# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

Appellees,

v.

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

**Appellee** 

v.

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

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### Appeal No. 27976

## APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

## THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

#### INTERVENOR/APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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### **JURISDICTIONAL STATEMENT**

Following a trial de novo held May 11, 2016, the Honorable Jerome A. Eckrich, Fourth Judicial Circuit Court Judge, entered a Memorandum Decision on May 20, 2016 and Findings of Fact, Conclusions of Law, Order, and "Judgement" [sic] on August 24, 2016. "Notice of Entry of Judgement" [sic] was made August 31, 2016. The case was originally brought as two appeals, one by the City of Sturgis, and the other by Gary Lippold and Jane Murphy following a decision by the Meade County Commission. The two cases were consolidated on April 30, 2015. Intervenor Buffalo Chip Campground, LLC intervened on June 10, 2015. A Notice of Appeal was filed by Appellants Meade County Commission, Alan Aker, Robert Bertolotto, Robert Heidgerken, Galen Neiderwerder, and Linda Rausch (collectively "Commission" or "Meade County") and Buffalo Chip Campground, LLC on September 6, 2016. A Notice of Review was filed by Appellee City of Sturgis (hereinafter "Sturgis") on September 23, 2016 and Appellees Gary Lippold and Jane Murphy (collectively "Lippold") on September 28, 2016. This Court may exercise jurisdiction because the circuit court entered a final judgment, pursuant to SDCL § 15-26A-3(1).

### STATEMENT OF LEGAL ISSUES

# ISSUE ONE: DID LIPPOLD, MURPHY, AND STURGIS HAVE STANDING TO APPEAL THE DECISION OF THE MEADE COUNTY COMMISSION?

This issue was raised by Buffalo Chip Campground in its motion to dismiss for lack of subject matter jurisdiction. (CR 996, 998.)<sup>1</sup> The circuit court ruled in the affirmative. (CR 1238.) The issue was preserved for appeal by Meade County and Buffalo Chip Campground's proposed findings of fact and conclusions of law, objections to findings of fact and conclusions of law, and this subsequent appeal. (A 119-174.)<sup>2</sup>

### Apposite Authority:

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

Lake Hendricks Imp. Ass'n v. Brookings Co. Planning and Zoning Com'n, 2016 S.D. 48, 882 N.W.2d 307 SDCL § 7-8-27

# ISSUE TWO: DID THE TRIAL COURT HAVE SUBJECT MATTER JURISDICTION TO HEAR THE APPEAL IN LIGHT OF SDCL § 9-3-20?

This issue was raised by Buffalo Chip Campground through a motion to dismiss for lack of subject matter jurisdiction. (CR 996, 998.) The circuit court ruled in the affirmative. (CR 1238.) The issue was preserved for appeal by Meade County and Buffalo Chip Campground's proposed findings of fact and conclusions of law and this subsequent appeal. (A 119-145.)

#### Apposite Authority:

City of Sioux Falls v. Missouri Basin Mun. Power Agency, 2004 S.D. 14, 675 N.W.2d 739

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

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

Heine Farms v. Yankton County ex rel. County Com'rs, 2002 S.D. 88, 649 N.W.2d 597

<sup>2</sup> References to the Appendix will be cited as "A".

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<sup>&</sup>lt;sup>1</sup> References to the Clerk of Court's Record will be cited as "CR \_\_\_\_."

# ISSUE THREE: DOES SDCL § 9-3-1 REQUIRE A PROPOSED MUNICIPALITY TO CONTAIN BOTH 100 LEGAL RESIDENTS AND 30 VOTERS?

This issue was raised by the South Dakota Municipal League through their amicus brief and was later addressed by Sturgis and Lippold in briefs and at the trial de novo. (CR 1059.) The circuit court ruled in the affirmative. (A 1.) The issue was preserved for appeal by Meade County and Buffalo Chip Campground's proposed findings of fact and conclusions of law, objections to findings of fact and conclusions of law, and this subsequent appeal. (A 146-174.)

### Apposite Authority:

SDCL § 9-3-1 SDCL § 12-18-10 SDCL § 9-3-12

Lake Hendricks Imp. Ass'n v. Brookings Co. Planning and Zoning Com'n, 2016 SD 48, 882 N.W.2d 307

# ISSUE FOUR: MAY THE DISTRICT COURT ORDER ALL ACTIONS TAKEN BY A TOWN NOT A PARTY TO THE PROCEEDINGS VOID AB INITIO?

The circuit court raised this issue sua sponte at a hearing on March 4, 2016. (A 178.) The circuit court ruled in the affirmative. (A 1.) The issue was preserved for appeal by Meade County and Buffalo Chip Campground's objections to findings of fact and conclusions of law and this subsequent appeal. (A 146-174.)

#### Apposite Authority:

SDCL § 9-3-12

Merchants' National Bank v. McKinney, 2 S.D. 106, 48 N.W. 841 (1891) Speer v. Board of Com'rs of Kearney County, 88 F. 749 (8<sup>th</sup> Cir. 1898) Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 2011 S.D. 23, 798 N.W.2d 683

# ISSUE FIVE: DOES SDCL § 9-3-4 REQUIRE THE SURVEY, CENSUS, AND MAP TO BE POSTED FOR THIRTY DAYS PRIOR TO PRESENTATION TO THE COMMISSION?

This issue was raised by the City of Sturgis and Lippold and Murphy at the trial de novo. (CR 2059.) The circuit court ruled in the affirmative. (A 1.) The issue was preserved for appeal by Meade County and Buffalo Chip Campground's proposed findings of fact and conclusions of law,

objections to findings of fact and conclusions of law, and this subsequent appeal. (A 119-174.)

Apposite Authority:

SDCL § 9-3-3 SDCL § 9-3-4

# ISSUE SIX: WAS THE DECISION OF THE MEADE COUNTY COMMISSION TO SET THE ELECTION ARBITRARY AND CAPRICIOUS?

This issue was raised in the circuit court through Sturgis and Lippold's original appeal of the decision to set the election. (A 78-86.) The circuit court ruled in the affirmative. (A 1.) The issue was preserved for appeal by Meade County and Buffalo Chip Campground's objections to findings of fact and conclusions of law and subsequent appeal. (A 146-174.)

Apposite Authority:

SDCL Ch. 9-3

Beyer v. Cordell, 420 N.W.2d 767 (S.D. 1988)

Nist v. Nist, 2006 S.D. 67, 720 N.W.2d 87

State ex rel. Sperling v. Board of County Com'rs of McCook County, 73 S.D. 361, 43 N.W.2d 232 (1950)

### **STATEMENT OF THE CASE**

This case was brought before the Honorable Jerome A. Eckrich, Judge of the Fourth Judicial Circuit, as an appeal of the decision of the Meade County Commission pursuant to SDCL § 7-8-27. Following a court trial held on May 11, 2016, the court ruled in favor of the City of Sturgis, and Lippold and Murphy, finding that the Meade County Commission acted arbitrarily and capriciously in approving the Amended Petition for Municipal Incorporation of Buffalo Chip, South Dakota and submitting the matter for a public vote. Buffalo Chip Campground, LLC owns all of the real property inside the limits of the Town of Buffalo Chip. Despite the Town of Buffalo Chip not being a party to the case, the court also ruled that all proceedings taken by the Town of Buffalo Chip were void ab initio and the town was a nullity.

## **STATEMENT OF THE FACTS**

On February 11, 2015, twenty-six registered voters petitioned the Meade County Commission for an order to incorporate the municipality of Buffalo Chip, South Dakota. (Ex. 23, p. 1-10.)<sup>3</sup> The proposed boundary for the town was determined to be approximately eighty feet inside the three mile boundary of the city limits of Sturgis, and the petitioners withdrew their application on February 12, 2015. (Ex. 47, p. 1.) On February 20, 2015, seventeen voters presented a new Petition for Municipal Incorporation of Buffalo Chip, South Dakota to the Meade County Commission, this time with a new proposed boundary that was more than three miles from the corporate limits of the City of Sturgis. (Ex. 23, p. 28-49.) However, this petition included a discrepancy between the written paragraph of legal descriptions of the boundary and the official map

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<sup>&</sup>lt;sup>3</sup> References to Exhibits entered in the Trial De Novo will be cited as "Ex. \_\_\_\_."

of the proposed boundaries of the new town presented to the Commission with the Petition. (Ex. 47, p. 3, 10.) On February 26, 2015, seventeen voters presented both an Amended Petition (an amendment to the petition presented on February 20, 2015) and a new Petition for Incorporation, both of which corrected the discrepancy between the legal description and the map. (Ex. 24; Ex. 23, p. 50-70.) After several hours of testimony and discussion, the Meade County Commission voted on February 27, 2015, to accept the submission of the Amended Petition, and to approve the Petition, setting the matter for a public vote. (Ex. 44, p. 103-105, 116-117.) The petitioners withdrew the new petition filed on February 26, 2015, since the Amended Petition was accepted. (Ex. 44, p. 117-118.)

The importance of timing on the filing of the petitions was due to actions by the City of Sturgis in attempting to annex land that would be within three miles of the proposed municipality of Buffalo Chip. Invoking the emergency exception to the twenty-day referendum period required by SDCL § 9-19-13, the annexation of the Sturgis airport was declared to be effective immediately by the Sturgis City Council under the need to preserve the health and welfare of its citizens. The Airport Annexation was not filed with Meade County until February 23, 2015 at 12:17 p.m. (Ex. 7.) The Airport Annexation has never been validly filed. (T 57.)<sup>4</sup>

The Meade County Commission found the annexation to be invalid based on questionable use of the declaration of an emergency and the lack of a correct map, and determined that the Municipal Incorporation Petitions of the citizens, filed prior to the

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<sup>&</sup>lt;sup>4</sup> References to the Transcript of the Trial De Novo will be cited as "T \_\_\_\_."

time of the attempted annexation, were first in time, first in right, and more than three miles from the boundary of the City of Sturgis. (Ex. 46, p. 21-22; Ex. 44, p. 103-105.)

The Commission further found that the area to be incorporated contained at least thirty registered voters and that more than 25% of them had signed the Petitions for Incorporation as required by SDCL § 9-3-5. (Ex. 44, p. 112-117.) Having complied with the statutory requirements for incorporation, the Commission at the February 27, 2015 meeting voted, 3-2, to set the matter for a public vote on incorporation. (Ex. 44, p. 112-117.) The election was set for May 7, 2015. (Ex. 44, p. 116-117.)

On March 27, 2015, Lippold, Murphy, and several other people petitioned the Meade County State's Attorney to appeal the order of the Meade County Commission to incorporate the municipality of Buffalo Chip pursuant to SDCL § 7-8-28. (Ex. 13.) The State's Attorney declined to do so. (Ex. 14.) Lippold and Murphy, and the City of Sturgis each filed an appeal to circuit court, appealing the order of the Commission to set the matter for a public vote. Buffalo Chip Campground, LLC moved to intervene in the action, and all parties stipulated to the intervention. Buffalo Chip Campground officially intervened on June 10, 2015. The two cases were consolidated on April 30, 2015.

On April 29, 2015, the City of Sturgis moved the circuit court for a stay of the election and to set a hearing on the motion to stay. Sturgis failed to serve adequate notice, but a teleconference was held on May 1, 2015 with attorney Greg Barnier for the City of Sturgis in chambers with Judge Eckrich, Jack Hieb attorney for Meade County and the Commissioners appearing by telephone, and no other appearances. The result of this teleconference was a handwritten note by Judge Eckrich indicating "Motion Denied. Order Refused" on the Order to set a hearing. (A 112; CR 200.)

The vote on incorporation was duly held on May 7, 2015, and a majority of citizens voted to incorporate the Town of Buffalo Chip, South Dakota. (Ex. 16.) The Meade County Commission canvassed the votes pursuant to SDCL § 9-3-11 and declared the town incorporated as required by SDCL § 9-3-12 on May 13, 2015. (Ex. 16.) This Order has not been appealed by any party. Articles of Incorporation were issued by the South Dakota Secretary of State. (Ex. 17.) The Town of Buffalo Chip is not a party in this case. The State of South Dakota is not a party to this case.

Lippold and Murphy, as well as Meade County, made motions for summary judgment. Those motions were all denied by the court. Buffalo Chip Campground, LLC moved to dismiss for lack of subject matter jurisdiction. That motion was denied by the court. The South Dakota Municipal League moved to intervene in the matter, that motion was denied, but they were allowed to submit an amicus brief.

A trial de novo was held on May 11, 2016. Following the trial, Judge Eckrich issued a Memorandum Decision on May 20, 2016, stating a number of facts not supported by the record. (A 1-9.) Those errors are outlined in Buffalo Chip Campground, LLC and Meade County's Objections to Findings of Fact, Conclusions of Law, and Order. (A 146-174.)

The parties each submitted proposed findings of fact and conclusions of law. (CR 2212, 2272, 2289.) Meade County and Buffalo Chip Campground each filed objections to the proposed findings of fact and conclusions of law submitted by Sturgis and Lippold. Judge Eckrich signed the proposed Findings of Fact and Conclusions of Law submitted by Sturgis and Lippold without making any changes. As such, the attached Objections at Appendix 146-174 need not be repeated here.

Judge Eckrich ordered "that the Board's decision in approving the Amended Petition and setting the matter for a public vote is a legal nullity" and "all actions or any kind or character undertaken by the Town of Buffalo Chip, SD are void ab initio." (A 41.)

All other relevant facts will be discussed in the body of the brief.

#### **ARGUMENT**

I. THE CIRCUIT COURT ERRED BY FINDING THAT THE CITY OF STURGIS, GARY LIPPOLD, AND JANE MURPHY HAD STANDING TO BRING THE APPEAL.

#### A. Standard of Review

A review of whether a circuit court had standing to hear an appeal of a county commission's decision is a question of law, subject to a de novo standard of review.

Arnoldy v. Mahoney, 2010 S.D. 89, 791 N.W.2d 645. Standing is determined by the status of the party seeking relief, not the issues presented. *Id.* at ¶ 18. Standing is established through being a "real party in interest" and is controlled by statute. *Id.* at ¶ 19. SDCL § 15-6-17(a) provides that every action shall be prosecuted in the name of the real party in interest. *Id.* The "real party in interest" requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *Id.* 

#### **B.** Standing

Standing is a threshold question, which a party must have in order to bring a suit. Without standing, the court has no jurisdiction. *Lake Hendricks Imp. Ass'n v. Brookings Co. Planning and Zoning Com'n*, 2016 S.D. 48, 882 N.W.2d 307, 313. A plaintiff must satisfy three elements in order to establish standing as an aggrieved person for a court to have subject matter jurisdiction. *Cable v. Union County Bd. of County Com'rs*, 2009

S.D. 59, ¶21, 769 N.W.2d 817, 825. First, the party bringing the action 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.'" *Id.* Second, the party bringing the action must show a causal connection between their injury and the conduct complained of. *Id.* at 826. The causal connection is satisfied when the injury is "fairly traceable to the challenged action of the defendant," and not the independent actions of a third party not before the court. *Id.* Finally, the party bringing the action must show it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Id.* 

A party who challenges the legality of a government action has an additional burden when the government's allegedly illegal action acts upon a third party who is not the respondent. When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," the causation and redressability elements of standing hinge on what the third party's response will be to the government regulation. *Id.* at ¶ 24. Thus, the existence of standing in such cases "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* at 827. When the regulation is focused on the conduct of some independent third party, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.* Showing standing under such circumstances is "substantially more difficult." *Id.* The third parties not part of this action are a number of voters who petitioned to become a town, and ultimately the Town of Buffalo Chip.

In *Wood v. Bangs*, the court examined the policy behind taxpayer appeals versus appeals by the state. 1 Dakota 179, 46 N.W. 586 (Dak. Terr. 1875). The court found that

If this action [by the taxpayers] can be sustained, then any tax-paying citizen may compel the public authorities to litigate in the courts the acts of any administrative board or officer in the state, and thus proceedings of this kind can only be perfected by the judgment of the court of final appeal[...]but if a citizen may maintain an action for such a purpose, in respect to his rights as a voter and tax-payer, the courts may be regularly called upon to revise all laws that may be passed.

*Id.* at 193, 588. An action brought by the attorney general may be allowed on behalf of the taxpayers and citizens, but otherwise,

the state and county officers might be compelled to litigate the question of constitutionality with every tax-payer, and thus the fiscal business of the state would be transacted mainly in the courts. The law, in my judgment, does not afford such an opportunity for excessive litigation. No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts.

Id. at 193-194, 588 (emphasis added).

Tt the hearing on March 4, 2016, the court converted the motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment. (A 175-179.) When a motion for lack of subject matter jurisdiction is converted to a motion for summary judgment an appellant must present more facts than presented in the pleadings. Argument alone does not suffice; subjective fears and concerns are not enough to cover the motion. *Cable*, 2009 S.D. 59, 769 N.W.2d 817.

Just as in *Cable* where the court said "Cable failed to establish he had standing by pleading and producing sufficient facts to show he had incurred a personal and unique injury in fact, and was unable to meet the causation element required for standing,"

Sturgis, Lippold, and Murphy have failed to produce more than argument and speculation. *Id.* at  $\P 41$ .

#### C. Person Aggrieved

The City of Sturgis, Gary Lippold and Jane Murphy are not persons aggrieved by the decision of the Meade County Commission scheduling a vote on incorporation.

SDCL § 7-8-27 allows an appeal of a commission decision by any person aggrieved. The right to appeal by a "person aggrieved" requires a showing that a person suffers "a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county." *Cable*, 2009 SD 59, ¶ 26. Only persons who can show they were aggrieved by the decision of the board with a denial of a personal or property right or an imposed personal, individual burden or obligation (as opposed to a grievance as a citizen) have standing. *Id.* "Personal" in the context of SDCL § 7-8-27 means an injury *unique* to a person as an individual, that is not also suffered by other individuals to a different extent. *Id.* at ¶ 33.

The Court in *Weger v. Pennington County* pointed out that when a person is not a "person aggrieved" he may only have a remedy by way of the State's Attorney filing an appeal. 534 N.W.2d 854 (S.D. 1995). The State's Attorney has discretion in determining the merits of the demand for appeal of an action of a county commission. If he chooses not to appeal an action upon the written demand of fifteen or more taxpayers, in accordance with SDCL § 7-8-28 then the taxpayers' remedy is to request a state's attorney pro tem be appointed by the circuit court, if his actions in refusing the appeal are unjustifiable or due to a conflict of interest. *Id.* at 857; SDCL § 7-16-2. "We have, on

numerous occasions, noted that "the strict limitations on the availability of taxpayer challenges to county commission actions were enacted to help reduce the number of lawsuits brought by taxpayers in order to prevent continued and unnecessary interference with the conduct of public affairs." *Id.* (citing *Simpson v. Tobin*, 367 N.W.2d 757, 761 (S.D. 1985)). SDCL § 7-8-28 is an exclusive remedy of which Lippold and Murphy did avail themselves. The Meade County State's Attorney declined to appeal upon the demand of taxpayers. (A 85.) No request for a State's Attorney pro tem was made.

#### 1. City of Sturgis

The City of Sturgis presented no evidence at trial that it was a "person aggrieved." Assuming, *arguendo*, Sturgis qualifies as a "person," the "Affidavit of Daniel Ainslie In Support of Appellant's Supplemental Brief in Opposition to Intervenor's Motion to Dismiss" did not show how the City was personally aggrieved. The circuit court's Memorandum Decision states, "Sturgis' grievances are both general and particularized. Without repetition, those grievances are outlined in Sturgis' Brief and Supplemental Brief filed January 8 and April 1, 2016." (A 2.) What the court failed to recognize, however, is that these were legal arguments, not facts presented in Affidavit form or through testimony. Further, these arguments were speculative as to what may or may not happen in the future. The court stated, "At a minimum, Chip City's incorporation imposes a concrete, particularized imminent, actual invasion of Sturgis [sic] annexation rights. The incorporation of Chip City limited and limits Sturgis [sic] statutory annexation rights.

<sup>5</sup> As argued in Meade County's brief, the City does not qualify under the statute as a "person" who can appeal the county's decision. Buffalo Chip Campground, LLC incorporates Meade County's argument and brief by reference.

<sup>&</sup>lt;sup>6</sup> No supplemental brief filed by any party on or about April 1, 2016 is part of the record.

and invasion of Sturgis' annexation rights are clear." (A 3.) However, the court was referencing the May 13, 2015 Order of the County Commission granting the Incorporation of the Town of Buffalo Chip. This Order was not appealed in this case by Sturgis or Lippold. It is only the February 27, 2015 order which set the date for a public vote that was appealed. The decision to allow the vote itself had no effect on Sturgis. Sturgis continued annexing land east of the City of Sturgis, within three miles of the Town of Buffalo Chip, even after the Town of Buffalo Chip was incorporated, including areas of MAKO and T-Bob, the entities Gary Lippold works for that are approximately a half-mile from the Town of Buffalo Chip. (T 16-17, 25-26.) Clearly, the incorporation of the Town of Buffalo Chip has had no effect on the annexation of land or other actions of the City of Sturgis. The City of Sturgis is not, and has not conducted itself as, a "person aggrieved" by the action of the Commission to allow the vote on incorporation.

The concerns of Sturgis are not concrete and particularized; they are not actual or imminent. The concerns are merely conjectural or hypothetical.

Further, towns are specifically not allowed to sue in circumstances such as this.<sup>8</sup> See SDCL § 9-3-20 (only the State may inquire into the regularity of the organization of a municipality). Looking at this law in a historical context, it makes sense that at the time when most towns were formed in this State, they were in competition with each other for a county seat, railroad, or other enterprise. It would be easy for one town to argue that another town wasn't really a town, to lure an enterprise to come to their town and not

<sup>&</sup>lt;sup>7</sup> The court refers to "Chip City" which is the circuit court's moniker for the Town of Buffalo Chip.

<sup>&</sup>lt;sup>8</sup> A city, too, has been denied the right to maintain an action in the nature of quo warranto to challenge the validity of the incorporation of another city and to oust alleged official usurpers. McQuillin, Municipal Corporations § 3.53 (3d ed. 1971).

another. This is why only the State may inquire. It is the exact situation presented in this case where Sturgis opposes another town's competition or hindrance to annexing areas into Sturgis such as the Buffalo Chip Campground (an area rich with taxing possibilities given the huge draw of people and entertainment during the Sturgis Motorcycle Rally). Sturgis wants to be able to control the entire area, tax them, require them to pay licensing fees, and collect money from its expansion throughout Meade County. The court's finding that Sturgis is a "person aggrieved" is clearly erroneous.

## 2. Gary Lippold

Gary Lippold is not a "person aggrieved" by the action of the Commission.

Lippold testified that he does not have any ownership interest in the businesses of MAKO and T-Bob, which are in competition with Buffalo Chip Campground. He is only an employee. (T 10, 24, 25.) He does not claim to own land near Buffalo Chip. Lippold's claimed grievances are speculative at best. Lippold testified he was "afraid" the city of Buffalo Chip may not charge vendor fees (T 19-20); Buffalo Chip may or may not annex the dragstrip (T 22); a lot of people are concerned they could be annexed into Buffalo Chip. (T 27.) His claims are not unique to him. His claims would also apply to other employees of MAKO and T-Bob as well as any other competing entity. Lippold admitted that the personal impact against him would be the same as about anybody that works the rally. (T 11-12.) This is non-personalized speculation.

Further, by MAKO and T-Bob voluntarily annexing into the City of Sturgis, his fears of being annexed into Buffalo Chip are without merit. Lippold testified that MAKO and T-Bob voluntarily annexed some of their property into the City of Sturgis effective

July 1, 2015 (after the order incorporating the Town of Buffalo Chip). (T 13, 16-17, 26.) The court's finding that Lippold is a "person aggrieved" is clearly erroneous.

#### 3. Jane Murphy

Nothing is known about Jane Murphy. The court's finding that she is a person aggrieved and has standing is wholly without merit as absolutely no evidence was ever presented about who she is, what grievance she has, or how it was caused by the action of the Commission. The court's finding that she is a person aggrieved is clearly erroneous.

# II. THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO HEAR THE APPEAL.

#### A. Standard of Review.

The Supreme Court reviews a court's ruling on jurisdiction as a question of law under the de novo standard of review. *Upell v. Dewey County Commission*, 2016 S.D. 42, 880 N.W.2d 69. Under the de novo standard of review, the Supreme Court gives no deference to the circuit court's conclusions of law. *Cable*, 2009 S.D. 59, ¶19 (citing *Sherburn v. Patterson Farms, Inc.*, 1999 S.D. 47, ¶ 4, 593 N.W.2d 414, 416). Subject matter jurisdiction is the power of a court to act. The issue may be raised at any time. *Lake Hendricks*, 2016 S.D. 48, ¶ 12.

#### B. Only the State may inquire into the regularity of an acting municipality

"Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void." *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 10, 675 N.W.2d 739, 742. Subject matter jurisdiction "is conferred solely by constitutional or statutory provisions." *Id.* Additionally, subject matter jurisdiction cannot be conferred on a court, or denied to a court, by the acts of the parties or the procedures they employ. *Id.* SDCL § 9-3-20 states,

"The regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the state." It is undisputed that the Town of Buffalo Chip, a non-party to this action, has been an acting municipality since May 13, 2015. (T 128.) This specific statute (§ 9-3-20) grants no authority for political subdivisions, taxpayers, or any other person to directly inquire as to the regularity of the organization of a municipality, much less institute a legal action against the Meade County Board of Commissioners.

A court must have jurisdiction to enter a valid, enforceable judgment on a claim. In this case, the court entered a judgment declaring the actions of the Town of Buffalo Chip void ab initio. The court had no personal jurisdiction over the Town of Buffalo Chip,<sup>9</sup> as it was not a party to this action, and had no subject matter jurisdiction because it was not authorized to hear the matter, as only the State may inquire and the State was not a party to the action. Subject matter jurisdiction does not exist absent standing. *Cable*, 2009 S.D. 59. As discussed in Argument I, *infra*, the parties (Sturgis, Lippold, and Murphy) did not have standing to bring this appeal, thereby depriving the court of subject matter jurisdiction.

On appeal, the Supreme Court has a duty to determine whether the circuit court had jurisdiction over the subject matter as a condition precedent to that circuit court's right to decide the issues before it. *Id.* at ¶ 52. Once a circuit court is found to have lacked subject matter jurisdiction, any judgment entered in the matter is void. *Id.* If the circuit court lacked subject matter jurisdiction in the matter, the Supreme Court likewise

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<sup>&</sup>lt;sup>9</sup> It was not until the Court's Memorandum Decision issued May 20, 2016 that the court asserted personal jurisdiction over the Town by issuing a ruling that could affect the Town of Buffalo Chip, an entity not a party to the case.

does not have jurisdiction over the subject matter and the matter must be dismissed. *Id.*Buffalo Chip Campground, LLC therefore requests this Court reverse the decision of the circuit court denying its motion to dismiss for lack of subject matter jurisdiction and dismiss the original appeal filed by Sturgis, Lippold, and Murphy.

# C. No jurisdiction lies if the appeal is from a political, legislative, administrative, discretionary, or ministerial decision.

The right to appeal is purely statutory; no appeal may be taken absent statutory authorization. An attempted appeal from which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it. *Lake Hendricks*, 2016 S.D. 48, ¶ 16. Here, no appeal lies because the County Commission's decision was ministerial.

This Court has consistently held that an appeal to the circuit court from decisions of the board of county commissioners is an *exclusive remedy*. *Heine Farms v. Yankton County ex rel. County Com'rs*, 2002 S.D. 88, ¶ 10, 649 N.W.2d 597. However, the remedy only exists when the board of county commission issues a *decision*. A "decision" is quasi-judicial in nature. *Id.* at ¶11. When a board exercises political, legislative, administrative, discretionary, or purely ministerial power, no appeal will lie. *Id.* (citing *Codington County v. Board of Com'rs of Codington County*, 51 S.D. 131, 212 N.W. 626 (1927). The term "shall" manifests a mandatory directive and does not confer any discretion in carrying out the action so directed. *Id.* at ¶ 12 (citing *Willoughby v. Grim*, 1998 S.D. 68 ¶ 9, 581 N.W.2d 165, 168). Just as with the statute at issue in *Willoughby*, the word "shall" in SDCL § 9-3-6 requiring the county commission to set an election for incorporation if the commission is satisfied that the requirements of the chapter have been met, the statute indicates a legislative intent to create a compulsory obligation. Here, the compulsory obligation is to confirm that each criterion was completed and set

an election for incorporation. The statute confers no discretion on the commission in carrying out this action. They simply go down a checklist of statutory requirements. Therefore, the duty or power to approve the application if the criteria are met is purely ministerial. *Heine Farms*, at ¶ 13. In fact, every statute in SDCL 9-3 concerning the formation/incorporation of municipalities contains the word "shall" and are legislatively imposed compulsory obligations. (*See* SDCL §§ 9-3-1 through 9-3-20.)

Further, where procedure for an appeal is proscribed by the legislature, review may only be had if there has been compliance with such proper conditions as the legislature may have imposed. *Lake Hendricks*, 2016 S.D. 48, ¶ 16. Here, the legislature described who may bring an appeal under SDCL § 7-8-27 finding that one must be a "person aggrieved." As discussed in *Cable* and again in *Lake Hendricks*, in order for a court to have subject matter jurisdiction, the petitioner must have standing. As outlined in Argument I, *infra*, Sturgis, Lippold, and Murphy were not "persons aggrieved" and did not have standing. The decision of the circuit court must be reversed and the case dismissed because the court did not have jurisdiction.

# III. THE COURT ERRED IN FINDING THAT SDCL § 9-3-1 REQUIRES BOTH 100 LEGAL RESIDENTS AND THIRTY VOTERS.

#### A. Standard of Review

This Court reviews legal issues under a de novo standard of review. If a mistake of law has occurred, the mistake itself is an abuse of discretion by the circuit court. *Corcoran v. McCarthy*, 2010 S.D. 7, ¶ 13, 778 N.W.2d 141, 146. A trial court's discretion is a judicious discretion, not an uncontrolled one, and its exercise must have a sound and substantial basis in the testimony. *Meinders v. Meinders*, 305 N.W.2d 404, 408 (S.D. 1981) (Henderson, J., dissenting). A trial court "necessarily abuses its

discretion if it bases its ruling on an erroneous view of the law." *Corcoran*, 2010 S.D. 7, ¶ 19. Statutory construction is also an issue of law to be reviewed under the de novo standard of review. *Cable*, 2009 S.D. 59, ¶19.

#### B. "Or" is disjunctive

At all times relevant herein, SDCL § 9-3-1 stated, "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." The word "or" is disjunctive. Webster's dictionary defines "or" as "used as a function word to indicate an alternative" and "used between words or phrases that are choices." Merriam-Webster Online Dictionary, http://www.meriam-webster.com/dictionary/or (last visited October 12, 2016). Black's Law Dictionary has a similar definition: "a disjunctive particle used to express an alternative or to give a choice of one among two or more things." Black's Law Dictionary 1246 (Revised 4<sup>th</sup> ed. 1968). Courts consistently look to the plain meaning of words, rather than to unrelated statutes. *Mauch v. South Dakota Dept. of Revenue and Regulation*, 2007 S.D. 90, ¶ 20, 738 N.W.2d 537, 543.

There were not 100 legal residents of Buffalo Chip. That has never been claimed, nor did the Commission base its decision on this fact. Rather, the question for the board was whether the individuals who signed the petitions equaled thirty or more "voters."

SDCL Chapter 9-3 underwent significant revisions in the 2016 Legislature. In particular, the revisions to SDCL § 9-3-1 dramatically changed the parameters for those who petition for incorporation of a municipality. Prior to July 1, 2016, SDCL § 9-3-1 provided:

No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters.

As of July 1, 2016 SDCL § 9-3-1 now provides:

A municipality may not be incorporated unless it contains at least one hundred legal residents and at least forty-five registered voters. For the purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition or is an active duty member of the armed forces whose home of record is within the proposed municipality.

The circuit court declared that in the interpretation of SDCL § 9-3-1 the word "or" really means "and." (A 6, 32, 38.) This is not a plain reading of the statute. When considering the Legislature's new language, it is clear a drastic change was intended. The court declared the statute "no model of clarity" even though it is clear on its face and only a strained reading whereby the words are changed could make it unclear. (A 6.)

A primary rule of statutory construction is that words and phrases are to be given their plain meaning and effect. *In re West River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 15, 675 N.W.2d 222, 226; SDCL § 2-14-1. When interpreting statutes, South Dakota courts are to define words according to their ordinary meaning unless the Code provides otherwise. SDCL § 2-14-1. If a word or phrase has a plain meaning, a court should simply declare the meaning and not resort to any other canons of statutory construction. *In re West River*, at ¶ 15. This Court gives a statute's language a practical and natural meaning to affect its purpose. *First Gold, Inc. v. S.D. Dep't of Revenue & Regulation*, 2014 S.D. 91, ¶ 6, 857 N.W.2d 601, 604. Moreover, in construing a statute, the court's main objective is to determine and give effect to the intention of the legislature by looking at the statutory language. *Western Surety Co. v. Mydland*, 85 S.D. 172, 179 N.W.2d 3 (1970); *Argo Oil Corp. v. Lathrop*, 76 S.D. 70, 72 N.W.2d 431 (1955).

In the recent case of *Lake Hendricks*, this Court had no difficulty explaining that the plain language of a statute indicated the legislature intended to create disjunctive classes of persons by using the word "or." *Lake Hendricks*, 2016 S.D. 48, ¶ 22. Here, the plain language of the statute clearly demonstrates two ways in which to become incorporated as a municipality, by having either 100 legal residents, or by having thirty voters, both clearly are not required. In *Lake Hendricks*, notably, the court also recognized a change in the wording of the statute, effective July 1, 2016, which changed the meaning of the statute; similar to the wording change here to SDCL § 9-3-1. *Id*.

The argument that SDCL § 9-3-1 contains a double-negative which changes "or" to "and" is without merit. There is no double-negative in the statute. The only negative term in the statute is the word "no" found at the beginning of the sentence. A second negative term is not found. Changing the language from "no municipality shall" to "a municipality may not" creates the same meaning. "Or" does not mean "and."

The court erred by concluding that SDCL § 9-3-1 requires both 100 legal residents and thirty voters; this ruling should be reversed.

# IV. THE CIRCUIT COURT ERRED BY ORDERING ALL ACTIONS OF THE TOWN OF BUFFALO CHIP *VOID AB INITIO* WHEN THE TOWN WAS NOT A PARTY TO THE ACTION.

#### A. Standard of Review

Whether a court has jurisdiction or the ability to enter an order is a question of law, subject to de novo review. *Upell v. Dewey County Com'n*, 2016 S.D. 42, ¶9, 880 N.W.2d 69, 72.

#### **B.** Effect of ruling on non-party

The record clearly demonstrates that the Town of Buffalo Chip was incorporated on May 13, 2015, following an election and order of the Meade County Commission. (Ex. 16.) Any decision by the court therefore affects the Town, yet the Town was never made a party to the action. It was an indispensable party. SDCL § 15-6-19(a). Even if it were not an indispensable party, the court's Order is clearly meant to affect the town. Surely, without the town being a party, such an order can have no effect on the Town. 10

In Whiting v. Hoffine, the court noted "since the outsider is not before the court, he cannot be bound by the judgment rendered." 294 N.W.2d 921, 925 (S.D. 1980) (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968)). While a court may issue an order that, in practice, affects a nonparty, nonparties are "not bound" in a technical sense. *Id.* However, the court must consider the extent to which the judgment may impair or impede the interest in the subject matter. *Id.* The court refused to allow evidence of the Town of Buffalo Chip as an ongoing governmental body which included three letters from the South Dakota Department of Revenue, the Official South Dakota Highway Map, two photographs of Buffalo Chip road signs, minutes of Buffalo Chip trustee meetings, Buffalo Chip Municipal Ordinance Number 1, notices of meetings, hearings on applications for sale of alcoholic beverages, and ordinance readings. (Ex. 29-41, offer of proof.)

The court's ruling is murky and leaves more questions unanswered than answered. Having been duly recognized by the South Dakota Secretary of State as a

<sup>&</sup>lt;sup>10</sup> In Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., the court found that without an action commenced against or served on the non-party individuals, the court lacked personal jurisdiction to grant the relief requested. 2011 S.D. 23, 798 N.W.2d 683. In J.K. Dean, Inc. v. KSD, Inc., 2005 S.D. 127, 709 N.W.2d 22, an action to abate a public road a nuisance found the Town of Keystone a necessary party to the action.

municipal corporation, Buffalo Chip has conducted itself accordingly, including: a bank has loaned the town money, the town has entered into contracts, the town has collected sales tax, the town has tax exempt status and has not paid sales tax for purchased items, the town has issued liquor licenses, the town has been recognized by the State and been placed on the Official Map of the State of South Dakota. What does it now mean to be "void ab initio?" What happens to the sales tax? How can the Town effectively be returned to its prior status? Are the Secretary of State's Articles of Incorporation void? The Order incorporating the Town on May 13, 2015 was never appealed.

The circuit court allowed, and granted, a collateral attack on an acting municipality. Even if there were an irregularity in permitting the vote to incorporate, a vote was nonetheless held and any order restraining the town from its legal operations as a viable legal organization would disenfranchise the decision of the voters. The Board's order declaring the municipality to be incorporated is "conclusive of the fact of such incorporation." SDCL § 9-3-12. Sturgis and Lippold are not proper parties to challenge the existence of the Town of Buffalo Chip. Only an action instituted by or on behalf of the state can challenge the regularity of the organization. SDCL § 9-3-20. Even if the town were not validly enacted, it has been acting as a municipality for more than a year and is a *de facto* corporation.

#### C. Buffalo Chip, South Dakota is a De Facto Corporation

A review of McQuillin, *The Law of Municipal Corporations*, Chapter on Creation of Municipal Corporations instructively provides:

The only remedy to attack the validity of the existence of a de facto corporation is by a direct proceeding by the state, which is generally quo warranto or information in the nature of quo warranto. A private individual cannot bring quo warranto proceedings to test the validity of the

incorporation, nor can a private individual compel the state to become a party to his suit or to file a quo warranto proceeding in his behalf. A city, too, has been denied the right to maintain an action in the nature of quo warranto to challenge the validity of the incorporation of another city and to oust alleged official usurpers.

McQuillin, Municipal Corporations § 3.53 (3d ed. 1971).

An early case from South Dakota's Supreme Court which considered a flawed petition to incorporate is found at *Merchants' Nat. Bank v. McKinney*, 2 S.D. 106, 48 N.W. 841 (1891) and is instructive in this matter.

McKinney involved Douglas County, an unorganized county separated from Dakota Territory until the spring of 1881, when a petition purporting to be signed by the voters of Douglas County was presented to Governor Ordway. *Id.* Some of the names on the petition were forged, and some of the signers were not residents of Douglas County. *Id.* At the time the petition was presented there were not even 20 voters living in the county when the law required that the voters of an unorganized county be fifty or more to become organized. *Id.* The governor, not knowing of the defects in the petition, approved the organization of the county and appointed county commissioners. *Id.* The board appointed other county officers who qualified and began discharging their duties as county officers, "and the county government so organized continued to transact the business of the county for more than a year." *Id.* at 843.

The county's board issued warrants on the county which were sold to the plaintiffs. *Id.* The warrants were challenged as being illegal and void for the reason that they were issued by an illegally appointed board. *Id.* 

The Supreme Court adopted the position that "when the petition sets forth that there are the requisite number of voters in the county, and the governor is satisfied of that

fact, his decision must be regarded as *prima facie* a determination of a matter left to his judgment and discretion, so far, at least, as the public and third parties are concerned."

Id. The court noted the legislature made it the governor's duty, once he was satisfied that a county had at least fifty voters, and they petition him for organization, to proceed and organize it by appointing three commissioners. Id. Once completed, the court said such appointment could not be questioned in a collateral proceeding where neither the county nor its officers are parties. Id. "To allow the decision of the governor to be controverted in such a case would be to overturn the doctrine long established, that the acts of de facto officers are good as to the public and third persons." Id.

"The term 'satisfied' [11] imports examination, investigation, and a decision." *Id.* The court held that the legislature intended to vest in the governor the power to determine whether or not there are 50 voters in the county. *Id.* at 844. The court further held that the legislature intended to vest in the executive the authority to organize new counties, "and, to prevent questions involving the legality of such organizations being raised in a collateral proceeding, it intended to make his decision so far conclusive as to make such an organization at least a *de facto* organization." *Id.* Importantly, the court stated:

Can the public be expected to re-examine the proceedings of the governor, ascertain whether or not the signatures to the petition are genuine, take a census of the county, and ascertain, at its peril, whether or not there actually existed the required number of voters in the county to authorize the governor to organize it, before it can transact business with the county officers of such county? Should the public be required to look further than to see that a county organization actually exists, with officers performing the duties usually performed by county officers of a county? We think not.

Id.

<sup>&</sup>lt;sup>11</sup> The term "satisfied" appears both at SDCL § 9-3-6 as well as SDCL § 9-3-12.

"When a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence." National *Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 62 F. 778, 787 (8<sup>th</sup> Cir. 1894); Chicago & N.W. Ry. Co. v. Murphy, 50 S.D. 221, 209 N.W.353 (1926) (incorporation of company under laws of South Dakota and its right to exercise power shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; inquiry may be had at the suit of the state); Dudley v. Dakota Hot Springs Co., 11 S.D. 559, 79 N.W. 839 (1899) (proceedings against de facto corporations are at the instance and on behalf of the government—state must be a party to the prosecution); State v. Ness, 75 S.D. 373, 65 N.W.2d 923 (1954) (challenge to Canton municipal court judge's exercise of power not open to collateral attack). Here, the State has issued Articles of Incorporation, liquor licenses, sales tax exemption, and sales tax collection authority. The municipal body of Buffalo Chip has assumed with the consent of the state the powers of a public corporation.

James Walczak, Finance Officer for the Town of Buffalo Chip, testified at the trial de novo. He testified that in his capacity as Finance Officer, on behalf of the Town he signed an Affidavit of Application for Writ of Prohibition to the Supreme Court. (T 104-105.) He testified that the Town had received Articles of Incorporation from the Secretary of State. (T 111.) Mr. Walczak testified that the Town of Buffalo Chip has been an acting municipality since incorporation on May 13, 2015. (T 112.) He testified that the State of South Dakota has not challenged the corporate status of the municipality.

(T 113.) He testified to a photograph of Fourth Circuit Judge Michelle Percy swearing in the trustees for the Town of Buffalo Chip. (T 124.) And he testified to the Town receiving a loan from Black Hills Community Bank of Spearfish, with no security, no personal guaranty, and no one but the Town of Buffalo Chip obligated to repay the loan. (T 132.) A number of Exhibits, 29-41, we made part of the record as an offer of proof (as the court refused admission into evidence) as to how the Town of Buffalo Chip has been acting as a municipality and regularly conducting business since incorporation. The Trustees held regular town meetings, passed ordinances, collected sales tax, provided notice of meetings and ordinances, and issued liquor licenses.

Given the settled law, the circuit court erred in ordering the actions of the Town of Buffalo Chip void ab initio. The Town was not a party to the case and the case is a collateral attack on the existence of such Town. The Town of Buffalo Chip is at the very least a *de facto* corporation at this point. The Court's Order declaring the Town void ab initio was outside the scope of the appeal and allowed a collateral attack on an acting municipality. The order exceeded the court's jurisdiction, if any.

# V. THE DECISION OF THE MEADE COUNTY COMMISSION TO SET A VOTE ON THE INCORPORATION WAS NOT ARBITRARY AND CAPRICIOUS.

#### A. Standard of Review

This Court reviews factual findings under the clearly erroneous standard and accords no deference to legal conclusions of the circuit court. A mistake of law is an abuse of discretion by the circuit court. (*See* Standard of Review in Argument III, *infra*.)

# B. The decision of the Meade County Commission was not arbitrary and capricious

The Commission acted within its authority in setting the matter for a public vote. At the time of the filing of the petition in this matter, SDCL § 9-3-1 provided: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." (Emphasis added).

As stated in Argument III.B., *infra*, it has never been claimed that Buffalo Chip had one hundred legal residents, nor did the Meade County Commission base its decision on this fact. Rather, the question for the board was whether the individuals who signed the petitions were "voters" and if they numbered thirty or more. Lisa Schieffer, Meade County Auditor, verified the existence of more than thirty voters, as certified by the Secretary of State.

In accordance with SDCL § 9-3-3, a census was completed and submitted with the petition, which confirmed that the petition was "verified by the circulator and signed by not less than twenty-five percent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state." SDCL § 9-3-5.

If the Meade County Commission was satisfied that the proposed municipality had at least thirty voters, and the balance of the requirements were met under Chapter 9-3, the board's decision was neither arbitrary nor capricious. There is no evidence showing that a number of less than thirty voters existed. The undisputed evidence demonstrates fifty-one voters. (Ex. 48, p. 6-57.)

SDCL § 9-3-3 requires an "accurate census to be taken of the landowners and the resident population." The census reveals only the resident population—which addresses to the question of whether there were one hundred legal residents and whether 25% of the

residents petitioned for incorporation. Again, the petitioners have never represented that there were 100 or more residents within the proposed territory. As to the requisite number of qualified voters, that determination falls on the county auditor based on the certification of voter registration forms by the Secretary of State.

It is undisputed that the voters registered in the territory to be incorporated did exercise their right to vote, and no challenges to any of the voters' qualifications were made. SDCL § 12-18-10; Ex. 48.

As required by SDCL § 9-3-6, the Meade County Commission issued its Order setting the date for the incorporation election to be held. (Ex. 16.) Within the body of the Order, the Commission stated that its findings were based upon proof by affidavit submitted to the Commission and oral examination of witnesses. Hearing and testimony was provided to the Commission on February 12, 2015, February 25, 2015, and February 27, 2015. (Ex. 44 and 47.)

After the Meade County Commission verified that the election had met all necessary criteria, the Commission was satisfied with the legality of the election as required by SDCL § 9-3-12, and the Commission made an Order that the municipality has been incorporated by the name adopted. Its order thereon is conclusive of the fact of incorporation. SDCL § 9-3-12. The Commission took its job seriously, taking testimony from both those for and against the incorporation, and holding hearings on multiple dates concerning the proposed Town of Buffalo Chip. Significant discussion was held, executive sessions occurred, and ultimately the matter was put to a vote, which was 3-2 in favor. (Ex. 44 and 47.) One of the "no" votes was made by the Commissioner representing the City of Sturgis district.

The Commission found that 1) the proposed municipality contained more than thirty voters, 2) no part of the proposed municipality was within three miles of any point of another incorporated municipality, 3) the applicants caused an accurate census to be taken not more than 30 days prior to presenting the application to the commission, 4) the survey, map, and census when completed and verified were left at the Main Office of Buffalo Chip Campground for at least thirty days, 5) the application for incorporation was in the form of a petition, verified by the circulators, and signed by at least 25% of the qualified voters, 6) the petition identified the type of government to be formed, and 7) the commission was satisfied that the requirements of SDCL Chapter 9-3 had been complied with. (Ex. 16.)

Given the history of the matter, the volume of evidence considered, and the close vote, the decision was neither arbitrary nor capricious. An action is arbitrary and capricious if based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action. *Coyote Flats, L.L.C. v. Sanborn County Com'n*, 1999 S.D.87, ¶ 14, 596 N.W.2d 347, 351. Although unsubstantiated and not supported by the record, the court determined the action was arbitrary and capricious due to a culmination of alleged errors in the process, dismissing the hearing as "hasty" and "ill-informed." (A 5.) Even if the Commissioners engaged in "tortured parliamentary procedure" and "unfocused expostulation" that does not mean the decision was arbitrary and capricious, especially considering the numerous hours of testimony and debate over three separate Commission meetings. The court made no findings of fact as to personal, selfish, or fraudulent motives of the Commissioners. The court found numerous falsities along the way that are not supported

by the record. (See A 1-9.) The court went so far as to make a finding from a Wikipedia page. (A 17 #50.) The findings numbered 6, 9, 10, 15, 16, 18, 32, 33, 36, 50, 52, 54, 55, 57, 61, 63, 64, 67, 71, 72, 73, 76, 79, 80, 81, 83, 86, 87, 88, 89, 90, 93, 95, 97, 101, 102, and 103 are without support in the record. The statements from pages 17 through 28 are neither findings of fact nor conclusions of law and they are argument rather than factual; they should be stricken from the court's order. These findings all constitute clear error. The conclusions of law numbered A through N are erroneous legal conclusions. These errors by the court led to the erroneous conclusion and order that found the Commission acted in an arbitrary and capricious manner, when such finding is not supported by the record or the law. The circuit court erred in finding the Commission's February 27, 2015 Order was arbitrary and capricious and the court's ruling should be reversed.

## C. SDCL § 9-3-4 does not specify the time for posting the survey, map, and census

At all times relevant herein, SDCL § 9-3-4 stated, "Such survey, map, and census when completed and verified shall be left at some convenient place within such territory for a period of not less than thirty days for examination by those having an interest in such application." This does not provide that the items must be left at a convenient place for thirty days prior to the hearing on the application. In fact, it is not a temporal or legal possibility for that time-frame to occur. The census must be taken "not more than thirty days previous to the time of presenting the application to the board of county commissioners." SDCL § 9-3-3. With that in mind, the circuit court would have us believe that the census must be completed less than thirty days before the time of the hearing (presentation to the board), but it also must be completed more than thirty days. The

legislature wanted a fresh, not stale, accurate census to be presented to the board. With that in mind, the requirement that the census not be more than thirty days old seems of paramount importance. It equally makes sense that the survey, map, and census should be left at a convenient place for at least thirty days for anyone with interest in the application to view it *prior to the election*, so that they might make an informed decision at the time of the election on incorporation. The court created its own interpretation of SDCL § 9-3-4 and imposed a timeline that simply does not exist in the statute. The intent of the requirement makes more sense to occur prior to the election, not the commission meeting at which the Petition is considered; the evidence presented demonstrates that this was done. (T 101, 129-130; Ex. 16 ¶ 5.) The court erred in finding the Commission ignored the requirement of SDCL § 9-3-4.

# D. Amendments are allowed in every avenue of proceedings before commissions, boards, and the court.

Amendments are allowed in virtually every area of the law for one reason or another. *See Black Hills Brewing Co. v. Middle West Fire Ins. Co.*, 31 S.D. 318, 140 N.W. 687 (1913) (sheriff could amend return where he failed to incorporate a legal term through oversight); *City of Aberdeen v. Rich*, 2001 S.D. 55, 625 N.W.2d 582 (city could amend declaratory judgment complaint); SDCL § 26-7A-84 (allowing amendment of juvenile petitions); SDCL § 34A-6-1.15 (allowing amendment for permits and petitions in environmental law); SDCL § 21-35-3 (allowing amendment of petition and notice in eminent domain proceedings); SDCL § 15-6-60(a) (allowing relief from clerical mistakes). The amendment here corrected a typographical error in the paragraph containing all the legal descriptions and did not prejudice anyone nor did it change the meaning or understanding of what the petitioners believed the boundaries to be. It did

not create a misunderstanding of what the petitioner's believed they were signing. The surveyor provided an affidavit noting it was his error and that it was technical in nature. (Ex. 24, p. 10.) It is also noteworthy that the correct written legal descriptions were set forth on each land parcel illustrated inside the boundaries on the town map.

If there is no prejudice in allowing the amendment, generally amendments are allowed. *Beyer v. Cordell*, 420 N.W.2d 767 (S.D. 1988); *Bucher v. Staley*, 297 N.W.2d 802 (S.D. 1980); *Andree v. Andree*, 291 N.W.2d 788 (S.D. 1980); *Bak v. Walberg*, 65 S.D. 292, 273 N.W. 381 (1937); *Minneapolis Threshing-Mach Co. v. Darnall*, 13 S.D. 279, 83 N.W. 266 (1900). No prejudice has been shown here.

Judges are allowed to correct judgments, which can affect a person's substantial rights, and hold a much deeper consequence than a petition for municipal incorporation. SDCL § 15-6-60(a). Clerical corrections include the implementation of what was intended, but was not memorialized in an order. *Nist v. Nist*, 2006 S.D. 67, 720 N.W.2d 87. A clerical error is a mistake or omission mechanical in nature, which does not involve a legal decision or judgment by an attorney. *Id*.

When the record shows that counsel acted in good faith in the preparation of a notice of appeal and the undertaking, leave should be granted to amend the notice of appeal to correct a clerical mistake. *Redman v. Lasell*, 44 S.D. 327, 183 N.W. 996 (1921). Here, the technical error between a legal description and a map is no different. It is technical in nature; most people do not understand legal descriptions nor rely on them, but people can read a map and recognize physical boundaries. The boundary map was correct; the legal description was amended to conform to the map. Thus the boundaries of the town did not change from the map that was attached to the petition the citizens

signed. The Amended Petition simply corrected the written paragraph of legal descriptions so as to conform to the map and allowing the amendment was not arbitrary and capricious or improper by the Meade County Commission under these facts. Further, the signatories attested to the amendment, evidencing they understood the correction and agreed with it. No prejudice can be shown under these circumstances.

Even when an amendment is not authorized by statute, it can still be valid if no prejudice results. See State v. Timperley, 1999 S.D. 75, 599 N.W.2d 866 (allowing for a grand jury to amend an indictment even though not specifically allowed by statute). Additionally, a reasonable interpretation of a statute is allowed when the statute is silent. Esling v. Krambeck, 2003 S.D. 59, 663 N.W.2d 671. A governing board may exercise its sound discretion in the handling of applications when a statute is silent. State ex rel. Sperling v. Board of County Com'rs of McCook County, 73 S.D. 361, 43 N.W.2d 232 (1950). The court in *Sperling* found that a statute was silent as to whether a second application could be filed after the rejection of a first application. *Id.* The court determined that if the legislature wanted to prohibit something, it could write a law prohibiting it; absent a prohibition, a board has no reason to not accept a second application. Id. Similarly, here, if the legislature wanted to prohibit the filing of an amended petition, it could have done so. Amendments are common throughout the law. It cannot be said to be arbitrary and capricious for a county commission to accept a clerical amendment to a petition for incorporation which does not change the meaning or intent of the petitioners, especially when the petitioners specifically consent to the amendment.

The circuit court did not specifically address this issue in its Memorandum Decision, yet it was one of the main issues raised by Sturgis and Lippold. The court, in signing Sturgis and Lippold's proposed findings as the Court's Findings, did state, "The Board has no legal authority to accept or act on an Amended Petition for incorporation of a municipality." (A 38 #D.) This conclusion of law is without citation to any legal authority and upon a de novo review by this Court, is an erroneous conclusion of law. This Court should reverse this decision.

## **CONCLUSION**

Buffalo Chip Campground, LLC hereby prays this Honorable Court enter an order reversing the decision of the circuit court that Sturgis, Lippold, and Murphy have standing and the court had subject matter jurisdiction in this case. Buffalo Chip Campground, LLC further requests this Court enter an order reversing the decision of the circuit court that the actions of the County Commission were arbitrary and capricious. Buffalo Chip Campground, LLC requests this Court reverse the Order of the circuit court that all actions of the Town of Buffalo Chip are void ab initio.

Dated: October 21, 2016 Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was drafted using Microsoft Word. The font is Times New Roman size 12, which includes serifs. The word count, according to the word processing program is 10,024. The character count without spaces is 49,404. The page count is 32 pages.

Dated: October 21, 2016 /s/ Kent R. Hagg\_\_\_\_\_

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The undersigned hereby certifies that on the date written below, true and correct copies of INTERVENOR/APPELLANT'S BRIEF and APPENDIX were served via first-class U.S. mail on:

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# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

## Appellees,

-vs-

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

## Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

## Appellee,

-vs-

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

## Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

## Intervenor/Appellant.

Appeal No. 27976

APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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#### PRELIMINARY STATEMENT

In this brief, the Appellants, Meade County Board of Commissioners, Alan Aker, Bob Bertolotto, Robert Heidgerken, Galen Neiderwerder, and Linda Rausch, will be collectively referred to as the "County." Intervenor/ Appellant Buffalo Chip Campground, LLC, will be referred to as "Buffalo Chip Campground." The City of Sturgis will be referred to as "City," Gary Lippold and Jane Murphy will be referred to by their surnames, and, as these three parties pursued appeals of the County's decision, they will at times be referred to collectively as the "appealing parties." The Meade County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The transcript of the May 11, 2016 trial will be referred to as "T" and the corresponding page numbers. Exhibits entered into evidence at the trial will be referred to as "Ex." followed by the corresponding exhibit number. The Appendix to this brief will be referred to as "Appx." followed by the corresponding page number.

## JURISDICTIONAL STATEMENT

This is an appeal from the trial court's Findings of Fact and Conclusions of Law and Judgment, both filed on August 24, 2016. (Appx. 10-41; CR 2301, 2331.) Notice of Entry of Judgment was served on August 31, 2016. The County and Buffalo

Chip Campground served a Joint Notice of Appeal on September 6, 2016. (CR 2335.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because the trial court entered a final judgment reversing the County's decision and ordering additional relief.

## QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT WAS WITHOUT SUBJECT MATTER
JURISDICTION TO HEAR THE APPEAL OF THE COUNTY'S DECISION
BECAUSE LIPPOLD, MURPHY, AND THE CITY LACKED STANDING.

The trial court declined to dismiss the case, and determined that the appealing parties had standing under SDCL 7-8-27.

<u>Lake Hendricks Improvement Ass'n v. Brookings Cnty. Planning</u> & Zoning Comm'n, 2016 S.D. 48, 882 N.W.2d 307.

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

Law v. City of Sioux Falls, 2011 S.D. 63, 804 N.W.2d 428.

Merchants' National Bank v. McKinney. 2 S.D. 106, 48 N.W. 841 (1891).

SDCL 7-8-27.

SDCL 9-3-20.

II. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE COUNTY ACTED ARBITRARILY OR CAPRICIOUSLY IN DETERMINING THAT THE APPLICATION FOR MUNICIPAL INCORPORATION MET THE REQUIREMENTS OF SDCL CHAPTER 9-3.

The trial court found that the County acted arbitrarily and capriciously, and declared the incorporation void.

Meyerink v. Nw. Pub. Serv. Co., 391 N.W.2d 180 (S.D. 1986).

State v. Lafferty, 2006 S.D. 50, 716 N.W.2d 782.

State v. Krebs, 2006 S.D. 43, 714 N.W.2d 91.

SDCL 9-3-1.

SDCL 9-3-3.

SDCL 9-3-4.

SDCL 9-3-5.

III. WHETHER THE TRIAL COURT EXCEEDED ITS APPELLATE AUTHORITY BY ORDERING THAT THE INCORPORATION OF THE TOWN OF BUFFALO CHIP IS VOID, AND THE ELECTION IS A NULLITY.

The trial court ruled as follows: "The incorporation of Chip City is void. The election is a nullity. The Board's decision and orders approving the incorporation are void and determined to be a nullity."

Wedel v. Beadle Cty. Comm'n, 2016 S.D. 59, 884 N.W.2d 755.

S.D. Const. Art. V, §§ 1,5.

SDCL 16-6-10.

SDCL 7-8-27.

## STATEMENT OF THE CASE

At the close of a hearing held on February 27, 2015, a majority of the Meade County Commission determined that the requirements for incorporation contained in SDCL Chapter 9-3 had been met and, by a vote of 3-2, set an election for the incorporation of the Town of Buffalo Chip. (Ex. 11, p. 3.) On

March 27, 2015, counsel for Lippold and Murphy wrote to the Meade County States Attorney and requested that he appeal under SDCL 7-8-28. (Appx. 83-84; Ex. 13.) The States Attorney concluded that it was not in the interest of the County to pursue such an appeal. (Appx. 85-86; Ex. 14.)

On March 31, 2015, Lippold, Murphy, and the City filed separate notices of appeal pursuant to SDCL 7-8-27, claiming to be "person[s] aggrieved" by the County's decision. (Appx. 78-86; CR 1-7, 8-10.) The two appeals were later consolidated. (CR 205.) On April 20, 2015, Buffalo Chip Campground moved to intervene as an Appellee. (CR 16-17.) That motion was granted. (CR 220.)

In spite of being fully aware of the County's approval of an election to occur on May 7, 2015, none of the appealing parties requested that the trial court stay the election until April 29, 2015. At that time, the City filed a document entitled "Motion to Set Hearing Regarding Motion to Stay Election," together with its attorney's affidavit. (Appx. 99-103; CR 193-197.) The City's motion was neither served on the County's attorneys nor scheduled to be heard when it was filed on April 29, 2015. (Id.) Rather, it was emailed to the County's attorneys on April 30, 2015. (CR 207.) The County responded immediately, pointing out that the Motion was

untimely and could not be heard on such short

notice. (Appx.104-107; CR 209-212.) Lippold and Murphy did not file a motion seeking a stay in their separate appeal.

Notably, the City made no reference to the impact of SDCL 9-3-20 as a basis for staying the election in any of the documents it filed in conjunction with its attempt to seek a stay. The trial court, the Honorable Jerome A. Eckrich, held a teleconference with the City's attorney and the County's attorney on May 1, 2015. (CR 198.) The trial court declined to set a hearing, apparently concluding that the stay was unnecessary because the appeals could provide complete relief to the City if it was successful. (Id.) The May 7, 2015 election occurred as scheduled. None of the appealing parties sought any further stays relating to the incorporation proceedings.

Pursuant to the trial court's Scheduling Order, the parties thereafter filed motions for summary judgment raising a variety of issues. The County sought summary judgment on the issues raised by appealing parties relating to the County's failure to reject the petitions based upon voter residency. (CR 283-284.) Lippold and Murphy also sought summary judgment, claiming that the petitioners who claimed to be resident voters

did not actually have places of habitation within the boundaries of the proposed municipality. (CR 431-432.) In a Memorandum Decision dated April 29, 2016, the trial court denied the pending motions for summary judgment. (CR 1305.)

On December 23, 2015, Buffalo Chip Campground moved to dismiss the appeal based on a lack of subject matter jurisdiction. (CR 996.) Specifically, Buffalo Chip Campground argued that the appealing parties lacked standing because they were not "person[s] aggrieved" under SDCL 7-8-27; and, under SDCL 9-3-20, only the State of South Dakota could challenge the regularity of the organization of any acting municipality. (CR 998.) The trial court denied the motion. (CR 1238.)

Following a Court Trial on May 11, 2016, the trial court entered its Memorandum Decision. (Appx. 1-9; CR 2050.)

Over the County and Buffalo Chip Campground's objections, the trial court entered the set of Findings of Fact and Conclusions of Law proposed by Lippold and Murphy, which went well beyond the substance of the Memorandum Decision, both in terms of factual findings and legal conclusions. (Appx. 10-39; CR 2301.) The trial court not only reversed the County's decision to allow the election; the trial court also entered a Judgment which reads: "ORDERED, ADJUDED (sic) AND DECREED that all

actions of any kind or character undertaken by the Town of Buffalo Chip, SD are void ab initio." (Appx. 41; CR 2332.)

The County and the Buffalo Chip Campground jointly filed this appeal on September 6, 2016. (CR 2335.)

#### STATEMENT OF FACTS

## A. The Original Petition.

On February 20, 2015, the Meade County Auditor was presented with an application and Petition for Municipal Incorporation of the City of Buffalo Chip. (Ex. 23.) The persons making application for the organization of the municipality caused a survey and map to be made of the territory intended to be embraced within the limits of the municipality showing the boundaries and area thereof with the accuracy verified by affidavit of a surveyor. (T108-110, 130; Ex. 23, pp. 32-39; Ex. 61.)

Census documents were also filed with the application for organization of the municipality which showed a list of landowners and registered voters within the area. (T130, Ex. 23, pp. 40-49.) The census was prepared not more than thirty days prior to the time the application for incorporation was presented to the County, and the filed documents show they were verified by the circulator of the census. (Id.) Notice of the survey, map, and census associated with the Petition for

Municipal Incorporation was left at a place located within the proposed municipality for

examination by those having an interest in the application for a period of not less than thirty days. (T101, 129-130.)

## B. The City's Attempted Annexation.

The corporate boundaries of the City of Sturgis are more than three miles from any point in the perimeter of the corporate limits of the area sought to be incorporated as the Town of Buffalo Chip. (T44.) In an attempt to thwart the incorporation and get within three miles, the City tried to annex the City Airport through an emergency resolution dated February 20, 2015. (Exs. 6, 7.)

Meade County Assessor, Kirk Chaffee, testified regarding his investigation of the City's failed attempt to annex its airport. He and his office were responsible for checking over the annexation to determine whether it was in proper form. (T56-57.) The resolution for annexation recorded at 8:29 a.m. on February 20, 2015, failed to include a map. (T50; Ex. 6.) The resolution recorded that same date at 12:17 p.m. included a map, but the legal descriptions did not match the map. (T50; Ex. 7.) Chaffee testified that, per his office's records, the Sturgis airport

was not annexed into the City of Sturgis. (T57.) As of the time of trial, nothing had been done by the City to fix the problems with the attempted annexation documents. (Id.) The City has never challenged Meade County's position that the annexation was invalid and has taken no steps to record corrected documents. (T57.) Because the annexation of the City of Sturgis Airport was invalid, the corporate boundaries of the City of Sturgis continue to lie more than three miles from any point in the perimeter of the corporate limits of the area incorporated as the Town of Buffalo Chip.

## C. The Amended Petition and Hearing.

After certain mistakes were noted in the original Petition, Buffalo Chip Campground submitted an Amended Petition by delivering it to the Meade County Commission offices on February 26, 2015. (Ex. 24.) A public hearing went forward on February 27, 2015, as noticed, and the County agreed to consider the Amended Petition in lieu of the Petition that had been originally filed on February 20, 2015. (Ex. 11, pg. 3.)

During the February 27, 2015 hearing, the County heard testimony from the County Auditor who advised that there were more than thirty persons registered to vote within the area sought to be incorporated by the Buffalo Chip Campground. (Ex.

44, pg. 67.) The auditor made no investigation into whether the persons who registered to vote in her office were "residents," as that term is defined by SDCL 12-1-4. (Ex. 44, pgs. 63-64.) The voter registration forms associated with those voters who registered to vote within the area sought to be incorporated were provided to the Secretary of State's office by the Meade County Auditor and none of those forms were rejected by the State of South Dakota. (Ex. 48, pg. 3.) At the time of the hearing on February 27, 2015, there were fifty-one voter registration forms on file with the Meade County Auditor for persons registered to vote within the area sought to be incorporated. (Id., pgs. 6-57; Ex. 25.)

At the close of the hearing on February 27, 2015, a majority of the Meade County Commission determined that the requirements for incorporation contained in SDCL Chapter 9-3 had been met and, by a vote of 3-2, set an election for the incorporation of the Town of Buffalo Chip. (Ex. 11, pg. 3.) The election was scheduled for May 7, 2015. (Id.)

## D. Incorporation of the Town of Buffalo Chip.

The election was held as scheduled on May 7, 2015, and the results of the election were in favor of incorporation.

(T110-111.) The County was satisfied that the election was legal

and entered an order declaring that the municipality be incorporated using the name "Buffalo Chip." (Ex. 16.) The Town of Buffalo Chip was issued Articles of Municipal Incorporation which were filed with the secretary of state's office on May 20, 2015. (T111-112; Ex. 17.)<sup>1</sup> The Town of Buffalo Chip's form of government is through a board of trustees. After selection of those trustees, Circuit Judge Michelle Percy conducted a swearing-in ceremony wherein those board members were sworn. (T124; Ex. 28.)

The State of South Dakota is not a party to this case and has not challenged the incorporation of the Town of Buffalo Chip as a municipality. (T113.) The Town of Buffalo Chip is also not a party.

## ARGUMENT

 $<sup>^{1}</sup>$  The Town of Buffalo Chip has taken several other steps as an active municipality since that time. The Circuit Court permitted Exhibits 29-41 to be made part of the record as an offer of proof on this subject.

This appeal is separated into three parts. The focus of the first part of this brief is the City, Lippold and Murphy's lack of standing, and, therefore, the trial court's lack of subject matter jurisdiction over the appeal of the County's decision. Assuming arguendo the trial court had subject matter jurisdiction, the second part of this appeal focuses on whether the County acted arbitrarily and capriciously in concluding that the applicants for municipal incorporation met the requirements of SDCL Chapter 9-3, such that the election could go forward. The third part of the appeal focuses on whether the trial court had the authority to order that the incorporation and actions of the Town of Buffalo Chip are void.

The Court only reaches the second part of the appeal if it concludes that the appealing parties have standing and the trial court had subject matter jurisdiction. The Court only reaches the third part of the appeal if it agrees that the County's actions were arbitrary and capricious.

# I. THE TRIAL COURT HAD NO SUBJECT MATTER JURISDICTION, BECAUSE THE CITY, LIPPOLD AND MURPHY LACKED STANDING.

"Whether a party has standing to maintain an action is a question of law reviewable by this Court de novo." Arnoldy v. Mahoney, 2010 S.D. 89,  $\P$  12, 791 N.W.2d 645, 652. The appeal

of the County's decision to circuit court is statutory, and subject matter jurisdiction is limited to exactly what the Legislature allowed. There is no jurisdiction unless the appellant meets all requirements:

The right to any appeal is statutory and established by the legislature. This court has consistently recognized that the right to an appeal is purely statutory and no appeal may be taken absent statutory authorization. An attempted appeal from which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it.

Appeal of Lawrence County, 499 N.W.2d 626, 628 (S.D. 1993)
(internal citations omitted).

A party bringing an appeal must establish standing such that a court has subject matter jurisdiction. <u>Cable v. Union Board of Cnty. Comm'rs</u>, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825 (citations omitted). Further, "[i]t is the rule in this state that jurisdiction must affirmatively appear from the record and this [C]ourt is required *sua sponte* to take note of jurisdictional deficiencies, whether presented by the parties or not." <u>Elliott v. Board of Cnty. Comm'rs of Lake Cnty.</u>, 2005 S.D. 92, ¶ 15, 703 N.W.2d 361, 368 (citations omitted).

Recently, in <u>Lake Hendricks Improvement Ass'n v.</u>

<u>Brookings Cnty. Planning & Zoning Comm'n</u>, 2016 S.D. 48, 882

N.W.2d 307, this Court examined the interplay between standing

and subject matter jurisdiction. Citing its prior decision in <u>Cable</u>, the Court explained that, where a statute creates a cause of action or limits the parties who may bring such an action, standing is interwoven with subject matter jurisdiction and becomes a jurisdictional prerequisite. Id. at ¶¶ 17-18,

The trial court could not have exercised its subject matter jurisdiction if the appealing parties lacked standing. The trial court erred in refusing to dismiss the case. The City, Lippold and Murphy lack standing to appeal the County's decision for two reasons: (1) the election occurred, the Town of Buffalo Chip was incorporated, and only the State of South Dakota can challenge the regularity of the organization of an acting municipality; and (2) they are not "person[s] aggrieved" by the County's decision, within the meaning of SDCL 7-8-27.

A. Once the election occurred and the Town of

Buffalo Chip was incorporated, the only entity

with the statutory authority to challenge the

incorporation was the State of South Dakota.

The threshold question in this appeal is whether the City, Lippold and Murphy retained standing to challenge incorporation through their appeals once the election occurred and the Town of Buffalo Chip became an acting municipality.

They did not. SDCL 9-3-20 controls this issue, as it states: "The regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the state." (Emphasis added.)

The City, Lippold and Murphy attempted to appeal the County's decision to permit the election under SDCL 7-8-27. But they failed to undertake any timely action to prevent the election or subsequent actions to incorporate from occurring. In spite of being fully aware that the County approved an election to occur on May 7, 2015, it was not until April 29, 2015 - eight days before the scheduled

election - that the City moved the trial court to schedule a hearing on a motion to stay. (CR 193-197.) The time for noticing a hearing consistent with SDCL 15-6-6(d) had already elapsed by several days. Without properly serving the motion or scheduling a hearing, the City asked the trial court to schedule a hearing the same week as the election. Lippold and Murphy did not seek a stay in their appeal, which was still a separate case at that time.

In its ill-fated pursuit of a stay, the City did not mention SDCL 9-3-20 or its potential impact. Thus, the trial court was not apprised of the effect SDCL 9-3-20 could have on the its ongoing jurisdiction over the appeal. The trial court

declined to schedule a hearing regarding a motion for stay, finding that the appeal could afford complete relief to the City if it prevailed, and it entered a handwritten notation to that effect on May 1, 2015. (CR 198.)

The election went forward as scheduled, with the results in favor of incorporation. (T110-111.) The County was satisfied that the election was legal and entered an order declaring that the municipality be incorporated using the name "Buffalo Chip." (Ex. 16.) The Town of Buffalo Chip was issued Articles of Municipal Incorporation which were filed with the secretary of state's office on May 20, 2015. (T111-112; Ex. 17.) None of the appellants sought any type of relief to stop these actions.

Once the Town of Buffalo Chip became an acting municipality, the regularity of the organization of that entity could only be inquired into in an action or proceeding instituted by or on behalf of the State. Dating back to the 19<sup>th</sup> Century, this Court has recognized the problems with allowing collateral attacks on the organization of governmental entities.

In <u>Merchants' National Bank v. McKinney</u>, 2 S.D. 106, 48 N.W. 841 (1891), this Court discussed the organization of

Douglas County, which was segregated from Dakota Territory and an unorganized county until the spring of 1881. At that time, a petition purporting to be signed by the voters of Douglas County was presented to then Governor Ordway. Some of the names on the petition were signed without the knowledge or consent of the parties whose named appeared on the petition. Other persons who signed were not even residents of Douglas County. At the time the petition was presented, there were not 20 voters living in the county. The law at that time required 50 or more voters to petition to have a county organized, and have the governor appoint county commissioners. The governor was unaware that

the petition was not what it purported to be, and went ahead with the appointment of county commissioners.

Douglas County began conducting business. It issued warrants on the county which were sold to the plaintiffs. The plaintiffs challenged the warrants, contending they were illegal and void for the reason that they were issued by an illegally appointed board. This Court explained: "[t]he legislature having made it a duty of the governor, when he was satisfied that a county had 50 voters and upwards, and they

petition him for an organization, to proceed and organize it, by the appointment of three commissioners, it would seem that such appointment could not be questioned in a collateral proceeding, where neither the county nor its officers are parties." Id. at 115, 48 N.W. at 15 (emphasis added).

Likewise, it has been widely held that the only remedy available to attack the validity of the existence of an acting municipality (which is a de facto corporation) is through a direct proceeding by the State against the corporation in the nature of quo warranto. See e.g. National Life Insurance Co. of Montpelier v. Board of Education of City of Huron, 62 F. 778, 787 ( $8^{\text{th}}$  Cir. 1894) ("When a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence."); Chicago & N.W, Railway Co. v. Murphy, 50 S.D. 221, 209 N.W.353 (1926) (Incorporation of company under laws of South Dakota and its right to exercise power shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; inquiry may be had at the suit of

the state); <u>Dudley v. Dakota Hot Springs Co.</u>, 11 S.D. 559, 79 N.W. 839 (1899) (Proceedings against de facto corporations are at the instance and on behalf of the government—state must be a party to the prosecution); <u>Topeka v. Dwyer</u>, 70 Kan. 244, 245-46, 78 P. 417, 418 (1904) (municipal corporation cannot be attacked, nor any action taken affecting the existence of the corporation, except in a direct proceeding, prosecuted at the instance of the state by the proper public officer); McQuillin, <u>The Law of Municipal Corporation</u>, § 3.53 (3<sup>rd</sup> ed. 1971).

The appeals in this case are not quo warranto proceedings. Nor do the appealing parties have standing to initiate quo warranto proceedings to test the validity of the Town of Buffalo Chip's corporate existence. The State of South Dakota has not inquired into the regularity of the organization of the Town of Buffalo Chip, and the Town of Buffalo Chip is not even a party to these proceedings. Based upon the dictates of SDCL 9-3-20 and settled case law, neither the City nor Lippold nor Murphy had standing to challenge the regularity of the organization of the Buffalo Chip at the time of trial. The trial court erred by refusing to dismiss the appeals.

B. The City, Lippold, and Murphy lack standing to appeal under SDCL 7-8-27 because they are not persons aggrieved by the County's decision.

Even if the Court finds that a collateral attack under SDCL 7-8-27 can continue to challenge the existence of a completed and acting municipal incorporation, the appealing parties in this case lacked standing to pursue such an appeal in the first place. In <u>Cable</u>, this Court recognized that only a "person aggrieved" under SDCL 7-8-27 may seek review of a county commission's decision. <u>Id.</u> at ¶ 21, 769 N.W.2d at 825. The Court held that "[a] plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction." <u>Id.</u>

Standing requires (1) that the plaintiff suffer an "injury in fact"; (2) that a causal connection exists between the injury and the conduct complained of; and (3) that the injury will likely be redressed by a favorable decision. Lujan v.

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted). This Court applies the Lujan test to aggrieved person status for subject matter jurisdiction of an appeal from a county commission decision. Cable at ¶¶ 21-22, 769 N.W.2d at 825-26. "The right to appeal by a 'person aggrieved' required a showing that the person suffered 'a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not

merely in his capacity as a taxpayer and member of the body politic of the county[.]'" Id. at ¶ 26, 769 N.W.2d at 827 (quoting Barnum v. Ewing, 53 S.D. 47, 220 N.W. 135, 137-38). "The rationale for limiting the right of appeal to only those persons who are actually aggrieved is to preclude 'every citizen, elector, or taxpayer of a county who deems himself aggrieved in his capacity as a citizen, taxpayer, or elector' from appealing." Cable at ¶ 30, 769 N.W.2d at 828 (quoting Barnum, 220 N.W. at 138).

Lippold is a private person and a resident of Meade County who is semi-retired. (T9.) He manages certain properties that he formerly owned and sold to his brother, which are competitors of the Buffalo Chip Campground. (T9-10.) In Lippold's trial testimony, he speculated about competitive disadvantages his employers could potentially suffer as a result of the incorporation. (T11-12.) But Lippold acknowledged that any problems created by the incorporation would be suffered by his employer, not him personally. (T16.)

Being an employee of a competitor to the campground does not make Lippold personally aggrieved by the County's decision. Missing from his testimony was anything that qualifies as "a personal and pecuniary loss not suffered by

taxpayers in general, falling upon him in his individual capacity." Cable at ¶ 26, 769 N.W.2d at 827. In Cable, the appellant's claim was that, because he lived near the proposed refinery, its construction would cause increased traffic, and its emissions would worsen his asthma. This Court found that there was nothing unique about Cable's claim, and he was not a "person aggrieved":

[T]he injuries that Cable insists will affect him personally, as well as Save Union County members Arden Hanson, Burdette Hanson, Harkness, and Quam, are not due to any loss of an individual right or some claim of right, either of person or property, or the imposition of some burden or obligation in their personal or individual capacity. Rather, any injury they may suffer in terms of diminution of the value of their real property or damage to their quiet rural lifestyle will be shared by all taxpayers and electors, but to a greater extent by those in closer proximity to the proposed refinery. This is not enough under our case law for Cable to gain standing as a "person aggrieved" under SDCL 7-8-27.

Id. at ¶ 32, 769 N.W.2d at 829.

Similarly, Buffalo Chip Campground has many competitors in the Sturgis area, with many employees.

Speculation about potential impacts that could trickle down to such employees is insufficient to make persons such as Lippold a "person aggrieved" under SDCL 7-8-27.

Murphy is a private person and a resident of Meade County. No evidence was presented with respect to what

interest Murphy may have with respect to this appeal.

Finally, the trial court's conclusion regarding standing rested heavily on the claimed impacts on the City. The City is a South Dakota municipal corporation. This Court has repeatedly noted that municipalities "possess only those powers given to them by the Legislature." Law v. City of Sioux Falls, 2011 S.D. 63, ¶9, 804 N.W.2d 428 (citations omitted). SDCL 7-8-32 states: "Appeal to the circuit court from decisions of the board of county commissioners, as provided in this chapter, is an exclusive remedy. Judicial review of county commission action shall be allowed only as provided in §§ 7-8-27, 7-8-28, 7-8-29, 7-8-30 and 7-8-31." SDCL 7-8-27 speaks only of a "person aggrieved" having the statutory authority to appeal; there is no mention of municipalities or any other governmental entities.

Municipalities are not "persons." In other areas, the Legislature has broadened scope of who may appeal to include governmental entities. See e.g. SDCL 11-2-61 ("Any person or persons, jointly or severally, or any taxpayer, or any officer, department, board, or bureau of the county, aggrieved by any decision of the board of adjustment . . ."). But no provision

in SDCL Chapter 7-8 provides authority for a municipality to appeal a county commission's decision.<sup>2</sup> The plain meaning of SDCL 7-8-27 is clear, and the City does not have the authority to appeal the County's decision.

Assuming arguendo that the City could qualify as a "person aggrieved," the evidence at trial does not support a finding that the City is somehow aggrieved. The record is devoid of evidence of a particularized injury or loss to the City as a result of the municipal incorporation.

None of the appealing parties had standing to pursue an appeal under SDCL 7-8-27. Consequently, the trial court lacked subject matter jurisdiction, and the appeals should have been dismissed.

 $<sup>^2</sup>$  In <u>Lake Hendricks Improvement Ass'n</u>, the standing of a foreign municipality to appeal under SDCL Chapter 11-2 was questioned. Finding another appellant had standing, the Court did not address whether the City of Hendricks, Minnesota also had standing. <u>Id.</u> at ¶ 22, 882 N.W.2d at 314.

# II. THE COUNTY'S DECISION THAT THE APPLICANTS SATISFIED THE REQUIREMENTS OF SDCL CHAPTER 9-3 SUCH THAT THE ELECTION COULD GO FORWARD WAS NOT ARBITRARY AND CAPRICIOUS.

As the appealing parties, the City, Lippold and Murphy had the burden before the trial court to show that the County's actions were "based on personal, selfish, or fraudulent motives, or on false information, [or] . . . characterized by a lack of relevant and competent evidence to support the action taken." In the Matter of the Conditional Use Permit Denied to Meier, 2000 S.D. 80, ¶ 22, 613 N.W.2d 523, 530; Coyote Flats, L.L.C. v. Sanborn Cty. Comm'n, 1999 S.D. 87, ¶ 8, 596 N.W.2d 347, 349. When this Court reviews the actions of a board of county commissioners after an appeal to the circuit court, it applies the clearly erroneous standard to factual findings, but accords no deference to the legal conclusions of the trial court. Coyote Flats at ¶ 7, 596 N.W.2d at 349.

In its Memorandum Decision, the trial court concluded the County's decision was arbitrary and capricious for four reasons: (1) the County approved of the application in spite of improper notice under SDCL 9-3-4; (2) the County approved the application, even though there were less than 100 legal residents in the area proposed to be incorporated; (3) the County failed to recognize the City's airport annexation; and

(4) the County improperly relied upon voter registration forms in making its February 27, 2015 decision. The trial court's conclusions were erroneous for the reasons that follow.

# A. SDCL 9-3-4 does not specify that the survey, map and census must be posted for 30 days prior to the matter coming before the County.

The trial court's interpretation of SDCL 9-3-4 implicates a question of law, which is reviewed de novo. See Martinmaas v. Engelmann, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (questions of law such as statutory interpretation are reviewed by the Court de novo).

SDCL 9-3-4 requires that the survey, map, and census required by SDCL 9-3-3 "shall be left at some convenient place within such territory for a period of not less than thirty days for examination by those having an interest in such application." Contrary to the trial court's ruling, this section makes no correlation between the availability of the materials and the County's consideration of the application at a hearing. Nor does it require a full 30 days prior to the County considering the application at a hearing.

In fact, given SDCL 9-3-3's requirement that census be taken "not more than thirty days previous to the time of presenting the application to the board of county

commissioners," an applicant who complies with SDCL 9-3-3 would be automatically disqualified under the trial court's interpretation of SDCL 9-3-4. Adopting the trial court's reasoning, an applicant would have to: (1) take the census not more than 30 days prior to the commission meeting; and (2) leave it for inspection not less than 30 days prior to the commission meeting.

The Legislature did not intend such a strange result. Under the tenets of statutory construction, SDCL 9-3-3 and 9-3-4 have to be read together in a way that makes sense. See Meyerink v. Nw. Pub. Serv. Co., 391 N.W.2d 180, 184 (S.D. 1986) ("Where conflicting statutes appear, it is the responsibility of the court to give reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable."). The only reasonable interpretation of SDCL 9-3-4 is that the survey, map, and census must be available for inspection for a period greater than 30 days prior to the election.

At trial, James Walczak testified that the survey, map, and census associated with the Petition for Municipal Incorporation was left at a place located within the proposed

municipality for examination by those having an interest in the application for a period of not less than 30 days. (T101, 129-130.) The appealing parties did not present evidence which controverted this testimony. The trial court erred in concluding that the notice was insufficient.

# B. SDCL 9-3-1 permits the incorporation of areas with 30 voters, and the County verified that there were 30 voters.

The trial court's interpretation of SDCL 9-3-1 implicates a question of law, which is reviewed de novo.

Martinmaas at ¶ 49, 612 N.W.2d at 611. The trial court concluded that SDCL 9-3-1 means something other than it says. Simply stated, SDCL 9-3-1 contained the disjunctive word "or" when the County considered the application, and the trial court's interpretation is not a reasonable one.

The applicable version of SDCL 9-3-1 at the time the County considered the application stated: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." (Emphasis added.)

Notably, the two criteria in the statute were separated by the disjunctive word "or." See State v. Lafferty, 2006 S.D. 50, ¶ 7, 716 N.W.2d 782, 785 (referring to the word "or" as a disjunctive word). Thus, the existence of one of these two

State v. Krebs, 2006 S.D. 43, ¶12, 714 N.W.2d 91, 96 (holding that because the applicable statute in the case listed its factors in the disjunctive, "any one or more" of the factors sufficed to support the trial court's findings under the statute).

In 2016, the South Dakota Legislature amended SDCL 9-3-1 to replace the "or" with an "and." (Appx. 87; Exs. 42, 43.) This Legislative act begs the question - if the Legislature intended for SDCL 9-3-1 to be read conjunctively, why did it need to amend it?

The incorporation in this case was based upon having 30 or more voters. The application did not seek incorporation based upon having 100 legal residents. The County was presented with the requisite materials which showed that there were more than 30 registered voters proclaiming to be residents of the area of the proposed municipality. (Ex. 48.) The County did not act arbitrarily or capriciously in accepting the application, because it met the 30 voter threshold under the law in effect in 2015.

C. Because the City did not validly annex property under SDCL Chapter 9-4, SDCL 9-3-1.1 does not preclude the municipal incorporation.

The trial court clearly erred in concluding that the County failed to properly consider the legal effect of the City's airport annexation. The evidence at trial clearly demonstrated that the airport annexation was never properly completed.

SDCL 9-3-1.1 prohibits the incorporation of a municipality if any part of such proposed municipality lies within three miles of any point on the perimeter of the corporate limits of any incorporated municipality. The City apparently sought to thwart the Petition for incorporation by recording an emergency annexation of the City Airport. To complete a legal annexation, SDCL 9-4-11 requires that the mayor or president of the board of trustees of the city cause "an accurate map of [the] territory . . . to be recorded in the office of the register of deeds of the county . . . in which such territory is situated." (Emphasis added.)

To date, no accurate map of the area sought to be annexed by the City has been recorded. (T57.) As a result, "such territory [has not] become and [is not] a part of" the City of Sturgis. SDCL 9-4-11. The trial court clearly erred in finding that the attempted annexation precluded the incorporation from occurring.

# D. The County properly relied upon voter registration forms in determining that the requirements of SDCL Chapter 9-3 were met.

Nothing in SDCL Ch. 9-3 specifically requires the County to investigate the residency of the voters or even authorizes such a challenge. Rather, the County's inquiry, when presented with this application for incorporation, only went so far as ascertaining whether the individuals were registered voters in the proposed municipality.

SDCL 9-3-5 requires that "[t]he application for incorporation shall be by a petition verified by the circulator and signed by not less than twenty-five percent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state." (Emphasis added.) As detailed in the Meade County Auditor's affidavit received as evidence in this case, the majority of the individuals who signed the Petitions registered to vote in the area of the proposed municipality in February 2015. (Ex. 48, ¶5.) To the best of Ms. Schieffer's knowledge, none of these registrations were rejected by the State of South Dakota. (Id. at ¶6.) Her office was not contacted with reference to any of the Buffalo Chip Voter Registration Forms that were submitted.

In other words, by the time the petitions were presented, the petition signers were, in fact, registered voters in the proposed municipality. Additionally, when the Auditor inquired about whether she had a duty to conduct an investigation into the Buffalo Chip voters' residency, the South Dakota Secretary of State's office advised her that such an investigation was beyond the scope of her duties and she should rely upon the Voter Registration Forms that were submitted. (Id. at ¶11.)

The instruction the Auditor received from the South Dakota Secretary of State's Office is consistent with what is recognized under South Dakota law. For example, SDCL 12-1-14, the statute governing an election official's duty when presented with a deficiency affidavit in the context of other types of petitions, specifies that the inquiry stops at the voter registration forms: "The person in charge of the election shall verify that each person, challenged pursuant to § 12-1-13, was a registered voter at the time the person signed the petition by using the registration documents on file." (Emphasis added.) The South Dakota Attorney General likewise pointed to no further inquiry beyond the voter registration documents. See e.g. 1979 S.D. AG LEXIS 12, \*5, 1979 Op. Atty Gen. S.D. 93, 95,

1979 Op. Atty Gen. S.D. 93 (auditor cannot independently inquire into proof of residency if the individual signs the required registration documents promulgated by the State Board of Elections).

A person's right to vote can only be challenged as to a person's identity, status as a felon, or mental competency, and must be challenged in a proceeding conducted by the precinct superintendent and deputies. See SDCL 12-18-10. These three challenges are the only challenges expressly authorized by statute. The statutes related to voting in municipal, school, and township elections do allow for challenges to residency, but state that the procedure of 12-18-10 must be followed. See SDCL 9-13-4.1 (municipal elections); SDCL 13-7-4.2 (school elections); SDCL 8-3-7 (township elections). In this case, there is no record of the City, Lippold, or Murphy making any challenges to residency under the provisions of SDCL 12-18-10.

Conversely, SDCL Chapter 9-3 does not authorize challenges to residency. The trial court reviewed something that the County was neither obligated nor authorized to consider in deciding whether to authorize the election under SDCL 9-3-6. This is inappropriate in an appeal brought under SDCL 7-8-27, and was not a basis for reversal of the County's decision.

# III. THE TRIAL COURT EXCEEDED ITS APPELLATE JURISDICTION BY ORDERING THAT THE INCORPORATION OF THE TOWN OF BUFFALO CHIP IS VOID, AND THE ELECTION IS A NULLITY.

The trial court went well beyond the appellate jurisdiction conferred upon it in fashioning its Judgment, which not only reverses the County's decision to allow the election, but makes the following order: "that all actions or any kind or character undertaken by the Town of Buffalo Chip, SD are void ab initio." (Appx. 41; CR 2332.) Even if the appealing parties had standing and the County's actions can be characterized as arbitrary and capricious, the trial court's Judgment cannot be upheld.

The trial court's appellate jurisdiction is conferred upon it by SDCL 7-8-27. A court cannot create its own subject matter jurisdiction, because "[s]ubject matter jurisdiction is conferred solely by constitutional or statutory provisions." Cable at ¶20, 769 N.W.2d at 825 (quotation omitted). While the South Dakota Constitution gives each circuit court general subject matter jurisdiction in many cases, circuit courts only have appellate jurisdiction where conferred by statute. S.D. Const. Art. V, §§ 1,5. SDCL 16-6-10 states: "The circuit court has jurisdiction of appeals from all final judgments, decrees, or orders of all courts of

limited jurisdiction, inferior officers, or tribunals, in the cases prescribed by statute."

SDCL 7-8-27 does not, however, give the Court carte blance authority to make whatever order it desires following the trial de novo. Rather, the statutory provision invoked by the appealing parties, SDCL 7-8-27, establishes the judicial boundaries of the Court's jurisdiction, namely, the review of the Meade County Commission's February 27, 2015 decision to grant the Amended Petition for Municipal Incorporation of Buffalo Chip. (Appx. 78, 81.)

The trial court's review of this matter and the remedy granted was not so limited. The trial court did not confine its review to what happened at the February 27, 2015 county commission meeting, and the trial court did not merely determine whether the County's actions at that meeting should be reversed or affirmed. The trial court also attempted to eviscerate the very existence of the Town of Buffalo Chip - a non-party to these proceedings - using the appeals as the vehicle to do so.

In an analogous setting, this Court recently recognized the constraints that should apply to a trial court's exercise of appellate jurisdiction:

Although the circuit court properly considered the validity of the ordinances in resolving the challenge

to the CUP, the scope of review under the certiorari standard did not give the court the power to invalidate the ordinances themselves in this action. This is because under SDCL 11-2-65, "[t]he court may reverse or affirm, wholly or partly, or may modify the decision brought up for review." The decision brought up for review is not the validity of the ordinances, but the Board's decision granting the CUP. Invalidating county ordinances goes beyond the relief a court may grant under SDCL 11-2-65. The circuit court's determination that the ordinance "has no force and effect" is reversed.

Wedel v. Beadle Cty. Comm'n, 2016 S.D. 59, ¶ 16, 884 N.W.2d 755
(emphasis added).

Likewise, the invalidation of the election and incorporation go beyond the relief the trial court could grant under SDCL 7-8-27. The scope of this appeal is limited to reviewing County's decision that the application complied with SDCL Chapter 9-3, such than an election could go forward. Assuming arguendo the other jurisdictional prerequisites are met, the trial court only has the authority to reverse or affirm that decision.

But the events that occurred subsequent to the February 27, 2015 meeting and the validity of any actions taken are not a part of this appeal. They would need to be handled in a separate proceeding. The May 7, 2015 election occurred, without any appropriate challenge from the appealing parties. The Town of Buffalo Chip was issued articles of incorporation.

As already discussed, SDCL 9-3-20 provides that the regularity of the organization of any acting municipality shall be inquired into "only in an action or proceeding instituted by or on behalf of the state." This is not such a proceeding. The Town of Buffalo Chip is not even a party to this appeal.

Upholding the trial court's judgment puts the County in an untenable position. In its Memorandum Decision, the trial court orders that the matter be remanded to the County with direction to vacate its February 27, 2015 decision and order approving the incorporation election. The trial court also orders that the County is "further directed to vacate its May 13, 2015 order nunc pro tunc to May 13, 2015." (Appx. 8.) There are two problems with this. First, the May 13, 2015 order was not appealed under SDCL 7-8-27; only the February 27, 2015 decision was appealed. Second, what the Court is ordering cannot be accomplished by vacating an Order. The County simply does not have the statutory authority to undo a validly-conducted election, revoke articles of incorporation, or otherwise take any action vis-a-vis the Town of Buffalo Chip that would serve to terminate an acting municipality. And yet, in theory, the County faces the trial court's contempt power if it does not comply with the trial court's Order. See SDCL 7-8-31.

If the County erred, the organization of the Town of Buffalo Chip could, admittedly, be subject to challenge by the State. But the trial court's exercise of appellate jurisdiction vis-a-vis the County's February 27, 2015 decision does not give it the authority to nullify an acting municipality, or the authority to remand the matter to the County and order it to nullify an acting municipality.

Consequently, the trial court exceeded its appellate jurisdiction, and its Judgment must be reversed.

#### CONCLUSION

For these reasons, the County respectfully urges the Court to reverse the trial court's Judgment, and remand this matter with instructions that the appeals filed by the City, Lippold and Murphy be dismissed.

#### REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

Dated this 21<sup>st</sup> day of October, 2016.

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# By /s/ Jack H. Hieb

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#### CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 37 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 7,708 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 21<sup>st</sup> day of October, 2016.

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#### CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellants Meade County Board of Commissioners, hereby certifies that on the  $21^{\rm st}$  day of October, 2016, a true and correct copy of

APPELLANTS' BRIEF was electronically transmitted to:

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and the original and two copies of **APPELLANTS' BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley

Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue,

Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this  $21^{\rm st}$  day of October, 2016.

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By /s/ Zachary W. Peterson
Attorneys for Appellants
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# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

### Appellees,

-vs-

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

#### Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

#### Appellee,

-vs-

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

#### Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

### Appeal No. 27976

APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

#### APPENDIX

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NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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STATE OF SOUTH DAKOTA	) IN CIRCUIT COURT ) SS
COUNTY OF MEADE	) FOURTH JUDICIAL CIRCUIT
GARY LIPPOLD AND JANE MURPHY,	
and	
THE CITY OF STURGIS, a South Dakota Municipal Corporation,	) ) CIV 15-94
Appellants,	)
vs.	) MEMORANDUM DECISION
MEADE COUNTY BOARD OF COMMISIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH, Appellees,	MAY 20 2016
and	MAY 2 0 2016 )  SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM TH CIRCUIT CLERK OF COURT
BUFFALO CHIP CAMPGROUND, LLC,	) ) )
Applicant/Intervener.	ý ) )

This case is an appeal of a February 27, 2015 decision made by the Meade County Board of Commissioners ("The Board").

## SEMINAL PROCEDURAL FACTS

On February 27, 2015, the Board accepted an Application/Amended Application to incorporate the "City of Buffalo Chip" ("Chip City"). This decision allowed an incorporation election. Electors voted to approve incorporation May 7, 2015. Thereafter various governmental agencies and private entities recognized Chip City as a duly organized municipality.

Appellants timely appealed the Board's decision filing their respective notices of appeal in Civil Files 15-94 and 15-95. The Court consolidated the appeals. The Court granted Buffalo Chip Campground LLC ("The Campground") Intervener status. The Court held a trial de novo May 11, 2016. This memorandum decides the issues raised on appeal.

While pending, the parties filed various motions to dismiss or for summary judgment. In each case, authenticated documents accompanied these motions. Many facts are uncontested.

#### **STANDING**

In a pre-trial motion to dismiss, Campground challenged each Appellant's status as an aggrieved person. SDCL 7-8-27. The Court denied Campground's challenge. Subject matter jurisdiction requires standing. See generally Cable v. Union County Board of County Commissioners, 769 NW2d 817.

The Appellants "...must satisfy three elements in order to establish that he suffered an injury in fact." Cable, at ¶ 21:

- 1) An invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.
- 2) A causal connection between the Appellant's injury and the conduct of the Board.
- 3) The Appellants must show it is likely that the injury will be redressed by a favorable decision.

The City of Sturgis ("Sturgis") clearly satisfies all three elements. Sturgis' grievances are both general and particularized. Without repetition, those grievances are outlined in Sturgis' Brief and Supplemental Brief filed January 8 and April 1, 2016.

At a minimum, Chip City's incorporation imposes a concrete, particularized imminent, actual invasion of Sturgis annexation rights. The incorporation of Chip City limited and limits Sturgis statutory annexation rights. The causal connection between the Board's actions to approve the incorporation election and invasion of Sturgis' annexation rights are clear.

In addition, the Campground argues that SDCL 9-3-12 divests this Court of subject matter jurisdiction.

### SDCL 9-3-12 provides:

If satisfied of the legality of such election, the Board of County Commissioners shall make an order declaring that such municipality has been incorporated by the name adopted. Such order shall be conclusive of the fact of incorporation in all suits by or against such municipality.

The Board issued an order approving Chip City's incorporation on May 13, 2015. The Campground argues that as of May 13, 2015, the Appellants' statutory right to appeal the Board's decision vanished.

The argument is without merit. If the Board's predicate decision to allow the incorporation election was arbitrary and capricious, then the decision is void and any subsequent act which derives authority from a void act is similarly void. As a matter of policy, the Campground's notion is abhorrent. If any governmental entity has the power to, in effect, declare illegal acts legal, then the state should declare dead the separation of powers doctrine.

The City of Sturgis clearly has standing. The Court has subject matter jurisdiction and will now turn its attention to the merits of the appeal.

#### **ISSUE**

The issue – broadly cast – is whether the Board's decision to allow the incorporation election was arbitrary and capricious?

#### STANDARD OF REVIEW

An appeal to the circuit court "shall be heard and determined *de novo*." "The trial court is instructed to determine anew all matters of fact without ascribing any presumption of correctness to the Board's findings on the evidence." <u>In Re: Conditional Use Permit Denied to Meier</u>, 2000 S.D. 80, ¶ 22. "Once the trial court finds the facts, it is to determine if the actions of the Board were arbitrary or capricious." <u>Id.</u>; <u>Goos RV Center v. Minnehaha County Com'n</u>, 2009 S.D. 24, ¶ 8.

### **SUMMARY OF DECISION**

The Board's decision was arbitrary and capricious. The Board clearly erred on several occasions throughout the incorporation process. The incorporation of Chip City is void. The election is a nullity. The Board's decision and orders approving the incorporation are void and determined to be a nullity.

### **SEMINAL FACTS**

No person at any relevant time resided, inhabited, or was domiciled within the declared limits of the proposed municipality ("Chip Territory"). No person at any relevant time was legally qualified to vote within Chip Territory. The Application/Amended Application submitted to the Board was based upon false information and incompetent evidence.

The Board relied upon the census ostensibly circulated by Mr. Walczak, CEO of the Campground. Among other things, the census lists 50 residents within the limits of the area to be incorporated. The census is grossly inaccurate. Zero residents resided within the proposed Chip City limits.

The Petition and/or Amended Petition, corrected survey map, and census were not posted as required by law. The notice was defective.

The Board's February 27, 2015 proceeding was hasty, ill-informed, confused by tortured parliamentary procedure, and unfocused expostulation. Review of the February 27, 2015 hearing transcript demonstrates that certain Board members didn't understand the procedural posture of the motions or their votes. The procedural machinations employed to move the Application/Amended Application to a Board vote were arbitrary and capricious.

## THE APPLICATION/AMENDED APPLICATION TO INCORPORATE

#### A. NOTICE

SDCL 9-3-2 and 9-3-3 requires any valid Application for incorporation to be accompanied by an accurate survey, map, and census. SDCL 9-3-4 requires the survey, map, and census be available for inspection for a period not less than 30 days. The Board acknowledged the first Application failed to include an accurate survey or map. See Exhibit 47, pages 1-4. (Transcript February 25, 2016).

Two days later the Board determined that the Application/Amended Application and corrected survey/map dated February 26, 2016 met the statutory requirements of SDCL 9-3-2 and 9-3-4. The Board failed to consider the mandate imposed by SDCL 9-3-4. The "corrected"

survey and map was completed February 26, 2016. Therefore, they could not have been "left at some convenient place...for a period not less than 30 days for examination."

The Board erred.

## **B. MINIMUM APPLICATION REQUIREMENTS**

SDCL 9-3-1 reads:

No municipality shall be incorporated which contains less than one hundred legal residents on less than thirty voters.

The statute is no model of clarity. A casual reader misdirected by the passive voice reads the "or" to be disjunctive. It is not. The statute requires 100 hundred legal residents and no fewer than 30 voters. The Application/Amended Application and census is then deficient. The census and Application/Amended Application attest to only 50 people "residing in" the Chip Territory.

The Board erred.

#### AIRPORT ANNEXATION

In an apparent effort to stave off the Chip incorporation process Sturgis annexed the City Airport by resolution dated February 20, 2015. The Board had the written resolution in hand before their February 27, 2015 decision (Exhibit 7). Sturgis City Manager Ainslie and City Attorney Barnier testified before the Board concerning the resolution and the airport's location within 3 miles of the proposed Chip City limits. The resolution is regular on its face. Some Board members opined that the airport annexation was improper and was therefore "invalid."

Fay Bueno, Sturgis Finance Officer, testified at the May 11, 2016 trial. To date, no person or entity has legally challenged the validity of the airport annexation.

# SDCL 9-3-1.1 provides in pertinent part:

No municipality may be incorporated if any part of such proposed municipality lies within three miles of any point on the perimeter of the corporate limits of any incorporated municipality...

The Board failed to properly consider the legal effect of the airport annexation.

The Board erred.

# RESIDENCY, HABITATION, DOMICILE

The words are not synonymous. "Residence and domicile are not interchangeable concepts." Merril v. Altman, 2011 S.D. 94, ¶ 18.

## SDCL 9-3-3 provides in pertinent part:

"Any person making application for the organization of a municipality shall cause an accurate census to be taken of the <u>landowners</u> and the <u>resident population</u> of the proposed municipality... The census <u>shall exhibit</u> the name of each landowner and person residing <u>in the proposed municipality</u> and the person belonging to each family as of a certain date..." (Emphasis added.)

The incorporators circulated "Voter Registration Forms (Exhibit 25). The Campground submitted the forms to the Board as evidence of "residence." Each signatory to the form swore, "I actually live at and have no intention of leaving the above address." (Emphasis added.) This language – though not identical with the statute is in accord with SDCL 9-3-3 which requires exhibition of the name of each landowner and person residing in the proposed municipality. The voter registration signatories attested to their domicile within Chip Territory. "Domicile is established by physical presence in a place with the intent to reside there." Merrill, supra.

Mr. Walczak testified at trial that Chip City was a "concept." And that the applicants were "excited to be part of the concept." He admitted that no one actually lived within the Chip Territory on February 20, 2015. The Campground owned all of the real property in Chip

Territory. The lots identified on the census are owned by no signatory – including the principal owner of the Campground. They are plots of grass with no sewer. Most lots have water and electricity – as might a KOA or Custer State Campground. The "residents" signed one-year lot leases after signing the voter registration forms.

The census circulator did not – in fact could not, under the facts of this case – verify domicile.

The voter registration forms falsely represented domicile, residency, or habitation. The Board relied on the forms to make its February 27, 2015 decision.

The Board erred.

#### SUMMARY

The Board has an affirmative, profound, legal duty to competently satisfy itself that the municipal incorporation statutes are fully complied with. <u>SDCL 9-3-6.</u>

Taken as a whole or in isolation, the errors described fatally flaw the incorporation of Chip City.

The Board's decision was arbitrary and capricious.

#### **DECISION**

The Board's February 27, 2015 decision is reversed. This matter is remanded to the Board with direction to vacate its February 27, 2015 decision and order approving the incorporation election. The vacated decision and order shall be effective as of February 27, 2015. The Board is further directed to vacate its May 13, 2015 order nunc pro tunc to May 13, 2015.

# **ADDENDA**

Mr. Barnier and/or Mr. Marshall, please prepare Findings, Conclusions and Final Judgment/Order in accord with this decision. Service by mail is intended.

Dated this 20 day of May, 2016.

BY THE COURT:

Hon. Jerome A. Eckrich Circuit Court Judge

ATTEST:

Clerk of Courts

FILED

MAY 2 0 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

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STATE OF SOUTH DAKOTA )
) SS
COUNTY OF MEADE

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

46 CIV. 15-94

GARY LIPPOLD AND JANE MURPHY,

and

**THE CITY OF STURGIS,** a South Dakota Municipal Corporation,

Appellants,

VS.

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH,

Appellees,

and

BUFFALO CHIP CAMPGROUND, LLC,

Applicant/Intervener.

Count's

FINDINGS OF FACT AND CONCLUSIONS OF LAW

## INTRODUCTION

This matter came before the undersigned for a court trial on May 11, 2016.

Appellants Gary Lippold and Jane Murphy (Lippold) appeared by Mark F.

Marshall, Appellant City of Sturgis (Sturgis) appeared by its City Attorney Greg

Barnier, the Meade County Board of Commissioners, Alan Aker, Bob Bertolotto,

46 CIV 15-94 Findings of Fact and Conclusion of Law Page 1 FILED

AUG 2 4 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

APPENDIX pg. 10

Robert Heidgerken, Galen Neiderwerder and Linda Rausch (Board or Commission) appeared by Jack H. Heib and the Buffalo Chip Campground, LLC, (Campground) appeared by Kent Hagg and John S. Dorsey.

The Court has listened carefully to the witnesses and reviewed the exhibits offered in evidence as well as the entire file herein. On May 20, 2016, the Court filed its Memorandum Decision and by this reference incorporates such decision into these Findings of Fact and Conclusions of Law.

Based on that review, and good cause appearing therefore, the Court makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

#### A. Parties.

- Gary Lippold is a resident of Sturgis, Meade County, South Dakota.
   (Tr. p. 9.) He is employed by a competitor of the Campground. (Id.)
- 2. Lipppold formerly owned the Glencoe Campground and is knowledgeable about the business of operating an entertainment venue and campground during the Sturgis Motorcycle Rally. (Tr. pp. 9-10.)
- 3. Lippold talked with Commissioners privately, outside the public meetings, about his objections to the petition for proposed incorporation. (Tr. p. 21.)
- 4. Lippold's ability to earn a living is affected by allowing a competitor of his employer the statutory power of an incorporated municipality to tax, condemn and annex. (Tr. pp. 10-12.)
  - 5. Lippold was a credible witness.

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Findings of Fact
and Conclusions of Law
Page 2

- 6. Lippold is a person aggrieved by the Board's decision and therefore has standing to appeal the Board's decision.
  - 7. Sturgis is a South Dakota municipal corporation.
  - 8. Sturgis maintains a municipal airport. (Ex. 7.)
- 9. The exterior boundary of Sturgis lies within three miles of the boundary of the proposed Town of Buffalo Chip.
- 10. Sturgis is a person aggrieved by the Board's decision and therefore has standing to appeal the Board's decision.
  - 11. Campground is a South Dakota limited liability company.
- 12. Lippold and Sturgis did not contest the Campground's motion to intervene.
  - 13. The Board is the governing body of Meade County, South Dakota.
- 14. Alan Aker, Bob Bertolotto, Robert Heidgerken, Galen Neiderwerder and Linda Rausch are members of the Board.
- 15. As a subordinate governmental arm of the State of South Dakota, Meade County, and its Board of Commissioners have only such authority as granted by the State of South Dakota.
  - 16. The Board and its members are proper parties to this appeal.
- 17. No one who petitioned for the municipal incorporation of Buffalo Chip, SD is a party to this appeal.
- B. Petitions and Censuses.

meeting date); Two (2) Petitions for the Municipal Incorporation of Buffalo Chip, SD (February 12 meeting date); Affidavit of Surveyor; Map and Census. (Ex. 23.)

- 19. On February 20, 2015, the Meade County Auditor received Two (2) additional Petitions for the Municipal Incorporation of Buffalo Chip, SD (February 25 meeting date); Affidavit of Surveyor; Map; Census; and Distance Map. (Ex. 24.)
- 20. Ultimately the Board took no action on the various Petitions identified in Findings 18 and 19.
- 21. On February 26, 2015, the Meade County Auditor received Three (3)
  Amended Petitions for the Municipal Incorporation of Buffalo Chip, SD (February
  27 meeting date); Affidavit of Surveyor; Map and Census. (Ex. 24.)
- 22. The County Auditor sought the advice of a Meade County Deputy States attorney as to whether the Amended Petitions should be filed in the Auditor's office. (Ex. 47, p. 32.)
- 23. The Meade County Deputy State's Attorney advised the Auditor that there was no authority permitting the filing of an amended petition for municipal incorporation. (Ex. 47, p.32.)
- 24. The County Auditor rejected the Amended Petitions and did not file them in her office. (Ex. 44, p. 111.)
- 25. Deputy State's Attorney Chleborad advised the Board that if any portion of the map or survey was changed to correct a mistake a new application was required to be filed and submitted to the County Auditor. (Ex. 10, p. 5; Ex. 11; Ex. 44, p32; Ex. 47, pp. 15-16.)

- 26. After the close of business on February 26, 2015, Petitioner delivered Three (3) Amended Petitions for the Municipal Incorporation of Buffalo Chip, SD (February 27 meeting date); Affidavit of Surveyor Notice of Correction; Surveyor's Affidavit; Map and Census to an employee of the Board. (Ex. 24.)
- 27. The Affidavit of Surveyor Notice of Correction; Surveyor's Affidavit; Map and Census were not left at some convenient place within the territory for a period of 30 days prior to the February 27, 2016, meeting date for examination by those having an interest in the Amended Petition as required by SDCL § 9-3-4. (Tr. pp. 102-103.)
- 28. The record does not reflect when notice of the Amended Petitions, Census and Survey were made available for inspection.
  - 29. The date of the initial Petition is February 10, 2015. (Ex. 23, p. 2.)
- 30. Notice of the initial Petition could not have been given before the date on which it was signed.
- 31. The Amended Petitions are dated February 26, 2015. (Ex. 24.) (Ex. 24, pp. 2, 4 & 6.) Notice of the Amended Petitions could not have been given before the date on which it was signed.
- 32. Petitioner failed to provide 30 days notice of the any Petition, Amended Petition, Census and Survey.
  - 33. Walczak was not a credible witness.
- 34. Notice of the Board's hearing on the Amended Petition was not included in the Board's Agenda for its February 27, 2015 special meeting. (Ex. 51, p. 2.)

- 35. The Census shows the resident population as of February 20, 2015, to be fifty (50). (Ex. 24, pp. 1, 3, 5.)
- 36. The Census shows the resident population was less than the statutory requirement contained in SDCL § 9-3-1 of 100 legal residents.
- 37. The Census filed with the Amended Petition states that the total number in each household is one (1), and that no one other than the person identified as the head of the house resides there. (See e.g., Ex. 24, p. 11.)
- 38. The Census filed with the Amended Petition states that household number 4 is comprised of Brenda Brown who lives at 20603 132<sup>nd</sup> Ave. Lot # 24, Sturgis, SD. (Ex. 24; p. 11.) The Census also states that household number 5 is comprised of Madeline Campbell who also lives at 20603 132<sup>nd</sup> Ave. Lot # 24, Sturgis, SD. (Id. at p. 11.)
- 39. The Census with the Amended Petition states that household number 7 is comprised of Dawn Daughters who lives at 20603 132<sup>nd</sup> Ave. Lot # 33, Sturgis, SD. (Ex. 24, p. 11.) The Census also states that household number 18 is comprised of Jeffery Ice who also lives at 20603 132<sup>nd</sup> Ave. Lot # 33, Sturgis, SD. (Id. p. 13.)
- 40. The Census filed with the Amended Petition states that household number 10 is comprised of James Griffith who lives at 20603 132<sup>nd</sup> Ave. Lot # 72, Sturgis, SD. (Ex. 24, p. 11.) The Census also states that household number 13 is comprised of James Griffith who also lives at 20603 132<sup>nd</sup> Ave. Lot # 72, Sturgis, SD. (Id. p. 13.)

- 41. The Census filed with the Amended Petition states that household number 11 is comprised of Michael Griffith who lives at 20603 132<sup>nd</sup> Ave. Lot # 73, Sturgis, SD. (Ex. 24, p. 11.) The Census also states that household number 14 is comprised of Michael Griffith who also lives at 20603 132<sup>nd</sup> Ave. Lot # 73, Sturgis, SD. (Id. p. 13.)
- 42. The Census filed with the Amended Petition states that household number 1 is comprised of Edward Aurand who lives at 20603 132<sup>nd</sup> Ave. Lot # 1, Sturgis, SD. (Ex. 24, p. 11.)The Census also states that household number 35 is comprised of Brian Thompson who also lives at 20603 132<sup>nd</sup> Ave. Lot # 1, Sturgis, SD. (Id. p. 17.)
- 43. The Census filed with the Amended Petition states that household number 36 is comprised of Callie Tisdale who lives at 20603 132<sup>nd</sup> Ave. Lot # 58, Sturgis, SD. (Ex. 24, p. 17.) The Census also states that household number 38 is comprised of James Walczak who also lives at 20603 132<sup>nd</sup> Ave. Lot # 58, Sturgis, SD. (Id. p. 17.) The Census also states that household number 39 is comprised of Sandra Walczak who also lives at 20603 132<sup>nd</sup> Ave. Lot # 58, Sturgis, SD. (Id. p. 17.)
- 44. The Census filed with the Amended Petition states that household number 44 is comprised of Andrea Johnson who lives at 20603 132<sup>nd</sup> Ave. Lot #82, Sturgis, SD. (Ex. 24, p. 17.) The Census also states that household number 45 is comprised of James Johnson who lives at 20603 132<sup>nd</sup> Ave. Lot #82, Sturgis, SD. (Id. p. 19.)

- 45. The Census filed with the Amended Petition states that household number 48 is comprised of Symphony M. Tidwell who lives at 20603 132<sup>nd</sup> Ave. Lot # 11, Sturgis, SD. (Ex. 24, p. 19.) The Census also states that household number 50 is comprised of Randall J. McKnight who lives at 20603 132<sup>nd</sup> Ave. Lot # 11, Sturgis, SD. (Id. p. 19.)
- 46. The Census filed with the Amended Petition states that James Griffith occupies Household 10. (Ex. 24, p. 11.) The Census also states that James Griffith occupies Household 13. (Id. p. 13.)
- 47. The Census filed with the Amended Petition states that Frederick Gille occupies Household 12 as the head of household with a stated address of 20603 132<sup>nd</sup> Ave., Lot. 91, Sturgis, SD 57785-6635, and lists no other person at said address. (Ex. 24, p. 13.)
- 48. The Amended Petition was signed by Frederick Gille and Cruise Gille, both of whom claimed 20603 132<sup>nd</sup> Ave., Lot 91, Sturgis, SD as their residence. (Ex. 24, p. 3.) Cruise Gille was not listed on the Census.
- 49. The Census filed with the Amended Petition states that household number 42 is comprised of Carol Woodruff whose address is 20603 132<sup>nd</sup> Ave., Lot 80, Sturgis, SD 57785-6635. (Ex. 24, p. 17.) Carol Woodruff signed the Amended Petition and stated that her address is 20622 131<sup>st</sup> Ave., Sturgis, SD. (Id. p. 2.)
- 50. Carol Woodruff is married to Rod Woodruff.

  <a href="https://en.wikipedia.org/wiki/Buffalo-Chip Campground#Ownership\_and-oper-ation">https://en.wikipedia.org/wiki/Buffalo-Chip Campground#Ownership\_and-oper-ation</a> (Last visited April 30, 2016.)

- 51. Rod Woodruff signed the Amended Petition and claimed 20672,131st Ave., Sturgis, SD as his residence. (Ex. 24, p. 2.)
- 52. James Walczak, the Petitioner who executed the Census filed with the Amended Petition was not a resident voter in the area proposed to be incorporated; he merely intended to live there some time in the future. (Ex. 24, pp. 11-20; Tr. pp. 96-97.)
- 53. The Meade County Auditor was under no obligation to verify information contained in the Amended Petition, Census and Survey.
- 54. James Walczak, the Petitioner who executed the Census filed with the Amended Petition did not verify the information contained in the Census to determine whether those named in the Census were in fact residents of the area to be incorporated. (Tr. p. 98.)
- 55. The Census submitted with the Amended Petition was not accurate or verified and was rife with factual errors.
- 56. 51 supporters of the Buffalo Chip, SD filed Voter Registration forms with the Meade County Auditor between February 3, 2015 and February 10, 2016. (Ex. 25.)
- 57. 32 of 50 persons identified in the Census are current or former employees of the Campground. (Tr. p. 80.)
- 58. The Petitioner who prepared the Census did not know how the addresses in the Census were assigned. (Tr. p.80.)
- 59. Mr. Woodruff "was taking responsibility for" assigning the addresses. ((Tr. p. 80.)

- 60. Angela from the Campground office completed the Census; the Petitioner, James Walczak, merely signed the form and swore to the accuracy of the Census after it was completed. (Tr. pp. 86-88,)
- 61. 47 of those completing a Meade County Voter Registration form included a residence address of "Apt. or Lot #" at 20603 132<sup>nd</sup> Ave., Sturgis, SD 57785. (Ex. 25.)
- 62. Madeline Campbell, (Ex. 25, p. 6.); Angela Hubert, (Ex. 25, p. 19.); Cadence Owen, (Ex. 25, p. 32.) and Jon Wik, (Ex. 25, p. 48.) also list a residence address at 20603 132<sup>nd</sup> Ave., Sturgis, SD 57785 but did not include an Apt. or Lot #.
- 63. The "lots" referred to in the voter registration form are just raw ground. (Tr. p. 116.)
- 64. The lots are  $25 \times 50$  foot camping spaces that are not occupied except during rally. (Tr. p. 86.)
- 65. Counsel for the Campground advised the Board that "we're not pretending that all these people live in homes out there..." (Ex 44. P. 74.)
- 66. Each person who registered as a Meade County voter nevertheless signed a declaration stating, under oath, that "I actually live at and have no present intention of leaving the above address." (Ex. 25, passim.)
- 67. The "above address" that was the subject of the affirmation of each person completing a voter registration form was the lot number assigned to the 25 x 50 raw ground camping spaces that are not occupied except during the rally.

- 68. James Walczak and Sandra Walczak did not actually live at the Campground, but planned on parking an RV there in the future. (Tr. 87; Ex. 44. pp. 70, 77-79.)
- 69. Paul Mitchell told the Board that he intended to move to the Campground in the future. (Ex. 44, pp. 75-77.)
- 70. David Owen told the Board that he worked at the Campground as part of the grounds crew and stage crew but he was not staying there. (Ex. 44, 80-82.)
- 71. Greg Smith told the Board he stayed at the Campground in an RV from May through September. (Ex. 44, p. 57.)
- 72. Nyla Griffith told the Board that she and her husband rented a home in Deadwood, but were talking about building a home on the 25 x 50 camping space. (Ex. 44, p.57.)
- 73. Brenda Brown told the Board that she lived in an apartment in Spearfish and also worked in Spearfish. (Ex. 44, p. 66.)
- 74. Jeff Smith told the Board that he was in the process of procuring an RV to live in the Campground in the future. ((Ex. 44, p. 77.)
- 75. Deputy States Attorney Chleborad advised the Board that the Voter Registration form was signed under the penalty of perjury by the applicant and included a statement that the applicant actually lived at the address shown on the Voter Registration form. (Ex. 44, p. 72.)
- 76. No one actually lives at the residence addresses identified on the Meade County Voter Registration forms in Exhibit 25, pp. 1.-51.

77. James Walczak is the person who prepared the Census, and in doing so he represented that he is

A resident voter in the area proposed to be incorporated into the City of Buffalo Chip, South Dakota, [and] hereby certifies that he/she personally obtained the formation (sic) provided above and that said information is accurate according to the best information and belief of the undersigned.

(Ex. 24, p. 15.)

78. James, Walczak, as the person who prepared that Census, also signed the following affirmation:

James M. Walczak,, being first duly sworn on his/her oath, deposes and says: That he/she is the Petitioner named in the within and foregoing CENSUS OF THE PROPOSED CITY OF BUFFALO CHIP, SOUTH DAKOTA, that he/she has read the same and knows the contents thereof to be true of his/her own knowledge, except as to those matters therein stated on information and belief, and as to such matters he/she believes it to be true.

(Ex. 24, p. 16.)

- 79. The Census is rife with false information.
- 80. None of the persons identified on the Census had a voting residence at the "lot" identified in the Census because none of the persons so identified had fixed his or her habitation at such address.
- 81. No person identified in the Amended Petition actually lived in the area proposed to be incorporated.
- 82. James Walczak circulated one of the Amended Petitions for the Municipal Incorporation of Buffalo Chip, SD, and signed a statement under oath which stated:

That he/she is the Circulator of the within and foregoing PETITION TO THE MEADE COUNTY BOARD OF COUNTY COMMISSIONERS FOR THE INCORPORATION OF THE MUNICIPALITY OF BUFFALO CHIP, SOUTH DAKOTA PURSUANT, to SDCL 9-3-5; that he/she has read the same and knows the contents thereof to be true of his/her own knowledge, except as to those matters therein stated on information and belief, and as to such matters, he/she believes it to be true.

(Ex. 24, p. 2.)

- 83. James Walczak testified that as the Circulator he did not explain to the petitioners the concept of "residence". (Tr. pp. 88, 91.)
- 84. James Walczak testified that as the Circulator he did not know what it means to be a "resident". (Tr. pp. 94-95.)
- 85. The Amended Petition on its face listed only the names of 17 persons claiming to be legally registered voters.
  - 86. The Amended Petitions are rife with false information.
- 87. Some time after 5:00 PM on February 26, 2015, the Board provided Notice of its meeting scheduled for 10:30 AM on February 27, 2015.
- 88. The Board did not provide public notice of its February 27, 2015, meeting "for at least an entire, continuous twenty-four hours immediately preceding any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting. The proposed agenda shall include the date, time, and location of the meeting as required by SDCL § 1-25-1.1

89. The Board Agenda for the Special Meeting of February 27, 2016 does not mention the matter of the Amended Petition for the municipal incorporation of Buffalo Chip at all. (Ex. 51, p.2.)

# C. City of Sturgis Airport Annexation.

- 90. On February 20, 2015, the City of Sturgis legally annexed the City of Sturgis Municipal Airport into the City of Sturgis. (Ex. 6.)
- 91. The Resolution stated that "the City of Sturgis is currently in negotiations with the Federal Aviation Administration to make needed repairs to the exiting taxiway and that the existing taxiway is necessary for the preservation of an existing public institution." (Ex. 6.)
- 92. The Resolution also stated "that this Resolution of Annexation shall become effective February 20, 2015 pursuant to S.D.C.L. 9-19-13." (Ex. 6.)
- 93. No one challenged the annexation of the Sturgis Municipal Airport in to the City of Sturgis or attempted to appeal the City's decision to annex its airport.
- 94. Meade County Deputy State's Attorney Chleborad advised the Board that Sturgis' annexation of the Sturgis Municipal Airport was complete upon the filing of the resolution. (Ex. 46, pp. 29-30.)
- 95. The real property on which the Sturgis Municipal Airport lies is described in the Resolution of Annexation. (Ex. 6, p. 2.)
- 96. The real property which was to comprise Buffalo Chip, SD is described in the Surveyor's Affidavit. (Ex. 24, p. 7.)

97. As can be seen from comparing the legal descriptions in Findings 65 and 66, the boundaries of perimeter of Sturgis at the Sturgis Municipal Airport on February 23, 2015 lie within three miles of the area proposed to be incorporated.

### D. Meade County Comprehensive Plan,

- 98. Meade County adopted a Comprehensive Plan. (Ex. 45).
- 99. The Comprehensive Plan states:

A comprehensive plan is designed to draw on citizen values and opinions as well as data about existing and future population and economic growth to help shape how a county or municipality will look and develop over the next 20 to 30 years. It is adopted by a local government to guide decisions primarily about the physical development of a community. It analyzes current conditions and sets future goals and policies in such areas as land use, housing, transportation, water supply and use, natural resources, and economic development.

The comprehensive plan is developed through a process of public input and discussion to ensure that the document reflects the desires of the community and garners broad public support. The comprehensive plan is in effect once adopted by the local governing body of the municipality, in this case the Meade County Commissioners, after at least one public hearing. Once adopted, the plan should be used to guide the government's general approach and particular policies to be considered by elected officials, appointed boards, and staff in future decision-making. Meade County particularly intends the plan to be a unifying force that will cultivate cooperation between the County and the municipalities and the public within

(Ex. 45, p.3.)

### 100. The Comprehensive Plan also provides:

This comprehensive land use plan is comprised of common characteristics. The first characteristic is longevity. The intent of this plan is to assist in the shaping of Meade County's future by providing the means necessary to obtain planned and predicted expectations.

Secondly, this plan is comprehensive in content so that it will be directed toward all unincorporated areas of the county, except the area of joint jurisdiction with the Cities of Sturgis, Box Elder, Summerset, Piedmont and Rapid City. The plan must also serve as a guide to the physical development of those areas.

Thirdly, this plan is a statement of policy that will guide the decisions made by the Planning Commission, Governing Board of Commissioners and various other governmental officials. This document offers a prescription, which will assist in answering future questions concerning future land use, special zoning areas and subdivision regulations. These policies form a common thread throughout the plan, stressing the critical importance of compact and contiguous growth of municipalities.

Fourthly, the plan emphasizes the importance of long-term agricultural use by seeking to minimize interference with farming activities and discourage haphazard development, which leads to costly and inefficient public expenditures, while assuring the right of property owners to develop and market their property.

Finally, the plan emphasizes the importance of existing industries and stresses the need to support the creation of more supporting businesses in agricultural areas to provide employment opportunities for farm and ranch families.

# (Ex. 45, pp. 5 and 6.)

- 101. Board did not consider the Meade County Comprehensive Plan in its deliberations.
- 102. The Board did not provide adequate notice to county residents of its intent to consider the Amended Petition.

103. The incorporation of a new municipality has a significant impact on all residents within the county and changes the operation of a comprehensive county plan.

#### STANDARD OF REVIEW

As the South Dakota Supreme Court has noted:

SDCL 7-8-30 provides that appeals to the circuit court from a decision by the county board shall be heard and determined de novo. This Court has interpreted this standard as meaning the circuit court should determine anew the question ... independent of the county commissioner's decision. In addition, the trial court should determine the issues before it on appeal as if they had been brought originally. The court must review the evidence, make findings of fact and conclusions of law, and render judgment independent of the agency proceedings.

Goos RV Center v. Minnehaha County Comm'n, 2009 SD 24, ¶ 18, 764 N.W.2D 704 (Citations and quotations omitted).

"Once the trial court finds the facts, it is to determine if the actions of the Board were arbitrary or capricious, i.e., whether the actions of the Board were "based on personal, selfish, or fraudulent motives, or on false information, [or] ... characterized by a lack of relevant and competent evidence to support the action taken." Conditional Use Permit Denied to Meier, 2000 SD 80 ¶ 21, 613 N.W.2d 523 quoting Coyote Flats v. Sanborn County Comm,'n, 1999 S.D. 87, ¶ 14, 596 N.W.2d 347, 350.

If the court finds the decision was arbitrary or capricious, it should reverse the decision and remand to the Board for further proceedings. *Id.* Of course, "[a] party may not claim a better version of the facts on appeal than claimed below[.]" Cole v. Wellmark of South Dakota, Inc., 2009 SD 108, ¶ 18, n.3, 776 N.W.2d 240

quoting Matter of SDDS, Inc., 472 N.W.2d 502, 511 (S.D. 1991) (citing Garrett v. BankWest, Inc., 459 N.W.2d 833, 838 (S.D. 1990)).

## REQUIREMENTS FOR MUNICIPAL INCORPOARTION

The statutory requirements for municipal incorporation are found in several statutes within SDCL ch. 9-3. The statutes which comprise the requirement for municipal incorporation statutes are:

- 9-3-1. Minimum population of municipalities. No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters.
- 9-3-1.1. Minimum distance from existing municipality-Exceptions. No municipality may be incorporated if any part of such proposed municipality lies within three miles of any point on the perimeter of the corporate limits of any incorporated municipality, unless the incorporated municipality refuses or fails to annex a territory which is contiguous to said incorporated municipality, and said contiguous territory has properly petitioned said municipality to be annexed thereto, as provided by § 9-4-1.
- 9-3-2. Survey and map showing proposed municipal boundaries-Affidavit of surveyor. Persons making application for the organization of a municipality shall first cause an accurate survey and map to be made of the territory intended to be embraced within the limits of such municipality showing the boundaries and area thereof and the accuracy of which shall be verified by the affidavit of the surveyor.
- 9-3-3. Census of proposed municipality-Contents-Verification. Any person making application for the organization of a municipality shall cause an accurate Census to be taken of the landowners and the resident population of the proposed municipality not more than thirty days previous to the time of presenting the application to the board of county commissioners. The Census shall exhibit the name of each landowner and person residing in the proposed municipality and the number of persons belonging to each family as of a certain date. The Census shall be verified by the affidavit of the person taking the Census.

- 9-3-4. Survey, map, and Census available for public inspection. Such survey, map, and Census when completed and verified shall be left at some convenient place within such territory for a period of not less than thirty days for examination by those having an interest in such application.
- 9-3-5. Voters' petition as application for incorporation--Number of signers required--Contents of petition--Presentation to county commissioners. The application for incorporation shall be by a petition verified by the circulator and signed by not less than twenty-five percent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state. The application shall identify the type of government to be formed, the number of trustees, commissioners, or wards in the municipality, the boundaries and area according to the survey, and the resident population according to the Census taken. The application shall be presented at the time indicated in the notice of the application or as soon thereafter as the board of county commissioners can receive and consider the application.
- 9-3-6. commissioners' order incorporate County to municipality--Name--Date for election. If the board, after proof by affidavit or oral examination of witnesses, is satisfied that the requirements of this chapter have been fully complied with, the board shall make an order declaring that the proposed municipality shall, with the assent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state, be an incorporated municipality by the name specified in the application. The name shall be different from that of any other municipality in this state. The board shall also include in the order a date for an election to be conducted pursuant to Title 12.

Based on the statutes cited above a proponent of municipal incorporation must prove:

1. The area to be incorporated has a minimum of one hundred legal (100) residents. (SDCL § 9-3-1.)

- 2. The area to be incorporated has a minimum of thirty (30) legally registered voters. (SDCL § 9-3-1.)
- 3. The area to be incorporated must be at a distance greater than three miles from any point on the perimeter of the corporate limits of any incorporated municipality. (SDCL § 9-3-2.)
- 4. The Census must confirm the legal resident population of the proposed municipality. (SDCL § 9-3-3.)
- 5. The Census must confirm the name of each person residing in the proposed municipality as of a certain date. (SDCL § 9-3-3.)
- 6. The Census must confirm the number of persons belonging to each family. (SDCL § 9-3-3.)
- 7. The completed survey, Census and map must be made available for public inspection for thirty (30) days before the Commission acts. (SDCL § 9-3-4.)
- 8. The application for municipal incorporation must be signed by not less than twenty-five percent (25%) of the registered voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered South Dakota voters. (SDCL § 9-3-5.)
- 9. The application for municipal incorporation must confirm the resident population according to the Census taken. (SDCL § 9-3-5.)

### THE SCOPE OF THE BOARD'S LEGAL AUTHORITY

The South Dakota Supreme Court has noted that "[i]n the United States, the individual states have all authority except that which they have delegated to the federal government or prohibited to themselves." *Pennington County v. State* 

of South Dakota, 2002 SD 31, ¶ 10, 641 N.W.2d 127 citing US Const. Art. 1 §§ 8, 10; McDonald v. Sch. Bd. of Yankton Ind. Sch. Dist. No. 1, 90 S.D. 599, 606, 246 N.W.2d 93, 97 (1976) (citing Kramar v. Bon Homme County, 83 S.D. 112, 115, 155 N.W.2d 777, 778 (1968)). The states have created local government entities such as counties, townships and cities to do the states' work at the local level. These subordinate arms of the State have only that authority specifically given by the state legislature, and their "powers will be strictly construed." Welsh v. Centerville Township, 1999 SD 73, ¶ 11, 595 N.W.2d 622 (Citations omitted.)

"A county has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." State v. Quinn, 2001 S.D. 25, ¶10, 623 N.W.2d 36, 38 (citing State ex rel. Jacobsen v. Hansen, 75 S.D. 476, 478, 68 N.W.2d 480, 481 (1955) (citations omitted)). Counties, like cities, lack inherent authority and derive their power from the legislature. See City of Marion v. Schoenwald, 2001 S.D. 95, ¶6, 631 N.W.2d 213, 216; Donovan v. City of Deadwood, 538 N.W.2d 790, 792 (S.D. 1995) (citations omitted).

The failure to follow proper procedures in the exercise of such delegated authority renders the county's action a legal nullity. *Quinn*, 2001 S.D. 25, ¶ 9, 623 N.W.2d 36. Indeed, as the representative of the county having general control over its property and the management of its business and fiscal affairs, the county board can exercise authority only in so far as statutes confer power upon the county. *Pennington County v. Moore*, 94 SD 1083, 525 N.W.2d 257 (1994). Moreover, "[a] local government is only allowed to 'take official action

through ordinances and resolutions." Quinn, 2001 S.D. 25, ¶ 10 quoting Appeal of Jackpine Gypsies Motorcycle Club, 395 N.W.2d 593, 595 (S.D. 1986).

#### STATUTORY CONSTRUCTION

Judge Learned Hand once said, "[t]here is no surer way to misread [a statute] than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944). Indeed, the South Dakota Supreme Court in its 1986 decision, *Revocation of the Driver License of Fischer*, 395 N.W.2d 598 (S.D. 1986) adopted the philosophy underlying Judge Hand's pithy comment. The Court observed:

Statutes should be given a sensible, practical and workable construction, and to such end, the manifest intent of legislature will prevail over literal meaning of words. Consequently, it is a familiar rule of construction that the word 'and' is sometimes construed as a disjunctive such as 'or.' Courts will construe disjunctive words as conjunctive, and vise versa, and will disregard technical rules of grammar and punctuation, when necessary to arrive at the intent of the legislative body. While words 'or' and 'and' are not to be treated as interchangeable, ... their strict meaning is more readily departed from than that of other words and one read in the place of the other in deference to the meaning of the context of a statute. In order to effectuate the intention of the legislature, the word "and" in a statute is sometimes construed to mean "or."

The laxity in the use of the conjunctive 'and' and the disjunctive 'or' is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature. We find that reading the amendment in the conjunctive leads to an absurd and unreasonable conclusion. We therefore read the word "and" at the start of the 1984 amendment to be interpreted as "or" and as thus interpreted, we find the ambiguity in the statute to be cleared up.

395 N.W2d at 600 (Citations and quotations omitted.)

Courts have long recognized this dichotomy described by the South Dakota Supreme Court. In 1866, the United States Supreme Court stated that a

statutory use of the word "and" could express the ordinary, conjunctive meaning but could also signify the disjunctive "or": "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and' and again 'and' as meaning 'or" *United States v. Fisk*, 70 U.S. 445, 447 (1866). The Supreme Court continued by noting that "[a]s is often the case in statutes, though the intention is clear, the words used to express it may by ill chosen" Id.

The South Dakota Supreme Court's observation about the laxity in the use of the conjunctive "and" and the disjunctive "or" is consistent with correct grammatical interpretation of the SDCL § 9-3-1. The statute contains a double negative, and the correct grammatical interpretation is that the two negative terms cancel each other and translate into an affirmative. See Oxford Dictionaries, <a href="http://www.oxforddictionaries.com/us/word/double-negatives">http://www.oxforddictionaries.com/us/word/double-negatives</a> (last visited April 28, 2016.)

SDCL § 9-3-1 requires that a proposed municipality have both one hundred (100) residents and thirty (30) qualified voters. The Board apparently read the word "or" and concluded that only one of the two predicate requirements be met. SDCL § 9-3-1 contains a double negative meaning that two things must occur before there may be an incorporation of a municipality. The first requirement is that the propose municipality must contain no less than one hundred (100) legal residents. The second requirement is that the municipality contains no less than thirty voters.

The need to satisfy both requirements of SDCL § 9-3-1 is supported by SDCL § 9-3-3, which requires an accurate Census of the resident population of the proposed municipality, documentation of each person residing in the proposed municipality and documentation of the number of persons belonging to each family within the proposed area. Such a Census and documentation would be unnecessary if an applicant need not satisfy the one hundred legal resident requirement of SDCL § 9-3-1. The requirements for municipal incorporation need to be interpreted by considering the entire statutory scheme of SDCL ch. 9-3.

Moreover, during the last session the South Dakota legislature adopted HB 1119 which clarified the possible ambiguity in SDCL § 9-3-1. HB 1119 provides that SDCL § 9-3-1 be amended to read:

9-3-1. No municipality may be incorporated that contains less than one hundred legal residents and at least forty-five registered voters. For the purposes of this section, a person is a legal resident in the incorporating municipality if the person actually lives in the incorporating municipality for at least ninety days each year or is an active duty member of the armed forces whose home of record is with the incorporating municipality.

#### NOTICE

In this case three notice provisions apply to an attempt to incorporate a municipality. The first, more specific provision is found in SDCL § 9-3-4 which provides "[s]uch survey, map, and Census when completed and verified shall be

left at some convenient place within such territory for a period of not less than thirty days for examination by those having an interest in such application.<sup>1</sup>"

The second statute is SDCL § 1-25-1.1 which requires that part "[a]ll public bodies shall provide public notice, with proposed agenda, that is visible, readable, and accessible for at least an entire, continuous twenty-four hours immediately preceding any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting. The proposed agenda shall include the date, time, and location of the meeting."

The Amended Petition, Census, Corrected Survey and Map were given to a Board employee after 5:00 PM on February 26, 2015. The Board met at 10:30 AM on February 27, 2015, and therefore failed to provide the notice required by SDCL § 1-25-1.1 for the Amended Petition, and Corrected survey.

Moreover, the Campground cannot show that the documents delivered to an unknown employee at 5:10 pm of February 26, 2015 met the 30 day notice requirement found in SDCL § 9-3-5. The initial Petition (or, if one prefers, application) was filed with the Meade County Auditor on February 11, 2015, only 16 days before the hearing on February 27, 2015. The purpose of such notice is to allow "for examination by those having an interest in such application."

SDCL § 9-3-5 provides that the "application for incorporation shall be by a petition \* \* \*." Thus, it appears that the legislature intended the terms application and petition be considered as synonymous.

Third, Appellants submit that all county residents have an interest in the subject. One needs to look no further than the Meade County Comprehensive Plan for evidence of the county-wide interest in planning and development.

The comprehensive plan is developed through a process of public input and discussion to ensure that the document reflects the desires of the community and garners broad public support. The comprehensive plan is in effect once adopted by the local governing body of the municipality, in this case the Meade County Commissioners, after at least one public hearing. Once adopted, the plan should be used to guide the government's general approach and particular policies to be considered by elected officials, appointed boards, and staff in future decision-making. Meade County particularly intends the plan to be a unifying force that will cultivate cooperation between the County and the municipalities and the public within.

(Ex. 45, p. 3.)

The recognized interest of residents throughout the County in any modification of the County Comprehensive Plan is protected by the special election requirement of SDCL § 11--2-28.

To be effective such notice must necessarily come prior to the Board of County Commissioners decision whether to enter an order to set the matter for election. See § SDCL 9-3-5. After the commission has entered an order setting the matter for election, only those who actually live in the proposed territory to be incorporated have a voice in the decision.

#### MINIMUM VOTING RESIDENTS

All of the Petitions filed by the Applicant demonstrate that the proposed municipality contains less than one hundred legal residents and therefore fails to meet the statutory requirements for municipal incorporation.

The South Dakota Supreme Court looked at the issue of resident voter registration in *Heinemeyer v. Heartland Consumer's Power Dist.*, 2008 SD 110, 757 N.W.2d 772. The Court noted that SDCL § 12-4-1 provides "that every person who is qualified to register as a voter in South Dakota 'shall be entitled to register in the voting precinct in which he resides." The Court stated that SDCL § 12-1-4 provides that residence means "the place in which a person has fixed his or her habitation." The Court further noted that SDCL § 12-1-4 provides "a person is considered to have gained a residence in any county or municipality of this state in which the person actually lives."

The Court held that a voting residence is the place where a person "has fixed his or her habitation" and that "a person gains voting residence in the place in which he or she actually lives." *Heinemeyer*, 2008 SD 110 ¶ 12.

The following facts were significant in the Court's decision:

- 1. Heinemeyer was living at 927 Jenifer St., Madison, SD when he took out a petition to rule for office. *Id.* at ¶ 14.
- 2. "Since this was the only residence that Heinemeyer kept at the time, this was in fact his voting residence." *Id*.
- 3. On November 1, 2006, Heinemeyer gave up possession of his Madison, SD home and moved to the new home he built in Wentworth, SD. *Id.*
- 4. On November 1, 2006, Heinemeyer ceased to actually live in his Madison, SD home. *Id*.
- 5. Heinemeyer gained voting residence at his Wentworth home on November 1, 2006, because he began actually living there. *Id.*
- 6. On November 1, 2006, Heinemeyer, removed himself from District 10 in Madison and established his voting residence in Wentworth. *Id.*

On appeal Heinemeyer argued that he retained his voting residence in Madison by renting an apartment there. The South Dakota Supreme Court rejected that argument noting that one's declared intentions may be discounted when they conflict with the facts. The Court stated that to evaluate voting residence under the guise of where a voter wants his voting residence to be ignores the clear statutory language of SDCL § 12-1-4. The question is not where a voter intends his voting residence to be, but whether the voter has any present intention of leaving the home where the voter actually lives.

Heinemeyer, 2008 SD 110, ¶ 16.

Heinemeyer controls the result in this appeal. That one may register to vote based on where they intend to live some time in the future may and should be discounted when it conflicts with the present facts. There were not 100 persons actually residing in the area proposed for incorporation, nor were there 30 legally registered voters living in the proposed area at the time the Amended Petitions were signed.

Heinemeyer cited a South Dakota Attorney General's Opinion in support of its conclusion:

That an individual who has a place of business, within the corporate limits of a municipality, and which place of business has a one-room apartment, may not be permitted to register and vote as though the individual was a resident of that municipality when, in fact, the individual has an ordinarily recognized place or residence outside the corporate limits of said municipality.

1984 S.D.Atty.Gen.Rep. 19. Here each of the voters had a recognized place of residence outside of the area proposed for incorporation.

#### **CONCLUSIONS OF LAW**

- A. The Court has jurisdiction over the parties and subject matter of this action.
- B. Gary Lippold is a person aggrieved by the Board's action and has standing to appeal from the Board's decision.
- C. As a municipal corporation, Sturgis is a person aggrieved by the Board's action and has standing to appeal from the Board's decision.
- D. The Board has no legal authority to accept or act on an Amended Petition for incorporation of a municipality.
- E. The Amended Petition was not properly filed with the Meade County Auditor.
- F. The area to be incorporated contained less than one hundred (100) legal residents and contained less than thirty (30) legally registered voters. (SDCL § 9-3-1.)
- G. The Amended Petition was signed by less than twenty-five percent of the qualified voters as required by SDCL § 9-3-5.
- H. The area to be incorporated is at a distance less than three miles from any point on the perimeter of the corporate limits of the City of Sturgis, an incorporated municipality. (SDCL § 9-3-2.)
- I. Petitioner provided legally inadequate notice of the Amended
  Petitions for the Municipal Incorporation of Buffalo Chip, SD and supporting
  documents before the February 27, 2015 meeting date.

- J. The Board did not provide legal adequate notice of its intent to consider the Amended Petition for Municipal Incorporation at its Special Meeting on February 27, 2015.
- K. The Board gave no consideration of the Meade County

  Comprehensive Plan in making its decision.
- L. The Census was inaccurate, contained false information and failed to comply with the requirements of SDCL ch. 9-3.
- M. The Amended Petition was inaccurate, contained false information and failed to comply with the requirement of SCCL ch. 9-3.
- N. The Board's action was taken without the required relevant and competent evidence necessary to support it.

Dated this 8/2, 2016

BY THE COURT:

46 CIV 15-94

Findings of Fact and Conclusions of Law Page 30

Hon. Jerome A. Eckrich Circuit Court Judge

Clerk of Courts



FILED

AUG 24 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA )	IN CIRCUIT COURT
COUNTY OF MEADE )	FOURTH JUDICIAL CIRCUIT
GARY LIPPOLD AND JANE ) MURPHY, )	46 CIV. 15-94
and )	
THE CITY OF STURGIS, a South Dakota Municipal Corporation,	
Appellants,	
vs.	
MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH,	JUDGEMENT
Appellees,	
and )	TIT
BUFFALO CHIP CAMPGROUND, LLC,	AUG 2 4 2016  SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT
Applicant/Intervener	SOUTH CIRCUIT COM

This matter came before the undersigned for a court trial on May 11, 2016. Appellants Gary Lippold and Jane Murphy (Lippold) appeared by Mark F. Marshall, Appellant City of Sturgis (Sturgis) appeared by its City Attorney Greg Barnier, the Meade County Board of Commissioners, Alan Aker, Bob Bertolotto,

> 46 CIV 15-94 Judgment Page 1

Applicant/Intervener.

Robert Heidgerken, Galen Neiderwerder and Linda Rausch (Board or Commission) appeared by Jack H. Heib and the Buffalo Chip Campground, LLC, (Campground) appeared by Kent Hagg and John S. Dorsey.

On May 20, 2016, the Court filed its Memorandum Decision. On June 24, 2016 the Court entered its Finding of Fact and Conclusions of Law. Based on the Memorandum Decision, Findings of Fact and Conclusions of Law, it is hereby

**ORDERED, ADJUDED AND DECREED** that the Board's decision in approving the Amended Petition and setting the matter for public vote is a legal nullity; and it is further

**ORDERED, ADJUDED AND DECREED** that all actions or any kind or character undertaken by the Town of Buffalo Chip, SD are void ab initio.

Dated this

2016.

BY THE COURT:

Hon. Jerome A. Eskrich Circuit Court Judge

Clerk of Courts

46 CIV 15-94 Judgment Page 2



AUG 2 4 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT : SS. FOURTH JUDICIAL CIRCUIT COUNTY MEADE) GARY LIPPOLD and JANE MURPHY, File 46CIV15-94 Appellants, -vs-MEADE COUNTY BOARD OF COMMIS-APPELLEE'S STATEMENT OF SIONERS, ALAN AKER, BOB BERTOLOTTO, \* UNDISPUTED MATERIAL FACTS ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH, Appellees, -vs-BUFFALO CHIP CAMPGROUND, LLC Intervenor Applicant. CITY OF STURGIS, Appellant, -vs-MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, \* MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA, Appellees, -vs-BUFFALO CHIP CAMPGROUND, LLC,

1

Intervenor Applicant.

Pursuant to SDCL 15-6-56(c), Appellee Meade County

Commission submits this statement of undisputed material facts<sup>1</sup>

in support of its motion for partial summary judgment:

- 1. On February 20, 2015, Buffalo Chip Campground, LLC, submitted an Application and Petition for Municipal Incorporation of Buffalo Chip to the Meade County Auditor. (Woodruff Aff.  $\P 2$ )
- 2. On February 25, 2015, the Meade County Commission held a meeting at which time the Petition for Municipal Incorporation was heard, and it was discovered that the map accompanying the Petition did not match the surveyor's written legal description of the area to be incorporated. (Woodruff Aff.  $\P4-5$ )
- 3. On February 27, 2015, Buffalo Chip submitted an Amended Petition for Municipal Incorporation of Buffalo Chip to Meade County, and the Meade County Commission voted to approve the Amended Petition. (Woodruff Aff.  $\P6-7$ )
- 4. At the time the Meade County Commission approved the Amended Petition for Municipal Incorporation of Buffalo Chip, an election date was set for May 7, 2015 for eligible voters to

¹The Affidavit of Rod Woodruff, signed on April 20, 2015, will be referred to in this statement as "Woodruff Aff." followed by the corresponding paragraph. The Affidavit of Lisa Schieffer will be referred to in this statement as "Schieffer Aff." followed by the corresponding paragraph or exhibit.

determine if Buffalo Chip should become incorporated as a municipality. (Woodruff  $\P 8$ )

- 5. One of the challenges raised by appellants in this matter concerns the residence of those who signed the Petitions for the Municipal Incorporation of Buffalo Chip, South Dakota, and were eligible to vote in the May 7, 2015 election. (City of Sturgis' Notice of Appeal of Decision by the Meade County Commission to Approve a Petition for Municipal Incorporation, ¶3; Schieffer Aff. ¶8, Ex. B)
- 6. In early February 2015, the Meade County Auditor received a number of Voter Registration Forms from individuals residing at various lots at 20603 132<sup>nd</sup> Avenue, Sturgis, South Dakota, otherwise known as the Buffalo Chip Campground (Schieffer Aff. ¶5, Ex. A)
- 7. In signing the Voter Registration Form, each prospective Buffalo Chip voter declared, under penalty of perjury, that the following is true:
  - I am a citizen of the United States of America:
  - I actually live at and have no present intention of leaving the above address;
  - I will be 18 on or before the next election;
  - I have not been judged mentally incompetent;
  - I am not currently serving a sentence for a felony conviction; and
  - I authorize cancellation of my previous registration, if applicable.

(Schieffer Aff. Ex. A)

- 8. The Meade County Auditor's office processed the Buffalo Chip Voter Registration Forms in the same manner as any others that it receives by transmitting the data to the State of South Dakota using the TotalVote™ Program. (Schieffer Aff. ¶6)
- 9. The Meade County Auditor's office received no notifications from the State concerning the Buffalo Chip Voter Registration Forms. (Id.)
- 10. To the best of the Meade County Auditor's knowledge, the State did not reject any of the Buffalo Chip Voter Registration Forms. (Id.)
- The Meade County Auditor does not customarily investigate the residency of Meade County voters and relies upon the prospective voters to truthfully complete the Voter Registration Form. (Schieffer Aff. ¶10)
- The South Dakota Secretary of State's office advised the Meade County Auditor that she had no duty to investigate the residence of the prospective Buffalo Chip voters and should rely upon the Voter Registration Forms that were submitted. (Schieffer Aff. ¶11)
- 13. Buffalo Chip was not yet a "municipality" at the time of the May 7, 2015 election. (Schieffer Aff. ¶9, Ex. C)

14. Appellants have not filed statutory challenges to any of the Buffalo Chip voters' qualifications as residents using the procedure set forth in SDCL 12-18-10.

Dated this 24th day of August, 2015.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

Bv

Attorneys for Appellee

One Court Street
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No. 605-225-6310

STATE OF SOUTH DAKOTA )	IN CIRCUIT COURT
COUNTY OF MEADE ) SS	FOURTH JUDICIAL CIRCUIT
GARY LIPPOLD AND JANE MURPHY,	) 46 CIV 15-94 )
and	
<b>THE CITY OF STURGIS,</b> a South Dakota Municipal Corporation,	
Appellants,	
vs.	
MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH,	APPELLANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS  ) )
Appellees,	
and	
BUFFALO CHIP CAMPGROUND, LLC,	
Applicant/Intervener.	)

Appellants submit the following State of Undisputed Material Fact in support of their Motion for Summary Judgment. In this document SR designates the Settled Record as proposed by the Appellants.

1. Edward Aurand is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)

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- 2. Edward Aruand apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 3. Edward Aurand did not actually reside at his claimed residence. (SR 94.)
- 4. James Balalich is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 5. James Balalich apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 6. James Balalich did not actually reside at his claimed residence. (SR 95.)
- 7. Thomas Blawn is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 8. Thomas Blawn apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 9. Thomas Blawn did not actually reside at his claimed residence. (SR 95.)

- 10. Brenda Brown is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 11. Brenda Brown signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18.)
- 12. Brenda Brown did not actually reside at her claimed residence. (SR 92.)
- 13. Madeline Campbell is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 14. Madeline Campbell signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 17.)
- 15. Madeline Campbell did not actually reside at her claimed residence. (SR 92.)
- 16. Bradford Coombs is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 17. Bradford Coombs apparently did not sign the Petition or the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.

- 18. Bradford Coombs did not actually reside at his claimed residence.(SR 95.)
- 19. Dawn Daughters is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 20. Dawn Daughters did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 21. Dawn Daughters did not actually reside at her claimed residence. (SR 95.)
- 22. Patrick Flanigan is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 23. Patrick Flanigan apparently did not sign the Petition or the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 24. Patrick Flanigan did not actually reside at his claimed residence. (SR 95.)
- 25. Travis Floyd is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 26. Travis Floyd signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 73.)

- 27. Travis Floyd did not actually reside at his claimed residence. (SR96.)
- 28. James Griffith is listed twice as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 29. James Griffith apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 30. James Griffith did not actually reside at his claimed residence. (SR 96.)
- 31. Michael Griffith is listed twice as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 7.)
- 32. Michael Griffith signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 74.)
- 33. Michael Griffith did not actually reside at his claimed residence. (SR 97.)
- 34. Frederick Gille is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 35. Frederick Gille signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 19.)

- 36. Frederick Gille did not actually reside at his claimed residence. (SR 96.)
- 37. Nyla Griffith is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 38. Nyla Griffith signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 17.)
- 39. Nyla Griffith did not actually reside at her claimed residence. (SR 94.)
- 40. Lauren Hagg is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 41. Lauren Hagg signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 21.)
- 42. Lauren Hagg did not actually reside at her claimed residence. (SR 94.)
- 43. Angela Hubert is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 44. Angela Hubert signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 77.)

- 45. Angela Hubert did not actually reside at her claimed residence. (SR 97.)
- 46. Jeffery Ice is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 47. Jeffery Ice apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
  - 48. Jeffery Ice did not actually reside at his claimed residence. (SR 97.)
- 49. Taylor Jacobs is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 50. Taylor Jacobs apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 51. Taylor Jacobs did not actually reside at his claimed residence. (SR 97.)
- 52. David Kezar is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 53. David Kezar signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 17.)

- 54. David Kezar did not actually reside at his claimed residence. (SR 93.)
- 55. Michael Kilmer is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 56. Michael Kilmer signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 23.)
- 57. Michael Kilmer did not actually reside at his claimed residence. (SR 92.)
- 58. Bonita London is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 9.)
- 59. Bonita Landon signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 67.)
- 60. Bonita Landon did not actually reside at her claimed residence. (SR 98.)
- 61. Laura London is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 62. Laura London apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.

- 63. Laura London did not actually reside at her claimed residence. (SR 98.)
- 64. Melanie Mason is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 65. Melanie Mason signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 19.)
- 66. Melissa Mason is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 67. Melissa Mason signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 71.)
- 68. Melissa Mason did not actually reside at her claimed residence. (SR 98.)
- 69. Paul Mitchell is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11)
- 70. Paul Mitchell signed the Petition and Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18; 23.)
- 71. Candace Owen is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)

- 72. Candace Owen signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 75.)
- 73. Candace Owen did not actually reside at her claimed residence. (SR 92.)
- 74. David Owen is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11)
- 75. David Owen signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18.)
- 76. David Owen did not actually reside at his claimed residence. (SR 91.)
- 77. Zachary Perry is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 78. Zachary Perry apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 79. Zachary Perry did not actually reside at his claimed residence. (SR 98.)
- 80. Michael Powers is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)

- 81. Michael Powers apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 82. Michael Powers did not actually reside at his claimed residence. (SR 99.)
- 83. James Rieigliano is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 84. James Rieigliano apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 85. James Rieigliano did not actually reside at his claimed residence. (SR 99.)
- 86. Russell Franklin is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 87. Russell Franklin apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 88. Russell Franklin did not actually reside at his claimed residence. (SR 96.)

- 89. Greg Smith is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 11.)
- 90. Greg Smith signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18.)
- 91. Jeffery Smith is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 92. Jeffery Smith signed the Petition and Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 23; 17.)
- 93. Jeffery Smith did not actually reside at his claimed residence. (SR 99.)
- 94. Brian Thompson is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 95. Brian Thompson signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18.)
- 96. Brian Thompson did not actually reside at his claimed residence. (SR 99.)

- 97. Callie Tysdale is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 98. Cosmo Varriano is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 99. Cosmos Varriano apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 100. Cosmos Varriano did not actually reside at his claimed residence. (SR 100.)
- 101. James Walczak is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota, (SR 13.) and signed the same representing himself to be a "resident voter in the area proposed to be incorporated into the City of Buffalo Chip, SD. (SR 7-11.)
- 102. James Walczak signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 75.)
- 103. James Walczak did not actually reside at his claimed residence. (SR 100.)
- 104. Sandra Walczak is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 105. Sandra Walczak signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land

owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18.)

- 106. Sandra Walczak did not actually reside at her claimed residence. (SR 93.)
- 107. Jon Wik is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 108. Jon Wik signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 69.)
  - 109. Jon Wik did not actually reside at his claimed residence. (SR 100.)
- 110. Joyce Wik is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 111. Joyce Wik signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 69.()
- 112. Joyce Wik did not actually reside at her claimed residence. (SR 100.)
- 113. Carol Woodruff is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 114. Carol Woodruff signed the Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 18.)

- 115. Carol Woodruff did not actually reside at her claimed residence. (SR 93.)
- 116. Daymon Woodruff is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 117. Daymon Woodruff apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 118. Daymon Woodruff did not actually reside at his claimed residence. (SR 100.)
- 119. Andrea Johnson is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 13.)
- 120. Andrea Johnson signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 69.)
- 121. Andrea Johnson did not actually reside at her claimed residence. (SR 97.)
- 122. James Johnson is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 15.)
- 123. James Johnson signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 69.)

- 124. James Johnson did not actually reside at his claimed residence. (SR 97.)
- 125. Leighann Dunn is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 15.)
- 126. Leighann Dunn apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 127. Leighann Dunn did not actually reside at her claimed residence. (SR 95.)
- 128. Ross Grant is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 15.)
- 129. Ross Grant signed the Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein. (SR 74.)
- 130. Ross Grant did not actually reside at his claimed residence. (SR 96.)
- 131. Symphony M. Tidwell is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 15.)
- 132. Symphony M. Tidwell apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.

- 133. Symphony M. Tidwell did not actually reside at her claimed residence. (SR 99.)
- 134. Roger D. Templeton is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 15.)
- 135. Roger D. Templeton apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 136. Roger D. Templeton did not actually reside at his claimed residence. (SR 99.)
- 137. Randall J. McKnight is listed as a "resident voter" on the Census of the Proposed City of Buffalo Chip, South Dakota. (SR 15.)
- 138. Randall J. McKnight apparently did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD, representing to be a "resident[] and or land owner in the proposed Buffalo Chip Municipality" and claiming a residence therein.
- 139. Randall J. McKnight did not actually reside at his claimed residence. (SR 98.)
- 140. The Census of the Proposed City of Buffalo Chip, South Dakota, identifies 50 "resident voters in the proposed territory shown on the Attached Exhibit A proposed to be included in the City of Buffalo Chip, South Dakota. As of the 20<sup>th</sup> day of February, 2015." (SR 29-36.)

- 141. Michael Griffith and James Griffith are identified twice. (SR 29 & 31.)
- 142. Forty-Six (46) of the Forty-Eight (48) resident voters did not actually reside at their claimed residences.

Dated this 28th day of August, 2015

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

By: \_\_/s/ Mark F. Marshall

Mark F. Marshall

Attorney for Appellants

333 West Boulevard, Suite 400

P.O. Box 2670

Rapid City, SD 57709-2670

(605) 343-1040

## CERTIFICATE OF SERVICE

The undersigned certifies that on August 28, 2015, he caused a true and correct copy of the above to be served upon the person identified below as follows:

[ ] First Class Mail[ ] Overnight Mail[ ] Hand Delivery[ ] Facsimile[ ] Electronic Mail[X] ECF System

Jack Hieb Richardson, Wyly, Wise, Sauck, & Hieb, LLP P.O. Box 1030 Aberdeen, SD 57402-1030

Kent Hagg Whiting, Hagg, Hagg, Dorsey & Hagg P.O. Box 8008 Rapid City, SD 57709-8008

> Greg Barnier 1040 2<sup>nd</sup> Street Sturgis, SD 57785

> > /s/ Mark F. Marshall
> > MARK F. MARSHALL

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT : SS. COUNTY OF MEADE) FOURTH JUDICIAL CIRCUIT GARY LIPPOLD and JANE MURPHY, File 46CIV15-94 Appellants, -vg-MEADE COUNTY BOARD OF COMMIS-SIONERS, ALAN AKER, BOB BERTOLOTTO, \* APPELLEES' RESPONSE TO ROBERT HEIDGERKEN, GALEN APPELLANTS' STATEMENT OF NEIDERWERDER, AND LINDA RAUSCH, UNDISPUTED FACTS Appellees, -vs-BUFFALO CHIP CAMPGROUND, LLC Intervenor Applicant. CITY OF STURGIS, Appellant, -vs-MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, \* MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA, Appellees, -VS-BUFFALO CHIP CAMPGROUND, LLC, Intervenor Applicant.

1

Pursuant to SDCL 15-6-56(c), the Meade County Appellees ("County") respond to the Appellants' Statement of Undisputed Facts, as follows:

- Paragraphs 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 66, 69, 71, 74, 77, 80, 83, 86, 89, 92, 94, 97, 98, 101, 104, 107, 110, 113, 116, 119, 122, 125, 128, 131, 134, 137, 140, 141 are undisputed. These paragraphs all concern the persons identified on the Census of the Proposed City of Buffalo Chip, South Dakota.
- 2. As to paragraphs 2, 5, 8, 17, 20, 23, 29, 47, 50, 62, 78, 81, 84, 87, 99, 117, 126, 132, 135, and 138, it is undisputed that the listed individuals did not sign the Petition or Amended Petition for the Municipal Incorporation of Buffalo Chip, South Dakota. These facts are not material.
- 3. As to paragraphs 26, 32, 35, 38, 41, 44, 53, 56, 59, 65, 67, 70, 72, 75, 90, 92, 95, 102, 105, 108, 111, 114, 120, 123, and 129, it is undisputed that the listed individuals signed the Petition and/or Amended Petition.
- 4. The County objects to paragraphs 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 68, 73, 76, 79, 82, 85, 88, 93, 96, 100, 103, 106, 109, 112, 115, 118, 121, 124, 127, 130, 133, 136, 139, and 142,

stating that the various voters "did not actually reside at [their] claimed residence[s]," for the following reasons:

- dency of the Buffalo Chip voters. The Appellants' challenge to the residency of the various voters is not appropriately before the Court in the context of this appeal under SDCL 7-8-27.

  Therefore, these paragraphs are immaterial. The Brief in Support of Appellee's Motion for Partial Summary Judgment and Appellee's Statement of Undisputed Material Facts are incorporated by this reference.
- b. These paragraphs rely upon the legal conclusions of Daniel Aron Ainslie concerning what constitutes a "residential structure or residence that meets the requirements of SDCL 12-1-4 as a place of habitation. . . " The requirements of SDCL 12-1-4 if they are reached in this appeal involve a question of law to be decided by the Court, not Mr. Ainslie.

<sup>&</sup>lt;sup>1</sup> The paragraphs that follow are offered only in the alternative, as the County maintains that an examination of the residence of each voter goes beyond the Court's appellate jurisdiction.

- Facts appear to be directly controverted by the Appellant's other undisputed facts within the same document. Appellants assert that the persons who were identified in the Census and signed the Petitions claimed to be residents of the proposed Buffalo Chip Municipality. Those facts are not disputed. Appellants then contend, in each of these paragraphs, that these persons do not actually reside at their claimed residences. Putting those facts side-by-side demonstrates that there is a factual dispute over whether the individuals are actually residents.
- d. Other facts in the record also conflict with the assertion that the Buffalo Chip voters were not residents of the proposed municipality. In early February 2015, the Meade County Auditor received a number of Voter Registration Forms from individuals residing at various lots at 20603 132<sup>nd</sup> Avenue, Sturgis, South Dakota, otherwise known as the Buffalo Chip Campground (Schieffer Aff. ¶5, Ex. A) In signing the Voter Registration Form, each prospective Buffalo Chip voter declared, under penalty of perjury, inter alia,

that they "actually live at and have no present intention of leaving the above address . . ." (Schieffer Aff. Ex. A) Dated this 3<sup>rd</sup> day of September, 2015.

> RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

ttorneys for Meade County Appellees

One Court Street Post Office Box 1030 Aberdeen, SD 57402-1030 Telephone No. 605-225-6310 STATE OF SOUTH DAKOTA

COUNTY OF MEADE

GARY LIPPOLD and JANE MURPHY,

Appellants,

-VS-

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDERGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH,

Appellees,

-VS-

BUFFALO CHIP CAMPGROUND, LLC

Intervenor Applicant

APPELLANT'S
STATEMENT OF
DISPUTED MATERIAL FACTS

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CIV. 15-000094

CITY OF STURGIS.

Appellant,

-vs-

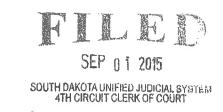
MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

Appellees,

-vs-

BUFFALO CHP CAMPGROUND, LLC

Intervenor Applicant



- 1. Appellants do not dispute Appellee's Statement of Undisputed Material Fact #1.
- 2. Appellants do not dispute Appellee's Statement of Undisputed Material Fact #2.

- 3. Appellants do not dispute Appellees Statement of Undisputed Material Fact #3 only in that at the meeting on February 27, 2015 the County Commission discussed a document described as an "amended petition". Appellants dispute said statement of Appellees to the degree it asserts that the County Commission had jurisdiction to consider such a document for the reason that an amended petition is not authorized by SDCL 9-5-5, for the reason that Appellees admitted to the County Commission that it was not filed with the Office of County Auditor (Transcript February 27th meeting, page 3), and for the reason that the Deputy Meade County State's Attorney gave his legal opinion that the County Auditor had no authority to accept the amended petition (Transcript of 27th meeting, page 49).
- 4. Appellants dispute Appellees Statement of Undisputed Material Fact #4 that the County Commission approved the "amended" petition for the reasons set forth in Appellants Statement #3 herein, and for the further reason that at the February 27th meeting the County Commission voted 3-2 to deny the initial motion to accept the "amended" petition (Transcript February 27th meeting, page 101).
- 5. Appellants do not dispute that portion of Appellees Statement of Undisputed Material Fact #5 that this appeal concerns residence as stated in the Petition, but assert further the trial de novo will also include a challenge to statements of residence contained in the Census documents.
- 6. Appellant's do not dispute that a portion of Appellee's Statement of Undisputed Material Fact #6, that in early February 2015 the County Auditor received a number of Voter Registration forms purporting to show voter residences at 20603 132nd Avenue, Sturgis, South Dakota, but do dispute that the forms referred to in Appellees Statement of Undisputed Material Fact #6 truthfully reflected voter habitation residence as required by SDCL 12-1-4.
- 7. Appellants do not dispute that a portion of Appellee's Statement of Undisputed Material Fact #7 stating that the standard registration forms referred to in Statement #6 above contained the text of the six statements listed in Appellee's Statement of Undisputed Matter Fact Statement 7.

- 8. Appellant's dispute Appellee's Statement of Undisputed Material Fact #8 in that without Discovery or witness testimony at a trial de novo, Appellants are without knowledge to admit or deny the manner in which the Office of Meade County Auditor processed the disputed registration forms, and to what the degree that processing was similar to or inconsistent with the processing of other voter registration forms.
- 9. Appellants dispute Appellee's Statement of Undisputed Material Fact #9 in that during the County Commission meeting on February 27th the County Auditor stated that a letter had been sent to the Secretary of State for clarification but no answer had been received (Transcript February 27th meeting, page 55). Furthermore, Appellants dispute Appellee's Statement of Undisputed Material Fact #9 in that without Discovery or direct witness testimony at a trial de novo, Appellants are without knowledge to admit or deny the manner in Secretary of State responded to the letter from the Meade County Auditor.
- 10. Appellants dispute Appellee's Statement of Undisputed Material Fact #10 in that without Discovery or witness testimony at a trial de novo, Appellants are without knowledge to admit or deny the manner in which the Secretary of State responded to the letter seeking clarification submitted by the Meade County Auditor (Transcript February 27th meeting, page 55).
- 11. Appellants do not dispute Appellee's Statement of Undisputed Material Fact #11 regarding the customary practice by the Office of Meade County Auditor in reviewing voter registration forms submitted for non-municipal incorporation elections.
- 12. Appellants dispute Appellee's Statement of Undisputed Material Fact #12 in that SDCL 9-3-3, SDCL 12-1-13 and SDCL 7-10-5 impose an obligation on the County Auditor to review the truthfulness of voter registration documents when submitted as part of the petition process for municipal incorporation election. Furthermore, without Discovery or direct witness testimony at a trial de novo, Appellants are without knowledge to admit or denythe manner in which the Office of

Meade County Auditor was instructed by the Secretary of State as to its duties regarding a petition for a municipal incorporation election.

- 13. Appellants do not dispute Appellee's Statement of Undisputed Material Fact #13.
- 14. Appellants do not dispute Appellee's Statement of Undisputed Material Fact #14.

Dated this day of September, 2015.

Greg Barnier Sturgis City Attorney Attorney for Appellant 1040 Harley Davidson Way, Sturgis, SD 57785

> FILED SEP 0 1 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
COUNTY OF MEADE	)SS.	FOURTH JUDICIAL CIRCUIT
GARY LIPPOLD AND JANE MURPHY Appellants,	;	Civ. File No. 15-000094 )
MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKE BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH Appellees and BUFFALO CHIP CAMPGROUN LLC, Intervener/Appellee	<b>A</b>	) ) ) ) ) ) ) ) ) ) ) INTERVENER BUFFALO CHIP ) CAMPGROUND, LLC'S RESPONSE TO APPELLANTS GARY LIPPOLD AND JANE MURPHY'S STATEMENT OF UNDISPUTED MATERIAL FACTS
CITY OF STURGIS Appellant, vs.  MEADE COUNTY COMMISSION MR. ALAN AKER, CHAIR; MS LINDA RAUSCH, VICE CHAIR GALEN NEIDERWERDER, MR ROBERT BERTOLOTTO and MR ROBERT HEIDGERKEN, all in Official capacities as MEMBERS THE BOARD OF COMMISSION OF MEADE COUNTY, SOUTH DAKOTA, Appellees,	i; MR. IR. their OF NERS	
and  BUFFALO CHIP CAMPGROUN  LLC  Intervener/Appellee.	ND,	) ) ) )

APPENDIX pg. 75 Filed: 9/3/2015 5:01:11 PM CST Meade County, South Dakota 46CIV15-000094

COMES NOW Intervener, Buffalo Chip Campground, LLC, by and through its attorney Kent R. Hagg, and submits the following response to Appellants' Statement of Undisputed Material Facts submitted by Appellants Gary Lippold and Jane Murphy.

- 1. Intervener does not dispute the material facts addressed in paragraphs 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 66, 69, 71, 74, 77, 80, 83, 86, 89, 91, 94, 97, 98, 101, 104, 107, 110, 113, 116, 119, 122, 125, 128, 131, 134, and 137 related to the individuals named and listed as resident voters on the Census of the Proposed City of Buffalo Chip, South Dakota.
- 2. Intervener does not dispute the material facts addressed in paragraphs 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 67, 70, 72, 75, 78, 81, 84, 87, 90, 92, 95, 99, 102, 105, 108, 111, 114, 117, 120, 123, 126, 129, 132, 135, and 138 related to the named individuals either signing or not signing the Petition and/or Amended Petition for the Municipal Incorporation of Buffalo Chip, SD.
- 3. Intervener does not dispute the material fact addressed in paragraph 140.
- 4. Intervener does not dispute the material facts addressed in paragraph 141.
- 5. Intervener does dispute the material facts addressed in paragraphs 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 68, 73, 76, 79, 82, 85, 88, 93, 96, 100, 103, 106, 109, 112, 115, 118, 121, 124, 127, 130, 133, 136, and 139 related to the named individuals not residing at the claimed residences.
- 6. Intervener does dispute the material fact addressed in paragraph 142 that forty-six of the forty-eight resident voters did not actually reside at their claimed residences.

Filed: 9/3/2015 5:01:11 PM CST Meade County, South Dakota

Dated this 3 day of September, 2015.

WHITING HAGG HAGG DORSEY & HAGG, LLC

Kent R. Hagg

Attorneys for Intervener

P.O. Box 8008

Rapid City, SD 57709

(605) 348-1125

APPENDIX pg. 77 Filed: 9/3/2015 5:01:11 PM CST Meade County, South Dakota 46CIV15-000094

STATE OF SOUTH DAKOTA

COUNTY OF MEADE

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CITY OF STURGIS, A South Dakota Municipal Corporation,

CIV. 15-

Appellant

VS.

MEADE COUNTY COMMISSION,
Mr. Alan Aker, Chair; Ms. Linda
Rausch, Vice Chair; Mr. Galen
Niederwerder, Mr. Robert Bertolotto
and Mr. Robert Heidgerken, all in their
official capacities as MEMBERS OF THE
BOARD OF COMMISSIONERS OF MEADE
COUNTY, SOUTH DAKOTA

MEADE COUNTY COMMISSION to approve a PETITION for MUNICIPAL INCORPORATION

NOTICE OF APPEAL OF DECISION by the

MEADE COUNTY, SD FILED

MAR 3 1 2015

LISA SHIEFFER I

Appellee/Defendants

Appellant City of Sturgis, by its counsel of record, hereby submits to this Court its Appeal of a decision by the Meade County Commission on February 27, 2015, as shown by the minutes of that Commission meeting published on March 11, 2015, to approve the Petition for Municipal Incorporation of the Town of Buffalo Chip. This appeal is based upon the statutory procedure as set forth at SDCL 7-8-27, and on the grounds the Meade County Commission was without legal basis to approve the petition for incorporation, to-wit:

- That at the time the Meade County Commission considered the petition for municipal incorporation, the City Limits of the City of Sturgis were less than three miles distant from the area of proposed municipal incorporation; therefore municipal incorporation was prohibited by SDCL 9-3-1.1.
- That at the time the Meade County Commission considered the petition for municipal incorporation, the City Limits of the City of Sturgis at the Sturgis Municipal Airport were less than three miles distant from the area of proposed incorporation; therefore municipal incorporation was prohibited by SDCL 9-3-1.1 and SDCL 9-4-12.
- 3. That at the time the Meade County Commission considered the petition for municipal incorporation, five of the six petitioners present who addressed the Commission at that meeting stated that they did not then live at or have their habitation at the area of proposed municipal incorporation, in violation of SDCL 12-

1-4 and SDCL 9-3-6.

- 4. That at the time the Meade County Commission considered the petition for municipal incorporation, the area of proposed municipal incorporation was subject to the requirements of the Meade County Comprehensive Plan, and without approval by the Meade County Planning Commission any vote to approve the petition for municipal incorporation was in violation of SDCL 11-2-24, as well as other provisions of Chapter 11-2 of the South Dakota Code.
- 5. That at the time the Meade County Commission considered the petition for municipal incorporation, the adopted Policies in the Meade County Comprehensive Plan prohibited non-agricultural commercial or residential development in that portion of Meade County proposed for municipal incorporation.
- 6. That at the time the Meade County Commission considered the petition for municipal incorporation at the meeting on February 27, the Commission was advised by the Meade County Deputy State's Attorney that petitioner's had no legal basis to amend or correct the petition dated February 20th and filed that date with the Meade County Auditor.
- 7. That at the time of the meeting on February 27, the Meade County Commission considered the petition for municipal incorporation dated February 20th and filed that date with the Meade County Auditor, and the Commission voted to deny petitioner's request to amend and correct that petition.
- 8. That at the time of the meeting on February 27, when for a second time the Meade County Commission considered the petition for municipal incorporation, the Commission acted in violation of SDCL 7-8-17 and SDCL 7-8-18 when it attempted a second vote to on petitioner's request to amend and correct the petition dated February 20th.
- 9. That at the time of the meeting on February 27, when for a second time the Meade County Commission considered the petition for municipal incorporation, the Commission acted in violation of SDCL 7-8-17 and SDCL 7-8-18 when it attempted a vote to approve the "amended version" of the petition for municipal incorporation dated February 20th.

Dated this 3/2 day of March, 2015.

MEADE COUNTY, SD FILED

MAR 3 1 2015

LISA SHIEFFER COUNTY AUDITOR

Greg Barnier
Sturgia City Attorney
Attorney for Appellant
1040 2nd Street,
Sturgis, SD 57785

STATE OF SOUTH DAKOTA	)		IN CIRCUIT COURT	
COUNTY OF MEADE	) SS )	FOU	RTH JUDICIAL CIRCUIT	•
GARY LIPPOLD AND JANE MURPHY,		) 46	Civ. No. 15- <u>9</u>	
Appellants,		)		
vs.		į		
MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKT BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LIND RAUSCH,	er, r	) N ) ) ) )	OTICE OF APPEAL	£
Appellees.		)		

To: The Meade County Board of Commissioners and Allan Aker, Bob Bertolotto, Robert Heidegerken, Galen Neiderwerder, and Linda Rausch:

On March 27 Appellants Gary Lippold and Jane Murphy, as well as Meade County taxpayers Robert Sundeen, Larry Barnett, Annie Barnett, Steve Barry, Rod Baumberger, Sharon Baumberger, Betty Bourk, John Bourk, Mary Brandner, Joel Brandner, Loren Charnholm, Aida Charnholm, Mike Charnholm, Aaryn Charnholm, Colleen Cooley, Regina Cooper, Janice Cronin, Cheryl Cross, Burt Cross, Cheryl Delzer, Glen Delzer, Garland Dobler, Ward Dobler, Vance Gilles, Randall Hengl, Holly Hengl, Corey Johnson, Randa Johnson, Rod Johnson, Diane Johnson, Mike Kayras, Coleen Kayras, Kurt Keffler, Kamette Keffler, Mark Kehn, Rodney Lamont, Joyce Lamont, Dale Lamphere, Mark Larive, Tanya Larive, Dana Legner, Cathi Legner, Harold Matz,

Kim Matz, David Moller, Bob Packer, Michael Parsons, Sandra Parsons, Floyd Peters, Toby Peters, Blake Thomas, Kellie Thomas, Tim Udager and Amy Udager demanded that the Meade County State's Attorney appeal the County Commissioner's decision to grant the Amended Petition for Municipal Incorporation of Buffalo Chip. A copy of the Demand is attached as Exhibit A.

By a letter dated March 30, 2015, a copy of which is attached as Exhibit B, the Meade County State's Attorney refused to filed the appeal. Therefore, You and each of you take notice hereby that the above named Appellants hereby appeal the Meade County Commission's decision of Friday, February 27, 2015, to grant the Amended Petition for Municipal Incorporation of Buffalo Chip to the Circuit Court for Fourth Judicial Circuit, County of Meade, State of South Dakota pursuant to SDCL §§ 7-8-27 and 7-8-29. The Minute of said meeting were published March 11, 2015.

Dated this 31st of March, 2015

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

By:

Mark F. Marshall
Attorney for Appellants

333 West Boulevard, Suite 400

P.O. Box 2670

Rapid City, SD 57709-2670

(605) 343-1040

us skall

## CERTIFICATE OF SERVICE

The undersigned certifies that on March 31, 2015, he caused a true and correct copy of the above to be served upon the person identified below as follows:

[X] First Class Mail [ ]
[ ] Hand Delivery [ ]
[ ] Electronic Mail [ ]

Overnight Mail
Facsimile
ECF System

Galen Neiderwerder 22100 Ricky Road New Underwood, SD 57761

Linda Rausch
15362 Canyon Trail

Piedmont, SD 57769

Bob Bertolotto 1316 Pine View Dirve Sturgis, SD 57785

Alan Aker 14347 Mahaffey Drive Piedmont, SD 57769

Robert Heidgerken 22371 West Nike Road Rapid City, SD 57701

> Notice of Appeal Page 3

prokall



Reply to Rapid City Office

Writer's e-mail address: mmarshall@bangsmccullen.com

March 27, 2015

Via email: kkrull@meadecounty.org and U.S. Mail

Kevin J. Krull Meade County States Attorney 1426 Sherman St. Sturgis, SD 57785

Re: Petition for Appeal re Incorporation of Buffalo Chip

Dear Mr. Krull,

As a lawyer and an officer of the court I represent to you that the following individuals are residents of Meade County and county taxpayers: Larry Barnett, Annie Barnett, Steve Barry, Rod Baumberger, Sharon Baumberger, Betty Bourk, John Bourk, Mary Brandner, Joel Brandner, Loren Charnholm, Aida Charnholm, Mike Charnholm, Aaryn Charnholm, Colleen Cooley, Regina Cooper, Janice Cronin, Cheryl Cross, Burt Cross, Cheryl Delzer, Glen Delzer, Garland Dobler, Ward Dobler, Vance Gilles, Randall Hengl, Holly Hengl, Corey Johnson, Randa Johnson, Rod Johnson, Diane Johnson, Mike Kayras, Coleen Kayras, Kurt Keffler, Kamette Keffler, Mark Kehn, Rodney Lamont, Joyce Lamont, Dale Lamphere, Mark Larive, Tanya Larive, Dana Legner, Cathi Legner, Gary Lippold, Harold Matz, Kim Matz, David Moller, Jane Murphy, Bob Packer, Michael Parsons, Sandra Parsons, Floyd Peters, Toby Peters, Robert Sundeen, Blake Thomas, Kellie Thomas, Tim Udager and Amy Udager.

These persons have retained this office to demand, pursuant to SDCL § 7-8-28, that you appeal the order of the Meade County Commission to incorporate the municipality of Buffalo Chip.

As you are aware Lisa Schieffer, the Meade County Auditor/Election Officer, concluded that the census was not appropriate, but was advised by the South Dakota Secretary of State that no challenge to the validity of the information contained in the census was available. Ms. Schieffer's concerns

Kevin J. Krull March 27, 2015 Page 2

were validated when a number of those who had signed the petition admitted to the County Commission that they failed to meet the necessary criteria for residency under SDCL § 12-1-4.

As you are also aware the County Commission granted an amended Petition, contrary to the advice of Deputy State's Attorney Kenneth Chleborad. I have not found any statute that permits a petitioner to submit an amended petition under these circumstances. Thus, it seems the amended petition was not properly before the County Commission.

It only seems reasonable that a new petition must be filed and properly noticed in order to comply with not only the spirit of the law but the letter of law as well. The need for a new, rather than an amended petition is all the more apparent where the Petitioners seek to circumvent an event such as the annexation of property that took place between the date of the initial petition and the amendment.

It appears to me that the power of the County Commission to consider and approve a petition for a new municipality is one that was unknown under the common law. As such the legal authority to create a new municipality is a grant of power and not a limitation on a power. The point of this observation is to suggest that the Commission must strictly follow the statutes that create the Commission's legal authority to incorporate a municipality and not simply make things up as they go.

I believe the Commissioners' decision to grant the amended petition is fraught with procedural and factual error. Given the apparent errors, the advice of those charged with the duty to advise the Commission on the issue, and the importance of the issue to the lawful and orderly development of Meade County, my clients respectfully demand that you appeal the decision of the Meade County Commission to grant the amended petition.

Thank you for your kind attention to the taxpayers' concerns.

Sincerely,

BANGS, McCULLEN, BUTLER,

FOYE & SIMMONS, L.L.P.

cc: Jane C. Murphy via email: jcmurphy@wildblue.net and U.S. Mail Gary Lippold

00005



## **OFFICE OF THE STATE'S ATTORNEY**

MEADE COUNTY, SOUTH DAKOTA

KEN CHLEBORAD
CHIEF DEPUTY STATE'S ATTORNEY

KASEY SORENSON
DEPUTY STATE'S ATTORNEY

MICHELE BORDEWYK
DEPUTY STATE'S ATTORNEY

### KEVIN KRULL, STATE'S ATTORNEY

1425 Sherman Street Sturgis, South Dakota 57785 Tel. (605)-347-4491 Fax (605)-347-6815

March 30, 2015

MAR 3 1 2015

Mark Marshall Bangs, McCullen Law Firm PO Box 2670 Rapid City, SD 57709

RE: Incorporation of Buffalo Chip

And via e-mail: mmarshall@bangsmccullen.com

Dear Mr. Marshall:

I have received your letter of March 27, 2015, regarding a request to appeal the decision of the Meade County Commissioners to set an election date for the incorporation of Buffalo Chip, SD. This office declines to do so.

First, I want to clarify a few statements in your correspondence. You request this office to "appeal the order of the Meade County Commission to incorporate the municipality of Buffalo Chip." The Commissioners have no authority, and did not, order the incorporation. Rather, they were satisfied that the submissions through attorney Kent Hagg met the requirements of statute, Chapter 9-3, and set an election date. At that time, the qualified voters will determine if the incorporation shall occur.

You state the Meade County Auditor "concluded that the census was not appropriate." I do not believe this is an accurate statement. Ms. Schieffer conferred with the Secretary of State's office who advised that the Auditor, and the Commissioners, had no authority to question the validity of the sworn statements of registered voters. While the Commissioners spoke to several registered voters, this was not intended to, and did not, invalidate any statements of those individuals.

The authority for this office to appeal an action of the Commissioners is discretionary and may be taken "if he deems it to the interest of the county to so do." SDCL 7-8-28. I do not feel it in the interest of the county to appeal this action. If your clients, collectively or individually, are "person[s] aggrieved" by the actions on the Commissioners they may have appeal rights to exercise under statute and we would encourage them to pursue such rights, should they deem it appropriate.

Thank you for your inquiry.



Sincerely,

Kevin J. Krull

Meade County State's Attorney

CC: Meade County Commissioners

# FILED

MAR 3 1 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

Current through all legislation from the 2016 Regular Session of the 91st Legislative Assembly and Supreme Court Rule 16-67.

<u>LexisNexis® South Dakota Codified Laws Annotated</u> > <u>Title 9 Municipal Government</u> > <u>Chapter 9-3</u> <u>Incorporation of Municipalities</u>

### 9-3-1. Minimum population required.

A municipality may not be incorporated unless it contains as least one hundred legal residents and at least forty-five registered voters. For the purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition or is an active duty member of the armed forces whose home of record is within the proposed municipality.

### History

SDC 1939, § 45.0302; 2016, ch 48, § 1, eff. July 1, 2016.

### Annotations

#### **Notes**

#### **Amendment Notes**

The 2016 amendments to this section by ch. 48 rewrote the section, which formerly read: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters."

### **Opinion Notes**

#### **Opinions of Attorney General**

- 1. Do municipalities incorporated under <u>SDCL 9-3-22</u> have the same legal rights and powers as other towns and municipalities except as otherwise provided by law?, Official Opinion No. 76-40, <u>1976 S.D. AG LEXIS 39</u>; 1975-1976 Op. Atty Gen. S.D. 549.
- 2. Approval of plats pursuant to <u>SDCL 11-3-6</u>, Official Opinion No. 76-48, <u>1976 S.D. AG LEXIS 47</u>; 1975-1976 Op. Atty Gen. S.D. 565.

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### 9-3-1.1. Minimum distance from incorporated municipality — Exceptions.

A municipality may not be incorporated if any part of such proposed municipality lies within three miles of any point on the perimeter of the corporate limits of any incorporated municipality, unless the incorporated municipality refuses or fails to annex a territory which is contiguous to said incorporated municipality, and said contiguous territory has properly petitioned said municipality to be annexed thereto, as provided by § 9-4-1. However, a proposed municipality may be incorporated that is within three miles of an incorporated municipality if the territory to be incorporated is in a different county and has a post office prior to incorporation.

### History

SL 1971, ch 54; 1987, ch 74; 2016, ch 48, § 2, eff. July 1, 2016,

#### **Annotations**

#### **Notes**

#### **Amendment Notes**

The 2016 amendments to this section by ch. 48 substituted "A municipality may not" for "No municipality may" at the beginning of the first sentence; and added "proposed" in the second sentence.

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### 9-3-2. Survey and map required.

Persons making application for the organization of a proposed municipality shall first cause an accurate survey and map to be made of the territory intended to be embraced within the limits of the proposed municipality showing the boundaries and area thereof and the accuracy of which shall be verified by the affidavit of the surveyor.

### History

SDC 1939, § 45.0301; 2016, ch 48, § 3, eff. July 1, 2016.

#### **Annotations**

#### **Notes**

#### **Amendment Notes**

The 2016 amendments to this section by ch. 48 substituted "organization of a proposed municipality" for "organization of a municipality" and "the proposed municipality" for "such municipality."

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### 9-3-3. Census required — Information to be included.

Any person making application for the organization of a proposed municipality shall cause an accurate census to be taken of the landowners and the legal resident population of the proposed municipality not more than thirty days previous to the time of presenting the application to the board of county commissioners. The census shall exhibit the name of each landowner and legal resident residing in the proposed municipality and the number of persons belonging to each family as of a certain date. The census shall be verified by the affidavit of the person taking the census.

### History

SDC 1939, § 45.0302; <u>SL 1999, ch 37,</u> § 1; <u>2016, ch 48,</u> § 4, eff. July 1, 2016.

#### **Annotations**

#### **Notes**

#### **Amendment Notes**

The 2016 amendments to this section by ch. 48, in the first sentence, added "proposed" following "organization of a" and "legal" preceding "resident"; and substituted "legal resident residing" for "person residing" in the second sentence.

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### 9-3-4. Survey, map and census to be posted.

Such survey, map, and census when completed and verified shall be left at some convenient place within the proposed municipality for a period of not less than thirty days for examination by those having an interest in such application.

### History

SDC 1939, § 45.0303; 2016, ch 48, § 5, eff. July 1, 2016,

#### Annotations

#### **Notes**

#### **Amendment Notes**

The 2016 amendments to this section by ch. 48 substituted "the proposed municipality" for "such territory."

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### 9-3-5. Petition by voters as application — Required application information.

The application for incorporation of a proposed municipality shall be by a petition verified by the circulator and signed by not less than twenty-five percent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state. The application shall identify the type of government to be formed, the number of trustees, commissioners, or wards in the proposed municipality, the boundaries and area according to the survey, and the legal resident population according to the census taken. The application shall be presented at the time indicated in the notice of the application or as soon thereafter as the board of county commissioners can receive and consider the application.

### History

SDC 1939, § 45.0304; SL 1987, ch 67, § 20; 1999, ch 37, § 2; 2016, ch 48, § 6, eff. July 1, 2016.

#### **Annotations**

#### Notes

#### **Amendment Notes**

The 2016 amendments to this section by ch. 48 added "of a proposed municipality" in the first sentence; and in the second sentence, added "proposed" preceding "municipality" and "legal" preceding "resident."

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### 9-3-6. Board of county commissioners to order election.

If the board, after proof by affidavit or oral examination of witnesses, is satisfied that the requirements of this chapter have been fully complied with, the board shall make an order declaring that the proposed municipality shall, with the assent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state, be an incorporated municipality by the name specified in the application. The name shall be different from that of any other municipality in this state. The board shall also include in the order a date for an election to be conducted pursuant to Title 12.

### History

SDC 1939, § 45.0305; <u>SL 1999, ch 37,</u> § 3.

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### 9-3-12. Commissioners to order incorporation.

If satisfied of the legality of such election, the board of county commissioners shall make an order declaring that such municipality has been incorporated by the name adopted. Such order shall be conclusive of the fact of such incorporation in all suits by or against such municipality.

### History

SDC 1939, § 45.0310.

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### 9-3-20. Regularity of acting municipality questioned only by state.

The regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the state.

### History

SDC 1939, § 45.0111.

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### 9-4-11. Map of change to be recorded with resolution or decree.

Whenever the limits of any municipality are changed by a resolution of the governing body or by a decree of court it shall be the duty of the mayor or the president of the board of trustees to cause an accurate map of such territory, together with a copy of the resolution or decree duly certified, to be recorded in the office of the register of deeds of the county or counties in which such territory is situated, and thereupon such territory shall become and be a part of such municipality or be excluded therefrom as the case may be.

### History

SDC 1939, § 45.2908; SL 1955, ch 215, § 2,

#### **Annotations**

#### **Case Notes**

#### Real Property Law: Limited Use Rights: Easements: General Overview

1. Although the city submitted a map of the territory, it did not submit a plat of the territory to be annexed; consequently, when the subdivision was annexed, the section line easement was still in existence because the court had to refer to the 1978 and 1979 plat which did not vacate the section line easement. Wildwood Ass'n v. Harley F. Taylor, Inc., 2003 SD 98, 668 N.W.2d 296, 2003 S.D. LEXIS 125 (S.D. 2003).

### **Opinion Notes**

#### **Opinions of Attorney General**

- 1. Effect of Big Sioux Township annexation on status of township officers residing in annexed areas, OFFICIAL OPINION No. 78-1, 1978 S.D. AG LEXIS 51; 1978 Op. Atty Gen. S.D. 262.
- **2.** Recording of unplatted areas within boundaries of a municipality, Official Opinion No. 74-47, <u>1974 S.D. AG LEXIS 20</u>; 1975-1976 Op. Atty Gen. S.D. 48.

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STATE OF SOUTH DAKOTA

**COUNTY OF MEADE** 

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CITY OF STURGIS, A South Dakota Municipal Corporation, CIV. 15-000096

Appellant

VS.

MEADE COUNTY COMMISSION, Mr. Alan Aker, Chair; Ms. Linda Rausch, Vice Chair; Mr. Galen Niederwerder, Mr. Robert Bertolotto and Mr. Robert Heidgerken, all in their official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA MOTION TO SET HEARING regarding MOTION TO STAY ELECTION

### Appellee/Defendants

Comes now Appellant City of Sturgis and hereby move this court to set a time for the hearing on Appellants' Motion to Stay Election regarding Municipal Incorporation.

Appellant is authorized to state that parties Lippold and Murphy join in this motion as well. Appellant has provided the court with a copy of that motion and further states that the relief sought is to allow the appeal now pending before this court to provide a real and meaningful review of the action taken by the County Commission. Appellant relies upon the authority of SDCL 15-6-6(d) to request that the Court set a time for hearing that Motion to Stay Election on or before May 6, 2015 for the following reasons:

- 1. That SDCL 7-8-27 provides for an appeal of a decision of the county commission to the Circuit Court.
- 2. That SDCL 7-8-27 requires that a bond of \$250.00 be filed to perfect the appeal, and Appellant has filed that bond.

- 3. That SDCL 7-8-30 requires that after filing, the proceedings are to be scheduled on the normal calendar, for a trial de novo to the Circuit Court.
- 4. That the transcript of the February 27<sup>th</sup> County Commission meeting was filed with the Clerk of Circuit Court on April 27<sup>th</sup>, 2015.
- 5. That a copy of the transcript was received by counsel on April, 28, 2015.
- 6. SDCL 7-8-31 requires the Circuit Court to make final Judgment and cause it to be executed, or in the alternative send the matter back to the County Commission with an order how to proceed, and require such board to comply therewith.
- 7. That the notes from February 27 meeting show the County Commission directed election to be conducted May 7, 2015.
- 8. These laws clearly intend a Stay to be in effect upon filing the Notice of Appeal to allow the Circuit Court to rule on an issue that has not been made moot by subsequent action of the County Commission or another person.
- 9. That SDCL 15-26A-38 provides that an appeal to the Supreme Court by the state, a county, a municipality, school district or state board, serving and filing the notice of appeal prefects the appeal and also stays the performance of the order appealed from.
- 10. That for a party to entitled to an automatic stay of an order under SDCL15-26A-38 to receive meaningful judicial review by the Circuit Court at the trial de novo, a stay pending the trial de novo is both fair to both parties and consistent with these statutes.

11. That without a stay of the order of the County Commission directing the election, the parties to the action are denied any meaningful judicial review of the County Commission approval of the petition to incorporate.

Dated this 29 day of April, 2015.

Greg Barnior

Sturgis City Attorney Attorney for Appellant 1040 2nd Street,

Sturgis, SD 57785

STATE OF SOUTH DAKOTA

COUNTY OF MEADE

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CIV. 15-00.0096

CITY OF STURGIS, A South Dakota Municipal Corporation,

Appellant

VS.

MEADE COUNTY COMMISSION,
Mr. Alan Aker, Chair; Ms. Linda
Rausch, Vice Chair; Mr. Galen
Niederwerder, Mr. Robert Bertolotto
and Mr. Robert Heidgerken, all in their
official capacities as MEMBERS OF THE
BOARD OF COMMISSIONERS OF MEADE
COUNTY, SOUTH DAKOTA

AFFIDAVIT OF GREG BARNIER IN SUPPORT OF MOTION TO SET HEARING

### Appellee/Defendants

Greg Barnier, being duly sworn upon his oath, deposes and states:

- 1. That I am the attorney of record for Appellant in the above-entitled action;
- 2. That I hereby certify that this Motion to Set Hearing is required to without notice to other parties to enable all parties to the action to participate in and receive meaningful judicial review by a Circuit Court of the County Commission order setting May 7, 2015 as the time for an election on the municipal incorporation of the Buffalo Chip campground.
- 3. That Appellant will make no objection to other counsel participating in the hearing on the Motion to Stay Election by electronic means.
- 4. That the family obligations following the death of affiant's mother in Minneapolis on the night of April 16, 2015 is the primary cause affiant was not able to serve this motion with a ten day notice.

5. That this Motion to Set Hearing is submitted upon good cause and not to unfairly delay these proceedings or the pending election.

Dated this I day of April, 2015.

Sturgis City Attorney

Subscribed and sworn to before me this 29 day of April, 2015.

(SEAL)

My Commission Expires May 22, 2020

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT : SS. FOURTH JUDICIAL CIRCUIT COUNTY OF MEADE) CITY OF STURGIS, A South File 46CIV15-96 Dakota Municipal Corporation, \* Appellant, -vs-MEADE COUNTY COMMISSION, Mr. Alan Aker, Chair; Ms. Linda Rausch, Vice Chair; Mr. Galen \* Niederweder, Mr. Robert Bertolotto and Mr. Robert APPELLEES' RESPONSE TO Heidgerken, all in their APPELLANT'S MOTION TO SET official capacities As HEARING REGARDING MOTION TO MEMBERS OF THE BOARD OF STAY ELECTION COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA, Appellees/Defendants, BUFFALO CHIP CAMPGROUND, LLC, \*

Appellees/Defendants, Meade County Commission, Alan Aker, Linda Rausch, Galen Niederweder, Robert Bertolotto and Robert Heidgerken (collectively "County"), respectfully submit this response in opposition to Appellant City of Sturgis' Motion to Set Hearing Regarding Motion to Stay Election. This response is supported by the Affidavit of Zachary W. Peterson ("Peterson Aff.").

SDCL 15-6-6(d) provides:

Applicant for Intervention.

A written motion, other than one which may be heard ex parte and notice of the hearing thereof or an order to

show cause shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit or brief, the affidavit or brief shall be served with the motion and, except as otherwise provided in § 15-6-59(b), opposing affidavits or briefs may be served not later than five days before the hearing, unless the court permits them to be served at some other time. A reply brief or affidavit may be served by the movant not later than two days before the hearing, unless the court permits them to be served at some other time.

#### (Emphasis added.)

Appellant City of Sturgis ("City") acknowledges in its appeal documents that the County made its decision concerning the Amended Petition for Municipal Incorporation of Buffalo Chip ("Amended Petition") on February 27, 2015. At the time the County approved the Amended Petition, an election date was set for May 7, 2015, at which time eligible voters would determine if Buffalo Chip should become incorporated as a municipality. In both the Motion to Stay Election and the Motion to Set Hearing, the City acknowledges "[t] hat the notes from February 27 meeting show the County Commission directed election to be conducted May 7, 2015." (See Motion to Stay, ¶8; Motion to Set Hearing, ¶7) Both the City and the appellants in File 46CIV15-94 filed their notices of appeal on or about March 31, 2015.

In spite of being fully aware of the date of the election since either late February or some time in March, neither appellant served a Motion to Stay until today - April 30,

2015. The motion was apparently filed on April 29, 2015, without serving counsel of record. See Peterson Aff. ¶2, Ex. A. It was emailed to the County's attorneys at 12:53 o'clock P.M. (Mountain Time) Id. The County is sympathetic to Attorney Barnier's loss. However, to assure the availability of counsel and the Court for a hearing prior to the election, the motion to stay could have been made contemporaneously with or shortly after filing the Notice of Appeal. Also, the appellants from File 46CIV15-94 are apparently joining in the motion. See Peterson Aff. ¶3, Ex. B. The County is aware of no reason that they could not have moved for this relief in a timely fashion.

SDCL 15-6-6(a) provides that "[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Excluding today, the date of service, and the intervening Saturday and Sunday, plaintiff's Motion was served four days before the proposed hearing on May 6, 2015. Setting aside counsel's scheduling conflicts on May 6, 2015, the short time frame does not allow sufficient time to fully brief this issue. See Peterson Aff. ¶4-5. In point of fact, if a hearing is to be held on May 6, 2015, the undersigned received the motion and supporting materials after the normal deadline for submitting a response under SDCL 15-6-6(d).

For these reasons, the County submits that the Motion to Stay is untimely, and respectfully asks that the Court decline to set a hearing to address it.

Dated this 30th day of April, 2015.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

Attorneys for Appellees/ Defendants

One Court Street
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No. 605-225-6310

#### CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for appellees/defendants, hereby certifies that on the 30<sup>th</sup> day of April, 2015, a true and correct copy of APPELLEES' RESPONSE TO APPELLANT'S MOTION TO SET HEARING REGARDING MOTION TO STAY ELECTION was served electronically through the Odyssey file and serve system on:

(kent.hagg@amatteroflaw.com)
Mr. Kent R. Hagg
Whiting, Hagg, Hagg, Dorsey
 & Hagg, LLP
Attorneys at Law

(mmarshall@bangsmccullen.com)
Mr. Mark F. Marshall
Bangs, McCullen, Butler, Foye
 & Simmons, LLP
Attorneys at Law

(GBarnier@sturgisgov.com) Mr. Gregory J. Barnier Sturgis City Attorney 1040 - 2<sup>nd</sup> Street Sturgis, SD 57785

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STATE OF SOUTH DAKOTA

COUNTY OF MEADE

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CITY OF STURGIS, A South Dakota Municipal Corporation, CIV. 15-000096

**Appellant** 

VS.

MEADE COUNTY COMMISSION, Mr. Alan Aker, Chair; Ms. Linda Rausch, Vice Chair; Mr. Galen Niederwerder, Mr. Robert Bertolotto and Mr. Robert Heidgerken, all in the ORDER SETTING HEARING regarding MOTION TO STAY ELECTION

Niederwerder, Mr. Robert Bertolotto

and Mr. Robert Heidgerken, all in their
official capacities as MEMBERS OF THE

BOARD OF COMMISSIONERS OF MEADE M. Hieb with my Barney present

COUNTY, SOUTH DAKOTA

Appellee/Defendants

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Could indicated to Mr. council char

Appellee/Defendants

Could provide amplific relief to the

Could provide amplification of Appellant, and under the

authority of SDCL 15-6-6(d), the Court having considered the Affidavit in Support of Motion to set Hearing as well as the Appellee's Response and the Affidavit of Zachary Peterson, the Court having further considered the court file herein, it is hereby:

ORDERED that the hearing on the Motion to Stay Election regarding Municipal

Incorporation shall be scheduled for hearing on the \_\_\_\_\_ day of May at \_\_\_\_\_a.m./p.m.

Dated this \_\_\_\_ day of May, 2015.

denied.

Honorable Jerome A. Ecknich Judge of Circuit Court

Fourth Judicial Circuit

Attest:

5/1/15

APR 2 9 2015
UTH DAKOTA UNIFIED JUDICIAL SYSTE
4TH CIRCUIT CLERK OF COURT

APPENDIX pg. 108

### CIRCUIT COURT OF SOUTH DAKOTA

### FOURTH JUDICIAL CIRCUIT P O BOX 939 STURGIS, SD 57785-0939

Phone (605) 347-4413 - Fax (605) 347-3526

Judge Hon. Jerome A. Eckrich Court Reporter Michelle Swal

May 1, 2015

Mr. Jack Hieb One Court Street PO Box 1030 Aberdeen, SD 57402

Mr. Mark Marshall PO Box 2670 Rapid City, SD 57709

Mr. Greg Barnier 1040 Harley Davidson Way Sturgis, SD 57785

Re: City of Sturgis V- Meade County Commission, et al CIV 15-94

Dear Counsel,

Please find enclosed filings from May 1, 2015, presented by Attorney Greg Barnier with response from Judge Eckrich on the issue.

Yours very truly,

Denise Adams

Deputy Clerk of Courts

FILED

APR 2 9 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

APPENDIX pg. 109

00199

City of Riders

1040 Harley Davidson Way Sturgis, SD 57785 www.sturgis-sd.gov



City Attorney

Voice: (605) 347-4422 Fax: (605) 347-4861

May 1, 2015

The Honorable Jerome A. Eckrich Judge of Circuit Court P.O. Box 939, Sturgis, SD 57785 Hand Delivered

Re: City of Sturgis v,. Meade County Commission, et al CIV #15-000096 94

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APR 2 9 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

By		

Dear Judge Eckrich:

This letter is in response to the brief phone call we had yesterday morning regarding the City's Motion to Stay Election and Motion to Set Hearing, now pending in this case. You indicated then that you wanted me to talk with counsel to see if they would be available after 2:30 pm on May 6. You also indicated that at that time you did not see an opening on your calendar to set a hearing on the Motion to Stay on the 4<sup>th</sup> or 5<sup>th</sup>.

Following that conversation I contacted the offices of Mr. Hieb, Mr. Marshall and Mr. Hagg. When I was able to speak with Mr. Hieb later in the afternoon, he pointed out that he was not aware that either an order granting the Motion to Consolidate or an order granting the Motion to Intervene been signed. Accordingly, he asserted that in this case, #CIV15-000096, the parties before the court on the motions in regard to the Stay of Election are only the City and County Commission. I agree with him that the parties now before the court in this action are only the City and the County Commission. The proposed Order enclosed with this letter reflects that.

As to his ability to attend a hearing on the 6<sup>th</sup>, Mr. Hieb indicated he would be in depositions all day on May 6th. As to his availability on the 4<sup>th</sup> or 5<sup>th</sup>, he indicated he would prefer to speak directly with Court in a conference call. At the conclusion of the conversation he also indicated he would be submitting a written response to the City's pending motions.

The controlling statute provides as follows:

15-6-6(d). Time for motion--Affidavits--Briefs, A written motion, other than one which may

be heard ex parte and notice of the hearing thereof or an order to show cause shall be served not later ten days before the time specified for the hearing than, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit or brief, the affidavit or brief shall be served with the motion and, except as otherwise provided in § 15-6-59(b), opposing affidavits or briefs may be served not later than five days before the hearing, unless the court permits them to be served at some other time. A reply brief or affidavit may be served by the movant not later than two days before the hearing, unless the court permits them to be served. (Emphasis added)

Clearly the statute recognizes that the Court has inherent authority to order that notice be less than ten days. Appellee's reading of the statute would require 10 days notice prior to hearing for each of the two motions, meaning that service would have to have been accomplished on approximately April 9. The transcript, however, was not even available to the parties until filed on April 28<sup>th</sup>.

The Court has the authority to set a hearing on the Motion to Stay as requested. It must be asked: what harm is there going slow, ensuring that voting rights are protected, and conducting the election properly? It will appear to some that the rush to hold the election suggests there are flaws in the Commission's procedure that are being "papered over".

It is conceded that the County has incurred minimal costs to publish the Notice of Election and print a limited number of ballots. Beyond that, however, it is nearly impossible to envision any prejudice whatsoever to County Commission if the election is delayed a few weeks to ensure the integrity of the election process.

Thank you for your courtesy and consideration in this matter.

Respectfully submitted,

Greg Barnier,
Sturgis City Attorney

C: Mr. Zachery Peterson (zpeterson@rwwsh.com)

Mr. Jack Hieb (jhieb@rwwsh.com)

FILED

APR 2 9 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT Caron

APPENDIX pg. 111

# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

### Appellees,

-vs-

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

### Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

Appellee,

-vs-

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

### Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

### Appeal No. 27976

### APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

### THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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#### JURISDICTIONAL STATEMENT

Because of the similarities of their argument and authorities, Appellees agreed to submit a joint brief. Appellees have no objection to the Appellants' Jurisdictional Statement. Appellees suggest, however, that it is incongruous that Appellants, having filed a joint notice of appeal, would file separate briefs. If there were twenty appellants who filed a joint notice of appeal, would each of the twenty therefore be entitled to file a separate appellant's brief? The practical answer to that question seems to be "no".

That the County Commission and the Campground would file a joint notice of appeal and then submit separate appellants' briefs seems like an offer of a "twofer" from the bar at the Buffalo Chip. The only difference being that in the normal case of a "twofer" a person gets two beverages for the price of one, where here one filing fee bought twice the volume of briefing. In the interest of judicial economy, Appellees will address all issues raised by both Appellants in this brief.

#### STATEMENT OF THE LEGAL ISSUES

Dissatisfied with Appellants' Statement of the Issues,
Appellees restates the issues as follows:

# A. Did the Circuit Court have Jurisdiction to Entertain the Underlying Appeal?

The circuit court determined it had jurisdiction to entertain the appeal.

Heuther v. Bisson, et al., 2014 S.D. 93, 857 N.W.2d 854.

State v. Chavez, 2003 S.D. 98, 668 N.W.2d 89.

Springer v. Black, 94 SDO 668, 520 N.W.2d 77.

SDCL § 9-1-6.

# B. Was the Circuit Court's finding that the City of Sturgis had Standing to Appeal Clearly Erroneous?

The circuit concluded that the City of Sturgis had standing to appeal.

Heuther v. Bisson, et al., 2014 S.D. 93, 857 N.W.2d 854.

*Cable v. Union County Bd. of Comm'rs*, 2009 S.D. 59, 769 N.W.2d 817.

Zahn v. Musick, 2000 S.D. 26, 605 N.W.2d 823.

SDCL § 19-19-801(2).

# C. Was the Circuit Court's finding that Lippold had Standing to Appeal Clearly Erroneous?

The circuit court found Lippold had standing to appeal.

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

Heuther v. Bisson, et al., 2014 S.D. 93, 857 N.W.2d 854.

Knecht v. Weber, 2002, S.D. 21, 640 N.W.2d 491.

S.D.C.L. § 9-1-6.

# D. Was the Circuit Court's Findings that the Commission Failed to Establish the Factual Predicate Necessary to Submit the Matter of Incorporation to the Voters Clearly Erroneous?

The circuit court's findings that the commission failed to establish the factual predicate necessary to submit the matter of incorporation to the voters were not clearly erroneous.

Moser v. Moser, 422 N.W.2d 594 9 (S.D. 1988).

Matter of South Dakota Water Management Bd., 351 N.W.2d 119 (S.D. 1984).

Town of Dell Rapids v. Irving, 7 S.D. 310, 64 N.W. 149 (1895).

SDCL ch. 9-3.

# E. Notice of Review: Did the Circuit Court Err by Failing to Stay the Municipal Election?

The circuit court erred by failing to stay the municipal election.

Citibank v. S.D. Dep't Revenue, 2015 S.D. 67.

Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15.

SDCL § 15-26A-38.

SDCL § 2-14-2.1.

# F. Did the Circuit Err When It Concluded a Purported Municipality Formed in Disregard of Statutory Procedure and Factual Predicate was a Nullity?

The circuit court did not err when it concluded a purported municipality formed in disregard of statutory procedure and factual predicate was a nullity.

State v. Quinn, 2001 S.D. 25, 623 N.W.2d 36.

Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15.

SDCL § 15-26A-38.

#### STATEMENT OF THE CASE AND THE FACTS

On May 11, 2016, the circuit court, the Honorable

Jerome A. Eckrich, presiding, conducted a trial de novo of the

Meade County Commission's decision to submit the question of incorporation of the Town of Buffalo Chip to a public vote.

Judge Eckrich concluded Gary Lippold and the City of Sturgis had standing to challenge the Commission's findings as to the predicate facts on which the petitions were based. (FF 6, 10; CL B, C.)

Prior to the trial de novo, Buffalo Chip Campground,
L.L.C. moved to intervene in the case on April 20, 2015, and
the circuit court granted the motion on June 11, 2016. While
Lippold and the City of Sturgis did not contest the
Campground's motion to intervene (FF 12), the circuit court
made no finding on whether Campground had standing.

On December 23, 2015, the Campground moved to dismiss the appeal alleging SDCL § 9-3-20 deprived the court of subject matter jurisdiction. The circuit court denied the Campground's motion on March 28, 2016.

The Town of Buffalo Chip challenged the circuit court's decision as to subject matter jurisdiction by applying to this Court for a Writ of Prohibition against Judge Eckrich on

April 6, 2016. (Exhibit 59.) Curiously although counsel for the Campground is also the City Attorney for the putative Town of Buffalo Chip, the application for Writ of Prohibition was signed by the town's City Finance Officer, a lay person. (Exhibit 59, pps 3-5.)

The centerpiece of the City Finance Officer's argument was that:

The circuit court is without subject matter jurisdiction to proceed with the action because only the State may inquire into the regularity of an acting municipality and the State is not a party to the action. (SDCL § 9-3-20). The May 13, 2015 Order of the Meade County Commission is conclusive of the fact on incorporation. (SDCL § 9-3-12.)

(Ex. 59 pg. 4, ¶ 10.)

This Court entered an Order Denying Application for Writ of Prohibition on April 12, 2016. (Ex. 59 pg. 13.)

Following the trial de novo the circuit court made 103
Findings of Fact. Most, if not all, of the facts so found were
matters of undisputed historical fact. The circuit court then
concluded:

A. The Court has jurisdiction over the parties and subject matter of this action.

- B. Gary Lippold is a person aggrieved by the Board's action and has standing to appeal from the Board's decision.
- C. As a municipal corporation, Sturgis is a person aggrieved by the Board's action and has standing to appeal from the Board's decision.
- D. The Board has no legal authority to accept or act on an Amended Petition for incorporation of a municipality.
- E. The Amended Petition was not properly filed with the Meade County Auditor.
- F. The area to be incorporated contained less than one hundred (100) legal residents and contained less than thirty (30) legally registered voters. (SDCL § 9-3-1.)
- G. The Amended Petition was signed by less than twenty-five percent of the qualified voters as required by SDCL § 9-3-5.
- H. The area to be incorporated is at a distance less than three miles from any point on the perimeter of the corporate limits of the City of Sturgis, an incorporated municipality. (SDCL § 9-3-2.)
- I. Petitioner provided legally inadequate notice of the Amended Petitions for the Municipal Incorporation of Buffalo Chip, SD and supporting documents before the February 27, 2015 meeting date.
- J. The Board did not provide legal adequate notice of its intent to consider the Amended Petition for Municipal Incorporation at its Special Meeting on February 27, 2015.
- K. The Board gave no consideration of the Meade County Comprehensive Plan in making its decision.

- L. The Census was inaccurate, contained false information and failed to comply with the requirements of SDCL ch. 9-3.
- M. The Amended Petition was inaccurate, contained false information and failed to comply with the requirement of SCCL ch. 9-3.
- N. The Board's action was taken without the required relevant and competent evidence necessary to support it.

Based on its Findings of Fact and Conclusions of Law the circuit court entered judgment in which it was:

**ORDERED, ADJUDED AND DECREED** that the Board's decision in approving the Amended Petition and setting the matter for public vote is a legal nullity; and it is further

**ORDERED, ADJUDED AND DECREED** that all actions or any kind or character undertaken by the Town of Buffalo Chip, SD are void ab initio. This joint appeal followed.

#### PRELIMINARY MATTERS

#### A. Standard of Review.

This Court's often repeated standard of review for appeals from a county commission decision is set forth in *Coyote Flats L.L.C. v. Sanborn County Comm.*, 1999 S.D. 87, ¶7, 596 N.W.2d 347, 349. SDCL 7-8-30 provides an appeal from a decision of a county commission shall be heard and

determined by the circuit court de novo. ... "this standard means 'the circuit court should determine anew the question ... independent of the county commissioner's decision." As such:

When we review such actions of a board of county commissioners after an appeal to the circuit court, we apply the clearly erroneous standard to factual findings, but accord no deference to the legal conclusions of the circuit court.

Id., quoting Gregoire v. Iverson, 1996 S.D. 77, ¶14, 551N.W.2d 568, 570 (citing Tri-County Landfill Ass'n v. BruleCounty, 535 N.W.2d 760, 763 (S.D. 1995)).

It would be easy to accept the oft repeated authority on this Court's standard of review and move to a consideration of the merits of the appeal. However, to do so would give short shrift to this Court's role in county commission appeals.

In this case most, if not all of the issues involve mixed questions of law and fact. As this Court has stated "a mixed question of law and fact includes one in which 'the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether . . . the rule of law as applied to the established facts is or is not favorably satisfied."

Huether v. Bisson et al.,2014 S.D. 93, ¶ 14, 857 N.W.2d 854 quoting In re Dorsey & Whitney Trust Co., 2001 S.D. 35, ¶ 6, 623 N.W.2d 468, 471 (further citations omitted).

In determining the standard of review for a mixed question of law and fact, this Court considers the nature of the inquiry. *Huether*, 2014 S.D. 93, ¶ 14 citing *Stockwell v. Stockwell*, 790 N.W.2d 52, 59. As this Court stated in *Stockwell*:

If application of the rule of law to the facts requires an inquiry that is 'essentially factual' -- one that is founded 'on the application of the fact-finding tribunal's experience with the mainsprings of human conduct' -- the concerns of iudicial administration will favor the [circuit] court, and the [circuit] court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

Id., 2010 S.D. 79, ¶ 16 (quoting Darling v. W. River Masonry,Inc., 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366).

Thus, to the extent that the parties in this case ask the Court to examine the application of a legal doctrine to

established facts, it seems appropriate for the Court to review the application of the law under the de novo standard of review. See *id.*; *Hanson v. Vermillion Sch. Dist. No. 13-1*, 2007 S.D. 9, ¶ 24, 727 N.W.2d 459, 467.

Still contested issues of fact should be reviewed under the more deferential clearly erroneous standard. *Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 17, 736 N.W.2d 824, 831 (citing *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 9, 607 N.W.2d 22, 25).

Under this deferential standard of review, this Court will not overturn the trial court's factual findings unless it is "definitely and firmly convinced a mistake has been made." Gilmcher v. Supermall Venture, LLC v. Coleman Co., 2007 S.D. 98, ¶ 50, 739 N.W.2d 815 quoting Prairie Lakes Health Care Sys. Inc. v. Wookey, 1998 S.D. 99, ¶5, 583 N.W.2d 405, 410. Application of either standard to the circuit court's findings of fact "requires consideration of 'the entire record." State v. Aaberg, 2006 S.D. 58, ¶ 24, 718 N.W.2d 598.

It is also a function of the circuit court to draw inferences from the evidence presented to it. *State v. Chavez*, 2003 S.D.

98, ¶ 29, n. 9, 668 N.W.2d 89. Finally, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.*, quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985).

The standard of review with regard to the circuit court's conclusions of law is simply stated. This Court 'accords no deference to the legal conclusion of the circuit court' when the appeal involves a circuit court's review of a county board's decision." Conditional Use Permit Denied to Meier, 2002 S.D. 49, ¶ 6, quoting Tisdel, 2001 SD 149 at ¶5, 638 N.W.2d at 253 (quoting Coyote Flats, 1999 SD 87 at ¶7, 596 N.W.2d at 349).

#### B. <u>Proper Use of Authority Matters</u>.

Before addressing the substance of the issues on appeal, Lippold feels compelled to call the Court's attention to what he believes is the Campground's casual citation of legal authority.

At page 5 of the Campground's brief it states:

A review of whether a circuit court had standing to hear an appeal of a county commission's decision is a question of law, subject to a de novo standard of review. The Campground cites *Arnoldy v. Mahoney*, 2010 S.D. 89, 791 N.W.2d 645 in support of this proposition.

Awkwardly enough, the issue in *Arnoldy* did not involve whether a circuit court had standing to hear an appeal of a county commission's decision at all. Instead, the case concerned the validity of the purchase of assignments of judgments. *Id.*, 2010 S.D. 89, ¶ 2. The Campground's cavalier citation of authority should give this Court pause when considering any of the Campground's legal arguments.

#### C. Scope of a Subordinate Body's Authority.

A county is a creature of statute and has "only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *Tibbs v. Moody Cnty.*, 2014 S.D. 44, ¶ 25, 851 N.W.2d 208 quoting *State v. Quinn*, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, 38. "The policy of the law is to require of municipal corporations a reasonably strict observance of their powers." *Ericksen v. City of Sioux Falls*, 70 S.D. 40, 54, 14 N.W.2d 89 citing 1 McQuillin, Municipal Corporations, 2d Ed. Rev., § 368.

In other words, a county commission cannot simply make up a procedure contrary to state statute, regardless of how convenient it would be to do so; instead the county commissioners must follow the law as enacted by the legislature. While for the purposes of hand grenades and horseshoes, close may be good enough, the same cannot be said of county adherence to statutory procedures. The statutory process for establishing a new municipality is not merely precatory; it is obligatory. Strict compliance is required.

#### ARGUMENT IN SUPPORT OF MOTION TO DISMISS:

## THE CAMPGROUND LACKS STANDING AND ITS APPEAL SHOULD BE DISMISSED

The Court may have perused the Appellants' brief and wondered who the Campground is and why is it here? Those are good questions. The Campground did not file petitions for municipal incorporation. Nor did the Campground admit any control over who did the leg work to circulate and file the petitions.

Nevertheless there is some continuity between the Campground and the stillborn town of Buffalo Chip. Counsel

for the campground is city attorney for the nascent community and campground rules posted on the internet such as prohibiting minors, prohibit possession of alcohol purchase outside the campground and prohibiting entry into the putative community without buying a ticket seem to take the place of municipal ordinances. Still, it is difficult to see why the Campground was a party below and not the City of Buffalo Chip, or for that matter any person listed in the Census supposedly aggrieved by the Commission's decision.

"Jurisdictional issues can be raised at any time and determination of jurisdiction is appropriate." *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 38, 835 N.W.2d 886, quoting *State v. Anders*, 2009 S.D. 15, 763 N.W.2d at 549-50. A Court's cannot obtain jurisdiction by agreement, consent, wavier or estoppel. *Id.*, citing *State v. Honomichl*, 333 N.W.2d 797, 799 (S.D. 1983). "This court is required sua sponte to take note of jurisdictional deficiencies, whether presented by the parties or not ...." *Decker v. Hutterian Brethern*, 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362 quoting *State v. Phipps*, 406 N.W.2d 146, 148 (S.D. 1987) (citations omitted)).

Aggrieved parties are those that "suffer the denial of some claim of right either of person or property ...." *Application of N. States Power Co.*, 328 N.W.2d at 855 (quoting *Barnum v. Ewing*, 53 S.D. 47, 53, 220 N.W. 135, 138 (S.D. 1928)). Merely because the Campground intervened in the case below does not give it standing. Here the Campground has suffered no denial of some claim of right either of person or property and thus it is not a person aggrieved by the Commission's decision.

Moreover the Campground may not legally represent the interests of others. The Campground is South Dakota limited liability company in good standing, identified by its business registration record number DL002305. The Campground is member managed by Rod Woodruff.

https://sosenterprise.sd.gov/BusinessServices/Business/FilingDetail.aspx?CN=1892480682402102180401030102060720
25087156205173 (Last visited December 19, 2016.) Those records show no other members of the LLC.

To set the date for the election, the Commission was required by SDCL § 9-3-1 to examine the Census and determine number of persons who actually resided within the

area to be incorporated. The Campground is not on the Census. SDCL § 9-3-1 also required the commission to determine the number of eligible voters who had signed the petition. The Campground did not sign a petition or an amended petition for incorporation, and indeed could not because it does not have the status of a legal voter.

This court has held that an individual, acting in the person's individual capacity, cannot bring a claim on behalf of the corporation for which the individual may be an officer. See e.g., *Ellingson v. Ammann*, 2013 S.D. 32, ¶¶ 6 & 7, 830 N.W.2d 99.

Similarly, a "limited liability company is a legal entity distinct from its members. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company." SDCL § 47-34A-201. Finally, while a lawyer may form a professional corporation or limited liability company pursuant to SDCL ch. 47-13A, for the practice of law, there is no indication in the record that the Campground is such an entity.

The Campground has no standing on its own behalf or on behalf of others to pursue this appeal and, accordingly its appeal should be dismissed without consideration of any of the issues raised in its brief.

#### **ARGUMENT AND AUTHORITY**

- A. The Circuit Court had Jurisdiction to Entertain the Underlying Appeal.
  - 1. The Circuit Court had Jurisdiction as a Matter of Law and of Fact.

Before addressing the substance of this contention it is important to note that neither Appellant has argued that the facts on which the circuit court found jurisdiction are clearly erroneous.

Appellants' contention that SDCL § 9-3-20 deprives the circuit court of jurisdiction to hear the underlying appeal is simply wrong. SDCL § 9-3-20 provides "[t]he regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the state." This appeal is not an inquiry into the regularity of the organization of an acting municipality.

Instead, this appeal challenges the existence of the factual predicate on under which the county commission purported to act under the provisions of SDCL ch. 9-3. The incongruity of Appellants' argument is illustrated by the simple fact that the putative town of Buffalo Chip did not exist on March 2, 2015, the date when the Lippold and the City filed their notices of appeal.

Moreover, if this case was an inquiry into "the regularity of the organization of any acting municipality" it would seem to follow that the "acting municipality" would be a party to the action. While the ghost of the town of Buffalo Chip haunts this case, the putative municipality is not a party to this action. Stated another way, SDCL § 9-3-20 provides a defense that is personal to the municipality under scrutiny but not to anyone else. Here no municipality is under scrutiny; instead it is the action of the Meade County Commission that under scrutiny.

Moreover, SDCL § 9-1-6 provides "[a]ny citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title." The circuit court found that

Lippold is "a resident of Sturgis, Meade County, South

Dakota." (FF 1.) Thus, by statute, Lippold has specific

statutory authority to maintain an action to prevent a violation

of Title 9-3.

## 2. Appellants' Argument as to SDCL § 9-3-20 is Barred by the Doctrine of Res Judicata.

Finally, not only is Appellants' argument about the merits SDCL § 9-3-20 wrong, that argument is also barred by the doctrine of res judicata. The Town of Buffalo Chip sought review of the circuit court's ruling the applicability SDCL § 9-3-20 and subject matter jurisdiction by way of the extraordinary writ of prohibition to this Court. (Exhibit 59.)

While Court has held "[a] writ of prohibition cannot be invoked merely as a substitute for an appeal." *Board of Regents v. Heege*, 428 N.W.2d 535, 538 (S.D. 1988) citing *Nelson v. Dickenson*, 64 S.D. 456, 268 N.W. 103 (1936) this Court has also stated:

[P]rohibition will lie when the inferior court is without jurisdiction of the subject-matter, or of the parties, or is exceeding its jurisdiction in the particular case... . If the solution of the question depended upon ascertaining disputed facts, the decision of the circuit court thereon would, we

think, be binding until reversed upon appeal. But where, as here, the facts are substantially without dispute and the question is primarily a legal one, we believe prohibition should lie if this court entertains the opinion that the circuit court erroneously decided as a matter of law that it had jurisdiction.

64 S.D. at 459, 268 N.W. at 104.

The facts in the Town's application were undisputed. This Court had only a legal question before it. Based on a record created solely by the Town of Buffalo Chip, this Court denied the application for prohibition concluding the circuit court. (Exhibit 59, pg. 13.) That decision should be binding in this case as well.

As this Court has observed "[t]he doctrine of res judicata serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined in a prior action." *Springer v. Black*, 94 SDO, 668, 520 N.W.2d 77 (1994) quoting *Hogg v. Siebrecht*, 464 NW2d 209, 211 (S.D. 1990).

This court applies four factors in determining whether res judicata is applicable: (1) Whether the issue decided in the former adjudication is identical to the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties in the two actions are the same or in privity; and (4)

whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

Id., quoting In re Matter of Guardianship of Jake, 500 N.W.2d 207, 208-09 (S.D. 1993).

This Court determined that SDCL 9-3-20 did not deprive the circuit court of subject matter jurisdiction. The Court's denial of the Application for Prohibition is final. There is no credible suggestion that the putative Town of Buffalo Chip and the Campground are not at least in privity. Likewise, the Commission is also in privity with the Buffalo Chip as demonstrated by the nature of the "joint appeal" now before this Court. Finally, the Town Finance Officer had complete control over the facts and the procedure on which he based his legal argument that the circuit court lacked subject matter jurisdiction. Buffalo Chip, whether claiming to act as the putative Town or as a Campground as no provided valid argument about whether this Court gave it a full and fair opportunity to litigate the applicability of SDCL § 9-3-20 to this case.

SDCL § 9-3-20 simply does not apply to this case and the circuit court had jurisdiction to hear the underlying appeal.

## B. The Circuit Court's Finding that the City of Sturgis has Standing to is not Clearly Erroneous.

This Court has held:

A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction. 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.

Cable v. Union County Bd. of Comm'rs, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817 (Citations and quotations omitted).

The question of the standing of the City of Sturgis must be addressed within the context of the statutory requirement for the location of a new municipality and the City's ongoing efforts to develop and preserve its municipal infrastructure. A municipality may not be incorporated if any part of such proposed municipality lies within three miles of any point on the perimeter of the corporate limits of any incorporated municipality, unless the incorporated municipality refuses or fails to annex a territory which is contiguous to said incorporated municipality, and said contiguous territory has properly petitioned said municipality to be annexed thereto, as provided by § 9-4-1. However, a proposed municipality may be incorporated that is within three miles of an incorporated municipality if the territory to be incorporated is in a different county and has a post office prior to incorporation.

#### SDCL § 9-3-1.1

Prior to February 20, 2015, the City of Sturgis owned an airport located outside the City boundaries. As of February 20, 2015, those circumstances changed. The circuit court found:

- 90. On February 20, 2015, the City of Sturgis legally annexed the City of Sturgis Municipal Airport into the City of Sturgis. (Ex. 6.)
- 91. The Resolution stated that "the City of Sturgis is currently in negotiations with the Federal Aviation Administration to make needed repairs to the exiting taxiway and that the existing taxiway is necessary for the preservation of an existing public institution." (Ex. 6.)
- 92. The Resolution also stated "that this Resolution of Annexation shall become effective February 20, 2015 pursuant to S.D.C.L. 9-19-13." (Ex. 6.)

- 93. No one challenged the annexation of the Sturgis Municipal Airport in to the City of Sturgis or attempted to appeal the City's decision to annex its airport.
- 94. Meade County Deputy State's Attorney Chleborad advised the Board that Sturgis' annexation of the Sturgis Municipal Airport was complete upon the filing of the resolution. (Ex. 46, pp. 29-30.)
- 95. The real property on which the Sturgis Municipal Airport lies is described in the Resolution of Annexation. (Ex. 6, p. 2.)
- 96. The real property which was to comprise Buffalo Chip, SD is described in the Surveyor's Affidavit. (Ex. 24, p. 7.)
- 97. As can be seen from comparing the legal descriptions in Findings 65 and 66, the boundaries of perimeter of Sturgis at the Sturgis Municipal Airport on February 23, 2015 lie within three miles of the area proposed to be incorporated.

Here the Commissioners (directly contrary to the legal advice of the deputy State's attorney employed to advise them) attempted to set an election date for another municipality within the territorial authority of the City of Sturgis. The incorporation if successful at the election would put at risk the City's ability to improve its municipal airport as well as the

preserve the municipal capital already invested in the airport.

Thus, Sturgis faced an imminent injury in fact, directly traceable to the Commissioner's conduct that could be redressed by an appeal of the Commissioner's action.

Moreover it appears that the deputy state's attorney advice was an admission against interest. SDCL 19-19-801(2) (d) provides that an admission offered against a party is not hearsay: "A statement is not hearsay if it is offered against a party and is: [h]is own statement, in either his individual or a representative capacity[.]" SDCL ¶19-19-801(2) (A); Sabag v. Continental, S.D., 374 N.W.2d 349, 355 (S.D. 1985). "It is not necessary that the out-of-court statement be against the declarant's interest at the time it is made. The statement must be adverse to the party's case at the time of trial and be offered against the party[.]" Johnson v. O'Ferrell, 2010 S.D. 68, ¶ 22, 787 N.W.2d 307 quoting Fritzmeier v. Krause Gentle Corp., 2003 S.D. 112, ¶72, 669 N.W.2d 699, 712 (for citations omitted).

"A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of a fact claimed to be

true, and is used as a substitute for legal evidence at the trial." Zahn v. Musick, 2000 S.D. 26, ¶ 27; 605 N.W.2d 823 quoting Harmon v. Christy Lumber, Inc., 402 N.W.2d 690, 692-93 (S.D. 1987) "An admission is 'limited to matters of fact which would otherwise require evidentiary proof,' and cannot be based upon personal opinion or legal theory." Tunender v. Minnaert, 1997 S.D. 62, ¶21, 563 N.W.2d 849, 853 "[A]n attorney can make an admission . . . that is binding upon his client and relieves the opposing party of the duty to present evidence on that issue." Rosen's Inc. v. Juhnke, 513 N.W.2d 575, 577 (S.D. 1994) (citations omitted).

"Judicial admissions may occur at any point during the litigation process." *Estate of Tallman*, 1997 S.D. 49, ¶ 13, citing *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D. 1987) (Citations omitted." The focus is on the statement, not on a certain stage of the litigation. Id.

The Deputy State's attorney made an admission on a mixed question of law and fact. The factual component of that admission on this issue should effectively end the inquiry. The factual admission is that the area proposed for incorporation

which would comprise the potential Town of Buffalo Chip was within three mile the area prohibited by law. It is readily apparent that the City of Sturgis has standing to appeal the commissioner's decision.

## C. The Circuit Court's Finding that Lippold has Standing to Appeal is not Clearly Erroneous.

#### 1. Lippold has Standing as a Matter of Fact.

Before addressing the substance of this contention it is important to again note that neither Appellant has argued that the facts on which the circuit court found standing are clearly erroneous. Those findings include the facts that Lippold was a credible witness (FF 5) and a resident of Sturgis, Meade County, South Dakota, (FF 1); that he is employed by a competitor of the Buffalo Chip, (FF 1); that he is knowledgeable about the business of operating a campground and entertainment venue during the Sturgis Motorcycle Rally, (FF 2); and that his livelihood is affected by giving his employer's competitor the municipal power to tax, condemn and annex property. (FF 3.) Based on those undisputed findings the circuit court found as a matter of fact, (FF 6); and

concluded as matter of law, (CL A); that Lippold was aggrieved by the Commission's decision and has standing to pursue this appeal.

Lippold faced the loss of income by the Commission's unlawful grant of the municipal power to tax, annex and condemn to a competitor located just a stone's through from his employer's business. A successful appeal could redress Lippold's imminent injury in fact. Thus, Lippold has standing to pursue this appeal of the Commissions decision.

#### 2. Lippold has Standing as a Matter of Law.

Appellants suggest that standing is controlled by statute and Lippold agrees with that suggestion. As previously noted SDCL § 9-1-6 provides "[a]ny citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title."

To attempt to incorporate a municipality without sufficient notice is a violation of Title 9. To attempt to incorporate a municipality without the requisite number legal residents is a violation of Title 9. To attempt to incorporate a

municipality without the requisite number of registered voters is a violation of Title 9. To attempt to incorporate a municipality within three miles of another incorporated municipality is a violation of Title 9. And, finally to attempt to incorporate a municipality based on a census that does not comply with the requirements of Title 9 is but yet one more violation of that title.

Where a circuit court's decision is governed by the clearly erroneous standard, this Court may affirm the decision below if it "right for any reason." *Knecht to Weber*, 2002, S.D. 21 ¶ 4, 640 N.W.2d 491 quoting *Krebs v. Weber*, 2000 S.D. 40, ¶5, 608 N.W.2d 322, 324, overruled on different grounds by *Jackson v Weber*, 2001 S.D. 30, 637 N.W.2d 19. Although not cited by the circuit court SDCL § 9-1-6 clearly demonstrates that Lippold has standing as a matter of law to pursue the underlying appeal.

Lippold respectfully submits that SDCL § 9-1-6 confers standing on him to pursue this appeal as a matter of law.

## 3. The Court's Findings as to Lippold's Standing are not Clearly Erroneous.

The Campground has offered yet another quixotic argument about standing further illustrating its misapprehension of the law on the nature of this appeal:

A party who challenges the legality of a government action has an additional burden when government's allegedly illegal action acts upon a third party who is not the respondent. When "a asserted injury arises plaintiff's from government's allegedly unlawful regulation (or lack or regulation the causation and redressability elements of stranding hinge on what the third party's response will be to the government regulation. Id. at ¶ 24. Thus, the existence of standing in such cases "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict." Id. at 827. When the regulation is focused on the conduct of some independent third party, "it becomes the burden of the plaintiff to adduce facts show that those choices have been or will be made in such a matter as to produce causation and permit redressability of injury." Id. Showing standing under such circumstances is "substantially more difficult." Id. The third parties are part of this action are a number of voters who petitioned to become a town, and ultimately the Town of Buffalo Chip.

(Campground's Br. at 6.) Perhaps the most elegant response to the Campground's argument is "huh?" The issue before the circuit court was an appeal challenging the commission's determination that all of the factual predicate necessary to submit the question of incorporation to a vote had been met. The decision as to whether those who would incorporate the Town of Buffalo Chip had proved the facts required by the statutory procedure is not one "depends on the unfettered choices made by independent actors not before the courts." Instead it is one that depends entirely on the narrowly circumscribed authority of the Meade County Commission.

For years Lippold owned and operated a competitor of the would-be town of Buffalo Chip. A battle with cancer caused Gary to sell his business to his brother for whom Gary continues to work. The would-be Town of Buffalo Chip consists of a campground and entertainment venue that would compete directly with Lippold's employer and threaten Gary's livelihood.

The putative town would have the power to adopt a sales tax and use that tax to fund improvements to the campground. As a putative town the Campground would have

the unfair advantage to allow the Buffalo Chip Campground to pave the roads in its facility with taxpayer money; lay water lines and power lines with tax payer money while Gary's employer must borrow money to finance its operation or pay for those improvements out of operating income.

The circuit court found that "Lippold's ability to earn a living is affected by allowing a competitor of his employer the statutory power of an incorporated municipality to tax, condemn and annex." (FF 4) Moreover, neither Appellant has suggested let alone demonstrated that the findings of fact on standing are clearly erroneous.

D. The Circuit Court's Finding that the Commission Failed to Establish the Factual Predicate Necessary to Submit the Matter of Incorporation to the Voters is not Clearly Erroneous.

One matter is obvious by its absence from the Commission's argument about the merits of the circuit court's decision. The Commission has ignored the circuit court's extensive findings of fact and instead focused its attack on the circuit court's Memorandum Decision. (Comm. Br. at 25.) Indeed, counsel was unable to identify a single reference to a

specific finding of fact in the Commission's discussion of this issue.

Black letter law recognizes the significance of the trial court's findings of fact. The authors of *Corpus Juris Secundum* note:

The findings of fact by the trial court in an action tried without a jury are conclusive on the rights of the parties as to the issues necessarily involved and passed on, having an effect analogous to a jury verdict or a jury's answers to jury questions. Specific written findings of fact that are supported evidence prevail substantial bv over anv inconsistent conclusions of law or an inconsistent judgment or memorandum opinion; otherwise, findings of fact and conclusions of law made by the trial court do not vacate or change the judgment but merely explain the reasons for the judgment.

#### 89 C.J.S. Trial § 1317 (Footnotes omitted.)

Likewise the authors of American Jurisprudence note:

The trial court's memorandum opinion is merely an expression of the trial court's opinion of the facts on the law. It has no binding effect. The findings of fact and conclusions of law and judgment, as signed by the judge, are the binding statement of adjudication.

The findings of a trial court are to be interpreted in the light of the issues joined in the case on trial and must be read together and construed as a whole. They are not to be construed strictly, like a special pleading, but must be given a liberal construction so as to uphold rather than defeat the judgment.

Words in findings are to be given a reasonable and natural meaning. Although findings may lack precision, it is sufficient if, from them all, taken together with the pleadings, there is enough upon a fair construction to justify the judgment. Findings of fact and law are judicial writings subject to substantially the same canons of interpretation as are statutes, contracts, and other writings.

75B Am.Jur.2d Trial § 1692 (Footnotes omitted.)

Most importantly this court has said a "memorandum opinion is merely an expression of the trial court's opinion of the facts and the law. It has no binding effect. *Moser v. Moser*, 422 N.W.2d 594, 596 citing *Connelly v. Sherwood*, 268 N.W.2d 140 (S.D. 1978. The findings of fact and conclusions of law and judgment, as signed by the judge, are the binding statement of adjudication. *Id.*, citing *Yankton Prod. Credit Ass'n v. Jensen*, 416 NW2d 860 (S.D. 1987).

## 1. Petitioners Failed to Provide Adequate Notice of the Petition, Survey and Census.

SDCL § 9-3-4 governs notice and provides:

Such survey, map, and census when completed and verified shall be left at some convenient place within the proposed municipality for a period of not less than thirty days for examination by those having an interest in such application.

Although the item was not included on the Commission's agenda the hearing on the Amended Petition for Municipal Incorporation was conducted on February 27, 2015. (FF 34.)

The circuit court entered Findings of Facts concerning notice. None of those findings have been challenged as clearly erroneous. The circuit court found:

- 27. The Affidavit of Surveyor Notice of Correction; Surveyor's Affidavit; Map and Census were not left at some convenient place within the territory for a period of 30 days prior to the February 27, 2016, meeting date for examination by those having an interest in the Amended Petition as required by SDCL § 9-3-4. (Tr. pp. 102-103.)
- 28. The record does not reflect when notice of the Amended Petitions, Census and Survey were made available for inspection.
- 29. The date of the initial Petition is February 10, 2015. (Ex. 23, p. 2.) 30. Notice of the initial Petition could not have been given before the date on which it was signed.
- 31. The Amended Petitions are dated February 26, 2015. (Ex. 24.) (Ex. 24, pp. 2, 4 & 6.) Notice of the Amended Petitions

- could not have been given before the date on which it was signed.
- 32. Petitioner failed to provide 30 days notice of the any Petition, Amended Petition, Census and Survey.
- 33. Walczak was not a credible witness.
- 34. Notice of the Board's hearing on the Amended Petition was not included in the Board's Agenda for its February 27, 2015 special meeting. (Ex. 51, p. 2.)

"As a general rule, where a method if giving notice is prescribed by statute, there must be strict compliance with the prescribed method in [the] form of notice." *Stark v. Munce Bros. and Hartford*, 461 N.W.2d 587, 588 (S.D. 1990) quoting *Hein v. Marts*, 295 N.W.2d 167, 171 (S.D. 1980), citing *Smith v. D.R.G., Inc.*, 30 Ill.App.3d 162, 331 N.E.2d 614 (1975). The purpose of adequate notice is to allow public input into the matter under consideration. *Matter of South Dakota Water Management Bd.*, 351 N.W.2d 119, 127 (S.D. 1984) (Henderson, J., dissenting.)

Thus it is clear that legally sufficient notice of the hearing on the petition was not provided. Moreover, the Deputy State's attorney advised the Board that if any portion of map or survey was changed to a mistake a new application was required to be filed and submitted to the County Auditor. The Commission rejected this advice and accepted "amended petitions" without any statutory authority to do so. As noted in section D, *supra*, the States Attorney's advice is an admission against interest.

Finally, reliance on the testimony of James Walczak cannot be the source of any solace to the Commission. The circuit court found "Walczak was not a credible witness." (FF 32.) Neither the Campground nor the Commission has suggested that finding is clearly erroneous.

# 2. The Petitions did not Contain the Requisite Number of Residents or Registered Voters.

Once again the Commission has ignored the circuit court's finding of fact. Based on a through examination of the documents before it the circuit court found that the "Census shows the resident population was less than the statutory requirement contained in SDCL § 9-3-1 of 100 legal residents. (FF 36.) Likewise, the circuit court found that the "amended

petition on its face listed only the names of 17 persons claiming to be legally registered voters." (FF 85.)

The Commissions lawyer told the Board that the "Voter Registration form was signed under the penalty of perjury by the applicant and included a statement that the applicant actually lived at the address shown on the Voter Registration form. (FF 75.)

The circuit court's finding analyzed the facts on which the petitions residence was claimed and found:

- 76. No one actually lives at the residence addresses identified on the Meade County Voter Registration forms in Exhibit 25, pp. 1.-51.
- 77. James Walczak is the person who prepared the Census, and in doing so he represented that he is:

A resident voter in the area proposed to be incorporated into the City of Buffalo Chip, South Dakota, [and] hereby certifies that he/she personally obtained the formation (sic) provided above and that said information is accurate according to the best information and belief of the undersigned.

(Ex. 24, p. 15.) Oddly enough Walczak testified that he "did not actually live at

the Campground, but planned on parking an RV there in the future. (FF 68.)

78. James, Walczak, as the person who prepared that Census, also signed the following affirmation:

James M. Walczak,, being first duly sworn on his/her oath, deposes and says: That he/she is the Petitioner named in the within and foregoing CENSUS OF THE PROPOSED CITY OF BUFFALO CHIP, SOUTH DAKOTA, that he/she has read the same and knows the contents thereof to be true of his/her own knowledge, except as to those matters therein stated on information and belief, and as to such matters he/she believes it to be true.

(Ex. 24, p. 16.)

- 79. The Census is rife with false information.
- 80. None of the persons identified on the Census had a voting residence at the "lot" identified in the Census because none of the persons so identified had fixed his or her habitation at such address.
- 81. No person identified in the Amended Petition actually lived in the area proposed to be incorporated. Nevertheless each person who registered as a Meade County voter signed a declaration stating, under oath that "I actually live at and no present intention of leaving the above address." (FF 66.)

82. James Walczak circulated one of the Amended Petitions for the Municipal Incorporation of Buffalo Chip, SD, and signed a statement under oath which stated:

That he/she is the Circulator of the within and foregoing PETITION TO THE MEADE COUNTY BOARD OF COUNTY COMMISSIONERS FOR THE INCORPORATION OF THE MUNICIPALITY OF BUFFALO CHIP, SOUTH DAKOTA PURSUANT, to SDCL 9-3-5; that he/she has read the same and knows the contents thereof to be true of his/her own knowledge, except as to those matters therein stated on information and belief, and as to such matters, he/she believes it to be true.

(Ex. 24, p. 2.)

As previously noted the circuit found the Census submitted with the Amended Petition was not accurate or verified and was rife with factual error. (FF 55, 81.) The circuit court also found the Amended Petitions are rife with false information. (FF 86.)

Thus even if one accepts the Commissions reading of § 9-3-1 the circuit court's findings of fact are not clearly erroneous and the Petitions failed to prove that the area to be

incorporated has a minimum of one hundred legal residents or thirty legally registered voters.

The circuit court rejected the literal disjunctive reading of SDCL § 9-3-1 adopting instead a more carefully reasoned conjunctive reading of the statutory requirements based on the same Findings of Fact. Once again Appellants have not shown those findings are clearly erroneous. Appellees' respectfully suggest this Court should adopt that circuit court's cogent interpretation of SDCL § 9-3-1 as contained in its Findings of Fact and Conclusions of law.

## 3. The City Properly Annexed the City Airport.

Appellees rely on their argument on this issue contained in section B, *supra*.

## 4. This Court should not Condone Misrepresentation.

The Commission moved the circuit court for summary contending that the County Auditor had the duty to investigate and verify the accuracy of the information contained on voter registration forms submitted to auditor's office. The circuit court concluded that the County Auditor

had no such duty. A copy of the circuit court's Memorandum Decision is included in the Appendix as Exhibit E.

Based on SDCL § 9-3-6 the circuit court found instead person circulating the petition has the duty to verify the information in the petition is accurate and that the Commission has the statutory duty insure that "the requirement of this chapter [SDCL ch. 9-3] have been fully complied with. The circuit concluded that the "undisputed facts do no resolve, as a matter of law, whether the Board satisfied its statutory duty."

Walczak who executed the Census filed with the Amended Petition did not verify the information contained in the Census to determine with those name in the Census were in fact residents of the area to be incorporated. (FF 54.) The Census submitted with the Amended Petition was not accurate or verified and was rife with factual error. (FF 55.) In fact, "[n]o one actually lives at the residences identified on the Meade County Registration forms Exhibit 25, pp. 1-51.)

Those who signed the Census were friends, family members or employees of the owner of the Campground. (FF

57.) The "lots referred to in the voter registration forms are just raw 25 50 camping spaces that are not occupied except during the Sturgis Motorcycle Rally. (FF 63, 64.) Even counsel for the Campground admitted that "we're not pretending that all these people live in home out there.... (FF 65.) Nevertheless each person who registered as a Meade County voter signed a declaration, stating under oath, that I actually live at and have no present intention of leaving the above address." (FF 66.)

Very early in its history this Court cited a quote from Judge Dillon, in his work on Municipal Corporations, defining a municipal corporation as follows:

incorporation by the authority of government of the inhabitants of a particular place or district, and authorizing them, in their corporate capacity, to exercise subordinate specified powers of legislation and regulation with respect to their local internal concerns. The power of local distinguishing government is the feature municipal corporations proper, and is used with us in the strict and proper sense just mentioned.

Town of Dell Rapids v. Irving, 7 S.D. 310, 64 N.W. 149, 150–51 (1895) Dill. Mun, Corp. § 20.

The effort to incorporate the Town of Buffalo Chip was little more than a mere artifice to create the appearance of a municipality where no true municipality existed to gain a competitive advantage over other campgrounds and entertainment venues during the Sturgis Motorcycle Rally. It was not and is not an attempt to create the kind of entity envisioned by this Court in *Town of Dell Rapids v. Irving*.

### NOTICE OF REVIEW

# E. The Circuit Court Erred by Failing to Stay the Municipal Election.

Lippold filed his Notice of Appeal on March 31, 2016, and perfected it that same date by personally serving

Commissioner Linda Rausch.

On April 29, 2015, after the Commission concluded petitions had established the necessary factual predicate, but before the municipal election was held the City filed a "Motion to Set Hearing Regarding Motion to Stay Election and an Affidavit in Support of the motion, copies of which are included in the Appendix as Exhibits A and B, respectively. The City Attorney also filed a letter in which the City Attorney

described his effort to schedule a hearing. A copy of Mr.

Barnier's letter is included in the Appendix as Exhibit C. The

Commission objected to the motion for stay as "untimely."

The circuit court conducted a telephonic hearing on the Motion for Stay May 1, 2015, in which the court reached the merits of the request for stay and denied the request stating (in the court's own hand) "[t]he court indicated in its opinion the pending appeals could provide relief to the city – if successful – thus stay request denied." A copy of the Court's order is included in in Appendix as Exhibit D.

Stays in appeals brought by municipal corporations, such as the City of Sturgis, are governed by SDCL § 15-26A-38 which provides in relevant part:

When the state, any state board or officer, any county, township, municipal corporation, school district, or its officers, in a purely official capacity, shall take an appeal, service and filing of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from and no undertaking or bond need be given.

After the stay was denied the Meade County Auditor, presumably at the behest of Campground oversaw the

expediously conducted election on municipal incorporation May 7, 2015, in the face of underlying appeal. As a result of the election the County and Campground generally suggest the underlying appeal should be dismissed for want of jurisdiction and also due to the absence of numerous parties, including the putative Town of Buffalo Chip, whose rights are alleged to be at risk because of the illegal election.

SDCL §15-6-81(a) provides "[t]his chapter does not govern pleadings, practice, and procedure in the statutory and other proceedings included in but not limited to those listed in Appendix A to this chapter insofar as they are inconsistent or in conflict with this chapter." Appeals from county commission decisions under SDCL § 7-8-27 are not listed in Appendix A.

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

Appellees contend that the review of the Commission's decision to submit a petition for the organization of a new municipality for a vote is a "quasi-judicial function" and thus in proceedings before the circuit court the rules of civil

procedure should supplement the rules governing appeals from county commission decisions.

SDCL 1-32-1(10) defines "Quasi-judicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies." The term includes among other functions, "granting or denying privileges, rights, or benefits; issuing, suspending, or revoking licenses, permits and certificates." *Id.* Entertaining a petition to create a new municipality falls squarely within that definition.

As previously noted, "service and filing of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from." SDCL § 15-26A-38. As this court has noted "[w]hen 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." *Citibank v. S.D. Dep't Revenue*, 2015 S.D. 67, ¶ 13, quoting *Fritz v. Howard Twp.*, 1997 S.D. 122, ¶ 15, 570 N.W.2d 240, 242. See also SDCL § 2-14-2.1 ("As used in the South Dakota Codified Laws to direct any action, the term,

shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.")

Lippold and the City contend that under the terms plain language of SDCL § 15-26A-38 of the stay is self executing and no action was necessary to implement it. In spite of the clearly self executing language of SDCL § 15-26A-38, the Commission opposed the stay claiming it was "untimely". Such a response seems incongruous since it was the "service and filing of the notice of appeal [that] perfect[ed] the appeal and stay[ed] the execution or performance of the judgment or order appealed from." SDCL § 15-26A-38.

The City and Lippold contend the Commission invited error when it opposed the motion for stay. As this court has noted "when a party 'induce[s] or provoke[s] the court or the opposite party to commit' an error, the doctrine of 'invited error' applies and that party 'will not be heard to complain on appeal' about such error." *Veith v. O'Brien*, 2007 S.D. 88, ¶27, 739 N.W.2d 15, 24, (quoting *Taylor Realty Co. v. Haberling*, 365 N.W.2d 870, 873 (S.D. 1985) (additional citation omitted)).

Moreover, the all of the consequences of which

Appellants complain about acting on the apparent authority of
the putative Town of Buffalo Chip would have been avoided if
Commission would not have persuaded the circuit to deny the
motion for stay.

Finally, the Commission and Campground cannot feign ignorance of SDCL §15-26A-38 or its self executing effect as the Appellees took the same position in their Joint Notice of Appeal as Lippold and the City advocate now.

F. The Circuit Court did not Err when it Concluded a Purported Municipality formed in Disregard of Statutory Procedure and Factual Predicate was a Legal Nullity.

The Commissions complaint about the circuit court's remedy can be seen as little more than crocodile tears. This Court has held a "county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *State v. Quinn*, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, quoting *State v. Hansen*, 75 SD 476, 478, 68 N.W.2d 480, 481 (1955) (citations

omitted). Therefore, by failing to follow the proper procedure for enacting the indigent assistance guidelines, the county's actions are a legal nullity. *Id.* The same is true in this case. By failing to follow the proper procedure for creating a new municipality the county's actions are a legal nullity.

The County's action in this case is worse that that involved in *State v. Quinn*. Here the Commission was given a chance to pause and reflect on the potential impact of its conduct. The Commission was presented with a motion to stay which cited statutory authority providing the, "service and filing of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from." SDCL § 15-26A-38. In spite of that authority the Commission urged the Court to deny the stay and press on with the process of incorporation oblivious to the mischief it may create doing so.

As noted in the previous section "when a party 'induce[s] or provoke[s] the court or the opposite party to commit' an error, the doctrine of 'invited error' applies and that party 'will

not be heard to complain on appeal' about such error." Veith v. O'Brien, 2007 S.D. 88, ¶27, 739 N.W.2d 15, 24.

The Commission created the error of which it now complains and the Appellee's suggest that as a result of the Commission's conduct it should not be heard to complain that its actions were a legal nullity.

## **CONCLUSION**

This Court has a "long-standing rule of appellate review that we will not seek reasons to reverse but rather will affirm a trial court if there is a basis to do so." *Parker v. Western Dakota Ins., Inc.,* 2000 S.D. 14, ¶ 28, 605 N.W.2d 181 citing *Boland v. City of Rapid City,* 315 N.W.2d 496, 499 (S.D. 1982) ("A trial court's rulings and decisions are presumed to be correct and this court will not seek reasons to reverse."). In other words, it is the obligation of the Commission and Campground to show why the trial court erred, not the obligation of Lippold and the City to show why the trial court was correct. *Parker v.* 2000 S.D. 14, ¶ 28 citing *Crook v. Pap,* 303 N.W.2d 818, 819 (S.D. 1981) (Further citations omitted.)

The laws of this state permit anyone aggrieved by a county commission's decision to appeal to circuit court. *Tisdel v. Beadle Co. Board of Comm'nrs*, 2001 S.D. 149, ¶ 5, 638 N.W.2d 250 citing SDCL 7-8-27; *Tri-County Landfill Ass'n, Inc. v. Brule County*, 535 N.W.2d 760, 762 (S.D. 1995). "The legislature permitted such appeals 'to strike a proper balance between the necessity of county government to operate in an efficient and orderly fashion and the right of its citizens to pursue injustices in the courts of this state through an appeal process." *Id.*, quoting *Weger v. Pennington County*, 534 N.W.2d 854, 858 (S.D. 1995).

The Commission's decision that the amended petitions for the Incorporation of the Town of Buffalo Chip were legally sufficient is wrong both as a matter of fact and as a matter of law. Judge Eckrich's decision reversing the Commission's action is fully justified by his extensive Findings of Fact and untainted by any error of law.

Lippold and the City of Sturgis respectfully pray that this Court affirm Judge Eckrich's decision.

Dated this 21st day of December 2016.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

BY: /s/ Mark F. Marshall
Mark F. Marshall
333 West Blvd, Ste 400
P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040
ATTORNEYS FOR APPELLEE
LIPPOLD & MURPHY

### and

### STURGIS CITY ATTORNEY

BY: /s/ Gregory J. Barnier
Gregory J. Barnier
1040 2nd St.
Sturgis, SD 57785
(605) 490-8982
ATTORNEYS FOR APPELLEE
CITY OF STURGIS

## **CERTIFICATE OF COMPLIANCE**

Pursuant to SDCL 15-26A-66(b) (4), I state that Appellees' Brief has 47,322 characters and 9,475 words in compliance with SDCL 15-26A-66(b) (2). This count excludes the table of contents and the table of authorities. The brief is typed in 14 point Bookman Old Style font and left justified.

Dated this 21st day of December, 2016.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

BY: /s/ Mark F. Marshall
Mark F. Marshall
333 West Blvd, Ste 400
P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040
ATTORNEYS FOR APPELLEE
LIPPOLD & MURPHY

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on December 29, 2016, he caused true and correct copies of the above to be served upon each of the persons identified below as follows:

[X] First Class Mail	[ ] Overnight Mail
[ ] Hand Delivery	[ ] Facsimile
[ ] Electronic Mail	[ ] ECF System

Greg Barnier
Sturgis City Attorney
1040 – 2<sup>nd</sup> Street
Sturgis, SD 57785
Attorney for Appellee,
City of Sturgis

Jack H. Hieb Zachary W. Peterson Richardson, Wyly, Wise, Sacuk & Hieb, LLP Post Office Box 57402-1030 Attorneys for Appellants

Kent R. Hagg
John Stanton Dorsey
Whiting, Hagg, Hagg, Dorsey & Hagg, LLLP
601 West Boulevard
Rapid City, SD 57701
Attorneys for Intervenor

Thomas Frieberg
Frieberg, Nelson & Ask
P.O. Box 511
Beresford, SD 57004
Attorney for South Dakota Municipal League

and the original and two copies of **APPELLEES' JOINT BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

/s/ Mark F. Marshall MARK F. MARSHALL

## **APPENDIX**

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STATE OF SOUTH DAKOTA

**COUNTY OF MEADE** 

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CIV. 15-000096 94

CITY OF STURGIS,
A South Dakota Municipal Corporation,

Appellant

VS.

MEADE COUNTY COMMISSION,
Mr. Alan Aker, Chair; Ms. Linda
Rausch, Vice Chair; Mr. Galen
Niederwerder, Mr. Robert Bertolotto
and Mr. Robert Heidgerken, all in their
official capacities as MEMBERS OF THE
BOARD OF COMMISSIONERS OF MEADE
COUNTY, SOUTH DAKOTA

MOTION TO SET HEARING regarding MOTION TO STAY ELECTION

Appellee/Defendants

Comes now Appellant City of Sturgis and hereby move this court to set a time for the hearing on Appellants' Motion to Stay Election regarding Municipal Incorporation.

Appellant is authorized to state that parties Lippold and Murphy join in this motion as well. Appellant has provided the court with a copy of that motion and further states that the relief sought is to allow the appeal now pending before this court to provide a real and meaningful review of the action taken by the County Commission. Appellant relies upon the authority of SDCL 15-6-6(d) to request that the Court set a time for hearing that Motion to Stay Election on or before May 6, 2015 for the following reasons:

- That SDCL 7-8-27 provides for an appeal of a decision of the county commission to the Circuit Court.
- 2. That SDCL 7-8-27 requires that a bond of \$250.00 be filed to perfect the appeal, and Appellant has filed that bond.

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

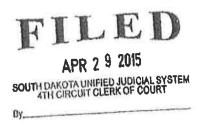
APP. 1

- 3. That SDCL 7-8-30 requires that after filing, the proceedings are to be scheduled on the normal calendar, for a trial de novo to the Circuit Court.
- 4. That the transcript of the February 27th County Commission meeting was filed with the Clerk of Circuit Court on April 27th, 2015.
- 5. That a copy of the transcript was received by counsel on April, 28, 2015.
- 6. SDCL 7-8-31 requires the Circuit Court to make final Judgment and cause it to be executed, or in the alternative send the matter back to the County Commission with an order how to proceed, and require such board to comply therewith.
- 7. That the notes from February 27 meeting show the County Commission directed election to be conducted May 7, 2015.
- 8. These laws clearly intend a Stay to be in effect upon filing the Notice of Appeal to allow the Circuit Court to rule on an issue that has not been made moot by subsequent action of the County Commission or another person.
- 9. That SDCL 15-26A-38 provides that an appeal to the Supreme Court by the state, a county, a municipality, school district or state board, serving and filing the notice of appeal prefects the appeal and also stays the performance of the order appealed from.
- 10. That for a party to entitled to an automatic stay of an order under SDCL15-26A-38 to receive meaningful judicial review by the Circuit Court at the trial de novo, a stay pending the trial de novo is both fair to both parties and consistent with these statutes.

11. That without a stay of the order of the County Commission directing the election, the parties to the action are denied any meaningful judicial review of the County Commission approval of the petition to incorporate.

Dated this 29 day of April, 2015.

Sturgis City Attorney Attorney for Appellant 1040 2nd Street, Sturgis, SD 57785



STATE OF SOUTH DAKOTA

**COUNTY OF MEADE** 

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CITY OF STURGIS, A South Dakota Municipal Corporation, CIV. 15-000096 44

Appellant

VS.

MEADE COUNTY COMMISSION, Mr. Alan Aker, Chair; Ms. Linda Rausch, Vice Chair; Mr. Galen Niederwerder, Mr. Robert Bertolotto and Mr. Robert Heidgerken, all in their official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA AFFIDAVIT OF GREG BARNIER IN SUPPORT OF MOTION TO SET HEARING

Appellee/Defendants

Greg Barnier, being duly sworn upon his oath, deposes and states:

- 1. That I am the attorney of record for Appellant in the above-entitled action;
- 2. That I hereby certify that this Motion to Set Hearing is required to without notice to other parties to enable all parties to the action to participate in and receive meaningful judicial review by a Circuit Court of the County Commission order setting May 7, 2015 as the time for an election on the municipal incorporation of the Buffalo Chip campground.
- 3. That Appellant will make no objection to other counsel participating in the hearing on the Motion to Stay Election by electronic means.
- 4. That the family obligations following the death of affiant's mother in Minneapolis on the night of April 16, 2015 is the primary cause affiant was not able to serve this motion with a ten day notice.

APR 2 9 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

APP. 4

5. That this Motion to Set Hearing is submitted upon good cause and not to unfairly delay these proceedings or the pending election.

Dated this Aday of April, 2015.

Greg Barnier Sturgis City Attorney

Subscribed and sworn to before me this 29th day of April, 2015.

Tamuad E. C.

Notary Public - South Dakota

My Commission Expires

May 22, 2020

FILED

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM ATH CIRCUIT CLERK OF COURT

Ву\_\_\_\_\_\_

City of Riders

1040 Harley Davidson Way Sturgis, SD 57785 www.sturgis-sd.gov



City Attorney

Voice: (605) 347-4422 Fax: (605) 347-4861

May 1, 2015

The Honorable Jerome A. Eckrich Judge of Circuit Court P.O. Box 939, Sturgis, SD 57785 Hand Delivered

Re: City of Sturgis v,. Meade County Commission, et al CIV #15-0000967 94

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APR 2 9 2015
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
ATH CIRCUIT CLERK OF COURT

Dear Judge Eckrich:

This letter is in response to the brief phone call we had yesterday morning regarding the City's Motion to Stay Election and Motion to Set Hearing, now pending in this case. You indicated then that you wanted me to talk with counsel to see if they would be available after 2:30 pm on May 6. You also indicated that at that time you did not see an opening on your calendar to set a hearing on the Motion to Stay on the 4<sup>th</sup> or 5<sup>th</sup>.

Following that conversation I contacted the offices of Mr. Hieb, Mr. Marshall and Mr. Hagg. When I was able to speak with Mr. Hieb later in the afternoon, he pointed out that he was not aware that either an order granting the Motion to Consolidate or an order granting the Motion to Intervene been signed. Accordingly, he asserted that in this case, #CIV15-00096, the parties before the court on the motions in regard to the Stay of Election are only the City and County Commission. I agree with him that the parties now before the court in this action are only the City and the County Commission. The proposed Order enclosed with this letter reflects that.

As to his ability to attend a hearing on the 6<sup>th</sup>, Mr. Hieb indicated he would be in depositions all day on May 6th. As to his availability on the 4<sup>th</sup> or 5<sup>th</sup>, he indicated he would prefer to speak directly with Court in a conference call. At the conclusion of the conversation he also indicated he would be submitting a written response to the City's pending motions.

The controlling statute provides as follows:

15-6-6(d). Time for motion--Affidavits--Briefs. A written motion, other than one which may

be heard ex parte and notice of the hearing thereof or an order to show cause shall be served not later ten days before the time specified for the hearing than, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit or brief, the affidavit or brief shall be served with the motion and, except as otherwise provided in § 15-6-59(b), opposing affidavits or briefs may be served not later than five days before the hearing, unless the court permits them to be served at some other time. A reply brief or affidavit may be served by the movant not later than two days before the hearing, unless the court permits them to be served. (Emphasis added)

Clearly the statute recognizes that the Court has inherent authority to order that notice be less than ten days. Appellee's reading of the statute would require 10 days notice prior to hearing for each of the two motions, meaning that service would have to have been accomplished on approximately April 9. The transcript, however, was not even available to the parties until filed on April 28<sup>th</sup>.

The Court has the authority to set a hearing on the Motion to Stay as requested. It must be asked: what harm is there going slow, ensuring that voting rights are protected, and conducting the election properly? It will appear to some that the rush to hold the election suggests there are flaws in the Commission's procedure that are being "papered over".

It is conceded that the County has incurred minimal costs to publish the Notice of Election and print a limited number of ballots. Beyond that, however, it is nearly impossible to envision any prejudice whatsoever to County Commission if the election is delayed a few weeks to ensure the integrity of the election process.

Thank you for your courtesy and consideration in this matter.

Respectfully submitted,

Sturgis City Attorney

C: Mr. Zachery Peterson (zpcterson@rwwsh.com)

Mr. Jack Hieb (jhieb@rwwsh.com)

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APR 2 9 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

Ву

STATE OF SOUTH DAKOTA IN CIRCUIT COURT COUNTY OF MEADE FOURTH JUDICIAL CIRCUIT CIV. 15-000098 CITY OF STURGIS. A South Dakota Municipal Corporation, Appellant ۷S، ORDER SETTING HEARING MEADE COUNTY COMMISSION, regarding Mr. Alan Aker, Chair; Ms. Linda **MOTION TO STAY ELECTION** Rausch, Vice Chair: Mr. Galen Niederwerder, Mr. Robert Bertolotto and Mr. Robert Heldgerken, all in their official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE Mr. maroniel was not available. COUNTY, SOUTH DAKOTA Appellee/Defendants in its openion the sinding a could provide appelled this sale.

This matter having come before the Court upon motion of Appellant, and under the authority of SDCL 15-6-6(d), the Court having considered the Affidavit in Support of Motion to set Hearing as well as the Appellee's Response and the Affidavit of Zachary Peterson, the Court having further considered the court file herein, it is hereby: ORDERED that the hearing on the Motion to Stay Election regarding Municipal Incorporation shall be scheduled for hearing on the \_\_\_\_\_ day of May at \_\_\_\_\_a.m./p.m. Dated this \_\_\_\_ day of May, 2015. Honorable Jerome ludge of Circuit Colift Fourth Judicial Circuit Attest: denies.

APP. 8

STATE OF SOUTH DAKOTA

COUNTY OF MEADE

GARY LIPPOLD and JANE MURPHY,

Appellants,

-VS-

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, AND LINDA RAUSCH,

Appellees,

-vs-

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor Applicant,

CITY OF STURGIS.

Appellant,

-VS-

MEAD COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BETOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

Appellees,

-VS-

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor Applicant.

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CIV. 15-000094

MEMORANDUM DECISION AND ORDER DENYING APPELLEES' MOTION FOR PARTIAL SUMMARY JUDGMENT and DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT



SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
ATH CIRCUIT CLERK OF COURT

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#### Procedural History

Appellee, County filed its motion for Partial Summary Judgment August 24, 2015, generally arguing that "To the extent appellants seek the reversal of the County's decision (to allow an incorporation vote) based upon voter eligibility, the county is entitled to summary judgment on this issue." (County's Brief filed August 24, 2015.)

Appellants Lippold and Murphy (joined by appellant City of Sturgis) explain the voter eligibility issue thusly: "The undisputed material facts shown as part of this motion will demonstrate that none of the "resident voters" identified in the Census of the Proposed City of Buffalo Chip and none of the Petitioners who claimed to be "residents" in the proposed Buffalo Chip municipality on the initial or Amended Petition for the Municipal Incorporation of Buffalo Chip actually had a place of habitation within the boundaries of the proposed municipality." (Appellants' Motion for Summary Judgment filed August 28, 2015.)

Subsequent to filing of the respective motions, the Court has conducted various hearings related directly and indirectly to the parties' contentions. But the Court has not yet directly decided the parties' motions.

#### Standard of Review

#### Administrative Appeal

This case is an appeal of the County Commission decision to allow a vote on incorporation.

On appeal from a decision by the County Commission, the trial Court should determine the issues before it as if they had been brought originally. The Court must review the evidence, make findings of fact and conclusions of law, and render judgment independent of the agency proceedings. If a trial Court

finds a decision arbitrary or capricious, it should reverse the decision and remand for further proceedings, otherwise it must affirm. SDCL 7-8-30; In re Conditional Use Permit Denied to Meier, 2000 SD 80 ¶ 21. "An arbitrary and capricious" decision is a term of art. If the Court determines that the Commission's decision was based on "false information," or "characterized by a lack of relevant and competent evidence to support the action taken," then the decision would be arbitrary and capricious. 1999 SD 87 ¶ 16. Coyote Flats, LLC v. Sanborn County Commission.

Upon this foundation then, the Court considers the respective motions for summary judgment.

#### Summary Judgment Review

The standard of review on a grant or denial of summary judgment is well settled. "Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Hofer v. Redstone Feeders, LLC, 2015 S.D. 75, ¶ 10 (citing SDCL § 15-6-56(c)). Additionally, "the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. Id.

### **Undisputed Material Facts**

The parties have agreed to the following material facts:

- (1) On February 20, 2015, Buffalo Chip Campground, LLC, submitted an Application and Petition for Municipal Incorporation of Buffalo Chip to the Meade County Auditor. (Woodruff Aff. ¶ 2)
- (2) On February 25, 2015, the Meade County Commission held a meeting at which time the Petition for Municipal Incorporation was heard, and it was discovered that the map accompanying the Petition did not match the surveyor's written legal description of the area to be incorporated. (Woodruff Aff. ¶¶ 4-5)
- (3) On February 27, 2015, Buffalo Chip submitted an Amended Petition for Municipal Incorporation of Buffalo Chip to Meade County, and the Meade County Commission voted to approve the Amended Petition. (Woodruff Aff. ¶ 6-7)
- (4) At the time the Meade County Commission approved the Amended Petition for Municipal Incorporation of Buffalo Chip, an election date was set for May 7, 2015 for eligible voters to determine if Buffalo Chip should become incorporated as a municipality.
- (5) One of the challenges raised by appellants in this matter concerns the residence of those who signed the Petitions for the Municipal Incorporation of Buffalo Chip, South Dakota, and were eligible to vote in the May 7, 2015 election. (City of Sturgis' Notice of Appeal of Decision by the Meade County Commission to Approve a Petition for Municipal Incorporation, ¶ 3; Schieffer Aff. ¶ 8, Ex. B)

- (6) In early February 2015, the Meade County Auditor received a number of Voter Registration Forms from individuals residing at various lots at 20603 132<sup>nd</sup> Avenue, South Dakota, otherwise known as the Buffalo Chip Campground. (Schieffer Aff. ¶ 5, Ex. A)
- (7) In signing the Voter Registration Forms, each prospective Buffalo Chip voter declared, under penalty of perjury, that the following are true:
  - a. I am a citizen of the United States of America;
  - I actually live at and have no present intention of leaving the above address;
  - c. I will be 18 on or before the next election:
  - d. I have not been judged mentally incompetent;
  - e. I am not currently serving a sentence for a felony conviction;
    and
  - f. I authorize cancellation of my previous registration, if applicable. (Schieffer Aff. Ex. A)
- (8) The Meade County Auditor's Office processed the Buffalo Chip Voter Registration Forms in the same manner as any others that it receives by transmitting the data to the State of South Dakota using the TotalVote<sup>TM</sup> Program. (Schieffer Aff. ¶ 6)
- (9) The Meade County Auditor's Office received no notifications from the State concerning the Buffalo Chip Voter Registration Forms. <u>Id.</u>

- (10) The Meade County Auditor does not customarily investigate the residency of Meade County voters and relies upon the prospective voters to truthfully complete the Voter Registration Form. (Schieffer Aff. ¶ 10)
- (11) The South Dakota Secretary of State's Office advised the Meade

  County Auditor that she had no duty to investigate the residence of the

  prospective Buffalo Chip voters and should rely upon the Voter

  Registration Forms that were submitted. (Schieffer Aff. ¶ 11)
- (12) Buffalo Chip was not yet a "municipality at the time of the May 7, 2015 election. (Schieffer Aff. ¶ 9, Ex. C)
- (13) Appellants have not filed statutory challenges to any of the Buffalo Chip voters' qualifications as residents using the procedure set forth in SDCL § 12-18-10.

### Contentions

The arguments orbit around related but distinct duties:

- (1) Does the County Auditor have an independent duty to verify the Petition signers' "residence,"
- (2) Whether the County Commissioners satisfied their duty to ensure SDCL 9-3-6 was "fully complied with."

#### Decision

- 1. The Meade County Auditor had no independent duty to verify "residency."
- The Court cannot find as a matter of law that the County Commission did or did not
  satisfy the duty imposed by SDCL 9-3-6. In other words, the Court cannot find as a
  matter of law that the Commission acted arbitrarily or capriciously.

#### Analysis

SDCL 9-4-5 requires verification by the circulator, not the auditor. The Court found no law requiring the auditor to undertake an independent verification of the Petitions.

A moment's reflection unfolds the reason for this conclusion. It would be impossible if every auditor, finance officer, or Secretary of State had to independently investigate the complete accuracy of every scrap of information asserted in every Petition ever filed in their respective offices. It's enough that auditor check against the public records available.

However, SDCL 9-3-6 imposes a higher duty upon the County Commission.

Residency is relevant. The Board of County Commissioners made the decision to grant the application for forming the Buffalo Chip municipality. This decision presupposes residency. SDCL § 9-3-6 states:

"If the board, after proof by affidavit or oral examination of witnesses, is satisfied that the requirements of this chapter have been fully complied with, the board shall make an order declaring that the proposed municipality shall, with the assent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state, be an incorporated municipality by the name specified in the application. The name shall be different from that of any other municipality in this state. The board shall also include in the order a date for an election to be conducted pursuant to Title 12.

S.D. Codified Laws § 9-3-6 (emphasis added). The statute requires the Board of County Commissioners to be satisfied that the petition to form the Buffalo Chip municipality fully comply with the requirements of Title 9. So while the pertinent statutes do not require the Commission to put each petition signer under oath and interrogate her, the Board's duty mandates that <u>all</u> the requirements of the chapter be fully satisfied.

The Chapter requires an accurate census of the resident population of the proposed municipality. SDCL § 9-3-3 directs:

"Any person making application for the organization of a municipality shall cause an accurate census to be taken of the landowners and the resident population of the proposed municipality not more than thirty days previous to the time of presenting the application to the board of county commissioners. The census shall exhibit the name of each landowner and person residing in the proposed municipality and the number of persons belonging to each family as of a certain date. The census shall be verified by the affidavit of the person taking the census."

S.D. Codified Laws § 9-3-3 (emphasis added). This statute explains the requirements placed upon the person taking the census, and is within Chapter 3 of Title 9, referenced in SDCL § 9-3-6. The statute requires the person taking the census to have an accurate census of the resident population of the proposed municipality within 30 days prior to giving the application to the Board of County Commissioners. Whether the individuals who signed the petitions are actually residents is relevant because SDCL § 9-3-6 requires the Board of County Commissioners to be satisfied, "after proof by affidavit or oral examination of witnesses," "that the requirements of this chapter have been fully complied with." Since an accurate census of the resident population is required, the Board of County Commissioners is obliged to ensure an accurate census. The undisputed facts do not resolve, as a matter of law, whether the Board satisfied its statutory duty.

Dated this \_\_\_\_\_\_ day of April, 2016.

BY THE COURT:

Hon. Jerome A. Pekrich Circuit Court Judge

ATTEST:

ORDER

raccord with the Court's Memorandum Decision, the parties' respective Motions for (Partial)

Summary Judgment ARE DENIED.

Dated this 35 day of April, 2016.

BY THE COURT:

Hon. Jerome A. Eckrich

Circuit Court Judge

ATTEST:

Clarico Courts, Deputy

FILED

APR 2 9 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM ATH CIRCUIT CLERK OF COURT By

# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

Appellees,

vs.

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

**Appellee** 

v.

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR,; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

Appellants,

And

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

### Appeal No. 27976

### APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

### THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

## AMICUS CURIAE BRIEF OF SOUTH DAKOTA MUNICIPAL LEAGUE

Mr. Kent R. Hagg Mr. John Stanton Dorsey Whiting Hagg Hagg Dorsey & Hagg, LLP 601 West Boulevard Rapid City, SD 57709 (605)348-1125 Attorneys for Intervenor/Appellant

Mr. Jack H. Hieb Mr. Zachary W. Peterson Richardson, Wyly, Wise, Sauck & Hieb, LLP PO Box 1030 Aberdeen, SD 57402-1030 (605)225-6310

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Attorney for Appellees Lippold
and Murphy

Mr. Greg Barnier Sturgis City Attorney 1040 – 2<sup>nd</sup> Street Sturgis, SD 57785 (605)490-8982 **Attorney for Appellee City of Sturgis** 

NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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### PRELIMINARY STATEMENT

This Amicus Curiae brief is being submitted by the South Dakota Municipal League, hereinafter "SDML", in support of the position taken by the City of Sturgis and to the extent consistent therewith, Intervenors and Appellees Gary Lippold and Jane Murphy. In this brief, references to the Meade County Commission, Alan Aker, Bob Bertolotto, Robert Heidgerken, Galen Neiderwerder and Linda Rausch shall be collectively referred to as "County Commission" or "Meade County". The Intervenor Buffalo Chip Campground, L.L.C. shall be referred to as "Buffalo Chip". The City of Sturgis shall be referred to as "Sturgis". Gary Lippold and Jane Murphy will be referred to by their surnames. The Meade County Clerk of Courts' record or Settled Record will be referred to by the initials "SR" and the corresponding page numbers. Exhibits entered into evidence at the trial will be referred to as "Ex." followed by the corresponding exhibit number. The Appendix to this brief will be referred to as "Appx." followed by the corresponding page number. SDML will address only issues which are deemed by it to be relevant to all of its membership.\(^1\)

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<sup>&</sup>lt;sup>1</sup> SDML joins Sturgis, Lippold and Murphy's arguments that support the Circuit Court's finding that the procedures used by the County Commission were "hasty, ill-informed, confused by tortured parliamentary procedure, and unfocused expostulation." Likewise, SDML concurs in Sturgis, Lippold and Murphy's arguments that SDCL § 9-3-20 does not apply to the question of the propriety of the incorporation of Buffalo Chip as presented to the Circuit Court. SDML also joins the argument and authority provided by Sturgis, Lippold and Murphy that the city's interest as owner and operator of a municipal airport gives Sturgis standing as an aggrieved person. Finally, SDML also supports the Circuit Court's finding that the Sturgis Municipal Airport was within the city and within three miles of the area proposed to be incorporated as a municipality.

### **JURISDICTIONAL STATEMENT**

SDML accepts the jurisdictional statement as set forth in Sturgis' brief. SDML is authorized to submit this Amicus Curiae brief pursuant to the Supreme Court's Order dated December 8, 2016.

### STATEMENT OF LEGAL ISSUES

1. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT SDCL § 9-3-1 REQUIRES THAT AN AREA PROPOSED FOR INCORPORATION AS A MUNICIPALITY CONTAIN BOTH ONE HUNDRED RESIDENTS AND THIRTY VOTERS.

The trial court ruled that SDCL § 9-3-1 requires that an area proposing to be incorporated as a municipality must contain not less than one hundred legal residents and not less than thirty voters. SDCL § 9-3-1.

### *Relevant Authority*

- 1. SDCL § 9-3-1
- 2. 1947 A.G.R. 157
- 3. Spink County v. Heinhold Hog Market, Inc., 229 N.W.2d 811 (S.D. 1980)
- 4. *Moss v. Guttormson*, 1996 S.D. 76, 551 N.W. 2d 14
  - 2. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE PREDICATE REQUIREMENTS OF SDCL CHAPTER 9-3 HAD NOT BEEN MET FOR THE PURPOSES OF A MUNICIPAL INCORPORATION ELECTION.

The trial court ruled that the predicate requirements of SDCL Chapter 9-3 had not been complied with and that the County Commission acted arbitrarily and capriciously in ordering an election on a petition for incorporation of a municipality.

### *Relevant Authority*

- 1. SDCL § 9-3-1
- 2. SDCL § 9-3-3
- 3. SDCL § 9-3-6
- 4. Heinemeyer v. Heartland Consumers Power District, 2008 S.D. 110, 757 N.W.2d 772

## 3. WHETHER THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ELECTION TO INCORPORATE BUFFALO CHIP AS A MUNICIPALITY WAS VOID.

The trial court ruled that the election for the incorporation of Buffalo Chip as a municipality was void since it was improperly ordered by the arbitrary and capricious acts of the County Commission.

### Relevant Authority

- 1. SDCL § 9-3-6
- 2. Klaudt v. City of Menno, 72 S.D. 1, 28 N.W.2d 876 (1947)
- 3. Gooder v. Rudd, 38 S.D. 197, 160 N.W. 808
- 4. Brekke v. Sioux Falls, 72 S.D. 451, 36 N.W.2d 406 (1949)

### **STATEMENT OF THE CASE**

SDML will rely upon the statement of the case as set forth in the Joint Appellees' brief.

### STATEMENT OF THE FACTS

SDML will reply upon the statement of facts as set forth in the Joint Appellees' brief.

### **ARGUMENTS**

1. THE CIRCUIT COURT CORRECTLY RULED THAT THE PREDICATE REQUIREMENTS OF SDCL CHAPTER 9-3 WERE NOT MET.

SDCL § 9-3-6 mandates that all of the statutory requirements of Chapter 9-3 must be met before a county commission can order an election on a petition for the formation of a new municipal corporation. The Circuit Court properly found that the County Commission acted with great disregard for the statutory requirements of SDCL Chapter 9-3 when it ordered an election on the formation of Buffalo Chip as a South Dakota city.

A. THE COURT CORRECTLY DETERMINED THAT SDCL § 9-3-1 REQUIRES A PROPOSED MUNICIPALITY TO HAVE BOTH ONE HUNDRED LEGAL RESIDENTS AND THIRTY VOTERS.

SDCL § 9-3-1, as it existed when Buffalo Chip petitioned Meade County for the creation of a new municipality, stated in its entirety as follows:

No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters.

The Circuit Court correctly determined that the County Commission was erroneous in allowing an election on the incorporation of Buffalo Chip to occur when the statutory requirements of SDCL § 9-3-1 were not met.

In fulfilling its role of interpreting statutes, the ultimate purpose for the Court is to "fulfill the legislative dictate." Legislative "intent is ordinarily ascertained by examining the express language of the statute." *Faircloth v. Raven Industries, Inc.*, 2000 S.D. 158, ¶6, 620 N.W.2d 198, 201. Courts are "bound by the actual language of applicable statutes

and must assume that the statutes mean what they say and that the legislators have said what they meant." *Schwan v. Burgdorf, et al.*, 2016 S.D. 45, ¶23, quoting *State v. Bordeaux*, 2006 S.D. 12, ¶18, 710 N.W.2d 169, 172 quoting *Crescent Electric Supply Co. v. Nerison*, 89 S.D. 203, 210, 232 N.W.2d 76, 80 (1975). When interpreting statutes, words and phrases in a statute must be given their plain meaning and effect. *Hay v. Grant County Commissioners*, 2003 S.D. 117, ¶9, 670 N.W.2d 376, 379 (*citing Esling v. Krambeck*, 2003 S.D. 59, ¶6, 663 N.W.2d 671, 676 (*citing Moss v. Guttormson*, 1996 S.D. 76, ¶10, 551 N.W.2d 14, 17 (citations omitted)). We review the language of the statute as a whole, "as well as enactments relating to the same subject." *Moss*, 1996 S.D. 76, ¶10, 551 N.W.2d at 17 (quoting *U.S. West Communications, Inc. v. Public Utilities Comm'n*, 505 N.W.2d 115, 122-23 (S.D. 1993)).

The Circuit Court indicated in its Memorandum Decision that the statute is "no model of clarity. A casual reader misdirected by the passive voice reads the 'or' to be disjunctive. It is not." (See Pg. 6 of Buffalo Chip's Appendix to Brief.) A careful reading and interpretation can, however, only lead to one conclusion. The Circuit Court correctly reached that conclusion when it ruled that the statute does require <u>both</u> one hundred legal residents and thirty voters as a prerequisite to be met before the question of the formation of a new municipality can be put to an election.

A review of the history of SDCL § 9-3-1 provides guidance. Section 6172 of the 1919 South Dakota Code (see Appx. Pg. 1) required that a census be completed not more than thirty days previous to the time of presenting the application for the incorporation of a municipality to the board of county commissioners. The statute required the census to

be verified by the affidavit of the person taking the same and concludes with the following language ... "provided, that no municipality shall be incorporated which contains less than one hundred legal residents or less than thirty qualified electors." 1919 SD Code Section 6172 (Appx. Pg. 1).

In the 1939 recodification of the South Dakota Code, the statute was amended to read:

45.0302 Census. Such persons shall cause an accurate census to be taken of the resident population of the territory included in said map as of a day not more than thirty days previous to the time of presenting such application to the board of county commissioners as hereinafter provided. Such census shall exhibit the name of every head of a family and shall also state the names of all persons residing within such territory at such time. It shall be verified by the affidavit of the person taking the same.

No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty qualified electors. Emphasis added.

SDC 1939 Section 45.0302. (See Appx. Pg. 2)

The requirements of the 1939 statute were directly addressed in an Attorney General's Opinion dated August 30, 1947. In that opinion, one question presented was:

2. Section 45.0302 of the South Dakota Code of 1939 provides that 'no municipality shall be incorporated which contains less than one hundred legal residents or less than thirty qualified electors. Under this Section, does the petition of August 4<sup>th</sup>, referred to above, listing sixty-two residents, thirty-nine of whom are qualified electors come within the law?'

1947 A.G.R. 157. *Emphasis added*. (Appx. Pg. 3)

In response to this question, the Attorney General Opinion states:

2. Incorporation of the municipality pursuant to the petition filed August 4, 1947 may not be accomplished since the census required by SDC 45.0302 shows only sixty-two residents, whereas, the statute requires as a prerequisite to incorporation that the territory shall contain a minimum of one hundred legal residents. Since the statute prescribes the minimum

number of inhabitants requisite to incorporation 'there must be a fulfillment of the requirement.'

*Id.* (Appx. Pg. 3).

An Attorney General Opinion provides "...guidance on legal issues until those issues are ruled upon by a court or the law is changed by the Legislature." *Spink County v. Heinhold Hog Market, Inc.*, 229 N.W.2d 811, 812 (S.D. 1980); *State v. Rumpca*, 2002 S.D. 124, ¶ 12, 652 N.W.2d 795, 799 (stating "[w]hile attorney general opinions are not binding on the court, they can be considered.")

The County Commission apparently chose to ignore the 1947 Attorney General Opinion. The interpretation of the Circuit Court in this matter is wholly consistent with the Attorney General Opinion. In this case, Buffalo Chip and Meade County see the word "or" and assume that only one of the two requirements of SDCL§ 9-3-1 need to be met. Their casual interpretation continues to be argued. SDML is not persuaded. The plain and clear language of SDCL§ 9-3-1 is that both requisites must be met. The language "less than one hundred legal residents or less than thirty voters" are both qualified by the introductory language in the sentence which states "no municipality shall be incorporated which contains". The language of the statute thus requires both one hundred legal residents and thirty voters.

Buffalo Chip and Meade County simply refuse to acknowledge that the qualifying language of "no municipality shall be incorporated" changes the meaning of what would otherwise be one of two conditions. Without being overly simplistic, one can look to a common phrase used in signage outside courtrooms throughout the country. A sign stating "no food or drink in the courtroom" does not mean that one can bring either food

or drink into the courtroom but not both. It means that neither is permitted. The same rests true in this case. The language of the statute is clear, the legislative history is clear and the 1947 Attorney General's Opinion verifies the requirement that both prerequisites of the statute must be met.

Buffalo Chip and Meade County further argue that changes made to SDCL § 9-3-1 during the 2016 legislative session dictate that their interpretation of the meaning of the statute as it existed prior to July 1, 2016 is correct. When reviewing the newly amended SDCL § 9-3-1, the only pertinent change relevant to this appeal was to make certain that there could be no misinterpretation of the requirement that both the number of legal residents and the number of registered voter prerequisites need to be met before a new municipality may be formed. The change is not drastic. The change is intended and gives guidance to county commissioners so that they do not follow the erroneous lead of three of the Meade County Commissioners in ignoring the statutory requirements of SDCL Chapter 9-3 and the 1947 Attorney General Opinion for the holding of an election on the formation of a new municipality.

When carefully reviewed and analyzed, it is clear that SDCL § 9-3-1 requires both one hundred legal residents and thirty voters. The sentence could be broken down into two sentences which read "no municipality shall be incorporated which contains less than one hundred legal residents. No municipality shall be incorporated which contains less than thirty voters." Regardless of the semantics that Buffalo Chip and Meade County use to assert that "or" is disjunctive as used in this statute, doing so ignores the rest of the statute and the statutory scheme which is required to be read in its entirety.

The need to satisfy both requirements of SDCL § 9-3-1 is further supported by SDCL § 9-3-3. This statute requires an accurate census of the landowners and the resident population of the proposed municipality. The statute requires that the census shall exhibit the name of each landowner and each person residing in the proposed municipality. The census must also document the number of persons belonging to each family within the area of the proposed municipality as of a certain date. A census of each person residing in the proposed municipality and documentation would be unnecessary if an applicant could proceed to an election without satisfying the one hundred legal residents requirement of SDCL § 9-3-1. The requirements for municipal incorporation need to be interpreted by consideration of the entire statutory scheme of SDCL Chapter 9-3.

Buffalo Chip concedes that there "were not 100 legal residents of Buffalo Chip. That has never been claimed..." *Buffalo Chip's Brief page 16, line 16*. The County Commission concedes that the incorporation in this case was based solely on having 30 or more voters. *Meade County's Brief page 28, lines 8-9*. The County Commission concedes that the application did not seek incorporation based upon having 100 legal residents. *Meade County's Brief page 28, lines 9-10*. That alone should have stopped all proceedings.

The prerequisite requirements of SDCL § 9-3-1 were not met. The Circuit Court correctly determined that the County Commission abused its discretion in ordering an election on the issue of the incorporation of Buffalo Chip when there were not both one hundred legal residents and thirty voters. The County Commission failed to ensure that

all requirements of Chapter 9-3 had been complied with as mandated by SDCL § 9-3-6. The County Commission ignored the 1947 Attorney General Opinion and misinterpreted the statute.

# B. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE PREDICATES OF SDCL § 9-3-3 AND § 9-3-4 HAD NOT BEEN MET.

SDCL § 9-3-3 provides:

Any person making application for the organization of a municipality <u>shall</u> cause an accurate census to be taken of the <u>landowners</u> and the <u>resident</u> <u>population</u> of the proposed municipality not more than thirty days previous to the time of presenting the application to the board of county commissioners. <u>The census shall exhibit the name of each landowner and person residing in the proposed municipality and the number of persons <u>belonging to each family as of a certain date</u>. The census shall be verified by the affidavit of the person taking the census. *Emphasis added*.</u>

The Circuit Court properly determined that the requisite provisions of SDCL § 9-3-3 had not been met.

The Circuit Court's Conclusions of Law provide:

- "L. The census was inaccurate, contained false information and failed to comply with the requirements of SDCL ch. 9-3. (SR 2330).
- M. The Amended Petition was inaccurate, contained false information and failed to comply with the requirement of SDCL ch. 9-3." (SR 2330).

In addition, the Circuit Court's Finding of Fact #54 stated:

"James Walczak, the Petitioner who executed the Census filed with the Amended Petition did not verify the information contained in the Census to determine whether those named in the Census were in fact residents of the area to be incorporated. (Tr. P. 98.)" (SR 2309).

A census exhibiting the name of each landowner and person residing in the proposed municipality and the number of persons belonging to each family as of a certain date must be presented along with an application for organization of a municipality.

SDCL § 9-3-3. The only purpose served for a census showing the name of each landowner and person residing in the proposed municipality and the number of persons belonging to each family as of a certain date is to ensure that the proposed incorporation meets the one hundred resident requirement of SDCL § 9-3-1. If one hundred legal residents were not required, there would be no purpose in requiring a census.

An examination of the February 20, 2016 census itself (attached to Ex. 23 & 24) demonstrates that the submitted census failed to comply with SDCL § 9-3-3 in at least two particulars:

- 1. It failed to contain an accurate census of the landowners within the proposed municipality. No landowners are listed on the February 20, 2016 census.
- 2. The census failed to exhibit the name of each legal resident residing in the proposed municipality. The February 20, 2016 census only states that the persons named are resident voters.

SDCL § 9-3-5 establishes the contents of the petition for incorporation and requires that:

1. The application for incorporation shall be by a petition verified by the circulator and identifying the resident population according to the census taken. The Circuit Court found that James Walcyzk, the petitioner who executed the census filed with the Amended Petition, did not verify the information contained in the census to

determine whether those named in the census were in fact residents of the area to be incorporated. (*Findings of Fact #54*, SR 2309.)

- 2. The application for incorporation must be signed by not less than twenty-five percent of the qualified voters who are either registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state. The Circuit Court states in the Memorandum Decision dated May 20, 2016, under <u>SEMINAL FACTS</u> that "[n]o person at any relevant time, resided, inhabited, or was domiciled within the declared limits of the proposed municipality ("Chip Territory"). No person at any relevant time was legally qualified to vote within Chip Territory." (See Pg. 004 of Buffalo Chip's Appendix to Brief.)
- 3. The application for incorporation shall be by petition and identify the "type of government to be formed, the number of trustees, commissioners, or wards of the municipality, the boundaries and area according to the survey, and the resident population according to the census taken."

The Circuit Court properly found that there were no persons identified in the Amended Petition who actually lived in the area proposed to be incorporated. (SR 2312)

This Court has examined the issue of resident voter registration in *Heinemeyer v*. *Heartland Consumers Power District*, 2008 S.D. 110, 757 N.W.2d 772. In *Heinemeyer*, this Court noted that SDCL § 12-4-1 provides "that every person who is qualified to register as a voter in South Dakota 'shall be entitled to be registered as a voter in the voting precinct in which he resides." *Id.* ¶12, 757 N.W.2d 776. This Court stated that SDCL § 12-1-4 provides that residence means "the place in which a person has fixed his

or her habitation..." *Id.* Under SDCL § 12-1-4 "a person is considered to have gained a residence in any county or municipality of this state in which the person actually lives". *Id.* 

In *Heinemeyer*, this Court noted the following facts were significant in its decision:

- 1. When Heinemeyer took out a petition to run for office, he was living in his home at 927 Jennifer Street in Madison, South Dakota. [¶14]
- 2. "Since this was the only residence that Heinemeyer kept at the time, this was in fact his voting residence." [¶14]
- 3. On November 1, 2006, Heinemeyer relinquished possession of his home at 927 Jennifer Street to the purchasers of that home and moved to the new home he built at 27 Golf Drive in Wentworth, South Dakota. [¶14]
- 4. On November 1, 2006, Heinemeyer ceased to actually live in his home in Madison. [¶14]
- 5. Heinemeyer effectively gained voting residence at his home in Wentworth on November 1, 2006, because he began actually living in his Wentworth home. [¶14]
- 6. On November 1, 2006, Heinemeyer removed himself from District 10 and established his voting residence at 27 Golf Drive in Wentworth.

Heinemeyer at ¶14 757 N.W.2d 772.

On appeal, Heinemeyer argued that he regained his voting residence in Madison when he rented an apartment there. The Court rejected this argument noting that a person's declared intentions may be discounted when they conflict with the facts. The Court also found that it was clear that Heinemeyer actually resided in his home in Wentworth and that he had no present intention of leaving. *Id.* at ¶18, 757 N.W.2d 777-

778. The Court stated that to evaluate voting residence under the guise of where a registered voter wants his voting residence to be ignores the clear statutory language of SDCL § 12-1-4. The question is not where a voter intends his voting residence to be, but whether the voter has any present intention of leaving the home where he actually lives. *Id.* at ¶16, 757 N.W.2d 772, 777.

In *Heinemeyer* at ¶20, 757 N.W.2d 772, 778, this Court noted, with approval, the 1984 South Dakota Attorney General's Opinion 19 which opined,

... that an individual who has a place of business, within the corporate limits of a municipality, and which place of business has a one-room apartment, may not be permitted to register and vote as though the individual was a resident of that municipality when, in fact, the individual has an ordinarily recognized place of residence outside the corporate limits of said municipality.

### 1984 S.D. OpAttyGen 19.

In applying the *Heinemeyer* analysis to this case, the Circuit Court properly found that where a person intends to live at some place at some point in the future may and should be discounted when it conflicts with the facts. The record indicates that no one lives at Buffalo Chip. (SR 2312) Each of the voters named in the petition for organizing a municipality had a recognized place of residence outside of the proposed area for municipal incorporation. The voter registration forms relied upon by Buffalo Chip and Meade County contained false information. The County Commission ignored the requirements of SDCL Chapter 9-3 in allowing this campground and entertainment venue to hold an election on the issue of municipal incorporation.

# C. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE COUNTY COMMISSION WAS ARBITRARY AND CAPRICIOUS WHEN IT ORDERED THAT AN ELECTION BE HELD ON INCORPORATION OF BUFFALO CHIP.

In the summary portion of the Circuit Court Memorandum Opinion dated May 20, 2016, Judge Eckrich stated:

"The Board has an affirmative, profound, legal duty to competently satisfy itself that the municipal incorporation statutes are fully complied with. SDCL 9-3-6.

Taken as a whole or in isolation, the errors described fatally flaw the incorporation of Chip City.

The Board's decision was arbitrary and capricious."

(See Buffalo Chip's Appendix to Brief Pg. 008.)

The Circuit Court correctly observed, among other things, that:

- 1. No person at any relevant time resided, inhabited or was domiciled within the declared limits of the proposed municipality.
- 2. No person at any relevant time was legally qualified to vote within the proposed municipality.
- 3. The application/amended application submitted to the Board was based upon false information and incompetent evidence.
- 4. The census, ostensibly circulated by Mr. Walczak, was grossly inaccurate and zero residents resided within the proposed municipality.
- 5. SDCL § 9-3-1 requires that one hundred legal residents reside within the area of the proposed municipality.

6. SDCL § 9-3-1 requires that the area of the proposed municipality contain at least thirty voters.

SDCL § 9-3-6 requires that the board be "satisfied that the requirements of this chapter have been fully complied with". Based upon all of the above Circuit Court determinations, the Circuit Court was correct when it ruled that the County Commission acted inappropriately in ordering an election on the question of the establishment of Buffalo Chip as a South Dakota municipality.

The action of the County Commission disregarded SDCL § 9-3-6 which requires that the county commissioners, as a prerequisite to the ordering of an election, must be satisfied that all the requirements of the chapter have been fully complied with. The requirements must be strictly adhered to since a municipal corporation has tremendous powers including the ability to expand and the authority to tax, condemn property and issue liquor licenses. The list goes on. The acts of the County Commission were clearly arbitrary and capricious and they wholly failed to ensure strict compliance with Chapter 9-3 of the South Dakota Codified Laws.

2. THE ELECTION TO INCORPORATE BUFFALO CHIP AS A MUNICIPALITY WAS VOID FROM THE OUTSET AS COUNTY COMMISSON WAS WITHOUT JURISDICTION TO ORDER AN ELECTION.

The South Dakota Municipal League contends that the petition for incorporation filed with the County Commission was insufficient in law and because of that insufficiency, the County Commission was without jurisdiction to schedule an election. The case of *Klaudt v. City of Menno*, 72 S.D. 1, 28 N.W.2d 876 (1947), is directly on point. In *Klaudt*, the Plaintiffs claimed that the petition for an election on whether or not

the City of Menno should procure a license for the sale of intoxicating liquor was illegally held. The appellant asserted that "the petition was insufficient in law, and that the officials of the city were without jurisdiction to hold the election." *Klaudt* at 72 S.D. 1, 28 N.W.2d 876. Respondents contended that the *Klaudt* objections to the petition requesting an election were not available to her after the election had been held. This Court disagreed and ruled that the petition for an election is the "only authority the officials of a city, town, or township have for holding such an election, and where there is no petition or where the petition filed is insufficient in law,... such officials are without any jurisdiction to hold an election; and such election, if held, together with all proceedings had thereunder or pursuant thereto, are wholly void." *Id.*, 72 S.D. 1, 3, 28 N.W.2d 876, 877 (1947) quoting *Gooder v. Rudd*, 38 S.D. 197, 160 N.W. 808, 809.

The *Klaudt* Court went on to hold "[t]he statutory requirements for a sufficient petition were conditions precedent to the right to hold such an election. Failure to file a valid petition rendered the election void, and it was immaterial whether the question was raised before or after the election was held." *Klaudt v. City of Menno*, 72 S.D. 1, 4, 28 N.W.2d 876, 877 (1947).

In *Klaudt*, the Court followed the rationale of *Gooder v. Rudd*, 38 S.D. 197, 160 N.W. 808 (1916). In *Gooder*, certain residents sought to submit the question "shall intoxicating liquor be sold at retail within the corporate limits of Orient Township?" An election was held which passed and no election contest was initiated. Plaintiff sought relief in court on the sole ground that the petition for the election was not signed by the requisite number of qualified signers. In its decision, this Court stated that the election

was a special election (*Wharton v. Boyer*, 36 S.D. 167, 153 N.W. 951) and that the statutory requirements must be strictly complied with. *Gooder*, 38 S.D. 197, 200, 160 N.W. 808, 809. In its ruling, this Court noted that "said petition did not comply with the provisions of the statute and was therefore void for any purpose". *Id.* at 201. This Court held that "where the petition filed is insufficient in law (which amounts to the same thing as no petition at all), such officials are without any jurisdiction to hold such an election; and such election, if held, together with all the proceedings thereunder or pursuant thereto, is wholly void." *Id.* 

A similar result was reached in the case of *Brekke v. City of Sioux Falls, and Great Northern Railroad Company*, 72 S.D. 446, 36 N.W.2d 406 (1949), which involved the petition for the abandonment of certain drainage districts. As it relates to statutory authorization, the Court noted that "[t]he statute provides for the requisites of the petition and a compliance therewith is essential to the jurisdiction of the county board to proceed with or consider the question of abandonment." *Brekke* at 72 S.D. 446, 451, 36 N.W.2d 406, 408. This Court further noted, "[i]t is the petition which gives the board the jurisdiction to act and whether or not the board does have such jurisdiction is dependent upon the petition..." *Id*.

Gooder v. Rudd, Klaudt v. Menno and Hurley v. Corsey, 64 S.D. 131, 265 N.W. 4 (1936) are all cited as authority in the case of Bienert v. Yankton School District, 507 N.W.2d 80 (S.D. 1993). In that case, this Court noted in reference to the above three cases:

[t]hese three precedents all adhere to the premise that equitable relief is proper in prohibiting enforcement of an election result where the election itself could not legally have been held. When a petition is invalid, no authority or jurisdiction exists to hold an election. The same holds true for electing people to positions that do not legally exist.

Bienert v. Yankton Sch. Dist. at 90.

This is consistent with the ruling in *Heine Farms v. Yankton County*, 2002 S.D. 88, 649 N.W.2d 597. In that case, an initiated zoning ordinance was adopted at an election ordered by the county commission. The ordinance was adopted but invalidated by the court since Yankton County did not have a comprehensive plan which is a "necessary predicate for the enactment of a zoning ordinance." *Id.* at ¶15, 649 N.W.2d 601. This is no different. Voiding the result of an election which was an unauthorized act of a county commission is the only logical and legal conclusion that can be reached.

SDML submits that the petition submitted in this case was defective because of the numerous shortcomings identified. Since the predicate requirements of SDCL Chapter 9-3 had not been met, the County Commission lacked jurisdiction to order an election. The election at Buffalo Chip was void and could not be legally held. Therefore, the formation of Buffalo Chip as a municipality was properly declared to be void. No other remedy is proper or adequate.

### **CONCLUSION**

SDML submits that the attempted incorporation of Buffalo Chip was a misguided effort that was perpetuated by the unlawful acts of the County Commission. Whether through misinterpretation, misapplication or sheer disregard of the law, the County Commission wholly failed its duty when ordering an election to be held. Buffalo Chip did

not meet the qualifications of SDCL Chapter 9-3 and the election was void. Buffalo Chip should remain a campground.

Respectfully submitted this 22<sup>nd</sup> day of December, 2016.

FRIEBERG, NELSON & ASK, LLP

THOMAS H. FRIEBERG LARRY A. NELSON 115 N. 3<sup>rd</sup> Street, PO Box 511 Beresford, SD 57004-0511 (605) 763-2107 Attorneys for South Dakota Municipal League

### **CERTIFICATE OF SERVICE**

I, THOMAS H. FRIEBERG, hereby certify that I am a duly licensed and practicing attorney at law, having been so licensed by the Supreme Court of the State of South Dakota, and that I served the within and foregoing AMICUS CURIAE BRIEF upon the following by mailing two (2) true and correct copies thereof, by first class mail, on December 22, 2016, as follows:

Mr. Kent R. Hagg Mr. John Stanton Dorsey Whiting Hagg Hagg Dorsey & Hagg, LLP 601 West Boulevard Rapid City, SD 57709 (605)348-1125 Attorneys for Intervenor/Appellant

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and Murphy

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and that I mailed the original brief and two (2) copies to the Clerk of the Supreme Court on December 22, 2016.

Dated at Beresford, South Dakota, this 22<sup>nd</sup> day of December, 2016.

THOMAS H. FRIEBERG

### **CERTIFICATE OF COMPLIANCE**

I, THOMAS H. FRIEBERG, hereby certify this brief is submitted in Times New Roman typeface, 12 pt., and that the word processing system used to prepare the brief indicates that the number of words used was 4,535 and the character count was 22,932 without counting spaces.

Dated this 22<sup>nd</sup> day of December, 2016.

THOMAS H. FRIEBERG

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Cities and

### ARTICLE 1. ORGANIZATION

\$ 6171. New Municipalities.
\$ 6172. Cansus.
\$ 6173. Map and Census Subject to Examination.
\$ 6174. Potition for Incorporation.
\$ 6175. County Commissioners Order Incorporation.
\$ 6175. County Commissioners Order Incorporation.
\$ 6176. Notice of Meeting.
\$ 6177. Opening of Folls.
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\$ 6180. Statement of Accounts.
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\$ 6182. Division into Wards.
\$ 6183. Still Division into Wards.
\$ 6184. Legalization.

§ 6171. New Municipalities. Persons intending to make application for the organization of a municipal corporation hereunder shall cause an accurate survey and map to be made of the territory intended to be embraced within the limits of such municipality. Such survey shall be made by a practical surveyor and show the courses and distances of the boundaries thereof and the quantity of land contained therein, the accuracy of which survey and map shall be verified by the affidavits of such surveyor, written thereon or annexed thereto.

Bourcei § 1, Ch. 24, Fol; C.; § 1022, C.
L.; § 1417, Rev. Pol. C.
Incorporated towns distinguished from
towns or townships. Town of Dell Rapids
v. Irving, 7 S. D. 810, 64 N. W. 149, 26 L.
A town has no authority to assess abutting property for laying water mains. Lee

V. Town of Mellette, 15 S. D. 586, 90 N. W. 855.
Who may maintain que warrante te test validity of organization of village. 21 L. R. A. (N. S.) 685.
See Town of Vilas v. Circuit Court, 24 S. D. 298, 128 N. W. 841.

§ 6172. Census. Such persons shall cause an accurate census to be taken of the resident population of the territory included in said map as such population may be on some day not more than thirty days previous to the time of presenting such application to the board of county commissioners as hereinafter provided, which census shall exhibit the name of every head of a family residing within such territory on such day, and the number of persons belonging to every such family, and shall also state the names of all persons residing within such territory at such time, which census shall be verified by the affidavit of the person taking the same; provided, that no municipality shall be incorporated which contains less than one hundred legal residents or less than thirty qualified electors.

Source: § 2. Ch. 24, Pol. C.; § 1023, C. L.; § 1418, Rev. Pol. C.; Ch. 78, 1909.

§ 6173. Map and Census Subject to Examination. Such survey, map and census when completed and verified shall be left at some convenient place within such territory for examination, by those having an interest in such application, for a period of not less than thirty days.

Source: § 8, Ch. 24, Pol. C.; § 1024, C. L.; § 1419, Rev. Pol. C.

§ 6174. Petition for Incorporation. The application for incorporation shall be by a petition subscribed by the applicants and by not less than one-third of the whole number of qualified voters residing within such territory, and such petition shall set forth the boundaries, the quantity of land embraced according to the survey, and the resident population of such territory according to the census taken. Such petition shall have attached thereto or written thereon affidavits verifying the facts alleged therein, and it shall be presented at the time indicated in the notice of such application or as soon thereafter as the board of county commissioners can receive and consider the same.

Source: §. 4, Ch. 24, Pol, C.; § 1025, C. L.; § 1420, Rev. Pol. C.

1484

MUNICIPAL GOVERNMENT

undaries and area thereof and the accuracy of which shall be verified by the indayit of the surveyor.

gource: § 6171 Rev. Code 1919, revised for brevity.

45,0802 Census. Such persons shall cause an accurate census to be taken of the esident population of the territory included in said map as of a day not more than thirty days previous to the time of presenting such application to the board of county commissioners as hereinafter provided. Such ceissus shall exhibit the hane of every head of a family residing within such territory, on such day and the number of persons belonging to every such family and shall also state the hanges of all persons residing within such territory at such time. It shall be

verified by the affidavit of the person taking the same, No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty qualified electors.

Source: § 6172 Rev. Code 1919, revised in form.

15.0808 Map and census subject to examination. Such survey, map, and census when completed and verified shall be left at some convenient place within such territory for a period of not less than thirty days for examination by those having an interest in such application.

Source: § 6178 Rev. Code 1919, revised in form.

48,0804 Petition for incorporation. The application for incorporation shall be by a petition subscribed and verified by the applicants and subscribed by not less than one-third of the whole number of qualified voters residing within such territory. It shall set forth the boundaries and area thereof according to the survey and the resident population thereof according to the census taken. It shall be presented at the time indicated in the notice of such application or as soon thereafter as the board of county commissioners can receive and consider the same.

Source: § 6174 Rev. Code 1919, revised in form.

45,0305 County commissioners order incorporation. If the board, after proof by affidavit or oral examination of witnesses, shall be satisfied that the requirements of this chapter have been fully complied with, it shall make an order declaring that such territory shall, with the assent of the qualified voters thereof as hereinlafter provided, be an incorporated municipality by the name specified in the application. Such name shall be different from that of any other municipality in this state. It shall also include in such order a notice for a meeting of the qualified electors resident in the proposed municipality, at a convenient place therein, on some day within one month therefrom, to determine whether such territory shall become an incorporated municipality.

Source: § 6175 Rev. Code 1919, revised in form.

45,0306 Notice of meeting. The board shall give ten days notice of such meeting by publication and by posting a copy of such notice at ten of the most public places in the proposed municipality. places in the proposed municipality.

Source: § 6176 Rev. Code 1919, revised in form.

45,0807 Opening of polls. At such meeting the polls shall be kept open from ine o'clock in the forenoon until four o'clock in the afternoon.

Source: § 6177 Rev. Code 1919, revised in form.

45.0808 Dection of inspectors. The voters at such meeting shall first elect liree inspectors, who shall elect one of their number as clerk and shall without delay open the polls to receive the ballots of the voters.

Source: § 6178 Rev. Code 1919, revised in form.

45,0809 Manner of voting. The vote upon the question of incorporation shall Manner of Voting, 1116 voting 45,1821.

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MUNICIPAL CORPORATIONS—COUNTY COMMISSIONERS Petition for extension of boundaries of existing city and petition for incorporation, of new town pending at same time, involving same territory; minimum number of inhabitants for incorporation.

August 30, 1947

Mr. J. H. Bottum, Jr., State's Attorney,

Rapid City, South Dakota,

Your letter of the 26th instant requests my opinion as follows:

"On August 1, 1947, the City Commission of the City of Rapid City, after full compilance and in conformity with the provisions of Section 45.2907 of the South Dakota Code of 1939, filed with the Board of County Commissioners of Pennington County a petition for the annexation to the City of Rapid City of a certain area. Subsequently, and on August 4, 1947, a group of residents of a portion of the area affected by the petition above described filed a petition with the said Board of County Commissioners to incorporate a municipality, the same to comprise a portion of the area affected by and described in the original partition for annexation. The second petition referred to above lists sixty-two (82) legal residents and thirty-nine (39) qualified voters or electors.

Under the foregoing facts, I would like to have an answer to the following

- 1. When a petition for extension of the boundaries of a municipality has been filed with the County Commissioners, does the Board of County Commissioners have jurisdiction to consider a subsequent petition for the incorporation of a municipality in the area or a portion thereof affected by the original petition before such original petition has been disposed of by said Board?
- 2. Section 45.0302 of the South Dakota Code of 1939 provides that "no municipality shall be incorporated which contains less than one-hundred legal residents or less than thirty qualified electors. Under this Section, does the petition of August 4th, referred to above, listing sixty-two residents, thirty-nine of whom are qualified electors come within the law."
- 1. The two projects are as much in conflict as they would be if the petitions were filed with different boards. The Board of County Commissioners first obtained jurisdiction by the filing of the petition pursuant to SDO 45.2907 on August 1, 1947. I, therefore, conclude that action on this petition first filed should be first completed. State ex rel Johnson vs. Clark (ND) 131 NW 715.
- 2. Incorporation of the municipality pursuant to the petition filed August 4, 1947 may not be accomplished since the census required by SDC 46.0302 shows only sixty-two residents, whereas, the statute requires as a prerequisite to incorporation that the territory shall contain a minimum of one hundred legal residents. Since the statute prescribes the minimum number of inhabitants requisite to incorporation "there must be a fulfillment of the requirement". State vs. Clark 76 Neb. 620, 106 NW 971, 48 C. J. 80 Sec. 19.

APPX. 3

# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

Appellees,

v.

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

**Appellee** 

v.

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

\_\_\_\_\_

### Appeal No. 27976

### APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

# THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

### INTERVENOR/APPELLANT'S REPLY BRIEF and RESPONSE TO MOTION TO DISMISS APPEAL

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NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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### **STATEMENT OF LEGAL ISSUES**

# ISSUE ONE: APPELLANTS' ARGUMENT IS NOT BARRED BY RES JUDICATA.

Apposite Authority:

Springer v. Black, 520 N.W.2d 77 (S.D. 1994) Brekke v. City of Sioux Falls, 72 S.D. 446, 36 N.W.2d 406 (1949)

# ISSUE TWO: LIPPOLD DOES NOT HAVE STANDING UNDER SDCL § 9-1-6; SUCH CLAIM WAS NOT RAISED BELOW.

Apposite Authority:

Hall v. State ex rel. South Dakota Dept. of Transportation, 2006 S.D. 24, 712 N.W.2d 22

ISSUE THREE: ADDITIONAL MATTERS

### **RESPONSE TO MOTION TO DISMISS APPEAL**

# ISSUE ONE: BUFFALO CHIP CAMPGROUND, LLC HAS STANDING TO BRING THIS APPEAL.

Apposite Authority:

In re B.C., 2010 S.D. 59, 786 N.W.2d 350 Whitesell v. Rapid Soft Water & Spas, Inc., 2014 S.D. 41, 850 N.W.2d 840 Lake Hendricks Imp. Ass'n v. Brookings Co. Planning & Zoning Com'n, 2016 S.D. 48, 882 N.W.2d 307

### **ARGUMENT**

#### I. APPELLANTS' ARGUMENT IS NOT BARRED BY RES JUDICATA.

Appellees claim that the case of Town of Buffalo Chip v. Jerome Eckrich, an application for writ of prohibition to the Supreme Court, which was denied, precludes a decision on the issues of jurisdiction and the application of SDCL § 9-3-20 in this case, based on the doctrine of res judicata.

The doctrine of res judicata precludes claims in order to prevent re-litigation of an issue actually litigated or which could have been properly raised and determined in a prior action. *Springer v. Black*, 520 N.W.2d 77 (S.D. 1994). The court applies four factors in determining whether res judicata is applicable: 1) Whether the issue decided in the former/previous adjudication is identical to the present issue; 2) whether there was a final judgment on the merits; 3) whether the parties in the two actions are the same or in privity; and 4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication. *Id.* at 79.

Missing from this case are factors 1, 2, 3, and 4. The parties in the application for writ of prohibition case to the Supreme Court were the Town of Buffalo Chip, SD and Judge Jerome A. Eckrich. Neither of whom are parties in this case. This Court denied the application for writ of prohibition within a week of receiving it, without any response from Judge Eckrich, or any briefing or oral argument. No full and fair opportunity to litigate the issues occurred, nor was a final judgment on the merits reached. The application was summarily denied without the Supreme Court making any decision or judgment on the merits of the case. Buffalo Chip Campground, LLC is a separate legal entity from the Town of Buffalo Chip, as is Meade County. Filing a joint Notice of

Appeal in this case, saving the Court time and resources from consolidating two appeals, does not make Meade County in privity with the Town of Buffalo Chip in the writ case. Moreover, separate legal entities are not in privity with one another in separate legal cases. Res judicata does not apply.

A similar situation occurred in the case of *Brekke v. City of Sioux Falls*, in which petitions were brought to the county board; writs of mandamus, prohibition, and an appeal of the county's decision all occurred by various parties related to the action. 72 S.D. 446, 451, 36 N.W.2d 406, 408 (1949). Each proceeding involved different parties and the court found that "no estoppel could be predicated upon either of these proceedings which would deny to the respondents their right to question the sufficiency of the petition nor has there been any determination of the question binding upon respondents." *Id.* In other words, the appeal could be brought because the issue had not been litigated by the parties in any of the prior, separate proceedings, much as the situation here.

Other jurisdictions have reached the conclusion that "a denial without written opinion of a petition for a writ of prohibition...[is] not res judicata." *In re Kammerer's Estate*, 8 Wis 2d 494, 99 N.W.2d. 841 (1959); *see also McDonough v. Garrison*, 68 Cal App 2d 318, 156 P.2d 983 (1945); *Aday v. Municipal Court for Burbank Judicial Dist.*, 210 Cal App 2d 229, 26 Cal Rptr 576 (1962); *Oak Grove School Dist. v. City Title Ins.*Co., 217 Cal App 2d 678, 32 Cal Rptr 288 (1963); *State ex rel. St. Louis v. Sartorius*, 340 Mo. 832, 102 S.W.2d 890 (1937).

Additionally, the writ of prohibition case was filed on April 6, 2016, after the issue was originally litigated in this case; this is the prior case, not the writ of prohibition

case. A motion to dismiss for lack of subject matter jurisdiction, in which SDCL § 9-3-20 was argued by Buffalo Chip Campground, was filed with the court in this case on December 23, 2015, argued on March 4, 2016, and an order denying such motion was filed on March 28, 2016. All of these matters occurred in this case prior to the writ of prohibition being filed by the Town of Buffalo Chip in a separate case.

It is not uncommon for parties in a case to seek a writ of prohibition or mandamus in addition to or instead of an appeal. *See In re State of S.D.*, 692 F.2d 1158 (8<sup>th</sup> Cir. 1982). Although the parties in this case did not seek a writ, even if they had, it would be unlikely to be considered res judicata because "If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error." *Id.* at 1162. A court may decline to decide whether a writ should be issued and a case may proceed on appeal.

As this Court has stated, "One of the purposes of res judicata is to protect parties from being subjected twice to the same cause of action, since public policy is best served when litigation has a finality." *Springer v. Black*, 520 N.W.2d at 79. Here, Sturgis and Lippold have only been subject to litigation once, in the current action that they initiated; the case is now on appeal – an appeal is not a new case subjecting them to additional litigation. Res judicata does not apply here and the arguments related to SDCL § 9-3-20 and the Circuit Court's jurisdiction are not barred under that doctrine.

### II. LIPPOLD DOES NOT HAVE STANDING UNDER SDCL § 9-1-6; SUCH CLAIM WAS NOT RAISED BELOW.

For the first time, on appeal, Lippold claims he had standing to appeal the County Commission's decision under SDCL § 9-1-6. This Court has repeatedly stated "we will

not address for the first time on appeal issues not raised below." *Hall v. State ex rel.*South Dakota Dept. of Transportation, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26.

To raise a legal argument on appeal in an answering brief without first addressing it below puts the adverse party at an extreme disadvantage. Had the issue been raised below, the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration.

*Id.* at 27. The court will ordinarily treat the issue as not being properly before the court. *Id.* 

Lippold's Notice of Appeal, filed with Circuit Court, cited only to the provisions of Ch. 7-8 and did not assert as a basis for his appeal SDCL § 9-1-6. (See A 080-81.)

Lippold claims that he has standing under SDCL § 9-1-6, claiming that he is a citizen and taxpayer within a municipality and can bring an action to prevent a violation of any provision of Title 9. Notably, § 9-1-6 lies under the Municipal Government section of Title 9 (§ 9-1), not the County Commission section (§ 9-3). Importantly, there is no evidence in the record that Gary Lippold is a citizen of any municipality. The only testimony presented at trial was that he was a resident of Meade County. (T 9.)<sup>2</sup> Finding 1, that he was a resident of Sturgis is clearly erroneous. Even if § 9-1-6 did apply to this appeal, there is a lack of evidence in the record to show that Lippold has standing under such provision.

Assuming, *arguendo*, that § 9-1-6 does apply here, in *Winter Brothers Underground, Inc. v. City of Beresford*, the court found that a citizen who resided in the city, paid sales tax in the city, but did not own any real property in the city was not a

<sup>&</sup>lt;sup>1</sup> References to Intervenor/Appellant's Appendix filed on October 21, 2016 are cited as "A"

<sup>&</sup>lt;sup>2</sup> References to the Transcript from the Trial De Novo are cited as "T \_\_."

"taxpayer" who had standing to bring a suit to challenge the award of a public contract to the lowest bidder. 2002 S.D. 117, 652 N.W.2d 99. The record is devoid of evidence concerning whether Lippold owns real property in either Sturgis or Meade County.

Even if this section applied, § 9-1-6 is the more general statute than § 7-8-27, which is the more specific statute allowing for appeals of county commission decisions. Rules of statutory construction require that a statute that is specific and express controls over a more general statute. *Marshall v. State*, 302 N.W.2d 52 (S.D. 1981). *See Clem v. City of Yankton*, 83 S.D. 386, 160 N.W.2d 125, 134 (1968) (the terms of a statute relating to a particular subject will prevail over the general terms of another statute). Here, SDCL §§ 7-8-27 through 7-8-32 provide specific procedures to follow when appealing a county commission decision.

Lippold cites *Knecht v. Weber* for the proposition that this court should affirm the ruling below if it was "right for any reason." 2002 S.D. 21, ¶ 4, 640 N.W.2d 491, 494. However, *Knecht* is distinguishable from this case as *Knecht* was a habeas corpus case stemming from a criminal conviction. The court has stated that "a review of a habeas case is not an ordinary appeal." *Id.* A petition for habeas corpus occurs separately and after a defendant has a right to appeal. It also relates only to criminal matters, not civil matters. Because a habeas case is reviewed differently than an ordinary appeal, like the one here, the reasoning that the Court should affirm a decision if it was right for any reason does not apply in this case.

This issue was raised for the first time on appeal and should not be considered by the court. However, if considered by the Court, this Court should find that the record lacks the evidence necessary to find that Lippold is a taxpayer and that § 9-1-6 does not apply to appeals of a county commission's decision.

#### III. ADDITIONAL MATTERS

### A. Error in Citation of Arnoldy v. Mahoney

Lippold and Sturgis point out an error in Buffalo Chip Campground's brief.

Intervenor admits the citation error and apologizes to the Court. At this point it would be speculation as to how the error occurred. Regardless, no reputable attorney or party would want to mislead the Court by a citation to law that is inaccurate, and Intervenor apologizes for the error.

# **B.** Appeal of Circuit Court's decision to not hold a hearing on the motion to stay the election

On November 28, 2016 this Court dismissed Gary Lippold's Notice of Review. While this matter is best addressed by Meade County, as Buffalo Chip Campground was not a party to the action at the time the motion to stay the election was made, Intervenor would be remiss to not point out that Lippold has ignored this Court's order dismissing their notice of appeal of the matter. In the brief in this issue at page 45, Lippold notes when he filed his notice of appeal with the Circuit Court, but Sturgis does not similarly note its notice of appeal filed with the Circuit Court. Similarly, the argument addresses both Lippold and Sturgis's position. (See Appellees' Brief at page 49 "Lippold and the City contend..." and "The City and Lippold contend..." and at page 50 "as Lippold and the City advocate now.") It is appalling that Lippold would so blatantly ignore this Court's ruling and continue to address a matter to which it was not permitted an appeal.

Buffalo Chip Campground hereby adopts by reference the response by Meade County on the issue of the Circuit Court's decision to not hold a hearing or grant the motion to stay the election.

### RESPONSE TO MOTION TO DISMISS APPEAL

### I. BUFFALO CHIP CAMPGROUND HAS STANDING TO BRING THIS APPEAL.

### A. Appellees have not met their burden

The party bringing a motion to dismiss has the burden of establishing facts to support its motion. *In re B.C.*, 2010 S.D. 59, ¶ 11, 786 N.W.2d 350, 353. In a footnote in that case, the court noted that intervention allows the third voice of the intervenor to be heard by the court and binds the intervenor to the judgment. *Id.* at fn 1.

A similar motion was made in the case of *Kamrar v. Sanborn County*, 60 S.D. 147, 244 N.W. 89 (1932). In that case respondents filed a motion to dismiss the appeal arguing that the appellants were not "parties aggrieved" and had no interest in the subject-matter in controversy to justify an appeal. *Id.* at 91. The Court said "To determine this point would require a determination of at least one of the very issues made by the appeal itself upon the merits..." *Id.* "We are of the view that the questions now sought to be presented by motion to dismiss are, in substance, identical for the most part with those that will be presented on the merits of the appeal, and that they should be determined when the appeal is reached upon the merits rather than upon motion." *Id.* The court denied the motion to dismiss. *Id.* 

Here, too, the court should deny the motion to dismiss. Appellees have failed to articulate a basis for which to grant their motion to dismiss. They argue that Buffalo

Chip Campground lacks standing, but only make references to the law of limited liability companies. It is unclear if Appellees are arguing that because Buffalo Chip Campground is a limited liability company it does not have standing to bring an appeal in a case in which it was a party below and bound by the decision?

It appears that perhaps Appellees are arguing that without standing this Court has no jurisdiction over the appeal, but it is not clear why they think that. To try to bolster their confused and tortured argument, Appellees have brought up matters outside the record. (See top paragraph on page 15 and middle paragraph on page 16 of Appellees' brief.) If the question is why is the Town of Buffalo Chip not a party, that is because Appellees and the Court never made it a party; it was not for the Town to intervene and subject itself to the jurisdiction of the court, but that is irrelevant to Buffalo Chip Campground's standing.

"A challenge to standing can be waived." Whitesell v. Rapid Soft Water & Spas, Inc., 2014 S.D. 41, ¶ 9, 850 N.W.2d 840, 842. Appellees waited until the extended date their brief was due to make a motion to dismiss Buffalo Chip Campground's appeal. The notice of appeal by Intervenor/Appellant was filed on September 6, 2016; the motion to dismiss such appeal was not made until December 22, 2016, over three months later. In Whitesell, the employer argued that Whitesell lacked standing to bring the claim that was the subject of the appeal. Id. at ¶ 8. The court noted that the issue of standing did not come up until Whitesell's reply brief and thus employer claimed it did not have the opportunity to raise the issue. Id. at ¶ 10. This Court found that "Employer's failure to file a notice of review precluded appellate review...[a]s such, we deem Employer's standing argument waived." Id. at ¶ 11, 843.

Likewise, Sturgis and Lippold did not make such a motion until well into the appellate process before the Supreme Court and did not file any sort of notice of review regarding the matter. The parties consented to Buffalo Chip Campground's intervention below. Due to the delay, this Court should find that the issue of standing is waived.

### B. Buffalo Chip Campground has standing to bring this appeal

Buffalo Chip Campground was permitted to intervene below and this intervention was consented to by all parties. Intervenor intervened as an Appellee, on essentially the same side as Meade County. Intervenor therefore was not required to show that it was a person aggrieved by the Commission's decision, as it never alleged such a grievance and actually sided with the decision of the Commission. (See Brief of Appellee at page 16 "Here the Campground has suffered no denial of some claim of right either of person or property and thus is not a person aggrieved by the Commission's decision.") It may be that what Appellees meant, but did not state, is that the Campground must be aggrieved by the Court's decision to bring this appeal.

A party bringing an appeal must be a "party aggrieved" and must have been a party at some stage to the action or proceeding below. *Olesen v. Snyder*, 249 N.W.2d 266, 269 (S.D. 1976). Intervenor Buffalo Chip Campground was clearly a party below, as it intervened on June 10, 2015 by consent of the parties and order of the Court. "As a general rule, an appellant must not only have an interest in the subject matter in controversy, but must also be prejudiced or aggrieved by the decision from which he appeals." *Smith v. Rustic Home Builders, LLC*, 2013 S.D. 9, ¶ 9, 826 N.W.2d 357, 360. Commentators look to the interest of the intervenor in determining whether an intervenor is authorized to appeal. *In re B.C.*, 2010 S.D. 59, ¶ 8, 786 N.W.2d 350, 352. An appeal

will be allowed only if the subsequent orders affect the intervenor and only to the extent of the interest that made it possible for the intervention. *Id.* Buffalo Chip Campground was aggrieved by the judgment of the court.

Buffalo Chip Campground has a strong interest in the outcome of this case as the Town of Buffalo Chip is located within the perimeter of the Campground and has jurisdiction over those areas of the Campground; Meade County has jurisdiction over the areas of the Campground outside of the Town. What authorities, laws, and ordinances apply to the Campground is determined by this case. Where the Campground can obtain liquor licenses is determined by the outcome of this case. Whether the Campground wrongfully paid sales tax to the Town of Buffalo Chip rather than to Meade County is determined by the outcome of this case. The Campground's interests in the outcome of this case cannot be questioned. This is why the Campground was allowed to intervene in the case.

After intervention, the Campground made motions to dismiss the case, actively participated in the de novo trial, made proposed findings of fact and conclusions of law, and objected to findings of fact and conclusions of law. The court chose to rule against Intervenor in all of these matters and the Campground has the ability to challenge that decision through the appellate process allowed in the State of South Dakota. SDCL § 15-26A-3 allows for an appeal from a judgment or final order. The Campground is harmed by the ruling of the Circuit Court in essentially dissolving the Town of Buffalo Chip in that it relied on the ruling of Meade County creating the Town by obtaining liquor licenses from the Town and paying sales tax to the Town. As set forth in Intervenor/Appellant's Brief and Intervenor Buffalo Chip Campground, LLC's

Objections to Findings and Conclusions Pursuant to SDCL § 15-6-52(a) (A 146-157), the Circuit Court erred in its rulings, by ruling against Intervenor's motion to dismiss for lack of subject matter jurisdiction and by its clearly erroneous findings, conclusions, and orders. Should this Court not reverse the Circuit Court's ruling, the Campground will be adversely affected and it should be repaid for the sales tax paid to the Town of Buffalo Chip. Had the Court ruled in Intervenor and Meade County's favor, there would be no question as to the existence of the Town of Buffalo Chip. But the Circuit Court's Order left open many questions as to how it affects the Town, who was not a party, and how the order affects the Campground's functioning.

### C. The appeal survives regardless of Buffalo Chip Campground's standing

If, however, this Court were to determine that Buffalo Chip Campground did not have standing to appeal the Circuit Court's decision, this Court may consider its briefs as amicus curiae. *See In re National Benefit Ass'n*, 72 S.D. 320, 34 N.W.2d 166 (1948).

If standing is decisive of jurisdiction, it may be raised at any time. *Lake Hendricks Imp. Ass'n v. Brookings Co. Planning & Zoning Com'n*, 2016 S.D. 48, ¶ 12, 882 N.W.2d 307, 311. However, it is possible for a court to have subject matter jurisdiction even though a party lacks standing. *Id.* Determining lack of standing versus lack of subject matter jurisdiction are separate arguments that require separate analysis. *Id.* Here, this Court has the power to act and review the decision of the Circuit Court because even if Buffalo Chip Campground lacks standing, Meade County does not.

As much as Lippold and Sturgis would like to believe that Intervenor's lack of standing (if it exists) would result in the dismissal of the appeal, that is simply not the case. This Court retains jurisdiction over the appeal because of Meade County's

standing. No dispute appears to exist as to the County's standing in this case. Just as in *Lake Hendricks*, whether Buffalo Chip Campground has standing to bring the appeal, the County does and there is no challenge to the County's standing. Thus, it makes no difference in the resolution of this case; the court retains jurisdiction. *Id.* at ¶ 22.

### **CONCLUSION**

Buffalo Chip Campground, LLC hereby prays this Honorable Court for the relief requested in its original Appellate Brief. Buffalo Chip Campground, LLC further requests this Court enter an order denying Sturgis and Lippold's motion to dismiss.

Dated: January 9, 2017 Respectfully submitted,

WHITING HAGG HAGG DORSEY & HAGG, LLP

By: /s/ Kent R. Hagg

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was drafted using Microsoft Word. The font is Times New Roman size 12, which includes serifs. The page count is 12 pages.

Dated: January 9, 2017 /s/ Kent R. Hagg

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date written below, true and correct copies of INTERVENOR/APPELLANT'S REPLY BRIEF and RESPONSE TO MOTION TO DISMISS APPEAL were served via electronic mail and first-class U.S. mail on:

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# IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

GARY LIPPOLD and JANE MURPHY,

Appellees,

-vs-

MEADE COUNTY BOARD OF COMMISSIONERS, ALAN AKER, BOB BERTOLOTTO, ROBERT HEIDGERKEN, GALEN NEIDERWERDER, and LINDA RAUSCH,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

CITY OF STURGIS,

Appellee,

-vs-

MEADE COUNTY COMMISSION, MR. ALAN AKER, CHAIR; MS. LINDA RAUSCH, VICE CHAIR; MR. GALEN NEIDERWERDER, MR. ROBERT BERTOLOTTO and MR. ROBERT HEIDGERKEN, all in their Official capacities as MEMBERS OF THE BOARD OF COMMISSIONERS OF MEADE COUNTY, SOUTH DAKOTA,

Appellants,

and

BUFFALO CHIP CAMPGROUND, LLC,

Intervenor/Appellant.

Appeal No. 27976

APPEAL FROM THE CIRCUIT COURT FOURTH JUDICIAL CIRCUIT MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME A. ECKRICH, CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED SEPTEMBER 6, 2016

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### REPLY ARGUMENT<sup>1</sup>

### A. SDCL 9-3-20 DOES NOT PERMIT THE USE OF AN APPEAL UNDER SDCL 7-8-27 TO UNINCORPORATE AN ACTING MUNICIPALITY.

The appealing parties attempt to persuade this Court that the Circuit Court retained jurisdiction throughout the underlying appeal because the appeal "is not an inquiry into the regularity of the organization of an acting municipality."

There are two problems with this argument: (1) once the election occurred, and the Town of Buffalo Chip was incorporated, the appeal was either rendered moot, or it necessarily involved an inquiry into the regularity of an acting municipality's organization; and (2) the appealing parties' requested relief, which was granted by the Circuit Court, goes beyond merely reversing or affirming the County's decision to set an election and purports to unincorporate an acting municipality.

<sup>&</sup>lt;sup>1</sup> This brief is written on behalf of Meade County and its commissioners to reply to the argument and authorities presented in the Appellees' Joint Brief ("Appellees' Brief"), and, where appropriate, the Amicus Curiae Brief of South Dakota Municipal League ("SDML"). The same conventions adopted in Appellants' Brief will be used throughout this brief.

The appealing parties first argue that the County's jurisdictional argument is incongruous because Buffalo Chip did not exist on March 2, 2015, the date the appeals were filed. This is an incorrect view as it relates to subject matter jurisdiction. A case must "be viable at all stages of the litigation; 'it is not sufficient that the controversy was live only at its inception.'" Brooks v. Ga. State Bd. of Elections, 59 F.3d 1114, 1119 (11<sup>th</sup> Cir. 1995) (quoting C & C Products, Inc. <u>v. Messick</u>, 700 F.2d 635, 636 (11<sup>th</sup> Cir. 1983)). Intervening events can occur during the pendency of a case, before it reaches an evidentiary hearing or decision. In this case, the election occurred and the Town of Buffalo Chip was incorporated. Once the Town of Buffalo Chip became an acting municipality, SDCL 9-3-20 commands that the regularity of its organization can only be inquired into in an action or proceeding instituted by or on behalf of the State.

The appealing parties also argue that, if this was an action challenging the organization of an acting municipality, the municipality should be a party to the action. Unwittingly, they have highlighted one of the chief problems with what they are attempting to do in this appeal. Plain and simply, the appealing parties are not attempting to use this appeal to obtain reversal of the County's decision, but to challenge the Town of Buffalo Chip's organization and existence. The County agrees

that the municipality should be a party to an action seeking to unincorporate it. But this is not such an action, and the appealing parties do not have standing to make the challenge. SDCL 9-3-20 sets the jurisdictional framework for the *only* action that may be used for that purpose. Suffice it to say, the State of South Dakota and the Town of Buffalo Chip are necessary parties to this action.

This Court has directed that "the test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought." State v. Phipps, 406 N.W.2d146, 148 (S.D. 1987) (citation omitted) (emphasis added). By the time the Circuit Court ruled in this case, the election had occurred. The controversy that prompted the appeals had, for all intents and purposes, ceased. Merely reversing the County's decision to allow the election "would be ineffectual for any purpose and would be an idle act concerning rights involved in the action." Aetna Life Ins. Co. v. Satterlee, 475 N.W.2d 569, 572 (S.D. 1991).

SDML points to Klaudt v. City of Menno, 72 S.D. 1, 28 N.W.2d 876 (1947), Gooder v. Rudd, 38 S.D. 197, 160 N.W. 808 (1916), Brekke v. City of Sioux Falls, 72 S.D. 446, 36 N.W.2d 406 (1949), and Bienert v. Yankton School District, 507 N.W.2d 80 (S.D. 1993), for the propositions that an invalid petition

can render an election or other proceedings void, and that the issue relating to invalidity can be raised after the election or other proceedings have taken place. Two things are significant about this case, compared to those cases. First, this case is factually and legally distinguishable. cases do not involve municipal incorporation. There are no statutes like SDCL 9-3-20 specifically controlling standing to challenge liquor licenses, drainage districts, etc. Second, SDML's cases do not concern appeals of county commission decisions. Could the Town of Buffalo Chip's organization be challenged? Of course. But the issue cannot be fully and finally resolved in an appeal under SDCL 7-8-27, and it cannot be fully and finally resolved among the parties to this case. See Wedel v. Beadle Cty. Comm'n, 2016 S.D. 59, ¶ 16, 884 N.W.2d 755, 759 (reversing the circuit court's decision that an ordinance "has no force and effect" because the court did not have the power to make such an order in the appeal).

The appealing parties asked the Circuit Court to go further than merely exercising appellate jurisdiction. The Circuit Court obliged:

ORDERED, ADJUDED (sic) AND DECREED that the Board's decision in approving the Amended Petition and setting the matter for public vote is a legal nullity; and it is further

ORDERED, ADJUDED (sic) AND DECREED that all actions

or any kind or character undertaken by the Town of Buffalo Chip, SD are void ab initio.

(Appx. 41; CR 2332.)

While this case started as an appeal of the County's decision to set an election under SDCL 7-8-27, that is not where it ended. The appealing parties did not merely seek an Order reversing the County's decision; they sought to unincorporate an acting municipality and void all of its actions. SDCL 9-3-20 dictates that, once the municipality is created, it is up to the State to pursue that challenge. The Circuit Court erred by failing to yield to the clear language of SDCL 9-3-20.

#### B. RES JUDICATA DOES NOT APPLY.

This Court's denial of a Writ of Prohibition to the Town of Buffalo Chip does not have any impact on the County's jurisdictional argument under SDCL 9-3-20. This Court applies four factors to determine whether the doctrine of res judicata applies: "(1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication." Faulk v. Faulk, 2002 S.D. 51, ¶ 17, 644 N.W.2d 632, 635 (quoting Moe v. Moe, 496 N.W.2d 593, 595 (S.D. 1993)). Factors 2, 3, and 4 are not satisfied.

"A denial of an application for a writ of prohibition does not necessarily reflect any view by the court on the merits, but rather may and very often does constitute only a ruling that the situation does not warrant utilization of the extraordinary writ of prohibition." In re Estate of Sympson, 577 S.W.2d 68, 71 (Mo. App. 1978). As to factors 2 and 4, on April 12, 2016, the Court summarily denied the Town of Buffalo Chip's Application for Writ of Prohibition. Although the County can only speculate about the Court's reasons for denying the writ, there is nothing about the Court's Order that suggests that the Court passed upon the merits of the jurisdictional argument. The Application was denied without a hearing or opinion.

As to factors 3 and 4, the County was not a party to the prior proceedings, and it had no opportunity to brief or argue the issue. The appealing parties cite no authority for the proposition that filing a joint appeal renders the County "in privity" with the Campground or the Town of Buffalo Chip. "[F]ailure to cite authority waives the argument that depends on it." Chem-Age Indus. v. Glover, 2002 S.D. 122, ¶ 22, 652 N.W.2d 756, 767. Under these circumstances, the elements of residuicata are not met.

C. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT THE APPEALING PARTIES HAD STANDING TO APPEAL UNDER SDCL 7-8-27.

### Attorney Chleborad's legal advice to the commission is not a binding admission and has no bearing on whether the City has standing.

The appealing parties argue that the City has standing because it annexed its airport and is, therefore, within three miles of the Town of Buffalo Chip and faced an imminent injury vis-a-vis the municipal incorporation. Notably, they do not address the County's argument that the City, as a municipality, is not a "person aggrieved" under SDCL 7-8-27 and lacks the statutory authority to appeal. (See Appellants' Brief, pp. 22-23.) Likewise, they do not address the undisputed evidence that the City failed to comply with SDCL 9-4-11, making the airport annexation a nullity. (See Appellants' Brief, pp. 28-29.) Rather, the appealing parties rest their standing argument on Deputy States Attorney Ken Chleborad's statements about the validity of the airport annexation during the commission hearing. Because Attorney Chleborad's statements constitute legal opinions, they have no impact on this matter.

An admission is limited to matters of fact which would otherwise require evidentiary proof, and cannot be based upon personal opinion or legal theory. Zahn v. Musick, 2000 S.D. 26, ¶ 27, 605 N.W.2d 823, 829. "Erroneous concessions of law are not binding upon the court." In re J.F., 109 Wash. App. 718,

732, 37 P.3d 1227, 1235 (2001). The appealing parties attempt to twist Attorney Chleborad's statements into factual concessions, because they know that it is the only way they can benefit. There is nothing "mixed" about the Deputy States Attorney's statements on pages 29-31 of Exhibit 47. Attorney Chleborad was clearly stating his legal opinion. Those opinions do not bind the County, and they should not influence the decision in this case.

Nor did Attorney Chleborad make "judicial admissions." The authority cited on pages 26-27 of Appellees' Brief expressly states: "A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of a fact claimed to be true, and is used as a substitute for legal evidence at the trial." Zahn at ¶ 27 (emphasis added). "'Judicial admissions may occur at any point during the litigation process.'" In re Estate of Tallman, 1997 S.D. 49, ¶ 13, 562 N.W.2d 893, 896 (quoting Kohne v. Yost, 250 Mont. 109, 818 P.2d 360, 362 (Mont 1991) (further citations omitted) (emphasis added). Chleborad's statements were made in a county commission hearing, not in a pleading, in open court, in a brief, or at any point during the litigation. The appealing parties cite no authority for the proposition that legal advice rendered at a county commission meeting can qualify as a "judicial"

admission," and, once again, this argument is waived. Chem-Age Indus. at  $\P$  22, 652 N.W.2d at 767.

#### 2. Lippold lacks standing.

The appealing parties initially claim that the appellants have not argued that the facts on which the Circuit Court found standing are clearly erroneous. This argument is hyper-technical and intentionally obtuse. On pages 20-21 of Appellants' Brief, the County pointed out Lippold's express acknowledgment that any problems created by the incorporation would be suffered by his employer, not him personally. (T16.) This stands in stark contrast to the Circuit Court's finding that "Lippold's ability to earn a living is affected..." (Appx. 11.) Indeed, the argument on pages 32 and 33 of Appellees' Brief, which appears without citation to the record, further cements the notion that Lippold's brother - who did not appeal - is potentially aggrieved, not Lippold.

More importantly, the appealing parties miss the point, because whether a party has standing to maintain an action is a legal question. Arnoldy v. Mahoney, 2010 S.D. 89, ¶ 12, 791 N.W.2d 645, 652. The County pointed to the facts relied upon by the Circuit Court in finding that Lippold had standing, and argued why the Circuit Court's conclusion was legally wrong.

The purportedly "undisputed" findings listed on page 28 of Appellees' Brief do not support a legal conclusion that Lippold had standing. They prove the opposite. Nothing about Lippold's testimony - or the Circuit Court's factual findings - supports the idea that the County's decision would cause him to suffer "a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity." Cable v. Union Board of Cnty. Comm'rs, 2009 S.D. 59, ¶ 26, 769 N.W.2d 817, 827.

Recognizing his frail position under the <u>Cable</u> factors, Lippold believes SDCL 9-1-6 provides him with the path he needs to both establish standing and get around the clear language of SDCL 9-3-20. (<u>See</u> Appellees' Brief, pp. 19-20, 29-30.) The specific language of that statute and the impact of Lippold's argument must be carefully considered. SDCL 9-1-6 states: "Any citizen and taxpayer residing within a municipality may maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of this title." (Emphasis added.) A fair reading of SDCL 9-1-6 is that a citizen who pays taxes and resides in a municipality can take action to redress violations within that same municipality.

The County does not dispute the Circuit Court's Finding of Fact No. 1, which reads in part: "Gary Lippold is a

resident of *Sturgis*, Meade County, South Dakota." (Appx. 11.) (Emphasis added.) Stated another way, Lippold is neither a citizen, a resident, nor a taxpayer in the Town of Buffalo Chip. Setting aside SDCL 9-3-20 and the other requirements for standing under <u>Cable</u>, Lippold's argument is completely untenable. Under Lippold's reasoning, a Sturgis resident and taxpayer could commence an action to prevent violations in the Town of Buffalo Chip, Sioux Falls, Rapid City, Pierre, or Aberdeen.

Even if the Court is willing to indulge the idea that being a resident and taxpayer in Sturgis gives Lippold license to redress violations all over the state, SDCL 9-1-6 is broadly cast and does not speak specifically to the organization of municipalities, which is the precise issue at play in this case. Under the circumstances, SDCL 9-3-20 is the more specific statute that applies. "[T]he rules of statutory construction dictate that 'statutes of specific application take precedence over statutes of general application.'" Schafer v. Deuel Cnty. Bd. of Comm'rs, 2006 S.D. 106, ¶ 10, 725 N.W.2d 241, 245 (quoting Coop. Agronomy Servs. v. S.D. Dep't of Revenue, 2003 S.D. 104, ¶ 19, 668 N.W.2d 718, 723).

Lippold does not get there under <u>Cable</u> or SDCL 9-1-6. Even if Lippold could overcome the <u>Cable</u> factors, which he cannot, because the Town of Buffalo Chip became an acting

municipality, SDCL 9-3-20 gives the State the exclusive right to challenge its organization. In the context of this appeal, Lippold clearly lacks standing.

# D. THE COUNTY DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT THE PETITION COMPLIED WITH THE REQUIREMENTS OF SDCL CHAPTER 9-3.

The appealing parties' lengthy academic discussion that begins Section D of Appellees' Brief is puzzling. The interplay between Memorandum Decisions and Findings of Fact and Conclusions of Law ("FFCL") might have some relevance if the Circuit's Court's Memorandum Decision and the FFCL differed in some material respect. Here, they did not. The simple fact is that the Memorandum Decision encapsulates, in a somewhat concise form, the decisions of the Circuit Court. The FFCL, on the other hand, amasses 30 pages, and appears to contain within the body of the document a section of argument from the appealing parties' pretrial submission. (Cf. Appx. 26-37 and CR 1317-1330.)

Referencing the Memorandum Decision was not meant to suggest that the FFCL do not have importance; it was merely meant to suggest that the Memorandum Decision was eminently more readable.

## 1. The only testimony in the record regarding notice under SDCL 9-3-4 was unrefuted.

The appealing parties continue to take an overly rigid view of what is argued in this appeal, as though some formulaic

recitation of the Circuit Court's FFCL and the disputes with each of them is required. With specific regard to the factual findings concerning "notice," on page 27 of Appellants' Brief, the County argued that the "[t]rial court erred in concluding that the notice was insufficient." One page prior to that, the County pointed to James Walczak's testimony that the survey, map, and census associated with the Petition for Municipal Incorporation was left at a place located within the proposed municipality for examination by those having an interest in the application for a period of not less than 30 days. (T101, 129-130.) Whether or not the Circuit Court found Walczak credible, the appealing parties did not refute his testimony with anything during the evidentiary hearing. The Circuit Court's findings to the contrary were simply unsupported and erroneous.

The bulk of the County's argument was directed at the Circuit's Court error related to when the 30 days required under SDCL 9-3-4 can run. This is the true issue here, and it is a question of law. The only reasonable interpretation of SDCL

<sup>&</sup>lt;sup>2</sup> If such a recitation is required, it is required at the Circuit Court level. The County complied with SDCL 15-6-52(a). The appealing parties neglect to mention that the County preserved its challenges to the Court's FFCL by filing objections and its own proposed findings. (CR 2243, 2289.)

9-3-3 and 9-3-4, read together, is that the survey, map, and census must be available for inspection for a period greater than 30 days prior to the election, not the hearing. Neither the appealing parties nor SDML address the interplay between SDCL 9-3-3 and 9-3-4, or otherwise refute the County's position regarding the proper notice time-frame.

# 2. The legislative change to SDCL 9-3-1 supports the County's interpretation of the pre-2016 version of SDCL 9-3-1.

SDML relied upon a 1947 Attorney General's opinion to support its argument that the pre-2016 version of SDCL 9-3-1 required both one hundred legal residents and thirty voters. Immediately following that argument, SDML cites to Spink County v. Heinhold Hog Market, Inc., 229 N.W.2d 811, 812 (S.D. 1980), for the proposition that an Attorney General opinion provides "... guidance on legal issues until those issues are ruled upon by a court or the law is changed by the Legislature." (Emphasis added.) Here, the Legislature has acted. (Appx. 87; Exs. 42, 43.) SDML argues that the change to SDCL 9-3-1 "is not drastic." The 2016 amendments rewrote the section. The pre-2016 version simply stated: "No municipality shall be incorporated which contains less than one hundred legal

residents or less than thirty voters." The new version reads:

A municipality may not be incorporated unless it contains as least one hundred legal residents and at least forty-five registered voters. For the purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition or is an active duty member of the armed forces whose home of record is within the proposed municipality.

(Emphasis added.) The statute went from having disjunctive language to conjunctive language. The Legislature redrafted the opening sentence in order to replace an "or" with its antonym, "and." This is a significant change.

SDML also argues that SDCL 9-3-3 supports its argument, because it requires a census of both the landowners and the resident population of the proposed municipality. What the Legislature wants within a census vs what the Legislature requires for a minimum population are two different things. This is an apples to oranges comparison and adds nothing to the discussion.

The pre-2016 version of SDCL 9-3-1 required either 100 residents or 30 registered voters. The application presented to the County met the latter requirement.

 The conclusions of the Circuit Court, the appealing parties, and amicus curiae regarding

# residency that go beyond the proper scope of the appeal.

Both the appealing parties and SDML argue, at length, concerning the Circuit Court's conclusions regarding the residency of the various voters who signed the petitions and were listed in the census. As argued in the Appellants' Brief, pages 30-32, the County does not get to decide who is and is not a legally registered voter. Nothing in SDCL Chapter 9-3 specifically requires the County to investigate the residency of the voters or authorizes a challenge based on voter residency. It was error for the Circuit Court to look behind the curtain at these issues, instead of relying upon the voter registrations that were actually before the County at the time of the hearing. (Ex. 25.)

Further, assuming arguendo that residency is relevant to the County's decision under SDCL Chapter 9-3, the Circuit Court had absolutely no evidentiary basis upon which to could conclude that the residency requirements were or were not met by the Town of Buffalo Chip's registered voters. SDML cites to SDCL 12-1-4 and Heinemeyer v. Heartland Consumers Power

District, 2008 S.D. 110, 757 N.W.2d 772, to frame its discussion of what is required for residency. Examining these authorities, it is clear that the inquiry into one's residency

is fact-intensive.

The Circuit Court specifically ordered that the appealing parties would not be presenting the live testimony of the 52 individuals identified on the census. (CR 951.) However, it left the door open for more judicially economic ways of presenting evidence of those individuals' residence. (Id.)

The appealing parties decided to do next to nothing to show that the registered voters are not residents. The appealing parties presented scant evidence concerning residency at the hearing, and certainly did not demonstrate that each registered voter who signed the petition failed to meet the requirements of SDCL 12-1-4 and Heinemeyer. Yet, somehow, the Circuit Court reached the conclusion that no one resides in the Town of Buffalo Chip.

The registered voters' residence is not something the County was responsible for investigating under SDCL Chapter 9-3. Even if relevant, the record does not demonstrate that there are less than 30 residents, because the appealing parties did not present evidence that would resolve the inquiry under SDCL 12-1-4 and Heinemeyer.

E. IF THE DISTRICT COURT REACHED THE ISSUE OF THE UNTIMELY MOTION FOR STAY, IT DID NOT ERR IN DENYING THE MOTION.

The City waited until the eve of the election to

attempt to schedule a hearing on a motion to stay the election.<sup>3</sup> The parties dispute whether the Circuit Court even reached the merits of the City's purported motion. Regardless, given the extremely late filing of the motion, the Circuit Court did not err in refusing it.

<sup>&</sup>lt;sup>3</sup> To Lippold and Murphy's credit, they undertook efforts to stop the election earlier than the City. They applied for a writ of mandamus from this Court. Their application was denied. From the school of what's good for the goose is good for the gander, the appealing parties would presumably concede that this Court's denial of their application for writ of mandamus would have a preclusive effect on their ability to seek review of the stay issue in this appeal under the doctrine of Res Judicata. (See Appellees' Brief, pp. 20-23.)

The appealing parties argue that stays in appeals brought by municipal corporations, such the City, are governed by SDCL 15-26A-38. This is wrong. SDCL 15-26A-1 states that "[t]his chapter shall govern procedure in civil appeals to the Supreme Court of South Dakota." (Emphasis added.) Obviously, an appeal to the Circuit Court under SDCL 7-8-27 does not fall within the scope of SDCL Chapter 15-26A. There is no mandatory statutory provision that required a stay.

The appealing parties recognize that appeals of County decisions under SDCL Chapter 7-8 are not excepted from the rules of procedure. See SDCL 15-6-81(a), Appendix A. What they do not mention (and did not follow) are the rules requiring that parties present motions to the Circuit Court in a timely fashion. SDCL 15-6-6(d) requires that a written motion be served not later than ten days prior to a hearing, unless the Court orders a different period.

The County made its decision concerning the Amended Petition for Municipal Incorporation of Buffalo Chip ("Amended Petition") on February 27, 2015. At the time the County approved the Amended Petition, an election date was set for May 7, 2015, at which time eligible voters would determine if Buffalo Chip should become incorporated as a municipality. In spite of being fully aware of the date of the election since late

February, the City did not serve its Motion to Stay until April 30, 2015. SDCL 15-6-6(a) provides that "[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Excluding the date of service, and the intervening Saturday and Sunday, the City's Motion was served just five days before the election. The Circuit Court acted within its discretion in refusing to set a hearing or hear the Motion.

The appealing parties also argue that the County "invited error" when it opposed the motion for stay. Two things bear mention. First, the County was not aware that a jurisdictional issue could be created by going forward with the election. At no point was SDCL 9-3-20 discussed or brought to the attention of the Circuit Court or the County's counsel during the City's ill-fated attempt at seeking a hearing to have its motion for stay heard. In point of fact, the Campground raised SDCL 9-3-20, and did so several months after the election. (CR 996.) It had not yet intervened at the time the City sought the stay. (CR 220.)

Second, since the election created a jurisdictional issue, the actions of the parties are irrelevant. "[S]ubject matter jurisdiction can neither be conferred on a court, nor

denied to a court by the acts of the parties or the procedures they employ." In re Koch Expl. Co., 387 N.W.2d 530, 536 (S.D. 1986).

The real issue here is not whether the County invited error. It is that the City did not act diligently. The Circuit Court was under no obligation to hear or grant the City's untimely motion.

#### CONCLUSION

For these reasons, the County respectfully urges the Court to reverse the Circuit Court's Judgment, and remand this matter with instructions that the appeals filed by the City, Lippold and Murphy be dismissed.

Dated this 9<sup>th</sup> day of January, 2017.

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#### CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 20 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 4,374 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 21<sup>st</sup> day of October, 2016.

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#### **CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Appellants Meade County Board of Commissioners,

hereby certifies that on the  $9^{th}$  day of January, 2017, a true and correct copy of **APPELLANTS' REPLY BRIEF** was

electronically transmitted to:

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and the original and two copies of APPELLANTS' REPLY BRIEF were mailed by first-class mail, postage prepaid, to Ms.

Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East

Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in

Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this  $9^{th}$  day of January, 2017.

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