IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30084

DAKOTA CONSTRUCTORS, INC.,

Plaintiff/Appellant,

vs.

HANSON COUNTY BOARD OF ADJUSTMENT,

Defendant/Appellee.

Appeal from Circuit Court
First Judicial Circuit, Hanson County, South Dakota
Honorable Chris S. Giles, Circuit Court Judge

BRIEF OF APPELLANT

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Notice of Appeal Filed August 12, 2022

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PRELIMINARY STATEMENT

The Appellant will be referred to as Dakota Constructors. The Appellee will be referred to as Board. The Clerk's record is designated "R". The Transcript from the hearing will be referred to as "T".

JURISDICTIONAL STATEMENT

Dakota Constructors appeals from the July 20, 2022 Order Affirming Decision of the Hanson County Board of Adjustment requiring Dakota Constructors to obtain a conditional use permit in order to continue extracting gravel, sand or minerals. (R 795-96; App. 1-2) Notice of Entry of the Order was served on July 21, 2022. (R 797) Dakota Constructors served and filed its Notice of Appeal on August 12, 2022. (R 800-801) This Court has jurisdiction of this appeal pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUE

1. Whether the Circuit Court erred in affirming the decision of the Hanson County Board of Adjustment requiring Dakota Constructors to obtain a conditional use permit to continue to extract gravel, sand or minerals from its quarry.

The Circuit Court concluded that Dakota Constructors was required to obtain a conditional use permit to continue the extraction of gravel, sand or minerals at the quarry.

Legal Authority:

SDCL 11-2-26
SDCL 45-6B-3(15)
*Jensen v. Lincoln Cnty. Bd.of Comm'rs,*2006 S.D. 61, 718 N.W.2d 606.
River Springs Ltd. Liability Co. v. Board of Cnty. Comm'rs of Teton Cnty., 899 P.2d 1329 (Wyo. 1995).
Ernst v. Johnson County, 522 N.W.2d 599 (Iowa 1994).

STATEMENT OF THE CASE

In the spring of 2021, Dakota Constructors purchased a quarry in Hanson County located at 41390 257th Street, Mitchell, South Dakota. (R 2) The quarry had been in use as a quarry long before Hanson County adopted its Zoning Ordinance in April 2000 (Zoning Ordinance). (R 3; 740-42, 645) The quarry is located in an area that was zoned Agriculture by the Zoning Ordinance. (R 3, 57)

Following Dakota Constructors' purchase of the quarry, the Hanson County Zoning Administrator advised Warren Barse, the president of Dakota Constructors, that it was required to get a conditional use permit to continue the mining and removal of rock, gravel and aggregate. (R 3) On November 15, 2021, Dakota Constructors submitted a conditional use permit application. (R 229) A hearing on the conditional use application was set for December 22, 2021 and it was deferred to January 26, 2022. (R 57) At the January 26, 2022 hearing, the matter was again deferred to February 23, 2022, so more information could be obtained. (R 63) At the February 23, 2022 hearing, the Planning Commission convened as the Board of Adjustment and considered the conditional use permit. (R 70; App. 2) Although it had been raised and argued that no conditional use permit was required due to the continued use of the quarry before and after enactment of the Zoning Ordinance, the Board required a conditional use permit and ultimately established numerous conditions for such conditional use. (R 537-41, 70-71; App. 6-8)

Dakota Constructors filed its Verified Petition on March 18, 2022, contesting the Board's decision. (R 2) On April 18, 2022, the Board filed its Return to Writ of Certiorari. (R 17) On April 28, 2022, the Court entered a Writ of Certiorari setting a hearing for June 27, 2022 to consider the Petition. (R 351) The parties later presented

the Circuit Court with Briefs and on June 27, 2022 the Circuit Court, the Honorable Chris S. Giles presiding, held a hearing on the Petition. (T 1, 3; R 798) On July 19, 2022, the Circuit Court entered it Memorandum Decision affirming the Board's decision. (R 792-94; App. 3-5) On July 20, 2022, the Circuit Court entered its Order Affirming Decision of the Hanson County Board of Adjustment, with Notice of Entry served on July 21, 2022. (R 795-97) On August 12, 2022, Dakota Constructors filed its Notice of Appeal. (R 800)

STATEMENT OF FACTS

In the spring of 2021, Dakota Constructors purchased a quarry at the common address of 41390 257th Street Mitchell, South Dakota. (R 2) The quarry was owned by Fischer Sand & Gravel Co. (Fischer) prior to Dakota Constructors' purchase. (R 3) Fischer used this land as a quarry for providing aggregate and rock since 1986. (R 740-41) Fischer had consistently renewed its mining license to remove aggregate with the South Dakota Department of Environment and Natural Resources, Mineral and Mining Program (DENR) since 1986. (R 649-69, 743-45) In fact, in 2019, Fischer provided the DENR Notice of Intent to Continue Operation until 2031. (R 745) Fischer filed its last Mine License Annual Report with the DENR on January 25, 2021, shortly before it sold the property to Dakota Constructors. (R 734)

The quarry was in use as an active quarry long before Hanson County adopted its Zoning Ordinance in April 2000. (R 2, 743-45) An active mining license was in place in 2021, the year Dakota Constructors purchased the land. (R 734, 745) Dakota Constructors later took over the reclamation liability in April 2021, with final approval of that transfer by the DENR on August 19, 2021. (R 747)

Furthermore, the evidence presented by the president of Dakota Constructors, Warren Barse, was that he had hauled aggregate from the quarry in the recent past. (R 66, 350 - Ex F2 – 1/26/22 Video Recording at Appx. 9:12) The Board was also provided with the Affidavit of Clinton Degen establishing that he had hauled aggregate from the Quarry every year except 2004 and 2005, when it was being used by Spencer Quarries. (R 541) Clinton Degen was the former Hanson County Highway Superintendent who had held his position with Hanson County for almost 35-years, until he retired in April 2021. (R 541) Finally, the quarry is located in an area that was later zoned Agriculture by Hanson County under its Zoning Ordinance adopted on April 12, 2000 and no conditional use permit was ever obtained by the prior operator and owner, Fischer. (T 30)

Following Dakota Constructors' purchase of the quarry, the Hanson County Zoning Administrator advised Warren Barse that Dakota Constructors was required to obtain a conditional use permit for its operation of extraction and removal of rock, gravel and aggregate. (R 3) Mr. Barse applied for a conditional use permit. (R 4) However, under SDCL 11-2-26 and the Hanson County Zoning Ordinance, Dakota Constructors should have never been required to obtain a conditional use permit because it was a preexisting use that continued through the date of Dakota Constructors' purchase in 2021. (R 189-91; App. 11-13)

The application was to be heard On December 22, 2021 and at that time the Board deferred the matter to January 26, 2022. (R 56-57) On January 26, 2022, the Board again considered Dakota Constructor's conditional use permit application. (R 64-64) The Board heard from Warren Barse and his legal counsel, and it was orally stated to the

Board that no conditional use permit was required because the quarry predated the Zoning Ordinance and has been actively in use as a quarry since the passage of the Zoning Ordinance. (R 66, 350 - Ex F2 – 1/26/22 Video Recording) The Board deferred its decision to consider more information and Dakota Constructors provided the Board with the Affidavit of Clinton Degen about usage and further provided a Legal Statement outlining its position. (R 63, 537-41) On February 23, 2022, the Board again considered the conditional use permit and concluded that Dakota Constructors was required to obtain a conditional use permit for its use of the quarry and further granted a conditional use permit with numerous restrictions and costly requirements. (R 70-72; App. 6-8) The Board made the following findings:

1. Dakota Constructors presented a legal statement to the Board. Statement is on file with the Hanson County Zoning Office.

2. The requested conditional use is permitted under Article 5, Section 507 of Hanson County Zoning Ordinance.

3. The request does require a Conditional Use permit. The current owner will be expanding to occupy a greater area of land. Article 3, Section 1305, Hanson County Zoning Ordinance.

4. The previous operation has ceased for more than one year according to all records filed with the State of South Dakota. Article 3, Section 1305, Hanson County Zoning Ordinance.

(R. 70-71; App. 7-8)

STANDARD OF REVIEW

Appeals from board of adjustment decisions are considered under a writ of certiorari standard under SDCL 11-2-61.1. *Miles v. Spink Cnty. Bd. of Adjustment*, 2022 S.D. 15, ¶30, 972 N.W.2d 136, 148 (quoting SDCL 11-2-61.1). This Court's review of a decision on a writ of certiorari is as follows:

> Our consideration of a matter presented on certiorari is limited to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it. A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law.

Jensen v. Turner Cnty. Bd. of Adjustment, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 412-13, (citing *Elliott v. Board of Cnty. Comm'rs of Lake Cnty.*, 2005 S.D. 92, ¶¶ 13-14 (quoting *Hines v. Board. of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 234)). Finally, this Court has recognized that "[c]ourts must not review the merits of a petition or evidence for the purpose of determining the correctness of a finding, in the absence of a showing that the Board 'acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof.'" *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 32, 866 N.W.2d 149, 161 (quoting *Lamar Advertising of South Dakota, Inc. v. City of Rapid City*, 2007 S.D. 36, ¶21, 731 N.W.2d 199, 205 (quoting *Cole v. Bd. of Adjustment of City of Huron*, 1999 S.D. 54, ¶10, 592 N.W.2d 175,177))).

LEGAL ARGUMENT

1. Whether the Circuit Court erred in affirming the decision of the Hanson County Board of Adjustment requiring Dakota Constructors to obtain a conditional use permit to continue to extract gravel, sand or minerals from its quarry.

A. Overview.

SDCL 11-2-26 allows a nonconforming use that existed before enactment of the zoning ordinance to continue unless such nonconforming use ceases for a period of at least one year. Zoning Ordinance Article 13 similarly provides that a preexisting nonconforming use may continue unless such use ceases for a period of more than one year. The Board ignored SDCL 11-2-26, its own ordinances and the indisputable proof in concluding that operations at the quarry had ceased. In fact, Fischer, the previous owner, had actively used the quarry by consistently removing stockpiled material and the Board never required Fischer to obtain a conditional use permit due to the claimed cessation of nonconforming use. Instead, once Dakota Constructors purchased the property, the Zoning Administrator decided to require a conditional use permit and the Board exceeded its authority, neglected to follow applicable law and disregarded indisputable proof when it required Dakota Constructors to obtain a conditional use permit to continue to extract gravel, sand or minerals from its quarry.

B. The Zoning Ordinance Regulating a Quarry.

The Zoning Ordinance defines a quarry as follows:

> Quarry - A place where consolidated rock has been or is being removed by means of an open excavation to supply material for construction, industrial or manufacturing purposes, but does not include a wayside quarry or open pit metal mine.

(R 106) The Zoning Ordinance further provides that a quarry is an allowed conditional use in land zoned AG. It provides at Section 507 Conditional Uses:

> After the provisions of this ordinance relating to conditional uses have been fulfilled, the Board of Adjustment may permit as conditional uses in Agricultural District (AG):
>
> * * * *
>
> 33. Extraction of sand, gravel, or minerals provided such uses meet requirements for conducting surface mining activities of SDCL 45-6B.

(R 131-33) SDCL 45-6B-3 provides the following definition of surface mining:

> (15) "Surface mining," the mining of minerals by removing the overburden lying above such deposits and mining directly from the deposits thereby exposed. The term includes mining directly from such deposits where there is no overburden and such practices as open cut mining, open pit mining, strip mining, placer mining, quarrying, and dredging;
>
> (16) "Surface mining disturbed land," land from which overburden has been removed, land upon which overburden, waste rock, mine spoil, or mill tailings have been deposited, land mined which has no overburden, heap leach pads, and process ponds;

SDCL 45-6B-3(15)(16).

C. Exception for Preexisting and Continued Nonconforming Land Use.

Before both the Board and the Circuit Court, Dakota Constructors maintained that its quarry was in existence as an active quarry long before Hanson County adopted its Zoning Ordinance and it has been in continued use as a quarry in land zoned for agriculture use since adoption of the Zoning Ordinance. Any nonconforming land use that preexisted the enactment of a later zoning ordinance is exempt from the later Zoning Ordinance, as long as such use has not been discontinued for more than one year. SDCL 11-2-26 provides:

> Any lawful use, lot, or occupancy of land or premises existing at the time of the adoption of the zoning ordinance may be continued, even though the use, lot, or occupation does not conform to the provisions of the ordinance. However, if the nonconforming use, lot, or occupancy is discontinued for a period of more than one year, any subsequent use, lot, or occupancy of the land or premises shall conform with the zoning ordinance.

This statute establishes that "the Legislature limited the application of zoning ordinances for preexisting uses." *Jensen v. Lincoln Cnty. Bd. of Comm'rs,* 2006 S.D. 61, ¶12, 718 N.W.2d 606, 611. In *Jensen*, the Court considered the application of SDCL 11-2-26 and a similar Lincoln County Zoning Ordinance to a preexisting feedlot. The Court found there that because the operator of the feedlot had used the property as a feedlot prior to the adoption of the ordinance, it was deemed a conforming use under the zoning ordinances. *Id.* at ¶20, 718 N.W.2d at 613.

Consistent with SDCL 11-2-26, Art. 13 § 1301 of the Zoning Ordinance provides in relevant part:

> Within the districts established by this ordinance or amendments that may later be adopted, there exists (a) lots, (b) structures, (c) uses of land and structures, and (d) characteristics of use which were lawful before this ordinance was passed or amended, but which would be prohibited, regulated, or restricted under the terms of this ordinance or future amendment; it is the intent to permit these nonconformities to continue until they are removed, but not to encourage their survival. It is further the intent that nonconformities shall not be enlarged upon, expanded, or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district. . . .

(R 189; App. 11)(emphasis supplied). Zoning Ordinance Art. 13 § 1305 further provides that such use may be continued as long as such use does not cease for a period of more than one year. (R 190-91; App. 12-13) Therefore, under both South Dakota law and the Zoning Ordinance, a nonconforming land use that preexisted the enactment of the Zoning

Ordinance is exempt from later regulation, as long as such use has not been discontinued for more than one year.

D. The Board Ignored the Law, the Zoning Ordinance and Indisputable Proof in Concluding Operations had Ceased for More Than a Year.

Under SDCL 11-2-26 and Zoning Ordinance Art. 13 § 1301, Dakota Constructors was not required to obtain a conditional use permit because it was merely continuing the preexisting use of the quarry. However, the Board required a conditional use permit, concluding that the preexisting use had ceased for more than a year and therefore a conditional use permit was required under SDCL 11-2-26 and Zoning Ordinance Art. 13 § 1305, which provides in relevant part:

> Where at the time of passage of this revised ordinance lawful use of land exists, which would not be permitted by the regulations imposed by this ordinance, and where such use involves no individual structure with a replacement cost exceeding one thousand (1,000) dollars, the use may be continued so long as it remains otherwise lawful, provided:
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> * * * *
>
> 3. If any such nonconforming use of land ceases, for any reason, for a period of more than one (1) year, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located;

(R 190-91; App. 11-12) The Board's determination neglected to follow the Zoning Ordinance, South Dakota law and indisputable proof of the preexisting and continued use of the quarry. There has been continued use of this property as an active quarry because there has been continued removal of rock and material, and no conditional use permit is required.

Fischer, the prior owner, had consistently renewed its mining license since 1986 and in 2019 it provided Notice of Intent to Continue Operation until 2031 to the DENR.

(R 734, 743-45) The evidence established that material had been continuously removed from the quarry. This evidence came from both Mr. Barse and Clinton Degen, who had been Hanson County's Highway Superintendent for almost 35-years, until he retired in April 2021. (R 66, 350 - Ex F2 – 1/26/22 Video Recording at Appx. 9:12; R 541) However, the Board ignored this indisputable evidence and instead concluded that: "The previous operation has ceased for more than one year according to all records filed with the State of South Dakota." (R 71; App. 7) This was its conclusion even though an active mining license had been in place and renewed since 1986 and the evidence established that material had been consistently removed from the quarry.

Furthermore, the Board, led by the Zoning Administrator's endeavor to require a conditional use permit, apparently concluded that because the more recent material removed from the quarry were from stockpiled material, the quarry was inactive. This is entirely contrary to the Zoning Ordinance and South Dakota law.

The ordinance provides:

> After the provisions of this ordinance relating to conditional uses have been fulfilled, the Board of Adjustment may permit as conditional uses in Agricultural District (AG):
>
> * * * *
>
> 33. Extraction of sand, gravel, or minerals provided such uses meet requirements for conducting surface mining activities of SDCL 45-6B.

(R 131-33) Section 507 (33) refers to surface mining activities in SDCL Ch. 45-6B. SDCL 45-6B-3(15) provides the following definition of surface mining:

> (15) "Surface mining," the mining of minerals by removing the overburden lying above such deposits and mining directly from the deposits thereby exposed. <u>The term includes mining directly from such deposits where there is no overburden</u> and such practices as open cut mining, open pit mining, strip mining, placer mining, quarrying, and dredging;

SDCL 45-6B-3(15)(underlining added). Overburden is defined as: "all of the earth and other materials which are disturbed or removed, in the original state, or as it exists after removal from its natural state in the process of surface mining." SDCL 45-6B-3(13) In its simplest of meanings, overburden is the soil covering the mineral or aggregate. *Rith Energy, Inc. v. U.S.*, 44 Fed. Cl. 108, 111, fn. 1 (Ct. Cl. 1999); *Protect Grand Island Farms v. Yamhill County*, 275 P.3d 201, 205 (Or. App. 2012).

The first sentence of SDCL 45-6B-3(15) defines the situation where soils are removed and the mineral is exposed and extracted. The second sentence, underlined above, involves removing directly from the deposits that have no overburden. Stockpiles do not have overburden and the definition of surface mining necessarily includes removing the mineral (aggregate) directly from the stockpile established. This is the definition that the Zoning Ordinance adopted and the Board ignored in its decision.

Further, the annual license reports in the possession of Board that were filed with the DENR, show this as an active mine. (R648-734) Fischer had also consistently filed Notice of Intent to Continue Operations since 1986, with the last Notice of Intent to Continue Operations being filed on March 4, 2019, giving notice to the DENR that it would continue operations until February 1, 2031. (R 649-69, 743-45)

If this operation had ceased long ago as the Board determined, then the quarry had to be reclaimed. SDCL 45-6-67.1 provides:

> Any reclamation provided for in § 45-6-67 shall be carried to completion by the operator with all reasonable diligence, and final reclamation shall be completed within three years after all mining under the license has ceased operation, unless such period is extended by the Board of Minerals and Environment upon a finding that additional time is necessary for the completion of final reclamation of all licensed sites. Failure to complete final reclamation within three years after all mining under the license has ceased may result in the forfeiture of the surety.

SDCL § 45-6-67.1. The quarry has not been reclaimed and, in fact, Dakota Constructors undertook those reclamation liabilities from Fischer after it purchased the quarry. (R 746-47)

Consistent with the discussion of South Dakota law on this issue, numerous decisions from other jurisdictions recognize that a nonconforming quarry use does not cease simply because there is not rock mining, crushing or blasting. A number of these decisions were presented to the Circuit Court, as it recognized at the hearing. (T 32-33) Those decisions are directly on point and are discussed in turn.

The Wyoming Supreme Court considered this similar issue in *River Springs Ltd. Liability Co. v. Bd. of Cnty. Comm'rs of Teton Cnty.*, 899 P.2d 1329 (Wyo. 1995). In *River Springs*, the Wyoming Supreme Court considered two different consolidated cases, one involving River Springs that is not applicable and another considering property owned by Becho. *Id.* at 1332. The subject property involved in the Becho appeal had been used as a limestone quarry since 1949 and is referred to as the Fox Creek Quarry in the opinion. *Id.* The regulating authority in Wyoming, the Department of Environmental Quality (DEQ), issued a mining permit for the subject property in 1975. *Id.* The Becho property was used to sell limestone to beet farmers until 1978. *Id.* at 1332. From 1979 through 1988 only previously quarried limestone was removed from the quarry for use in

road base construction. *Id*. "From 1988 through 1993, only small quantities of previously quarried limestone were removed, and there was virtually no activity at the quarry." *Id.*

Becho later obtained a contract with the LDS Church in 1993 and applied for a conditional use permit with Teton County. *Id.* at 1331. The county concluded that Becho was required to comply with the conditional use requirements because the mine had been "substantially dormant" from 1988 to 1993. *Id.* at 1332. *Id.* Becho sought review at the district court level and it certified the issues to the Wyoming Supreme Court. *Id.* at 1330.

Upon its consideration, the Wyoming Supreme Court rejected the county's conclusion that the Fox Creek Quarry site had been abandoned. The Court recognized:

> Becho's limestone quarry was opened in 1949 and had been in existence almost thirty years prior to implementation of the Plan in 1978. It was a lawful, nonconforming use. The reliance of the Board on the proposition that the quarry had been substantially dormant, even if correct, does not constitute a cessation of use. It is uncontroverted that some activity, although minimal, was taking place at the quarry during the years 1988 through 1993.
>
> If we look for an intention to abandon in accordance with the view of the Illinois Court of Appeals, we cannot identify such an intention. The quarry was actively operated, even though at a reduced level of activity, from 1949 until 1993. This does not evidence an intention to abandon the operation. There were continuing efforts to renew the mining permit with the DEQ.

Id at 1335.

The Wyoming Supreme Court, however, did not end there. It also looked to the relevant statute requiring reclamation. Like SDCL 45-6-67.1, Wyo. Stat. § 35-11-401 required that upon abandonment and cessation of mining on the property, the property must be reclaimed. This was never done by Becho. The Wyoming Supreme Court ruled:

> Becho took no affirmative steps to reclaim and restore in accordance with this statute and the rules and regulations of the DEQ. Instead, by applying for renewal of a mining permit, Becho advised the DEQ of its intent to further utilize the product of the quarry.
>
> The record does not support the ruling of the Board that Becho's nonconforming use had been abandoned. We hold it was a lawful "grandfathered" use, and the Board is not justified in requiring Becho to seek either a variance or a CUP.

Id. at 1335.

This previous argument was made by Dakota Contractors but not addressed by the Board. To put this in perspective, there can be a reduction in use. In fact, the Wyoming Supreme Court recognized that some activity at the quarry was taking place, although minimal, and this was enough to conclude that the operation had not ceased. *Id.* at 1335.

Similarly, the New Mexico Appeals Court has considered this similar issue in *Romero v. Rio Arriba Cnty. Comm'rs*, 149 P.3d 945 (N.M. App. 2006). The *Romero* Court considered an analogous issue involving whether the mining property was being actively used on the effective date of the ordinance. The board there concluded there was a lack of adequate mining activity on the property at the time the zoning ordinance was passed and refused to grandfather in the property. *Id.* at 947-48. Romero ultimately took the matter to district court, which partially reversed the board on the 5-acre portion at issue, but affirmed the board on the remaining 9.5 acres at issue. *Id.* Both Romero and the board then appealed that decision. *Id.* at 948. On appeal, the New Mexico Court of Appeals found there was continued use because there was intermittent hauling from stockpiles. The Court ruled:

> The Board's argument is based upon its contention that, in order to conduct ongoing activity, Romero must be extracting new materials from the ground. We disagree. There is no definition of mining in the Sand and

> Gravel Ordinance, and nothing in the Zoning Ordinance, requiring Romero to extract new material from the ground, or to conduct major activity to continue his non-conforming use. Therefore, the intermittent removal and hauling from existing stockpiles is enough to constitute ongoing, non-conforming activity, and we agree with the district court that "whatever existing activity or remaining mining activity on the five acres can be completed, [Romero is] entitled to do so on the existing five acre parcel."

Id. at 950 (quoting *Hansen Bros. Enters., Inc. v. Bd. of Supervisors*, 907 P.2d 1324, 1345 (Cal. 1996)).

Likewise, in *Ernst v. Johnson County*, 522 N.W.2d 599 (Iowa 1994), the Iowa Supreme Court considered a very similar issue involving a quarry in Johnson County and the allegations of cessation of use. The Court recognized there that there had been minimal prior use and observed:

> At the time the Ernsts purchased the quarry in 1969, county ordinances zoned the site "A–1 agricultural." Prior to 1980, the zoning ordinances allowed for mining and mineral extraction in A–1 districts. In 1980, Johnson County amended its zoning ordinances to include section 8:1.34, "Conditional Use Permits." This section allows parties to mine and extract minerals in A–1 districts, but only if they acquire a conditional use permit or if they established the mining use of the land as an "existing use" prior to the enactment of the permit requirement. Section 8:1.34 further provides that if a party with an established existing use "voluntarily interrupts" the use for one year, the conditional use provisions must be satisfied.
>
> Since at least 1953, the responsible parties have maintained all required quarrying permits and licenses. However, neither B.L. Anderson nor Vulcan have paid the Ernsts any royalties nor made any commercial sales since the Ernsts purchased the quarry. There has been no blasting or crushing of rock at the site since the mid–1960s when Interstate 80 was built. The quarry contains stockpiles left from previous mining activity and Ernst has removed a few truckloads of material from these stockpiles annually. Ernst has taken these materials for his private use and in 1974 donated rock to the Morse Community Center and to the county for road improvement projects. Ernst also sold quarry materials to Wilson's Apple Orchard in 1991.

Id. at 601. In 1990, Ernsts' tenant, Vulcan, notified the county that it intended to mine from the quarry. *Id.* The county ultimately rendered a determination that the quarry had not maintained its status as an existing use due to the lack of commercial activity and that it must cease operations and apply for a conditional use permit. *Id.*

Vulcan and Ernsts later commenced a declaratory judgment action against the county and the district court concluded that the quarry constituted an existing use that had been maintained without interruption and no conditional use permit was required. *Id.* at 602. Johnson County and intervening parties appealed. *Id.* at 600.

On appeal, the Iowa Supreme Court affirmed. The Court concluded that the above quoted activity was enough to establish a continuing use and rejected the board's claim a conditional use permit was required. The Court ruled:

> The plaintiffs have maintained all requisite leases, permits, and licenses without interruption since before the conditional use permit amendments were enacted. They have also engaged in minimal activity at the site and have not demonstrated any intention of interrupting the quarry use of the site. Due to the nature of the quarrying business, maintenance of the required permits and licenses in combination with minimal activity demonstrates an uninterrupted operation following an initial establishment of the nonconforming use.

Id. at 604.

Other decisions further support the conclusion that diminished use does not mean that a quarry's use has been discontinued or abandoned. *See e.g. FLM Enterprises, LLC v. Peoria Cnty. Zoning Bd. of Appeals*, 148 N.E.3d 164, 172 (Ill. App. 2020)("Illinois courts have held that continued existence of a test pit or large stockpile is sufficient to preserve the validity of the nonconforming use certificate.") *South County Sand & Gravel Co. v. Town of Charlestown*, 446 A.2d 1045, 1046-47 (R.I. 1982) (concluding minimal

use, including years when gravel was merely removed from the quarry approximately once per year, was adequate use to support a continuing nonconforming use that was not subject to a later enacted zoning ordinance); *Polk County v. Martin,* 636 P.2d 952, 958 (Or. 1981)(recognizing that quarry use not abandoned merely because use was intermittent and fluctuated because there was rock continuously stockpiled at the quarry, sales were made from time to time and rock was quarried and crushed from time to time); *Union Quarries v. Board of Cnty. Comm'rs of Johnson Cnty.*, 478 P.2d 181, 187 (Kan. 1970)(recognizing quarry was not abandoned due to operator leaving a large stockpile and the continued sale of small quantities of rock); *Hinkle v. Board of Zoning Adjustment and Appeals of Shelby Cnty.*, 415 S.W.2d 97, 100 (Ky. 1967)(concluding that "although the only activities at the quarry were the storage and sale of stone, the quarry was never abandoned").

Additionally, the Board argued to the Circuit Court that Fischer's annual mine reports to the DENR support the claim of cessation or abandonment. (R 765) That is not the case. This was explained by Michael G. Erickson, an environmental senior scientist with Minerals and Mining program at the DENR, in a letter within the record:

> The material in the stockpiles is included in tonnage removed. "Tonnage of material removed" is the material that has been mined (extracted) from the ground. Some operations load mined material directly from a mine site directly to haul trucks and the material is hauled off site. Other operations, such as Fisher's quarry, mine the material and stockpile the material on site to be removed at a later time. The 1,300,000 tons of material stockpiled on site would be included in the tonnage of material removed figures in the annual reports.

(R 593) The prior owner of the pit dug material and then stockpiled the same for removal over time. There would necessarily be 0 on the reports because the tonnage stockpiled

was already reported. However, that does not mean that there was a cessation of the removal of material. The evidence undisputedly establishes that material was consistently taken out of the quarry. Both South Dakota law, specifically SDCL 45-6B-3(15), and numerous decisions from other jurisdictions conclude that hauling from stockpiles constitutes continuing use of a quarry.

The Circuit Court issued its brief Memorandum Decision following the hearing. (R 792-94 – App. 3-5) The Circuit Court concluded that any determination as to whether the nonconforming use had ceased or would be enlarged was solely within the province of the Board. (App. at 4-5) The Circuit Court further concluded that the Board should be given deference under SDCL 11-2-61.1 in interpreting its own ordinance. (App. at 4) The Circuit Court did not discuss whether and when operations cease under the Zoning Ordinance, the South Dakota law the Zoning Ordinance incorporated by reference, or any of the numerous decisions considering this issue that were presented to the Circuit Court. A fair reading of the Circuit Court's Memorandum Decision is that the Board was essentially free to interpret its Zoning Ordinance as it so desired and reach whatever factual determinations it may concerning preexisting and continued land use without question.

This goes too far. First, the Board was interpreting South Dakota law incorporated into the Zoning Ordinance dealing with surface mining activities as defined outside the Zoning Ordinance. This goes beyond interpreting its own Zoning Ordinance and involves interpreting South Dakota law that Hanson County chose to incorporate into its Zoning Ordinance. Furthermore, this Court has recognized that:

> [I]n passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance. However, "an administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous."

Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm'rs, 2017 S.D. 87, ¶ 20, 905 N.W.2d 344, 350 (quoting *Wegner Auto Co. v. Ballard*, 353 N.W.2d 57, 58 (S.D. 1984)) (further citations omitted). Therefore, this Court is not bound by the Board's erroneous interpretation of the Zoning Ordinance and South Dakota law.

Further, the South Dakota Legislature has established a limitation on the authority of a county to regulate preexisting and continuing nonconforming land use in SDCL 11-2-26. This Court has recognized that in SDCL 11-2-26, "the Legislature limited the application of zoning ordinances for preexisting uses." *Jensen, supra,* 2006 S.D. 61, ¶12, 718 N.W.2d at 611. However, the Circuit Court's decision improperly allowed the Board unfettered authority to regulate a preexisting and continuing nonconforming use.

Here, the Board exceeded its authority when it failed to follow the Zoning Ordinance and South Dakota law that was incorporated into the Zoning Ordinance. In *Dunham v. Lake Cnty. Comm'n*, 2020 S.D. 23, 943 N.W.2d 330, this Court recognized that the board of adjustment there "exceeded its authority by failing 'to follow the prescribed test' within the ordinance." *Id.* (quoting *Hines v. Bd. of Adjustment of Miller,* 2004 S.D. 13, ¶13, 675 N.W.2d 231, 234) The Board was required to follow its own Zoning Ordinance and South Dakota law, but it did not. It therefore exceeded its authority. Further, this Court has recognized that a board's decision may be reversed if

"it did some act forbidden by law or neglected to do some act required by law." ***Jensen, supra,*** 2007 S.D. 28, ¶ 4, 730 N.W.2d at 412-13. The Board was required to follow the Zoning Ordinance and South Dakota law. It neglected to follow the Zoning Ordinance and South Dakota law. Finally, the Board acted improperly when it ignored indisputable evidence of the preexisting and continuing nonconforming use. *Grant Cnty. Concerned Citizens*, *supra*, 2015 S.D. 54, ¶ 32, 866 N.W.2d at 161

Under the Zoning Ordinance and the law, Dakota Constructors was not required to obtain a conditional use permit because the quarry was continuously licensed since 1986 and material has been removed from the quarry every year. This constitutes both a preexisting and continuing nonconforming use that is not subject to regulation.

E. There was no Expansion Requiring a Conditional Use Permit.

The Board also concluded that Dakota Constructors was expanding the use of the property. The Board's conclusion states that: "The request does require a Conditional Use Permit. The current owner will be expanding to occupy a greater area of land." (R 71; App. 7) Hanson County Zoning Ordinance Art. 13 § 1305 (1) does provide that: "No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance . . ." (R 190; App. 12) Dakota Constructors was not expanding to occupy a greater area of land. Dakota Constructors took over the same land that was an active and unreclaimed quarry. Fischer had originally requested a license for the SE ¼ Sec. 5 and S ½ Sec. 4 T-102N-R59W and consistently renewed its license for this area. (R 740, 649-69, 743-45) In short, Dakota Constructors took over the quarry on the same area of land

owned by Fischer and it intends to use the quarry for extraction of gravel, sand and aggregate, which has been its preexisting use. There was no evidence that Dakota Constructors intended to occupy a greater area of land than the land that it purchased that was previously occupied by Fischer and used as a quarry. In fact, in its Brief to the Circuit Court, the Board appears to concede that this finding was in error. (R 777)

Furthermore, decisions considering this issue conclude that a quarry as a nonconforming use cannot be limited to the land actually excavated at the time of the enactment of the ordinance. In *Hansen Bros. Enters., Inc. v. Bd. of Supervisors*, 907 P.2d 1324, 1337 (Cal. 1996), the California Supreme Court observed:

> It is because of the unique realities of gravel mining that most courts which have addressed the particular issue involved herein have recognized that quarrying constitutes the use of land as a 'diminishing asset.' (See, e.g., *County of Du Page v. Elmhurst–Chicago Stone Co.*, 18 Ill.2d 479, 165 N.E.2d 310.) Consequently, these courts have been nearly unanimous in holding that quarrying, as a nonconforming use, cannot be limited to the land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry." (*Syracuse Aggregate Corp. v. Weise, supra*, 414 N.E.2d 651, 654–655.)

Id. Similarly, the Minnesota Supreme Court observed:

> We are of the opinion that the phrase 'occupy a greater area of land than that occupied by such use at the time of the adoption of this ordinance' should be interpreted, in the case of a diminishing asset, to mean all of that part of the owner's land which contains the particular asset, and not merely that area in which operations were actually being conducted at the time of the adoption of the ordinance. In other words, since the gravel here 'occupied' a larger area than the part actually being mined at the time of the adoption of the ordinance, the entire area of the gravel bed could be used without constituting an unlawful extension of a nonconforming use.

Hawkins v. Talbot, 80 N.W.2d 863, 866 (Minn. 1957). Similarly, the New Hampshire Supreme Court also noted:

> We hold, as the majority of courts have held, that lateral expansion of an existing pit to land previously unexcavated will be considered a continuation of a previous excavation if the land had been appropriated for excavation prior to the effective date of RSA chapter 155-E, by actions which objectively show the appropriation.

Town of Wolfeboro v. Smith, 556 A.2d 755, 758 (N.H. 1989).

Dakota Constructors was not expanding to occupy a greater area of land. Furthermore, the entire area of the parcel containing the aggregate could be mined without constituting an expansion of the nonconforming use.

CONCLUSION

The Board exceeded its authority, neglected to follow the law and disregarded indisputable proof when it required Dakota Constructors to obtain a conditional use permit to continue to extract gravel, sand or aggregate from its quarry. Dakota Constructors respectfully requests that the Court reverse the Circuit Court's Order Affirming Decision of the Hanson County Board of Adjustment.

Dated this 28th day of November, 2022.

SCHAFFER LAW OFFICE, PROF. LLC

/s/ Paul H. Linde

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Sioux Falls, SD 57108
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Facsimile (605) 274-6764
Email: paull@schafferlawoffice.com
Attorneys for Appellant

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests the privilege of oral argument in this appeal.

/s/ Paul H. Linde

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Brief of Appellant* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellant* contains 6529 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare *Brief of Appellant*. The original *Brief of Appellant* and all copies are in compliance with this rule.

/s/ Paul H. Linde
_____

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellant, hereby certifies that a true and correct copy of the foregoing "Appellant's Brief" was served by Odyssey E-File and Serve to the following attorneys in PDF format on November 28, 2022, before 11:59 p.m. on that date:

Jack H. Hieb
JHieb@rwwsh.com
Zachary W. Peterson
ZPeterson@rwwsh.com
Richardson Wyly Wise Sauck & Hieb, LLP
One Court Street
PO Box 1030
Aberdeen SD 57402-1030

on this 28th day of November, 2022.

/s/ Paul H. Linde
_____

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA) : SS.		IN CIRCUIT COURT
COUNTY OF HANSON)		FIRST JUDICIAL CIRCUIT
DAKOTA CONSTRUCTORS, INC.,	*	30CIV22-7
Petitioner,	*	
-vs-	*	**ORDER AFFIRMING DECISION OF THE HANSON COUNTY BOARD OF ADJUSTMENT**
HANSON COUNTY BOARD OF ADJUSTMENT,	*	
Respondent.	*	

Dakota Constructors, Inc. ("Petitioner"), petitioned the Court for a Writ of Certiorari to challenge the decision of the Hanson County Board of Adjustment ("Board") to require Petitioner to obtain a conditional use permit in order for Petitioner to extract gravel, sand, or minerals. The matter came on for hearing before the Court, the Honorable Chris S. Giles presiding, on June 27, 2022. Petitioner appeared through its attorney, Paul Linde. The Board appeared through its attorney, Jack H. Hieb.

Having considered the arguments of counsel and having conducted a review of this matter under the certiorari standard of review, and having entered its Memorandum Decision dated July 19, 2022, which is incorporated herein by this reference, now, therefore, it is hereby

Filed on: 07/20/2022 HANSON County, South Dakota 30CIV22-000007

ORDERED, ADJUDGED AND DECREED that the decision of the Hanson County Board of Adjustment to require Petitioner to obtain a conditional use permit in order for Petitioner to extract gravel, sand, or minerals is AFFIRMED.

ORDERED, ADJUDGED AND DECREED that the Writ of Certiorari filed on April 28, 2022, is DISMISSED.

BY THE COURT:

7/20/2022 11:37:55 AM

Chris S. Giles

Circuit Court Judge

Attest:
Koupal, Pam
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):ss	
COUNTY OF HANSON	)	FIRST JUDICIAL COURT

DAKOTA CONSTRUCTORS, INC., Petitioner, v. HANSON COUNTY BOARD OF ADJUSTMENT; Respondent.	30CIV22-000007 MEMORANDUM DECISION

FILED
JUL 19 2022
Pam Kaupal
Hanson County Clerk of Courts
First Judicial Circuit Court of SD

The matter came before the Court on the Petitioner's petition seeking a writ of certiorari and reversal of the Hanson County Board of Adjustment's decision requiring Dakota Constructors, Inc. to obtain a conditional use permit. A hearing was held for these motions at the Hanson County Courthouse, in Alexandria, South Dakota. Having considered all the briefs, arguments, and evidence dealing with this petition, the court now issues this written memorandum decision.

FACTUAL BACKGROUND

In the Spring of 2021, Dakota Constructors purchased a quarry at the common address of 41390 257th Street, Mitchell, South Dakota. Following this purchase, the Hanson County Zoning Administrator advised Dakota Constructors, through its president, Warren Barse, that it was required to obtain a conditional use permit for its operation of mining and removal of rock, gravel, and aggregate. Mr. Barse subsequently applied for a permit despite his objection that he believed no permit was required because the Quarry predated the Hanson County Zoning Ordinances and had been actively in use as a quarry since the passage of the Hanson County Zoning Ordinances. After consideration of Mr. Barse's objections, the Board concluded that Dakota Constructors was required to obtain a conditional use permit for its use of the Quarry and further granted a conditional use permit with numerus restrictions and conditions.

ANALYSIS AND DECISION

"SDCL 11-2-61 provides that '[a]ny person... aggrieved by a decision of the board of adjustment may present to a court of record a petition... setting forth that the decision is illegal...specifying the grounds of the illegality.'" *Miles v. Spink County Board of Adjustment*, 2022 S.D. 15, 30, 972 N.W.2d 136, 147. Although the Court's review from a board of adjustment is not to determine whether the board acted right or wrong, it does determine "whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it." *Id.* at 31. This Court has authority to reverse the board's decision if "it did some act forbidden by law or neglected to do some act required by law." *Id.* "Courts must not review the merits of a petition or evidence for the purpose of determining the correctness of a finding, in the absence of a showing that the Board 'acted fraudulently or in an arbitrary or willful disregard of undisputed and indisputable proof." *Grant Cnty. Concerned Citizens v. Grant County Bd. of Adjustment*, 2015 S.D. 54, 32, 866 N.W.2d 149, 161. The Petitioner has the burden to make the showing that the Board acted fraudulently or in an arbitrary or willful disregard of undisputed and indisputable proof. *Lamar Outdoor Adver. of S.D.; Inc. v. City of Rapid City*, 2007 S.D. 36, 22, 731 N.W.2d 199, 205.

Here, the Court does not find that the Petitioner's have met their burden of showing that the Board acted in any illegal manner. The Board has the authority to interpret their own ordinances and are given deference in their interpretations and determinations. "The court shall give deference to the decision of the approving authority in interpreting the authority's ordinances." SDCL 11-2-61.1. This appeal can not be an avenue to re-argue evidence presented to the board concerning factual determinations. Whether the "nonconforming use of land cease[d] for any reason, for a period of more than one year," or whether the nonconforming use would be "enlarged or increased" or "extended to occupy a greater area of land than as occupied at the effective date of adoption or amendment of [the] ordinance," is not a question for this Court to decide in this appeal, but rather is a determination that

belonged and remains with the Board. While the Petitioner may disagree with the Board's conclusions, the parties' difference in opinion is not a sufficient reason for the Court to apply a less deferential standard of review or find a reversible error. Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding; simply put, this Court is not tasked with deciding whether it would have reached the same conclusion as the Board. *See Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, 17, 866 N.W.2d 149, 156. As such, upon finding that the Board did not act illegally, any further factual discussion from this Court is beyond its scope of review.

The Court finds the Petitioner did not meet its burden in showing the Board acted fraudulently or in an arbitrary or willful disregard of undisputed and indisputable proof in its determination that Dakota Constructors needed a Conditional Use Permit and thus the Hanson County Board of Adjustment's decision is affirmed.

Dated this 19th day of July 2022.

BY THE COURT:

Chris S. Giles

Honorable Chris S. Giles
First Circuit Court Judge

ATTEST:

Pam Koupal

Clerk of Courts / Deputy

Hanson County Planning Commission
Minutes of Proceedings

February 23, 2022

The regular meeting of the Hanson County Planning Commission was held at the Hanson County Courthouse on February 23, 2022. Chairman Kayser called the meeting to order at 9:00am with the Pledge of Allegiance. Members Present: Chairman Josh Kayser, Bruce Kjetland, Jean Freeman, Sharon Jarding, Richard Waldera, Wayne Waldner, and Tristan Bender. Also Present: Christi Pierson, Zoning Administrator, Jennifer Craig, Recording Secretary, and Brian McGinnis, Community Development Specialist, Planning & Developing District III. A complete attendance list is available at the Hanson County Planning and Zoning Office.

PUBLIC COMMENT

No one present

APPROVE MINUTES

Motion by Bender, seconded by Jarding to approve the minutes of the January 26, 2022, regular meeting. All members voted aye.

APPROVE AGENDA

Motion by Kjetland, seconded by Waldera to approve the agenda. All members voted aye. Motion carried.

DISCLOSURE OF CONFLICT OF INTEREST

Rich Waldera

OLD BUSINESS

Update concerning Patton property. Patton did not show up to court on February 16, 2022.

BOARD OF ADJUSTMENT

Motion to recess Planning Commission and convene as Board of Adjustment made at 9:05 am by Jarding seconded by Freeman. All members present voted aye. Motion carried.

9:05am Conditional Use permit is requested by Dakota Constructors Inc., Warren Barse, (owner) for a Mining operation with Aggregate sales operation in an agricultural district, legally known as SE4 SE4 (less Metz Tract 1) Section 5 & SW4 SW4; PT S2 incl. lots 1,2,3 SW4 & Lot 4 SE4, Section 4 all in Rosedale Township Hanson County. In attendance was Warren Barse.

Findings:

1. Dakota Constructor's presented a legal statement to the Board. Statement is on file with the Hanson County Zoning Office.
2. The requested conditional use is permitted under Article 5, Section 507of Hanson County Zoning Ordinance

3. The request does require a Conditional Use permit. The current owner will be expanding to occupy a greater area of land. Article 3, Section 1305, Hanson County Zoning Ordinance.
4. The previous operation has ceased for more than one year according to all records filed with the State of South Dakota. Article 3, Section 1305, Hanson County Zoning Ordinance.

A motion made by Bender and seconded by Freeman to approve the conditional use permit as it complies with Article 16 Subsection 5, A-H, with the following conditions attached:

1. Compliance with all Federal, State, and local regulations pertaining to the approved work activities
2. No expansion of operations to include blasting of rock shall commence prior to repairing the identified damages within the right-of-way. A longitudinal barrier must be installed along 257th Street for the length of the existing mined face (open mine) and an appropriate distance past the mined face in either direction. After repair and installation, a licensed engineer shall inspect the integrity of the improvements within the right of way and longitudinal barrier then provide a report to the Hanson County Zoning Administrator. All associated expenses shall be financed by Dakota Constructors Inc., Warren Barse, owner or the current property owner.
3. No expansion of operations with regards to area or depth nor blasting of rock prior to the County's approval of a haul road agreement between Dakota Constructors Inc., Warren Barse owner, or the current property owner and Hanson County. A copy of which shall be filed with the Zoning Administrator.
4. All operations to include loading of trucks for offsite hauling, minus basting shall be restricted to the following days and hours: Monday thru Friday, 7:00am to 6:00 pm and Saturday, 7:00 am to 4:00pm nor conducted on Federal holidays. Activities such as office operations and equipment maintenance which will not generate noise, dust or vibrations beyond the property boundaries shall not be restricted by the days or hours of operation
5. Blasting operations are restricted to: Monday thru Friday, 9:00 am to 4:00 pm,
6. A minimum of twenty-four-hour notification shall be given to all property owners within a half mile radius, as measured from the Dakota Constructors Inc. property boundaries to private owner's property lines prior to all blasting operations. The same shall be provided to the County Zoning Administrator.
7. All blasting activities will abide by all Federal, State, and local regulations.
8. A three to one (3/1) back slope will be constructed on the south sheer rock wall abutting 257th Street no later than May 2024. Precautions shall be made to ensure the slopes future integrity. A consulting engineer, at the expense of the Dakota Constructors Inc., or the current property owner shall provide periodic inspections of work activities and provide a final report to the County. Failure to comply shall void the Conditional Use Permit.
9. A berm(s) will be constructed six feet in height, as measured from the prevailing grade, with a minimum base of forty feet and running approximately 860 feet on the south property line where there has not been excavation as of February 23, 2022. The berm is to be placed no closer than seventy-five feet from the right of way. Vegetation is to be planted on the berms and kept free of all noxious weeds.
10. A secure perimeter shall enclose the property to include at a minimum; a six-foot chain-link fence and gates to be locked during non-business hours.
11. Signage identifying emergency contact information shall be displayed on all property access points
12. Emergency contact information shall be filed with the Hanson County Zoning Administrator, Sheriff's Office, and Emergency Services. Information should be updated by Dakota Constructors Inc. or the current property owner as necessary.

Filed: 4/18/2022 1:24 PM CST Hanson County, South Dakota 30CIV22-000007

13. Liability insurance in an amount of no less than two million dollars, shall be secured and effective throughout ownership. Hanson County shall be named as additionally insured. Proof of liability insurance shall be filed with the County Zoning Administrator upon the renewal date.

14. Subcontractors to include blasting firms shall have a copy of their liability insurance filed with the County Zoning Administrator prior to commencing operations.

15. No further expansion of the mining operations within required property setbacks as detailed within the Zoning Ordinance nor within public rights-of-way.

16. Dust control measures approved by the Highway Superintendent shall be employed on all on-site non paved driving surfaces.
17. Exterior lighting shall be limited to security lights on buildings, yard lights and signs. All lighting shall be designed in accordance with dark skies provisions.
18. No more excavating, blasting or mining activities upon the previously mined rock face along 257th Street. This does not include back sloping work as noted herein.
19. Signage shall comply with the Hanson County Zoning Ordinance.

Roll call vote taken: Waldner, aye. Bender, aye. Jarding, aye. Freeman, aye. Kayser, aye. Waldera, recuse. Ayes have it, motion approved.

PLANNING COMMISION

The Chairman called to adjourn as Board of Adjustment and reconvene as Planning Commission at 11:18 am. Motion by Bender, seconded by Jarding. Freeman left from remainder of the meeting.

PLATS

None at this time

NEW BUSINESS

Discussion regarding the rock, sand, and gravel extraction amendment to Hanson County Ordinance #18 Motion made by Waldera and seconded by Bender to recommend approval to the County Commissioners. All members voted aye. Motion carried.

WELFARE OF THE ORDER

Discussion to start the update process to Zoning Ordinances late fall 2022.

EXECUTIVE SESSION

Not needed at this time

A motion to adjourn was made by Waldera, seconded by Bender. All members present voted aye. Motion carried. The date for the next regularly scheduled meeting is Wednesday, March 23, 2022

Josh Kayser
Hanson County Planning Commission
Christi Pierson, CAA
Zoning Administrator

Published one time at the approximate cost of: _____

Prepared for: Dakota Constructors Inc., Warren Barse, owner.
By: Hanson County Planning Commission
P.O. Box 500
Alexandria, SD 57311
(605) 239-4445

CONDITIONAL USE PERMIT
Hanson County Board of Adjustment

The application referred to in these conditions:
Dated: November 15, 2021
Permit number: 22-02.
Applicant, Dakota Constructors Inc., Warren Barse, owner.
Legal description Covered: SE4 SE4 (LESS METZ TRACT 1) 05-102-59 and SW4 SW4; PT S2 INCL LOTS 1-2-3 SW4 & LOT 4 SE4 04-102-59
Reason for application: The mining and sales of aggregate material (Rock Ledge quartzite mine)

Approved Conditions, Restrictions, Requirements:

1. Compliance with all Federal, State, and local regulations pertaining to the approved work activities
2. No expansion of operations to include blasting of rock shall commence prior to repairing the identified damages within the right-of-way. A longitudinal barrier must be installed along 257th Street for the length of the existing mined face (open mine) and an appropriate distance past the mined face in either direction. After repair and installation, a licensed engineer shall inspect the integrity of the improvements within the right of way and longitudinal barrier then provide a report to the Hanson County Zoning Administrator. All associated expenses shall be financed by Dakota Constructors Inc., Warren Barse, owner or the current property owner.
3. No expansion of operations with regards to area or depth nor blasting of rock prior to the County's approval of a haul road agreement between Dakota Constructors Inc., Warren Barse owner, or the current property owner and Hanson County. A copy of which shall be filed with the Zoning Administrator.
4. All operations to include loading of trucks for offsite hauling, minus basting shall be restricted to the following days and hours: Monday thru Friday, 7:00am to 6:00 pm and Saturday, 7:00 am to 4:00pm nor conducted on Federal holidays. Activities such as office operations and equipment maintenance which will not generate noise, dust or vibrations beyond the property boundaries shall not be restricted by the days or hours of operation
5. Blasting operations are restricted to: Monday thru Friday, 9:00 am to 4:00 pm,
6. A minimum of twenty-four-hour notification shall be given to all property owners within a half mile radius, as measured from the Dakota Constructors Inc. property boundaries to private owner's property lines prior to all blasting operations. The same shall be provided to the County Zoning Administrator.
7. All blasting activities will abide by all Federal, State, and local regulations.
8. A three to one (3/1) back slope will be constructed on the south sheer rock wall abutting 257th Street no later than May 2024. Precautions shall be made to ensure the slopes future integrity. A consulting engineer, at the expense of the Dakota Constructors Inc., or the

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current property owner shall provide periodic inspections of work activities and provide a final report to the County. Failure to comply shall void the Conditional Use Permit.

9. A berm(s) will be constructed six feet in height, as measured from the prevailing grade, with a minimum base of forty feet and running approximately 860 feet on the south property line where there has not been excavation as of February 23, 2022. The berm is to be placed no closer than seventy-five feet from the right of way. Vegetation is to be planted on the berms and kept free of all noxious weeds.

10. A secure perimeter shall enclose the property to include at a minimum; a six-foot chain-link fence and gates to be locked during non-business hours.

11. Signage identifying emergency contact information shall be displayed on all property access points

12. Emergency contact information shall be filed with the Hanson County Zoning Administrator, Sheriff's Office, and Emergency Services. Information should be updated by Dakota Constructors Inc. or the current property owner as necessary.

13. Liability insurance in an amount of no less than two million dollars, shall be secured and effective throughout ownership. Hanson County shall be named as additionally insured. Proof of liability insurance shall be filed with the County Zoning Administrator upon the renewal date.

14. Subcontractors to include blasting firms shall have a copy of their liability insurance filed with the County Zoning Administrator prior to commencing operations.

15. No further expansion of the mining operations within required property setbacks as detailed within the Zoning Ordinance nor within public rights-of-way.

16. Dust control measures approved by the Highway Superintendent shall be employed on all on-site non paved driving surfaces.
17. Exterior lighting shall be limited to security lights on buildings, yard lights and signs. All lighting shall be designed in accordance with dark skies provisions.
18. No more excavating, blasting or mining activities upon the previously mined rock face along 257th Street. This does not include back sloping work as noted herein.
19. Signage shall comply with the Hanson County Zoning Ordinance.

Administrative Data:

Notice of Hearing Published:

Alexandria Herald & Emery Enterprise: February 10, 2022

Notice of Hearing posted: February 11, 2022

Notice of Hearing to Adjacent property Owners: February 11, 2022

Public Hearing Held:

February 23, 2022

9:00am

Hanson County Court house

ARTICLE 13

NONCONFORMANCE

Section 1301 General

Within the districts established by this ordinance or amendments that may later be adopted, there exists (a) lots, (b) structures, (c) uses of land and structures, and (d) characteristics of use which were lawful before this ordinance was passed or amended, but which would be prohibited, regulated, or restricted under the terms of this ordinance or future amendment; it is the intent to permit these nonconformities to continue until they are removed, but not to encourage their survival. It is further the intent that nonconformities shall not be enlarged upon, expanded, or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district.

Nonconforming uses are declared to be incompatible with permitted uses in the districts involved. A nonconforming use of a structure, a nonconforming use of land, or a nonconforming use of structure and land in combination shall not be extended or enlarged after passage of this revised ordinance by attachment on a building or premises of additional signs intended to be seen from off the premises, or by the addition of other uses, of a nature which would be prohibited generally in the district involved.

To avoid undue hardship, nothing in this ordinance shall be deemed to require a change in the plans, construction, or designated use of any building on which actual construction was lawfully begun prior to the effective date of adoption or amendment of this ordinance and upon which actual building construction has been carried on diligently. Actual construction is hereby defined to include the placing of construction materials in permanent position and fastened in a permanent manner. Where excavation or demolition or removal of an existing building has been substantially begun preparatory to rebuilding, such excavation or demolition or removal shall be

deemed to be actual construction, provided that work shall be carried on diligently.

Section 1303 Nonconforming Lots of Record

In any district in which single-family dwellings are permitted, a single-family dwelling and customary accessory building may be erected on any single lot of record at the effective date of adoption or amendment of this ordinance, not withstanding limitations imposed by other provisions of this ordinance. Such lots must be in separate ownership and not of continuous frontage with other lots in the same ownership. This provision shall apply even though such lots fail to meet requirements for area or width, or both, that are generally applicable in the district, provided that yard dimensions and requirements other than those applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of other yard requirements shall be obtained only through action of the Board of Adjustment.

Section 1305 Nonconforming Uses of Land (or Land with Minor Structures Only)

Where at the time of passage of this revised ordinance lawful use of land exists, which would not be permitted by the regulations imposed by this ordinance, and where such use involves no individual structure with a replacement cost exceeding one thousand (1,000) dollars, the use may be continued so long as it remains otherwise lawful, provided:

1. No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance;

2. No such nonconforming use shall be moved, in whole or in part, to any portion of the lot or parcel other than that

occupied by such use at the effective date of adoption or amendment of this ordinance;

3. If any such nonconforming use of land ceases, for any reason, for a period of more than one (1) year, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located; and

4. No additional structure, not conforming to the requirement of this ordinance, shall be erected in connection with such nonconforming use of land.

Section 1307 Nonconforming Structures

Where a lawful structure exists at the effective date of adoption or amendment of this ordinance, that could not be built under the terms of this ordinance by reason of restrictions on area, lot coverage, height, yards, its location on the lot, or other requirements concerning the structure, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

1. No such nonconforming structure may be enlarged or altered in any way, which increases its nonconformity, but any structure or portion thereof, may be altered to decrease its nonconformity.

2. Should such nonconforming structure, or nonconforming portion of structure, be destroyed by any means, to an extent of more than seventy-five (75) percent of its replacement cost at the time of destruction, it shall not be reconstructed except in conformity with the provisions of this ordinance; and

3. Should such structure be moved for any reason for any distance whatever, it shall thereafter conform to the

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DAKOTA CONSTRUCTORS, INC.

Plaintiff/Appellant,

-vs-

HANSON COUNTY BOARD OF ADJUSTMENT,

Defendant/Appellee.

Appeal No. 30084

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
HANSON COUNTY, SOUTH DAKOTA

THE HONORABLE CHRIS S. GILES
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this brief, Appellant Dakota Constructors, Inc., will be referred to as "Dakota Constructors." Appellee Hanson County Board of Adjustment will be referred to as "Board." The Hanson County Clerk of Courts' record will be referred to by the initials "SR" and the corresponding page numbers. The transcript of the June 27, 2022 hearing will be referred to as "T" followed by the corresponding page numbers.

JURISDICTIONAL STATEMENT

The Board agrees with Dakota Constructors' Jurisdictional Statement.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT CORRECTLY AFFIRMED THE BOARD'S DECISION TO REQUIRE DAKOTA CONSTRUCTORS TO OBTAIN A CONDITIONAL USE PERMIT.

The trial court found that the Board has the authority to interpret the zoning ordinance it administers and is given deference in its interpretation. The trial court found that Dakota Constructors did not meet its burden of showing that the Board acted illegally.

Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm'rs, 2017 S.D. 87, 905 N.W.2d 344.

Dunham v. Lake Cnty. Comm'n, 2020 S.D. 23, 943 N.W.2d 330.

Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, 866 N.W.2d 149.

SDCL 11-2-61.

SDCL 11-2-61.1.

STATEMENT OF THE CASE

At a public hearing held on February 23, 2022, the Board determined that Dakota Constructors needed a conditional use permit ("CUP") in order to extract sand, gravel, or minerals from its Hanson County property. (SR 70-72.) On March 18, 2022, Dakota Constructors appealed the Board's decision to Circuit Court by filing a Verified Petition seeking a Writ of Certiorari. (SR 2-8.) Consistent with SDCL 11-2-61, the Board filed a Return to Writ of Certiorari with a record of its proceedings on April 18, 2022. (SR 17-349, 366-502.) An Amendment to Return to Writ of Certiorari was filed on May 18, 2022 to correct a clerical error and ensure that the entire "Exhibit D" to the Return to Writ of Certiorari was included in the record. (SR 503-749.)

The matter came on for hearing before the Honorable Chris S. Giles on June 27, 2022. (SR 351.) On July 19, 2022, Judge Giles issued a Memorandum Decision affirming the Board's decision. (SR 792-794.) On July 20, 2022, Judge Giles entered an Order Affirming Decision of the Hanson County Board of Adjustment. (SR 795-796.)

STATEMENT OF FACTS

In the fall of 2021, the Hanson County Zoning Administrator, Christi Pierson, became aware of the transfer of real estate from Fisher Sand & Gravel Co. ("Fisher") to Dakota Constructors. (SR 3.) Pierson reached out Dakota Constructors' president, Warren Barse, to advise him that Dakota Constructors needed a CUP to extract gravel on the property. (Id.) The Hanson County Zoning Ordinance ("Ordinance") lists "[e]xtraction of sand, gravel, or minerals provided such uses meet requirements for conducting surface mining activities of SDCL 45-6B" as a conditional use in the Agricultural District. (SR 133.)

While Appellant's Brief repeatedly refers to Fisher's prior use of the real estate as a "quarry," the Ordinance imposes a CUP requirement when *extraction* is involved. On November 15, 2021, Dakota Constructors applied for a CUP for "mining rock." (SR 229.) Dakota Constructors' application makes clear that it does not just intend to own a quarry; it intends to mine or extract. It describes its work is "Mining & Aggregate Sales." (Id.) Its business plan says that it "will make & and (sic) sell quality aggregate to customers in the area." (SR 231.) Pierson conducted an investigation into the site. As part of her investigation, Pierson secured information from the State of South Dakota's Department of Environment and Natural Resources (now Department of

Agriculture and Natural Resources) ("DANR") relating to License No. 83-54, held by Fisher. (SR 505-749.) The DANR's documents include Fisher's annual reports, which are required by SDCL 45-6-72 to report: "the tonnage of material removed, a map showing the areas mined, the areas reclaimed, and the acreage of each." The reports from 2004 through the 2021 transfer of the real estate from Fisher to Dakota Constructors show that 0 tons were removed in each of those years. (SR 684-734.) A December 3, 2003 letter authored by Michael Erickson, now an Environmental Scientist Manager with DANR, provides insight on why the reports show "0 tons" after 2004:

> The material in the stockpiles is included in tonnage removed. "Tonnage of material removed" is the material that has been **mined (extracted) from the ground**. Some operations load mined material directly from a mine site directly to haul trucks and the material is hauled off site. Other operations, such as Fisher's quarry, mine the material and stockpile the material on site to be removed at a later time. The 1,300,000 tons of material stockpiled on site would be included in the tonnage of material removed figures in the annual reports.

(SR 593.) (Emphasis added.)

In other words, the DANR's records confirm that, from 2004 to 2021, no material was "extracted," in the sense that term is used by DANR. Otherwise, it would have been reported to DANR on Fisher's annual reports. That understanding was reaffirmed in Erickson's correspondence to Pierson dated February 10, 2022: "We have always gone with the *extraction*

of sand, gravel, or rock from the ground as mining. Thus the removal of stockpiled material is not considered mining." (SR 536.) (Emphasis added.)

A hearing was set for December 22, 2021 to address Petitioner's CUP application, and notice was mailed to interested parties and published in the legal newspaper. (SR 232-235.) The application came before the Board on December 22, 2021. (SR 54-59.) The Board needed more information from Dakota Constructors, so it deferred action to the next meeting. (SR 57.)

Pierson took a number of photographs of the site on January 4, 2022. (SR 505-529.) Because this site presented an ongoing concern with respect to Hanson County's adjacent right-of-way and highway, the County Highway Department also made contact with GeoStabilization International and sought a proposal relating to the stabilization of 257th Street along the site. (SR 530-533.)

At the January 26, 2022 meeting, Barse and his attorney appeared and claimed that a CUP is unnecessary. (Ex. F2, at approx. 9:15:00-9:16:45; 9:22:00-9:25:00.) They stated that Fisher's quarry predated the zoning ordinance, Fisher continuously maintained a state license for the site, and, even though mining operations were not going on there, material had been hauled out of the site regularly. (Id.) Dakota

Constructors thereafter provided written argument and an affidavit from Clinton Degen in which Degen testified that individuals hauled aggregate out of the site in the recent past. (SR 268-272.) Dakota Constructors presented nothing to the Board showing that any extraction of material occurred from 2004 to 2021. Once again, the Board elected to defer action pending more information. (SR 63.)

On February 23, 2022, the Board again discussed Dakota Constructors' application. (SR 70-74.) At that time, the Board made its findings regarding the CUP application. (Id.) The Board determined that a CUP was needed, based upon its findings that Dakota Constructors intended to expand and the previous operation[1] had ceased mining operations for more than one year according the records on file with the State of South Dakota. (Id.)

The Board's findings were based on Ordinance § 1305, which provides:

> Where at the time of passage of this revised ordinance lawful use of land exists, which would not be permitted by the regulations imposed by this ordinance, and where such use involves no individual

[1] Dakota Constructors included argument in its brief about the Board's expansion finding. (Appellants' Brief, at 21-23.) The Board essentially abandoned its position on expansion in its brief below and at the hearing, acknowledging that the record did not address expansion of the operations. (SR 777; T28.) Consequently, the Board's argument in this appeal is limited to the cessation of the non-conforming use for more than one year.

structure with a replacement cost exceeding one thousand (1,000) dollars, the use may be continued so long as it remains otherwise lawful, provided:

1. No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance;

2. No such nonconforming use shall be moved, in whole or in part, to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this ordinance;

3. **If any such nonconforming use of land ceases, for any reason, for a period of more than one (1) year, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located;** and

4. No additional structure, not conforming to the requirement of this ordinance, shall be erected in connection with such nonconforming use of land.

(SR 190-191; Appx. 11-13.) (Emphasis added.)

The Board approved Dakota Constructors' application for CUP, with numerous conditions. (SR 73-74.)

ARGUMENT

When Dakota Constructors' argument is properly evaluated under the governing standards, it is clear there is no basis for reversal of the Board's decision. First, Dakota Constructors' argument addresses the interpretation of the zoning ordinance the Board administers, an area on which the Board is statutorily entitled to deference. SDCL 11-2-61.1. The Board permissibly construed the term "extraction" to

require something more than merely hauling away material that was removed from its natural state and stockpiled years earlier.

Second, Dakota Constructors is challenging a factual determination made by the Board, namely, the determination that a particular land use – extraction of gravel, sand, or minerals - ceased for a period of more than one year. While Dakota Constructors characterizes the evidence before the Board as "indisputable," it is not. The Board's factual determinations cannot be disturbed in this appeal.

A. THE BOARD'S INTERPRETATION OF THE TERM "EXTRACTION" IS ENTITLED TO DEFERENCE.

The Board's determination that the nonconforming use of land - extraction of sand, gravel or minerals – ceased for a period of at least one year turns on its interpretation of the zoning ordinance it administers. More specifically, it turns on its interpretation of the term "extraction" and what that means in the context of the Ordinance. Dakota Constructors' entire argument hinges on its differing interpretation that mere removal of stockpiled material suffices as "extraction." (Appellant's Brief, at 11-12.) For the Court to reverse the Board, it must conclude that the Board's construction of the Ordinance is impermissible. The Board's interpretation of the term "extraction" matches the interpretation of the DANR. It also squares with the conclusion of some courts that have considered this precise issue. It also comports with the purpose of the zoning ordinance. Because

the Board's construction is permissible, it is entitled to deference. The Board's reasonable construction of the zoning ordinance is entitled to deference. In Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm'rs, 2017 S.D. 87, 905 N.W.2d 344, this Court quoted from its earlier decision in Wegner Auto Co. v. Ballard, 353 N.W.2d 57, 58 (S.D. 1984):

> **[I]n passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance.** However, "an administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous."

Id. at ¶ 20, 905 N.W.2d at 350 (emphasis added).

The Court also looked to Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), for guidance on when to give deference to those administering the law. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has

involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." Id. at 844.

In 2018, the South Dakota Legislature enacted SDCL 11-2-61.1, which states, in part: "The court shall give deference to the decision of the approving authority in interpreting the authority's ordinances." "[T]he term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL 2-14-2.1.

In considering the Board's interpretation of its Ordinance, it is critical to remember the precise nonconforming land use at issue. It is also critical to consider what Dakota Constructors plans to do on its real estate. Dakota Constructors conflates the Ordinance's definition of a "quarry" with the conditional use. (Appellant's Brief, at 7-8.) The nonconforming use is not owning a "quarry." Rather, the nonconforming use is the ***extraction of sand, gravel, or minerals***. (SR 133.) (Emphasis added.) The pivotal question, therefore, is not whether the owner of the real estate continues to label it a "quarry" at all relevant times; it is whether the extraction of sand, gravel, or minerals was discontinued

for a period exceeding one year. SDCL 11-2-26 ("[I]f the **nonconforming use** . . . is discontinued for a period of more than one year, any subsequent use. . . shall conform with the zoning ordinance.") (Emphasis added.)

While the parties disagree about the proper interpretation of the term "extraction," it is undisputed that there were no instances where gravel was removed from its natural state on the site from 2004-2021. Recognizing this, Dakota Constructors tries to contort the word "extract" to mean hauling away previously stockpiled material. (Appellant's Brief, at 12.) The Board's decision to reject Dakota Constructors' interpretation in favor of a narrower interpretation of "extraction" is sound and entitled to deference.

The Board's interpretation makes sense, particularly when it is viewed outside the vacuum of this case. Dakota Constructors' argument for such a broad definition of "extraction" would create unintended consequences. Consider Dakota Constructors' broad interpretation of the term "extraction" as applied in a different context. The logical extension of Dakota Constructors' interpretation of "extraction" is that a Hanson County landowner in the Agricultural District who has a gravel pile on their property that wants to sell the gravel would need a CUP, because hauling away stockpiled material is "extraction" of gravel. The Board has

chosen not to burden landowners by requiring them to obtain a CUP to simply haul away material.

But a CUP is necessary when the land use involves extracting gravel from its natural state in the ground. The hauling of stockpiled material is quite a measure different than what happens in an active mining operation like Dakota Constructors is planning. Dakota Constructors' operation will necessarily involve blasting, creating holes in the ground, running a crushing machine, noise, dust, and all the things that may disturb neighbors in a way that calls for regulation by the local zoning authority.

Indeed, these effects are the "special characteristics" that make extraction of sand, gravel, or minerals a conditional use that is "subject to the evaluation and approval by the approving authority." SDCL 11-2-17.4. Per the evidence before the Board, these effects were discontinued back in 2004, but Dakota Constructors wants to bring them back.

The Board's interpretation of the term "extraction" to mean more than merely hauling away stockpiled material is consistent with the Ordinance's purpose and is not a ground for reversal. See Holborn v. Deuel Cnty. Bd. of Adjustment, 2021 S.D. 6, ¶ 49, 955 N.W.2d 363, 381 (not erroneous for Board to interpret term of ordinance consistent with the ordinance's purpose). The Board rightly concluded that, since Dakota

Constructors intends to engage in extraction, it must "conform with the zoning ordinance." SDCL 11-2-26.

While Dakota Constructors cites authority from other jurisdictions ostensibly favoring its interpretation, it misses the point in a few critical ways. First, there is no indication that the states of Wyoming, New Mexico, Iowa, or other states have mandated that the Courts give deference to their zoning authorities' interpretations. In South Dakota, SDCL 11-2-61.1 requires the Court to give "deference to the decision of the approving authority in interpreting the authority's ordinances."

Second, Dakota Constructors gives no consideration to the nature of the cases or the applicable standard of review in its cited authority. See River Springs Ltd. Liab. Co. v. Bd. of Cnty. comm'rs, 899 P.2d 1329 (Wyo. 1995) (answering certified questions from district court); Romero v. Bd. of Cnty. comm'rs, 2007-NMCA-004, 140 N.M. 848, 149 P.3d 945 (arbitrary and capricious review); Ernst v. Johnson Cnty., 522 N.W.2d 599 (Iowa 1994) (de novo review of declaratory judgment); S. Cnty. Sand & Gravel Co. v. Charlestown, 446 A.2d 1045 (R.I. 1982) (appeal from permanent injunction). The fact that this case is an appeal brought under SDCL 11-2-61, et seq. that involves an extremely narrow review is an important consideration that, while ignored by Dakota Constructors, was correctly observed by the Circuit Court. (SR 793) ("Whether the 'nonconforming

use of land cease[d] for any reason, for a period of more than one year,' . . . is not a question for this Court to decide in this appeal, but rather is a determination that belonged and remains with the Board.")

Third, the Board's interpretation is not unreasonable or arbitrary. Other courts analyzing the term "extraction" have concluded that removing stockpiled gravel does not continue a nonconforming use. See e.g. Brown v. Mason Cnty., No. C20-5628 TSZ, 2021 U.S. Dist. LEXIS 106643, at *14 (W.D. Wash. June 7, 2021) (affirming hearing examiner's decision that "[t]he stockpiling of gravel and removal and hauling of gravel from such stockpiles without any ground extraction does not qualify as mining and/or gravel extraction"); Kraemer Co. v. Sauk Cnty. Bd. of Adjustment, 2001 WI App 254, 248 Wis. 2d 527, 635 N.W.2d 905 (construing the phrase "mineral extraction activities" to include mere stockpiling of product would lead to absurd results).

The Wisconsin Court of Appeals' decision in Kraemer Co. illustrates the reasonableness of the Board's interpretation. The Sauk County Board of Adjustment argued that the nonconforming use at issue, "mineral extraction activities," is limited to the actual separation of minerals from the earth. The Board of Adjustment asserted that, because no separation activity occurred during the time period in

question, the relevant nonconforming use ceased for the requisite twelve-month period and, therefore, the Kraemer Company needed a special exception permit. The Court of Appeals reviewed the Board's interpretation de novo and agreed that maintaining stockpiled material did not constitute "mineral extraction activities":

> [S]tockpiling of the blasted rock alone cannot reasonably constitute "mineral extraction activities." If "mineral extraction activities" included the mere stockpiling of rock with nothing more, then a quarry owner could maintain property as a legal nonconforming use for an indefinite period of years by simply leaving some unsold rock on the property. Such an interpretation would be directly contrary to the obvious goal of the ordinance to limit the duration of nonconforming uses.

Id.

Similarly, Hanson County's zoning ordinance expresses an intent to limit nonconforming uses in § 1301. (SR 189.) The foregoing description by the Wisconsin Appellate Court in Kraemer is the situation presented here. The investigation that ensued after the change in ownership revealed that Dakota Constructors' predecessor had not extracted material for approximately 18 years. Yet, Dakota Constructors claims here that the nonconforming use has continued during that time, based on stockpiled material and individuals allegedly hauling if off premises from time to time.

Dakota Constructors also cites the definition of

surface mining in SDCL 45-6B-3(15) as somehow supporting its interpretation. (Appellant's Brief, at 12.) This reliance is misplaced. "Overburden" is defined as "all of the earth and other materials which are disturbed or removed, in the original state, or as it exists after removal from its natural state in the process of surface mining." SDCL 45-6B-3(13). Extracting or mining without having to disturb or remove earth or other material is not synonymous with loading up stockpiled materials that were mined or extracted years before. Indeed, the interpretation that extraction requires something more than simply hauling out previously mined material also squares with the interpretation of the South Dakota DANR, which does not consider the mere removal of stockpiled material as mining. (SR 536.)

Finally, Dakota Constructors' argument that the Circuit Court's decision means the Board was "free to reach whatever factual determinations it may concerning preexisting and continued land use without question," simply obfuscates the issue. (Appellant's Brief, at 19.) Contrary to Dakota Constructors' argument, this case does not turn on the Board's interpretation of state statutes. Rather, the Board had to make a determination as to whether the non-conforming use, "extraction of sand, gravel or minerals," had ceased for a period exceeding one year. To reach that determination, the Board

had to decide what the Ordinance means by "extraction of sand, gravel, or minerals." The Board's interpretation is permissible and entitled to deference, and its decision to require Dakota Constructors to obtain a CUP should be affirmed.

B. THE BOARD REGULARLY PURSUED ITS AUTHORITY IN THE CONSIDERATION OF DAKOTA CONSTRUCTORS' CUP APPLICATION.

The Board's interpretation of the term "extraction" is permissible and dispositive of this appeal. The Court need not consider Dakota Constructors' factual arguments, because they depend entirely on Dakota Constructors' erroneous construction of the term "extraction." Indeed, Dakota Constructors makes no contention that gravel was removed from its natural state continuously from 2004-2021; it only argues that it was hauled away from stockpiles. However, even if the Court considers Dakota Constructors' factual arguments, under a proper review of this matter, the Board's decision must be affirmed.

1. DAKOTA CONSTRUCTORS ASKS THE COURT TO INCORRECTLY APPLY THE STANDARD OF REVIEW.

Dakota Constructors' argument invites the Court to weigh the evidence and review the merits of the Board's decision. This Court reaffirmed the appropriate standard of review just weeks ago in Powers v. Turner Co. Bd. of Adjustment, 2022 S.D. 77. In that decision, the Court stated:

> The review upon writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board, or officer, has regularly pursued the authority of such court, tribunal, board, or officer." SDCL 21-31-8. "[T]he statute 'limit[s] certiorari review "to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it."'" Ehlebracht v. Deuel Cnty. Plan. Comm'n, 2022 S.D. 18, ¶ 12, 972 N.W.2d 464, 470 (second alteration in original) (quoting Dunham v. Lake Cnty. Comm'n, 2020 S.D. 23, ¶ 10, 943 N.W.2d 330, 333). "The test of jurisdiction is whether there was power to enter upon the inquiry[.]" Id. (quoting Lake Hendricks Imp. Ass'n v. Brookings Cnty. Plan. & Zoning Comm'n, 2016 S.D. 48, ¶ 26, 882 N.W.2d 307, 315). "With a writ of certiorari, we do not review whether the [board's] decision is right or wrong." Id. ¶ 13, 972 N.W.2d at 470 (alteration in original) (quoting Grant Cnty. Concerned Citizens, 2015 S.D. 54, ¶ 10, 866 N.W.2d at 154). "Courts must not review the merits of a petition or evidence for the purpose of determining the correctness of a finding, in the absence of a showing that the Board 'acted fraudulently or in arbitrary or willful disregard of undisputed and .indisputable proof.'" Id. (quoting Lamar Outdoor Advert. of S.D., Inc. v. City of Rapid City, 2007 S.D. 35, ¶ 21, 731 N.W.2d 199, 205). "[W]e will sustain the lower tribunal's decision 'unless it did some act forbidden by law or neglected to do some act required by law.'" Id. (quoting Dunham, 2020 S.D. 23, ¶ 10, 943 N.W.2d at 333).

Id. at ¶ 27.

By re-arguing the evidence presented to the Board, Dakota Constructors attempts to seize on the "willful

disregard of undisputed and indisputable proof" language and convince the Court to review the merits. Dakota Constructors has the burden to show that the Board acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof. Lamar Outdoor Adver. of S.D., Inc., 2007 S.D. 35, ¶ 22, 731 N.W.2d at 205. The Circuit Court

wisely concluded that Dakota Constructors failed to meet this burden. (SR 794.)

Simply claiming that the Board acted in arbitrary or willful disregard is not enough. If it was, the deferential certiorari standard of review would be nullified, because every certiorari appeal would involve the Court re-weighing the evidence. This Court rejected an analogous attempt to expand the standard of review in Dunham, stating: "Dunham's arguments would logically expand the scope of review in every certiorari proceeding to consider whether a board of adjustment's findings were correct." Id. at ¶ 11, 943 N.W.2d at 334.

There are absolutely no facts in the record which support a departure from the customary certiorari standard of review. Instead, the record shows that the Board gave conscientious consideration to the issues Dakota Constructors brought before it over the course of three separate meetings.

The Board ultimately concluded that the nonconforming use, extraction of gravel, had ceased for more than one year, and Dakota Constructors should be required to obtain a CUP before it could extract gravel. Dakota Constructors has not shown an arbitrary and willful disregard of undisputed and indisputable proof. It is simply re-arguing the evidence to suggest that the Board got it wrong. Disagreement with the Board's decision is not a sufficient reason for the Court to apply a less deferential standard of review.

2. THE BOARD'S RESOLUTION OF FACTUAL DISPUTES IS NOT EVALUATED FOR CORRECTNESS IN A CERTIORARI APPEAL.

In addition to its interpretation of Ordinance language, the Board's determination that the nonconforming use of land ceased for a period of at least one year also turns on a resolution of disputed facts. The factual determination of whether the "nonconforming use of land cease[d], for any reason, for a period of more than one (1) year," belonged to the Board. Its findings in this regard cannot be evaluated for correctness in this appeal. See Grant Cnty. Concerned Citizens, 2015 S.D. 54, ¶ 17, 866 N.W.2d at 156 (because certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, the Court does not decide whether it would have reached the same conclusion as the Board).

As it did below, Dakota Constructors re-argues the evidence presented to the Board concerning removal of stockpiled material from the quarry. Dakota Constructors bases its position that the Board disregarded "undisputed proof" on its evidence regarding the alleged removal of stockpiled material from the property, as told by Warren Barse and Clinton Degen. The proof was not undisputed. Annual reports on file with the State of South Dakota, signed under penalty of perjury, show **0 tons** of material removed under Fisher's license from 2004-2021. (SR 684-734.) Dakota Constructors also argues that reclamation has not occurred. (Appellant's Brief at 12-13.) To simply argue that "[t]he quarry has not been reclaimed," does not tell the whole story. In reality, the reclamation issue only raises more questions about the cessation of Fisher's operations long ago.

The DANR was fielding telephone calls concerning Fisher's failure to reclaim as early as 2007, when John Metz, the landowner, reported that Fisher had been off-site for "around five years." (SR 601.) Reclamation of the site was apparently the subject of ongoing correspondence, meetings, and even a federal lawsuit. (SR 601-642.) The DANR's materials include an Affidavit of Tom Cline, Jr., with a number of photographs depicting the progress of Fisher's reclamation efforts in 2006-2009. (SR 610-628.) The fact that Fisher

delayed its reclamation obligation by keeping its state license active and continually publishing Notice of Intent to Continue Operation filings is immaterial to the issue before the Board. It certainly does not equate to ongoing extraction of gravel, which is the nonconforming use at issue.

At minimum, the Board considered conflicting evidence about whether the nonconforming land use ceased. Whether the Board decided this conflict of evidence right or wrong is not at issue in this appeal.

CONCLUSION

For these reasons, the Board respectfully urges the Court to affirm.

Respectfully submitted this 11th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 22 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 4,454 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 11th day of January, 2023.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellee, hereby certifies that on the 11th day of January, 2023, a true and correct copy of **BRIEF OF APPELLEE** was served and filed via the Odyssey file and serve system on:

(paull@schafferlawoffice.com)
Mr. Paul H. Linde
Schaffer Law Office, Prof. LLC

and the original of **BRIEF OF APPELLEE** was 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 11th day of January, 2023.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30084

DAKOTA CONSTRUCTORS, INC.,

Plaintiff/Appellant,

vs.

HANSON COUNTY BOARD OF ADJUSTMENT,

Defendant/Appellee.

Appeal from Circuit Court
First Judicial Circuit, Hanson County, South Dakota
Honorable Chris S. Giles, Circuit Court Judge

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant will be referred to as Dakota Constructors. The Appellee will be referred to as Board. The Clerk's record is designated "R". The Transcript from the hearing will be referred to as "T".

JURISDICTIONAL STATEMENT

The parties agree that this Court has jurisdiction to decide this appeal.

STATEMENT OF LEGAL ISSUE

1. Whether the Circuit Court erred in affirming the decision of the Hanson County Board of Adjustment requiring Dakota Constructors to obtain a conditional use permit to continue to extract gravel, sand or minerals from its quarry.

The Circuit Court concluded that Dakota Constructors was required to obtain a conditional use permit to continue the extraction of gravel, sand or minerals at the quarry.

Legal Authority:

SDCL 11-2-26
SDCL 45-6B-3(15)
River Springs Ltd. Liability Co. v. Board of Cnty. Comm'rs of Teton Cnty., 899 P.2d 1329 (Wyo. 1995).
Ernst v. Johnson County, 522 N.W.2d 599 (Iowa 1994).

REPLY ARGUMENT

1. Whether the Circuit Court erred in affirming the decision of the Hanson County Board of Adjustment requiring Dakota Constructors to obtain a conditional use permit to continue to extract gravel, sand or minerals from its quarry.

A. The Board's Interpretation of its Zoning Ordinance and South Dakota law is Erroneous.

The Board argues in it its Brief it should be given deference in interpreting its ordinances and that it properly interpreted the Hanson County Zoning Ordinance (Zoning Ordinance). (Appellee's Brief at p. 9) This is not correct.

The Zoning Ordinance provides, in relevant part, at Section 507 Conditional Uses:

> After the provisions of this ordinance relating to conditional uses have been fulfilled, the Board of Adjustment may permit as conditional uses in Agricultural District (AG):
>
> * * * *
>
> 33. Extraction of sand, gravel, or minerals provided such uses meet requirements for conducting surface mining activities of SDCL 45-6B.

(R 131-33) Necessarily, one must then reference the statute incorporated into the Zoning Ordinance in order to interpret it. This goes beyond interpreting Hanson County's own Zoning Ordinance and involves interpreting South Dakota law that it incorporated into its Zoning Ordinance.

Although the Board claims that SDCL 11-2-61.1 requires that the Court "give deference to the decision of the approving authority in interpreting the authority's ordinances," the Zoning Ordinance here necessarily incorporates the statutory definition of surface mining in SDCL 45-6B-3(15). There is nothing that supports the argument that the Board should be given deference in interpreting state law incorporated into the

Zoning Ordinance. The plain and ordinary language of SDCL 11-2-61.1 provides that the deference provided to the Board is limited to "interpreting the authority's ordinances." That deference does not extend to other laws or regulations that are referenced by such zoning ordinance or incorporated into such zoning ordinance. Under the Board's argument, this would require that a Court give deference to a board of adjustment's interpretation of any law or regulation referenced by or incorporated into a zoning ordinance. That is not correct and not what the Legislature intended. Such limited deference is restricted to "interpreting the authority's ordinances." SDCL 11-2-61.1 This means deference is given to the interpreting authority when interpreting the actual ordinance and not to other laws the ordinance may reference or incorporate.

Furthermore, the Court has recognized that:

> [I]n passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance. However, "an administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous."

Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm'rs, 2017 S.D. 87, ¶ 20, 905 N.W.2d 344, 350 (quoting *Wegner Auto Co. v. Ballard*, 353 N.W.2d 57, 58 (S.D. 1984)) (further citations omitted). As the Court noted, any deference is not unlimited and the Court is free to overrule an erroneous interpretation.

The Board focuses heavily on the word "extraction" in isolation in an attempt to support its erroneous interpretation. However, the entire language in Section 507(33) must be read, including the definition of surface mining the Zoning Ordinance incorporated from SDCL Ch. 45-6B. "The purpose of the zoning districts is to be

gathered from the whole act . . .." *Save Centennial Valley Ass'n, Inc. v. Schultz*, 284 N.W.2d 452, 457 (S.D. 1979).

The Zoning Ordinance, in Section 507(33), provides the following is a conditional use: "Extraction of sand, gravel or minerals provided such uses meet the requirements for conducting surface mining activities of SDCL 45-6B." (R 131-33) One must then reference SDCL Ch. 45-6B for further explanation of the conditional use. SDCL 45-6B-3(15) provides the following definition of surface mining:

> "Surface mining," the mining of minerals by removing the overburden lying above such deposits and mining directly from the deposits thereby exposed. The term includes mining directly from such deposits where there is no overburden and such practices as open cut mining, open pit mining, strip mining, placer mining, quarrying, and dredging[.]

(emphasis supplied) Surface mining includes removing directly from the deposits that have no overburden.[1] This necessarily includes the activity at the quarry of removal from the gathered aggregate without overburden.

Moreover, surface mining, as defined in SDCL 45-6B-3(15), also includes "such practices as . . . quarrying . . .." Therefore, contrary to the Board's argument, the Zoning Ordinance's definition of "quarry" is relevant. It incorporated quarrying as part of the allowed conditional use. The Zoning Ordinance defines a quarry as follows:

> A place where consolidated rock has been or is being removed by means of an open excavation to supply material for construction, industrial or manufacturing purposes, but does not include a wayside quarry or open pit metal mine.

(R 106)

[1] Overburden is the soil covering the mineral or aggregate under SDCL 45-6B-3(13).

The definition of quarry is contained within the Zoning Ordinance for a reason – quarrying activity is a conditional use in land zoned agriculture under Section 507(33). In fact, there is no other reference to a quarry in the Zoning Ordinance and this definition necessarily must have some purpose. "Zoning ordinances, as legislative enactments, are interpreted consistent with the rules of statutory construction." *In re Approval of Request for Amendment to Frawley Planned Unit Dev.*, 2002 S.D. 2, ¶ 6, 638 N.W.2d 552, 554 (citing *Cole v. Bd. of Adjustment of the City of Huron*, 1999 S.D. 54, ¶4, 592 N.W.2d 175, 176). Consistent with this Court's rules of statutory construction, the Court must "assume that the Legislature intended that no part of its statutory scheme be rendered mere surplusage." *Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 6, 620 N.W.2d 198, 201 (citing 2A Norman J. Singer, Sutherland Statutory Construction § 46.07, 205 (6th ed. 2000)). This same rule of construction would necessarily apply to interpreting the zoning ordinance. "Zoning ordinances are interpreted according to the rules of statutory construction and any rules of construction included in the ordinances themselves." *Cole v. Bd. of Adjustment of City of Huron*, 2000 S.D. 119, ¶ 7, 616 N.W.2d 483, 485.

The definition of surface mining the Zoning Ordinance adopted in Section 507(33) necessarily includes quarrying activity. This is in fact what the property at issue is – a quarry. Dakota Constructors purchased this property to continue its use as a quarry. A quarry is a place "where consolidated rock has been or is being removed by means of an open excavation to supply material for construction." This land use as a quarry existed long before the enactment of the Zoning Ordinance and continued continuously through Dakota Constructors' purchase.

Both SDCL 11-2-26 and Zoning Ordinance Article 13 § 1305 allow a nonconforming use that existed before enactment of the Zoning Ordinance to continue unless such nonconforming use ceases for a period of at least one year.[2] In considering the Board's argument on its face, it necessary argues that operations at the quarry ceased in 2004. (Appellee's Brief at p. 4) It claims that because the reports from 2004 to 2021 that Fischer Sand & Gravel Co. (Fischer) provided to the South Dakota Department of Environmental and Natural Resources (now Department of Agriculture and Natural Resources) (DANR), were labeled as -0- tons removed then there was no continuing use.

However, there was explanation of this -0- entry in the record. A December 3, 2003, letter authored by Michael Erickson, who is currently an Environmental Scientist Manager at DANR, explained:

> The material in the stockpiles is included in tonnage removed. "Tonnage of material removed" is the material that has been mined (extracted) from the ground. Some operations load mined material directly from a mine site directly to haul trucks and the material is hauled off site. Other operations, such as Fisher's quarry, mine the material and stockpile the material on site

[2] SDCL 11-2-26 provides:

> Any lawful use, lot, or occupancy of land or premises existing at the time of the adoption of the zoning ordinance may be continued, even though the use, lot, or occupation does not conform to the provisions of the ordinance. However, if the nonconforming use, lot, or occupancy is discontinued for a period of more than one year, any subsequent use, lot, or occupancy of the land or premises shall conform with the zoning ordinance.

Zoning Ordinance Article 13 § 1305 (R 190-91) provides in relevant part:

> [T]he use may be continued so long as it remains otherwise lawful, provided: . . .
> 3. If any such nonconforming use of land ceases, for any reason, for a period of more than one (1) year, any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located[.]

> to be removed at a later time. The 1,300,000 tons of material stockpiled on site would be included in the tonnage of material removed figures in the annual reports.

(R 593)

The prior owner of the pit dug material and gathered the aggregate deposits for removal over time. There would necessarily be -0- on the reports because the tonnage dug was already reported, but had yet to be removed from the quarry. Under the Board's interpretation, cessation of use would occur once any actual digging of aggregate ceases, regardless if there was removal of the aggregate deposits over time. This is not correct. Both South Dakota law, specifically SDCL 45-6B-3(15), and numerous decisions from other jurisdictions conclude that hauling from collected aggregate constitutes continuing use of a quarry. *See e.g., River Springs Ltd. Liability Co. v. Bd. of Cnty. Comm'rs of Teton Cnty.*, 899 P.2d 1329 (Wyo. 1995)(recognizing that removal of previously quarried limestone for a number of years did not support county's claim of cessation of use); *Ernst v. Johnson County*, 522 N.W.2d 599 (Iowa 1994)(recognizing that removal from stockpiles coupled with continued permitting and licensing of the quarry did not support county's claim of abandonment); *Union Quarries v. Board of Cnty. Comm'rs of Johnson Cnty.*, 478 P.2d 181 (Kan. 1970)(recognizing quarry was not abandoned due to operator leaving a large stockpile and the continued sale of small quantities of rock); *FLM Enterprises, LLC v. Peoria Cnty. Zoning Bd. of Appeals*, 148 N.E.3d 164, 172 (Ill. App. 2020)("Illinois courts have held that continued existence of a test pit or large stockpile is sufficient to preserve the validity of the nonconforming use certificate."); *Romero v. Rio Arriba Cnty. Comm'rs*, 149 P.3d 945, 950 (N.M. App. 2006)("the intermittent removal

and hauling from existing stockpiles is enough to constitute ongoing, non-conforming activity").

The Board relies heavily on the *unreported* decision of *Kraemer Co., LLC v. Sauk Cnty. Bd. of Adjustment*, 2001 WI App 254, 635 N.W.2d 905 (table) (Wis. App. 2001). Interestingly, the *Kramer* Court noted:

> After carefully reviewing the proceedings and exhibits before the Board of Adjustment, we conclude that we need not fully resolve the debate regarding the precise meaning of "mineral extraction activities" in order to affirm the decision of the Board. Even if we were to agree with Kraemer Company that "quarrying" includes the marketing and selling of the extracted rock, the record does not show that appreciable marketing or selling occurred during the twelve-month period between October 3, 1988, and October 6, 1989.

Kraemer, 2001 WI App 254, ¶ 14. In addition, the *Kraemer* Court's discussion involved stockpiling alone because there was not selling of the rock. The Court stated:

> [S]tockpiling of the blasted rock alone cannot reasonably constitute 'mineral extraction activities.' If 'mineral extraction activities' included mere stockpiling of rock with nothing more, then a quarry owner could maintain property as a legal nonconforming use for an indefinite period of years by simply leaving some unsold rock on the property.

Id. at ¶28. Here, unlike in *Kraemer,* there was not mere stockpiling and there was consistent removal of aggregate. As to the Board's other cited *unreported* decision of *Brown v. Mason County*, 2021 WL 2312859 (W.D. Wash. June 7, 2021), this decision appears to go against the weight of a number of other appellate courts that have considered this issue.

The Board also incorrectly concludes, based upon an email in the record, that its interpretation of "extraction" matches the DANR's interpretation of that term. This goes too far. The Board apparently relies on Mr. Erickson's February 10, 2022 email where he

concludes that "the removal of stockpiled material is not considered mining.[3]" (R 536) He was not asked, however, whether the quarrying operations had ceased and he did not in fact conclude that operations had ceased at the quarry. Furthermore, the DANR was still holding an active mine license at the facility and no reclamation had been completed. (R 649-69; 743-45)

Under the Board's interpretation, it should have required that Fischer, the previous owner, apply for a conditional use permit as early as 2006, but no conditional use permit was ever required from Fischer. This is because Fischer had actively used the quarry by consistently removing aggregate. The Board never required Fischer to obtain a conditional use permit because there was no cessation of the nonconforming use. It was only after Dakota Constructors purchased the property that the Board found a cessation of the nonconforming use by erroneously interpreting its Ordinance and the law.

In fact, Fischer, the prior owner, had consistently renewed its mining license since 1986 and in 2019 it provided Notice of Intent to Continue Operation until 2031 to the DANR. (R 734, 743-45) The evidence established that material had been continuously removed from the quarry. (R 541) However, the Board's erroneous interpretation of the Ordinance and South Dakota law resulted in its incorrect conclusion that "[t]he previous operation has ceased for more than one year according to all records filed with the State of South Dakota." (R 71)

[3] The Board argues in its Brief that the case does not turn on the interpretation of state statutes, but its Zoning Administrator was inquiring about interpretations of state law in her February 10, 2022 email. (Appellee's Brief at p. 16)

B. The Board Exceeded its Authority and Neglected to Follow the Law.

The Board argues that Dakota Constructors invites the Court to weigh the evidence. (Appellee's Brief at p. 17) However, that is not the case. Dakota Constructors recognizes that the mining reports contain a -0- as to quantities removed from 2004 through 2021. (R 684-734) It also recognizes that there was uncontradicted evidence that there was removal of aggregate from the quarry during this time period. (R 541) Dakota Constructors also recognizes that the DANR had licensed Fischer's use of the quarry from 1986 through 2021, without interruption. (R 648-734, 743-45). Furthermore, although the Board points to evidence concerning purported reclamation efforts in 2006-2009, it is undisputed the quarry has not been reclaimed and Dakota Constructors took over the reclamation liability. (R 746-47) Finally, it is undisputed that reclamation is required upon cessation of use:

> Any reclamation provided for in § 45-6-67 shall be carried to completion by the operator with all reasonable diligence, and final reclamation shall be completed within three years after all mining under the license has ceased operation, unless such period is extended by the Board of Minerals and Environment upon a finding that additional time is necessary for the completion of final reclamation of all licensed sites. Failure to complete final reclamation within three years after all mining under the license has ceased may result in the forfeiture of the surety.

SDCL 45-6-67.1 (emphasis added). Dakota Constructors is not merely arguing facts.

The Board incorrectly argues that "the factual determination of whether the 'nonconforming use of land cease[d], for any reason, for a period of more than one year' belonged to the Board." (Appellee's Brief at p. 20) This finding must be made based upon the Zoning Ordinance and South Dakota law. Here, the Board exceeded its authority when it failed to follow the Zoning Ordinance and South Dakota law that was

incorporated into the Zoning Ordinance. In *Dunham v. Lake Cnty. Comm'n*, 2020 S.D. 23, ¶20, 943 N.W.2d 330, 336, this Court recognized that the board of adjustment there "exceeded its authority by failing 'to follow the prescribed test' within the ordinance." (quoting *Hines v. Bd. of Adjustment of Miller*, 2004 S.D. 13, ¶13, 675 N.W.2d 231, 234) The Board was required to follow its own Zoning Ordinance and South Dakota law, but it did not. It therefore exceeded its authority. Further, this Court has recognized that a board's decision may be reversed if "it did some act forbidden by law or neglected to do some act required by law." *Jensen v. Turner Cnty. Bd. of Adjustment*, 2007 S.D. 28, ¶4, 730 N.W.2d 411, 412-13. The Board was required to follow the Zoning Ordinance and South Dakota law. It neglected to follow the Zoning Ordinance and South Dakota law.

C. There was no Expansion Requiring a Conditional Use Permit.

The Board also concluded that Dakota Constructors was expanding the use of the property. The Board has confirmed that it has abandoned this argument. (Appellee's Brief at P. 6 fn. 1)

CONCLUSION

The Board exceeded its authority and neglected to follow the law when it required Dakota Constructors to obtain a conditional use permit to continue to operate its quarry. Dakota Constructors respectfully requests that the Court reverse the Circuit Court's Order Affirming Decision of the Hanson County Board of Adjustment.

Dated this 9th day of February, 2023.

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REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests the privilege of oral argument in this appeal.

/s/ Paul H. Linde

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that the *Reply Brief of Appellant* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellant* contains 2888 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare the *Reply Brief of Appellant*. The original *Reply Brief of Appellant* and all copies are in compliance with this rule.

/s/ Paul H. Linde

CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellant, hereby certifies that a true and correct copy of the foregoing "Reply Brief of Appellant" was served by Odyssey E-File and Serve to the following attorneys in PDF format on February 9, 2023, before 11:59 p.m. on that date:

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