rule. **ARSD 44:90:03:16** was drafted with proactive forethought to

prevent possible future issues, such as hoarding of a registration certificate to limit competition. Instituting a one-year timeline is warranted because it provides ample time for the applicant to get a business up and running, while also respecting the interests of all applicants on the waitlist. And the one-time extension language that was added to the November 22, 2022 version was warranted to accommodate the business interests of the certificate holders that were experiencing an economic slowdown due to the COVID-19 pandemic, while also still recognizing the interests of the applicants on the waitlist.

On page 9 of its brief, Puffy's quotes the text of the new language that was added to **ARSD 44:90:03:16** in November, 2022. However, in quoting the additional language, Puffy's made an interesting choice to leave out the last sentence of the new language, which states: "Establishments must comply with the requirements for renewal in §44:90:03:02 regardless of the extension." This is an important part of the added language and is also crucial information for purposes of Puffy's argument because it demonstrates that the Department was underscoring that establishment needs to adhere to the requirement for an annual renewal application. And, importantly, the annual renewal application "[m]ust include all components of an initial application, except that a detailed description of any changes to operating procedures, or a certification that no such changes exist, may be

substituted for a complete set of operating procedures." ARSD 44:90:03:02(2) (2021).

Thus, an applicant that received the initial registration certificate must resubmit all components of an initial application every year. This illuminating rule requires the registration certificate holder to resubmit the application information, so it follows that an applicant on the waiting list that becomes eligible to receive the registration certificate in the place of an original certificate holder must also resubmit all components of an initial application every year.

When the Department notified Puffy's that it could proceed with the process for a lottery dispensary certification, it had been over a year from the date of the lottery so the Department was well within its authority to require all components of an initial application from Puffy's. Despite this, the then-acting Program Administrator only required Puffy's to update its application by verifying that everything was still accurate. As the attorney for Puffy's, Cwach acknowledged this in a phone conversation with the undersigned attorney and stated that providing a certification that the information in the initial application was all up-to-date would not be an issue. In addition to the required information, an initial application also must include the application fee. See, ARSD 44:90:03:01(9) (2021); SDCL 34-20G-55(1)(a). Thus, requiring Puffy's to pay the annual fee is also

commensurate with the Department's duties. All the rules apply, so to simply hand over a certificate without ensuring compliance with all the administrative rules would be an abrogation of the Department's duty.

Puffy's statement on page 9 of its brief that "the Department cannot even conclude if dispensaries that presently sell cannabis and cannabis products are operational" is, at best, a misstatement of the Department's answer to the cited interrogatory. In the referenced answer, the Department stated that it had not yet inspected the physical locations of either of the two dispensaries being asked about, so it could not say with certainty whether either one is operational. That is wholly different from the characterization given by Puffy's.

In response to Puffy's claims regarding the local license, it is noteworthy that the City of Rapid City issues the local licenses once per year - in January - as each license terminates on December 31 of the year of issuance.⁹ Furthermore, the City of Rapid City issues a provisional license to an applicant and does not issue the actual annual license unless and until the applicant receives a state-issued certificate¹⁰ and pays the annual license fee.¹¹

⁹ Rapid City Ordinance No. 6505, §5.74.050, para. C. The annual license issued under this chapter shall take effect when issued and shall terminate on December 31 in the year of issuance.

¹⁰ "A provisional license shall not entitle the establishment to operate within the City unless and until the establishment obtains a state registration from the Department and an annual license pursuant to Section 5.74.050." Rapid City Ordinance No. 6505, §5.74.040 Issuance of Provisional Licenses, para. D.

¹¹ Rapid City Ordinance No. 6505, §5.74.050, para. D. Unless otherwise changed by resolution of the Common Council, the annual license fee shall be \$3,500 for the first year of operation. The fee shall not be prorated, and any licensee whose license is for less than 12 months shall pay the total fee amount.

As stated in Appellant's Brief, on file herein, the context of ARSD 44:90:03:16 is important because it is part of a bigger whole to accomplish the goal of regulating the medical cannabis industry in South Dakota. There are several statutes and rules that an establishment must comply with to become eligible to receive a registration certificate. All these eligibility requirements apply whether it is an initial application, a renewal application, or an alternate on a lottery waitlist. Circumstances change, and the Department is tasked with the responsibility of ensuring an establishment complies from the start and throughout its tenure of holding a registration certificate. This also encompasses the duty to ensure an alternate applicant on a lottery waitlist is still fully compliant prior to issuing an available registration certificate.

In discussing interpretation and construction of statutes, a South Dakota law review article states

"In addition to the text, interpreters in South Dakota should consider the context of a statute.⁶¹ As an interpretive tool, "context" includes the entire statute, related enactments, the historic setting of enactment, and the purpose it was intended to accomplish.⁶² Context is a common interpretive tool, with even the most committed textualist interpreters evaluating context as a guide to textual meaning.⁶³"
(footnotes omitted)

Neil Fulton, South Dakota Legisprudence: A Catalog and Analysis, 68 S.D. L. REV. 334 (2023). Available at: <https://red.library.usd.edu/sdlrev/vol68/iss3/6>

For all these reasons, ARSD 44:90:03:16 is a constitutionally valid exercise of promulgated authority.

CONCLUSION

Puffy's did not preserve its right to bring a constitutional argument against ARSD 44:90:03:16. Even so, Puffy's cannot meet the standing requirements and also fails to prove the requisite elements of a rational basis analysis to an equal protection claim.

For all the reasons stated herein and in Appellant's Brief, the Department hereby respectfully requests that this Court reverse the order of the circuit court and enter an order dismissing and/or quashing the alternative writ of mandamus.

Dated this 24th day of July, 2024.

/S/ Tamara Lee
Tamara Lee
Special Assistant Attorney General
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(605) 773-3361

CERTIFICATE OF E-FILING AND SERVING

I hereby certify that on July 24, 2024, I caused a true and accurate copy of the foregoing Appellant's Reply Brief to be electronically served, via the South Dakota Odyssey program, on the following:

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Dated on this 24th day of July, 2024.

/S/ Tamara Lee
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EXHIBIT A

44:90:03:16. Department awarding of certification -- Tiebreaking procedures -- Notice to unsuccessful applicants. The department shall award certification as follows:

(1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;

(2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;

(3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

(4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants will be ranked via the lottery system to establish the order and establish a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of date of award or the certificate is deemed void and will be awarded to the next applicant on the waiting list.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021.

General Authority: SDCL 34-20G-72(3).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

EXHIBIT B

44:90:03:16. Department awarding of certification -- Tiebreaking procedures -- Notice to unsuccessful applicants. The department shall award certification as follows:

(1) If more establishments apply than are allowed by a local government, the department shall award the establishment with the highest score pursuant to § 44:90:03:15 a registration certificate;

(2) If the local government has enacted an overall limit on the number of establishments, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached;

(3) If the local government has enacted a limit on establishments by establishment type, the department shall award registration certificates, in order of final score beginning with the highest score attained pursuant to § 44:90:03:15, until the limit is reached for each establishment type;

(4) If applicants are tied for one or more openings in a locality, the affected applicants and interested members of the public shall have the opportunity to view, in person or via videoconference, a random drawing to determine the successful applicants. All applicants must be ranked via the lottery system to establish the order and a waiting list.

Any establishment granted a certificate pursuant to this section must become operational within one year of the date of award or the certificate is deemed void and must be awarded to the next applicant on the waiting list. If the establishment granted a certificate pursuant to this section cannot become operational within one year, the establishment may submit to the department, at least two weeks prior to the expiration of the certificate, written documentation of the efforts made by the establishment to meet the deadline. The written documentation must include the action taken by the establishment to secure equipment and services necessary to become operational, and the reason why the establishment is unable to meet the deadline. Upon a finding by the department that, despite the establishment's documented timely efforts to secure all equipment and services necessary to become operational, the establishment is unable to become operational by the certificate expiration date, the department may grant the establishment an extension of time by which the establishment must become operational. The department may only grant an extension for one additional year from the date of expiration of the certificate. No further extensions may be granted. Establishments must comply with the requirements for renewal in § 44:90:03:02 regardless of the extension.

The notification of any unsuccessful applicants must identify the department's decision as a final department action subject to the contested case procedures pursuant to SDCL chapter 1-26.

Source: 48 SDR 40, effective October 5, 2021; 49 SDR 47, effective November 22, 2022.

General Authority: SDCL 34-20G-72(3), 34-20G-72(5).

Law Implemented: SDCL 34-20G-56, 34-20G-72(3).

EXHIBIT C

MINUTES

Rules Review Committee

Representative Jon Hansen, Chair
Senator Jean Hunhoff, Vice Chair



Four hundred first meeting
Monday, September 13, 2021

Room 414 – State Capitol
Pierre, South Dakota

The four hundred first meeting of the Rules Review Committee was called to order by Representative Jon Hansen, Chair, at 9:02 a.m. (CT) on September 13, 2021, via electronic conference and in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Ryan Cwach, Jon Hansen, Chair, and Kevin Jensen; and Senators Jean Hunhoff, Vice Chair, Troy Heinert, and Timothy Johns. Staff members present were Justin Goetz, acting Chief Research and Legal Analyst/Code Counsel, Kelly Thompson, Supervisor of Text Editing Services, and Hilary Carruthers, IT Support Specialist.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order.

Approval of Minutes

Senator Johns moved, seconded by Representative Jensen, that the August 2, 2021, meeting minutes be approved. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

Staff Report

Mr. Justin Goetz, acting Chief Research and Legal Analyst/Code Counsel, announced that this would be his last meeting as the staff person for the Interim Rules Review Committee as the incoming Code Counsel, John McCullough, will be in place before the next meeting. Mr. Goetz thanked the members for the privilege of serving the committee for the past year.

Rules Reviewed

South Dakota Animal Industry Board (Department of Agriculture and Natural Resources): Adopt and amend rules to:

- More accurately reflect current terminology;
- Modernize the language of reference material; and
- Reflect current cervid TB diagnostic testing methods.

Dr. Dustin Oedekoven, Department of Agriculture and Natural Resources, reviewed the proposed rules, which were heard by the South Dakota Animal Industry Board twice. At the first meeting on July 13, 2021, the motion to pass the rules was tabled. The board approved the rules following a second meeting on August 10, 2021.

Senator Hunhoff asked what consequences exist if cervid TB tests are not conducted. Dr. Oedekoven said the penalties for such violations are defined in Chapter 40-5.

Senator Hunhoff inquired whether the repealed nondomestic ruminant animal provisions were inserted elsewhere in the rules. Dr. Oedekoven stated that the state did not need to regulate non-captive ruminants, given federal requirements.

Responding to Senator Hunhoff as to the definition of "area vet in charge", Dr. Oedekoven explained that it is a designation by the U.S. Department of Agriculture and that North Dakota and South Dakota share one, who is located in Pierre.

Senator Hunhoff moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Animal Industry Board (Department of Agriculture and Natural Resources) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

Department of Social Services: Amend rules to:

- Update to current coding manuals;
- Clarify coverage of 90 day fills on eligible generic maintenance medication;
- Clarify fees for personal care services;
- Allow an enrolled secure medical transportation provider to also enroll as a community transportation provider;
- Add a definition for telehealth;
- Allow continuation of public health emergency coverage of telehealth services; and
- Add nurse midwife as a type of provider a visit can occur with within the Federally Qualified Health Centers and Rural Health Clinics coverage chapter.

Mr. Jeremy Lippert, Department of Social Services, reviewed the proposed rules, which were prompted by the passage of Senate Bill 96 by the 2021 Legislature.

Public Testimony

Ms. Sara Aker, South Dakota Association of Health Organizations (SDAHO), thanked the department for collaborating with the industry on telehealth programs during the COVID-19 pandemic and stated that audio only services provide a vital link to care for those individuals who do not have access to reliable Internet connections.

Representative Jensen asked if all phases of treatment can be effectively provided without face-to-face contact. Mr. Lippert clarified that audio only is one of the possible means to provide treatment services.

Mr. Bill Snyder, Department of Social Services, said the preferred method for treatment still includes a face-to-face component. He told Representative Jensen there would never be a case where an individual would go all the way through the treatment process without establishing a provider-patient relationship.

Representative Jensen inquired if it was possible through the proposed rules that a person would never have to meet face-to-face with their treatment provider. Mr. Snyder acknowledged that may be possible,

in some circumstances, noting that an evaluation and management visit could be entirely performed through audio if the provider knows the patient.

Senator Hunhoff requested a definition of "secure medical transportation provider." Mr. Lippert said the term is defined in ARSD 67:16:25:01, and Mr. Snyder indicated that it refers to a provider who uses specifically designed and equipped vehicles to provide nonemergency transportation to individuals who may be in a wheelchair or need to be otherwise secured during transport, such as on a stretcher.

Senator Hunhoff inquired as to whether assessment, case management, and treatment of a person could be accomplished through audio only services. Mr. Snyder replied that while assessment could be, in most cases, that may not be the case with treatment.

Senator Johns moved, seconded by Senator Heinert, that the review of the rules proposed by the Department of Social Services is complete.

Representative Jensen said he was inclined to vote against approving the rules because of concerns over confidentiality and the effectiveness of using audio only services. Senator Hunhoff agreed, saying that while she believed in the use of video telehealth services, she was less confident that effective treatment could be provided by audio only means.

Senator Heinert commented that as someone who lives in an area that lacks reliable Internet service, he sees the value of having the audio only option. He said he trusted that SDAHO and other similar groups evaluated the proposed options and understood the cautions expressed by the committee.

Motion prevailed on a roll call vote with 4 ayes and 2 nays. Voting aye: Cwach, Hansen, Heinert, and Johns. Voting nay: Hunhoff and Jensen.

Bureau of Administration: Amend rules to increase the rate for legal publications.

Ms. Kirsten Jasper, Bureau of Administration, reviewed the proposed rules.

Public Testimony

Mr. Dave Bordewyk, South Dakota Newspaper Association (SDNA), said his organization supports the proposed rules and the rates in question are the maximum rates that can be charged by a newspaper. He clarified the rates also apply to other types of published content in addition to the public notices printed for state agencies, and the industry agrees the rates needed to be adjusted. He noted the last time rates were increased was 2016, and that these increases average out to a 1% increase per year.

Representative Hansen asked how much Minnehaha County and the city of Sioux Falls pay annually in these types of fees. Ms. Jasper responded that Minnehaha County did not submit numbers when queried about the proposed rates. Mr. Bordewyk referenced information gathered from SDNA member newspapers that showed in 2019, Minnehaha County paid almost \$17,000 to the Brandon Valley Journal. As Minnehaha County utilizes four area newspapers for legal publications, the cost would be similar for the other three publications.

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Representative Hansen said he has been told by Sioux Falls entities that their printing costs average about \$200,000 annually. Mr. Bordewyk acknowledged the amount was feasible. Ms. Jasper said that for the past year, Lincoln County reported over \$60,000 and Pennington County over \$85,000 in printing costs.

Representative Jensen requested that in the future, a comparison between legal publication advertising rates and regular advertising rates be provided.

Representative Hansen expressed his concern over the additional cost to taxpayers whenever these fees are raised, and said consideration should be given to other methods of delivery (such as websites) that would be less costly to taxpayers.

Senator Hunhoff moved, seconded by Senator Johns, that the review of the rules proposed by the Bureau of Administration is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

Board of Elections (Office of the Secretary of State): Adopt rules regarding the forms and processes relating to the implementation of the secured active voter registration designation, following the passage of Senate Bill 102, and to update the Certificate of Nomination to Fill Vacancy per the passage of Senate Bill 145, during the 2021 Legislative Session.

Mr. Jason Lutz, Office of the Secretary of State, reviewed the proposed rules.

Senator Heinert asked in regard to the submission of a Certificate of Nomination to Fill Vacancy form, who accepts the form in a single county legislative district that does not have a county central chairperson. Mr. Lutz responded that the proposed rule was aimed at multi-county districts but said he will further research the question and respond to Senator Heinert directly with the answer.

Senator Heinert moved, seconded by Representative Jensen, that the review of the rules proposed by the Board of Elections (Office of the Secretary of State) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

Department of Transportation: Amend rules to:

- Establish a 55 miles per hour speed zone on Highway 18 in and around Edgemont;
- Establish a 25 miles per hour speed zone on U.S. Highway 18P in Edgemont;
- Clarify the starting and ending points of speed zones in Fall River County;
- Eliminate references to highway segments that have been removed from the state trunk highway system; and
- Repeal lower speed limits for certain truck traffic on U.S. Highway 18 in and around Hot Springs.

Ms. Karla Engle, Department of Transportation, reviewed the proposed rules.

Representative Hansen commended the department and Ms. Engle for being one of the role models for how administrative rules should be prepared and presented.

Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the Department of Transportation is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

South Dakota Division of Insurance (Department of Labor and Regulation): Amend rules to update the certified reinsurer rating factor and filing requirement for audited financial statements.

Ms. Lisa Harmon, South Dakota Division of Insurance (Department of Labor and Regulation), reviewed the proposed rules.

Senator Hunhoff noted that as South Dakota is a member of the National Association of Insurance Commissioners, it is important to continue to maintain accreditation.

Senator Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Division of Insurance (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

Department of Revenue: Repeal and amend rules to eliminate the registration decal requirement for businesses with amusement devices.

Mr. Jason Evans, Department of Revenue, reviewed the proposed rules, which were prompted by the passage of Senate Bill 39 by the 2021 Legislature.

Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Revenue is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

South Dakota Board of Nursing (Department of Health): Amend rules to:

- Update the clinical nurse specialist and certified registered nurse anesthetist applications for licensure;
- Update and remove outdated language on examinations;
- Provide consistency with the current licensing process;
- Allow for the evaluation of educational qualifications for endorsing applicants who completed substantially equivalent education programs in other jurisdictions;
- Clarify the requirements and process for the approval, renewal, and denial of a nurse's health care corporation certificate;
- Outline standards for operating a health professional assistance program; and
- Repeal rules clarifying disciplinary procedures and the declaratory rulings process which are now covered in statute.

Ms. Linda Young, South Dakota Board of Nursing (Department of Health), reviewed the proposed rules, which resulted from the passage of Senate Bill 4 and House Bill 1014 by the 2021 Legislature.

Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Nursing (Department of Health) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.

Department of Health: Adopt rules to establish the South Dakota medical cannabis program as required by SDCL chapter 34-20G.

Senator Hunhoff, acting as Chair for the hearing, provided instructions for testifiers.

Ms. Kim Malsam-Rysdon, Secretary, and Mr. Justin Williams, Department of Health, reviewed the proposed rules, which were drafted with assistance from Cannabis Public Policy Consulting (CPPC). A presentation was given detailing the timeline for development of the rules, strategies for informing the public, the hearing process, and an overview of the state's Medical Cannabis Program. A section by section analysis of the proposed rules was then provided.

Ms. Malsam-Rysdon said the department had worked hard in a short period of time to prepare the rules for consideration by the committee and she expects to see changes in the rules as the program evolves, which has been the experience in other states. She acknowledged that the LRC had raised questions about whether the fees being proposed constituted a tax, saying the fee charged cannot be more than the cost of actually producing the cards that will be distributed to eligible individuals. According to Ms. Malsam-Rysdon, the figures contained in the fiscal note submitted with the proposed rules are based on projections for a brand-new industry, they are reasonable, and they can be adjusted in the future, if necessary, particularly if revenue greatly outpaces the cost.

The Department of Health challenged several recommendations to the final rules made by LRC staff on September 7, 2021; committee members received a formal response from the department detailing their opposition to the suggested changes.

Public Testimony

Ms. Yvonne Taylor, South Dakota Municipal League, testified in support of the rules and said the department had done its best in promulgating them. Her organization will be looking for some legislative changes, if they are warranted.

Mr. Jeremiah M. Murphy, Cannabis Industry Association of South Dakota, said he appreciated the department taking his group's concerns into consideration and making changes based on their comments. While the rules package overall was solid, his client is opposed to four of the proposed rules: ARSD 44:90:02:18 regarding the potency of concentrated cannabis; 44:90:10:14 relating to product labeling; 44:90:10:01 concerning packaging for transfer or sale; and 44:90:09:01 pertaining to mandatory testing prior to transfer.

Ms. Sara Aker, SDAHO, commended the department on its transparency throughout the promulgation process and their willingness to listen to the concerns of opponents. Her organization is opposed to ARSD 44:90:02:03 which requires a physician to certify an individual for home cultivation. Ms. Aker said no other state requires that action and she suggested South Dakota adopt a policy based on objective criteria.

Mr. Jason Tarasek, Dakota Natural Growers LLC of Vermillion, addressed the operation of vertically integrated businesses, which grow, process, and sell cannabis within the same building. Mr. Tarasek reiterated that safety is a top concern for his organization, which is opposed to ARSD 44:90:04:04 regarding co-location guidelines for cannabis operations. He said Dakota Natural Growers will be submitting its operating plan to the Department of Health and the agency can reject it if they choose to do so, but the rule as currently written constitutes a blanket ban on vertically integrated businesses.

Mr. Tim Engel, South Dakota State Medical Association (SDSMA), said while the overall rules package was acceptable, his association is opposed to ARSD 44:90:02:03, for the same reasons as expressed by SDAHO, as well as ARSD 40:90:02:08. SDSMA is also requesting access to a list of people in South Dakota using medical cannabis so drugs are not prescribed to those individuals that may be contrary to their use of cannabis. No such rule was included in the proposed package.

Mr. Steve Willard, South Dakota Broadcasters Association, detailed the group's opposition to ARSD 44:90:10:17 which regulates the advertising of medical cannabis establishments. Mr. Willard said the proposed rule as written would be difficult to enforce, make online advertisers the winners at the expense of TV and radio advertising, and a definition of "media" should be included to provide more clarity. He also noted that unless federal policy is changed, no one will advertise.

Ms. Deb Mortenson, South Dakota Optometric Society, told the committee the society is opposed to the addition of glaucoma in ARSD 44:90:13:01. She said the effects of glaucoma cannot be reversed by the use of medical cannabis, only eased, and its inclusion on the list gives patients false hope.

Mr. Matt Jorgenson, Cannabis Chem Lab, commended the department on its transparency and willingness to listen to industry concerns. His opposition centered on ARSD 44:90:06:01 regarding the accreditation of cannabis testing facilities. Mr. Jorgenson proposed that the rule include an appeal or addendum to the process if the accreditation is not completed within the required 18 months of licensure. He also raised concerns on ARSD 44:90:09:01 and 44:90:09:02 relating to mandatory testing.

Mr. Kittrick Jeffries, Dakota Cannabis Consulting, expressed opposition to ARSD 44:90:09:01 and 44:90:09:02 on mandatory testing and the dates on which testing would commence. He was also opposed to sections in ARSD 44:90:10:01 concerning bulk transfer and prepackaging of medical cannabis and testified that prepackaging requirements impact low-income patients who can only afford small amounts of medical cannabis. Mr. Jeffries supported ARSD 44:90:04:21 which stipulated that cannabis or cannabis products being transported must be contained in a secured area of the transport vehicle, out of public view.

Ms. Melissa Mentele, New Approach South Dakota, spoke against ARSD 44:90:02:15 concerning nonresident registration. As the author of Initiated Measure 26, Ms. Mentele said reciprocity was included to serve patients who were traveling through South Dakota to ensure they could get the medical cannabis they needed while in the state. Without reciprocity, such individuals would need to transport their cannabis across state lines to have access to it while in South Dakota, creating diversion issues. She also indicated support for Mr. Murphy's testimony.

Mr. Seth Pearman, Attorney General, Flandreau Santee Sioux Tribe, echoed the comments made by Mr. Murphy. According to Mr. Pearman, the Tribe has 7,000 patients from across the country who participate in its medical cannabis industry. He said the proposed rules lack an interface between state licensed and Tribal licensed facilities, and the Tribes would like to participate in the state program with medical cannabis grown on reservations, if the Tribe's testing results and products conform to state standards, and if shipping manifests can allow for transfer into the state system. Mr. Pearman offered that Tribal integration could occur through the nonresident cardholder aspect of the rules.

Mr. Ned Horsted, Cannabis Industry Association of South Dakota, thanked the department for their work on the medical cannabis program, saying it is close to being the best program in the country. Mr. Horsted stressed that the program should best serve patients and business owners and said some changes in its operation will naturally occur over time. He supported previous arguments made by other testifiers and urged that the following rules be reverted: ARSD 44:90:02:18, 44:90:10:14, 44:90:10:01, 44:90:09:01, 44:90:02:03, 44:90:06:01, and 44:90:02:15.

Rebuttal

Ms. Malsam-Rysdon responded to the testifiers' comments as follows:

- The Department of Health has the authority to regulate the concentration of medical cannabis;
- The packaging rules proposed by the Department are common practice in other states and in North Dakota, and are similar to tobacco requirements for packaging and subsequent labeling;
- The plain language of statute--34-20G-1(1)(c)--authorizes physician certification of cannabis cultivation;
- While she appreciates that testing facilities in South Dakota feel they can begin testing soon, other states have not reported having testing facilities ready to come online at the onset of their programs, and the State of Maine used these particular timelines;
- She indicates that access to the medical registry is confidential and law does not allow physicians to access it;
- She believes there are certain types of extraction methods that are inherently dangerous, as is the practice of applying pesticides to cannabis plants in the same physical structure at which a dispensary is housed;
- Regarding advertising of medical cannabis establishments, outside legal counsel advised the department that commercial speech has less protection than free speech;
- As to whether glaucoma should be on the list of conditions for which medical cannabis can be used, the decision over whether a patient should use it is best left to the patient and their doctor, and glaucoma is listed in 29 states and the District of Columbia as a debilitating condition;
- Nonresident reciprocity represents a fairness issue. Any nonresident should need to follow the same guidelines as a South Dakota resident, which is similar to how the department would operate any other program that also exists in another state; and
- Any Tribe that wishes to participate in South Dakota's medical cannabis program may apply to do so, provided they meet the criteria.

Committee Questions

Senator Johns asked if packaging needed to be limited to a certain size and whether the issue could be resolved by eliminating "retail sales" from the rule. Mr. Williams responded the language was aimed at preventing diversion, which other states say occurs at the retail level. Senator Johns noted that he respectfully disagreed.

Senator Johns inquired whether all advertising could be banned as cannabis is still illegal on the federal level. Mr. Williams replied that if the status of cannabis sales changes at the federal level, the rules could be updated.

Senator Johns asked if the practitioner certification process fell within the intent of the legislation that was approved. Ms. Malsam-Rysdon said the statute does not contemplate a different process.

Representative Jensen inquired how a sliding fee was determined for low-income patients. Ms. Malsam-Rysdon responded the department looked at the definition of a low-income person, estimated how many people overall would need medical cannabis cards, and estimated how many of those individuals would be classified as low-income patients.

Responding to Representative Jensen on the type of criminal background checks that will be conducted on employees for medical cannabis establishments, Ms. Malsam-Rysdon replied that the statute did not specify the type of background checks to be performed but they could include fingerprint background checks such as those conducted by the Department of Criminal Investigation if the proper statutory authority was provided, but that authority has not been provided yet.

Representative Jensen noted that for state registration card holders, a physician must certify, but then inquired whether a medical practitioner generally could provide the certification. Ms. Malsam-Rysdon confirmed that South Dakota cardholders need a physician, but nonresidents could have a practitioner certify.

Senator Heinert asked how licenses could be kept from becoming a commodity. Ms. Malsam-Rysdon said the issue was discussed with the industry during the drafting process and resulted in the addition of ARSD 44:90:03:16 to the proposed rules. Licensees must become active operations within one year of receiving the license or the license will expire. In answer to Senator Heinert's follow up question, Ms. Malsam-Rysdon confirmed there is no cap on the number of licenses that may be issued.

Representative Hansen asked how a prohibition on billboard advertising of medical cannabis establishments would reduce the potential for diversion. Mr. Williams responded that the goal is to restrict who can see the advertising, such as underage children who would be exposed to the messaging if displayed on a billboard.

Senator Hunhoff asked Mr. Jorgenson if there are testing labs already operating in South Dakota and if labs exist in other states that could expand their operations into South Dakota. Mr. Jorgenson confirmed that one South Dakota lab is already in operation performing testing for the Flandreau Santee Sioux Tribe operation and out-of-state labs could pursue facilities in South Dakota.

Senator Hunhoff posed the question to Mr. Murphy of whether it is feasible to pack something up and transport it in bulk without packaging. Mr. Murphy responded by noting that pharmacies obtain items in bulk without retail packaging.

Representative Cwach inquired if the practitioner certification imposes a liability on the medical community, given that a registration card statutorily establishes a presumptive defense if you are caught growing marijuana. Mr. Williams said the statute contemplates some involvement by a practitioner, likely a physician, in the process. Representative Cwach responded that the medical community may not be equipped to provide that kind of certification.

Representative Cwach then questioned whether a nonresident would only be permitted to use medical cannabis in this state if they have a debilitating condition recognized in South Dakota. The Department confirmed this.

Representative Cwach asked Mr. Murphy why the potency of medical cannabis is important to a patient. Mr. Murphy replied that there is a wide spectrum of patients that utilize medical cannabis and varying potencies are needed to address their conditions. Ms. Mentele added that just as with medications, every patient is different; what may be sufficient for one person may not be for another.

Representative Cwach asked why testing labs are confident that they can be up and running sooner than anticipated by the Department of Health. Mr. Jeffries responded that there are already labs in South Dakota that can perform some testing today.

Senator Hunhoff commented that the patient should be the priority for the medical cannabis program and asked how the potency issue addressed that priority. Ms. Malsam-Rysdon stressed that the priority for the rules is to get patients the relief they need and provide medical cannabis in forms and potencies that are both effective and non-addictive.

Representative Hansen asked Ms. Malsam-Rysdon if she agreed testing labs in South Dakota were ready to begin operations now. She said it would be great if a lab in the state could begin testing on Day 1 of the program but that has not been the case in other states with medical cannabis programs. As secretary of the department that oversees the State Health Lab, she understands that it takes time for a testing facility to ramp up its operations to meet the necessary levels of testing.

Representative Hansen asked for clarification on whether three plants was the minimum or maximum amount a patient would be allowed to cultivate. Ms. Malsam-Rysdon said the number represents neither a minimum nor a maximum but provides a benchmark to guide the practitioner in making their recommendations. Senators Hunhoff, Heinert, and Johns commented that the language regarding this issue was unclear.

Mr. Goetz, at the request of the Chair, gave an overview of the department's appeal of numerous edits suggested by LRC to the proposed rules. He said while the department made a number of good suggestions in response to LRC, due to time constraints, it was not possible to work out all of the issues prior to today's meeting. The rules documents as presented raised fiscal concerns about license fees and registration card fees. Other language of concern involved disqualifying felony offenses by principal

officers and board members; criteria for scoring applicants; inspections of vehicles transporting medical cannabis; and the petition process for adding conditions to the list of debilitating medical conditions for which medical cannabis could be prescribed.

Regarding the petition process, Ms. Malsam-Rysdon told the committee the department anticipates outlining the process in rule so the addition of conditions to the list would come through the regular rules review process. Senator Heinert asked what the turnaround time would be to add a condition to the list. Ms. Malsam-Rysdon said she anticipates the department would come before IRRC twice a year on these kinds of petitions.

Committee questions ended, and members proceeded to take action on the rules.

Senator Johns moved, seconded by Senator Heinert, that proposed rule 44:90:10:01 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 5 ayes and 1 nay. Voting aye: Cwach, Hansen, Heinert, Hunhoff, and Johns. Voting nay: Jensen.

Senator Johns moved, seconded by Senator Heinert, that proposed rule 44:90:02:18 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 4 ayes and 2 nays. Voting aye: Cwach, Hansen, Heinert, and Johns. Voting nay: Hunhoff and Jensen.

Senator Johns noted that he was comfortable with the remainder of the rules package as presented and requested to be excused from the meeting as he was due in court. He was so excused.

Senator Heinert moved, seconded by Representative Hansen, that proposed rule 44:90:10:14 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 3 ayes and 2 nays. Voting aye: Cwach, Hansen, and Heinert. Voting nay: Hunhoff and Jensen.

Senator Heinert moved, seconded by Representative Cwach, that the Department of Health be instructed to promulgate rules concerning cooperation with Tribal governments as it pertains to medical cannabis.

In making the motion, Senator Heinert noted that cooperation was a better avenue than confrontation, and a cooperative medical cannabis program could be more beneficial to patients, the state, and the Tribes.

Senator Hunhoff and Representative Jensen said as the Tribes already have their rules in place, it was important to get the state program up and running and a combined program could be proposed at a later time. Representative Hansen commented that it may be outside of IRRC's authority to pass such a motion.

The motion failed on a roll call vote with 2 ayes and 3 nays. Voting aye: Cwach and Heinert. Voting nay: Hansen, Hunhoff, and Jensen.

Senator Heinert moved, seconded by Representative Cwach, that proposed rule 44:90:02:03 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, and Jensen.

Senator Heinert moved, seconded by Representative Hansen, that proposed rule 44:90:02:15 be reverted to a step prior under SDCL 1-26-4.7. Motion failed on a roll call vote with 1 aye and 4 nays. Voting aye: Heinert. Voting nay: Cwach, Hansen, Hunhoff, and Jensen.

Commenting on options regarding the fee rules, including options that would result in reverting the rule, Mr. Goetz said one option is to not revert the rule but have the department come back after a year and retool the fee structure. Senator Hunhoff commented that the Committee on Appropriations will also be reviewing the department's proposed budget and will be aware how much is being collected in fees and can evaluate the fee structure.

Representative Hansen moved, seconded by Representative Jensen, that proposed rule 44:90:13:01 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 3 ayes and 2 nays. Voting aye: Cwach, Hansen, and Jensen. Voting nay: Heinert and Hunhoff.

Representative Cwach moved, seconded by Senator Heinert, that proposed rule 44:90:10:17 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 3 ayes and 2 nays. Voting aye: Cwach, Hansen, and Heinert. Voting nay: Hunhoff and Jensen.

Representative Hansen moved, seconded by Representative Jensen, that the review of the remaining rules proposed by the Department of Health is complete.

Representative Cwach made a substitute motion, seconded by Senator Heinert, that proposed rules 44:90:09:01 and 44:90:09:02 be reverted to a step prior under SDCL 1-26-4.7. Motion failed on a roll call vote with 2 ayes and 3 nays. Voting aye: Cwach and Heinert. Voting nay: Hansen, Hunhoff, and Jensen.

Senator Heinert indicated his early skepticism of the proposed rules, and while he saw them improve as the day went on, he would continue to resist the proposed rules as a whole, citing the greater complications these rules present, in contradiction to IM26.

Representative Hansen's previous motion prevailed on a roll call vote with 4 ayes and 1 nay. Voting aye: Cwach, Hansen, Hunhoff, and Jensen. Voting nay: Heinert.

Senator Hunhoff thanked the Department of Health, the testifiers, and the committee members for their good work on a hard task, saying it was an historic day for the state of South Dakota.

Public Testimony: General Purposes

No public testimony was provided.

Adjournment

Senator Hunhoff moved, seconded by Senator Heinert, that the meeting be adjourned. Motion prevailed on a unanimous voice vote with 5 ayes.

Chair Hansen adjourned the meeting at 4:20 p.m.

EXHIBIT D

MINUTES

Rules Review

Representative Jon Hansen, Chair
Senator Jean Hunhoff, Vice Chair

Four hundred thirteenth meeting
Tuesday, November 1, 2022



Room 414 – State Capitol
Pierre, South Dakota

The four hundred thirteenth meeting of the Interim Rules Review Committee (IRRC) was called to order by Representative Jon Hansen, Chair, at 9:00 a.m. (CT) on November 1, 2022, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Jon Hansen, Chair, Ryan Cwach, and Kevin Jensen; and Senators Red Dawn Foster, Jean Hunhoff, Vice Chair, and Timothy Johns. Staff members present were Justin Goetz, Code Counsel; Kelly Thompson, Supervisor of Text Editing Services; and Hilary Carruthers, Legislative Systems Analyst.

NOTE: For purpose of continuity, the following minutes are not necessarily in chronological order. All referenced documents distributed at the meeting are hyperlinked to the document on the Legislative Research Council website. This meeting was live streamed. The archived live stream is available at sdlegislature.gov.

Approval of Minutes

Representative Cwach moved, seconded by Representative Jensen, that the September 13, 2022, meeting minutes be approved. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.

Staff Report

Mr. Justin Goetz, Code Counsel, advised there were no issues to report.

Rules Reviewed

Department of Agriculture and Natural Resources: Amend rules to update South Dakota's existing industrial hemp rules to meet the requirements in current federal regulations and state laws, following the passage of Senate Bill 201 by the 2022 Legislature and House Bill 1228 by the 2021 Legislature as well as the USDA final rule change 7-CFR 990.

Mr. Derek Schiefelbein, Department of Agriculture and Natural Resources, reviewed the proposed rules.

Representative Jensen asked if the removal of the \$2,000 license fee meant the fee was no longer being assessed. Mr. Schiefelbein explained that the fee is now contained in state statute.

Senator Hunhoff inquired as to what criteria determines who is eligible to receive a waiver in regard to sampling prior to harvesting the crop. Mr. Schiefelbein responded the discretionary language was included to be proactive, and the department anticipates there will be some certified seed varieties in the future that will be tested before being grown.

Senator Hunhoff moved, seconded by Representative Cwach, that the review of the rules proposed by the Department of Agriculture and Natural Resources is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.

South Dakota Board of Water and Natural Resources (Department of Agriculture and Natural Resources): Amend rules to redistrict the director areas of seven water development districts.

Mr. Andrew Bruels, Department of Agriculture and Natural Resources, reviewed the proposed rules.

Senator Johns moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Board of Water and Natural Resources (Department of Agriculture and Natural Resources) is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.

South Dakota Conservation Commission (Department of Agriculture and Natural Resources): Amend rules to streamline the administration of the current program in order to accommodate an additional \$3,000,000.00 of one-time general funds added to the conservation district special revenue fund by House Bill 1277, passed by the 2022 Legislature.

Mr. Bill Smith, Department of Agriculture and Natural Resources, reviewed the proposed rules.

Public Testimony

Ms. Angela Ehlers, South Dakota Conservation Districts, said her organization concurs in and supports the proposed rules, and she complimented the department for their open and transparent process.

Senator Hunhoff asked if the timeframes for June 30th and December 31st constitute standard language. Mr. Smith confirmed that was correct.

Representative Cwach inquired as to the default rate for the loan program. Mr. Smith replied to date, there have been no defaults, and that the department has worked with the conservation districts to help prevent defaults.

Representative Jensen asked why the term, board of managers, was being removed from the definitions and what type of equipment would be covered by the \$5,000 deductible in the proposed rules. Mr. Smith explained the board of managers refers to the watershed district boards that were removed in 2013, so the term is obsolete. The deductible applies to any equipment the district plans to purchase, regardless of size, and is increased to allow for the purchase of larger equipment, such as grass drills.

Representative Jensen moved, seconded by Representative Cwach, that the review of the rules proposed by the South Dakota Conservation Commission (Department of Agriculture and Natural Resources) is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Jensen, Johns, Hunhoff, and Hansen. EXCUSED: Foster.

Department of Social Services: Amend rules to update the length of coverage for the Refugee Medical Assistance (RMA) program from eight months to twelve months for eligible refugees with entry dates on or after October 1, 2021, and to update the law implemented throughout the Chapter.

Mr. Greg Tishkoff, Department of Social Services, reviewed the proposed rules.

Referring to the fiscal statement provided by the agency, Senator Hunhoff asked whether individuals would receive four months of additional health coverage. Mr. Tishkoff said yes, through \$12,988 in federal funding. Responding to Senator Hunhoff as to how that amount was determined, **Ms. Carrie Johnson, Department of Social Services**, replied the amount is based on historical expenditures, multiplied by the additional months per person.

Representative Jensen inquired as to under what circumstances medical assistance would not be provided, if a refugee is eligible to receive it. Ms. Johnson responded that it would not be provided only if the refugee became ineligible because of income, because they moved out of state, or because they do not want the coverage anymore.

Senator Hunhoff moved, seconded by Senator Johns, that the review of the rules proposed by the Department of Social Services is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

Department of Health: Amend rules to:

- Allow an extension to certain establishments that cannot open within one year of receiving a certificate;
- Change requirements for agent identification badges;
- Create an allowance for testing facilities to use alternate methods of transportation when sending samples to the public health laboratory;
- Allow the use of non-odorized flammable gas in the extraction process; and
- Reduce the qualifications for submitting a petition for a debilitating condition to the department.

Ms. Ali Schaeffbauer, Department of Health, reviewed the proposed rules.

Public Testimony

Mr. Jeremiah M. Murphy, Cannabis Industry Association of South Dakota, said his membership supports the rules, as many of them were suggested by the group, and that the language to be struck regarding qualifying conditions is necessary to align with statute.

Mr. Emmett Reistroffer, Genesis Farms, spoke in support of the proposed rules, saying the process is working quickly in South Dakota due to good collaboration with the department.

Mr. Tim Engel, South Dakota State Medical Association, voiced opposition to some of the changes – specifically, the striking of language regarding qualifying conditions - noting that medical cannabis has dangerous known and unknown side effects and to allow the approval of experimental treatments without knowing the side effects is not a reasonable interpretation of the law.

Rebuttal

In response to the opposition, Ms. Schaeffbauer stated while medical cannabis is unvetted by the Food and Drug Administration (FDA), it was approved by the public and is legal in South Dakota.

Representative Jensen told of a phone call he received from a facility employee whose ID card was removed by management, yet the employee was allowed to keep working; he requested clarification of who monitors the ID cards. Mr. Reistroffer responded that from a manager's perspective, the manager must perform a background check on the individual prior to them starting employment and provide a badge to the employee with a copy going to the department. If a manager takes the card away from the employee, that individual should not be working in the facility.

Representative Cwach asked for whose use, medical cannabis is currently authorized in South Dakota. Ms. Schaeffbauer replied the department follows the definition in statute, authorizing the use of medical cannabis for any person with a debilitating medical condition, as determined by their practitioner. Mr. Murphy said the definition in statute is a list of symptoms rather than diseases.

Representative Cwach asked if a practitioner is required to look at what other medications may be prescribed instead of medical cannabis. Ms. Schaeffbauer responded that the department does not second guess a practitioner who certifies a patient as needing medical cannabis.

Referencing proposed language in ARSD 44:90:13:02, Senator Hunhoff requested data that shows the benefits of medical cannabis outweigh the risk of using it. **Ms. Lynne Valenti, Department of Health**, stated the language change was made in response to opposition by the medical association and reflects the language used by the FDA when they are considering or approving medications. Data on benefits outweighing the risks is provided to the department by the person submitting the petition. Mr. Murphy indicated that the petition would contain a clear description of the condition, its risks and benefits, and the peer-reviewed research to back up the risks and benefits.

Senator Hunhoff asked what information is provided to the patient to educate them on the benefits and side effects of medical cannabis. Mr. Reistroffer replied that the information is distributed in a variety of ways: warnings posted at medical cannabis facilities; a consultation with facility staff the first time the patient comes in to get medical cannabis; and reminders on the back of every receipt for every subsequent visit. However, information on the actual medical use is not provided – that is left to the doctor to discuss with the patient.

Representative Jensen referenced radio ads he has heard in recent months saying a person can get a medical card over the phone, which would indicate the person could purchase medical cannabis without consulting their doctor; he wondered where the safety factor is for the public. Mr. Reistroffer acknowledged that the ads are misleading and anyone offering a consultation over the phone is violating state law. A consultation must take place face to face, with the individual seeing their doctor in person to go over medical records and discuss a treatment plan, however, that consultation make take only five minutes because the need is apparent.

Representative Hansen asked if the department has denied a petition under the current rule that could be approved if the amended rule is passed and whether passage of the rule makes it easier for the department to approve petitions. Ms. Schaeffbauer replied that of the three petitions received to date, all have been incomplete and would not qualify if the revised rule is approved. She said the process would not necessarily be easier if the rule passes but it would be more in line with the legislative intent for the statute.

Representative Hansen asked if there was a condition that the agency had in mind that might be approved under this amendment. Ms. Schaeffbauer stated that there was no specific condition the agency had in mind but noted that many conditions on the list proposed by the department in last year's rulemaking would not meet the standard currently in rule.

Senator Hunhoff asked if it only takes one contact with some type of practitioner to get a medical cannabis card or are follow-up visits required. Mr. Murphy responded that the language in statute requires either ongoing discussions or for the practitioner to make themselves available for consultation. A patient must also talk to their doctor to renew their certification, which must occur annually at minimum or can be shorter if the doctor so designates.

Representative Hansen inquired about potential pop-up clinics around South Dakota State University and the University of South Dakota at which people can obtain medical cannabis cards. Mr. Murphy said none of his association's members are involved in such activities and if they are being held, they still must follow the law.

Representative Jensen commented that the wording could be more specific in terms of what the benefits of medical cannabis are and how they outweigh the risks, saying as it currently reads, he does not believe it reflects what the voters intended.

Representative Jensen moved, seconded by Representative Hansen, that proposed rule 44:90:13:02 be reverted to a step prior under SDCL 1-26-4.7(2)(3).

Senator Hunhoff asked the department if the Medical Marijuana Oversight Committee had been a part of their drafting and review process. Ms. Schaeffbauer answered that the committee had encouraged the department to review the changes but did not participate further in the hearing process.

Motion failed on a roll call vote with 1 AYE and 5 NAYS. Voting AYE: Jensen. Voting NAY: Cwach, Foster, Johns, Hunhoff, and Hansen.

Representative Cwach moved, seconded by Senator Johns, that the review of the rules proposed by the Department of Health is complete. Motion prevailed on a roll call vote with 5 AYES and 1 NAY. Voting AYE: Cwach, Foster, Johns, Hunhoff, and Hansen. Voting NAY: Jensen.

South Dakota Board of Nursing (Department of Health): Amend rules to:

- Update the definitions used in Article 20:48;
- Revise and update the rules on the delegation of medication administration tasks to nursing assistive personnel, including training and supervision requirements;
- Remove the registration requirement for diabetes aides to be listed on the board's unlicensed personnel registry; and
- Remove the requirement for all medication aides to be registered by the board and require only those employed in skilled nursing facilities, assisted living centers, or hospitals to be registered.

Ms. Linda Young, South Dakota Board of Nursing, reviewed the proposed rules.

Representative Jensen asked if the proposed rules include provisions for background checks. Ms. Young explained they are a requirement for nurses but not for aides, and a formal statutory change would be necessary to make them a requirement for registrants. Representative Jensen voiced concern that a background check was not being required for individuals who would be administering Schedule II narcotics.

Senator Hunhoff wanted to know why home health care and hospice care were not included on the list of facilities for which registration is required to perform medication administration. Ms. Young responded that most of the complaints received by the board involve medication aides and occur in skilled nursing facilities, assisted living centers, and hospitals, but that the registration requirement could be updated in the future, if necessary. Senator Hunhoff suggested that home health care be considered in the future because of the level of risk involved in that environment.

Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Nursing (Department of Health) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Board of Pharmacy (Department of Health): Amend rules to provide the framework for the Redistribution of Donated Prescription Drugs and Medical Supplies program which was created with the passage of House Bill 1086 by the 2022 Legislature.

Ms. Kari Shanard-Koenders, South Dakota Board of Pharmacy, reviewed the proposed rules.

Senator Hunhoff asked what constitutes medical supplies and where the term is defined. Ms. Shanard-Koenders said medical supplies are defined in statute and include items such as insulin pods for pumps and tubing.

Senator Hunhoff inquired as to where the pilot program was conducted in South Dakota and what are the risks for patients accepting donations from the program. Ms. Shanard-Koenders responded that the pilot program was conducted at Avera McKennan in Sioux Falls and drugs classified as narcotics are excluded from the program. Patients who accept donated drugs and medical supplies sign an acceptance form and the risk to the participating pharmacy is mitigated through the language in House Bill 1086.

Senator Hunhoff lastly asked about how illegal diversion is prevented within the program. Ms. Shanard-Koenders provided that pharmacists inspecting the products donated will be able to prevent diversion, and that this risk is diminished by the fact that controlled substances are ineligible for donation to the program.

Senator Johns moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Pharmacy (Department of Health) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

Department of Human Services: Amend rules to:

- Increase eligibility for certain telecommunications equipment;
- Correct and specify eligibility for the communication assistance services program;
- Add criteria for denial, suspension, or revocation of interpreter certification;
- Update shared living terminology and compliance requirements;
- Expand time for shared living required training and training requirements;
- Amend definitions;
- Adjust provider enrollment requirements;
- Clean up language and internal references;
- Specify records requirements;
- Update case management provisions;
- Clarify the requirement for a functional behavior analysis;
- Clarify provider role regarding immunizations;
- Increase eligibility for community training services;
- Repeal DRS statement of purpose;
- Repeal day service provisions within the shared living chapter; and
- Repeal the 300-foot provider building separation requirement.

Ms. Jenna Howell, Department of Human Services, reviewed the proposed rules.

Public Testimony

Mr. Dan Cross, Community Support Providers of South Dakota, testified in support of those proposed rules pertaining to the Division of Developmental Disabilities, saying his members had formed a work group and provided feedback to the department. Mr. Cross said it would be helpful in the future for the department to make the organization aware of what rules are being proposed prior to their public hearing to give them an opportunity to provide suggestions and information. Mr. Cross noted that while the rules resulted from the work group's suggestions, a number of other rules suggested by the group were not yet considered by the department.

Representative Jensen asked if the increased rate for telecommunication equipment is a federal requirement. Ms. Howell explained it is a state program with a dedicated funding source and the rate increase is based on need and will allow them to serve more people.

Representative Jensen inquired as to whether a resident must physically live in South Dakota to benefit from the program. Ms. Howell said the rules follow the legal definition of a resident. Responding to a follow-up question from Representative Jensen on the applicability of the telecommunication equipment benefit, **Mr. Eric Weiss, Department of Human Services**, stated there are a variety of low-cost options for popular pieces of equipment.

Representative Cwach generally questioned how community support providers are impacted in their day-to-day operations by these proposals. Ms. Howell indicated the goal of the rule changes is to impose less regulation on providers and clean up some rules, but maintain provider and participant flexibility.

Senator Foster asked if there is a timeline for the department to consider other rules submissions by the work group. Ms. Howell replied that a specific time has not yet been set but she anticipates more rules will be proposed next summer.

Senator Hunhoff asked for an explanation on the proposed changes regarding letters of compliance. Ms. Howell clarified that references to contractors were updated to read shared living providers, who work under the auspices of contractors. **Ms. Joey Younie, Department of Human Services**, confirmed that the language was being changed to align with the terminology currently being used.

Senator Hunhoff commented that she sits on many committees where the testifiers talk about communication; as community service providers serve some of the state's most vulnerable residents, it is important that the agency sit down with the providers to determine what rules are most important and need to be revised next.

Representative Cwach moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Human Services is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Board of Examiners for Counselors and Marriage and Family Therapists (Department of Social Services): Amend rules to:

- Clarify requirements of an approved counseling program's practicum and internship requirements for education acceptable for licensure as a professional counselor;
- Clarify the required methods of supervision for post graduate supervisees to allow flexibility in the required observation of supervisees seeking a professional counselor license or marriage and family therapist license;
- Clarify that a post-graduate plan of supervision automatically expires upon issuance of a professional counselor, professional counselor – mental health, or marriage and family therapist license;
- Add the Counselor Rehabilitation Certification Examination (CRC) as an acceptable national examination for meeting the requirements of licensure as a professional counselor; and
- Allow the board to accept an examination deemed equivalent to the Association of Marital and Family Regulatory Board's National Examination on Marital Therapy for purposes of meeting the examination requirement of licensure as a marriage and family therapist.

Ms. Jennifer Stalley, South Dakota Board of Examiners for Counselors and Marriage and Family Therapists, reviewed the proposed rules, which are part of the board's commitment to review their rules on a biennial basis.

Public Testimony

Mr. Terry Dosch, South Dakota Council of Community Behavioral Health, thanked the board for including his members in the process, and voiced support for the rules as presented, especially the simplification of the licensing process as it will help to remove barriers to hiring people amidst pressing workforce issues.

Representative Jensen asked why the requirement to have a supervisor evaluate a trainee's work face to face was being removed. Ms. Stalley said it is difficult to read an official transcript from a school and discern if the evaluation took place face to face. Going forward, an electronic process will be utilized, which is in alignment with the recent allowance of remote counseling.

Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Examiners for Counselors and Marriage and Family Therapists (Department of Social Services) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

State Board of Elections (Office of the Secretary of State): Amend rules to:

- Update recapitulation sheets to provide clarifying language and additional tabulation descriptions;
- Allow for the use of certain abbreviations on official ballot stamps;
- Provide clarity regarding the certificate of transmittal to a counting board; and
- Update the voter registration form to provide clarity to the choice of party information section.

Mr. Jason Lutz, Office of the Secretary of State, reviewed the proposed rules, and noted they all derived from county auditor offices.

Representative Jensen asked if only stamped ballots may be counted at an election. Mr. Lutz confirmed that the stamp is required by law for a ballot to be counted and tabulation machines were reprogrammed several years ago, as a result of a Government Operations and Audit Committee discussion, to check the printing of the ballot and remove those ballots that do not contain the stamp.

Representative Jensen asked if people with mail forwarding services who do not actually live in South Dakota can register to vote in the state. Mr. Lutz responded that when a person fills out the registration form, they are attesting to their address on that form. The historical practice has been that the Legislature has discussed the issue for at least a decade and determined that a person attesting to that address can use a post office box number.

Senator Johns inquired if the stamp is placed on the ballot manually or by a machine. Mr. Lutz clarified the stamp is placed on the ballot by the election worker before giving it to the voter.

Representative Cwach asked why hand-counted paper ballots were added to the rule regarding use of recapitulation sheets. Mr. Lutz said county officials had requested that the rule expressly state its application to non-hand-counted ballots, to match the technical understanding of the officials. In answer to Representative Cwach's follow-up regarding the need to report more information on optically counted ballots, Mr. Lutz cited federal law as requiring ballot marking devices, often used by individuals with disabilities, to be separately tabulated.

Senator Foster asked if a person registering to vote leaves their party affiliation blank, how it is determined whether to list them as an independent or a no party affiliation voter. Mr. Lutz explained that there is no recognized independent party in South Dakota so if the choice of party field is left blank, the person will be listed as independent/no party affiliation.

Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the State Board of Elections (Office of the Secretary of State) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

Department of Game, Fish and Parks: Amend rules to:

- Remove the deadline for removing ice shacks from the ice each year;
- Remove restrictions on mesh size or net size for nets used for taking smelt;
- Remove the 15-inch minimum length limit for bass on Burke Lake and impose a 15-inch minimum length limit on Lake Mitchell;
- Allow crossbows as a legal method of take for paddlefish during seasons when bow and arrow are a legal method of take, and match areas where crossbows can be used to take paddlefish below Gavins Point Dam with Nebraska regulations;
- Remove language regarding purchasing preference points associated with the old GFP licensing system;
- Allow someone else to help tend hoop, trap, setlines, and floatlines if the licensee is present;
- Reduce the check times for hoop nets, traps, and setlines;
- Modify the rule listing fish importation requirements to better describe current definitions;
- Allow permitted individuals to receive assistance when participating in lawful fishing activities; and
- Remove the Peregrine Falcon from the list of endangered birds and add the species to the list of threatened birds.

Mr. Tom Kirschenmann, Department of Game, Fish and Parks, reviewed the proposed rules.

Referencing the meeting minutes provided by the department with their rules packet, Senator Hunhoff asked if there is a controversy over the use of crossbows. Mr. Kirschenmann replied there is a lot of conversation in general over the use of crossbows for big game and paddlefish, with some individuals thinking their use would increase hunter success and result in fewer available licenses.

Senator Hunhoff inquired about the consequences if a person is authorized to use a licensee's hoop nets or traps but is caught using them without the licensee present. Mr. Kirschenmann said the individual would be ticketed for fishing without a license, and noted the reason for the proposed change is to account for the greater amount of work involved in setting these nets and lines, where additional help may be necessary.

Representative Cwach wondered if people can use crossbows from boats during the same time as other paddlefishing. Mr. Kirschenmann said he believed so although most crossbow use would occur from shore as long as the person was correctly permitted. Mr. Kirschenmann clarified in response to Representative Cwach's follow-up that crossbow use will be open to anyone, not just individuals with disabilities, but the number of people using the crossbows is limited.

Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the Department of Game, Fish and Parks, is complete. Motion prevailed on a roll call vote with 4 AYES and 2 NAYS. Voting AYE: Jensen, Johns, Hunhoff, and Hansen. Voting NAY: Cwach and Foster.

Department of Game, Fish and Parks: Amend rules to:

- Modify the time during the season when hunters can have uncased weapons within certain parks in the state park system;
- Change the start date of the spring turkey hunting season and increase the maximum number of licenses available to residents;
- Modify the hunting units within the Black Hills;

- Remove a unit from the spring wild turkey hunting season and revise the valid date of access permits for Good Earth State Park and Adams Homestead and Nature Preserve;
- Align start dates for turkey hunting seasons;
- Establish a later Custer State Park spring wild turkey season and set the number of licenses available to residents; and
- Remove the preference point unit from turkey hunting in Custer State Park.

Mr. Tom Kirschenmann, Department of Game, Fish and Parks, reviewed the proposed rules.

Senator Foster asked why turkey numbers have dropped in the Black Hills and western South Dakota. Mr. Kirschenmann cited a number of reasons including winter mortality and lower production. Research studies have been conducted in which radio collars were put on hens to check on nesting issues; the results of those studies along with hunter harvest information will be analyzed to assist the department in making turkey hunting season decisions in the future.

Representative Jensen inquired if the mountain lion population could impact turkey numbers. Mr. Kirschenmann responded that mountain lions do not generally go after turkeys but could possibly get nesting hens.

Senator Johns moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Game, Fish and Parks is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

Transportation Commission (Department of Transportation): Amend rules to:

- Delete limited speed zones on highway segments in Pennington County that have been obliterated or transferred to a local government;
- Establish a limited speed zone for the crossroad over Interstate Highway 90 at mileage reference marker 59.19 in Pennington County;
- Change the speed limits on U.S. Highways 281 and 212 in and around Redfield;
- Change requirements for becoming and remaining qualified to submit bids for highway construction contracts;
- Revise the process for accessing bid proposals;
- Repeal a rule relating to rejection of bids; and
- Allow the submission of optional combination bids.

Ms. Karla Engle, Department of Transportation, reviewed the proposed rules.

Representative Hansen requested an explanation of how the optional combination bid will work. Ms. Engle said the proposed rule outlines what happens with each circumstance, if a contractor submits a total number for the bid for the entire project or separate bids for each individual portion of the project. If there is at least one combination bid submitted and no bids for each of the separate projects, the bids cannot be compared, and the agency can award for the combination bid.

Representative Hansen expressed concern that in choosing a combination bid over bids for each project individually, the state may not be getting the best deal. Ms. Engle said the only way to know for sure is to compare bids, and the department is hopeful this change in the process will create more opportunity for different contractors to compete.

Representative Jensen asked if a larger contractor could submit a lower bid and shut out smaller contractors. Ms. Engle responded that the new process could likely have the opposite effect, and more smaller contractors will submit bids

on the broken-out projects. She agreed to track the program and report back to the committee next year with the results.

Senator Foster wondered if the combination bid could include a breakdown of bids for each separate project to allow for comparison with bids submitted just for a specific project. Ms. Engle replied that would force a combination bidder to essentially bid separately on each project. Senator Foster then asked if instead of separating their bids, a combination bidder could indicate where any cost savings are coming from with their bid. Ms. Engle said a concern she would have in that situation is that contractors are very careful about making their specific bid open to the public and unless they are awarded the contract, the information they submit is proprietary.

Representative Jensen asked if time and cost overrun factors are built in if one contractor does multiple projects. Ms. Engle responded that language is built into their contracts that the contractor must meet the stated deadlines and the department carefully analyzes any requests for additional compensation.

Senator Hunhoff inquired as to why the combination bid rules are being proposed. Ms. Engle said the department has been looking at the issue for a while and thought the change in process could increase competition and make more projects available for smaller contractors.

Representative Hansen asked if any geographical constraints would be placed on combination bids going forward. Ms. Engle replied that complex urban projects would likely not be combined. **Mr. Sam Weisgram, Department of Transportation**, who manages the bid-letting office, said the process would be used in rare occasions not on a frequent basis, and jobs that would limit competition would not be combined.

Senator Johns moved, seconded by Representative Hansen, that the review of the rules proposed by the Transportation Commission (Department of Transportation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota State Railroad Board (Department of Transportation): Amend or repeal rules concerning:

- Administration of the board;
- Property management guidelines;
- The award and administration of railroad trust fund loans; and
- The requirements for railroad tax credits.

Ms. Karla Engle, Department of Transportation, reviewed the proposed rules.

Representative Jensen asked about how the interest rates on railroad trust fund loans are established. Ms. Engle explained the rates are set by the board, with the most current rate being two percent with a balloon payment due after seven years.

Representative Hansen moved, seconded by Representative Cwach, that the review of the rules proposed by the South Dakota State Railroad Board (Department of Transportation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Lottery (Department of Revenue): Amend rules to implement ticket-in, ticket-out payment for video lottery terminals, and clean up and clarify existing rules.

Mr. Clark Hepper, South Dakota Lottery, reviewed the proposed rules which were prompted by the passage of Senate Bill 152 by the 2022 Legislature.

Public Testimony

Mr. Matt Krogman, South Dakota Licensed Beverage Dealers and Gaming Association, voiced his organization's support for the rules as presented.

Representative Jensen asked whether ticket in, ticket out play was already available on gaming devices and if it would be optional for businesses to offer it. Mr. Hepper explained that it is currently available on regular casino gaming devices, but the option would be new for video lottery machines and optional for an operator to purchase. The system eliminates the need for a player to go to a cashier to redeem a ticket from a machine.

Senator Hunhoff inquired as to why a rule was being proposed allowing licensed distributors to broker the sale of video lottery machines between operators. Mr. Hepper said such activities are already in rule, but the specific rule was being proposed to clarify the process. As the video lottery market matures, there will be some opportunities for an operator to sell to another operator, and they should be encouraged to use a licensed distributor to broker the sale.

Senator Hunhoff asked if the proposed rules mandate that establishments have broken video lottery machines replaced as quickly as possible. Mr. Hepper said owners have the opportunity to pull the machine off the floor without replacing it right away, but the expectation is that if a gaming machine is on the floor, it should be in a playable state or be replaced or removed.

Representative Hansen wanted to know if all machines are currently connected to the Internet. Mr. Hepper explained that currently, each establishment has a site controller which connects to the video lottery central system. Each video lottery machine in that establishment is connected to the site controller through IP cellular service and the site controller's information is collected every night on that cellular service line.

Representative Cwach wondered if having the game odds posted to the Lottery website, as is being proposed, instead of physically on a poster at the gaming location, complies with statute. Mr. Hepper said the change was being proposed to simplify the process of making the odds available to players with the easiest way to communicate being via the website. Posters cannot be updated quickly enough or printed large enough to convey all of the necessary information. **Ms. Kirsten Jaspers, Department of Revenue**, speaking as legal staff for the agency, stated that posting the odds online complies with the statute.

Representative Cwach asked if, given the advances in technology, the odds could be posted on the screen of the gaming machine before the player begins the game. Mr. Hepper replied that capability would need to be addressed by the game manufacturer.

Senator Johns inquired as to how often game odds have to be calculated. Mr. Hepper explained that the odds do not change based on play per machine but are the overall odds for the game.

Representative Hansen said although the rules say an establishment could post a link to the odds, the statute says a link is not good enough. Ms. Jaspers responded that the Lottery is trying to help the industry and is reading the law correctly.

Representative Hansen moved, seconded by Representative Cwach, that proposed rule 48:02:05:06 be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 4 AYES and 2 NAYS. Voting AYE: Cwach, Foster, Jensen, and Hansen. Voting NAY: Hunhoff and Johns.

Representative Jensen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the South Dakota Lottery (Department of Revenue) is complete and the remaining rules be approved. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Division of Insurance (Department of Labor and Regulation): Amend rules to:

- Adopt a definition of "authorized;"
- Identify certain circumstances that are not a conflict of interest under the annuity standards passed in Senate Bill 148; and
- Amend the effective date of the proposed adopted rules to coincide with the effective date of Senate Bill 148.

Ms. Lisa Harmon and Mr. Frank Marnell, Division of Insurance, reviewed the proposed rules.

Public Testimony

Mr. Warren Graber, Graber and Associates, testified in support of the proposed rules, saying the division has been open to working with insurance agencies to develop rules that are fair to both sides – independent insurance producers and industry producers. Mr. Graber said their main goal is to ensure that consumers are treated fairly.

Mr. Randy Moses, Independent Insurance Agents of South Dakota, said the division kept their side of the bargain in bringing the proposed rules forward and while Senate Bill 148 was contentious, the rules are necessary to provide clarification for agents so they do not unintentionally violate the law.

Mr. Justin Smith, American Counsel of Life Insurers (ACLI), spoke in opposition to the rules, referencing a letter his organization had submitted to the division as part of the written comments for their public hearing. Mr. Smith said while regulation of insurance should be kept at the state level, that regulation should be uniform from state to state, and the rules as presented neither carry the intent of the law nor represent a correct interpretation of the law.

Ms. Kim O'Brien, Federation of Americans for Consumer Choice, was opposed to the rules, stating the law is clear on what is not a material conflict of interest and further clarification is not needed.

Ms. Sarah Wood, Insurance Retirement Institute, testified that her members supported Senate Bill 148 but do not support the rules. Ms. Wood said these types of situations are better handled on a case by case basis rather than a one-size-fits-all basis as laid out in the rules.

Rebuttal

Mr. Marnell reiterated the division's mission statement which emphasizes protecting the public and providing fair industry regulation, and said the rules work in harmony with the law to accomplish that mission.

Senator Hunhoff requested clarification on the exclusions to material conflicts of interest, as proposed in ARSD 20:06:08:67. Mr. Marnell explained that the division would not look at a producer based solely on whether the producer has a minority or majority ownership in an insurer, or has an immediate family member employed by an insurance agency. Responding to Senator Hunhoff as to why he is opposed to the language, Mr. Smith said it is too ambiguous.

Senator Johns asked what constitutes a fiduciary relationship. Mr. Smith replied that the federal government briefly enacted a standard of care for insurance agents nationally that put in place a fiduciary standard, and the best interest standard enacted by Senate Bill 148 is not at the level of a fiduciary standard.

Senator Johns clarified whether there was an obligation of the insurance producer to disclose or demand a waiver beyond a material conflict of interest. Mr. Marnell explained that there is no such requirement.

Representative Cwach noted that while Senate Bill 148 was being considered by the legislature, there was a dispute over definitions and instead of letting legislators debate and discuss the issues, it is being brought before the IRRC which is not good government.

Senator Johns stated that while he does not believe the language of the rules is ambiguous, consumers need to be aware of what constitutes material as it relates to material conflicts of interest.

In response to Senator Johns, Mr. Moses said as a matter of disclosure, if a material conflict of interest exists, the agent would be unable to make the sale to the consumer. The statute states agents should avoid or reasonably manage material conflicts of interest. Mr. Moses added that many smaller agencies in the state would be unable to operate if a sale under these circumstances was prohibited altogether.

Senator Hunhoff asked who determines what is a material conflict of interest. Mr. Marnell explained that the division would review and investigate the complaint and make a decision based on the facts. If a decision cannot be made, the complaint would go to the Office of Hearing Examiners.

Representative Hansen commented that it was unusual that a term is defined in statute but the rules based on that statute say that is not how the term is defined. He said it would be better to make the change as an amendment legislatively and that it is not appropriate for the IRRC to take that action.

Mr. Moses said his organization is more than willing to change the statute but that the ACLI was opposed to any changes, wanting to use the language as it appears in the model. According to Mr. Moses, the division asked his group to allow the issue to be addressed through rule.

Mr. Smith responded that Senate Bill 148 was model legislation, and the division introduced an amendment to the bill at the request of insurance agents.

Senator Johns said he would be satisfied to pass the rules as presented and if the issue needs to be revised, it can be done during the 2023 Legislative Session.

Senator Hunhoff admonished the division and the industry for not working out problems with the proposed rules before they came before the IRRC, and said it was not the role of the committee to do that for them.

Senator Hunhoff moved, seconded by Representative Cwach, that all rules submitted by the Division of Insurance (Department of Labor and Regulation) should be reverted to a step prior under SDCL 1-26-4.7(4)(7). Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Real Estate Commission (Department of Labor and Regulation): Amend rules to:

- Require applicants for a responsible broker's license to furnish evidence of completion of 24 class hours beyond the associate broker's license;
- Formally adopt the required course of study for the responsible broker's class hours; and
- Add continuing education subject areas related to property managers.

Ms. Melissa Miller, South Dakota Real Estate Commission, reviewed the proposed rules, the passage of which will coincide with statutory changes that take effect January 1, 2023.

Public Testimony

Mr. Matt Krogman, South Dakota Realtors Association, testified that his organization had promoted this idea in House Bill 1153 during the 2022 Session and the members support the rules as presented.

Ms. Denise Hanzlik, South Dakota Multi-Housing Association, whose membership is comprised of rental unit managers, expressed support for the proposed rules.

Representative Cwach moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Real Estate Commission (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Appraiser Certification Program (Department of Labor and Regulation): Amend rules to redesignate the state-registered credential as the registered trainee appraiser credential and clarify the scope of practice to bring rules into closer alignment with federal rules.

Prior to the agency's presentation of the rules, Representative Hansen moved to waive, pursuant to SDCL 1-26-4, the five days' prior service of the agency's rules packet for Committee consideration as required by SDCL 1-26-4(8). Representative Hansen found sufficient reason that the agency was unable to comply, as the agency was working diligently to obtain an acceptable compromise with the industry at the recollection of the Committee.

Ms. Anna McCarthy, South Dakota Appraiser Certification Program, reviewed the proposed rules which bring the program back into compliance with federal law.

Public Testimony

Ms. Sandra Gresh, Professional Appraisers Association of South Dakota, thanked the agency for taking the concerns of the organization into consideration when revising the rules, and voiced support for the rules as presented.

Representative Hansen moved, seconded by Representative Cwach, that the review of the rules proposed by the South Dakota Appraiser Certification Program (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

South Dakota Appraiser Certification Program (Department of Labor and Regulation): Amend rules to establish experience training programs.

Ms. Marcia Hultman, Secretary, Department of Labor and Regulation, reviewed the proposed rules which were reverted by the IRRC at its August 23, 2022, and September 13, 2022, meetings, and are being resubmitted for consideration for a third time.

Public Testimony

Ms. Sandra Gresh, Professional Appraisers Association of South Dakota, voiced support for the proposed rules in their current form with a few minor recommended corrections. Senator Johns, acting as chair, said such corrections were inappropriate at this time and the rules would be considered as they were presented.

Representative Cwach asked what had changed in the current packet as compared to the previous versions and what is being required of trainees. Ms. Hultman said the rules in their current form lay out the minimum requirements for the program and remove the memorandum of understanding provision. The department's next

step is to work with South Dakota State University to develop the education platform. Trainees will need to pass the same assessments and meet the same requirements as other applicants for appraiser credentials.

Representative Hansen moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Appraiser Certification Program (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

Public Testimony: General Purposes

No public testimony was offered or received.

Closing Remarks

Chair Hansen congratulated Senator Johns on his years of service to the Interim Rules Review Committee, as he is not running for re-election. Senator Johns noted that the committee does a lot of heavy lifting on important issues, and he thanked his fellow committee members for their efforts in that duty.

Adjournment

Senator Hunhoff moved, seconded by Representative Jensen, that the meeting be adjourned. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: Cwach, Foster, Jensen, Johns, Hunhoff, and Hansen.

Chair Hansen adjourned the meeting at 5:08 p.m.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 22 2023

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Shirley A. Johnson-Leahy
Clerk

PUFFY'S, LLC, a South Dakota Limited
Liability Company.

Applicant/Appellee.

Vs.

STATE OF SOUTH DAKOTA,
DEPARTMENT OF HEALTH.

Respondent/Appellant.

430554

APPELLEE'S
NOTICE OF REVIEW

To: Tamara Lee, attorney for Respondent/Appellant, the State of South Dakota, Department of Health.

Please take notice that the plaintiff-appellee, Puffy's, LLC, will seek review of that portion of the order of the circuit court entered on the 17th day of November 2023 in 51CIV23-000937, concluding that the Department had constitutional and legal authority to create and impose S.D. Admin. R. § 44:90:03:16.

Dated this 22nd day of December 2023.

Puffy's LLC, Applicant/Appellee.

Ryan D. Cwach
Ryan D. Cwach, #47245

Attorney for the Applicant/Appellee
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(605)260-4747
Ryan@birmcwachlaw.com

DEC 22 2023

Shelley A. Johnson Leigh
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

PUFFY'S, LLC, a South Dakota Limited
Liability Company.

#30554

Applicant/Appellee.

Vs.

APPELLEE'S
DOCKETING STATEMENT

STATE OF SOUTH DAKOTA,
DEPARTMENT OF HEALTH,

Respondent/Appellant.

SECTION A. TRIAL COURT

1. The circuit court from which the appeal is taken: _____
2. The county in which the action is venued at the time of appeal: _____
3. The name of the trial judge who entered the decision appealed: _____

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address, and phone number of the attorney for each party. (May be continued on an attached appendix.)

SECTION B. TIMELINESS OF APPEAL

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

1. The date the judgment or order appealed from was signed and filed by the trial court: November 17, 2023.
2. The date notice of entry of the judgment or order was served on each party: November 28, 2023.
3. State whether either of the following motions was made:
 - a. Motion for judgment n.o.v., SDCL 15-6-50(b): Yes ☒ No ☐
 - b. Motion for new trial, SDCL 15-6-59: Yes ☐ No ☒

NATURE AND DISPOSITION OF CLAIMS

(Continue responses to questions 4 through 6 to the space provided).

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

Puffy's LLC filed an application for a writ of mandamus against the State of South Dakota Department of Health (hereinafter "Department") to issue a medical cannabis establishment license to Puffy's LLC for a location in Rapid City. The Court issued an alternative writ of mandamus requiring the Department to file an answer within 30 days. The Department filed a motion to dismiss/quash the alternative writ of mandamus. After hearing argument, the Court issued an order finding Puffy was entitled to the relief requested and a peremptory writ of mandamus was issued thereafter.

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

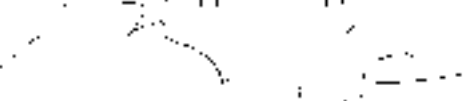
a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims? XXX Yes ☐ No ☐

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

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

The legal authority for the Court's order is S.D. Admin. R. § 42-90.03:16. While the Court's order is in favor of Puffy's, LLC for this license, Puffy's, LLC raised the constitutional, legal, and jurisdictional authority of the Department to create and implement the rule as being beyond constitutional and statutory authority since jurisdiction is a prerequisite to any further relief. In addition to the license in question in this proceeding, the legitimacy of the administrative rule impacts several of Puffy's other medical cannabis licenses that are currently in administrative proceedings with the Department of Health.

Puffy's LLC, Applicant-Appellee,



Ryan D. Cwach, #4245

Attorney For the Applicant/Appellee

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Yankton, SD 57078

(605) 260-4747

Ryan@birmcwachlaw.com

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Puffy's LLC, hereby certifies that a true and correct copy of the Notice of Review and docketing statement filed with the Supreme Court on December 22, 2023 was served by electronic mail upon:

Lamara Lee
600 E. Capitol Ave.
Pierre, SD 57501
lamara.lee@state.sd.us
Attorney for South Dakota Dept of Health

on this 22nd day of December, 2023.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 22 2023

Shirley A. Cwack
Clerk

Puffy's LLC, Applicant/Appellee.

Ryan D. Cwack

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