#31317, #31332-vacate & rem-MES
2026 S.D. 54

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STEVE ZIRBEL and
MONICA ZIRBEL, Appellants,

v.

DEUEL COUNTY COMMISSIONERS, Appellee.

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

THE HONORABLE DAWN M. ELSHERE
Judge

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ARGUED
AUGUST 27, 2026
OPINION FILED **10/28/26**

SALTER, Justice

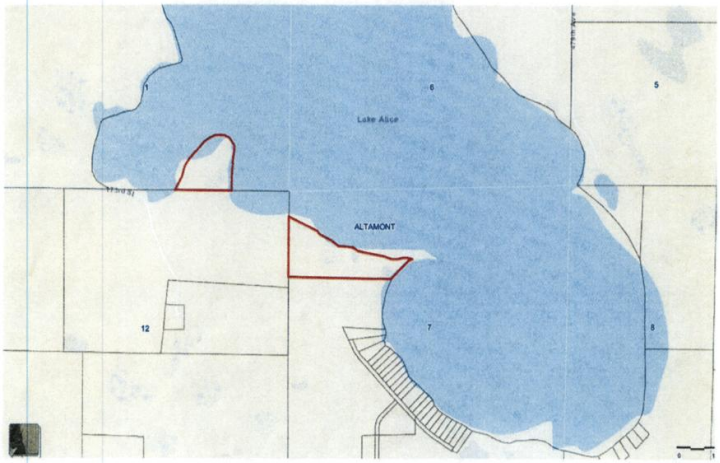
[¶1.] Steve and Monica Zirbel commenced this action to obtain access to two landlocked parcels they own. They invoked the statutory right to access set out in SDCL chapter 31-22, which required the Deuel County Board of County Commissioners (the Board) to lay out right-of-way access across adjoining parcels and authorized the Board to assess damages. After the Board acted, the Zirbels appealed to the circuit court, claiming the Board's damages assessment was too high and too dependent upon an appraiser's report. The court denied the Zirbels' request for a trial de novo and affirmed the Board's decision under an abuse of discretion standard. However, the court reversed the Board's decision to apportion the cost of the appraisal to the Zirbels.

[¶2.] The Zirbels now appeal, challenging the circuit court's trial de novo ruling, the Board's assessment of damages, and the court's denial of their request to disqualify a Board member. The Board, for its part, seeks review of the court's decision that effectively required the county to bear the cost of the appraisal.

[¶3.] We vacate the circuit court's order and remand for further proceedings, including a trial de novo.

Factual and Procedural History

[¶4.] In 2023, Steve and Monica Zirbel purchased from their son-in-law two noncontiguous parcels along Lake Alice in Deuel County. Neither parcel abuts a maintained roadway. Both are outlined in red, in the map below, which is oriented to standard cardinal directions.[1]



[¶5.] When they purchased the parcels, the Zirbels planned to access their East Parcel using what they believed to be an unimproved existing section line right-of-way. After inquiring with the Deuel County Register of Deeds, the Zirbels assert they were unable to find any indication that the right-of-way had been vacated, leading them to believe it remained intact.

[¶6.] After they closed on the purchase of the two parcels, the Zirbels used the unimproved right-of-way to access the East Parcel. They were apparently met there by the Deuel County Sheriff who served them with a notice of trespass and informed them that the right-of-way had been vacated. The Zirbels subsequently

1. We are adopting the parties' practice of referring to the Zirbels' properties as the East and West Parcels.

hired a land surveyor who confirmed their initial assessment that "there was no record of the section line right-of-way . . . being vacated."

[¶7.] The sheriff's view of the section line right-of-way was shared by the Deuel County State's Attorney. In what is described as an "interoffice memorandum" that was apparently circulated more widely, the state's attorney concluded that Altamont Township had vacated the section line right-of-way in 1959, citing a copy of the township's handwritten minutes from a May 8, 1959, meeting, as well as newspaper articles published around the same time.

[¶8.] Operating as though there was no public right-of-way to access their property, the Zirbels tried to negotiate with the neighboring landowners to obtain an access easement along the same routes their son-in-law—the previous landowner—had used. But when those negotiations proved unsuccessful, the Zirbels submitted an application to the Board, seeking statutory access pursuant to SDCL chapter 31-22. *See* SDCL 31-22-1 (providing that the "owner of an isolated tract of land . . . is entitled to an easement or right-of-way across adjacent lands to reach a public highway").

[¶9.] The Board held a public hearing on the Zirbels' application during a meeting in December 2023. The application potentially impacted a number of surrounding landowners, including Dakota Ridge, Inc., Andrew Haas and the Haas Family LLC, the United States Fish and Wildlife Service (USFWS), and William and Julie Moe. The minutes from the meeting reflect that some, but not all, of these landowners appeared and expressed opposition.[2]

2. None of the affected landowners have intervened in this proceeding.

[¶10.] Although the Board did not change its position that the section line to the East Parcel had been vacated, it initially denied the Zirbels' application for statutory access, reasoning that the Zirbels' lots were not "isolated" because Lake Alice, itself, is a public highway over which they could access their property, presumably by boat. The Zirbels appealed the Board's decision to the circuit court, which was unpersuaded by the Lake Alice-highway theory and reversed the Board's determination that Lake Alice "is a passable public highway for purposes of SDCL 31-22." As a result, the court determined that the Zirbels' parcels constituted "isolated tracts" under SDCL 31-22-1 and remanded the case back to the Board for further proceedings.

[¶11.] The Zirbels also identified what they believed to be a conflict-of-interest issue in their appeal, alleging that Commissioner Jay Grabow was a cousin of the current owner of Dakota Ridge, Inc. However, the circuit court "declined to find any conflict of interest by Commissioner Grabow" after determining that the Zirbels had "not provided adequate evidence of whether or not a conflict of interest was present."

[¶12.] After the remand, the Board met in June 2024 at the Zirbels' property. The interested landowners who were present identified their preferred routes for the statutory right-of-way, and the Board, together with the landowners, walked each of the proposed routes. However, before settling on a route, the Board unanimously agreed to obtain an appraisal to better understand how each proposal would financially impact the affected property owners. The appraiser ultimately

submitted a report stating he used the same methodology employed for assessing damages in takings cases involving state highway projects.

[¶13.] The Board discussed the appraiser's report at an April 2025 meeting where it considered three potential routes. For their part, though, the Zirbels expressed a desire to vary the routes in certain respects. For instance, the Zirbels argued that moving the West Parcel right-of-way to run along a tree line on the Dakota Ridge property rather than through the trees might be less expensive. And the Zirbels also proposed that the East Parcel right-of-way could be shifted east to avoid the cost of removing a fence that runs along the section line.

[¶14.] However, these contentions remained largely theoretical because the appraiser was not present at the meeting, and the Board chair indicated he was unwilling or unable, or both, to entertain variations from the three alternative routes. The Board chair did ask the Zirbels if they would "prefer some time with the appraisal before" the Board made its decision, but the Zirbels declined, stating, "No, . . . at this point we need a decision."

[¶15.] Ultimately, the five-member Board unanimously adopted one of the alternative proposals set out in the appraisal, which included a $270,647 total damages assessment that was further divided among the affected property owners as follows: $181,488 to Dakota Ridge, $4,946 to the Haases, $10,356 to the USFWS, and $44,058 to the Moes. Significant to this appeal, the Board also assessed the $29,799 cost of the appraisal to the Zirbels.

[¶16.] The Zirbels filed a second notice of appeal with the circuit court raising four arguments: (1) Altamont Township did not vacate the section line right-of-way;

(2) the Board failed to comply with the procedures set forth in SDCL chapter 31-22; (3) the Board's assessment of damages was arbitrary; and (4) the Board's decision effected an unconstitutional "taking."

[¶17.] The Zirbels also requested a trial de novo pursuant to SDCL 7-8-30, but the Board opposed the request and argued its decision should be reviewed under an abuse of discretion, or arbitrariness, standard. The circuit court agreed with the Board, concluding that the abuse of discretion standard applied because, in the court's view, the Board's decision was not quasi-judicial under our *Troy Township* line of cases. *See Dep't of Game, Fish & Parks v. Troy Twp.*, 2017 S.D. 50, 900 N.W.2d 840 (holding that the separation-of-powers doctrine prohibits courts from conducting a trial de novo on administrative appeals for executive or legislative actions that are non-quasi-judicial).

[¶18.] In a separate memorandum decision, the circuit court affirmed the Board's decision laying out the access routes to both Zirbel parcels. The court also affirmed the Board's determination of damages associated with the selected rights-of-way, stating that the Board "consider[ed] all the pertinent factors before making an informed decision and did not act arbitrarily or unreasonably." But the court reversed the Board's decision to attribute the cost of the appraisal to the Zirbels, deciding it was "unreasonable and should be removed from the assessed damages."

[¶19.] The Zirbels now appeal the circuit court's decision, raising multiple issues, which we restate as follows:

1. Whether the circuit court erred in its application of SDCL chapter 31-22's right of access statutes.

2. Whether the circuit court erred when it applied the abuse of discretion standard of review to the Board's decision and denied the Zirbels' request for a trial de novo.

3. Whether the circuit court erred by declining to decide whether Commissioner Grabow had a conflict of interest that necessitated his recusal.

4. Whether the Board's damages assessment constituted a taking under Article VI, § 13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution.[3]

[¶20.] Through our notice of review procedure, the Board appeals the circuit court's decision that relieved the Zirbels of any responsibility for the cost of the appraisal.

Analysis and Decision

The statutory right of access for isolated parcels

[¶21.] Before considering the merits of the issues presented for our review, we think it would be helpful to first provide a brief discussion of the statutory right of access, which, in many ways is neither fish nor fowl; it is not a common law easement of necessity or a traditional condemnation proceeding, but it resembles both.

[¶22.] Statutory access shares some of the key features of an implied easement of necessity in the sense that both provide a landlocked real estate owner a right of access across an adjoining, servient tract of land. *See Fuoss v. Dahlke Fam. Ltd. P'ship*, 2023 S.D. 3, ¶ 56 n.8, 984 N.W.2d 693, 707 n.8 (citing *Springer v.*

3. The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

Cahoy, 2013 S.D. 86, ¶ 8, 841 N.W.2d 15, 19) (explaining that an "easement of necessity implied by law will entitle a landlocked grantee to a right-of-way across the grantor's retained land for purposes of ingress and egress"). But the common-law easement of necessity features unique requirements, such as a common grantor for the dominant and servient landowners. And in instances where there is no common grantor, the implied easement of necessity will not fully "resolve the problem of landlocked property." Jon W. Bruce et al., *Law of Easements & Licenses in Land* § 4:14, Westlaw (database updated Sep. 2026).

[¶23.] Left to the common law, then, owners of landlocked, or isolated, real property without a common grantor are at a distinct disadvantage vis-à-vis their neighboring property owners who could conceivably charge a price for access that was untethered to any discernible real estate market. *See* James W. Simonton, *Ways of Necessity*, 25 Colum. L. Rev. 571, 577 (1925) (noting under such circumstances that an easement "can be had only by purchase at the price demanded" by the adjoining landowner). To address this disparity in bargaining power, a number of state legislatures, including ours, "have enacted statutes authorizing the owner of landlocked property to condemn a private right-of-way over neighboring land." Bruce et al., *supra*, § 4:14.

[¶24.] In South Dakota, this statutory-access right is expressed in SDCL 31-22-1:

> Every owner of an isolated tract of land containing at least ten acres not touched by a passable public highway or smaller tract of land containing at least five acres used or intended to be used in good faith in whole or in part for residential purposes is entitled to an easement or right-of-way across adjacent lands to reach a public highway . . . . An isolated tract is further defined

> as an area which is either inaccessible by motor vehicle because of natural barriers from all other land owned by the owner of the isolated tract or is such an area which is not touched by a passable public highway, which is in use or reasonably usable for motor vehicles. A tract of land adjoining a section line right-of-way for at least sixty-six feet is not an isolated tract if a passable road can be built within the adjoining section line to connect to a passable public highway.

[¶25.] A proper application from an isolated-tract owner prompts the county commission to visit the affected land and "lay out a right-of-way . . . across surrounding lands to a public highway." SDCL 31-22-3. The commission is obligated to "consider the convenience of the parties" and "[w]herever it is practicable . . . , lay such right-of-way along a section line." *Id.* Once established, SDCL 31-22-4 requires the "county auditor [to] . . . record the [right-of-way] in his record of highways."

[¶26.] The statutory right to access is not free, of course, and the county commission is obligated to "assess and determine the damage which the right-of-way is to the owner of the land across which it is laid." SDCL 31-22-4. The formerly isolated-tract owner's use of the newly created right-of-way is conditioned upon paying "all of the costs of the proceedings in laying out and assessing the damages of said right-of-way." SDCL 31-22-6.

[¶27.] The isolated-tract owner may also bear the responsibility for erecting fences along the right-of-way that traverses adjoining property, under the provisions of SDCL 31-22-7, and is authorized to install "gates in all fences which such roadway may cross." In addition, the Legislature has assigned to the owner of an isolated tract the responsibility to "keep and maintain such right-of-way at his or her own expense." SDCL 31-22-8.

[¶28.] So, while the result resembles an easement by necessity servitude, the statutory right-of-access process also looks, in some ways, like a private right to condemn a portion of adjoining land. In fact, we have previously rejected an argument by an intervening landowner that SDCL 31-22-1 was unconstitutional because it contemplated only private interests. *See Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 369–70 (S.D. 1978); *see also* Bruce et al., supra § 4.14 (noting that courts have generally rejected the private purpose challenges to statutory-access procedures under the theory that they serve a public purpose by promoting "the productive use of land").

[¶29.] In *Frawley*, we held, among other things, that a resulting right-of-way following a Chapter 31-22 proceeding is open to the public, and we implicitly concluded that this determination neutralized Frawley's constitutional argument. 270 N.W.2d at 369–70. This is true, we held, despite the fact that a dominant landowner can install gates to the newly created right-of-way and has the responsibility of maintaining it. *Id.*

[¶30.] With this brief exposition in mind, we turn now to the issues before us.

The section line right-of-way

[¶31.] "South Dakota law mandates inclusion of right-of-way easements along all section lines." *City of Sioux Falls v. Hone Fam. Tr.*, 1996 S.D. 126, ¶ 7, 554 N.W.2d 825, 826 (citing SDCL 31-18-1) ("There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal."). Consequently,

the section lines within the State are—by operation of law—public highways. *State v. Tracy*, 539 N.W.2d 327, 329 (S.D. 1995) ("In this state there is along every section line a public highway located by operation of law . . . .").

[¶32.] Once the section line right-of-way has been lawfully established in this way, it is *presumed* to exist until it can be shown to have been vacated or abandoned. *See Thormodsgard v. Wayne Twp. Bd. of Sup'rs.*, 310 N.W.2d 157, 159 (S.D. 1981) (noting that a "section line highway . . . is presumed to be a public highway, located by operation of law, unless vacated or relocated"); *Lowe v. East Sioux Falls Quarry Co.*, 126 N.W. 609, 610 (S.D. 1910). As "[t]he common-law maxim" goes: "Once a road always a road." *Id.* (acknowledging that the common-law maxim was still "subject to vacation or abandonment").

[¶33.] A right-of-way can be abandoned, but not casually. *See Thormodsgard*, 310 N.W.2d at 159 ("Abandonment of a section line right-of-way cannot be established solely by evidence that the highway has never been open, improved, or traveled." (citations omitted)). We have "held that vacation or abandonment of a legally established public way can only occur by some lawful method." *Id.* To do so, "[t]he appropriate governing board must act affirmatively to vacate or abandon a section line right-of-way." *Id.* (citing *Pederson v. Canton Twp.*, 34 N.W.2d 172 (1949); (citation omitted)). "The burden of proof is on the one obstructing a lawfully established public way to show vacation or abandonment." *Id.* (collecting cases).

[¶34.] After Deuel County officials and the Board took the position that the section line right-of-way to the East Parcel had been vacated, the Zirbels started this proceeding seeking statutory access from the Board by invoking the procedure

set out in SDCL chapter 31-22, which applies only in instances where tracts of land are "isolated." But the tract is *not* isolated if it has a certain level of access to a section line right-of-way. *See* SDCL 31-22-1 ("A tract of land adjoining a section line right-of-way for at least sixty-six feet is not an isolated tract if a passable road can be built within the adjoining section line to connect to a passable public highway."). Therefore, whether the section line right-of-way leading to the Zirbels' East Parcel remains intact is a necessary threshold question that went unanswered by the Board and the circuit court upon review.

[¶35.] Of course, the circuit court's decision affirming the Board's designated access route to the East Parcel was premised upon the fact that the section line right-of-way was, indeed, vacated. And, though the Zirbels, at times, referred to both the West and East Parcels as isolated, they also challenged the factual premise relating to the vacation question, identifying it as a discrete issue in their circuit court appeal and again in their current appeal.

[¶36.] But the issue was not factually developed, perhaps due in large part to the fact that the circuit court denied the Zirbels' request for a trial de novo or possibly because the right-of-way vacation issue was overshadowed by the effort to resolve the access route and damages issues. Whatever the reason, the threshold question concerning the existence of the section line right-of-way, which either remains intact or not, was never properly answered.

[¶37.] We note that a copy of the Deuel County State's Attorney's interoffice memorandum expressing the opinion that the section line right-of-way was vacated was attached as an appendix to the Zirbels' circuit court brief. But it does not

appear that the memorandum or the documents it relied on were ever admitted as evidence before the Board or the circuit court. Moreover, a state's attorney's interoffice memorandum, itself, has no legal force or effect and cannot serve as a substitute for judicial determination.

[¶38.] Accordingly, we vacate the circuit court's determination that the section line right-of-way was vacated and that the East Parcel meets the statutory definition of an isolated tract. We remand these issues to the court for an evidentiary hearing on SDCL 31-22-1's threshold question to determine whether a valid section line right-of-way remains in existence and whether the East Parcel meets the definition of an isolated tract.[4] On remand, the Board, as the party opposing the presumptive existence of the section line right-of-way, bears the burden of proving it was vacated. *Thormodsgard*, 310 N.W.2d at 159.

Trial de novo or abuse of discretion

[¶39.] Regardless of the circuit court's determination of the right-of-way vacation issue, the Zirbels' statutory-access claim will remain in some form, and so we continue our analysis to clarify the correct standard of review to apply on remand.

[¶40.] The Zirbels appealed the Board's decision under the general statute allowing appeals from county commission decisions found at SDCL 7-8-30. The statute provides that "[e]ach appeal taken to the circuit court . . . *shall be heard and determined de novo*." SDCL 7-8-30 (emphasis added). Yet, despite this statute's plain text, we have recognized a constitutional restriction on the judiciary's

4. The parties do not appear to dispute that the West Parcel is isolated.

authority to grant a trial de novo for certain administrative decisions, including county commission decisions. *MRose Dev. Co. v. Turner Cnty. Bd. of Cnty. Comm'rs*, 2024 S.D. 28, ¶¶ 31, 32, 7 N.W.3d 685, 692–93 (citing *Troy Twp.*, 2017 S.D. 50, ¶¶ 14, 20, 900 N.W.2d at 846, 849); *see also Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm'rs*, 2017 S.D. 87, ¶ 26 n.5, 905 N.W.2d 344, 351 n.5 (applying *Troy Township* to appeals from county commission decisions).

[¶41.] In *Troy Township*, we explained that the separation-of-powers doctrine prevents a trial de novo for administrative decisions that are legislative or executive in nature.

> Under the separation-of-powers doctrine, a court may not exercise or participate in the exercise of functions which are essentially legislative or administrative. Therefore, executive or administrative duties of a nonjudicial nature may not be imposed on judges, either directly or by appeal. The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches.

Troy Twp., 2017 S.D. 50, ¶ 14, 900 N.W.2d at 846 (citation modified).

[¶42.] "Whether an action is quasi-judicial is a fact-based inquiry undertaken on a case-by-case basis." *MRose Dev. Co.*, 2024 S.D. 28, ¶ 34, 7 N.W.3d at 693 (quoting *Carmody v. Lake Cnty. Bd. of Comm'rs*, 2020 S.D. 3, ¶ 17, 938 N.W.2d 433, 438). Although "[v]arious formulations of the term 'quasi-judicial exist,'"[5] *Surat v.*

5. Though not previously cited in our *Troy Township* line of cases, our Administrative Procedures Act (APA) that pertains to state government agencies contains a definition of "Quasi-judicial function." We do not apply it to the action of the county board here, but it is at least worthwhile to note the APA's definition of "Quasi-judicial function:"

(continued . . .)

Am. Twp., Brule Cnty. Bd. of Supervisors, 2017 S.D. 69, ¶ 12, 904 N.W.2d 61, 66, "we [have] identified certain relevant considerations to determine whether an administrative action is quasi-judicial in nature." *Carmody*, 2020 S.D. 3, ¶ 16, 938 N.W.2d at 438.[6] "A quasi-judicial act is one that 'investigates, declares, and

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> [A]n adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes the functions of interpreting, applying, and enforcing existing rules and laws; granting or denying privileges, rights, or benefits; issuing, suspending, or revoking licenses, permits and certificates; determining rights and interests of adverse parties; evaluating and passing on facts; awarding compensation; fixing prices; ordering action or abatement of action; holding hearings; adopting procedural rules or performing any other act necessary to effect the performance of a quasi-judicial function . . . .
>
> SDCL 1-32-1(10).

6. Although *Carmody* does not control our decision in this case, the circuit court relied upon it to conclude that the Board's decision was not quasi-judicial. However, we are skeptical that *Carmody's* quasi-legislative holding, in the context of the facts presented in that case, provides an accurate application of the *Troy Township* rules. *Carmody* presented the same sort of features we have identified as hallmarks of a *quasi-judicial* decision—an adjudication of a dispute between private parties in an adversarial setting using existing legal standards, all of which resemble an action that could have been brought in court. *See, e.g.*, *Surat Farms, LLC v. Brule Cnty. Bd. of Comm'rs*, 2017 S.D. 52, ¶ 11, 901 N.W.2d 365, 369 (holding that "an adjudication of a land-drainage dispute between two landowners" was quasi-judicial); *Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm'rs*, 2017 S.D. 87, ¶ 26 n.5, 905 N.W.2d 344, 352 n.5 (holding a board of commissioners' decision to issue a construction permit was quasi-judicial after comparing it to a zoning board's decision to grant or deny a conditional use permit); *see also Carmody*, 2020 S.D. 3, ¶ 46, 938 N.W.2d 423, 445 (Jensen, J., dissenting) ("The permit applications bore all the earmarks of a drainage dispute between individual landowners . . . ."). We cited *Carmody* for its abuse of discretion standard of review in *Little v. Hanson County Drainage Bd.*, 2022 S.D. 63, 981 N.W.2d 657, which involved a drainage permit authorizing removal of accumulated silt and debris from a ditch within a township right-of-way. However, that standard was not outcome determinative for our disposition of the issues in

(continued . . .)

enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . .'" *MRose Dev. Co.*, 2024 S.D. 28, ¶ 34, 7 N.W.3d at 693 (quoting *Troy Twp.*, 2017 S.D. 50, ¶ 21, 900 N.W.2d at 849).

[¶43.] The "judicial" part of a quasi-judicial act lies in its similarity to the adjudicative function of a court. We have held, in this regard, that a quasi-judicial act *resembles* or is *akin* to one "that could have been determined as an original action in the circuit court." *Id.* (citation omitted). Put another way, "quasi-judicial acts are those that comport with the ordinary business of the courts." *Id.* (citation modified). Or, as we stated in *Troy Township*: "Perhaps as good a criterion as any for determining what is judicial is merely to compare the action in question with the ordinary business of courts: that which resembles what courts customarily do is judicial, and that which has no such resemblance is nonjudicial." 2017 S.D. 50, ¶ 21, 900 N.W.2d at 849 (citation omitted).

[¶44.] "Non-quasi-judicial acts . . . look to the future and change existing conditions by making a new rule, to be applied thereafter to all or some parts of those subject to its power." *MRose Dev. Co.*, 2024 S.D. 28, ¶ 34, 7 N.W.3d at 693 (citation modified). "Non-quasi-judicial acts consider public interest and do not adjudicate individuals' existing rights." *Id.* (citing *Carmody*, 2020 S.D. 3, ¶ 16, 938 N.W.2d at 438). "[Q]uasi-legislative action is not concerned with the parties at hand but rather has a general, prospective application." *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1048 (Colo. 1991) (citations omitted).

Little, which were largely procedural and collateral to the drainage permit decision itself.

[¶45.] Applying these concepts here, the Board's decision under SDCL 31-22-3 to create a statutory access route to an isolated tract "and assess the damages therefor" was quasi-judicial. Our conclusion is supported by several readily apparent reasons.

[¶46.] First, the Board's responsibility under SDCL chapter 31-22 is to adjudicate a justiciable controversy. The Board must resolve the legal rights of identifiable individuals in a concrete dispute regarding specific parcels of land. The Board's decision enforces rights and imposes liabilities between adjacent landowners based on "present or past facts and under laws" that already exist. *MRose Dev. Co.*, 2024 S.D. 28, ¶ 34, 7 N.W.3d at 693 (citation omitted); *see* SDCL 31-22-1 (stating an owner of an isolated tract "is entitled to an easement or right-of-way"). Indeed, the statutory access right implicates private property rights and the broader area of property law and features a unique composite of legal principles. Decisions drawing upon these standards adjudicate rights between discrete parties; they do not establish forward-looking policy.

[¶47.] Second, the procedure set forth in SDCL chapter 31-22 is effectively an adversarial proceeding that looks very much like a civil action prosecuted in a court. The procedure becomes available to an isolated-tract owner only "[i]f the owner of such an isolated tract is unable to agree with the owner of surrounding lands for purchase of a right-of-way . . . ." SDCL 31-22-2. What follows is an application, notice, and a hearing—all of which are acts typically associated with judicial proceedings. *See generally Frawley*, 270 N.W.2d at 370 (describing the procedural sequence set out in SDCL 31-22-2 and -3).

[¶48.] To initiate the compulsory action provisions under SDCL chapter 31-22, the isolated-tract owner must submit a written application to the county commission. SDCL 31-22-2. In many ways, this application fulfills the same notice purposes of a formal pleading; it requires the isolated-tract owner to describe the necessity for the access route and identify the surrounding landowners whose property rights might be affected. *Id.* The county commission must then serve written notice upon the impacted landowners at least five days before the commission is scheduled to visit the land to establish a right-of-way and assess damages. *Id.* The statutes also guarantee the affected landowners the opportunity to be heard during the site visit. *See* SDCL 31-22-3 (providing that the county commission "shall consider the convenience of the parties"); *Frawley*, 270 N.W.2d at 371 (stating that "[a]ppellant was given notice and the opportunity to be heard at the time the Board visited the property").

[¶49.] Third, even though the Legislature charged county commissions with the adjudicative authority to decide applications for a statutory right-of-way in the first instance, that authority could have just as easily been vested with the courts, as eighteen other state legislatures have chosen to do under similar circumstances.[7]

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7. *See* Ala. Code § 18-3-3 (stating landlocked right-of-way claim "shall be exercised by application to the probate court"); Alaska Stat. § 09.55.290 (stating that eminent domain proceedings for, among other things, a private road to a residence "may be commenced in the superior court"); *Tobias v. Dailey*, 998 P.2d 1091, 1092-93 (Ariz. Ct. App. 2000) (seeking private way of necessity under Ariz. Rev. Stat. § 12-1202(A) in court); Ark. Code Ann. § 27-66-401 (instructing landowners seeking access to petition the county court); Colo. Rev. Stat. § 38-1-102 (stating property owners should apply to district court by submitting a petition with the clerk of court); Fla. Stat. § 704.04 (directing parties to file statutory way of necessity claims in circuit court);

(continued . . .)

[¶50.] And finally, it is notable that the specific appeal authorization of SDCL 31-22-5—which is not impacted by the *Troy Township*/SDCL 7-8-30 line of cases—prescribes a trial de novo for appeals *by adjoining, servient landowners*. In fact, we cited this as the principal justification for rejecting a due process challenge by the intervening landowner in *Frawley*:

> It appears that on a de novo appeal in the circuit court from the county commissioner's decision, the powers of the circuit court are the same as those possessed by the county commissioners, that is, to determine anew that which the commissioners decided by means of a full evidentiary hearing with witnesses and transcripts. Appellant was afforded a full hearing in a trial de novo before the circuit court. Therefore, appellant has no cause for a complaint of lack of due process.

270 N.W.2d at 371 (citation modified).

[¶51.] If we were to accept the Board's argument that its decision was quasi-legislative, we would endorse a patently incongruent rule: a landowner's circuit

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Ga. Code Ann. § 44-9-40 (vesting superior court with "jurisdiction to grant private ways to individuals"); Idaho Code § 7-706 (directing all proceedings under the eminent domain chapter to be brought in the district court of the county where the property is situated); Ind. Code § 32-23-3-1 (directing landowner unable to obtain agreement of adjoining landowners to file complaint in circuit court pursuant to Ind. Code § 32-24-1-4); *In re Luloff*, 512 N.W.2d 267 (Iowa 1994) (describing condemnation for access to private land under what is now Iowa Code. Ann. § 6A.4); Miss. Code Ann. § 65-7-201 (using a "special court of eminent domain"); Mo. Rev. Stat. § 228.342 (stating petition for establishment of private road based on necessity "shall be filed" in circuit court); Mont. Code Ann. § 70-30-107 (requiring the use of a jury to decide necessity and damages); N.C. Gen. Stat. § 136-68 (utilizing "a special proceeding . . . before the clerk of the superior court" but allowing an "appeal to the superior court for a jury trial de novo"); 36 Pa. Stat. Ann. § 2731 (vesting jurisdiction in "courts of quarter sessions"); Tenn. Code Ann. § 54-14-102(b) (giving chancery, circuit, and county courts concurrent jurisdiction); Wash. Rev. Code § 8.24.030 (discussing action brought in court); Wyo. Stat. Ann. § 24-9-101 (stating that an action may be commenced in district court).

court appeal under SDCL 31-22-5 results in a trial de novo, but an isolated-tract owner's appeal under SDCL 7-8-30 in the same proceeding does not.

[¶52.] The Board's principal argument to the contrary relies upon *Frawley's* determination that a Chapter 31-21 right-of-way may be used by the public. But this overreads *Frawley*, which simply held that "a fair construction of SDCL 31-22 provides that the right-of-way created was intended to be, and [i]s, a public right-of-way open to all the world." 270 N.W.2d at 370. We make two observations to set this statement in its proper context.

[¶53.] First, *Frawley's* public-use decision is a narrow one. The specific question being addressed was whether "SDCL 31-22 [was] unconstitutional in that it condemns private property for private uses." *Id.* at 368.

[¶54.] And, second, the inferences drawn by the Board mix apples and oranges. The unadorned fact that a statutory right-of-way for an isolated tract is open to the public does not mean the decision that created it is quasi-legislative under the *Troy Township* decision that came nearly forty years later.

[¶55.] An uncomplicated reading of Chapter 31-22 leads to the conclusion that the remedy it provides is a private one: "Every owner of an isolated tract of land . . . is entitled to an easement or right-of-way across adjacent lands to reach a public highway . . . ." SDCL 31-22-1. And the governing statutes instruct the Board to decide the question through the narrow lens of the dominant and servient landowners by considering only "the convenience *of the parties*"—not the public's interest more broadly. SDCL 31-22-3 (emphasis added).

[¶56.] Accordingly, we hold that the circuit court erred when it determined that the Board's decision under SDCL 31-22-1 through -4 was quasi-legislative in nature and reviewed that decision under an abuse of discretion standard. Consequently, on remand, the circuit court should conduct a trial de novo, and, given this disposition, we do not address the Zirbels' claim that the Board's damages assessment constituted a prohibited constitutional taking.

Appraisal cost

[¶57.] As its justification for reversing the Board's assessment of the $29,799 appraisal cost to the Zirbels, the circuit court concluded that "the cost of the appraisal was unreasonable and should be removed." In the court's view, the Board "did not have to incur this cost but chose to." In its notice of review, the Board asks that we reverse the court's decision.

[¶58.] The Zirbels do not appear to challenge the Board's authority to order the appraisal, at least not directly. Rather, they are critical of the Board's decision to engage an appraiser instead of using real property value information provided by the Deuel County Assessor to determine damages for the proposed access right-of-way. Under the circumstances, we pause briefly to discuss the Board's authority.

[¶59.] As we have frequently observed: "A county is an artificial being created by law, and has such powers only as are conferred upon it by statute." *State ex rel. Bell v. Bd. of Comm'rs of Beadle Cnty.*, 300 N.W. 832, 833 (S.D. 1941) (citation omitted); *see also Pennington Cnty. v. State ex rel. Unified Jud. Sys.*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 130. Under the statutory framework governing right of access proceedings for isolated tracts, "[t]he county commissioners shall assess and

determine the damage which the right-of-way is to the owner of the land across which it is laid." SDCL 31-22-4; SDCL 31-22-2 (same); SDCL 31-22-3 (noting that the purpose of the county commissioners site visit is for "laying out such right-of-way and appraising the damages to the owner of the surrounding land"). Although none of the statutes expressly grant the Board authority to hire an appraiser, that does not end our inquiry.

[¶60.] In addition to those specified by law, "the board of county commissioners shall have power . . . [t]o do and perform such other duties and acts as it is or may hereafter be required to do and perform." SDCL 7-8-20(10); *State ex rel. Jacobsen v. Hansen*, 68 N.W.2d 480, 481 (S.D. 1955) (noting that counties have such powers "as may be reasonably implied from those expressly granted"). "Boards of county commissioners are vested with . . . such implied powers as are reasonably necessary to enable them to exercise and perform those powers and duties expressly granted to and imposed upon them." *Pearson v. Johnson*, 238 N.W. 644, 646 (S.D. 1931).

[¶61.] Here, the Board is expressly charged with assessing damages resulting from the statutory access route sought by the Zirbels whose application covered their two noncontiguous tracts and implicated four adjoining landowners. This obligation is a solemn one. Chapter 31-22 authorizes the compulsory conveyance of real estate from an otherwise unwilling seller under the auspices of a county government to provide access to isolated tracts. In order to discharge this duty, we conclude it was reasonably necessary for the Board to engage a real estate appraiser to better ensure accurate and fair compensation for the adjoining landowners.

[¶62.] Having determined that the Board was authorized to hire an appraiser, we turn to the question more directly presented which is whether the Board had statutory authority to assess the cost of the appraisal to the Zirbels. It is true, as the Zirbels argue, that nothing in Chapter 31-22 explicitly states that the Board may assess the cost of an appraisal to an isolated-tract owner. However, the only inference from the text of SDCL 31-22-6 points to that inescapable conclusion:

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

(Emphasis added.)[8]

[¶63.] Under a plain reading of the statute, the owner of an isolated tract may freely use the newly created access right-of-way, but only after paying the assessed damages *and* "all of the costs of the proceedings in laying out and assessing the damages." This phrase is clear and unambiguous, and it easily encompasses the cost of the appraisal used to assess the damages here.

[¶64.] And though our conclusion is first and foremost a function of reading the text, we note that it can also be understood as a practical manifestation of legislative intent. Under the Zirbels' argument and the circuit court's decision, the

8. The Zirbels suggest that the last portion of the statute serves to limit the costs recoverable to the mileage allotted to commissioners for their travel. But this argument is unsustainable because the special mileage provision is separated from the general "all costs" text with an "and," which precludes the suggestion that the mileage is the only cost that may be assessed.

taxpayers of Deuel County would ultimately be responsible for the cost of calculating damages for the isolated tracts purchased by the Zirbels without a definitive means of access. The idea that the Legislature would have envisioned this outcome seems unlikely. Having provided isolated-tract owners with a statutory lifeline to access, it seems far more plausible that the Legislature intended the isolated-tract owners to shoulder the related expenses.

[¶65.] This is not to say, however, that the entire cost of the appraisal is automatically allocated to the Zirbels. The provisions of SDCL 31-22-6 make isolated-tract owners responsible for "all of the costs of the proceedings in laying out and assessing the damages of said right-of-way." Accordingly, we vacate the circuit court's decision relieving the Zirbels of any financial responsibility for the appraisal and direct it on remand to make findings of fact and conclusions of law relating to whether the appraisal was, based on the evidence adduced at the trial de novo, a cost of laying out the access routes and assessing damages.

Conflict of interest

[¶66.] We conclude with our consideration of the Zirbels' claim that the circuit court erred by declining to decide whether Commissioner Grabow had a conflict of interest that necessitated his recusal.[9] The provisions of SDCL 6-1-17 prohibit county officials from participating in a discussion or vote concerning an issue in which they have a direct pecuniary interest or after "two-thirds of the

9. Given our remand instructions that require the circuit court to conduct its own trial de novo, it is difficult to conceive of a scenario under which the case would return to the Board, but we address the Zirbels' conflict-of-interest argument to account for any unforeseen circumstances.

governing body votes that an official has an identifiable conflict of interest." *See also* SDCL 6-1-21 (providing additional guidance for county officials acting in a "quasi-judicial capacity").

[¶67.] When the Zirbels raised the issue of Commissioner Grabow's alleged conflict of interest in their first circuit court appeal, the court determined that the issue was not sufficiently developed to provide meaningful review. The Zirbels did not address the argument further after the remand to the Board and did not identify it as an issue in their second circuit court appeal. Under the circumstances, we find ourselves in much the same position as the circuit court initially—without a sufficiently developed factual record to support the claim that Commissioner Grabow's "authority, statements, or actions" demonstrated "prejudice or [an] unacceptable risk of bias." *Id.*

[¶68.] But, even if it were otherwise, it would not impact the outcome here. "[T]he legal sole remedy is to invalidate that official's vote." SDCL 6-1-17. Because the five-member Board's vote on the issue was unanimous, the invalidation of Commissioner Grabow's vote would not change its decision regarding the Zirbels' statutory access claim.

Conclusion

[¶69.] The Zirbels were entitled to a trial de novo. The Board's action laying out a right-of-way for the Zirbels was quasi-judicial, not quasi-legislative, and the circuit court should not have reviewed it under an abuse of discretion standard. We vacate the court's order and remand the case with instructions to conduct a trial de novo.

[¶70.] As part of the remand, we direct the circuit court to determine whether the section line right-of-way was vacated using a developed evidentiary record. We also vacate the court's decision that relieved the Zirbels of any responsibility for the cost of the appraisal and direct the court to determine whether the appraisal was, in fact, a cost of laying out the routes and assessing damages in providing statutory-right-of-way access to the Zirbels under SDCL 31-22-6.

[¶71.] JENSEN, Chief Justice, and DEVANEY, MYREN, and GUSINSKY, Justices concur.