IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 30495

PRESERVE FRENCH CREEK, INC.,
Plaintiff/Appellant
v.
COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, AND TERRI WILLIAMS,
Defendants/Appellees

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CUSTER COUNTY, SOUTH DAKOTA

THE HONORABLE STACY L. WICKRE
Circuit Court Judge

APPELLANT'S BRIEF

Steven C. Beardsley
Conor P. Casey
BEARDSLEY, JENSEN & LEE,
Prof. LLC
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709-9579
sbeards@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Plaintiff/Appellant

Richard M. Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City, SD 57709
(605)-342-9503
rwilliams@gpna.com
Attorneys for Defendants/Appellees

NOTICE OF APPEAL FILED ON OCTOBER 18, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE RULES

OTHER AUTHORITIES

I. PRELIMINARY STATEMENT

As used in the following brief, Preserve French Creek will be referred to as "Appellant" or "Plaintiff" and County of Custer, South Dakota, City of Custer, South Dakota, Board of Commissioners of Custer County South Dakota, City Council of the City of Custer South Dakota, Tracy Kelley, and Terri Williams will be referred to as "Appellee" or "Defendants". References to the Seventh Judicial Circuit Court will be made using "Seventh Circuit Court" or "lower court." References to the local nuisance ordinance in question will be made using "Local Ordinance". For purposes of this brief, references to the Chronological Index record will be made using "CI" denoting the Chronological Index followed by the page designation from the Index. References to Appellant's Index will be made using "App." followed by the page designation from Appellant's Index.

II. JURISDICTIONAL STATEMENT

On June 22, 2023, Plaintiff filed its Petition for Writ of Mandamus and Proposed Alternative Writ of Mandamus in Custer County of the Seventh Judicial Circuit. (CI at 1-10 and 22-24.) The Seventh Judicial Court denied Appellant's Proposed Alternative Writ of Mandamus on June 26, 2023. (CI at 22-24.) The Seventh Circuit Court noted with the denial that a hearing would be set to hear the Petition. (CI at 24.) A telephonic status hearing was held on August 18, 2023, in which the parties set the Petition for oral argument on September 7, 2023. (CI at 43-44.) On August 16, 2023, Defendants filed their Response to Petition for Writ

of Mandamus. (CI at 47-57.) On September 7, 2023, oral argument took place in front of the Honorable Stacy L. Wickre in Custer, South Dakota. On September 15, 2023, Judge Wickre issued a Memorandum Opinion and Order denying Plaintiff's Petition for Writ of Mandamus. (CI at 134-140.) Notice of Entry of Order was filed by the Defendants on September 19, 2023. (CI at 141-142.) Plaintiff filed their Notice of Appeal on October 18, 2023. (CI at 150-151.) On November 20, 2023, Appellant filed an Unopposed Motion to Extend Briefing Deadline, along with a joint stipulation signed by all parties. (App. at 002.) On November 30, 2023, this Court acknowledged receipt of the Unopposed Motion and extended Appellant's briefing deadline to December 19, 2023. (App. at 001.)

III. STATEMENT OF LEGAL ISSUES

1. Whether the lower court erred when it denied Appellant's Petition, on the basis that the Local Ordinance was preempted under SDCL § 21-10-2, where the Local Ordinance deems the act of discharging treated water into French Creek a nuisance.

   Legal Authority

   In re Yankton Cnty. Com'n, 2003 S.D. 109, 670 N.W.2d 34

   Greer v. City of Lennox, 79 S.D. 28 (S.D. 1961)

2. Whether the lower court erred when it denied Appellant's Petition, on the basis that Appellees are not estopped from asserting the Local Ordinance as unenforceable, where Appellees created an objectively reasonable impression that the Local Ordinance was enforceable and Appellees certified the Local Ordinance under SDCL § 7-18A-8.

Legal Authority

Even v. City of Parker, 1999 S.D. 72, 597 N.W.2d 670

A-G-E Corp. v. State, 2006 S.D. 66, 719 N.W.2d 780

IV. STATEMENT OF THE CASE

The citizens of Custer County, at the advice of their own Board of Commissioners, placed a Local Ordinance on the June 2023 general election ballot for Custer County, which stated the following:

> The discharge of any treated water from the Custer City, South Dakota sewage treatment plant into French Creek or its tributaries, within the boundaries of Custer County, South Dakota, is a nuisance.

The Local Ordinance passed by a significant margin. The Local Ordinance was then certified by the Board of Commissioners in Custer County. Now, the Appellees in this matter refuse to enforce the Local Ordinance.

The Local Ordinance should be enforced, because it is not preempted by State law. The Appellee City of Custer and its developer unilaterally chose French Creek as the discharge location for an upgraded wastewater treatment facility in Custer, South Dakota. As such, the act of unilaterally deciding the discharge location for the wastewater treatment facility is not an act protected by SDCL § 21-10-2. Further, the Appellee City of Custer and its developer failed to take reasonable precautions in choosing the discharge location of French Creek and cannot receive the benefit of SDCL § 21-10-2.

Additionally, the Appellees in this matter must be estopped from asserting the Local Ordinance is unenforceable, when they affirmatively created an objectively reasonable impression that if the Local Ordinance was enforceable. As such, a Writ of Mandamus is the appropriate remedy to force the Appellees in this matter to perform their clear legal duty: enforce the certified Local Ordinance and abate the declared nuisance.

V. STATEMENT OF THE FACTS

A. The Local Ordinance

On June 7, 2023, the voters of Custer County declared by an 801 to 609 vote that the act of discharging any treated wastewater from the city's wastewater treatment plant into French Creek or its tributaries within Custer County is a nuisance. (CI at 22.) The Local Ordinance read as follows:

> The discharge of any treated water from the Custer City, South Dakota sewage treatment plant into French Creek or its tributaries, within the boundaries of Custer County, South Dakota, is a nuisance.

(CI at 2.) The Local Ordinance does not challenge the process or the permit that allow for the City of Custer to discharge treated wastewater into French Creek, but rather the creek chosen by the City of Custer and its developer. (*Id.*) The City of Custer was presented with four locations to choose from:

1. Flynn Creek[1];

[1] Flynn Creek is the current discharge location for the City of Custer's current treated wastewater.

2. French Creek;

3. Beaver Creek (Sydney Park Basin Outlet); and,

4. Beaver Creek (Airport/Highway 385).

Ultimately, the City of Custer and its developer chose French Creek for its discharge location and the Local Ordinance declares that location choice a nuisance. (CI at 47 and 62-120.)

Appellant was directed early on to follow the statutory process outlined in SDCL § 7-18A to enact the nuisance ordinance. (CI at 21-22.) Appellee Custer County instructed Appellant that if the process outlined in SDCL § 7-18A was followed, the proposed Local Ordinance would be on the ballot for the upcoming general election, which took place in June 2023. (*Id.*) Appellant followed the process outlined in SDCL § 7-18A, the proposed Local Ordinance was placed on the June ballot, and the Local Ordinance passed by a significant margin. (*Id.*)

On June 8, 2023, Appellee Custer County canvassed election returns and certified the passage of the nuisance ordinance. (*Id.*) However, as of the date of this filing, Appellees refuse to enforce the Local Ordinance. (*Id.*)

B. The DANR Permit

On January 13, 2021, the Secretary of the South Dakota Department of Agriculture and Natural Resources (herein "DANR") stamped a permit which authorized the City of Custer to upgrade its wastewater treatment facility, in accordance with the parameters set forth within the permit. (CI at 86.) The

location the City of Custer and its developer chose for the discharge point for the upgraded wastewater treatment facility was French Creek. (*Id.*) The permit stated that the City of Custer must comply with all of the conditions of the permit. (*Id.*) One of the conditions of the permit is that there is compliance from the City of Custer with South Dakota Water Pollution Control Act and the Administrative Rules of South Dakota, Article 74:52. (*Id.*) South Dakota Administrative Rule 74:52:05:13 requires "actual notice of the action in question to the persons potentially affected by it." (App. at 012.) the "action in question" is switching the discharge location from Flynn Creek to French Creek. However, the Appellees willingly admit actual notice was never provided in this matter. (CI at 61 and 47-48.)

C. Procedural History

On June 9, 2023, counsel for Appellant sent a letter to Custer's City Counsel, Custer's Mayor, and Custer's City Attorney. (CI at 11-12.) The letter demanded that the Appellee City of Custer and its developer immediately cease and desist any further construction of the wastewater pipeline to French Creek. (*Id.*) Neither the Appellee City of Custer nor its developer responded to Appellant's cease and desist letter.

On June 22, 2023, a Petition for Writ of Mandamus was filed with the Seventh Judicial Court by the Appellant, alleging the Appellees refused to enforce

the certified Local Ordinance. (CI at 1-10.) The Appellees responded to Appellant's Petition on August 18, 2023. (CI at 47-57.) Within Appellees response they alleged "the [Local Ordinance] is clearly preempted by state law which negates the enforceability of the [Local Ordinance]." (CI at 56.) Throughout Appellees response they relied on the power afforded to DANR for their permit processing in Title 34A-2. (CI at 50-53.)

On September 15, 2023, the Honorable Stacy L. Wickre of the Seventh Circuit denied Appellant's Writ of Mandamus. (CI at 134-140.) In denying Appellant's Writ the lower court relied on Title 34A-2:

> [T]he [Local Ordinance] declaring that the discharge into French is a nuisance directly conflicts with the Department's permit issuance pursuant to State law. The City of Custer has no duty to enforce a local ordinance that conflicts with State law, as it is unenforceable. Therefore, Plaintiff is not entitled to an issuance of a writ of mandamus.

(CI at 136-137.) Ultimately, the lower court's determination was that the Local Ordinance conflicted with DANR's permit processing authority under Title 34A-2; thus, the Local Ordinance was preempted. (CI at 134-140.) As such, the lower court hinged their entire opinion on the preemption analysis in regards to the Local Ordinance. (*Id.*)

VI. ARGUMENT

A. Standard of Review

Applications of law and statutory interpretation issues are "questions of law that are reviewed de novo." *Krsnak v. South Dakota Dept. of Environment*

and Natural Resources, 2012 S.D. 89, ¶ 8, 824 N.W.2d 429, 433 (citing *State v. Goulding*, 2011 S.D. 25, ¶ 5, 799 N.W.2d 412, 414). Where this Court reviews the preemptive force of a statute, the issue is a question of law. *Dakota Systems, Inc. v. Viken*, 2005 S.D. 27, ¶ 7, 694 N.W.2d 23, 27 (citing *Boomsma v. Dakota, Minnesota, & Eastern Railroad Corp.*, 2002 S.D. 106, ¶ 13, 651 N.W.2d 238, 242). While "the decision to grant or deny a writ of mandamus [is reviewed] under an abuse of discretion standard," *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Comm'rs*, 2011 S.D. 5, ¶ 6, 794 N.W.2d 462, 464 (citing *Vitek v. Bon Homme Cnty. Bd. of Comm'rs,* 2002 S.D. 45, ¶ 5, 644 N.W.2d 231, 233), the decision to deny the Appellant's Writ was solely decided on a preemption analysis. As such, this Court should review the preemption issue de novo. As for the estoppel issue, the "scope of review as to whether an equitable estoppel exists is fully reviewable as a mixed question of law and fact." *Even v. City of Parker*, 1999 S.D. 72, ¶ 9, 597 N.W.2d 670, 674 (citing *Matter of Loomis*, 1998 S.D. 113, ¶ 7, 587 N.W.2d 427, 429).

B. The Local Ordinance is not Preempted by State Law

South Dakota Codified Law § 7-18A-2 expressly provides:

> Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers granted to it by law and provide for the enforcement of each violation of any ordinance.

The chapter further authorizes citizens of a County to present proposed ordinances to a given county commission:

> If a petition to initiate is filed with the auditor, the auditor shall present it to the board of county commissioners at its next regular or special meeting. The board shall enact the proposed ordinance or resolution and shall submit it to a vote of the voters in the manner prescribed for a referendum within sixty days after the final enactment. However, if the petition is filed within three months prior to the primary or general election, the ordinance or resolution may be submitted at the primary or general election.

SDCL § 7-18A-13. A proposed ordinance is only "effective" if it receives a majority of the vote:

> No initiated ordinance or resolution is effective unless approved by a majority of the votes cast for and against the ordinance or resolution. If approved, the ordinance or resolution takes effect upon the completion of the canvass of the election returns.

SDCL § 7-18A-14. A county may not pass an ordinance which conflicts with state law:

> A county is a creature of statute and has "only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." Article IX, section 2 of the South Dakota Constitution provides that counties have the authority to "exercise any legislative power or perform any function not denied by its charter, the Constitution or general laws of the state."

Tibbs v. Moody Cty. Bd. of Comm'rs, 2014 S.D. 44, ¶ 25, 851 N.W.2d 208, 217 (citations omitted). Conflicts between a local ordinance and state law can be identified in different ways:

> There are several ways in which a local ordinance may conflict with state law. In that event, state law preempts or abrogates the conflicting local

> law. First, an ordinance may prohibit an act which is forbidden by state law and, in that event, the ordinance is void to the extent it duplicates state law. Second, a conflict may exist between state law and an ordinance because one prohibits what the other allows. And, third, state law may occupy a particular field to the exclusion of all local regulation.

In re Yankton Cnty. Com'n, 2003 S.D. 109, ¶ 15, 670 N.W.2d 34, 38.

As it relates to the issue at bar, South Dakota law further provides, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." SDCL § 21-10-2. The South Dakota legislature defines nuisance in the same title:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> (1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;
> (2) Offends decency;
> (3) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, sidewalk, street, or highway;
> (4) In any way renders other persons insecure in life, or in the use of property.

SDCL § 21-10-1. A public nuisance is a nuisance that is considered to annoy or affect any considerable number of persons within the community. *City of Aberdeen v. Wellman*, 352 N.W.2d 204, 205 (S.D. 1984). Accordingly, if the express authority of a statute endorses a specific activity, the specific activity cannot be deemed a nuisance. *Hedel-Ostrowski v. City of Spearfish*, 2004, S.D. 55, ¶ 13, 679 N.W.2d 491, 496-97.

However, where a governing entity fails to perform its function in a reasonable manner and to take reasonable precautions, a governing entity's activity may be deemed a nuisance regardless of its statutory authority over the activity or statutory immunity in regards to the same. *Greer v. City of Lennox*, 79 S.D. 28, 32 (S.D. 1961). In *Greer*, the plaintiff, an owner of a farm adjacent to a public dump, prevailed in a nuisance action against the City of Lennox, where the public dump caused offensive odors and a rat and fly infestation on plaintiff's farm. *Id.* at 28. The City argued that the "creation and maintenance of a public dump by a municipality" is a governmental function that is expressly authorized by statute. *Id.* at 31. However, this Court discussed that the City of Lennox's statutory immunity regarding the creation and maintenance of a public dump is limited by the Lennox's duty to exercise its authority in a reasonable manner while taking all reasonable precautions. *Id.* at 32. This Court also described that negligence is not necessary for a nuisance to exist:

> As a general rule, negligence is not involved in nuisance actions or proceedings, and is not essential to the cause of action. If a particular use of property causes a nuisance, this fact is itself sufficient to entitle a person injured thereby to relief. If a nuisance exists, the facts that due care was exercised and due precautions were taken against the annoyance or injury complained of are immaterial; and the fact that defendant has used the ordinary means to avoid the nuisance complained of which are used in general by others engaged in the same business is no defense. In fact, a nuisance may be created or maintained with the best or highest degree of care.

Id. (citing 66 C.J.S. Nuisances § 11, p. 753.) Ultimately, this Court upheld the verdict which found Lennox's public dump to be a nuisance. *Id.* at 33.

a. The Local Ordinance Deems the Location of Discharge a Nuisance

The process by which the Local Ordinance was placed on the ballot and voted on was done correctly and Appellant's decisions in that regard were informed by Appellee Custer County and its Board of Commissioners. (CI at 21-22.) The Local Ordinance then passed by a significant margin and was canvassed and certified. (*Id.*) According to SDCL § 7-18A-14 the Local Ordinance took effect on June 8, 2023, the day the Local Ordinance was canvassed and certified. *See* SDCL § 7-18A-14. However, Appellees refused to enforce the local ordinance and the lower court denied the Local Ordinance's enforceability on grounds that the authority in SDCL 34A-2 preempts the Local Ordinance.

The Local Ordinance deems the result of discharging treated water into French Creek a nuisance. The location of French Creek for discharging Custer's treated wastewater is not expressly provided by statute. Rather, French Creek was unilaterally chosen by the Appellee City of Custer and its developer and has nothing to do with DANR's permit processing power found in SDCL 34A-2. The Local Ordinance is not preempted by State law in this regard.

While statutory authority in South Dakota empowers DANR to oversee the processes of "preserv[ing] our natural resources and control[ling] water

pollution"[2], such statutory authority does not exclude municipalities, developers or citizens from choosing the discharge location of a given wastewater treatment plant. Title 34A Chapter 2 does not expressly exclude these entities or persons from choosing the discharge location of a wastewater treatment plant. As such, the Local Ordinance, which declares the discharge location of a wastewater treatment plant a nuisance, is not preempted under *In re Yankton.*

First, the Local Ordinance does not conflict with any state law that allows for the DANR to oversee the process in issuing and approving surface water permits. *See In re Yankton County Com'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38. The lower court's discussion that the Local Ordinance in some way deems the wastewater treatment plant set to be constructed in Custer, South Dakota, a nuisance is simply incorrect. (Doc. 135.) The Local Ordinance only declares the discharge location a nuisance. No state law mandates wastewater discharge into French Creek. The location of French Creek was chosen by the Appellee City of Custer and its developer. As such, the Local Ordinance does not conflict with any state law in regards to DANR's permit processing power.

---

[2] The lower court discussed that "[t]he State of South Dakota tasks the [DANR] with 'preserv[ing] our natural resources and the environment through sound management." (CI 136.) While it is true that the DANR's power extends to oversee certain processes relating to natural resources and the environment, the Local Ordinance in question does not declare the DANR's power of such a process a nuisance. Rather, the Local Ordinance declares the location of the discharge, which was chosen by the Appellee City of Custer and its developer, a nuisance.

Second, the Local Ordinance does not encroach on any statutory law of which "the Legislature intended to occupy the field" entirely. *See In re Yankton County Com'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38. Clearly, the Legislature intended[3] for municipalities, counties, developers, and citizens to choose discharge locations for a given wastewater treatment plant. The Local Ordinance declares the resulting discharge location a nuisance. The Local Ordinance is not preempted in this regard, because there is "room" for municipalities, counties, developers and citizens to choose where they would like to discharge wastewater from a given wastewater treatment plant. *See In re Yankton County Com'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38 (citing *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)) (discussing that Congress intends to completely occupy a field of regulation when "it may be inferred [that] the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'")

The lower court incorrectly assumed the Local Ordinance somehow declared the DANR's power or the wastewater treatment plant itself a nuisance.

---

[3] Similarly, the Legislature intended for the effected public to be involved with the process of determining where wastewater should be discharged, because such decisions are subject to the administrative requirements of notice and public hearings. *See* SDCL § 34A-2-35; *see also* South Dakota Administrative Rule 74:52:05:13. However, as discussed below, the effected public never received actual notice regarding the Appellee City of Custer and its developer's choice of discharge location. In any event, SDCL § 34A-2-35 and South Dakota Administrative Rule 74:52:05:13 shows the legislature did not intend for the Appellee City of Custer and its developer to wholly occupy the field of choosing a location for the discharge.

However, the Local Ordinance only declares the resulting discharge location a nuisance. As such, there is no express authority found in South Dakota statute that preempts the citizens of Custer County from declaring the discharge location, unilaterally chosen by the Appellee City of Custer and its developer, a nuisance.

i. SDCL § 21-10-2 Should be Construed Narrowly

Section 21-10-2 requires "express authority", not implied authority. *See* SDCL § 21-10-2. The focus of the lower court's preemption analysis was on the DANR's permit processing authority under SDCL 34A-2. The lower court then extrapolated the DANR's permit issuance authority to apply to the Appellee City of Custer and its developer's unilateral choice of discharge location. (CI 136-137.) The lower court's interpretation of SDCL § 21-10-2 is too broad, when the language of SDCL § 21-10-2 requires narrow construction.

Other jurisdictions endorse a narrow construction of similar nuisance immunity statutes. *See e.g. Barnes v. City of Thompson Falls*, 979 P.2d 1275, 1278-79 (Mont. 1999); *Hassell v. City and County of San Francisco*, 78 P.2d 1021, 1022-23 (Cal. 1938); *In re National Prescription Opiate Litigation*, Case No. 1:17-md2804, 2019 WL 3737023, *10 (N.D. Ohio June 13, 2019). In *Barnes*, the Supreme Court of Montana adopted a narrow construction approach to a similar[4] nuisance immunity statute:

[4] Montana Codified Annotated § 27-30-101 contains the same immunity language SDCL § 21-10-2 utilizes:

> A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.

Barnes, 979 P.2d at 1278-79 (citing *Hassell*, 78 P.2d at 1022-23).

Here, the lower court expanded SDCL § 21-10-2 by applying the DANR's permit processing authority under SDCL 34A-2 to the unilateral choice made by the Appellee City of Custer and its developer for their discharge location. The

---

(1) Anything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin or any public park, square, street, or highway is a nuisance.

(2) Nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance.

(3) An agricultural or farming operation, a place, an establishment, or a facility or any of its appurtenances or the operation of those things is not or does not become a public or private nuisance because of its normal operation as a result of changed residential or commercial conditions in or around its locality if the agricultural or farming operation, place, establishment, or facility has been in operation longer than the complaining resident has been in possession or commercial establishment has been in operation.

(4) Noises resulting from the shooting activities at a shooting range during established hours of operation are not considered a public nuisance.

(emphasis added.)

extrapolation required to support this analysis is belied by the language of SDCL § 21-10-2. Section 21-10-2 requires express authority of a statute:

> Nothing which is done or maintained under the *express authority* of a statute can be deemed a nuisance.

See SDCL § 21-10-2 (emphasis added.) The lower court's determination inappropriately finds that DANR's permit processing authority somehow immunizes, and makes infallible, the unilateral choice made by the Appellee City of Custer and its developer for their discharge location. A choice the citizenry of Custer, who ratified the Local Ordinance, had a right to be involved in. This Court should employ a narrow construction in analyzing SDCL § 21-10-2, because the extrapolation exercise performed by the lower court was not contemplated in the passing of Section 21-10-2.

ii. <u>The Appellee City of Custer and Its Developer Failed to take Reasonable Precautions in Choosing the Discharge Location and Cannot Receive Immunity under Section 21-10-2</u>

The Appellee City of Custer and its developer failed to take reasonable precautions in choosing the discharge location and there is no express authority granting their decision ultimate immunity. The Local Ordinance only deems the discharge location for the Custer wastewater treatment plant a nuisance. As such, there is no express authority granting the Appellee City of Custer and its developer immunity under SDCL § 21-10-2.

Even if there was express authority to immunize the choice of discharge location, the Appellees in this case willingly admit that actual notice was not provided to "the persons potentially affected" by the discharge location of the wastewater treatment plant. (CI at 61 and 47-48); *see also* A.R.S.D. 74:52:05:13. Instead, notice of the surface water discharge application was published in the Custer County Chronicle on December 2, 2020. (CI at 61.) Under the requirements of South Dakota law, constructive notice in newspaper was not enough.

Appellees failure to provide actual notice is critical to the application of the nuisance immunity statute SDCL § 21-10-2, even where express authority for an activity exists. Failure to take reasonable precautions in choosing the discharge location by failing to provide actual notice[5] to the people affected by their decision, prevents Appellees from receiving the benefit of SDCL § 21-10-2. *See Greer,* 79 S.D. at 32. In *Greer*, this Court held a municipality could not receive the benefit of statutory immunity for activities it is expressly authorized to perform, where the municipality fails to take reasonable precautions in their performance of the activity. *Id.* The same rationale applies here.

---

[5] Actual notice presents a higher bar than publishing notice in a local newspaper: "A person has notice of a fact when he has actual knowledge of it, has received notice or notification of it, or from all the facts and circumstances known to him at the time in question he has reason to know that it exists." *Western Bank v. RaDec Const. Co., Inc.*, 382 N.W.2d 406, 410 (S.D. 1986); *see also* SDCL § 17-1-2.

Here, the Appellee City of Custer and its developer failed to take reasonable precautions, by ignoring the requirement to provide actual notice to "persons potentially affected" by their choice in discharge location. Failing this requirement led to the Local Ordinance, because the citizenry of Custer County needed to be heard. If the "persons potentially affected" did receive actual notice of the discharge location, the Appellee City of Custer and its developer would have become acutely aware of the fact that the vast majority of Custer County citizens opposed their choice of discharge location. In any event, because Appellee City of Custer and its developer failed to take reasonable precautions in choosing the discharge location for their wastewater treatment plant, they cannot have the benefit of immunity under SDCL § 21-10-2.

iii. Appellees Must be Estopped from Asserting the Local Ordinance is Unenforceable

The Appellees in this case should be estopped from arguing that the Local Ordinance they canvassed and certified are preempted by State law and unenforceable. *Federal Land Bank of Omaha v. Houck*, 4 N.W.2d 213, 218-19 (S.D. 1942); *see also A-G-E Corp. v. State*, 2006 S.D. 66, ¶¶ 31-32, 719 N.W.2d 780, 789. Appellee Custer County and its Board of Commissioners instructed Appellant that if the process outlined in SDCL § 7-18A was followed, then Custer County would allow for the ordinance to be voted on. (CI at 21-22.) Appellant followed the process outlined in SDCL § 7-18A and the nuisance ordinance

passed by a significant margin. (*Id.*) Then, on June 8, 2023, Appellee Custer County canvassed the election returns and certified that the nuisance ordinance not only passed but passed appropriately. (*Id.*) Appellees have asserted following the passage and certification of the Local Ordinance that it is preempted by State law and unenforceable.

This Court has clearly stated:

> To create an estoppel, *there must have been some act or conduct upon the part of the party to be estopped, which has in some manner misled the party in whose favor the estoppel is sought and has caused such party to part with something of value or so some other act relying upon the conduct of the party to be estopped*, thus creating a condition that would make it inequitable to allow the guilty party to claim what would otherwise be his legal rights.

A-G-E- Corp. State, 2006 S.D., ¶ 32, 719 N.W.2d at 789 (citing *Western Cas. & Sur. Co. v. American Nat'l Fire Ins. Co.*, 318 N.W.2d 126, 128 (S.D. 1982) (emphasis added). The doctrine of quasi-estoppel "has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits, and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." *Federal Land Bank of Omaha*, 4 N.W.2d at 218 (citing 31 C.J.S., *Estoppel*, § 107, pg. 341). The doctrine of estoppel is "[i]ntended to prevent parties from benefiting by taking two clearly inconsistent positions to avoid certain obligations, or effects." *Bailey v. Duling*, 2013 S.D. 15, ¶ 31, 827 N.W.2d 351, 363.

The lower court erred in finding "[w]hile Plaintiff likely believed the ordinance to be enforceable once voted on, passed, and certified, the ordinance still conflicts with State law . . . [i]t is, thus, preempted and unenforceable." (CI at 138.) Here, the Appellant relied upon the advice of its elected County Commissioners to employ resources, time, money, and manpower to place the nuisance ordinance on the ballot for voting. Then, in reliance that the Local Ordinance was on the ballot and valid, the Appellant voted to enact the Local Ordinance.

At no point in time did the Appellee County of Custer attempt to stop them to declare their attempts preempted by State law. Then, following the nuisance ordinance passing by a significant margin, those same County Commissioners certified and ratified the nuisance ordinance. Under South Dakota law, upon Appellee Custer County's ratification the Local Ordinance took effect:

> No initiated ordinance or resolution is effective unless approved by a majority of the votes cast for and against the ordinance or resolution. If approved, the ordinance or resolution takes effect upon the completion of the canvass of the election returns.

SDCL § 7-18A-14. Again, at no point in time prior to the nuisance ordinance's certification did Appellees assert that the Appellant's nuisance ordinance was preempted by State law.

In *Even,* the City of Parker was estopped from enforcing a zoning ordinance against a resident, where the resident relied on the city's initial actions

of approving and issuing a building permit. *Even*, 1999 S.D. 72, ¶ 21, 597 N.W.2d at 676. The resident initially decided to build a garage of pole type construction and the City of Parker granted him a building permit for the construction of the same. *Id.* at ¶ 3. In reliance upon the City's permit, the resident then began purchasing material. *Id.* at ¶ 4. Days after the permit was issued, the Zoning Administrator for the City re-visited the resident's property and informed the resident that he could not build the garage under the City's zoning ordinances. *Id.* The resident's claims were eventually heard by a trial court, which found the City was estopped from enforcing the provisions of the zoning ordinances. *Id.* at ¶ 6.

> This Court affirmed the trial court's estoppel decision and stated:
>
> [T]he City may not, through its agents, affirmatively create an objectively reasonable impression in an applicant that he has fully complied with all zoning requirements and then proceed to withdraw permission after the applicant has taken steps towards construction result in a substantial detriment to the applicant.

Id. at 14 (citing *Erickson v. County of Brookings*, 1996 S.D. 1, ¶ 15, 541 N.W.2d 734, 737). In addition, the Court also found that the amount of money expended in reliance upon the City's issuance of the building permit is "of as much importance . . . as a wealthy individual who decides to build an opulent brick carriage house and has no concern for its cost." *Id.* at 15. As such, there is no "dollar amount requirement to obtain equitable relief from the courts of this state" as it relates to the estoppel issue *Even* dealt with. *Id.*

The lower court erred in finding "[t]he facts in the present case differ significantly from *Even*." (CI 138.) Appellee Custer County and its Board instructed Appellant that if the process outlined in SDCL § 7-18A was followed, then they would allow for the ordinance to be voted on. (CI at 21-22.) Appellant expended time, money, and manpower to place the nuisance ordinance on the ballot for voting. Appellant followed the process outlined in SDCL § 7-18A and the Local Ordinance passed by a significant margin. (*Id.*) Then, on June 8, 2023, Appellee Custer County and it's Board canvassed the election returns and certified that the Local Ordinance passed and was passed appropriately. (*Id.*)

This Court should follow *Even* and hold the Appellees are estopped from asserting the Local Ordinance is unenforceable. Appellant reasonably relied on Appellee Custer County and its Board regarding the process that led to the passage of the Local Ordinance. At no point in time, did the Appellees in this matter assert the Local Ordinance was unenforceable. Most critically, the Local Ordinance was canvassed and certified, without any mention of unenforceability or preemption. Additionally, Appellant expended time, money, manpower, and, most importantly, their vote in pursuing the Local Ordinance's enactment. *See Even*, 1999 S.D. 72, ¶ 15, 597 N.W.2d at 675. As such, this Court should find the Appellees are estopped from taking the position that the Local Ordinance is unenforceable.

C. Appellant's Writ should be Granted

Given the above, Appellant requests this Court reverse the lower Court and grant their Petition for a Writ of Mandamus. "To prevail in seeking a writ of mandamus, [a] petitioner must have a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty." *S.D. Trucking Ass'n, Inc. v. S.D. Dep't of Transp.*, 305 N.W.2d 682, 684 (S.D. 1981). In characterizing this Writ, this Court has repeatedly stated:

> Mandamus is a potent, but precise remedy. Its power lies in its expediency; its precision in its narrow application. It commands the fulfillment of an existing legal duty, but creates no duty itself, and acts upon no doubtful or unsettled right. To prevail in seeking a Writ of Mandamus, Petitioner must have a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.

Baker v. Atkinson, 2001 S.D. 49, ¶ 16, 625 N.W.2d 265, 271; *see also* SDCL § 21-29-1.

This Court has held that mandamus is proper to compel a county or municipality to fulfill their ministerial duty, as identified by law. *Douville v. Christensen*, 2002 S.D. 33, ¶ 13, 641 N.W.2d 651, 655. The Local Ordinance at issue declares discharge location for treated water from the Appellee City of Custer into French Creek. Remedies against a this declared nuisance are enumerated within South Dakota law:

Remedies against any nuisance are:

(1) A civil action;

(2) Abatement; and

(3) In cases of public nuisance only, the additional remedy of indictment or information as prescribed by statute and rules relating thereto.

SDCL § 21-10-5. The Supreme Court of South Dakota has endorsed granting mandamus relief to abate nuisances, where government actors refuse to fulfill their ministerial duty. *Hermann v. Board of Com'rs of City of Aberdeen*, 285 N.W.2d 855, 858 (S.D. 1979). Here, the Appellees refuse to fulfill their ministerial duty of enforcing the Local Ordinance and abating the declared nuisance.

The Appellee County of Custer's ministerial duty is to enforce the duly enacted ordinance of the citizenry of Custer County. Statutory law requires Appellee Custer County to enforce ordinances. Multiple sections within Title 7 of South Dakota law affirm Custer County's duty to enforce in this regard:

> Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers granted to it by law and *provide for the enforcement of each violation of any ordinance* by means of any or all of the following:
>
> (1) A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to

> exceed thirty days for each violation, or by both the fine and imprisonment; or
>
> (2) An action for civil injunctive relief, pursuant to chapter 21-8.

SDCL § 7-18A-2 (emphasis added). An ordinance takes effect and must be enforced, upon the completion of "the canvass of the election returns":

> No initiated ordinance or resolution is effective unless approved by a majority of the votes cast for and against the ordinance or resolution. *If approved, the ordinance or resolution takes effect upon the completion of the canvass of the election returns.*

SDCL § 7-18A-14. In fact, the Appellee Board of County Commissioners in Custer County have been given the power to abate nuisances by the South Dakota legislature:

> The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality . . .

SDCL § 7-8-33 (*see also Coyote Flats, L.L.C. v. Sanborn County Com'n*, 1999 S.D. 87, ¶ 35, 596 N.W.2d 347, 354 (holding that the "legislature clearly sanctioned the counties with [the] police power" to abate declared nuisances).

Similar to Appellee Custer County's duty to act, the Appellee City of Custer also has a duty to enforce duly enacted ordinances. *City of Redfield v. Wharton*, 115 N.W.2d 329, 331 (S.D. 1962) (stating a city's officers must enforce

ordinances). Specifically, a city attorney must prosecute all violations of any duly enacted ordinances:

> When required by the governing body or any officer of the first- and second-class municipality, *the city attorney* shall furnish an opinion upon any matter relating to the affairs of the municipality or the official duties of such officer; *conduct the prosecution of all actions or proceedings arising out of the violation of any ordinance*; and perform such other professional services incident to his office as may be required by ordinance or directed by the governing body.

SDCL § 9-14-22.

Both Appellees Custer County and the City of Custer are disregarding their ministerial duties to enforce the certified Local Ordinance. As such, Appellant requests this Court grant their Petition given the clear duties Appellees have to enforce the certified Local Ordinance.

VII. CONCLUSION

Given the above, Appellant requests this Court reverse the lower court's ruling on their Petition for a Writ of Mandamus. Appellant requests this Court hold the Local Ordinance is not preempted by State law and Appellees are estopped from asserting the Local Ordinance is unenforceable.

VIII. REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument in this matter.

IX. CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 6,772 words and 34,839 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's Brief and all copies are in compliance with this rule.

Dated this 22nd day of December, 2023.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: /s/ Conor P. Casey

Steven C. Beardsley
Conor P. Casey
P.O. Box 9579
Rapid City, SD 57709
Tel: (605) 721-2800
E-mail: sbeards@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Plaintiff/Appellant

X. CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2023, I electronically filed the foregoing Appellant's Brief and sent one copy of it, upon acceptance of the Court, via U.S. Mail, first-class postage prepaid to:

Richard M. Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City, SD 57709

I further certify that on the 22nd day of December, 2023, I electronically filed the foregoing Appellant's Brief and sent the original of it via U.S. Mail, first-class prepaid, upon acceptance of the Court, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: /s/ Conor P. Casey
Conor P. Casey

APPENDIX INDEX

Supreme Court of South Dakota

OFFICE OF THE CLERK
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3511

Shirley A. Jameson-Fergel
Clerk

Amy Hudson
Deputy Clerk

Sarah L. Gallagher
Deputy Clerk

November 30, 2023

MR STEVEN C BEARDSLEY
MR CONOR P CASEY
BEARDSLEY, JENSEN & LEE
ATTORNEYS AT LAW
PO BOX 9579
RAPID CITY SD 57709-9579

MR RICHARD M WILLIAMS
GUNDERSON, PALMER, NELSON
& ASHMORE, LLP
PO BOX 8045
RAPID CITY SD 57701-8045

Re: #30495, Preserve French Creek v. County of Custer OSuth Dakota et al

Dear Counsel:

This acknowledges receipt of the original stipulation for extension of time for appellant to file their brief.

Accordingly, the due date for that brief is extended up to and including December 19, 2023.

Very truly yours,

Shirley A. Jameson-Fergel

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

PRESERVE FRENCH CREEK, INC., Appellant, vs. COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY, SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, and TERRI WILLIAMS, Appellees.	)	Appeal No. 30495 **UNOPPOSED MOTION TO EXTEND BRIEFING DEADLINE**

COMES NOW, Appellant, by and through the undersigned attorney and under SDCL § 15-26A-76, moves this Court to allow Appellant an extension to file its brief by 15 days, making the deadline December 18, 2023. This motion is based upon the facts set forth in the Affidavit in Support of this motion. Undersigned counsel has conferred with Appellees' counsel, who has no objection to this motion as indicated in the Stipulation attached hereto.

WHEREFORE, Appellant respectfully requests this Court enter an order allowing an extension of time to file its brief.

Dated this 30th day of November, 2023.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

By: /s/ Conor P. Casey

Steven C. Beardsley
Conor P. Casey
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709
Telephone (605) 721-2800
Email: *sbeards@blackhillslaw.com*

Filed: 11/30/2023 10:16 AM CST Supreme Court, State of South Dakota #30495

ccasey@blackhillslaw.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2023, I sent the foregoing document via electronic filing to:

Richard M. Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City, SD 57709
rwilliams@gpna.com

/s/ Conor P. Casey
Conor P. Casey

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

PRESERVE FRENCH CREEK, INC., Appellant, vs. COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY, SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, and TERRI WILLIAMS, Appellees.	Appeal No. 30495 **STIPULATION TO EXTEND BRIEFING DEADLINE**

The parties jointly stipulate and agree, under SDCL § 15-26A-76, that good cause exists for the Court to enter an Order extending the deadline for Appellant to file its brief by 15 days, making the deadline December 18, 2023.

Dated this 30th day of November, 2023.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

By: _____

Steven C. Beardsley
Conor P. Casey
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709
Telephone (605) 721-2800
Email: *sbeards@blackhillslaw.com*
ccasey@blackhillslaw.com
Attorneys for Appellant

Filed: 11/30/2023 10:16 AM CST Supreme Court, State of South Dakota #30495

Dated this 28th day of November, 2023.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

By: _____

Richard M. Williams
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Fax: (605) 342-9503
Email: rwilliams@gpna.com
Attorneys for Appellees

31 C.J.S. Estoppel and Waiver § 107

Corpus Juris Secundum August 2023 Update

Estoppel and Waiver
Elizabeth M. Bosek, J.D.; William Lindsley, J.D.; Thomas Muskus, J.D.; and Karl Oakes, J.D.

V. Equitable Estoppel; Estoppel by Misrepresentation; Waiver

A. In General

3. Essential Elements

c. Intent

§ 107. Intent as element of equitable estoppel

Topic Summary References Correlation Table

West's Key Number Digest

- West's Key Number Digest, Estoppel 52.15, 53

It is essential to equitable estoppel that the matters claimed to create it were intended to lead the other party to act thereon or that there were reasonable grounds to anticipate that the other party would so act.

It has been stated generally that intent is an essential element of estoppel. [1] However, given that estoppel may exist where a communication is made under circumstances making it both natural and probable that it would be acted upon, [2] it has also been declared that the doctrine of estoppel imposes a result regardless of intent and sometimes in defiance of intent. [3]

The requisite intent to satisfy this element of estoppel has been variously described as the intent that the conduct of the person against whom the estoppel is asserted be acted upon, [4] the intent that a communication be acted on, [5] the intent to induce another party to believe that certain facts exist and to act on that belief, [6] the intent to induce reliance on the part of a person to whom the representation is made, [7] and the intent that a representation or silence or concealment be relied upon. [8]

A line of cases holds that, as an essential element of an equitable estoppel, the acts, representations, or silence relied on to create the estoppel must have been willfully intended to lead the party setting up the estoppel to act on them, [9] or there must have been reasonable grounds to anticipate that the party would change position or in some way act on the faith of the conduct to the party's detriment. [10] The word "willfully" as used in this connection is not, however, to be taken in the limited sense of the term "maliciously" or "fraudulently," [11] it being sufficient if the acts, representations, or silence relied on are of such a character as to induce a reasonable and prudent person to believe that they were meant to be acted on, [12] and it also being sufficient that the

conduct of a party occurred under such circumstances that the party should have known that it was both natural and probable that it would be acted on. [13] Thus, equitable estoppel may also apply, even in the absence of any fraud or wrongful intent to mislead, [14] if the actions or the inaction of the party estopped cause a prejudicial change in the conduct of the other, [15] and negligence may supply the place of intent and operate as an estoppel. [16]

On the other hand, ordinary, casual declarations or admissions, not made for the purpose of inducing any specific action, and on the faith of which no one has been misled, are not conclusive in their character and are entitled to have only such weight attached to them as under all the circumstances they may fairly deserve. [17] In the absence of expressly proved fraud there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their opposites. [18]

Estoppel cannot be based on statements to third parties which were not intended to be communicated to the party claiming the benefit thereof. [19]

The intention that a representation or concealment be acted on may be inferred from circumstances [20] or the acts of the parties, [21] even though the inference when made is contrary to the actual intent. [22] Either the intention or a presumption thereof is essential. [23]

Footnotes

1 U.S.—In re Wertz, 557 B.R. 695 (Bankr. E.D. Ark. 2016).

Iowa—Khabbaz v. Swartz, 319 N.W.2d 279, 30 A.L.R.4th 461 (Iowa 1982).

La.—Concrete Post-Tensioning, Inc. v. Armco, Inc., 449 So. 2d 712 (La. Ct. App. 3d Cir. 1984).

2 Mont.—Oster v. Valley County, 2006 MT 180, 333 Mont. 76, 140 P.3d 1079 (2006).

3 U.S.—Bechtel v. Robinson, 886 F.2d 644, 15 Fed. R. Serv. 3d 272 (3d Cir. 1989).

Ill.—Northern Trust Co. v. Oxford Speaker Co., 109 Ill. App. 3d 433, 65 Ill. Dec. 113, 440 N.E.2d 968, 34 U.C.C. Rep. Serv. 1246 (1st Dist. 1982).

Vt.—Farm Bureau Mut. Auto. Ins. Co. v. Houle, 118 Vt. 154, 102 A.2d 326 (1954).

Estoppel by conduct
Or.—Kahl v. Pool, 47 Or. App. 43, 613 P.2d 1078 (1980).

4 Vt.—Starr Farm Beach Campowners Ass'n, Inc. v. Boylan, 174 Vt. 503, 811 A.2d 155 (2002).

Intent or expectation
An element of estoppel is the intention, or at least the expectation, that the conduct of the person against whom the estoppel is asserted be acted upon by, or influence, the other party or other persons.

Neb.—Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 (2002).

5 Ala.—Allen v. Bennett, 823 So. 2d 679 (Ala. 2001).

6 Conn.—In re Michaela Lee R., 253 Conn. 570, 756 A.2d 214 (2000).

7 Mass.—Sullivan v. Chief Justice for Admin. and Management of Trial Court, 448 Mass. 15, 858 N.E.2d 699 (2006).

Intention of inducing the other party to rely on representation
N.H.—In re Appeal of Stanton, 147 N.H. 724, 805 A.2d 419 (2002).

8 Miss.—Turner v. Terry, 799 So. 2d 25 (Miss. 2001).

9 U.S.—Rowe v. Chesapeake Mineral Co., 61 F. Supp. 773 (E.D. Ky. 1945), judgment aff'd, 156 F.2d 752 (C.C.A. 6th Cir. 1946).

Ala.—Woolen v. Taylor, 248 Ala. 407, 27 So. 2d 863 (1946).

Cal.—California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865, 3 Cal. Rptr. 675, 350 P.2d 715 (1960).

Fla.—Chemco Elec. Supply, Inc. v. Gonzalez, 475 So. 2d 724 (Fla. 1st DCA 1985).

Iowa—In re MacVicar's Estate, 251 Iowa 1139, 104 N.W.2d 594 (1960).

Pa.—Hertz Corp. v. Hardy, 197 Pa. Super. 466, 178 A.2d 833 (1962).

Tenn.—McClure v. Wade, 34 Tenn. App. 154, 235 S.W.2d 835, 28 A.L.R.2d 104 (1950).

10 Ala.—Mazer v. Jackson Ins. Agency, 340 So. 2d 770 (Ala. 1976).

Iowa—McIntosh v. McIntosh, 211 Iowa 750, 234 N.W. 234 (1931).

N.J.—Fidelity Union Trust Co. v. Essex County Mortg. Co., 130 N.J. Eq. 351, 22 A.2d 296 (Ct. Err. & App. 1941).

Tex.—Lohmann v. Hooper, 87 S.W.2d 803 (Tex. Civ. App. Beaumont 1935).

Utah—Kelly v. Richards, 95 Utah 560, 83 P.2d 731, 129 A.L.R. 164 (1938).

W. Va.—Bank of Sutton v. Skidmore, 113 W. Va. 25, 167 S.E. 144 (1932).

11 W. Va.—Shelton v. Johnston, 82 W. Va. 319, 95 S.E. 958 (1918).

As to intent to deceive or defraud, see § 108.

12 U.S.—The Tampico, 270 F. 537 (C.C.A. 9th Cir. 1921).

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 192 Wash. 1, 72 P.2d 311 (1937).

13 U.S.—U.S. v. Brabham, 122 F. Supp. 570 (E.D. S.C. 1954).

Minn.—Alwes v. Hartford Life and Acc. Ins. Co., 372 N.W.2d 376 (Minn. Ct. App. 1985).

N.J.—Fidelity Union Trust Co. v. Essex County Mortg. Co., 130 N.J. Eq. 351, 22 A.2d 296 (Ct. Err. & App. 1941).

14 § 108.

15 Md.—Heartwood 88, Inc. v. Montgomery County, 156 Md. App. 333, 846 A.2d 1096 (2004).

As to detrimental reliance, generally, see §§ 110 to 113.

16 § 139.

17 Iowa—Near v. Green, 113 Iowa 647, 85 N.W. 799 (1901).

Pa.—Northwestern Nat. Bank v. Commonwealth, 345 Pa. 192, 27 A.2d 20 (1942).

18 Ga.—Bragan v. Lumbermen's Mut. Cas. Co., 59 Ga. App. 862, 2 S.E.2d 189 (1939).

N.Y.—Hartford Acc. & Indem. Co. v. Oles, 152 Misc. 876, 274 N.Y.S. 349 (Sup 1934).

Pa.—Northwestern Nat. Bank v. Commonwealth, 345 Pa. 192, 27 A.2d 20 (1942).

19 Ga.—Parker v. Crosby, 150 Ga. 1, 102 S.E. 446 (1920).

20 U.S.—Liberty Nat. Bank & Trust Co. v. Bank of America Nat. Trust & Sav. Ass'n, 218 F.2d 831 (10th Cir. 1955).

Iowa—Smith v. Coutant, 232 Iowa 887, 6 N.W.2d 421 (1942).

Okla.—Lacy v. Wozencraft, 1940 OK 383, 188 Okla. 19, 105 P.2d 781 (1940).

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 192 Wash. 1, 72 P.2d 311 (1937).

21 U.S.—In re Sassi Corp., 51 B.R. 534 (Bankr. S.D. Ind. 1983).

22 U.S.—In re Sassi Corp., 51 B.R. 534 (Bankr. S.D. Ind. 1983).

23 N.Y.—Hartford Acc. & Indem. Co. v. Oles, 152 Misc. 876, 274 N.Y.S. 349 (Sup 1934).

End of Document

66 C.J.S. Nuisances § 11

Corpus Juris Secundum August 2023 Update

Nuisances
Cecily Fuhr, J.D.; Lonnie E. Griffith, Jr., J.D.; and Thomas Muskus, J.D.

I. In General

B. Types of Nuisances

3. Nuisances by Statute or Ordinance

§ 11. Nuisance defined by statute or ordinance, generally

Topic Summary References Correlation Table

West's Key Number Digest

- West's Key Number Digest, Nuisance 60

As an exercise of the state's police power, state statutes may define what constitutes a nuisance; ordinances of local governmental entities may also prescribe what constitutes a nuisance.

As an exercise of the state's police power, [1] state statutes may define what constitutes a nuisance, [2] including the codification of common-law nuisances, and the declaration of certain other conditions as constituting nuisances not codifications of the common law. [3]

Ordinances of local governmental entities may also prescribe what constitutes a nuisance, [4] particularly in relation to conditions characterized as public nuisances. [5] Unless exercised in clear conflict with general law, the constitutionally recognized inherent power of a city or county to determine the appropriate use of land within its borders allows it to define nuisances for local purposes, and to seek abatement of such nuisances. [6]

Footnotes

1 Ga.—Franklin v. State, 279 Ga. 150, 611 S.E.2d 21 (2005).

Iowa—City of Cedar Falls v. Flett, 330 N.W.2d 251 (Iowa 1983).

S.D.—Town of Winfred v. Scholl, 477 N.W.2d 262 (S.D. 1991).

Va.—Commonwealth v. Croatan Books, Inc., 228 Va. 383, 323 S.E.2d 86 (1984).

As to statutes relating to particular acts, conduct, or structures as nuisances and particular remedies, see §§ 52 to 266.

2 U.S.—In re Szewc, 568 B.R. 348 (Bankr. D. Or. 2017).

Cal.—Clary v. City of Crescent City, 11 Cal. App. 5th 274, 217 Cal. Rptr. 3d 629 (1st Dist. 2017).

Ind.—Centennial Park, LLC v. Highland Park Estates, LLC, 151 N.E.3d 1230 (Ind. Ct. App. 2020).

La.—Yokum v. Funky 544 Rhythm and Blues Cafe, 248 So. 3d 723 (La. Ct. App. 4th Cir. 2018).

Ohio—Brown v. Scioto Cty. Bd. of Commrs., 87 Ohio App. 3d 704, 622 N.E.2d 1153 (4th Dist. Scioto County 1993).

S.D.—Atkinson v. City of Pierre, 2005 SD 114, 706 N.W.2d 791 (S.D. 2005).

3 Ind.—VanHawk v. Town of Culver, 137 N.E.3d 258 (Ind. Ct. App. 2019).

4 Cal.—Clary v. City of Crescent City, 11 Cal. App. 5th 274, 217 Cal. Rptr. 3d 629 (1st Dist. 2017).

Ga.—Wilbros, LLC v. State, 294 Ga. 514, 755 S.E.2d 145 (2014).

5 Ala.—Wallen v. City of Mobile, 270 So. 3d 1190 (Ala. Crim. App. 2018).

Ark.—Steffy v. City of Fort Smith, 2018 Ark. App. 170, 545 S.W.3d 804 (2018).

Cal.—Clary v. City of Crescent City, 11 Cal. App. 5th 274, 217 Cal. Rptr. 3d 629 (1st Dist. 2017).

Kan.—City of Lincoln Center v. Farmway Co-Op, Inc., 298 Kan. 540, 316 P.3d 707 (2013).

Ill.—Shachter v. City of Chicago, 2011 IL App (1st) 103582, 356 Ill. Dec. 901, 962 N.E.2d 586 (App. Ct. 1st Dist. 2011).

Miss.—Whitley v. City of Brandon, 15 So. 3d 483 (Miss. Ct. App. 2009).

6 Cal.—City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc., 56 Cal. 4th 729, 156 Cal. Rptr. 3d 409, 300 P.3d 494 (2013).

End of Document

Administrative Rules of South Dakota
Department of Agriculture and Natural Resources (Articles 74:02 to 74:57)
Article 74:52. Surface Water Discharge Permits
Chapter 74:52:05. Application Process

ARSD 74:52:05:13

74:52:05:13. Methods of public notice.

Currentness

Public notice of activities described in this chapter shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons (a person otherwise entitled to receive notice under this subdivision may waive the right to receive notice for any categories of permits):

(a) The applicant;

(b) Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, state historic preservation officers, and other appropriate government authorities, including affected states;

(c) Any state agency responsible for plan development under § 208(b)(2), 208(b)(4), or 303(e) of the CWA and the U. S. Army Corps of Engineers, the U. S. Fish and Wildlife Service;

(d) Any user identified in the permit application of a privately owned treatment works;

(e) Persons on a mailing list developed by the department including those who request in writing to be on the list;

(f) Any unit of local government having jurisdiction over the area where the facility is proposed to be located;

(g) Each state agency having any authority under state law over the construction or operation of such facility; and

(h) Any agency which the secretary knows has issued or is required to issue a RCRA, UIC, PSD, NPDES, 404, or sludge management permit for the same facility;

(2) For major permits, general SWD permits, and permits that contain sewage sludge application plans, by publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity; and

(3) By any other method that gives actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

Credits

Source: 14 SDR 86, effective December 24, 1987; 19 SDR 122, effective February 21, 1993; transferred from § 74:03:21:18, July 1, 1996.

General Authority: SDCL 34A-2-28.
Law Implemented: SDCL 34A-2-35.

Current through rules published in the South Dakota register dated November 27, 2023. Some sections may be more current, see credits for details.

S.D. Admin. R. 74:52:05:13, SD ADC 74:52:05:13

End of Document

West's Montana Code Annotated
Title 27. Civil Liability, Remedies, and Limitations
Chapter 30. Nuisances
Part 1. General Provisions

MCA 27-30-101

27-30-101. Definition of nuisance

Currentness

(1) Anything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin or any public park, square, street, or highway is a nuisance.

(2) Nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance.

(3) An agricultural or farming operation, a place, an establishment, or a facility or any of its appurtenances or the operation of those things is not or does not become a public or private nuisance because of its normal operation as a result of changed residential or commercial conditions in or around its locality if the agricultural or farming operation, place, establishment, or facility has been in operation longer than the complaining resident has been in possession or commercial establishment has been in operation.

(4) Noises resulting from the shooting activities at a shooting range during established hours of operation are not considered a public nuisance.

Credits

(1) Enacted Civil Code 1895, § 4550; reenacted Revised Code 1907, § 6162; reenacted Revised Code of Montana 1921, § 8642; California Civil Code § 3479; reenacted Revised 1935, § 8642; Revised Code of Montana 1947, § 57-101. (2) Enacted Civil Code 1895, § 4553; reenacted Revised Code 1907, § 6165; reenacted Revised Code of Montana 1921, § 8645; California Civil Code § 3482; Field Code of New York Civil Code § 1952; reenacted Revised Code of Montana 1935, § 8645; Revised Code of Montana 1947, § 57-104; Revised Code of Montana 1947, 57-101, 57-104. (3) Enacted by Laws 1981, ch. 123, § 1. Amended by Laws 2011, ch. 299, § 1, eff. Oct. 1, 2011.

MCA 27-30-101, MT ST 27-30-101
Current through chapters effective January 1, 2024 of the 2023 Session. Some statute sections may be more current, see credits for details.

End of Document

South Dakota Codified Laws
Title 7. Counties
Chapter 7-8. County Commissioners

SDCL § 7-8-33

7-8-33. Declaration and abatement of nuisances by county

Currentness

The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.

Credits
Source: SL 1989, ch 186; SL 1991, ch 60; SL 1993, ch 65.

S D C L § 7-8-33, SD ST § 7-8-33
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 7. Counties
Chapter 7-18a. Ordinances and Resolutions

SDCL § 7-18A-2

7-18A-2. Authority to enact, amend, and repeal ordinances and resolutions--Penalties for violation

Currentness

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers granted to it by law and provide for the enforcement of each violation of any ordinance by means of any or all of the following:

(1) A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to exceed thirty days for each violation, or by both the fine and imprisonment; or

(2) An action for civil injunctive relief, pursuant to chapter 21-8.

Credits

Source: SL 1975, ch 82, § 2; SL 1989, ch 67, § 1; SL 1991, ch 187, § 1; SL 2007, ch 39, § 1.

S D C L § 7-18A-2, SD ST § 7-18A-2
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 7. Counties
Chapter 7-18a. Ordinances and Resolutions

SDCL § 7-18A-8

7-18A-8. Effective date of ordinances and resolutions--Exceptions

Currentness

Except such resolutions or ordinances as may be necessary for the immediate preservation of the public peace, health, or safety, or support of the county government and its existing public institutions; which provide for an election or hearing on an improvement or assessment; or which call for bids which take effect upon the passage and publication thereof, every resolution or ordinance passed by a board shall take effect on the twentieth day after its completed publication unless suspended by operation of a referendum.

Credits
Source: SL 1975, ch 82, § 10.

S D C L § 7-18A-8, SD ST § 7-18A-8
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 7. Counties
Chapter 7-18a. Ordinances and Resolutions

SDCL § 7-18A-13

7-18A-13. Board action on initiative petition--Submission to voters

Currentness

If a petition to initiate is filed with the auditor, the auditor shall present it to the board of county commissioners at its next regular or special meeting. The board shall enact the proposed ordinance or resolution and shall submit it to a vote of the voters in the manner prescribed for a referendum within sixty days after the final enactment. However, if the petition is filed within three months prior to the primary or general election, the ordinance or resolution may be submitted at the primary or general election.

Credits
Source: SL 1975, ch 82, § 23; SL 1983, ch 47, § 1; SL 2016, ch 44, § 49.

S D C L § 7-18A-13, SD ST § 7-18A-13
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 7. Counties
Chapter 7-18a. Ordinances and Resolutions

SDCL § 7-18A-14

7-18A-14. Majority vote required for approval of initiated measure--Effective date

Currentness

No initiated ordinance or resolution is effective unless approved by a majority of the votes cast for and against the ordinance or resolution. If approved, the ordinance or resolution takes effect upon the completion of the canvass of the election returns.

Credits

Source: SL 1975, ch 82, § 24; SL 2016, ch 44, § 50.

S D C L § 7-18A-14, SD ST § 7-18A-14
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 9. Municipal Government
Chapter 9-14. Municipal Officers and Employees (Refs & Annos)

SDCL § 9-14-22

9-14-22. Duties of city attorney

Currentness

When required by the governing body or any officer of the first and second class municipality, the city attorney shall furnish an opinion upon any matter relating to the affairs of the municipality or the official duties of such officer; conduct the prosecution of all actions or proceedings arising out of the violation of any ordinance; and perform such other professional services incident to his office as may be required by ordinance or directed by the governing body.

Credits

Source: SL 1890, ch 37, art VII, § 1; RPolC 1903, § 1247; SL 1913, ch 119, § 68; RC 1919, § 6297; SL 1925, ch 248; SDC 1939, § 45.1129; SL 1957, ch 247; SL 1992, ch 60, § 2.

S D C L § 9-14-22, SD ST § 9-14-22
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 17. Notice and Publication
Chapter 17-1. Actual and Constructive Notice

SDCL § 17-1-2

17-1-2. Actual notice

Currentness

Actual notice consists in express information of a fact.

Credits
Source: CivC 1877, § 2107; CL 1887, § 4741; RCivC 1903, § 2450; RC 1919, § 13; SDC 1939, § 65.0502.

S D C L § 17-1-2, SD ST § 17-1-2
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-10. Remedies Against Nuisances

SDCL § 21-10-1

21-10-1. Acts and omissions constituting nuisances

Effective: July 1, 2020
Currentness

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

(1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;

(2) Offends decency;

(3) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, sidewalk, street, or highway;

(4) In any way renders other persons insecure in life, or in the use of property.

Credits
Source: CivC 1877, § 2047; CL 1887, § 4681; RCivC 1903, § 2393; RC 1919, § 2066; SDC 1939 & Supp 1960, § 37.4701; SL 2020, ch 30, § 14.

S D C L § 21-10-1, SD ST § 21-10-1
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-10. Remedies Against Nuisances

SDCL § 21-10-2

21-10-2. Acts under statutory authority not deemed nuisance

Currentness

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Credits

Source: CivC 1877, § 2050; CL 1887, § 4684; RCivC 1903, § 2396; RC 1919, § 2069; SDC 1939 & Supp 1960, § 37.4703.

S D C L § 21-10-2, SD ST § 21-10-2
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-10. Remedies Against Nuisances

SDCL § 21-10-5

21-10-5. Remedies against nuisances enumerated

Currentness

Remedies against any nuisance are:

(1) A civil action;

(2) Abatement; and

(3) In cases of public nuisance only, the additional remedy of indictment or information as prescribed by statute and rules relating thereto.

Credits

Source: CivC 1877, §§ 2054, 2055, 2059; CL 1887, §§ 4688, 4689, 4693; RCivC 1903, §§ 2400, 2401, 2405; RC 1919, §§ 2073, 2074, 2086; SDC 1939 & Supp 1960, § 37.4707.

S D C L § 21-10-5, SD ST § 21-10-5
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 21. Judicial Remedies
Chapter 21-29. Writ of Mandamus

SDCL § 21-29-1

21-29-1. Power to issue writ--Purposes for which used

Currentness

The writ of mandamus may be issued by the Supreme and circuit courts, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Credits

Source: CCivP 1877, § 695; CL 1887, § 5517; RCCivP 1903, § 764; RC 1919, § 3006; SDC 1939 & Supp 1960, § 37.4501.

S D C L § 21-29-1, SD ST § 21-29-1
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

South Dakota Codified Laws
Title 34a. Environmental Protection (Refs & Annos)
Chapter 34A-2. Water Pollution Control (Refs & Annos)

SDCL § 34A-2-35

34A-2-35. Public hearing on permit to discharge waste--Notice--Uncontested recommendation

Currentness

Before issuing any permit pursuant to § 34A-2-36, the secretary shall provide an opportunity for public hearing, with notice of the opportunity for hearing, in accordance with applicable laws, rules, and regulations. If the recommendation of the department pursuant to § 34A-2-24, 34A-2-27, or 34A-2-36, is not contested, that recommendation shall become a final determination on the application. If an uncontested recommendation is for approval or conditional approval of the application, the permit shall be issued by the secretary consistent with the recommendation.

Credits

Source: SL 1973, ch 280, § 9 (1); SDCL Supp, § 46-25-51; SL 1991, ch 288, § 14; SL 2011, ch 165, § 42.

S D C L § 34A-2-35, SD ST § 34A-2-35
Current through the 2023 Regular Session and Supreme Court Rule 23-17

End of Document

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
PRESERVE FRENCH CREEK, INC.,	)	FILE NO. 16 CIV 23-47
Plaintiff,	)	**MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFF'S PETITION FOR WRIT OF MANDAMUS**
v.	)	
COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER SOUTH DAKOTA, TRACY KELLEY, AND TERRI WILLIAMS,	)	FILED 7TH JUDICIAL CIRCUIT COURT CUSTER COUNTY, SD SEP 15 2023 By: EB
Defendants.	)	

On June 22, 2023, Plaintiff filed a Petition for a Writ of Mandamus. On August 16, 2023, Defendants filed a Response to Petition for Writ of Mandamus. On August 31, 2023, Plaintiff filed a Reply to Defendants' Response to Petition for Writ of Mandamus. The Court held a hearing regarding the Petition and subsequent Response and Reply on September 7, 2023.

Having reviewed the motions, notices, and other submissions by parties, having heard arguments by parties, and being otherwise familiar with the record, Plaintiff's Petition for Writ of Mandamus is hereby **DENIED.**

DISCUSSION

I. The Custer County Ordinance is Preempted by State Law that Prohibits the County's Enforcement of the Ordinance.

SDCL 7–18A–2 expressly authorizes "a county to adopt ordinances 'as may be proper and necessary to carry into effect the powers granted to it by law....'" *Rantapaa v. Black Hills Chair Lift Co.*,

2001 S.D. 111, ¶ 22, 633 N.W.2d 196, 203. However, "a county may not pass an ordinance which conflicts with state law." *Id.* (citing S.D. Const. art. IX § 2).

> A county is a creature of statute and has "only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *State v. Quinn*, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, 38 (quoting *State v. Hansen*, 75 S.D. 476, 68 N.W.2d 480, 481 (1955)). Article IX, section 2 of the South Dakota Constitution provides that counties have the authority to "exercise any legislative power or perform any function not denied by its charter, the Constitution or general laws of the state."

Tibbs v. Moody Cnty. Bd. of Comm'rs, 2014 S.D. 44, ¶ 25, 851 N.W.2d 208, 217. When a local ordinance conflicts with state law, state law preempts the local ordinance. *In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d 34, 38.

> There are several ways in which a local ordinance may conflict with state law. In that event, state law preempts or abrogates the conflicting local law. First, an ordinance may prohibit an act which is forbidden by state law and, in that event, the ordinance is void to the extent it duplicates state law. Second, a conflict may exist between state law and an ordinance because one prohibits what the other allows. And, third, state law may occupy a particular field to the exclusion of all local regulation.

Id. (citation omitted).

A. Custer County's Ordinance Directly Conflicts with SDCL 21-10-2.

SDCL 21-10-2 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The local ordinance, passed by the citizens of Custer County pursuant to SDCL 7-18-A, provides that:

> The discharge of any treated water from the Custer City, South Dakota sewage treatment plant into French Creek or its tributaries, within the boundaries of Custer County, South Dakota, is a nuisance.

Defendants argue that because the Department of Agriculture and Natural Resources (hereinafter the "Department") issued a permit to operate the treatment plant pursuant to its authority under SDCL 34A-2 and South Dakota's Administrative Rules, Article 74:52, the plant cannot be deemed a nuisance. This Court agrees.

The State of South Dakota tasks the Department with "preserv[ing] our natural resources and the environment through sound management." SDCL 1-41-1. The State further grants the Secretary of Agriculture and Natural Resources authority to exercise the powers vested "by chapter 34A-2 with respect to the control of water pollution." SDCL 1-41-15.5. The Secretary also has the duty to perform the functions "relating to the divisions of water quality and water hygiene pursuant to chapter[] 34A-2[.]" SDCL 1-41-17.

Chapter 34A-2 further outlines the duties of the Department regarding discharge permits. "The secretary shall issue, suspend, revoke, modify, or deny permits to discharge sewage, industrial wastes, or other wastes to state waters, consistent with provisions of this chapter and with rules promulgated by the board pursuant to chapter 1-26." SDCL 34A-2-31. "The secretary shall examine and approve or disapprove plans and other information needed to determine whether a permit should be issued or suggest changes in plans as a condition to the issuance of a permit." SDCL 34A-2-32. "The secretary may, after notice and opportunity for public hearing, issue a permit for the discharge of any waste, pollutant, or combination of pollutants into surface waters, for a period not to exceed five years[.]" SDCL 34A-2-36.

Here, Plaintiff argues that because Defendants relied only on SDCL 34A-2-36 in their Response, there is no express statutory authority in conflict with the Custer County ordinance. However, this Court finds that the State tasks the Department to preserve our natural resources and control water pollution. The Department and its Secretary, pursuant to the authority granted by Title 1, Chapter 40, and Title 34, Chapter 2, granted a State-issued permit in compliance with State law that authorized the City of Custer's sewage treatment facility's discharge into French Creek. Because the issuance of the permit was "done or maintained under the express authority of a statute[,] [it cannot] be deemed a nuisance." Thus, the Custer County ordinance declaring that the discharge into French Creek is a nuisance directly conflicts with the Department's permit issuance pursuant to

State law. The City of Custer has no duty to enforce a local ordinance that conflicts with State law, as it is unenforceable. Therefore, Plaintiff is not entitled to an issuance of a writ of mandamus.

II. Defendants Are Not Estopped from Asserting the Nuisance Ordinance as Unenforceable.

Plaintiff asserts that Defendants are estopped from arguing that the ordinance is preempted by State law and is thus unenforceable. In support of this, Plaintiff argues that Defendant Custer County told Plaintiff that if SDCL 7-18A was followed, the ordinance would be voted on. Plaintiff contends that Defendants cannot now reverse course after certifying the ordinance and assert that it is preempted by state law when they did not raise any concerns of preemption prior to the ordinance's certification. At the Motions Hearing on September 7, 2023, Plaintiffs relied on *Even v. City of Parker*, 1999 S.D. 72, 597 N.W.2d 670.

The South Dakota Supreme Court has previously held that "an estoppel can be applied against public entities in exceptional circumstances to 'prevent manifest injustice.'" *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995) (citing *City of Rapid City v. Hoogterp*, 85 S.D. 176, 180, 179 N.W.2d 15, 17 (1970). "However, estoppels against the public are little favored and should be used sparingly." *Hoogterp*, 85 S.D. at 179, 179 N.W.2d at 17.

> "The doctrine of equitable estoppel or estoppel in pais is bottomed on principles of morality and fair dealing and is intended to subserve the ends of justice." When considering the application of equitable estoppel, each case is dependent on application of the doctrine to the specific facts. When applying the doctrine to "municipal corporations in matters pertaining to their governmental functions .... [t]he basis of its application ... is ... municipal officers ... have taken some affirmative action influencing another which renders it inequitable for the municipality to assert a different set of facts.") "More than municipal acquiescence ... should be required to give rise to an estoppel." "The conduct must have induced the other party to alter his position or do that which he would not otherwise have done to his prejudice."

Even, 1999 S.D. 72, ¶ 12, 597 N.W.2d at 674.

In *Even*, Plaintiff sought to build a new "pole type" garage but was unaware that the City of Parker had prohibited such garages in residential areas unless a conditional use permit was obtained. *Id.* ¶ 2 at 671-72. The City Zoning Administrator did not mention the prohibition to Plaintiff when they discussed various restrictions on building garages. *Id.* ¶ 3. Plaintiff filled out the application for a building permit, which did not ask whether the construction was for a "pole type" building. *Id.* The application was given to the Administrator, who reviewed it and issued Plaintiff a permit. *Id.* Upon receiving the permit, Plaintiff began buying building materials for the garage and incurred roughly $4,470.00 in expenses. *Id.* at ¶ 4. Plaintiff also ordered a non-returnable customized kit of materials to save money. *Id.* The Administrator later found out that Plaintiff sought to build a "pole type garage" and informed Plaintiff he could not build the garage. *Id.* On appeal, the South Dakota Supreme Court affirmed the trial court's ruling that the City was estopped from enforcing the zoning ordinance against Plaintiff because the Administrator's actions would "cause an objectively reasonable person to believe they had complied with the city zoning requirements and had a valid permit. To prohibit [Plaintiff] from building his garage would work an injustice on him." *Id.* ¶ 17 at 676.

The facts in the present case differ significantly from *Even*. Unlike the garage application in *Even*, the ordinance's legality is a procedural rather than a substantive issue. The issue is that the ordinance's terms conflict with State law, not that the ordinance is missing required terms. There is also no evidence that Plaintiff has incurred a substantial detriment, unlike Plaintiff in *Even*. Plaintiff did not incur building expenses and begin construction in reliance on Defendant Custer County's assertion that if Plaintiff complied with SDCL 7-18A, the ordinance could be voted on. While Plaintiff likely believed the ordinance to be enforceable once voted on, passed, and certified, the ordinance still conflicts with State law. It is, thus, preempted and unenforceable.

III. Issuing a Writ of Mandamus an Inappropriate Form of Relief.

> The writ of mandamus may be issued by the Supreme and circuit courts, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

SDCL 21-29-1. "The writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested." SDCL 21-29-2. "To prevail on a writ of mandamus or prohibition, Petitioners must show 'a clear legal right to performance of the specific duty sought to be compelled and the [respondent] must have a definite legal obligation to perform that duty.'" *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, ¶ 13, 822 N.W.2d 62, 66 (quoting *H & W Contracting, LLC v. City of Watertown*, 2001 S.D. 107, ¶ 24, 633 N.W.2d 167, 175)

A writ of "[m]andamus can only issue when the duty to act is unequivocal." *Atkinson v. City of Pierre*, 2005 S.D. 114, ¶ 26, 706 N.W.2d 791, 799 (citing *Black Hills Cent. R.R. Co. v. City of Hill City*, 2003 S.D. 152, ¶ 13, 674 N.W.2d 31, 34). "'It commands the fulfillment of an existing legal duty, but creates no duty itself, and acts upon no doubtful or unsettled right.'" *Id.* (quoting *Sorrels v. Queen of Peace Hosp.*, 1998 S.D. 12, ¶ 6, 575 N.W.2d 240, 242).

> Mandamus is a potent, but precise remedy. Its power lies in its expediency; its precision in its narrow application. It commands the fulfillment of an existing legal duty, but creates no duty itself, and acts upon no doubtful or unsettled right. To prevail in seeking a writ of mandamus, the petitioner must have a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.

Sorrels, 1998 S.D. 12, ¶ 6, 575 N.W.2d at 242 (internal citations omitted).

There is no clear duty to act in this case. Plaintiff argues that the City of Custer has a ministerial duty to enforce the local ordinance. However, the City of Custer has no legal obligation to enforce a local ordinance that conflicts with South Dakota Codified Law. As explained above, the

ordinance is preempted by State statute and is, thus, unenforceable. Therefore, mandamus relief is not applicable.

ORDER

Considering the foregoing, it is hereby

ORDERED that Plaintiff's Petition is **DENIED**;

Dated this 15th day of September 2023.

BY THE COURT:

The Honorable Stacy L. Wickre
Circuit Court Judge
Seventh Judicial Circuit

Appeal No. 30495

In the

Supreme Court of the State of South Dakota

PRESERVE FRENCH CREEK, INC.

Appellant

vs.

COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY, SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, and TERRI WILLIAMS

Appellees.

Appeal from the Circuit Court
Seventh Judicial Circuit
Custer County, South Dakota

The Honorable Stacy L. Wickre

Notice of Appeal filed October 18, 2023

BRIEF OF APPELLEES COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY, SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, and TERRI WILLIAMS

Richard M. Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
506 Sixth Street
Rapid City, SD 57709

Steven C. Beardsley
Conor P. Casey
Beardsley, Jensen & Lee, Prof. L.L.C.
4200 Beach Drive, Suite 3
Rapid City, SD 57702

Filed: 2/2/2024 4:24 PM CST Supreme Court, State of South Dakota #30495

Telephone: (605) 342-1078
E-mail: rwilliams@gpna.com
Attorneys for Appellees, County of Custer, South Dakota, City of Custer, South Dakota, Board of Commissioners of Custer County, South Dakota, City Council of the City of Custer, South Dakota, Tracy Kelley, and Terri Williams

Telephone: (605)-721-2800
E-mail: sbeards@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Appellant, Preserve French Creek, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

CONSTITUTION:

STATUTES:

ADMINISTRATIVE RULES:

SECONDARY SOURCES:

PRELIMINARY STATEMENT

Unless specifically denoted otherwise, the Appellees, including both Custer County and the City of Custer, will be referred to as the ("the County).[1] Appellant Preserve French Creek, Inc. will be referred to as "French Creek, Inc." Citations to the South Dakota Supreme Court's settled record will appear as "(SR ___)" with the range of relevant page numbers cited thereafter. Appellant's brief on appeal will be referred to as ("Brief of French Creek, Inc.") with appropriate citations thereafter.

JURISDICTIONAL STATEMENT

French Creek, Inc., filed a Petition for Writ of Mandamus and Proposed Alternative Writ of Mandamus in Custer County, Seventh Judicial Circuit, on June 22, 2023. (SR 1-10; SR 23-24). On September 7, 2023, the Honorable Judge Stacy Wickre held oral argument on the Petition. (SR 134). On September 15, 2023, the Court issued a Memorandum Opinion and Order denying the Appellant's Petition for Writ of Mandamus. (SR 134-40). Notice of Entry of the Court's Memorandum Opinion and Order was filed on September 19, 2023. (SR 141-49). French Creek, Inc. timely filed its Notice of Appeal on October 18, 2023. (SR 150-51). This Court has jurisdiction over the matter pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT CORRECTLY DENIED FRENCH CREEK, INC.'S PETITION FOR WRIT OF MANDAMUS ON THE BASIS THAT THE COUNTY'S ORDINANCE WAS PREEMPTED BY SOUTH DAKOTA LAW

[1] As argued below in footnote 5, the City of Custer has no authority to enforce county ordinances. Accordingly, to simplify the designation, and unless specifically noted otherwise, all Appellees will be referenced as the "the County."

The lower court denied French Creek, Inc.'s petition for mandamus relief on the grounds that the local ordinance was preempted by state law.

- *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, 633 N.W.2d 196.
- *Tibbs v. Moody County Bd. Of Comm'rs*, 2014 S.D. 44, 851 N.W.2d 208.
- *In re Yankton County Comm'n*, 2003 S.D. 109, 670 N.W.2d 34.
- *Krsnak v. Brant Lake Sanitary District*, 2018 S.D. 85, 921 N.W.2d 698.
- SDCL 21-10-2
- SDCL 1-41-1 *et seq.*
- SDCL 34A-2-35
- SDCL 34A-2-36
- ARSD 74:52:02:02

II. WHETHER THE CIRCUIT COURT ERRED HOLDING THAT ESTOPPEL DID NOT REQUIRE ENFORCEMENT OF THE ORDINANCE

The lower court found that estoppel did not require the County to enforce the ordinance.

- *Tibbs v. Moody County Bd. Of Comm'rs*, 2014 S.D. 44, 851 N.W.2d 208.
- *Heine Farms v. Yankton Cnty. ex rel. Cnty. Comm'rs*, 2002 S.D. 88, 649 N.W.2d 597.
- *Thom v. Barnett*, 2021 S.D. 65, 967 N.W.2d 261.
- SDCL 7-18A-13
- SDCL 7-18A-14
- SDCL 2-14-2.1

III. WHETHER MANDAMUS RELIEF WAS PROPERLY DENIED BY THE CIRCUIT COURT

The lower court denied mandamus relief.

- *Brendtro v. Nelson*, 2006 S.D. 71, 720 N.W.2d 670.
- *Argus Leader v. Hagen*, 2007 S.D. 96, 739 N.W.2d 475.
- *Crowley v. Spearfish Independent School Dist.*, 445 N.W.2d 308 (S.D. 1989).
- SDCL 21-29-1
- SDCL 21-29-2

STATEMENT OF THE CASE AND FACTS

Since 1972, the City of Custer has operated a wastewater treatment facility for municipal wastewater. (SR 62). Any discharge from the facility may only be done under

the authority of an approved Surface Water Discharge Permit and in conformance with water quality standards promulgated by the South Dakota Department of Agriculture and Natural Resources ("DANR") (SR 64-67). The City of Custer's current facility discharges into Flynn Creek or to the golf course's land application holding pond. (SR 63). No industrial users contribute to the discharge. (SR 62).

In 2020, the City of Custer submitted plans to DANR for an upgraded facility. (SR 63). The upgrades were necessary to repair the existing facility and to include additional treatment to meet future water quality standards. *Id.* After completing the application and approval process, on January 13, 2021, the Secretary of DANR signed permit No. SD0023281 (the "Permit") which authorized the City of Custer's wastewater treatment facility to discharge into French Creek. (SR 86-120). The Permit became effective on April 1, 2021. *Id.*

Prior to issuance of the Permit, DANR followed the notice requirements for the public to actively participate. (SR 83). As part of that process, on December 2, 2020, DANR placed a notice of surface water discharge in the Custer County Chronicle. (SR 61). The notice provided the ability to contest the issuance of the permit and specifically stated "any person desiring to comment on the Department's recommendations for the conditional issuance of this permit must submit written comments … within the specified thirty (30) day comment period." *Id*; *see also* ARSD chapter 74:50:02 (cited within the notice and referencing the contested case procedures). The notice further informed readers that "[i]f no objections are received within the specified 30-day period, the Secretary [of DANR] will issue final determinations within sixty days of the date of this notice." *Id.* DANR received no objections to the issuance of the permit. Secretary

Hunter Roberts authorized the permit on January 13, 2021, which took effect on April 1, 2021. (SR 86). The Permit remains effective until March 31, 2026. *Id.*

Upon completion of the upgraded water treatment facility, the permit allows the City of Custer to discharge into French Creek. Work on the upgraded facility continues. In pertinent part, the Permit provides:

> Upon completion of the city's wastewater treatment facility upgrades, there shall be no discharge to Flynn Creek. At that time, the city will be authorized under this permit to discharge to
>
> ***French Creek***
>
> from its upgraded wastewater treatment facility, in accordance with discharge points, effluent limits, monitoring requirements, and other conditions set forth herein.
>
> Authorization is limited to those outfalls specifically listed in the permit. The permittee must comply with all conditions of this permit. Any noncompliance constitutes a violation of the South Dakota Water Pollution Control Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for a denial of a permit renewal application.

(SR 86). Apparently dissatisfied with the DANR permit, and prior to the June 2023 General Election, a group of citizens of Custer County sought to place an initiated county ordinance on the General Election ballot that would declare discharge into French Creek as a nuisance. (SR 2-3). No members of this group intervened to contest the issuance of the Permit. Pursuant to the procedures for initiating county ordinances found in SDCL ch. 7-18A, the group was successful in placing the proposed county ordinance on the ballot for the June 8, 2023, General Election. (SR 2-3). As a result of the election, and subsequent canvass, it was determined that the proposed nuisance ordinance had passed. And thus, discharge into French Creek was declared a nuisance by ordinance. *Id.* Despite French Creek, Inc.'s requests, the County, and the City of Custer, refused to enforce the

newly passed ordinance because it conflicted with state law. (SR 3). As a result, French Creek, Inc. brought the petition for writ of mandamus subject to this appeal. (SR 1). Pursuant to the petition, French Creek, Inc. sought an order of the Circuit Court requiring enforcement of the County's newly-passed nuisance ordinance. (SR 3). After briefing and oral argument, the Court denied French Creek's request for mandamus relief. (SR 134-140). This appeal followed.

STANDARD OF REVIEW

"This Court reviews the decision to grant or deny a writ of mandamus under an abuse of discretion standard." *Krsnak v. South Dakota Dept. of Environment and Natural Resources*, 2012 S.D. 89, ¶ 8, 824 N.W.2d 429, 433 (citing *Grant County Concerned Citizens v. Grant County Board of Commissioners*, 2011 S.D. 5, ¶ 6, 794 N.W.2d 462, 464) (additional citations omitted).

> A writ of mandamus is an extraordinary remedy that will issue only when the duty to act is clear. To prevail on a petition for a writ of mandamus, the petitioner must have a clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.

Rapid City J. v. Callahan, 2022 S.D. 38, ¶ 38, 977 N.W.2d 742, 753 (cleaned up). Questions regarding statutory interpretation are reviewed de novo. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 15, 757 N.W.2d 756, 761 (citations omitted).

French Creek, Inc. did not order a transcript of the argument presented to the Circuit Court. Any matter not clear based on the settled record must be presumed to be ruled correctly by the Circuit Court. *Baltodano v. North Cent. Health Services, Inc.*, 508 N.W.2d 892, 895 (S.D. 1993) ("When confronted with incomplete records, our presumption is that the circuit court acted properly."). It is the responsibility of the

Appellant to present an adequate record on appeal. *Id.* at 894 (citing *Pearson v. Adams*, 279 N.W.2d 674, 676 (S.D. 1979)) ("We have stated that 'the ultimate responsibility for presenting and adequate record on appeal falls upon the appellant.'"). "Failure to timely order a transcript constitutes a waiver of the right to a transcript." *Id.* (citing SDCL 15-26A-49; *Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986)). "Where an appellant waives the right to a transcript by failing to order it, the only review which can take place 'is a review of that portion of the record which was before the circuit court.'" *Id.* (quoting *Hawkins v. Peterson*, 474 N.W.2d 90, 92–93 (S.D. 1991)). Therefore, "[w]hen confronted with incomplete records, our presumption is that the circuit court acted properly." *Id.* at 895 (citing *In re C.M.*, 417 N.W.2d 887, 889 (S.D. 1988)). The failure of French Creek, Inc. to order a transcript creates a presumption that the underlying Court's decision was correct.

ARGUMENT AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S PETITION FOR WRIT OF MANDAMUS ON THE BASIS THAT THE COUNTY'S ORDINANCE WAS PREEMPTED BY SOUTH DAKOTA LAW

The Circuit Court correctly determined that the Custer County ordinance is preempted by State law that prohibits the County's enforcement of the ordinance. (SR 134-140). The Court specifically found that "the Custer County ordinance declaring that the discharge into French Creek is a nuisance directly conflict[ed] with the [DANR]'s permit issuance pursuant to State law." (SR 136-37). Because the ordinance prohibited an act "done or maintained under the express authority of a statute…[it cannot] be deemed a nuisance." *Id.* Given the conflict, there is no duty to act, and therefore,

mandamus relief is not available. (SR 135-40). The Circuit Court's decision is correct and should be upheld.

South Dakota law prohibits a county from passing "an ordinance which conflicts with state law." *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, ¶ 22, 633 N.W.2d 196, 203 (citing S.D. Const. art. IX § 2). Counties may not act contrary to State law because counties are creatures of statute which possess no power unless such authority is granted to them by the State Legislature. *Schafer v. Deuel Cnty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 15, 725 N.W.2d 241, 248 (citing *Pennington County v. State ex rel. Unified Judicial System*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 131). As further described in *Tibbs v. Moody Cnty. Bd. Of Comm'rs*, 2014 S.D. 44, ¶ 25, 851 N.W.2d 208, 2017:

> A county is a creature of statute and has "only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *State v. Quinn*, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, 38 (quoting *State v. Hansen*, 75 S.D. 476, 68 N.W.2d 480, 481 (1955)). Article IX, section 2 of the South Dakota Constitution provides that counties have the authority to "exercise any legislative power or perform any function not denied by its charter, the Constitution or general laws of the state."

Id. This Court has been clear regarding preemption when a conflict between local and state law occurs.[2] Simply put, local ordinance that conflicts with State law is preempted by State law. *Rantapaa*, 2001 S.D. 111, ¶ 23, 633 N.W.2d at 203; *see also In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d 34, 38. "There are several ways in which a local ordinance may conflict with state law." *Id.*

---

[2] Municipalities are similarly constrained. "A municipality may exercise any power or perform any function not prohibited by our constitution and laws. S.D. Const. art. IX, § 2. Yet we have repeatedly noted that municipal corporations possess only those powers given to them by the Legislature." *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶ 9, 804 N.W.2d 428, 431–32.

> First, an ordinance may prohibit an act which is forbidden by state law and, in that event, the ordinance is void to the extent it duplicates state law. *Second, a conflict may exist between state law and an ordinance because one prohibits what the other allows.* And, third, state law may occupy a particular field to the exclusion of all local regulation.

In re Yankton Cnty. Comm'n, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38 (internal citations omitted) (emphasis added). An ordinance that conflicts with State law is preempted even if the ordinance was passed by initiative measure. *See Rantapaa*, 2001 S.D. 111, ¶¶ 22-23, 633 N.W.2d at 203; *Heine Farms v. Yankton Cnty. ex rel. Cnty. Comm'rs*, 2002 S.D. 88, ¶ 16, 649 N.W.2d 597, 601 ("[i]t is fundamental that an ordinance or resolution proposed by the electors of a municipality [or county] under the initiative law must be within the power of the municipality to enact or adopt."); *see also In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38. Custer County's ordinance conflicts with State law and mandamus cannot compel enforcement.

A. The County's Ordinance is preempted by SDCL 21-10-2

Custer County's ordinance prohibiting discharge into French Creek is contrary to SDCL 21-10-2. The statute provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." SDCL 21-10-2.[3] The ordinance at issue reads:

> The discharge of any treated water from the Custer City, South Dakota sewage treatment plant into French Creek or its tributaries, within the boundaries of Custer County, South Dakota, is a nuisance.

(SR 2). DANR's issuance of the Stormwater Discharge Permit allowing treated discharge into French Creek was authorized by State statute.

[3] French Creek, Inc. argues that the statute should be narrowly construed and cites to a Montana statute. Even with the narrowest of interpretations, however, a direct conflict exits between the State-issued permit and the Custer County ordinance. Therefore, the ordinance is preempted.

The Legislature tasked DANR with preserving and managing South Dakota's "natural resources and the environment." SDCL 1-41-1. The Legislature further granted DANR the authority "by chapter 34A-2" to control water pollution. SDCL 1-41-15.5. "The secretary of the [DANR] shall perform the functions … relating to the divisions of water quality and water hygiene, pursuant to chapters 34A-2, 34A-3, and 34A-9." SDCL 1-41-17.

> Chapter 34A-2 further outlines the duties of the Department regarding discharge permits. "*The secretary shall issue, suspend, revoke, modify, or deny permits to discharge sewage, industrial waste, or other wastes to state waters, consistent with provisions of this chapter and with rules promulgated by the board pursuant to chapter 1-26.*" SDCL 34A-2-31. "The secretary shall examine and approve or disapprove plans and other information needed to determine whether a permit should be issued or suggest changes in plans as a condition to the issuance of a permit." SDCL 34A-2-32. "The secretary may, after notice and opportunity for public hearing, issue a permit for the discharge of any waste, pollutant, or combination of pollutants into surface waters, for a period not to exceed five years[.]" SDCL 34A-2-36.

(SR 136) (emphasis added). The compilation of statutes above makes it clear that the Legislature required DANR to issue the Permit specifically allowing the discharge from the City of Custer's wastewater treatment plant into French Creek. After issuance of a permit, a local ordinance may not later usurp state law and contradict the permitted use.

This Court applied the above reasoning in *Krsnak v. Brant Lake Sanitary District*, 2018 S.D. 85, 921 N.W.2d 698 and upheld the denial of a nuisance claim. In *Krsnak*, the Brant Lake Sanitary District ("District") "constructed a treatment pond to service the increase in wastewater flow in the Brant Lake area." *Id.* ¶ 2, 921 N.W.2d at 699. The Krsnaks owned "8.27 acres of property approximately 675 feet north of the new water treatment pond and 1,100 feet from the existing ponds." *Id.* ¶ 3, 921 N.W.2d at 700.

Even though the pond had been authorized by DENR[4], pursuant to statute and various administrative rules, the Krsnaks alleged, *inter alia*, that the District's new pond violated "SDCL 21-10-1, the general nuisance statute." *Id.* ¶¶ 4, 10, 921 N.W.2d at 700-01; *see also Krsnak v. S. Dakota Dep't of Env't & Nat. Res.*, 2012 S.D. 89, ¶ 2, 824 N.W.2d 429, 432 (addressing DENR's approval of the plans and specifications for the District's wastewater treatment facility and denying mandamus relief). "The Circuit Court … concluded that even if the Krsnaks suffered a heightened injury due to the smell and their proximity to the pond, their injury was neither unique *nor constituted a nuisance.*" *Id.* ¶ 13, 921 N.W.2d at 701 (emphasis added). Accordingly, the Circuit Court granted the District's motion for summary judgment precluding Krsnak's nuisance claim.

On appeal, this Court affirmed the Circuit Court's decision citing SDCL 21-10-2 which provides: "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." *Id.* ¶ 32, 921 N.W.2d at 705. The Court wrote:

> Pursuant to SDCL 21-10-1, for an actionable claim, the District must be unlawfully engaged in "an act, or omitting to perform a duty, which act or omission either…[a]nnoys, injures, or endangers, the comfort, repose, health, or safety of others [,] or 'renders other persons insecure…in the use of property.'"

Id. Because the District was operating pursuant to law, and no evidence was presented illustrating that the District was in violation of its statutory authority, the nuisance claim failed. *Id.* (citing statutory authority for operation of a sewage disposal plant and SDCL 21-10-2). *Krsnak* is on point and controls the case at bar. The proposed discharge, by the

[4] The current Department of Agriculture and Natural Resources ("DANR") was previously named the Department of Environment and Natural Resources ("DENR"). *See Dakota Constructors, Inc. v. Hanson Cnty. Bd. of Adjustment*, 2023 S.D. 38, ¶ 2, 994 N.W.2d 222, 224 (recognizing the name change).

City of Custer into French Creek, cannot be deemed a nuisance because that discharge has been authorized by State law. No evidence has been presented to the contrary.

It makes no difference to this analysis that the Permit was issued pursuant to a regulatory scheme authorized by the State and carried into effect by DANR by means of administrative rule. The State Legislature may delegate its authority to a permitting agency, such as DANR, to carry out the will of the State. *Ehlebracht v. Crowned Ridge Wind II, LLC*, 2022 S.D. 19, ¶¶ 21-23, 972 N.W.2d 477, 486 (citing *Boever v. South Dakota Bd. of Acct.*, 1997 S.D. 34, ¶ 15, 561 N.W.2d 309, 313). The delegation of State authority, to an administrative agency is, of course, carried out by means of administrative rule. *Id.* Once promulgated, administrative rules are presumed valid and carry the full force and effect of State law. *Krsnak*, 2012 S.D. 89, ¶ 16, 824 N.W.2d at 436 (citations omitted). The Legislature expressed a clear intent that DANR is sole actor regarding wastewater discharge permits. Therefore, the City of Custer's Permit was authorized under the express authority of a statute. *See Ehlebracht*, 2022 S.D. 19, ¶¶ 49-52, 972 N.W.2d at 491-92 (recognizing that the preemptive effect of SDCL 21-10-2 as applied to permitting provided by statute and administrative rule does not constitute a taking). Thus, as the Circuit Court found, the Permit granted was "done or maintained under the express authority of a statute[;] [therefore, it cannot] be deemed a nuisance." (SR 149).

French Creek, Inc. points to a Montana case, *Barnes v. City of Thompson Falls*, 979 P.2d 1275 (Mont. 1999), to support its interpretation of South Dakota's nuisance statute. But that argument is futile because it does not alter preemption under the facts of this case. Montana has a portion of its statute that is nearly identical to South Dakota's.

See Mont. Code Ann. § 27-30-101(2) ("Nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance."). The *Barnes* court relied on California jurisprudence to interpret the statute.

> A statutory sanction cannot be pleaded in justification of acts which by general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.

Id. at 1279 (quoting *Hassell v. City and County of San Francisco*, 11 Cal.2d 168, 78 P.2d 1021, 1022–23 (1938) (quoting 46 C.J. at 674)). The Montana court went on to clarify that express statutory authority does in fact preempt nuisance actions. It stated:

> By requiring that the authorizing statute contain an express or necessarily implied authorization to do the very act which occasions injury, it is ensured that "an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability."

Id. (quoting *Varjabedian v. City of Madera*, 142 Cal. Rptr. 429, 572 P.2d 43, 47 (1977)). The Montana court's emphasis on express authorization does not change the result here. There can be no doubt that South Dakota's statutory scheme provides express authorization for DANR to issue surface water discharge permits. The preemptive effect of SDCL 21-10-2, in cases such as the matter under consideration, has already been decided by this Court in *Krsnak* and *Ehlebracht*.

French Creek, Inc., has not argued or presented evidence that the City of Custer acted outside of the authority granted to it by State law by means of the Permit. And how could it? The City of Custer has not begun discharge into French Creek and will not do so until completion of the project which is expected to occur in 2025. (SR 48). French

Creek, Inc. cannot, therefore, present an argument that the City of Custer is acting outside of the authority specifically granted to it by the Permit. French Creek, Inc. cites *Greer v. City of Lennox*, 107 N.W.2d 337 (1961), for the proposition that an action of a city can constitute a nuisance even when granted statutory authority for that activity. Brief of French Creek, Inc. at 16. *Greer*, however, specifically stated that the operation of a dump by the city may not be considered a nuisance *per se* because municipalities are expressly authorized to operate public dumps. *Greer*, 107 N.W.2d at 338-39. Rather, the operation of the dump may only become a nuisance if the operation results in an "improper or unlawful condition." *Id.* at 339 (citing 52 A.L.R.2d 1136).

The County does not argue that a permitted activity may never be considered a nuisance. The County simply argues that a nuisance action may only be maintained where the permitted entity acted unlawfully – for instance – in violation of the authority granted to it by the State. This distinction is illustrated in *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, 557 N.W.2d 748. In *Kuper*, the Court discussed the application of *Greer* and determined that stray voltage from a rural electric cooperative substation could not be considered a nuisance because the distribution system was permitted by the State and the cooperative was acting within its permitted authority. *Kuper*, 1996 S.D. 145, ¶¶ 47–51, 557 N.W.2d at 760-762. Therefore, SDCL 21-10-2 precluded the nuisance action. *Id.* As noted throughout this brief, the City of Custer is specifically permitted, by State law, to discharge into French Creek. Without a discharge or, in the future, any evidence that a discharge violates the City of Custer's Permit, French Creek, Inc. is asking this Court find that any discharge from the City of Custer's wastewater treatment plant is a *per se* nuisance under the ordinance. But, even under *Greer*, *per se* nuisance claims for a

permitted activity are not cognizable. Discharge in conformance with the Permit, which would include the effluent limitations imposed by the Permit, cannot be deemed a nuisance by local ordinance.

B. The local ordinance is preempted because it prohibits conduct expressly authorized by state law

For the same reason that the County ordinance is preempted by SDCL 21-10-2, the ordinance is preempted because it prohibits an activity specifically authorized by State law. *See In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38 (the ordinance prohibits an action authorized by State law). As discussed above, DANR acted pursuant to its authority in issuing the surface water discharge permit and allowed discharge, in conformance with that Permit, into French Creek. French Creek, Inc.'s argument that the ordinance merely deems the location of the discharge as being a nuisance fails because the ordinance directly prohibits an action that the Permit allows. It makes no difference, moreover, what entity chose the location of the discharge – the discharge into French Creek is allowed by State law through the Permit issued by DANR. The Permit is controlling.

For the first time in this action, French Creek, Inc. challenges the issuance of the Permit by DANR. *See* Brief of French Creek, Inc. at 23. This challenge was not raised below and cannot now be raised for the first time on appeal. *Legrand v. Weber*, 2014 S.D. 71, ¶ 26, 855 N.W.2d 121, 130 ("This court will not address arguments that are raised for the first time on appeal.") (citing *Kreiser Inc. v. First Dakota Title Ltd. P'ship*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425). French Creek, Inc. implies that the County recognized defects in the permitting process. Brief of French Creek, Inc. at 23. This is simply not correct. The County's brief at the Circuit Court level established the

background for, and the finality of, the issuance of the Permit. (SR 47-38). The County further argued below, during a discussion of other available remedies precluding mandamus relief, that French Creek, Inc. had missed its opportunity to make any challenge to the Permit by failing to object during the administrative permitting process and, therefore, the permit became final. (SR 55).

Not only was the validity of the permit not argued below, any challenge to the issuance of the Permit must have first been brought during the administrative proceedings pursuant to the contested case procedures in ARSD chapter 74:50:02. *See* ARSD 74:50:02 (applying the procedures to surface water discharge permits under ARSD chapter 74:52:05). French Creek, Inc. had the opportunity, at the administrative level, to contest the issuance of the Permit in accordance with chapter 34A-2. SDCL 34A-2-35 provides:

> Before issuing any permit pursuant to § 34A-2-36, the secretary shall provide an opportunity for public hearing, with notice of the opportunity for hearing, in accordance with applicable laws, rules, and regulations. *If the recommendation of the department pursuant to § 34A-2-24, 34A-2-27, or 34A-2-36, is not contested, that recommendation shall become a final determination on the application.* If an uncontested recommendation is for approval or conditional approval of the application, the permit shall be issued by the secretary consistent with the recommendation.

(emphasis added). As noted above, and pursuant to administrative rule, prior to the issuance or denial of a permit, the public is entitled to thirty days for public comments. ARSD 74:52:05:11. "During the public comment period, any interested person may submit written comments on the proposed permit and may request a contested case hearing …. A request for a contested case hearing must be in writing and must be … filed." ARSD 74:52:05:15. If not contested, the recommendation becomes final.

Written objections to the recommended permit must be received by DANR during the public comment period:

> If a person, including applicants, believes that any condition of the proposed permit is inappropriate or that the secretary's tentative decision to … prepare a proposed permit is inappropriate, *that person must raise all reasonably ascertainable issues and submit all reasonably available arguments, factual grounds, and supporting materials not already available in the administrative record, by the close of the public comment period....*

ARSD 74:52:05:16 (emphasis added). To contest the recommendation of DANR a person must initiate the contested case procedure by filing a petition for a contested case hearing pursuant to ARSD 74:50:02:02 and follow the procedures in ARSD chapter 74:50:02. If a contested case is not initiated, "[a]fter the close of the public comment period on a proposed permit, a final permit decision shall be issued by the secretary." ARSD 74:52:05:18; SDCL 34A-2-35 (the recommendation shall become a final determination on the application). In the event of a contested case, the final permit decision becomes "effective thirty days after the service of notice of the decision." ARSD 74:52:05:19. French Creek, Inc. provided no written objections to the proposed permit, failed to initiate a contested case, and is now foreclosed from making a challenge to the final permit.

French Creek, Inc. conceded the Circuit Court was not the proper venue for such a challenge in a footnote in its brief to the Circuit Court, and thus, did not raise the issue below. That footnote states in its entirety:

> Petitioner believes the permitting process required for this process was inadequate and failed numerous requirements under South Dakota and Federal law. *Petitioner reserves those arguments for the proper cause of action and focuses their arguments on the Mandamus relief it seeks herein.*

(SR at 129, fn. 1) (emphasis added). French Creek, Inc. is correct – any objection to the issuance of the Permit should have been made at the during the administrative process as outlined above.

Even more detrimental to French Creek, Inc. – and even if it had contested the issuance of the Permit at the administrative level – the passage of time has now deprived any tribunal from considering French Creek, Inc.'s objections. South Dakota statute permits an appeal in "circuit court … from a final decision, ruling, or action of an agency." SDCL 1-26-30.2. That appeal must have occurred within thirty (30) days after the DANR's final decision. SDCL 1-26-31. French Creek, Inc. did not contest the Permit at the agency level and did not appeal during the statutory period. "The failure to timely 'file' an appeal from an administrative decision is jurisdictionally fatal." *Kovac v. South Dakota Reemployment Assistance Division*, 2023 S.D. 45, ¶ 16, 995 N.W.2d 247, 252 (citing SDCL 1-26-31; *AEG Processing Center No. 58, Inc. v. South Dakota Dept. of Revenue and Regulation*, 2013 S.D. 75, ¶ 8, 838 N.W.2d 843, 846). Failure to contest or appeal the agency decision to issue the Permit waives any right to appeal and denies courts of subject matter jurisdiction to consider French Creek, Inc.'s objections. Under no circumstances may French Creek, Inc. now challenge the issuance of the Permit.

II. WHETHER THE CIRCUIT COURT ERRED HOLDING THAT ESTOPPEL DID NOT REQUIRE ENFORCEMENT OF THE ORDINANCE

The Circuit Court correctly held that the County was not estopped from arguing the ordinance was unenforceable. In general, French Creek, Inc. argues estoppel applies because the County did not stop the circulation of petitions, which allowed the placement of the ordinance on the ballot for the General Election, held an election, and thereafter

canvassed and certified the passage of the ordinance. Because of these actions, French Creek, Inc., argues that the County must now enforce the ordinance. Brief of French Creek, Inc. at 25 - 29. This argument is unsuccessful because the County has no obligation – no matter how the ordinance was put into effect – to enforce an ordinance that is contrary to State law. French Creek, Inc. ignores the basic underpinning of the County's authority – that the County is granted "only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *Tibbs*, 2014 S.D. 44, ¶ 25, 851 N.W.2d at 217. There is simply no authority for the ability of a county to usurp State law.

French Creek, Inc. also fails to recognize that, once enough signatures were gathered on the petition, the County was required by statute to place the proposed ordinance on the ballot. Chapter 7-18A generally provides the procedure for initiating a county ordinance and more specifically states:

> When a petition to initiate is filed with the auditor, he shall present it to the board of county commissioners at its next regular or special meeting. The board *shall* enact the proposed ordinance or resolution and *shall* submit it to a vote of the voters .... [I]f the petition is filed within three months prior to the primary or general election, the ordinance or resolution may be submitted at the primary or general election.

SDCL 7-18A-13 (emphasis added). And,

> No initiated ordinance ... shall become operative unless approved by a majority of the votes cast for and against the same. If so approved, it *shall* take effect upon the completion of the canvass of the election returns relating thereto.

SDCL 7-18A-14 (emphasis added). "As used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL § 2-14-2.1. Provided the

petition contained enough signatures, the County was obligated, by State statute, to place the proposed ordinance on the ballot and canvass the same thereafter. Where directed by statute, the actions in filing a petition are ministerial and no discretion is provided to the County to avoid the mandates of State law. *See Larson v. Hazeltine*, 1996 S.D. 100, ¶ 17, 552 N.W.2d 830, 835 (In determining whether to file these…petitions, [the Secretary of State's duties] were purely ministerial, limited to matters apparent on the face of the petition.) The same holds true for the County's obligations under chapter 7-18A. *Heine Farms*, 2002 S.D. 88, ¶ 13, 649 N.W.2d at 601. After the election, the County was required, by statute, to canvass the election and to declare whether a measure passed.

It is not unusual for a county, municipality, or the State, to pass an ordinance or law that is successfully challenged after the law has been enacted – even if the law was enacted by initiative. *See generally Heine Farms*, 2002 S.D. 88, 649 N.W.2d 597 (challenge to initiated zoning ordinance); *Schryver v. Schirmer*, 84 S.D. 352, 353, 171 N.W.2d 634, 634 (1969) (challenge to the constitutionality of an initiated city salary ordinance). In fact, a pre-election challenge to a substantive provision in a proposed law is likely not ripe for judicial review. *See Christensen v. Gale*, 917 N.W.2d 145, 158 (Neb. 2018) (substantive challenges to ballot measures are contingent events and premature for adjudication); 82 C.J.S. Statutes § 151 ("a challenge to the substantive validity or sufficiency of the measure proposed is not ripe for preelection review."). Even if a pre-election challenge were available, the availability of such a procedure does not eliminate a post-election challenge to the enacted law.

This Court recently considered a post-election challenge in *Thom v. Barnett*, 2021 S.D. 65, 967 N.W.2d 261. In *Thom*, the proponents of statewide Initiated Amendment A,

which legalized, *inter alia*, both medical marijuana and recreational marijuana, contended that the Governor was precluded from challenging the amendment after the election because the Governor could have pursued a pre-election challenge. *Id.* ¶ 33, 967 N.W.2d at 272. The proponents urged the Court to apply waiver and laches to the post-election challenge. *Id.* ¶ 34, 967 N.W.2d at 272. In rejecting the proponents' argument that the post-election lawsuit was untimely the Court wrote:

> The authorities cited by Proponents to support their claim of waiver and laches all involved challenges based upon procedural irregularities in the election process. Proponents have not cited any cases where the doctrines of waiver and laches have been applied to post-election challenges based upon the single subject or separate vote requirements of a state constitution. Further, Proponents' identification of other legal remedies that may have been available before the election does not mean these remedies were exclusive. "The existence of another adequate remedy does not preclude a judgment for declaratory relief[.]" See SDCL 15-6-57. Finally, we have previously considered post-election challenges where the defects were known and could have been addressed before the election. *See Bienert v. Yankton Sch. Dist.*, 507 N.W.2d 88 (S.D. 1988); *Barnhart v. Herseth*, 88 S.D. 503, 222 N.W.2d 131 (1974). We therefore reject Proponents' claim that this action is untimely.

Id. In this case, the County was obligated to place the proposed ordinance on the ballot, and to perform the procedures to confirm the passage of the ordinance. The County is not obligated to enforce an ordinance that is contrary to State law. Any court order to the contrary would cause a violation of the State Constitution because, under the Constitution, counties are only provided the authority granted to them by the Legislature.

The case law cited by French Creek, Inc. in support of estoppel does not change this result. The cases cited by French Creek, Inc. do not apply in situations where the actions of local government are prohibited by State law. French Creek, Inc. cites *Federal Land Bank of Omaha v. Houck*, 68 S.D. 449, 4 N.W.2d 213, 218-19 (S.D. 1942), for the premise that an ordinance canvassed and certified by the county cannot be preempted by

State law. *Houck* has nothing to do with a county ordinance, initiated measure, or preemption; rather, *Houck* involves assuming a mortgage. *Houck*, 68 S.D. 449, 461-462, 4 N.W.2d at 219. Its reliance on *A-G-E Corp. v. State*, 2006 S.D. 66, ¶¶ 31-32, 719 N.W.2d 780, 789, is similarly flawed. *A-G-E Corp.* is also a contract case, not a municipal governance case. In *A-G-E Corp.*, the case involved a state inspector guiding the work of its contractor, A-G-E Corporation, for road work to be completed. *Id.* at ¶ 35-37, 719 N.W.2d at 790-91. This case is not instructive on this issue because the case was analyzed under the law of contracts, not State preemption of local laws.

Likewise, French Creek, Inc.'s argument under *Even v. City of Parker*, 1999 S.D. 72, 597 N.W.2d 670 is also inapplicable. In *Even*, the Evens sought to rebuild a garage on their property. *Id.* ¶ 2, 597 N.W.2d at 671. The Evens were unaware of the City of Parker's newly enacted ordinance governing "pole type" garages. *Id.* ¶ 2, 597 N.W.2d at 672. The new ordinance required builders to seek a conditional use permit before they could build a pole-type garage. *Id.* Evens, prior to building, met with the City Zoning Administrator regarding their plan to build their garage. During their meeting, the City Zoning Administrator failed to mention the conditional use permit requirement for pole-type garage buildings. *Id.* ¶ 3. Evens ultimately sought and was granted a building permit for the construction of their new garage. *Id.* Subsequently, the Evens purchased roughly $4,000 worth of materials, including a customized materials kit, to begin construction. *Id.* ¶ 4. A few days later, the Zoning Administrator visited the Evens' property and, for the first time, informed them of the conditional use permit requirement for building "pole type" garages. *Id.* ¶¶ 4-5. Thereafter, the Planning and Zoning Board of Adjustment refused to issue a conditional use permit. *Id.* ¶ 5. Upon review, this Court

determined that "[t]he Board is estopped from enforcing its zoning ordinances on Even." *Id.* ¶ 17, 597 N.W.2d at 676. The case discusses estoppel only under the city's own ordinances based on actions of a city official. *See Id.* ¶¶ 17-18. The case is not applicable to conflicts between State law and local ordinances. The Circuit Court ruled correctly.

III. WHETHER MANDAMUS RELIEF WAS PROPERLY DENIED BY THE CIRCUIT COURT

The Circuit Court correctly held that mandamus relief is not appropriate because there is no definite obligation to require the County to enforce the nuisance ordinance. South Dakota's courts have the power to issue writs of mandamus when appropriate:

> The writ of mandamus may be issued by the Supreme and circuit courts, to any inferior tribunal, corporation, board, or person ... *to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled*, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

SDCL 21-29-1 (emphasis added). "The writ of mandamus must be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law." SDCL 21-29-2; *Sauer v. Bowdle Independent School Dist., No. 36*, 87 S.D. 584, 588, 212 N.W.2d 499, 502 (S.D. 1973) (stating mandamus "may be used only where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.")(cleaned up). "The nature of the writ of mandamus is an extraordinary remedy that will issue only when the duty to act is clear." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 13, 720 N.W.2d 670, 674. The South Dakota Supreme Court has repeatedly recognized that:

> Mandamus is a potent, but precise remedy. Its power lies in its expedience; its precision in its narrow application. It commands the fulfillment of an existing legal duty, but creates no duty itself, and acts upon no doubtful or unsettled right. To prevail in seeking a Writ of Mandamus, the *petitioner must have a clear legal right to the performance*

> *of the specific duty sought to be compelled* and the respondent must have a definite legal obligation to perform that duty.

Id. (*quoting Sorrells v. Queen of Peace Hosp.*, 1998, S.D. 12, ¶ 6, 575 N.W.2d 240, 242)(citations omitted)(emphasis added). Mandamus relief is only appropriate when the duty to act is unequivocal. *Argus Leader v. Hagen*, 2007 S.D. 96 ¶¶ 8, 9, 739 N.W.2d 475, 478-479. The remedy does not lie where the obligation to be compelled is of doubtful validity. *Crowley v. Spearfish Independent School Dist.*, 445 N.W.2d 308, 311 (S.D. 1989).

For the reasons stated above, French Creek, Inc. has not shown that either the County of Custer or the City of Custer had a duty to enforce the ordinance.[5] To the

---

[5] In no event can mandamus compel a city attorney to enforce a county ordinance. There is no clear legal right to compel such an action. French Creek, Inc. cites SDCL 9-14-22 for the proposition that State statute requires "a city attorney to prosecute all violations of any duly enacted ordinance" including county ordinances (Brief of French Creek, Inc. at 32). SDCL 9-14-22 provides:

> When required by the governing body or any officer of the first and second class municipality, the *city attorney shall* furnish an opinion upon any matter relating to the affairs of the municipality or the official duties of such officer; *conduct the prosecution of all actions or proceedings arising out of the violation of any ordinance*; and perform such other professional services incident to his office as may be required by ordinance or directed by the governing body.

SDCL 9-14-22 (emphasis added). But the word "ordinance" found in SDCL Title 9 "Municipal Government" is defined as "…a permanent legislative act of the governing body of a municipality within the limits of its powers." SDCL 9-19-1. "'Municipal corporation' or 'municipality,' [means] all cities and towns organized under the laws of this state but shall not include any other political subdivisions." SDCL 9-1-1. The city attorney's obligation, therefore, is to prosecute violations of municipal ordinances. The prosecution of county ordinances is controlled by SDCL 7-18A-32 which reads, in part, "[a]ctions for violations of county ordinances shall be civil cases *and the county shall be the plaintiff*. The actions shall be commenced by the filing of a complaint and the response thereto shall be by oral plea or written answer…" (emphasis added). For the prosecution of county ordinances, the State's Attorney "shall appear in all courts of his county and prosecute and defend on behalf of the state or his county all actions or

contrary, enforcement of the ordinance would be unlawful. The State Constitution provides that the County and the City have only the authority granted to them by the Legislature. The Legislature has spoken on this issue, and the courts have confirmed, that local governmental entities may not act in conflict with State law. The Permit issued by DANR in this case gives the City of Custer the authority, under State law, to discharge into French Creek. The County Ordinance may not act to contradict that authority.

Despite the fact that French Creek, Inc. can no longer challenge the Permit, French Creek, Inc. is not without a remedy. Should the future discharge into French Creek violate the terms of the Permit conditions, the City of Custer is subject to the provisions SDCL 34A-2-75. SDCL § 34A-2-36.1. SDCL 34A-2-75 allows for the imposition of civil and criminal penalties. Mandamus is not appropriate when other remedies are available.

CONCLUSION

Based on the arguments and authorities stated above and those provided in the Circuit Court's Memorandum Decision, the County respectfully requests the Circuit Court's decision be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this case.

---

proceedings, civil or criminal, in which the state or county is interested or a party." SDCL § 7-16-9. The statutory authority cited above makes it clear that a city attorney prosecutes violations of municipal ordinances and the State's Attorney, on behalf of the county, prosecutes violations of county ordinances. Accordingly, the city attorney has no statutory requirement to prosecute violations of county ordinances.

Dated: February 2, 2024.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*

Richard M. Williams
Attorney for Appellees
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: rwilliams@gpna.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellees' Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellees, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 7,157 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellees. The original Brief for Appellees and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*
Richard M. Williams

CERTIFICATE OF SERVICE

I hereby certify on February 2, 2024, the **BRIEF OF APPELLEES COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY, SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, and TERRI WILLIAMS** was filed through South Dakota Odyssey File and Serve and the original plus one copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
Pierre, SD 57501-5070

and the **BRIEF OF APPELLEES COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY, SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, and TERRI WILLIAMS** was served by electronic mail and mailed by U.S. Mail to the following:

Steven C. Beardsley
Conor Casey
Beardsley, Jensen & Lee, Prof. L.L.C.
PO Box 9579
Rapid City, SD 57709
E-mail: *sbeards@blackhillslaw.com*
ccasey@blackhillslaw.com
Attorneys for Appellant, Preserve French Creek, Inc.

and mailed by U.S. Mail to the following:

Tracy Kelley
Custer County State's Attorney
420 Mt. Rushmore Road
Custer, SD 57730
tkelley@custercountysd.com

Terri Williams
4956 5th Street, #201
Rapid City, SD 57702
TLW@avoiceofreason.life

By: */s/ Richard M. Williams*
Richard M. Williams

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 30495

PRESERVE FRENCH CREEK, INC.,
Plaintiff/Appellant
v.
COUNTY OF CUSTER, SOUTH DAKOTA, CITY OF CUSTER, SOUTH DAKOTA, BOARD OF COMMISSIONERS OF CUSTER COUNTY SOUTH DAKOTA, CITY COUNCIL OF THE CITY OF CUSTER, SOUTH DAKOTA, TRACY KELLEY, AND TERRI WILLIAMS,
Defendants/Appellees

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CUSTER COUNTY, SOUTH DAKOTA

THE HONORABLE STACY L. WICKRE
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Steven C. Beardsley
Conor P. Casey
BEARDSLEY, JENSEN & LEE,
Prof. LLC
4200 Beach Drive, Suite 3
P.O. Box 9579
Rapid City, SD 57709-9579
sbeards@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Plaintiff/Appellant

Richard M. Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City, SD 57709
(605)-342-9503
rwilliams@gpna.com
Attorneys for Defendants/Appellees

NOTICE OF APPEAL FILED ON OCTOBER 18, 2023

Filed: 3/4/2024 4:29 PM CST Supreme Court, State of South Dakota #30495

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. STANDARD OF REVIEW

The record before this Court is complete and does not carry the presumption that the underlying Court's decision was correct. Appellees assert that because Appellant chose not to order a transcript from the oral argument held on September 7, 2023, before the Honorable Stacy L. Wickre, the record before this Court is "incomplete". (Appellees' Response Brief at pgs. 5-6.) However, SDCL § 15-26A-48 does not require a party to order a hearing transcript, but allows for a transcript to be ordered when "deemed necessary" by one of the parties. *See* SDCL § 15-26A-48. In the case at bar, the transcript from the thirty-minute hearing was not necessary for proper review by this Court. *Id.* The issue before this Court regards the interpretation of a statute[1] and an application of that statute to the settled facts of this case. Appellant's decision not to order the transcript from the thirty-minute hearing from September 7, 2023, does not create the presumption that the lower court's decision was correct. This Court has a complete record of the relevant evidence that was before the lower court.

---

[1] Appellees cite *Baltodano* to support the position that this Court is now faced with an incomplete and unsettled record, because Appellant chose not to order a transcript from the September 7, 2023 hearing. (*See* Appellees' Response Brief at pgs. 5-6.) However, *Baltodano* dealt with a trial court granting a directed verdict at trial and the appellant failing to secure a transcript of the trial. *Baltodano v. North Cent. Health Services, Inc.*, 508 N.W.2d 892, 894 (S.D. 1993). Here, Appellant is appealing the lower court's legal interpretation of a statute and application to undisputed facts. As such, *Baltodano* is distinguishable and does not apply to the case at bar.

In addition, this Court should review the lower court's decision under a de novo standard. *See Krsnak v. South Dakota Dept. of Environment and Natural Resources*, 2012 S.D. 89, ¶ 8, 824 N.W.2d 429, 433 (citing *State v. Goulding*, 2011 S.D. 25, ¶ 5, 799 N.W.2d 412, 414); *see also Dakota Systems, Inc. v. Viken*, 2005 S.D. 27, ¶ 7, 694 N.W.2d 23, 27 (citing *Boomsma v. Dakota, Minnesota, & Eastern Railroad Corp.*, 2002 S.D. 106, ¶ 13, 651 N.W.2d 238, 242). The lower court's entire decision hinged on the determination that the Local Ordinance was preempted by state law, which led to the denial of Appellant's Writ. (CI at 136-40.) As such, this Court's review of the lower court's determination that the Local Ordinance was preempted, which was the basis for its denial of Appellant's estoppel theory and ultimate decision to deny Appellant's Writ, should be reviewed as a question of law.

II. DISCUSSION

A. The Local Ordinance is Enforceable and is not Preempted by State Law.

The majority of Appellees' position relies on the assumption that Appellant is challenging the Department of Agriculture and Natural Resources ("DANR") permit processing power[2] under Chapter 34A-2 and the surface water

[2] The facts of the permitting process are relevant to this appeal, because it is uncontested that Appellee City of Custer and its developer failed to provide actual notice to the "persons potentially affected" by their unilateral choice of location for the discharge in question. Appellant's appeal centers on the denial of their Writ and the preemption issue that underlies the lower court's rationale. DANR's

discharge permit that was issued in this case by DANR. However, Appellees' position ignores the fact that the Local Ordinance declares the discharge location of French Creek a nuisance. The Local Ordinance does not challenge DANR's power under Chapter 34A-2 or the surface water discharge permit. Instead, the Local Ordinance declares French Creek, the location chosen by Appellee City of Custer and its developer a nuisance. As such, the Local Ordinance is not preempted by SDCL § 21-10-2, because it does not conflict with any state law regarding DANR's permit processing power and does not inhabit any area of statutory law which "the Legislature intended to occupy the field" entirely. *See In re Yankton County Com'n*, 2003 S.D. 109, ¶ 15, 60 N.W.2d 34, 38.

Appellees rely on the lower court's application of *Krsnak v. Bryant Lake Sanitary District* for support of their position that SDCL § 21-10-2 preempts the Local Ordinance. (*See* Appellees' Response Brief at pgs. 9-11.) However, *Krsnak* is distinguishable from the case at bar. In *Krsnak,* the landowners were seeking to have the treatment ponds declared a nuisance. *See Krsnak v. Byrant Lake Sanitary District*, 2018 S.D. 85, ¶¶ 5-13, 921 N.W.2d 698, 700-701. Here, the citizenry of Custer County has already determined the discharge location of French Creek to be a nuisance. In addition, the sanitary district operating the

---

issuance of the surface water discharge permit and validity of the same are a separate issue from Appellee City of Custer and its developer's unilateral choice of discharge location in French Creek.

treatment ponds in *Krsnak* took reasonable precautions in its operation. *Id.* at ¶ 33, 921 N.W.2d at 705-706. The landowners in *Krsnak* failed to "present evidence that the [treatment] pond is unlawfully contaminating their well." *Id.* Under *Krsnak* facts, this Court allowed immunity under SDCL § 21-10-2 to extend to the sanitary district's operation of the treatment pond. Here, the settled factual record evinces that Appellee City of Custer and its developer failed to take reasonable precautions and provide actual notice to the "persons potentially affected" by its unilateral choice in discharge location. As such, *Krsnak* is not similar to the case at bar. The lower court's reliance on *Krsnak* is misplaced.

Appellees' Response Brief willingly admits they did not provide actual notice "to the persons affected by" the discharge location of French Creek. (*See* Appellees' Response Brief at pg. 3.) As such, immunity under SDCL § 21-10-2 does not extend to the Local Ordinance, because the Appellee City of Custer and its developer failed to take reasonable precautions in choosing the discharge location of French Creek. *See Greer v. City of Lennox*, 79 S.D. 28, 32 (S.D. 1961). The relevance of this undisputed fact is paramount to Appellees' request that this Court not grant immunity under SDCL § 21-10-2, because it shows the Appellee City of Custer and its developer failed to provide actual notice to the "persons potentially affected" by their choice of discharge location. *See* A.R.S.D. 74:52:05:13. As exhibited by the passage of the Local Ordinance, the people of Custer County clearly oppose the discharge location unilaterally chosen by

Appellee City of Custer and its developer. As such, Section 21-10-2 does not protect Appellee City of Custer and its developer's unilateral choice of location discharge from the force of the Local Ordinance. The Local Ordinance is not preempted under Section 21-10-2 and must be enforced.

Appellees' Response Brief attempts to repackage Appellant's position, by asserting that Appellant is attempting to contest DANR's permit or the processing power DANR is afforded for the same. However, Appellees miss the point. Appellant is challenging the unilateral choice of French Creek for the discharge location. Neither DANR's permit nor their permit processing power dictates that DANR chooses locations for discharge. Rather, Appellee City of Custer and its developer made that unilateral decision. The Local Ordinance declares the discharge location a nuisance. In addition, Appellees' failure to provide "actual notice" to the "persons potentially affected" by choosing French Creek as the project's discharge location prevents Appellees from receiving the benefit of SDCL § 21-10-2. As such, Appellant requests this Court hold that the Local Ordinance is enforceable and not preempted by State law.

B. Appellees should be Estopped from Asserting the Local Ordinance is Unenforceable, because Appellant Reasonably Relied on Appellees' Guidance to Its Detriment.

Appellees should be estopped from asserting the Local Ordinance is preempted[3], because Appellant reasonably relied on Appellee Custer County and its Board regarding the process that led to the passage of the Local Ordinance. *See Even v. City of Parker*, 1999 S.D. 72, ¶ 21, 597 N.W.2d 670, 676. The preemption issue Appellees now assert should have been resolved prior to Appellant's detrimental reliance[4] on Appellee Custer County's guidance of how to pass the Local Ordinance. At the very latest, Appellees should have challenged the Local Ordinance prior to the canvass of the election returns and certification of the election results. *See Even*, 1999 S.D. 72, ¶ 14, 597 N.W.2d at 676. Instead, Appellees created "an objectively reasonable impression" that if Appellant complied with the statutory process governing the Local Ordinance, it would be enforceable. *Id.* As such, Appellees should be estopped from asserting that the Local Ordinance is unenforceable.

---

[3] Appellees' position on estoppel is carried by its position that the Local Ordinance is preempted by State Law. (*See e.g.* Appellees' Response Brief at pgs. 17-22.) However, as discussed *supra*, the Local Ordinance is not preempted by State Law. As such, Appellant's position on preemption also applies to Appellees' estoppel position relying on preemption.

[4] As discussed in its initial Brief, Appellant relied on Appellee Custer County to employ resources, time, money, manpower, and their vote to place the nuisance ordinance on the ballot.

Appellees take issue[5] with the application of *Federal Land Bank of Omaha v. Houck* and *A-G-E Corporation v. State* to the case at bar by arguing neither case applies "in situations where the actions of local government are prohibited by State law." (*See* Appellees' Response Brief at pg. 20.) Neither case discusses or holds to Appellees' proposition nor do Appellees provide a citation to authority stating the same. Regardless, both cases apply to the case at bar because estoppel has its basis in election ratification, 4 N.W.2d 213, 218-219 (S.D. 1942), and estoppel prevents parties from taking inconsistent positions that cause detrimental reliance of another party, 2006 S.D. 66, ¶ 32, 719 N.W.2d 780, 790. Both cases exhibit that Appellees should be estopped from asserting the Local Ordinance is preempted by state law.

III. CONCLUSION

Appellant requests this Court reverse the lower court's ruling. The Local Ordinance is not preempted by State law and is enforceable. As such, Appellant's Petition for a Writ of Mandamus should be granted.

---

[5] Appellees' use of the *Thom* decision is unavailing, (*See* Appellees' Response Brief at pgs. 19-20), because Appellant is not asserting waiver or latches theories and has also provided precedent in *Even* that deals directly with elected officials taking inconsistent positions and citizens detrimentally relying on the elected officials' initial position. *See Even*, 1999 S.D. 72, ¶ 14, 597 N.W.2d at 676.

IV. CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Reply Brief contains 2,349 words and 15,016 characters. I have relied on the word and character count of our processing system used to prepare this Reply Brief. The original Appellant's Reply Brief and all copies are in compliance with this rule.

Dated this 4th day of March, 2024.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: /s/ Conor P. Casey

Steven C. Beardsley
Conor P. Casey
P.O. Box 9579
Rapid City, SD 57709
Tel: (605) 721-2800
E-mail: sbeards@blackhillslaw.com
ccasey@blackhillslaw.com
Attorneys for Plaintiff/Appellant

V. CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2024, I electronically filed the foregoing Appellant's Reply Brief and sent one copy of it, upon acceptance of the Court, via U.S. Mail, first-class postage prepaid to:

Richard M. Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City, SD 57709

I further certify that on the 4th day of March, 2024, I electronically filed the foregoing Appellant's Reply Brief and sent the original of it via U.S. Mail, first-class prepaid, upon acceptance of the Court, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: /s/ Conor P. Casey
Conor P. Casey