IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31074

VIVOS XPOINT INVESTMENT GROUP, LLC,	)
Appellant,	)
v.	)
DANIEL SINDORF,	)
Appellee.	)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

Filed:

NOTICE OF APPEAL FILED: May 1, 2025

The Honorable Scott Roetzel, Circuit Court Judge, presiding

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout Appellant's Brief, Plaintiff/Appellant Vivos xPoint Investment Group, LLC will be referred to as "Vivos" or "Appellant" interchangeably. "Vivos xPoint" is the name of the physical location of the survivalist community. Appellee, Daniel Sindorf will be referred to as "Appellee" or "Sindorf" interchangeably. The settled record is denoted "SR," follow by the appropriate pagination. The April 4, 2025, Motions Hearing will be denoted "MR" followed by the appropriate citation to the record.

JURISDICTIONAL STATEMENT

The trial court, the Honorable Scott A. Roetzel presiding, issued an Order Granting Defendant's Motion for Summary Judgment on April 24, 2025. SR. 1030. Notice of Entry thereof was filed on April 29, 2025. SR. 1033. Appellant timely filed its Notice of Appeal on May 1, 2025. SR. 1038.

STATEMENT OF THE ISSUES

I. WHETHER VIVOS' ABILITY TO "CHANGE OR MODIFY" THE *RULES*, MAKES THE *LEASE* ILLUSORY?

The trial court erroneously concluded the Lease was illusory.

Endres v. Warriner, 307 N.W.2d 146, 148 (S.D. 1981)

Cordry v. Vanderbilt Mortg. & Fin., Inc., 445 F.3d 1106, 1110 (8th Cir. 2006)

Nygaard v. Sioux Valley Hosps. & Health Sys., 2007 S.D. 34, ¶ 20, 731 N.W.2d 184, 19

STATEMENT OF THE CASE AND FACTS

Vivos[1] is the entity that owns the survival community, Vivos xPoint, that consists of 575 decommissioned military bunkers outside of Edgemont, South Dakota. *Vivos xPoint*, (https://www.terravivos.com/vivosxpoint.php (last visited June 25, 2025). The Black Hills Army Base military bunkers were originally built by the Army Corps of Engineers as a fortress to store bombs and munitions, from 1942 to 1967, when the base was completely retired. *Id.* The Army then sold the property to the City of Edgemont, which in turn sold it to local cattle ranchers. *Id.* Since 1967 the bunkers sat empty until Vivos purchased the property and repurposed the bunkers. *Id.* The bunkers are leased to individuals to be used as a primary residence or as survival shelter in the event of catastrophic event. *Id.*

Sindorf was one of the many individuals who decided to lease a bunker from Vivos. Prior to moving to Vivos xPoint, Sindorf worked for the United States Government and in that capacity, he ensured that "contracts include[ed] key provisions or language they needed to." SR. 1008. Sindorf also possesses an MBA with an emphasis on contracts. SR. 1008.

On July 19, 2020, Vivos and Sindorf executed the Vivos xPoint Bunker Structure & Land Lease (hereinafter "Lease"). SR. 3. (Complaint). Sindorf's leased bunker is 10755 Bunker Road, F-1202, Edgemont, South Dakota 57735. SR. 3. The Lease includes two addendums; Addendum A is a description of property and Addendum B is the Vivos xPoint Community Rules and Regulations (hereinafter "Rules"). SR. 3. (Complaint – Lease).

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[1] Vivos is a California based company that features survivalist shelters for sale or lease in South Dakota (Vivos xPoint), Indiana (Vivos Indiana), Europe (Vivos Europa One), a DNA Vault and has been featured by Fox News, CNN, Business Insider, Forbes, Netflix, History Channel, BBC, National Geographic Channel, HBO, The New York Times, Vice, and the Atlantic. *Vivos xPoint News*, https://www.terravivos.com/news.php (last visited June 25, 2025).

The clauses within the Lease of significance to this appeal are as follows.

Paragraph 10 of the Lease, "Vivos xPoint Community Rules and Regulations" provides:

> The Vivos xPoint Community Rules and Regulations are attached hereto as Addendum "B", and they, and any future amendments thereto, are expressly made a part of the Lease Agreement, and Bunker Lessee agrees to abide by and comply with all such rules and regulations.

SR. 3. (Complaint – Lease, ¶ 10, p. 8). Paragraph 11 of the Lease, "Modification of the Community Rules and Regulations" states:

> **Vivos may change or modify the Vivos xPoint Community Rules and Regulations at any time,** subject to providing the Bunker Lessee a minimum of Thirty (30) Days written notice prior to the effective date of any changes or modification.

SR. 3. (Complaint – Lease, ¶ 11, p. 8-9) (emphasis added). Paragraph 22 "Miscellaneous Conditions and Agreements" of the Lease, within that, paragraph a., as well as the advisement above the signature block, includes the following language:

> a. Entire Agreement. This Lease Agreement contains the entire agreement and understanding between the parties. There is no other oral or written understanding, or representation, nor any other terms or conditions that either party has relied upon, including any Vivos advertising, promotional or website material or information, media information or any representation, express or implied, that is not contained in this Lease Agreement. **This Lease Agreement cannot be changed or modified except by written agreement by the Parties.**
>
> VIVOS AND BUNKER **LESSEE HAVE CAREFULLY READ AND REVIEWED THIS LEASE AGREEMENT AND EACH TERM AND PROVISION CONTAINED HEREIN AND, BY EXECUTION OF THIS LEASE AGREEMENT, SHOW THEIR INFORMED AND VOLUNTARY CONSENT THERETO.** THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS LEASE AGREEMENT IS EXECUTED, THE TERMS OF THIS LEASE ARE COMMERCIALLY REASONABLE, DO NOT REPRESENT A CONTRACT OF ADHESION, AND EFFECTUATE THE INTENT AND PURPOSE OF VIVOS AND BUNKER LESSEE WITH RESPECT TO THE LEASED BUNKER AND LEASED LAND AREA.

SR. 3. (Complaint – Lease, ¶ 22, p. 13, 14) (emphasis added).Lastly, within Addendum B, of the Rules:

> The following Rules and Regulations shall inform and guide the Bunker Lessees in dealing with each other in connection with the use, access and operation their Bunker, Site, the Property and the Community.
>
> **These Rules and Regulations are established to keep the Vivos xPoint Community safe, secure, peaceful, harmonious, pleasant and comfortable for all Bunker Lessees and their guests, Vivos staff, employees, associates and management; and are hereby made a part of, and material condition to all Vivos xPoint Lease agreements**.
>
> By utilizing or entering upon the Property, Community or Site, and/or utilizing its services you hereby consent to comply with all of the following Rules and Regulations.

SR. 3. (Complaint – Lease, Addendum B "Rules" (Guiding Principals p.2)) (emphasis added).

Sindorf and Vivos executed the Lease on July 19, 2020, the Rules incorporated therein were effective from (last updated date), March 7, 2020. SR. 3. Vivos exercised its authority to modify the Rules in November of 2021 (hereinafter "2021 Rule Update"). SR. 898. Robert Vicino, (hereinafter "Vicino") the owner of Vivos stated, "[t]he addendums and changes were made for the safety and benefit of all members." SR. 912. Vivos updated the Rules with the specific language, "WEAPONS: B. No firearms or munitions may be discharged or brandished within the Community, other than in designated and posted shooting area(s), subject to the posted rules and regulations at the shooting range(s). SR. 898. The only change from the 2020 rules to the 2021 Rule Update is the phrase "or brandished." Sindorf admitted receipt of the 2021 Rule Update via email November 15, 2021. SR. 898.

On July 26, 2023, an altercation with Sindorf and two other Vivos members: Stephanie Dundas (hereinafter "Dundas") and J.R. Rodriguez (hereinafter "Rodriguez") occured. SR. 3. Sindorf rode his motorcycle outside the bunker (F-1201) immediately

next to his bunker (F-1202), which was being "built out"[2] by Dundas and Rodriguez. SR. 676. Vivos contends based on Dundas' affidavit, Sindorf rode his motorcycle around the bunker multiple times, which was unnecessary as he had alternative methods of egress and ingress to his bunker but based on prior correspondence involving "off-leash" dogs,[3] he wanted an altercation to occur. SR. 676. Outside the bunker multiple dogs were tethered to leashes outside of the bunker with runs of the leash in varying length. SR. 676. Sindorf stopped his motorcycle and drew a firearm, pointing it at Dundas. SR. 676. Dundas stated she felt threatened for her life. SR. 676. Sindorf contended he was only protecting himself from the potential of a dog attack. SR. 992.

Vivos' knowledge of the altercation was delayed, but upon learning of the altercation, Vivos sent Sindorf a Notice to Quit on April 30, 2024. SR. 3. Vivos commenced a Forcible Entry and Detainer (hereinafter "FED") action in Fall River County, Circuit Court of the Seventh Judicial Circuit against Sindorf May 17, 2024. SR. 3. The FED action was based Sindorf's violation of the 2021 Rule Update regarding brandishing a firearm. SR. 3.

Sindorf filed an Answer and Counterclaim on July 17, 2024, which denied the Complaint and included the following counterclaims: (1) Breach of Contract, (2) Return of Advanced Rent / Unjust Enrichment, (3) Declaratory Judgment. SR. 40. Sindorf filed

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[2] Vivos leased the bunkers as just the concrete shell, lessees could either hire Vivos to build out the bunker into livable accommodations or do the work themselves. All bunkers feature a standard 26.5 foot interior floor width, with lengths of 60 feet and 80 feet, each with a 12.5 foot high ceiling to the top of the interior arch. Protection is mitigated for virtually all known threats as each bunker includes a massive existing concrete and steel blast door, that seals to stop any water, air or gas permeation; air and exhaust ventilation shafts, and a secondary emergency exit. *Vivos xPoint Shelters*, https://www.terravivos.com/shelters.php (last visited June 25, 2025).

[3] Sindorf had complained to Vivos about off-leash dogs to Vivos on July 9, 2021, and December 3, 2021. SR. 678. Sindorf again complained to Vivos about off-leash dogs on July 23, 2023, three (3) days prior to the altercation in question. SR. 678. Sindorf stated to Vivos on July 23, 2023, "my wife just got charged by a dog belonging to Vivos employees working in F1201 (the same bunker where the altercation occurred), forcing her to retreat back up the hill. This bullshit with the loose dogs has gotten completely out of hand." SR. 678. Sindorf stated, "[h]e has been attacked by dogs 50 or 100 times." His definition of "attack" is "when a dog comes running straight at [him], and he's barking or drooling, or his ears are laid back, and he's looking like he wants to bite me." SR. 678.

for Default Judgment against Vivos on September 9, 2024. SR. 52. Vivos replied to the Motion for Default Judgment and filed a Motion to Dismiss Sindorf's Answer and Counterclaims. SR. 74, 77, 90, 92. Sindorf additionally filed a Motion for Jury Trial on October 18, 2024. SR. 108. A hearing on the motions was held October 25, 2024. The circuit court denied all the motions and scheduled a jury trial for January 28-30, 2025, in Fall River County. SR. 167, 169, 175.

On December 10, 2024, Vivos filed an Offer of Judgment wherein it would pay Sindorf the sum of $3,000 "on all causes of action in the Answer and Counterclaim." SR. 243. Based on two news articles which circulated locally as well as nationally late December 2024, regarding the basis of the FED action and other unfavorable assertions in which Sindorf and his counsel were interviewed, Vivos filed a Motion for Change of Venue.[4] SR. 422. Ultimately, considering the heavy pretrial motions in limine, the circuit court cancelled the jury trial on its scheduled dates and scheduled January 29, 2025, as a motions hearing. SR. 473. (Memorandum).

On January 27, 2025, the circuit court, sua sponte, upon further review of Vivos' Motion to Dismiss the Counterclaims, which it previously denied on October 31, 2024, reversed itself, issuing an Order to Vacate that denial on the basis it lacked subject matter jurisdiction. SR. 543. A subsequent Order Granting Plaintiffs Motion to Dismiss, dismissing all the counterclaims alleged by Sindorf was issued that same date. On January 29, 2025, the circuit court addressed the pending pretrial motions in limine and set the jury trial for June 11-13, 2025.

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[4] *See* Bart Pfankuch, *Trouble in 'prepper' paradise: Bunker residents raise financial, safety concerns at Igloo, SD site,* SOUTH DAKOTA NEWS WATCH (December 23, 20204), https://www.sdnewswatch.org/igloo-south-dakota-prepper-bunker-vivos-xpoint/; Bart Pfankuch, *Move into SD Bunker backfires on family seeking a new life,* South Dakota News Watch (December 30, 20204), ://www.sdnewswatch.org/bunker-community-igloo-south-dakota-vivos/.

On February 7, 2025, Sindorf filed "Defendant's Motion for Dismissal" and "Defendant's Brief in Support of Defendant's Motion for Summary Judgment/Dismissal." SR. 566, 569. Vivos filed for Application for Taxation of Costs, Affidavit of Costs and Disbursements, Application for Surety, Motion for Summary Judgment, SUMF (affidavit of Robert Vicino, Affidavit of Stephanie Dundas), Affidavit of Eric Schlimgen and corresponding notices of hearing, March 7 and 10, 2025. SR. 649, 653, 663, 655, 670, 672, 674, 684, 698. Vivos argued Sindorf's request for a jury trial unduly delayed the disposition of FED action well past the fourteen (14) days allowed by SDCL § 21-16-7 and he should have to post a surety. SR. 665. Lastly, Vivos was the prevailing party defined by SDCL § 15-17-37, as Sindorf's counterclaims were dismissed and it should recover disbursements to date, with the ability to request additional disbursements during continued litigation. SR. 649.

A motions hearing was held before the circuit court at the Fall River County Courthouse on April 4, 2025, regarding the competing motions for summary judgment as well as Vivos' taxation and surety motions. Sindorf's counsel argued, "for instance, my [Sindorf] paid an up front $35,000 rent payment. Vivos can modify the contract such that he now owes a million dollars a day, and that's allowable under the contract modification clause." MH. 5:11-14. Continuing, "[Vivos] could modify the contract to say anyone named Mr. Sindorf is not allowed on the property, yes, that's contrary to the lease, but the modification clause does not say [Vivos] can[not] modify it now contrary to the terms that are already written . . . It is a universal ability for Vivos to modify the contract without any recourse for [Sindorf]." MH. 5:17-24. Again, persisting, "s[s]o if you look at this case, Vivos could say, like I said, no one named Mr. Sindorf is allowed. That effectively nullifies that 99-year lease that Mr. Sindorf is a party to and basically makes it so while Mr. Sindorf is bound to this contract, Vivos is not, right. And so in this case, what Vivos

did is they changed the terms of the contract after it was signed by the parties and is now attempting to evict Mr. Sindorf due to these contract changes." MH. 6:16-24.

Lastly, Sindorf's counsel reasoned, "[s]o, you know, [Sindorf] do[esn't] have to wait for [Vivos] to -- because these changes, what Vivos is going to say is, yeah, they're reasonable. Well, it doesn't matter if the changes are reasonable or not because really it's not the issue of the changes. It's the issue of their ability to unilaterally change the contract that's the issue, right, because what it does is it forces Mr. Sindorf to have to comply with the terms of the contract, but Vivos – Vivos, their duties are illusory. They don't have any duties at all, because they can change those duties at any time unilaterally. If they want to stay in the contract, they can. If they want the contract to end, they can end it at any time." MH. 11:6-18.

Vivos' counsel replied, "[i]f we're looking at bargaining power, Mr. Sindorf has a master's in contracts. He's well aware of what he's signing. And the Court was right; this lease was signed July 19[] of 2020. The amendment was emailed, and we've included the receipt of the email from Mr. Sindorf on November 15 of 2021. The incident for the eviction happened two years later on July 26 of 2023. And the first time that this issue of an illusory lease is being raised or is raised before the Court was February 7, 2025. So, it has been four years from the time that lease was amended to the first time any objection or argument that it's invalid was raised. And during those four years Mr. Sindorf, who did have the ability to object and raise issues with other parts, and he did about dogs, and he made his objections well known. He did have the option to assign his lease, to sell his bunker, to say, I don't agree with this amendment. And it's only the rules and regulations. It's not the ability to amend the whole lease." MH. 14:1-22.[5]

[5] Vivos only addresses Sindorf's positions and arguments raised before the circuit court regarding the illusory contract claim without knowing specifically which positions carried what weight in from the circuit court. *See, e.g., Hall v. State ex rel. S. Dakota Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26–27;

The circuit court only addressed the motions for summary judgment, holding the other motions in abeyance and took the matter under advisement. On April 24, 2025, the circuit court issued its Order: Granting Defendant's Motion for Summary Judgement, stating:

> IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is GRANTED because there are no genuine issues of material fact, as the 99-year lease is an illusory contract that Plaintiff can unilaterally modify the terms of at any time with no recourse for Defendant. As Such, Defendant is entitled to judgment as a matter of law. The Court need not address the other arguments raised by Defendant in his Motion.
>
> IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED.

SR. 1030. Notice of Entry of Order was filed April 29, 2025. SR. 1033. Vivos' Notice of Appeal and Docketing Statement were filed May 1, 2025. SR. 1038, 1040.

STANDARD OF REVIEW

"[This Court] review[s] grants of summary judgment under the de novo standard of review." *Betty Jean Strom Tr. v. SCS Carbon Transp., LLC*, 2024 S.D. 48, ¶ 21, 11 N.W.3d 71, 81–82, *reh'g denied* (Oct. 9, 2024) (quoting *Bialota v. Lakota Lakes, LLC*, 2024 S.D. 7, ¶ 15, 3 N.W.3d 454, 459) (citation omitted). [This Court] gives[s] no deference to the circuit court's legal conclusions. *Klein v. Sanford USD Med. Ctr.*, 2015 S.D. 95, ¶ 20, 872 N.W.2d 802, 808. In considering a trial court's grant or denial of summary judgment, this Court will affirm *only if all legal questions have been decided correctly. Muhlbauer v. Est. of Olson*, 2011 S.D. 42, ¶ 7, 801 N.W.2d 446, 448 (citing *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 15, 796 N.W.2d 685, 692–93) (internal citations omitted) (emphasis added).

Action Mech., Inc. v. Deadwood Historic Pres. Comm'n, 2002 SD 121, ¶ 50, 652 N.W.2d 742, 755 ("An issue not raised at the trial court level cannot be raised for the first time on appeal."); *Sedlacek v. S.D. Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D.1989) (stating that where a party "failed to develop the record" on an issue "we deem that issue abandoned"); *Fortier v. City of Spearfish*, 433 N.W.2d 228, 231 (S.D.1988).

Vivos acknowledges there are no questions of fact in dispute regarding the parties entering the Lease, the Lease language itself, the subsequent 2021 Rule Update, and basis of the FED action as a violation of the 2021 Rule Update without contesting the validity or truthfulness of what occurred that date. The only issue before this Court is whether the circuit court decided the legal issue correctly in granting summary judgment in favor of Sindorf.

ARGUMENT

I. The Circuit Court Errored, Holding the Entire *Lease* is Illusory, it Misconstrued Vivos' Ability to Unilaterally Modify Only the *Rules* and was Subject to the Principals of Good Faith and Fair Dealing.

A. Standard of Review of Contract Interpretation Within a Lease.

The questions on appeal involve the interpretation of the lease. *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 9, 845 N.W.2d 911, 914. A lease is a contract, so contract principles govern its interpretation. *Id.* at 914-15. *See Icehouse, Inc. v. Geissler,* 2001 S.D. 134, ¶ 21, 636 N.W.2d 459, 465. Contract interpretation is a question of law that [this Court] review[s] de novo. *Poeppel v. Lester,* 2013 S.D. 17, ¶ 16, 827 N.W.2d 580, 584 (citation omitted). "The [circuit] court's interpretation of a covenant is a legal question which we review de novo." *Wilson v. Maynard*, 2021 S.D. 37, ¶ 14, 961 N.W.2d 596, 600 (quoting *Jackson v. Canyon Place Homeowner's Ass'n, Inc.*, 2007 S.D. 37, ¶ 7, 731 N.W.2d 210, 212).

B. The Leases' *Delineation of Authority is Commonplace Within South Dakota Lease Agreements.*

Facially, the Lease is self-evident regarding the rights, responsibilities, and authority of the parties. The Lease, aside from its length of time (99-years) and involving retired munitions bunkers is no different than the leases so many people enter, for example leasing an apartment or loft that will be "finished" in downtown Sioux Falls. The

Lease, like any other lease, defines the monetary obligations (rent), responsibilities of the parties (utilities/services), term of occupancy (lease term), and includes a community guideline addendum. Community guidelines are always included in leases and have routine terms, *i.e.* no loud noises after 10:00 p.m., no large dogs, etc. This Lease can truly be understood on that basic level—it is as simple as every other lease and so should the FED ability as well. *See e.g. Burgi v. E. Winds Ct., Inc.*, 2022 S.D. 6, ¶ 23 (Lease imposes upon the tenant "all responsibilities for pets" and is best read as a promise by the tenant to keep only "non-vicious, safe" pets on the premises.); *Meadowland Apartments v. Schumacher*, 2012 S.D. 30, ¶ 9, 813 N.W.2d 618, 621 (Lease contained code of conduct agreement); *Icehouse, Inc. v. Geissler*, 2001 S.D. 134, ¶ 13, 636 N.W.2d 459, 464 (lease language specifies access and responsibilities of parties).

In the Lease, there is no land interest for Sindorf or anything else delineating this Lease from any other residential lease within South Dakota. However, Sindorf has previously argued the 99-year duration, somehow "changes" it; it does not, but the following exercise in analogy of rights and interests is to pre-emptively foreclose that argument. *See City of Vermillion v. Hugener*, 75 S.D. 106, 109, 59 N.W.2d 732, 734 (1953) (Citing 32 Am.Jur., Landlord and Tenant, § 64.) (long term leases such as for ninety-nine years are valid under the common law).

Another analogy to draw with the 99-year Lease between Vivos and Sindorf is to a restrictive covenant, such as a Homeowners Association (hereinafter "HOA") and the authority and restrictions associated therewith. As a basis of this position and authority to support it, in South Dakota, "servitude[s] should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument[.]" *Wilson v. Maynard*, 2021 S.D. 37, ¶ 38, 961 N.W.2d 596, 605 (Kern Dissent) (citing *Brandt v. Cnty. of Pennington*, 2013 S.D. 22, ¶ 13, 827 N.W.2d 871, 875) (quoting Restatement

(Third) of Property (Servitudes) § 4.1(1) (2000)). "The rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often-expressed view that servitudes should be narrowly construed to favor the free use of land." *Id.* (quoting Restatement (Third) of Property (Servitudes) § 4.1 cmt. a (2000)). This rule "is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources. The rule is supported by modern case law." *Id.*

Comparable to a HOA where bylaws govern the internal operations within the community (how votes are taken, land interests defined, legal descriptions, dues, covenants amended: committee, one-vote per property, developer control) – that is the role of the Lease – and the covenants primarily regulate the property use and standards within the community – that is the Rules (Addendum B. to the Lease). The difference is, however, that the parties mutually can consent to the terms of governance and rights they retain, and they have done so within the Lease. The parties have agreed in this self-imposed servitude of a lease with community guidelines, that only Vivos can amend the community guidelines (Rules) and enforce them. It is commonplace as times change for HOAs to amend or change their covenants to adjust to societal changes *i.e.* Airbnb, or VRBO restrictions on short-term guests. *See Wilson v. Maynard*, 2021 S.D. 37, ¶ 8, 961 N.W.2d 596, 599 (Wilson filed for declaratory judgment, seeking a determination that Maynards' use of the Property for short-term rental income was prohibited by the Covenants.). Sindorf knew that only Vivos has the authority to amend the Rules (covenants) and all parties have agreed to be bound by the terms of the Lease (bylaws) which provides language to guide Vivos in its exercise of authority to amend the Rules. *See* SR. 3. (Complaint – Lease, ¶ 10, p. 8; ¶ 11, p. 8-9; ¶ 22, p. 13-14).

Sindorf, who has an MBA with an emphasis on contracts, knew what rights and authority each party within the Lease retained or surrendered, and he agreed to those positions. SR. 1008. A lease does not have to provide equal ability/authority of a contracting party to act or not act – most leases such as those for apartments do not! *See i.e. Knight v. Madison*, 2001 S.D. 120, ¶ 6, 634 N.W.2d 540, 542 (noting a holder of a private easement, has the right to limited use or enjoyment of the property "that is not inconsistent with the general use of the property by the owner); *Abbott v. Nampa School Dist. No. 131,* 119 Idaho 544, 808 P.2d 1289, 1293 (1991).

C. *The* Lease *Expressly States the Restrictions and Authority of the Parties; the Parties Agreed to be and are Bound to Those Terms.*

A lease is a contract, so contract principles govern its interpretation. *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 9, 845 N.W.2d 911, 914–15. "A contract is an agreement to do or not to do a certain thing." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22, 714 N.W.2d 884, 892 (quoting SDCL § 53–1–1). The existence of a valid contract is an issue of law to be determined by the court. *Id.* (citing *Werner v. Norwest Bank South Dakota, N.A.*, 499 N.W.2d 138, 141 (S.D.1993)) (citing *Mid–America Mktg. Corp. v. Dakota Indus.*, 289 N.W.2d 797 (S.D.1980)). "An express contract results when the parties mutually express an intent to be bound by specific terms and conditions." *Id.* (quoting *Werner,* 499 N.W.2d at 141) (citing *Van Zee v. Witzke,* 445 N.W.2d 34 (S.D.1989)).

The Lease between Vivos and Sindorf is an express contract, and the parties are bound by the specific terms and conditions. *Id.* The "specific terms and conditions" binding the parties include:

Paragraph 10 of the Lease, "Vivos xPoint Community Rules and Regulations" provides:

> The Vivos xPoint Community Rules and Regulations are attached hereto as **Addendum "B"**, and they, **and any future amendments thereto, are expressly made a part of the Lease Agreement, and Bunker Lessee agrees to abide by and comply with all such rules and regulations.**

SR. 3. (Complaint – Lease, ¶ 10, p. 8) (emphasis added). Paragraph 11 of the Lease, "Modification of the Community Rules and Regulations" states:

> **Vivos may change or modify the Vivos xPoint Community Rules and Regulations at any time,** . . . .

SR. 3. (Complaint – Lease, ¶ 11, p. 8-9) (emphasis added). Paragraph 22 "Miscellaneous Conditions and Agreements" of the Lease, within that, paragraph a.:

> . . . . **This Lease Agreement cannot be changed or modified except by written agreement by the Parties.**

SR. 3. (Complaint – Lease, ¶ 22, p. 13) (emphasis added).

D. *The* Lease *is not Illusory, Modification is Restricted only to the* Rules, *Not the Material Terms of the* Lease.

The breadth and scope of examination by this Court of illusory contracts is brief. In *Endres v. Warriner* regarding the issue of illusory contracts this Court held although purchaser's promise to buy land was conditioned upon completion of sale of land, purchaser impliedly promised to use his best efforts to complete purchase of quarters and, thus, there was adequate consideration. 307 N.W.2d 146, 148 (S.D. 1981). Appellants in *Endres* argued that appellee could have unilaterally abrogated the contract without recourse to appellants by virtue of the following provision of the contract:

> It is agreed that this contract is conditioned upon the completion of the sale of (the siblings' quarters) to the Purchaser herein. In the event that said sale has not been completed prior to January 1, 1980, or for any reason cannot be completed, this contract shall be null and void.

Id. Appellants argued that under the previously quoted provision of the contract, appellee could have refused to perform the siblings' contract and thus relieved himself from any obligation under the contract in question here. *Id.* at 148-89. Appellee's promise to buy

Jesse Warriner's land was conditioned upon the completion of the sale of the siblings' land. *Id.* at 149. In *Endres,* appellee impliedly promised to use his best efforts to complete the purchase of the siblings' quarters. *Id.* The Court held that there was adequate consideration. *See also Petroleum Refractionating Corp. v. Kendrick Oil Co.*, 65 F.2d 997 (10th Cir. 1933).

The Eighth Circuit has provided illuminating authority. "The phrase 'illusory promise' means 'words in promissory form that promise nothing.' *Cordry v. Vanderbilt Mortg. & Fin., Inc.*, 445 F.3d 1106, 1110 (8th Cir. 2006). An illusory promise is not a promise at all and cannot act as consideration; therefore no contract is formed." *Id.* (quoting *Magruder Quarry & Co. v. Briscoe,* 83 S.W.3d 647, 650 (Mo.Ct.App.2002)) (quoting Corbin on Contracts § 5.28). However, it is well-settled that "an implied obligation to use good faith is enough to avoid finding a contract null and void due to an illusory promise." *Id.* at 650–51. For example, *Magruder Quarry* held that a quarry lease was not void as illusory, even though the lessees had the discretion not to mine any rock at all, because the lessees were under an implied covenant of good faith and fair dealing to use reasonable efforts to mine rock. *Id.* at 650–52. Similarly, in the instant *Codry v. Vanderbildt,* Vanderbilt was bound by the implied covenant of good faith and fair dealing to use reasonable efforts to finance used homes for Cordry, as the covenant is implied in all contracts – thus the agreement is not illusory. *Id.* at 651.

Contrary to the arguments of Sindorf's counsel[6] and in conformity with South Dakota precedent, the Lease restricts the promisors (Vivos') future actions to

[6] Sindorf's counsel at the Motion Hearing argued, "for instance, my client paid an up front $35,000 rent payment. Vivos can modify the contract such that he now owes a million dollars a day, and that's allowable under the contract modification clause." MH. 5:11-14. Continuing, "[Vivos] could modify the contract to say anyone named Mr. Sindorf is not allowed on the property, Yes, that's contrary to the lease, but the modification clause does not say [Vivos] can[not] modify it now contrary to the terms that are already written. . . . It is a universal ability for Vivos to modify the contract without any recourse for [Sindorf]. MH. 5:17-24.

modifications only of the Rules and includes guiding principals for those modifications. the purposes of the Rules. *See Endres v. Warriner*, 307 N.W.2d 146, 149 (S.D. 1981)(A promise is illusory "only if it in no way limits the promisor's future action."). The words in promissory form (Lease) have meaning attached to them as required. Moreover, the implied covenant of good faith and fair dealing is enough to avoid finding a contract null and void due to an illusory promise. *Cordry v. Vanderbilt Mortg. & Fin., Inc.*, 445 F.3d 1106, 1110 (8th Cir. 2006).

The plain language within the Lease gives the promissory form meaning as to limitation. *See* SR. 3. (Complaint – Lease, ¶ 22, p. 13-14) (This Lease Agreement cannot be changed or modified except by written agreement by the Parties). The material terms within the Lease,[7] **cannot be changed or modified except by written agreement by the parties**. SR. 3 (Complaint – Lease) (emphasis added). Again, the Lease only authorizes Vivos to "modify or change" the Rules. *Id.* (Complaint – Lease, ¶ 11, p. 8-9). The Rules are incorporated as part of the Lease, insofar as it is necessary to be enforceable if a rule violation occurs. The Lease nor the Rules Nor ability to modify the Rules constitute an illusory promise.

E. *Vivos' Ability to Modify the* Rules *are Subject to its Self-Imposed "guiding principals" and the Obligation of Good Faith and Fair Dealing.*

Continuing to rebut the argument of Sindorf's counsel, that Vivos could make a rule "no one named Sindorf can live at Vivos," Vivos will explain why that is untrue. MH. 5:17-24. Vivos is allowed to modify or change the Rules, however, its scope of

[7] Property Access; Rent and Other Charges; Use of Bunker Structure; Maintenance of Structure and Lease Land Area; Responsibilities of Bunker Lessee; Responsibilities of Vivos; Access by Vivos; Nondiscrimination; Community Rules and Regulations – incorporated therein; Modification of the Community Rules and Regulations; Increase in Land Lease Rent or Common Area Fees; Termination of This Lease Agreement by Bunker Lessee; Termination of This Lease Agreement for Bunker Lessee's Defualt (sic); Abandonment; Assignment; Indemnification; As-is, Where-is, With All Faults; Dispute Resolution; Judicial Relief; Notice; Miscellaneous Conditions and Agreements.

modification is dictated by the objectives within the Rules, any modifications or changes must be to further those objectives. Within Addendum B, the Rules:

> **These Rules and Regulations are established to keep the Vivos xPoint Community safe, secure, peaceful, harmonious, pleasant and comfortable for all Bunker Lessees and their guests, Vivos staff, employees, associates and management; and are hereby made a part of, and material condition to all Vivos xPoint Lease agreements.**

SR. 3. (Complaint – Lease, Addendum B "Rules") (emphasis added).

Vicino, stated, "[t]he addendums and changes were made for the safety and benefit of all members." SR. 912. The 2021 Rule Update was in accordance with the Guiding Principals within the Rules, "to keep the Vivos xPoint Community safe, secure, peaceful, harmonious and, pleasant and comfortable for all Bunker Lessees." SR. 3. (Complaint – Lease, Addendum B "Rules" p. 2. "Guiding Principals"). Beyond the self-imposed restraint of authority to modify or change the Rules (not Lease) in a wild manner as argued by Sindorf's counsel (*supra*), the South Dakota Supreme Court has restricted contracting parties to act in accordance with the benefits they have contracted for.

This Court has previously recognized that " '[e]very contract contains an implied covenant of good faith and fair dealing [that] prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract.' " *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 20, 731 N.W.2d 184, 193–94 (citing *Farm Credit Servs. of Am. v. Dougan,* 2005 SD 94, 704 N.W.2d 24) (quoting *Garrett v. BankWest, Inc.,* 459 N.W.2d 833, 841 (S.D.1990). The concept of good faith and fair dealing is also recognized in the analogous provision of SDCL § 57A–1–203 (UCC § 1–203): "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement." *Id.*

The meaning of covenant varies with the context of the contract. *Id.* ¶ 21 at 195. Ultimately, the duty "emphasizes faithfulness to an agreed common purpose and

consistency with the justified expectations of the other party." *Id.* (citing Restatement (Second) of Contracts § 205, cmt a (1981)). However, the duty of good faith and fair dealing "is not a limitless duty or obligation." *Id.* ¶ 22. "The implied obligation 'must arise from the language used or it must be indispensable to effectuate the intention of the parties.' " *Id.* (quoting *Sessions, Inc. v. Morton,* 491 F.2d 854, 857 (9th Cir.1974)). [This court] also recognized a limitation when the language of a contract addresses the issue. *Id.* The covenant of good faith does not create an amorphous companion contract with latent provisions to stand at odds with or in modification of the express language of the parties' agreement. *Id.* It is not a repository of limitless duties and obligations. *Id.* (citing *Farm Credit Services,* 2005 SD 94 at ¶ 9, 704 N.W.2d at 28) (citations omitted). Therefore, [this Court] explained that "[i]f the express language of a contract addresses an issue, then there is no need to construe intent or supply implied terms" under the implied covenant. *Id.* at ¶ 10 (citations omitted).

Vivos' ability within the Lease, paragraph 11, is subject to the covenant of good faith and fair dealing – like every other lease in South Dakota. The 2021 Rule Update was subject to and complies with the covenant of good faith and fair dealing. The 2021 Rule Update, as required, "emphasize[d] faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* Again, it is commonplace for leases as well as HOAs to have community guidelines or rule addendums, those provisions all must operate within the scope of good faith and fair dealing.

F. Multiple Courts have Permitted Unilateral Contract Modification Without deeming it Illusory.

Again, it stands to be noted, the *only* modification or change Vivos could make was to the Rules, not the Lease itself. Perhaps the lower court was unclear on the distinction between the Lease and the Rules and what authority exists to modify or change based on the arguments presented to it by Sindorf's counsel. *Supra.* MH: 11:8-18. Vivos "cannot decide if they want to stay in the contract or end it at any time" as argued. *Id.* That is untrue, both parties are bound to the contract. The scope and authority of modification *is only to the Rules,* subject to the scope of the directive of the rules (guiding principals), and good faith and fair dealing directives additionally. SR. 3. (Complaint – Lease, Addendum B "Rules") This unilateral modification is consistent with contractual modifications other jurisdictions have confirmed did not create an illusory, invalid contract.

Canteen v. Charlotte Metro Credit Union involves a contract between two parties that allowed for the unilateral change of contractual terms by one party upon notice to the other. 386 N.C. 18, 19, 900 S.E.2d 890, 892 (2024). In *Canteen,* the Credit Union amended its membership agreement to require arbitration for certain disputes. *Id.* at **3. Pursuant to the "Notice of Amendments" provision in the membership agreement, the Credit Union sent plaintiff notice of the amendment on three occasions. *Id.* The notices provided that members could opt-out of the amendment and included instructions on how to do so. *Id.* at **4. Plaintiff did not opt-out of the agreement to arbitrate and filed a class action complaint against the Credit Union. *Id.* at **5. Following the Credit Union's filing of a motion to stay the action and to compel arbitration, plaintiff argued that the "Notice of Amendments" provision made the Credit Union's consideration for the agreement illusory. *Id.* at **7 n. 3.

Relying on the California Court of Appeals' decision in *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 79 Cal.Rptr.2d 273 (1998), and the North Carolina Court of Appeals' decision in *Sears Roebuck and Co. v. Avery*, 163 N.C. App. 207, 593 S.E.2d 424 (2004), the Court held that "[c]hange-of-terms provisions permit unilateral amendments to a contract so long as the changes reasonably relate back to the universe of terms discussed and anticipated in the original contract." *Canteen*, 2024 N.C. LEXIS 347, at **16, 2024 WL 2338525. This is so because "changes which relate back to the 'universe of terms' of the original agreement are consistent with the covenant of good faith [and fair dealing]." *Id.* at **11 (citing *Sears*, 163 N.C. App. at 218, 593 S.E.2d 424).

In *Johnson v. Associated Milk Producers, Inc.*, the Iowa Supreme Court held that the principle of contract law allowing unilateral changes to at-will contracts upon reasonable notice applies to independent contractors as well as employees. 886 N.W.2d 384, 393–94 (Iowa 2016). When AMPI announced in July 2013 it was phasing out the $100 trip fees, Johnson could "accept the new conditions or quit." *Willets*, 433 N.W.2d at 62. Johnson's decision to continue hauling milk, "knowing the newly proposed terms, results in [his] acceptance as a matter of law." *Id.*[8]

[8] *See also Care Travel Co. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 990 (2d Cir.1991) (recognizing that if one party imposes a unilateral modification and the other party continues to perform, recovery for breach is precluded); *Martin v. Airborne Express*, 16 F.Supp.2d 623, 632 (E.D.N.C.1996) ("At any rate, Martin's decision to remain in AMR Distribution's employ after notification of the restructuring negates any related breach of contract claim."); *Kauffman v. Int'l Bhd. of Teamsters*, 950 A.2d 44, 48 (D.C.2008) ("[N]either party to at-will employment is bound to continue performance, and thus courts properly view future performance by each as valid consideration for the change in terms."); *Geary v. Telular Corp.*, 341 Ill.App.3d 694, 275 Ill.Dec. 648, 793 N.E.2d 128, 133 (2003) ("Plaintiff accepted the April 1996 modification to the compensation plan when he accepted payment of commissions under the April 1996 plan and continued employment.").

i. The public policy implications of the circuit court's decision that the Lease is illusory open a pandoras box on all leases and restrictive covenants that have "community guideline" addendums and controverts the implied duty of good faith and fair dealing.

The implication of this Lease being illusory and invalid are incredibly consequential from a public policy and pragmatic standpoint; nearly all HOA covenants and "community rule" addendums in leases will make all the existing contracts in South Dakota invalid. Often the "community rule" provisions with a lease need modification either based on situations the lessor has encountered personally (*i.e.* learning of a dangerous animal or supreme court addressing that liability) or societal changes such as individuals working from home. *See e.g. Burgi v. E. Winds Ct., Inc.*, 2022 S.D. 6, ¶ 23 (Interpreting the plain language of the pet provision, we conclude that it does not constitute a reservation of East Winds' authority to control dogs on the tenant's leased premises.).

Moreover, the implications on the case at issue present policy implications likely unthought through by Sindorf. If the entirety of the Lease signed by all Vivo xPoint members is invalid or unlawful from the outset those individuals are without lease, deed, or any recognizable property right to access their "bunker" or their improvements – they are trespassers as no lease would have ever existed. *See Nature's 10 Jewelers,* 2002 SD 80, 648 N.W.2d 804, 807. That result is not the intended result Vivos seeks to achieve.

Without this ability to modify the "community rules" a lessor would be prohibited in its ability to effectuate a continued compliance with the implied duty of good faith and fair dealing. For example, a lessor would be unable to amend addendums for "community rules" (not the underlying lease) which is required to keep up with changes in society that affect a lessee's ability to expect a continued "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Nygaard,* 2007 S.D.

34, ¶ 20, 731 N.W.2d 184, 193–94. For example, during Covid-19 many people started working from home, this created a situation that needed to be addressed regarding changes in quiet hours, what types of businesses could be "at home." Another change in society that required landlords to address so that lessees could continue to enjoy the premises they leased under the "justified expectations" was the surge of VRBO and Airbnb properties that fundamentally changed uses of complexes, *i.e.* people renting out unites and individuals having parties or using the space not in accordance with the community rules.

Fundamentally, a lessor as the property owner has the right and ability to control the conduct of the lessee to some degree within the community rules to limit risk, activities, etc. and the lessee has that ability to accept a lease which incorporates community rules that fight within their expectations to lease. Taking away a lessors ability to modify the community rules, especially when the modifications are within the scope and guidance of the lease principals, good faith and fail dealing, it prohibits *any* modification which is necessary for a lessor to maintain premises in accordance with new information/societal changes as well as continue to provide a space to the lessee that continues a "faithfulness to an agreed upon common purpose." *Id.*

ii. Sindorf not "without recourse" as the circuit court found.

Firstly, recourse would not have been necessary, as Sindorf now in opposition to the terms of the Lease – he could have just not signed the Lease. This was not signed under duress like an agreement to an ambulance fee, this Lease was a long-contemplated survivalist bunker contract Sindorf knowingly entered. The ability to modify was explicitly included and he acknowledges that.

As argued to the circuit court, Sindorf "did have the option to assign his lease, to sell his bunker" or he could have contested the 2021 Rule Update. MH: 14:14-18. As

noted *supra* Sindorf was more than comfortable making his grievances known with Vivos regarding the off-leash dogs and could have protested this 2021 Rule Update on either the principal of its ability to happen or the specific language it included—Sindorf did neither.

iii. Vivos asserts the Lease is not illusory, or void from the outset, however, *Per Arguendo*, even if the "modify or amend" clause is unenforceable, the remainder of the Lease is enforceable, and the Rules are incorporated as in place when the Lease was signed but are unmodifiable.

The circuit court Order: Granting Defendant's Motion for Summary Judgement, does not specify a statute or precedent it relied upon for this decision. The Order states "the 99-year lease is an illusory contract that Plaintiff can unilaterally modify the terms of at any time." SR. 1030. (emphasis added). The mere fact a lease is unilaterally modifiable does not equate to it being illusory. Moreover, *even if* this Court were to accept Sindorf's argument, the clause in question, paragraph 11, could be stricken from the Lease and the remainder of the Lease would remain valid. The Rules would be unamendable but applicable as incorporated in the Lease at the time the parties signed the Lease, those Rules would be included.

"A void contract is invalid or unlawful from its inception. It is a mere nullity, and incapable of confirmation or ratification." *Id.* (quoting *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶ 12, 648 N.W.2d 804, 807) (citation omitted). A voidable contract is valid unless "legally voided at the option of one of the parties." *Kroeplin Farms Gen. P'ship v. Heartland Crop Ins., Inc.*, 430 F.3d 906, 911 (8th Cir. 2005) (quoting *Nature's 10 Jewelers,* 2002 SD 80, 648 N.W.2d 804, 807); *see also* Restatement (Second) of Contracts § 7 (1981). However, "[w]here a contract has several distinct objects, one or more of which are lawful and one or more of which are unlawful in whole or in part, the contract is void as to the latter and valid as to the rest." *Hanna v.*

Landsman, 2020 S.D. 33, ¶ 34, 945 N.W.2d 534, 545 (quoting *Nature's 10 Jewelers,* 2002 SD 80, 648 N.W.2d 804, 807); SDCL § 53-5-4.

With this Lease, like in *Hanna,* "[i]mportantly, there is nothing unlawful on the face the parties' agreement. *Hanna*, 2020 S.D. 33, ¶ 35, 945 N.W.2d 534, 545. Additionally, there is nothing criminal or to circumvent statutory authority. The circuit court might not have fully grasped the distinction in what Vivos can unilaterally modify, *only* the Rules, not the Lease. The Lease can only be modified with mutual agreement. The distinction is one of massive significance.

iv. Additionally, *even if* this Court agrees that the Lease was illusory, Sindorf waived his ability to argue it is illusory.

Waiver is when "one in possession of any right, whether confirmed by law or contract, and with full knowledge of the material facts, does or forbears something inconsistent with the existence of the right or of his intention to rely on it." *Boxa v. Vaughn*, 2003 S.D. 154, ¶ 12, 674 N.W.2d 306, 311 (quoting *Phipps v. First Federal Savings and Loan*, 438 N.W.2d 814, 817 (S.D.1989)) (additional citations omitted). There are many instances when one could do something inconsistent with a known right without entering into an agreement to waive the remedies, rights and liabilities under the Act. *Id.* Waiver is established when it is shown that "one in possession of any right, whether confirmed by law or contract, and with *full knowledge of the material facts,* does or forbears something inconsistent with the existence of the right or of his intention to rely on it." *Id.* ¶ 15 (quoting *Phipps,* 438 N.W.2d at 817 (additional citations omitted)) (emphasis supplied).

Moreover, within the Lease the final paragraph above the signatory block provides:

> VIVOS AND BUNKER **LESSEE HAVE CAREFULLY READ AND REVIEWED THIS LEASE AGREEMENT AND EACH TERM AND PROVISION CONTAINED HEREIN** AND, **BY EXECUTION OF THIS LEASE AGREEMENT, SHOW THEIR INFORMED AND VOLUNTARY CONSENT THERETO**. . . .

SR. 3. (Complaint – Lease, ¶ 22, p. 14) (emphasis added).

Sindorf argues "such agreements are not enforceable under contract law *at their outset*" as such, Sindorf never should have signed, and/or should have objected in a timely manner, he did not. Sindorf signed the Lease with *full knowledge of the material facts,* did not forbear or act inconsistent with the existence of the right or of his intention to rely on it." *Boxa v. Vaughn*, 2003 S.D. 154, ¶ 12, 674 N.W.2d 306, 311 *Id.* ¶ 15. The Lease included language to catch this type of argument later and prohibit it – Sindorf should now be prohibited from asserting the Lease was illusory.

Sindorf executed the Lease July 19, 2020. If the Lease provision, paragraph 11, for modification of the Rules, was objectionable, or illusory immediately, Sindorf waived the right to object upon signing the Lease which included the advisement "LESSEE HA[S] CAREFULLY READ AND REVIEWED THIS LEASE AGREEMENT AND EACH TERM AND PROVISION CONTAINED HEREIN AND, BY EXECUTION OF THIS LEASE AGREEMENT, SHOW THEIR INFORMED AND VOLUNTARY CONSENT THERETO." SR. 3. (Complaint – Lease, ¶ 22, p. 14).

The 2021 Rule Amendment was provided to him November 15, 2021; **Sindorf first objected February 7, 2025 – over four years after the 2021 Rule update.** MH: 14:1-20; SR. 566 (emphasis added). Three years, two months, 23 days passed from when Sindorf received the email with the amended 2021 Rule Update till he claimed it was "illusory." SR. 566. Four years, six months, 19 days passed from when Sindorf signed the

Lease until he alleged it was "illusory." *Id.* Sindorf waived his right to assert the contract was illusory by the advisement within the Lease as well as/alternatively by failing to do so timely. *See Phipps v. First Federal Savings and Loan*, 438 N.W.2d 814, 817 (S.D.1989) (Waiver is established when it is shown that "one in possession of any right, whether confirmed by law or contract, and with full knowledge of the material facts, does or forbears something inconsistent with the existence of the right or of his intention to rely on it.").

v. Continuing, *even if* this Court agrees the Lease was illusory, Sindorf's continued use under the terms of the 2021 Rule Update constitute ratification of the amendment.

The Rules explicitly provided,

> **By utilizing or entering upon the Property, Community or Site, and/or utilizing its services you hereby consent to comply with all of the following Rules and Regulations.**

SR. 3. (Complaint – Lease, Addendum B "Rules") (emphasis added).

Even if the contract could be deemed defective or incomplete, this conduct constitutes ratification. *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 31, 709 N.W.2d 350, 358. A contract is ratified when "an act by which an otherwise voidable and, as a result, invalid contract is conformed, and thereby made valid and enforceable." *Id.* (quoting 17A CJS Contracts § 138 (1998)). *See also* Restatement (Second) of Contracts § 380 cmt. a (1981) (Ratification by Affirmance). Ratification can either be "express or implied by conduct." *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D.1986) (citation omitted). "In addition, failure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party." *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D.1987) (citations omitted). Like in *Ziegler*, Sindorf through his actions ratified the

Lease and he cannot now disaffirm the contract especially when doing so will result in prejudice to Vivos.

CONCLUSION

Vivos respectfully for the aforementioned reasons asks this Court to REVERSE the circuit court, as Vivos' unilateral ability to modify *only* the Rules, not the material terms of the Lease, is permissible, and not illusory.

Dated June 30, 2025

SCHLIMGEN LAW FIRM, LLC

By: _____

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66, Eric M. Schlimgen, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 31 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The footnotes are Times New Roman 10 point. The word processor used to prepare this brief indicates that there are a total of **31 pages, 9,353** words, and 38,217 characters (no spaces) in the body of the Brief.

ERIC M. SCHLIMGEN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 30, 2025, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed to:

Mr. J. Scott James
Southern Hills Law, PLLC
40 N. St. Ste. B
Custer, SD 57730
(605) 673-2503

Mr. Matthew McCoy
Custer Attorney, PLLC
220 N. 5th St.
Custer, SD 57730
(605) 673-3529

The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date written above.

ERIC M. SCHLIMGEN

APPENDIX A
TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF FALL RIVER	)	SEVENTH JUDICIAL CIRCUIT
	)	
VIVOS X POINT INVESTMENT GROUP, LLC, Plaintiffs,	)	FILE NO. 23 CIV 24-44
v.	)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
DANIEL SINDORF	)	
Defendant.	)	

On February 7, 2025, the Defendant, Daniel Sindorf, filed a Motion for Summary Judgment. On March 7, 2025, the Plaintiff, Vivos X Point Investment Group, LLC, filed its Motion for Summary Judgment. The parties have filed Reply and Response Briefs to the cross-motions for Summary Judgment, and the Court heard arguments from the parties on April 4, 2025.

Having reviewed the motions, notices, and other submissions by parties, having heard arguments by parties, and being otherwise familiar with the record, Defendant's Motion for Summary Judgment is **GRANTED**. Conversely, Plaintiff's Motion for Summary Judgment is hereby **DENIED.**

ANALYSIS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL § 15-6-56(c). "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law." *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, 841 N.W.2d 250, 253-54. "In summary judgment proceedings, '[t]he burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.'" *City of Sioux Falls v. Strizheus*, 2022 S.D. 81, ¶ 18, 984 N.W.2d 119, 124 (quoting *Gail M. Benson*

Living Tr. v. Physicians Off. Bldg., Inc., 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 343). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804 (quoting *Pellegrino v. Loen*, 2007 SD 129, ¶ 13, 743 N.W.2d 140, 143).

"The party resisting summary judgment must present 'sufficient probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.'" *Lammers v. State by and through Department of Game, Fish and Parks*, 2019 S.D. 44, ¶ 9, 932 N.W.2d 129, 133. *See also Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 29, 980 N.W.2d 251, 261. "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Strizheus*, 2022 S.D. ¶ 27, 984 N.W.2d at 127 (quoting *Dakota Indus., Inc. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 11, 766 N.W.2d 510, 513).

The Court, having considered all filings, as well as arguments of counsel at a hearing held April 4, 2025, issues the following Order:

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** because there are no genuine issues of material fact, as the 99-year lease is an illusory contract that Plaintiff can unilaterally modify the terms of at any time with no recourse for Defendant. As such, Defendant is entitled to judgment as a matter of law. The Court need not address the other arguments raised by Defendant in his Motion.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED**.

Dated this 24 day of April 2025.

BY THE COURT

The Honorable Scott A. Roetzel
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

TAMMY GRAPENTINE
CLERK OF COURTS

By:
Deputy
(SEAL)

FILED
7TH JUDICIAL CIRCUIT COURT
AT HOT SPRINGS, SD
APR 24 2025

By:

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) ss.	
COUNTY OF FALL RIVER	)	FOURTH JUDICIAL CIRCUIT

VIVOS XPOINT INVESTMENT GROUP, LLC, Plaintiffs,	)	23CIV24-44
	)	**AFFIDAVIT OF ROBERT VICINO**
v.	)	
DANIEL SINDORF, Defendants.	)	

COMES NOW, your affiant, Robert Vicino, being first duly sworn upon his oath, and agreeing to this affidavit of his own free will and accord, disposes and states as follows:

1. I am a resident of Del Mar, San Diego County, California.

2. I am the Owner of Vivos xPoint Investment Group, LLC (hereinafter "Vivos").

3. Vivos on occasion as circumstances change, will routinely update its Vivos xPoint Community Rules and Regulations.

4. Daniel Sindorf entered into a Structure and Land Lease (*Exhibit 1*) with Vivos on July 19th, 2020.

5. A material term to that lease is the "Vivos xPoint Community Rules and Regulations" which as stated on page three, "the rules and regulations hereto as Addendum "B" which govern the operations of the Vivos xPoint Community." *Id.*

6. On page 8. Paragraph 10, reads as follows, "VIVOS xPOINT COMMUNITY RULES AND REGULATIONS The Vivos xPoint Community Rules and

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Regulations are attached hereto as Addendum "B", and they, *and any future amendments thereto*, are expressly made a part of the Lease Agreement, and Bunker Lessee agrees to abide by and comply with all such rules and regulations." (emphasis added).

7. On page 8 and continuing onto page 9, paragraph 11 reads, "MODIFICATIONS OF THE COMMUNITY RULES AND REGULATIONS, *Vivos may change or modify the Vivos xPoint Community Rules and Regulations at any time*, subject to providing the Bunker Lessee a minimum of Thirty (30) Days written notice prior to the effective date of any changes or modifications." (emphasis added).

8. A true copy of the signature block of the Lease Agreement between Vivos and Sindorf and the advisement above the signature block is included below as *Exhibit 2*.

VIVOS AND BUNKER LESSEE HAVE CAREFULLY READ AND REVIEWED THIS LEASE AGREEMENT AND EACH TERM AND PROVISION CONTAINED HEREIN AND, BY EXECUTION OF THIS LEASE AGREEMENT, SHOW THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS LEASE AGREEMENT IS EXECUTED, THE TERMS OF THIS LEASE ARE COMMERCIALLY REASONABLE, DO NOT REPRESENT A CONTRACT OF ADHESION, AND EFFECTUATE THE INTENT AND PURPOSE OF VIVOS AND BUNKER LESSEE WITH RESPECT TO THE LEASED BUNKER AND LEASED LAND AREA.

VIVOS

Vivos xPoint Investment Group, LLC

DocuSigned by:
By: Robert Vicino
3B28CD018AA2493...

Robert Vicino
Managing Member

Date: 7/19/2020

BUNKER LESSEE

DocuSigned by:
By: Daniel Sindorf
6D42560DE48D483...

Name: Daniel Sindorf

Date: 7/19/2020

Email: dansindorf@gmail.com

Phone: 325-315-0559

9. "Addendum B" for the Lease to Sindorf was dated "Effective March 7, 2020." *See Exhibit 1*, Lease.

10. Effective as of November 15th, 2021, Vivos revised and notified members of an updated "Addendum B" with the specific language, "WEAPONS: B. No firearms or munitions may be discharged or brandished within the Community, other than in designated and posted shooting range area(s), subject to the posted rules and regulations at the shooting range(s)." *See Exhibit 3*, 2021 amendment.

11. This updated Addendum B was sent to all members by email notification.

12. These addendums and changes were made for the safety and benefit of all members.

13. We did not receive any objection or pushback from any Vivos Xpoint Lessee.

14. The Lease Terms with the 2021 Addendum B were in place during the time of the incident regarding Daniel Sindorf on July 26th, 2023.

15. Lessees are also responsible to abide by all local, state, and federal laws.

16. Any delay in the eviction of Sindorf was due to delay in learning of the July 26th, 2023, incident.

Dated this 21ST day of FEBRUARY, 2025.

Robert Vicino

VERIFICATION

STATE OF CALIFORNIA)
)SS.
COUNTY OF _____)

On this _____ day of February, 2025, before me, the undersigned officer, personally appeared, **Robert Vicino**, known to be or satisfactorily proven to be the person whose name is subscribed to the within and foregoing instrument and acknowledged that he executed the same for the purposes therein contained.

SUBSCRIBED and SWORN to before me this ___day of February 2025.

Notary Public
My Commission Expires: _____

(SEAL)

please see attached CA jurat RPB

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of San Diego

Subscribed and sworn to (or affirmed) before me on this 21st day of February, 2025, by Robert Vicino,

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

KRISTIN L. BROCKMAN
Commission # 2427257
Notary Public - California
San Diego County
Comm. Expires DECEMBER 9, 2028

(Seal)

Signature Kristin L Brockman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 21, 2025 he served a copy of the foregoing *Affidavit of Robert Vicino*, upon the persons herein next designated by:

☐	First Class Mail	☐	Certified Mail
☐	Hand Delivery	☐	Facsimile
☒	Electronic Mail	☒	Odyssey File and Service

J. Scott James
40 N. 5th St., Suite B.
Custer, SD 57730
605-673-2503
southernhillslaw@gmail.com

which is the last address of the addresses known to the subscriber.

/s/ Eric M. Schlimgen
Eric M. Schlimgen
Schlimgen Law Firm, LLC

Filed: 3/10/2025 11:33 AM CST Fall River County, South Dakota 23CIV24-000044

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31074

VIVOS XPOINT INVESTMENT GROUP, LLC, Appellant, v. DANIEL SINDORF, Appellee.	)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA
NOTICE OF APPEAL FILED: May 1, 2025

The Honorable Scott Roetzel, Circuit Court Judge, presiding

APPELLEE'S BREF

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Filed: 9/15/2025 2:04 PM CST Supreme Court, State of South Dakota #31074

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PRELIMINARY STATEMENT

This brief is in response to Plaintiff-Appellant Vivos xPoint Investment Group, LLC's Appellant Brief. Petitioner-Appellant will be referred to as "Vivos." Respondent-Appellee Danien Sindorf will be referred to as "Sindorf." References to Vivos' Appellate Brief will be referred to as "Vivos Br." and references to Vivos' Appendix A will be referred to as "Vivos App."

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3(1), which provides that an appeal may be taken from a final judgment. The circuit court entered its Order Granting Summary Judgment in favor of Defendant-Appellee Daniel Sindorf on April 24, 2025. Plaintiff-Appellant Vivos xPoint Investment Group, LLC timely filed its Notice of Appeal on May 1, 2025. SR. Accordingly, this Court has appellate jurisdiction over this matter.

STATEMENT OF ISSUES PRESENTED

1. Whether the Lease is illusory?

The circuit court held that the Lease was illusory.

Endres v. Warriner, 307 N.W.2d 146 (S.D. 1981) (illusory promises lack mutuality and are unenforceable).
Dumais v. Am. Golf Corp., 299 F.3d 1216 (10th Cir. 2002) (contract illusory where employer retained unfettered right to modify arbitration terms).
Tunender v. Minnaert, 1997 S.D. 62, ¶ 35, 563 N.W.2d 849 (S.D. 1997) (judicial admissions binding; the Rules are material terms).
Edgar v. Mills, 2017 S.D. 7, ¶ 29, 892 N.W.2d 223, 231 (courts cannot add terms parties omitted).

2. Whether, if the Lease is enforceable, the incorporated Rules are illusory.

The circuit court did not address this issue.

See supra, Statement of Issues Presented No. 1.

3. Whether the Lease is void for illegality under SDCL 43-32-8.

The circuit court did not address this issue.

SDCL 43-32-8 (non-waivable habitability obligations).
Pfuhl v. Pfuhl, 2014 S.D. 25, ¶ 7, 846 N.W.2d 778 (judgment correct even if based on wrong reason—court may affirm on any ground supported by record).
Devitt v. Hayes, 1996 S.D. 71, ¶ 6, 551 N.W.2d 298 (jurisdictional and legal defects may be raised at any time).
Van Orden v. Van Orden, 170 Idaho 597, ¶ 28, 515 P.3d 233, 244 (Idaho 2022) (courts have duty to raise contract illegality sua sponte).

4. Whether the Lease is unconscionable and against public policy.

The circuit court did not address this issue.

SDCL 57A-2-302 (unconscionable contracts may be refused enforcement).
Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.D. 1982) (one-sided agreement leaving a party without remedy is unconscionable).
Willers v. Wettestad, 510 N.W.2d 676 (S.D. 1994) (courts have duty to refuse enforcement of unlawful contracts).

STATEMENT OF THE CASE

This case presents a straightforward question: Can a landlord lock a tenant into a fully prepaid 99-year lease while reserving for itself the unrestricted power to rewrite that lease "at any time"? The circuit court correctly held that it cannot, finding Vivos's modification clause illusory and the lease unenforceable as drafted.

Vivos appeals but offers no limiting principle that would distinguish its one-sided arrangement from other illusory promises consistently invalidated by courts nationwide. Instead, Vivos argues that its 99-year lease is comparable to at-will contracts that can be severed by any party at any time, or to HOA covenants that contain constraints on their modification abilities (such as through requiring member votes for approval, or being subject to fiduciary obligations, etc) that sufficiently scope and limit the ability to modify.

The Lease is also illegal under SDCL 43-32-8, which imposes a non-waivable duty on landlords to provide and maintain habitable residential premises. Vivos's Lease explicitly shifts the entire burden of making the bunker habitable onto the tenant, all while retaining ownership of every improvement and claiming the right to terminate at will. Such a scheme directly violates South Dakota's statutory residential lease laws.

This also causes Vivos' Lease to be substantively unconscionable. It requires tenants to pay the full 99-year rent upfront and invest tens of thousands of dollars in improvements which Vivos can seize at any time through a manufactured eviction. This one-sided arrangement is the very definition of oppressive and inequitable contracting.

Because Vivos's arguments cannot save its lease as being void ab initio for illegality, and because its unlawful detainer action rests entirely on this lease, this Court should affirm the circuit court's decision dismissing the Complaint in full.

STATEMENT OF THE FACTS

In July 2020, Daniel Sindorf entered into a 99-year lease ("Lease") with Vivos xPoint Investment Group, LLC ("Vivos") for a bunker unit at the Vivos xPoint development in Fall River County, South Dakota. Vivos requires these leases are prepaid, and Sindorf provided a $35,000 prepayment for the full 99 years. Vivos App, 0030 ("Bunker Lessee shall pay Vivos a lump sum upfront rent payment of Thirty Five Thousand Dollars ($35,000)").

The Lease expressly incorporates the "Vivos xPoint Community Rules and Regulations" ("Rules") as a material condition of tenancy, stating: "These Rules…are hereby made a part of, and a material condition to all Vivos xPoint Lease agreements." *Id.* at 19. Paragraph 14 of the Lease further provides that a violation of any Rule was grounds for immediate termination and eviction under SDCL 21-16-1(7) and SDCL 43-32-18. *Id.* at 36. Paragraph 11 of the Lease states that "Vivos may change or modify [the Rules] at any time[.]" *Id.* at 35-36.

Sindorf is accused of "brandish[ing] a firearm" and "aim[ing] a firearm at Stephanie Dundas" in March 2023. *Id.* at 53 (Vivos' Complaint, 8-9). Vivos then began eviction proceedings, resulting in this instant case, with its only basis being that Sindorf, by "brandishing" a firearm, violated a prohibition on brandishing firearms in the Rules. *Id.* at 0054 (Vivos' Complaint, 27).

Notably however, this brandishing prohibition did not exist when Sindorf signed the lease, and appeared later when Vivos used its ability to unilaterally change terms in the Rules to modify the language of subsection B of the section titled "WEAPONS" to include a prohibition on "brandishing" firearms. *See id.* at 77 (Original language signed

by Sindorf: "No firearms or munitions may be discharged within the Community…]"); *Cf. id.* at 53 (Plaintiff's Complaint, ¶8, citing the modified language after Sindorf's execution: "The Rules specifically provide that 'No firearms or munitions may be discharged *or brandished* within the Community…").

Vivos further claims that, upon eviction, Sindorf must relinquish the entire $35,000 99-year rent prepayment, *id.* at 138 ("There is no mention of this being a pre-payment or pro-rated, this is a non-refundable upfront payment"), as well as ownership of all improvements he made to the property to make it habitable, which cost Sindorf an additional $105,310. *Id.* at 36 ("Upon vacating the premises... any improvements … may not be removed … from the Bunker Structure."), 113 ("my bunker has been improved by approximately $105,310").

Sindorf moved for summary judgment, arguing that the unilateral modification clause rendered the entire lease illusory and unenforceable. The circuit court agreed, finding the contract illusory because "[Vivos] can unilaterally modify the terms at any time with no recourse for Defendant." *Id.* at 2. Vivos appeals, seeking to enforce the Lease and eviction action.

STANDARD OF REVIEW

"The existence of a valid contract is an issue of law to be determined by the court[,]" reviewed de novo. *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22, 714 N.W.2d 884, 892. Summary judgment is appropriate when "there is no genuine issue as to any material fact and…the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. *Wilson v. Great*

Northern Ry. Co., 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968). The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. *Ruane v. Murray*, 380 N.W.2d 362, 364 (S.D.1986).[1]

"[I]t is a well[-]entrenched rule of this Court that, where a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons." *Pfuhl v. Pfuhl*, 2014 S.D. 25, ¶ 7, 846 N.W.2d 778, 780 (quoting *Sommervold v. Grevlos*, 518 N.W.2d 733, 740 (S.D. 1994)) ("[W]here a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons."). Thus, this Court may affirm the trial court's judgment on any ground supported by the record, including that the Lease is unlawful under SDCL 43-32-8, or that it is unconscionable.

Jurisdictional defects may be raised at any time. *Devitt v. Hayes*, 1996 SD 71, ¶6, 551 NW2d 298, 300. This Court may raise issues of jurisdiction sua sponte. *Weins v. Sporleder*, 2000 SD 10, ¶8, 605 NW2d 488, 490; *Bohlmann v. Lindquist*, 1997 SD 42, ¶10, 562 NW2d 578, 580; *State v. Phipps*, 406 NW2d 146, 148 (SD 1987). Questions of jurisdiction are reviewed de novo. *White Eagle v. City of Fort Pierre*, 2000 SD 34, ¶4, 606 NW2d 926, 928; *Risse v. Meeks*, 1998 SD 112, ¶10, 585 NW2d 875, 876; *State v. Vandermay* , 478 NW2d 289, 290 (SD 1991).

Courts also have a duty to refuse enforcement of contracts that are unlawful or violate public policy. *Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994); see also *Van Orden v. Van Orden*, 170 Idaho 597, ¶ 28, 515 P.3d 233, 244 (2022) ("Any court may raise the illegality of a contract sua sponte and, in fact, has a duty to do so.").

[1] Importantly, nothing prohibits Sindorf from bringing a motion for summary judgment on this issue in light of the Supreme Court's newly released opinion in *Vor, Inc. et al. v. Estate of Paul O'Farrell et al.*, 25 SD 2 ¶ 17. The rules of civil procedure are applicable in this case as long as nothing in the rules contradicts SDCL 21-16 et seq. *Id.*

Accordingly, this Court can and should affirm on the independent ground that the Lease is void ab initio for illegality under SDCL 43-32-8, regardless of whether that argument was raised in the circuit court. Because the Lease is in evidence, its noncompliance with SDCL 43-32-8's mandatory habitability provisions presents a pure question of law requiring no further fact-finding.

ARGUMENT AND AUTHORITIES

I. The Lease Is Illusory and Unenforceable

A. Contracts Allowing One Party Unfettered Discretion to Modify Material Terms Are Illusory and Unenforceable

1. The Illusory Promise Doctrine

Consideration is an essential element for a valid, enforceable contract. SDCL 53-1-2(4). However, non-binding promises or contract terms are illusory and not valid consideration. Restatement (Second) of Contracts § 77, cmt a; *Endres v. Warriner*, 307 N.W.2d 146, 149 (S.D. 1981). "A promise constitutes consideration for another promise only when it creates a binding obligation. Thus, absent a mutuality of obligation, a contract based on reciprocal promises lacks consideration. Put more succinctly, such a contract must be binding on both or else it is binding on neither." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000) (citations omitted).

A promise is illusory "only if it in no way limits the promisor's future action." *Endres v. Warriner*, 307 NW 2d 146, 149 (1981), citing *Douglas v. City of Dunedin*, 202 So.2d 787, 788 (Fla.Dist.Ct.App.1967); *see also, Floss* 315, citing *Trumbull v. Century Marketing Corp.*, 12 F.Supp.2d 683, 686 (N.D.Ohio 1998) (holding that employer's promise in employee handbook to arbitrate disputes did not create binding obligation

when employer retains right to revoke arbitration provision); *David Roth's Sons, Inc. v. Wright and Taylor, Inc.*, 343 SW 2d 389, 391 (Ky.Ct.App 1961) (noting that a promise absent any fixed obligation to perform "is illusory in the sense that [the promisor] has made no legally enforceable commitment, and justice demands the other party should not be bound"); *Mattei v. Hopper*, 51 Cal. 2d 119 (Cal. 1958) "[I]f one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.")

As such, courts across the country have widely held that when a party to a contract retains the unfettered right to terminate or modify the agreement, the contract is deemed to be illusory. *See, e.g., Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir.2002) ("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."); *Floss*, 315-16 (6th Cir.2000) (arbitration agreement was "fatally indefinite" and illusory because employer "reserved the right to alter applicable rules and procedures without any obligation to notify, much less receive consent from," other parties) (citing 1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed.1957)); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir.1999) (arbitration agreement unenforceable in part because Hooters, but not employee, could cancel agreement with 30 days notice, and Hooters reserved the right to modify the rules "without notice"); *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1133 (7th Cir.1997) (Cudahy, J., concurring) (promise to arbitrate was illusory in part because employer retained the right to change or revoke the agreement "at any time and without notice"); *Snow v. BE & K Constr. Co.*, 126 F.Supp.2d 5, 14-15 (D.Maine 2001) (citations omitted) (arbitration agreement illusory because

employer "reserve[d] the right to modify or discontinue [the arbitration] program at any time"; "Defendant, who crafted the language of the booklet, was trying to `have its cake and eat it too.' Defendant wished to bind its employees to the terms of the booklet, while carving out an escape route that would enable the company to avoid the terms of the booklet if it later realized the booklet's terms no longer served its interests."); *Trumbull v. Century Mktg. Corp.*, 12 F.Supp.2d 683, 686 (N.D.Ohio 1998) (no binding arbitration agreement because "the plaintiff would be bound by all the terms of the handbook while defendant could simply revoke any term (including the arbitration clause) whenever it desired. Without mutuality of obligation, a contract cannot be enforced."); *Simpson v. Grimes*, 849 So.2d 740, 748 (La.Ct.App.2003) (arbitration agreement lacked mutuality, making it "unconscionable and unenforceable": "By retaining the right to modify at will any and all provisions of the agreement in question, Argent allows itself an escape hatch from its promise to be similarly bound to arbitrate all disputes arising between the parties. Argent's ability to modify the specific terms of the agreement at will is not shared by the potential customer signing the agreement.").[2]

2. Illusory Promises Are Not Valid or Enforceable Contracts

Because illusory promises are not valid consideration and lack mutuality of obligation, they fail to create a binding contract at the moment of formation and are unenforceable from the outset. SDCL 53-1-2(4) (stating one essential element of a contract is sufficient consideration); *see also, e.g., Floss* at 316; *Snow* at 15 (citing Restatement (Second) of Contracts § 77).

[2] Most illusory promise precedent comes from arbitration cases, not because arbitration agreements are unique, but because courts must compel arbitration unless the validity of the arbitration clause itself is challenged, concentrating judicial review on those provisions. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

3. Unilateral Modification Clauses Are Illusory Unless They Are Reasonably Constrained

Notably (and illustratively), Vivos' own citations of contract modification case law all involve clauses that are circumscribed such that they do not allow for the ability for unfettered modification. One such way of avoiding unfettered modification authority is though allowing the other party to opt out of the contract upon modification. *Canteen v. Charlotte Metro Credit Union*, 386 N.C. 18, 19, 900 S.E.2d 890, 892 (2024). This is also accomplished with contracts that allow the other party to cancel (effectively opt out) at any time, such as an at-will contract. *Johnson v. Associated Milk Producers, Inc.*, 886 N.W.2d 384, 393–94 (Iowa 2016). Modification clauses of at-will contracts where the employee *chose* to continue to perform are distinguishable from our instant 99-year lease contract because of the opportunity to opt out once the modification is made, which is then declined. *Care Travel Co. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 990 (2d Cir.1991) (recognizing that if one party imposes a unilateral modification and the other party continues to perform, recovery for breach is precluded); *Martin v. Airborne Express*, 16 F.Supp.2d 623, 632 (E.D.N.C.1996) ("At any rate, Martin's decision to remain in AMR Distribution's employ after notification of the restructuring negates any related breach of contract claim."); *Kauffman v. Int'l Bhd. of Teamsters*, 950 A.2d 44, 48 (D.C.2008) ("[N]either party to at-will employment is bound to continue performance, and thus courts properly view future performance by each as valid consideration for the change in terms."); *Geary v. Telular Corp.*, 341 Ill.App.3d 694, 275 Ill.Dec. 648, 793 N.E.2d 128, 133 (2003) ("Plaintiff accepted the April 1996 modification to the

compensation plan when he accepted payment of commissions under the April 1996 plan and continued employment.").

A second way modification clauses avoid being illusory is through constraints which limit their modification ability and give other parties some sort of recourse, such as in the case of HOA covenants through being subject to a vote of members and fiduciary duties of board members. Most anything that "fetters" the modification clause will suffice, even such language as the changes must be reasonable.[3]

These cases underscore that modification clauses are only enforceable when they are circumscribed by a meaningful check on one party's unilateral authority. The ability to withdraw consent or end the relationship in response to the modifications, or the ability to challenge these modifications in court as out of scope of the modification clause, provides the consideration and mutuality that prevent an illusory promise. Sindorf does not have this ability, and instead is locked into a 99-year prepaid lease, making his case distinguishable and the contract illusory.

B. The Rules Are Expressly Material Terms of the Lease, as Admitted by Vivos

It is undisputed and admitted by Vivos that the Rules are a material provision of, and inseparable from, the Lease, which must be complied with or risk termination of the agreement. From Plaintiff's own Complaint: "The Lease states: 'The Vivos xPoint Community Rules and Regulations are attached hereto as Addendum 'B, and they, and

[3] For example, Vivos's own Lease includes a provision allowing it to raise Common Area Fees only if the increase is "reasonable." Vivos App. at 31. This single qualifier meaningfully constrains Vivos's discretion by creating an enforceable standard: if Vivos imposes an unreasonable fee, Sindorf may challenge it in court for breach of contract. In sharp contrast, the Lease's modification clause contains no similar limitation. It authorizes changes "at any time" for any reason (including adding additional unreasonable fees), providing Sindorf no standard to invoke, no avenue to contest an unreasonable or absurd change, and no meaningful protection from arbitrary or oppressive alterations.

any future amendments thereto, are expressly made a part of the Lease Agreement, and Bunker Lessee agrees to abide by and comply with all such rules and regulations." Vivos App. at 52, ¶3-4. Plaintiff's Complaint also admits and asserts that "[t]he Parties intended the Rules to be a *material provision* of the Lease." Vivos App. at 52, ¶5 (emphasis added). The Rules also stated that they are material to the Lease: "These Rules and Regulations … are hereby made a part of, and material condition to all Vivos xPoint Lease agreements." *Id.* at 19. Vivos admits this in its *Reply to Defendant's Statement of Undisputed Material Facts*. *Id.* at 173, 1("Plaintiff *admits* paragraph one" which states, "Vivos and Sindorf entered into a Lease Agreement… which incorporated the Vivos xPoint Community Rules and Regulations ("Rules") as a material provision of the Lease." *Id.* at 87). Vivos then argues in their *Reply to Defendant's Motion for Summary Judgment / Dismissal* that "[a] material term to that lease is the 'Vivos xPoint Community Rules and Regulations[,]'" *id.* at 186, citing testimony from Mr. Vicino, the head of Vivos, who states, "A material term to that lease is the "Vivos xPoint Community Rules and Regulations" which as stated on page three, "the rules and regulations hereto as Addendum "B" which govern the operations of the Vivos xPoint Community." *Id.* at 156. In oral arguments, Vivos then argued the Rules were material to the Lease in oral arguments for this instant motion. *Id.* at 205 ("It was well-documented and obviously contained within the terms of the lease"); *id.* at 206 ("But we absolutely agree, the contract does say Vivos can amend the lease from time to time.")

Vivos now argues in its appeal that the Rules are not material to the Lease. *See Vivos Br.*, § I.D: "The Lease is not Illusory, Modification is Restricted only to the Rules, Not the Material Terms of the Lease"; *id.* at 16 n.7 (listing the sections that Vivos now

argues are material). However, listed *supra* are judicial admissions by Vivos that the Rules are material to the Lease which Vivos cannot now undo, and Vivos makes no argument for this sudden change.

"A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of the fact claimed to be true, and is used as a substitute for legal evidence at the trial." *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575, 577 (S.D. 1994). "A judicial admission is binding on the party who makes it and an admission of fact by an attorney is also binding on that party." *Tunender v. Minnaert*, 1997 S.D. 62, ¶ 35, 563 N.W.2d 849, 856 (citing *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D.1987); *Kohne v. Yost*, 250 Mont. 109, 818 P.2d 360, 362 (1991)). As identified by Justice Sabers in his dissent in *Tunender*, "[t]his court has found that statements made in pleadings constituted judicial admissions. 1997 S.D. 62, ¶ 35 (citing *Standard Cas. Co. v. Boyd*, 75 S.D. 617, 71 N.W.2d 450 (1955); *Goff v. Goff*, 72 S.D. 534, 37 N.W.2d 251 (1949); *Englund v. Berg*, 69 S.D. 211, 8 N.W.2d 861 (1943)). "Judicial admissions may occur at any point during the litigation process. They may arise during discovery, pleadings, opening statements, direct and cross-examination, as well as closing arguments." *Id.* (citing *Kohne*, 818 P.2d at 362 (citing *Lowe v. Kang*, 167 Ill.App.3d 772, 118 Ill.Dec. 552, 555, 521 N.E.2d 1245, 1248 (1988)).

Accordingly, Vivos is bound by its express assertions that the Rules are material provisions of the Lease, and it cannot now contradict those admissions on appeal.

C. The Lease Is Illusory Because Vivos Retained Unfettered Discretion to Modify Material Terms and Terminate Sindorf At Any Time

Being material terms of the Lease, a breach of the Rules by Sindorf constitutes a breach of the Lease and enables Vivos to terminate the Lease. The terms in the Lease also allow Vivos to unilaterally "change or modify" the Rules "at any time" during the 99-year term. Vivos App. at 35-36.

Any changes Vivos makes to the Rules require no approval, consent, or additional consideration from Sindorf and provide him no recourse. The thirty-day notice provision is purely informational; it provides no remedy, and Sindorf's only option is to comply or face eviction and (as Vivos argues) forfeiture of his $35,000 prepayment and costly improvements.

By contrast, Vivos is not bound at all, as it has the unfettered ability to modify the Lease at will. It may unilaterally rewrite obligations it agreed to, add provisions it initially omitted, or impose extreme conditions without consequence. In this case, Vivos exercised this power to retroactively classify Sindorf's alleged conduct as a violation after he signed the contract. This arrangement gives Vivos a unilateral "escape hatch" to terminate a 99-year lease at will, while Sindorf is locked in for nearly a century. Courts have repeatedly held that such provisions are the hallmark of an illusory promise. *See, e.g., Dumais* at 1219.

Vivos has identified no evidence that limits this modification authority.[4] The Lease contains no textual restriction on the scope or substance of modifications. Vivos

[4] Vivos argues that the scope of its modification authority is limited by a paragraph within the Rules themselves, Vivos Br. at 16-17, but that argument collapses under the Lease's own terms: because this limiting language is contained in the Rules, it is itself subject to unilateral amendment under the very modification clause at issue. Vivos's ability to rewrite or delete this provision at any time renders it meaningless as a safeguard.

may impose. Instead, Vivos's argument effectively asks this Court to trust that it will exercise its ultimate power benevolently despite the plain language authorizing any amendment imaginable, such as banning Sindorf by name or requiring him to pay additional fees of $1,000,000 per day.

The absence of any constraint is precisely what renders the clause illusory. These terms lack mutuality and consideration under SDCL 53-1-2(4) and are therefore unenforceable. Vivos cannot rely on Sindorf's alleged breach of an illusory provision to terminate the lease or bring this unlawful detainer action. As all bases for Vivos' Complaint stem from breaches of this unenforceable agreement, it should be dismissed.

D. Because the Rules are material provisions to the Lease, the entire Lease itself is illusory and unenforceable

Because the Rules can be modified at whim by Vivos, they are illusory and unenforceable. However, because the Rules are material and unseverable from the Lease itself, the entire contract must be found illegal.

Notably, Lease does not contain a severability clause. When contracts do not contain a severability clause, unlawful clauses are severable if the agreement meets the requirements of Restatement (Second) Contracts § 184, which states that if a term is unenforceable, a court may still enforce the rest of the contract unless the unenforceable term was essential to the parties' agreement. *Sanford v. Sanford,* 694 NW 2d 283, 293.[5] Because the Rules are material provisions of the Lease, as Plaintiff admits, they are inseparable from the Lease, and the entire Lease forms an illusory promise that was

[5] As the Lease does not contain part performance, the *Sanford* Court's reference to § 183 does not apply here.

unenforceable at its inception. As the Rules cannot exist without the Lease, SDCL 53-5-4 does not apply because they are not a distinct object.

Moreover, South Dakota law firmly forbids courts from rewriting contracts to insert terms the parties omitted. *Edgar v. Mills*, 2017 S.D. 7, ¶ 29, 892 N.W.2d 223, 231 ("Contracting parties are held to the terms of their agreement, and disputes cannot be resolved by adding words the parties left out."); *Coffey v. Coffey*, 2016 S.D. 96, ¶ 18, 888 N.W.2d 805, 812–13 (Courts "cannot add terms to the language of [an agreement] but rather 'are bound by the words chosen by the parties.'"). This is explicitly with the implied covenant of good faith and fair dealing. *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1032 (8th Cir. 1996) (the implied covenant of good faith "has nothing to do with the enforcement of terms actually negotiated and therefore cannot block use of terms that actually appear in the contract"). Striking only the modification clause, as Vivos proposes,[6] would block the use of terms that appear in the contract and amount to judicial redrafting of the Lease. This Court should not invent implied limits to save an illusory term contract to established case law.

Nor would severing only the Rules provision be equitable. Doing so would trap lessees, by this Court, in a prepaid 99-year lease for a community that was expressly marketed and governed by a comprehensive rules regime, yet would now lack any enforceable regulatory framework. This result would create a fundamentally different agreement than the one the parties executed. The Court should reject such rewriting.

[6] Vivos paradoxically claims this relief is untenable, arguing that "'community rule' provisions with a lease need modification" and that "[w]ithout this ability to modify the 'community rules' a lessor would be prohibited in its ability to effectuate a continued compliance with the implied duty of good faith and fair dealing." Vivos Br. at 21.

E. The Implied Covenant of Good Faith and Fair Dealing Does Not Apply to Illusory Promises Because They Are Not Contracts

South Dakota law recognizes that "[e]very contract contains an implied covenant of good faith and fair dealing [that] prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 20, 731 N.W.2d 184, 193–94 (quoting *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990)). This duty "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party," *id.* ¶ 21, but it "is not a limitless duty or obligation" and cannot create mutuality or rewrite express terms. *Id.* ¶ 22.

However, the implied covenant presupposes a valid contract; it cannot "cure" an agreement void at formation for lack of consideration. Restatement (Second) of Contracts § 205 (1981) (good faith applies only to performance and enforcement of a contract); *id.* cmt. c (good faith does not apply to the formation of a contract, including mutual assent and consideration issues which may invalidate contracts). The Restatement reinforces that the covenant applies only to performance and enforcement of valid contracts, not their formation or unilateral modification authority. *Id.*. Because illusory promises fail to create a binding contract at the moment of formation and never form a valid contract, the implied covenant never attaches.

Vivos cites *Mattei v. Hopper*, 51 Cal. 2d 119 (1958), and *Cordry v. Vanderbilt Mortg. & Fin., Inc.*, 445 F.3d 1106 (8th Cir. 2006), to argue that the implied covenant rescues its unilateral modification clause. Those cases, however, confirm the opposite. In *Mattei*, a satisfaction clause was enforceable because the buyer's discretion in

performance was inherently limited by an objective good-faith standard, making the contract valid at formation. *Cordry* likewise upheld a financing agreement where discretionary performance regarding whether to extend a loan was constrained by an implied duty of good faith. While *Mattei* and *Cordry* had discretion in performance, neither case considered a clause granting one party the unchecked power to rewrite contractual obligations. To parallel the situation here, *Cordry* would have had to grant the lender not only discretion to extend its own loan, but also the unilateral authority to impose new obligations or rewrite the borrower's duties at will—something far more sweeping than mere performance discretion.

If this Court adopted Vivos's theory, the implied covenant of good faith and fair dealing would become a universal cure for illusory promises, effectively nullifying the doctrine. Vivos offers no principled justification for why its unilateral modification clause should be "saved" by the covenant while other provisions courts have struck down as illusory, *supra*, are not.

II. The Lease is unlawful because it violates the non-waivable provisions of SDCL 43-32-8

Even if this Court declines to affirm the trial court's ruling that the Lease is void as an illusory promise, it should still hold the agreement unenforceable because it violates South Dakota's mandatory habitability requirements. The Lease's central terms—which shift all responsibility for rendering and maintaining the premises habitable onto the tenant—directly contravene SDCL 43-32-8's non-waivable obligations imposed on landlords. A contract that contravenes statute and public policy is void and cannot be enforced, regardless of the parties' consent.

Here, Vivos's Lease is a residential lease for one of 575 former military ammunition bunkers (the "Bunker Structures") for a 99-year term. The Lease expressly provides that each unit is delivered in an "unfinished" and uninhabitable condition, requires the tenant to invest significant funds to make the structure livable, and places all responsibility for repairs and maintenance on the tenant. These terms are not incidental; they define the very nature and purpose of the agreement. Because they directly violate SDCL 43-32-8's unwaivable mandates, the Lease is unlawful and void.

A. The Lease is a residential lease of the Bunker Structure

1. Definition of residential premises

The only hint to the exact definition of "residential premises" in SDCL 43-32 is its definition of "commercial premises," which is defined as "any real property for lease that does not consist of residential property, agricultural land, or any quantity of municipal lots." SDCL 43-32-24.1. However, the Supreme Court of South Dakota, in analyzing the issue of short term rentals, "adopt[ed] the majority view of 'dozens of courts around the country' that have held use of a property for eating, sleeping, and recreation for any duration is determinative as to whether the property is used for 'residential purposes,' regardless of the property owner's receipt of rental income." *Wilson v. Maynard*, 2021 S.D. 37, 17, 961 N.W.2d 596, 601; see also *Id.* at 602("'[R]esidential purposes' may be plainly understood to include the occupation of a home or dwelling for an indefinite length of time.").

This mirrors the definition included in the Uniform Residential Landlord and Tenant Act (URLTA), which was developed by the Uniform Law Commission in 1972 and "concerns landlord-tenant relationships under rental agreements for residential

purposes[.]" URLTA § 1.101 comment. URLTA defines a residential[7] "rental agreement" as "all agreements… the use and occupancy of a dwelling unit and premises[,]" and a "dwelling unit" as "a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or by 2 or more persons who maintain a common household[.]" *Id.*, § 1.301(11); § 1.301(3).

Therefore, an appropriate definition of "residential premises" is any real property that is used or intended to be used for the purpose of providing shelter for living, eating, sleeping, and recreation for individuals or groups, either for an indefinite or a specific duration of time

The Lease specifically contemplates that the Sindorf will use the Bunker Structure as a residential habitation, either fulltime, or during disaster or catastrophe survival events. See, for example, Section 4:

> 4. USE OF BUNKER STRUCTURE
> The Bunker Structure shall be primarily used for disaster or catastrophe survival purposes, by the Bunker Lessee and those Registered Persons listed above. However, *the Bunker Lessee may occupy and use the Bunker Structure and adjacent Leased Land Area for occupation use as its/their fulltime residence …*

Vivos App. at 32 (emphasis added); *see also, id.* at 28 (definition of "Bunker Use" is occupation as a survival shelter"), *id.* at 30 (This Lease Agreement permits occupancy only by the Bunker Lessee and the following additional registered persons …"); Habitation, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/habitation (last visited August 29, 2025)

[7] As URLTA specifically "does not apply to rental agreements made for commercial, industrial, agricultural or any purpose other than residential[,]" this definition of "rental agreement" is appropriately considered to be the definition for a residential rental agreement, or residential lease. § 1.101 comment.

(citing the definition of "habitation" as "the act of inhabiting : occupancy" and "a dwelling place").

Therefore, the provisions of the Lease clearly show the intended use of the Bunker Structure is for full-time or temporary residential habitation during disasters or catastrophes. Thus, the Bunker Structure is appropriately classified as a residential premises.

B. The Lease contemplates that the Bunker Structure is to be provided in an "unfinished" uninhabitable condition, and the Bunker Structure was provided in such condition

The Lease specifically maintains that the Bunker Structure to be leased will be provided in an "unfinished" condition. For example, in the recitals section, the Lease provides:

> Whereas: In consideration of Bunker Lessee's payment of rent and agreement to comply with the provisions set forth in this Lease, Vivos hereby leases to Bunker Lessee, for a term beginning on the Effective Date of this Lease Agreement and ending on the anniversary of Ninety-Nine Years thereafter ("Term"), *an unfinished survival bunker structure* ("Bunker Structure") hereinafter identified on the Vivos xPoint site plan and map as unit number: _____ ("Leased Bunker"); and, the land area located immediately under and surrounding the Leased Bunker…"

Vivos App. at 28 (emphasis added). Additionally, in Section 5. MAINTENANCE OF THE BUNKER STRUCTURE AND LEASED AREA, the Lease provides:

> "All Bunker Structures and the surrounding Leased Land Area shall be provided to the Bunker Lessee, *in its as-is, where-is, with all faults, unfinished, concrete shell condition.* Vivos shall assign a classification to each Bunker Structure ranging from "A" (little to no structural defects identified), "B" (minor cracks in the concrete structure or floor), "C" (major cracks in the concrete structure or floor identified), "D" (major cracks and irreparable damage to concrete structure identified), to "F"

(concrete structure is unsafe and uninhabitable), which such classification for the subject Bunker Structure and Leased Land Area is hereby determined and provided to the Bunker Lessee to be a 'B' rated bunker."

Id. at 32 (emphasis added).

The condition of the Bunker Structure actually supplied to Sindorf was indeed inhabitable, and was simply a "concrete shell" as accurately described in the Lease. *See, e.g.,* Vivos Br. at 5, n.2 ("Vivos leased the bunkers *as just the concrete shell*, lessees could either hire Vivos to build out the bunker *into livable accommodations* or do the work themselves.") (emphasis added), 10 ("The Lease, aside from its length of time… is no different than… leasing an apartment or loft *that will be finished*'" by the tenant) (emphasis added).

C. The Lease holds Sindorf responsible for finishing the Bunker Structure into a habitable premises at his own expense

Several clauses in the Lease require the Sindorf to finish the Bunker Structure and bring it into compliance as a habitable premises. For example, Section 5, MAINTENANCE OF THE BUNKER STRUCTURE AND LEASED AREA, in addition to attesting to the "unfinished, concrete shell" uninhabitable nature of the Bunker Structure, states:

> All structural reinforcement and reconditioning, as well as all mechanical, electrical, esthetic, outfitting, landscaping, fencing, movement of or addition of soil, overburden, drainage, or other required or desired improvements, modifications or repairs to either the Bunker Structure or its blast door, shall be the sole responsibility of, and expense of the Bunker Lessee."

Id. at 32. The Lease also states that Sindorf "shall be responsible for the expense of maintaining the plumbing, electrical, and any other utility service within the Bunker Structure, and from the point at which any such services cross over or under the Leased

Land Area; or, connects to the Bunker Structure[,]" and "is responsible for ensuring proper connection of any power, fuel, electrical, water, sewage or communications services to the Bunker Structure." *Id.* at 33.

The plumbing, electrical, and all other utility services mentioned above are not provided by Vivos and do not exist at the time of execution of the Lease, and required to be built out by Sindorf. However, the Lease does mention that:

> *Subject to an additional one time charge,* Vivos will provide the Bunker Lessee with potable water service, at an adequate pressure to meet standard everyday occupants needs, from the Vivos xPoint water well(s). Vivos shall be responsible for the maintenance of the water lines and equipment located outside and up to the point of entry into the Bunker Structure, including any disconnect device.

Id. at 34 (emphasis added). This described responsibility for maintenance of water lines and equipment by Vivos ends where the Bunker Structure begins, after which it becomes Sindorf's responsibility.

Notably, the Lease states that all of these improvements, once made by the tenant, effectively become property of Vivos: "Upon vacating the premises, the Bunker Lessee shall remove all personal property contained in its Bunker Structure, but any improvements and fixtures permanently affixed or attached to the Bunker Structure may not be removed, dismantled or detached from the Bunker Structure." *Id.* at 36.

Therefore, the Lease clearly places the responsibility for finishing the Bunker Structure and bringing it into habitable condition squarely on Sindorf. This includes all structural, mechanical, electrical, and utility work required to make the Bunker Structure livable. While Vivos provides some limited services, such as potable water,Sindorf must provide additional consideration. The maintenance and development of the premises are the tenant's sole responsibility and expense.

D. Lease holds Sindorf responsible for all repairs to the Bunker Structure

Several clauses in the Lease require Sindorf to make and pay for repairs in the Bunker Structure. For example:

- "All structural reinforcement and reconditioning, as well as all mechanical, electrical, esthetic, outfitting, landscaping, fencing, movement of or addition of soil, overburden, drainage, or other required or desired improvements, modifications or ***repairs*** to either the Bunker Structure or its blast door, *shall be the sole responsibility of, and expense of the Bunker Lessee.*" *Id.* at 32 (emphasis added).
- "All plumbing servicing or within the Bunker Structure must be kept in good operational repair and leak free. *Any identified plumbing leaks must be repaired immediately.* All exposed outdoor water lines must be properly insulated and/or have operative heat tapes, or an equivalent system, to prevent freezing. Running water shall not be used to prevent freezing." *Ibid* (emphasis added).
- "*The Bunker Lessee shall be responsible for the expense* of maintaining the plumbing, electrical, and any other utility service within the Bunker Structure, and from the point at which any such services cross over or under the Leased Land Area; or, connects to the Bunker Structure." *Id.* at 33 (emphasis added).
- *The Bunker Lessee is responsible* for ensuring proper connection of any power, fuel, electrical, water, sewage or communications services to the Bunker Structure." *Ibid* (emphasis added).

- "*The Bunker Lessee is responsible* for any damage caused by failing to control water leaks within the Bunker Structure" *Id.* at 34 (emphasis added).

E. SDCL 43-32-8 requires all leased residential premises to be fit for human habitation and places the responsibility on the landlord/lessor to maintain habitability and make necessary repairs

South Dakota has required that landlords provide habitable premises in all premises leases since before it was admitted to the Union. *See, e.g., Prior v. Sanborn County*, 12 S.D. 86, 80 N.W. 169 (1899), citing Comp. Laws, § 3737 ("the lessor must put his building into a condition reasonably fit for occupation, and repair all subsequent dilapidations thereof."). This is still the law today in South Dakota, albeit worded differently. SDCL 43-32-8 reads:

> In every hiring of residential premises…, the lessor shall keep the premises and all common areas in reasonable repair and fit for human habitation and in good and safe working order during the term of the lease … The lessor shall maintain in good and safe working order and condition all electrical, plumbing, or heating systems of the premises…
>
> The parties to a lease or hiring of residential premises may not waive or modify the requirements imposed by this section; however, the lessor may agree with the lessee that the lessee shall perform specified repairs or maintenance in lieu of rent.

SDCL 43-32-8 has several important provisions. First, it requires that a landlord provide and keep any leased residential premises fit for habitation. Second, it requires that the landlord be responsible for maintaining the habitability of the leased residential premises, including being responsible for repairs and maintenance of all electrical, plumbing, and heating systems on the premises. Third, it states that these requirements are not waivable or modifiable.

SDCL 43-32-8 imposes a clear and non-waivable duty on the landlord/lessor to ensure that leased residential premises are fit for human habitation and remain in good repair throughout the lease term. This includes maintaining all essential systems, such as electrical, plumbing, and heating, in safe working order.

F. The Lease is unlawful because it violates the unwaivable requirements of residential premises leases in SDCL 43-32-8

SDCL 43-32-8 imposes a clear and non-waivable duty on the landlord/lessor to ensure that leased residential premises are fit for human habitation and remain in good repair throughout the lease term. This includes maintaining all essential systems, such as electrical, plumbing, and heating, in safe working order.

The Lease unlawfully shifts the responsibility for making essential repairs and ensuring habitability to the tenant/lessee, in direct violation of the SDCL 43-32-8. Specifically, the Lease places the burden of constructing and finishing the Bunker Structure into a habitable living space on the tenant, including all structural reinforcement, mechanical, electrical, and plumbing installations. Given the clear conflict between these Lease terms, which represent the material purpose of the Lease, and the unwaivable provisions of SDCL 43-32-8, the Lease is unlawful.

G. Additionally, the Lease is void because it lacks consideration and a lawful object

"The essential elements to the existence of a contract are: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration." SDCL 53-1-2. SCDL 53-6-5 provides: "The consideration of a contract must be lawful within the meaning of the section defining unlawful contracts." SDCL

53-6-6 provides: "If any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void." Additionally, SDCL 53-1-2(3), a lawful object is essential to the existence of a contract. *See Knecht v. Evridge*, 2020 S.D. 9, ¶ 47, 940 N.W.2d 318, 331. The object of the contract is defined as "the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." SDCL 53-5-1. "Where a contract has but a single object and such object is unlawful in whole or in part, ... the entire contract is void." SDCL 53-5-3. Therefore, when a contract is void, it "is invalid or unlawful from its inception. It is a `mere nullity, and incapable of confirmation or ratification.'" *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶ 12, 648 N.W.2d 804, 807 (citation omitted).

The Lease's single object and consideration provided by Vivos the unlawful lease of a residential premises. The Lease is thus void and invalid and unlawful from its inception.

III. The Lease is Unconscionable and Should Not Be Enforced

Even if this Court were to reject the trial court's conclusion that the Lease is void as an illusory promise, it should still hold the Lease unenforceable under the doctrine of unconscionability. South Dakota law recognizes that contracts or clauses that are so one-sided as to be substantively unconscionable are unenforceable. SDCL 57A-2-302; *Johnson v. John Deere Co.*, 306 N.W.2d 231 (S.D. 1981); *Hanson v. Funk Seeds International*, 373 N.W.2d 30, 35 (S.D. 1985). "One-sided agreements whereby one party is left without a remedy for another party's breach are oppressive and should be declared unconscionable." *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 700 (S.D. 1982), citing

United *States Leasing Corp. v. Franklin Plaza Apts.*, 65 Misc. 1082, 319 N.Y.S.2d 531 (1971).

The Lease is substantively unconscionable because it requires tenants to prepay for a 99-year lease, bear the entire cost of making the bunker habitable, and then subjects them to Vivos's unfettered discretion to rewrite lease terms at any time. Vivos can evict tenants based on newly created rules, retain the full 99-year rent prepayment, and seize all tenant-funded improvements.

Vivos's litigation position illustrates the inequity: it seeks to evict Sindorf under a retroactively added lease term while keeping the remainder of his $35,000 prepaid rent and all $105,310 in additional improvements he funded. The Lease's structure allows Vivos to lure tenants into finishing Vivos' unfinished residential structures, manufacture breaches through unilateral rule changes, and then profit from eviction, re-leasing the newly improved bunkers to repeat the cycle.

This combination of extreme risk to tenants, absolute control for Vivos, and financial windfalls upon eviction is the hallmark of substantive unconscionability. Public policy and equity cannot condone the enforcement of such a contract.

IV. Waiver and Ratification Cannot Validate an Illegal Contract

Vivos argues Sindorf waived or ratified the lease by signing it and living under it for years without objection. That reasoning fails because the contract at issue here was illegal at formation, cannot be waived into existence, and the issue can be raised sua sponte at any time.

Additionally, waiver requires a voluntary and intentional relinquishment of a known right. Sindorf has no meaningful way to reject or challenge contract modifications

post-execution. Vivos' only alleged recourse for Sindorf is that "he could have just not signed the Lease[]," which is not recourse, or that he could have "contested" the change, but provides no evidence of such a contest process, and in fact alleges that Sindorf did contest the changes, but Vivos was not bound to listen to Sindorf and simply ignored him. Vivos App. at 22. This is not voluntary consent, and instead is an illusory promise because Sindorf has no choice but to ratify these changes. Additionally, SDCL 43-32-8 explicitly states that it cannot be waived.

V. Vivos's Lease Is Fundamentally Different from Ordinary Contracts, and Public Policy Supports Affirmance

Vivos argues its lease is no different from an ordinary residential lease or HOA covenant, claiming that invalidating this agreement would destabilize standard contracts across South Dakota. As a preliminary matter, to the extent Vivos offers no evidence of these "routine" contracts or specific clause terms, its generalized references to them amount to unsubstantiated attorney testimony that is not allowed as evidence.

Additionally, this argument mischaracterizes both the law and the facts. The contracts Vivos compares itself to are valid, enforceable contracts that do not give one party unfettered discretion to rewrite terms at will.

HOA covenants that can be modified through governance procedures requiring notice, member votes, and fiduciary obligations of HOA boards are not illusory, and are valid contracts. Conversely, HOA covenants that included the Lease's modification clause, and gave the HOA board the unfettered ability to change the covenants at any time with no recourse for its members would be illusory. Similarly with "codes of

conduct," Sindorf is not arguing that all codes of conduct are invalid, but rather, a code of conduct that is illusory is unenforceable.

Vivos's warnings of widespread disruption to areas of contract law are equally misplaced. For example, the typical way to modify a lease is to modify the agreement at the end of the contract when it is up for renewal. In a month-to-month tenancy, a landlord may propose new terms effective for the following month, and a tenant can either agree and continue or reject the terms and vacate. In an annual lease, new terms are negotiated at the end of the year's term, before the new lease is renewed or comes into effect. Tenants always retain the choice to accept new terms or leave.

By contrast, Sindorf is locked into a 99-year prepaid lease with no renewal point until the end of that century-long term. Vivos voluntarily chose this extraordinary duration, but now seeks to rewrite its own obligations as if the lease were month-to-month. This effectively gives Vivos the ability to impose new terms "at any time," while stripping Sindorf of any ability to refuse or exit without forfeiting his substantial investment.

In essence, Vivos wants all the benefits of a fixed, prepaid, long-term lease while retaining the flexibility of a short-term agreement to change terms unilaterally. That kind of imbalance is the very definition of an illusory promise: a "contract" binding only one side while the other remains free to alter its obligations at will. Public policy favors striking such provisions, not upholding them, because they undermine mutuality and fair dealing. This Court holding as such will not change the normal conduct of leases, covenants, or any other standard contracts in any way, unless those contracts are themselves illusory.

VI. Declaring the Lease Illusory Does Not Make Tenants Trespassers

Vivos argues that if the Lease is declared void, Sindorf and other tenants would become trespassers. This argument is legally incorrect. Landlord-tenant law has long held that where a written lease fails, the law defaults to a month-to-month tenancy, not trespass. SDCL 43-32-4. Tenants who have paid consideration and occupied property with the landlord's consent are not stripped of all rights simply because a lease is later declared void.

VII. Sindorf's Background and Education are Immaterial

Sindorf's background or familiarity with contracts, including any education or business experience, is irrelevant. The enforceability of a contract does not depend on the sophistication of the parties, but on whether it satisfies basic legal requirements. An invalid contract that fails these requirements does not become valid because one party has an MBA.

VIII. Sindorf's is Entitled to Attorney Fees

Because Vivos brought this unlawful detainer action under SDCL 21-16, if Sindorf prevails, he requests reasonable attorney fees under SDCL 21-16-11.

CONCLUSION

For these reasons, Sindorf respectfully requests that the circuit court's ruling be upheld and that Attorney Fees be awarded pursuant to SDCL 21-16-11

Respectfully submitted this 15th day of September, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, I hereby certify that this brief complies with the formatting and type-volume requirements of the South Dakota Supreme Court rules. The forgoing brief is 32 pages inclusive, typed in proportionally spaced Times New Roman 12-point font with footnotes in Times New Roman 10-point font. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, the word processor used indicates there are a total of 8082 words and 42357 characters excluding spaces in the body of this brief.

Date this 15th day of September, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of September, 2025, he electronically filed the foregoing document on Odyssey File and Serve and with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original of the foregoing brief in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31074

VIVOS XPOINT INVESTMENT GROUP, LLC,	)
Appellant,	)
v.	)
DANIEL SINDORF,	)
Appellee.	)

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

NOTICE OF APPEAL FILED: May 1, 2025

The Honorable Scott Roetzel, Circuit Court Judge, presiding

APPELLANT'S REPLY BRIEF

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Filed: 10/16/2025 12:00 AM CST Supreme Court, State of South Dakota #31074

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PRELIMINARY STATEMENT

Throughout Appellant's Brief, Plaintiff/Appellant Vivos xPoint Investment Group, LLC will be referred to as "Vivos" or "Appellant" interchangeably. "Vivos xPoint" is the name of the physical location of the survivalist community. Appellee, Daniel Sindorf will be referred to as "Appellee" or "Sindorf" interchangeably. The settled record is denoted "SR," followed by the appropriate pagination. Appellee's Brief will be referred to as "AB," followed by the appropriate pagination. References to the "Lease" shall refer to the ninety-nine (99) year lease agreement between Vivos and Sindorf.

JURISDICTIONAL STATEMENT

Vivos incorporates the Jurisdictional Statement in its initial briefing on page 1.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRORED IN FINDING VIVOS WITHOUT AUTHORITY TO ACT IN ITS MODIFICATION OF THE COMMUNITY RULES?

The trial court erroneously concluded Vivos lacked Authority.

Countryside S. Homeowners Ass'n, Inc. v. Nedved, 2007 S.D. 70, ¶ 11, 737 N.W.2d 280, 283
Hood v. Straatmeyer, 2025 S.D. 12, ¶ 6, 18 N.W.3d 649, 653
Barclay Square Condo. Owners' Ass'n v. Grenier, 153 N.H. 514, 515, 899 A.2d 991, 993 (2006)

II. WHETHER ISSUES NOT RAISED TO THE CIRCUIT COURT WILL BE CONSIDERED FOR THE FIRST TIME BY THIS COURT?

This Court does not consider issues not raised at the circuit court level.

Com. Tr. & Sav. Bank, 535 N.W.2d 853, 858 (S.D. 1995)
Hall v. State ex rel. S. Dakota Dep't of Transp., 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27
Norbeck & Nicholson Co. v. State, 32 S.D. 189, 142 N.W. 847, 849 (1913)

STATEMENT OF THE CASE AND FACTS

Vivos incorporates the Statement of the Case and Facts within its initial briefing, pages 2-6.

STANDARD OF REVIEW

Vivos incorporates the Standard of Review within its initial briefing, page 7.

ARGUMENT

I. Vivos' Authority to Modify "Community Rules" is Consistent with South Dakota Precedent as a Valid Exercise of Contractual Authority by HOAs, Covenant Communities, and Landlords Alike, which was Bargained for Here Between the Parties.

A. South Dakota Precedent Supports a Landlord/Covenant Community/HOAs/Vivos Authority to Modify "Community Rules" when and in Accordance with the Procedure Agreed Upon in Contracts, Leases, Covenants, and is Included as Contractual Consideration since that Authority Provides Continued Community Standards.

The Lease between Vivos and Sindorf contains clauses that exist "in consideration of the mutual promises contained herein (the Lease) and other good and sufficient consideration." SR, 3 (APP 28). The "Vivos xPoint Community Rules and Regulations" (hereinafter "Community Rules") were attached to the Lease as Addendum "B." *Id.* (APP 30). Paragraph 11 of the Lease permits "Modification of the Community Rules and Regulations," where "Vivos may change or modify the Vivos xPoint Community Rules and Regulations at any time, subject to providing the Bunker Lessee a minimum of thirty (30) days written notice prior to the effective date of any changes or modification." *Id.* (APP 35-36). However, the "Lease Agreement cannot be changed or modified except by written agreement by the parties." *Id.* ¶ 22 (APP 40). Vivos absolutely contends the Lease is a valid lease agreement, which includes a "modification"

provisions consistent with those that any landlord, condominium association, or Home Owners Association (hereinafter "HOA") could/does include and impose in its covenants or lease consistent with South Dakota law.

South Dakota has a long history of recognizing restrictions on usage of property be it tenants or members of a covenant community. "A covenant is a contract between the governing authority and individual lot owners." *Hood v. Straatmeyer*, 2025 S.D. 12, ¶ 6, 18 N.W.3d 649, 653 (quoting *Countryside S. Homeowners Ass'n, Inc. v. Nedved*, 2007 S.D. 70, ¶ 11, 737 N.W.2d 280, 283) (citation omitted). "It 'represents a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping subsequent change.' " *Id.* (citation omitted). "When interpreting the terms of a restrictive covenant, we use the same rules of construction applicable to contract interpretation." *Id.* (quoting *Halls v. White*, 2006 S.D. 47, ¶ 7, 715 N.W.2d 577, 580).

Vivos' Community Rules are a material part of the Lease. Vivos only has the ability to modify the Community Rules, not any provisions within the Lease, unless the lessee also consents in writing. SR, 3 (APP 35-36, 40). Vivos can within the Lease, however, also unilaterally increase land lease rent or common fees (which was not objected to by Sindorf) as well as levy additional charges for services performed, both unilaterally. *Id.* ¶¶ 2, 12 (APP 31, 36). This is commonplace amongst many covenant communities and leases and is practical; if property taxes increase the landowner or governing body needs the ability to increase rents or costs and can do so.

"The interpretation of a covenant is a legal question which we review de novo." *Id.* (quoting *Halls*, ¶ 4, 715 N.W.2d at 579 (citation omitted). "Equitable determinations, however, are reviewed only for abuse of discretion." *Id.* (citing *Halls,* at 579–80 (citing

Adrian v. McKinnie, 2002 S.D. 10, ¶ 9, 639 N.W.2d 529, 533). "An abuse of discretion is 'a fundamental error of judgment, a choice outside the reasonable range of permissible choices, a decision ... [that], on full consideration, is arbitrary or unreasonable.' " *Coester v. Waubay Twp.*, 2018 S.D. 24, ¶ 7, 909 N.W.2d 709, 711 (alteration and omission in original) "Under the de novo standard of review, no deference is given to the circuit court's conclusions of law." *Hauck v. Clay Cnty. Comm'n*, 2023 S.D. 43, ¶ 6, 994 N.W.2d 707, 710 (quoting *Good Lance v. Black Hills Dialysis, LLC*, 2015 S.D. 83, ¶ 9, 871 N.W.2d 639, 643).

This Court, as noted above has approved covenant and HOAs ability to exercise decision making capacities, like Vivos' retains the ability to modify Community Rules as "it represents a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping subsequent change." *Hood*, 2025 S.D. 12, ¶ 6, 18 N.W.3d 649, 653 (quoting *Nedved*, 2007 S.D. 70, ¶ 11, 737 N.W.2d 280, 283). In covenant communities, HOAs, landlord agreements; all contracts in South Dakota, " '[e]very contract contains an implied covenant of good faith and fair dealing [that] prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract.' " *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 20, 731 N.W.2d 184, 193 (quoting *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, 704 N.W.2d 24).

Unlike the hypotheticals offered by Sindorf, Vivos cannot make rules that are inconsistent with the covenant of good faith and fair dealing and has not done so in this underlying case. *See* AB, 15. To be clear, the covenant of good faith and fair dealing is not "curing" a void contractual agreement, the Lease is valid, the clauses (including

modification of Community Rules) is consistent with South Dakota precedent, and the good faith and fair dealing covenant is applicable here and has not been violated but is an additional assurance against arbitrary or capricious modifications by Vivos. *See* AB, 15.

The ability to contest as well as enforce these rights may be lost by waiver, consistent with South Dakota precedent. Vivos contends Sindorf knew of the Community Rule modification regarding the updated terms on Brandishing failed to take any action contesting the enforceability and acquiesced to the Community Rules. "The right to enforce [a] restrictive covenant[] may be lost by waiver or acquiescence of violation of the same." *Hood,* 2025 S.D. 12, ¶ 20, 18 N.W.3d 649, 656 (citing *Vaughn v. Eggleston*, 334 N.W.2d 870, 873 (S.D. 1983).

If the circuit court's decision is affirmed, all current South Dakota covenant communities, condominium associations, HOAs, landlords, that have a leases or by-laws permitting any ability of that community, landlord, or governing body to make any decision, *i.e.* increasing rent based on increased property taxes, modifying quiet hours, restricting parking, so long as that decision is consistent with the contract the parties entered into, will now be void and invalid nearly all contracts which parties entered into based on the expectation of those communities ability to act in their interests.

B. *Other Jurisdictions more Specifically Address the Narrow Question, "Whether a Contract/Lease Permit a Lessor/Board Discretion Authority to Unilaterally Modify" and Those Jurisdictions Affirm an Association that Grant of Authority.*

In *Barclay Square Condo. Owners' Ass'n v. Grenier*, Barclay Square contained twenty-four units and was a registered condominium association governed by a board of directors. 153 N.H. 514, 515, 899 A.2d 991, 993 (2006). Barclay Square Association enacted a new rule (the 2002 amendment) which allocated two gravel lot parking spaces

to each owner and provided owners with the option of renting unassigned spaces for twenty dollars a month. *Id.* Grenier did not comply with the 2002 amendment because he believed that it discriminated against him. *Id.*

The Court rationed a condominium's legal documents are "a contract that governs the legal rights between the association and property owners." *Id.* (quoting *Schaefer v. Eastman Community Assoc.,* 150 N.H. 187, 190, 836 A.2d 752 (2003). We are also mindful that a condominium declaration "should not be so narrowly construed so as to eviscerate the association's intended role as the governing body of the community." *Id.* (quoting *Schaefer,* 150 N.H. at 191, 836 A.2d 752). "[T]he important role [associations] play in maintaining property values and providing municipal-like services" justifies a broad view of the powers delegated to them. *Id.* Accordingly, a condominium association may promulgate rules to address day-to-day concerns as long as such rules: (1) do not conflict with the express language of the condominium documents; and (2) are reasonable and not arbitrary or capricious. *See id.* at 194, 836 A.2d 752; *Grenier,* 150 N.H. at 115, 834 A.2d 238.

Although [the Supreme Court of New Hampshire] ha[s] expressed the view that an association may not enact rules that are unreasonable, *Schaefer,* 150 N.H. at 190, 836 A.2d 752, it has never applied the reasonableness standard. *Id.* Other jurisdictions that have applied the reasonableness standard in this context require that the regulation "bear a relationship to the health, happiness and enjoyment of life of various [condominium] owners." *Id.*; *see also Unit Owners Ass'n of Buildamerica–1 v. Gillman,* 223 Va. 752, 292 S.E.2d 378, 385 (1982); *Hidden Harbour Estates, Inc. v. Norman,* 309 So.2d 180, 181–82 (Fla.Dist.Ct.App.1975); *Holleman v. Mission Trace Homeowners Ass'n.,* 556 S.W.2d

632, 636 (Tex.Civ.App.1977).The Court determined the Association acted within its authority in the actions it took.

The *Barclay Square* decision demonstrates Court's recognize this decision-making ability of an association (like Vivos over Vivos xPoint) and the important role [associations] play in maintaining property values and providing municipal-like services" justifies a broad view of the powers delegated to them. *Id.* Unlike in *Barclay Square*, there is not an dispute over "what decision was made" if that decision "did not conflict with the express language of the agreement" or "was reasonable and not arbitrary or capricious," solely the issue here is that Vivos has the ability to modify the Community Rules at all! As noted, there is a plethora of caselaw supporting the proposition of associations to act on behalf of the individuals that voluntarily agree to live within that associations community, and expect and bargain for the important role associations play.

Leases that contain modification clauses, nearly identical to ¶ 11 within the Lease are commonplace and consistently upheld by other jurisdictions. *See Olszewski v. Cannon Point Ass'n, Inc.*, 148 A.D.3d 1306, 1309–10, 49 N.Y.S.3d 571, 576 (2017) (condominium association's bylaws also contain a provision acknowledging that its board of managers may "make reasonable rules and regulations and ... amend the same from time to time, and [that] such rules and regulations and amendments shall be binding upon the [homeowners] when the [b]oard has approved them in writing" and delivered a copy thereof to each home. A similar provision is embodied in the HOA's bylaws, which reflects that the HOA's affairs shall be managed by its board of directors and enumerates the powers granted thereto. Indeed, it has been observed that, as a general proposition, "[b]ecause of the manner in which ownership in a condominium is structured, the

individual unit owner, in choosing to purchase the unit, must give up certain of the rights and privileges which traditionally attend fee ownership of real property and agree to subordinate them to the group's interest").

Sindorf's argument and the rationale from the circuit court, that the mere ability to unilaterally modify Community Rules voids the entire Lease agreement is entirely inconsistent with jurisprudence directly addressing the authority of governing bodies (associations, landlords, covenant communities). *See supra.* No decision here was even made that could be a basis as abuse of that authority—just that the ability to modify from time to time exists within the four walls of the contract. This ability to modify rules from time to time is bargained for, expected by members entering these types of communities, and consistently upheld as valid – so long as the decision made is consistent with the rules outlined above. This Court should reverse the circuit court and in accord with South Dakota as well as other jurisdictional precedent, uphold the Lease.

II. Sindorf argues for the first time on appeal that in the alternative, if this Court were to not affirm the circuit court on the grounds that the Lease is illusory, this Court can affirm as the Lease is "unconscionable" and violates SDCL § 43-32-4; those arguments should not be considered.

A. Arguments raised for the first time on appeal are not considered by this Court.

When an issue is raised for the first time on appeal this Court need not consider it. *LP6 Claimants, LLC v. S. Dakota Dep't of Tourism & State Dev.*, 2020 S.D. 38, ¶ 24, 945 N.W.2d 911, 918 (citing *Cain v. Fortis Ins. Co.*, 2005 S.D. 39, ¶ 22, 694 N.W.2d 709, 714); *see People in Int. of D.S.*, 2022 S.D. 11, 970 N.W.2d 547, 555; *State v. Stanley*, 2017 S.D. 32, ¶ 26, 896 N.W.2d 669, 678 ("This Court will not address arguments that are raised for the first time on appeal.") (citation omitted); *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 19, 719 N.W.2d 780, 786; *see, e.g., Action Mech., Inc. v. Deadwood Historic*

Pres. Comm'n, 2002 SD 121, ¶ 50, 652 N.W.2d 742, 755 ("An issue not raised at the trial court level cannot be raised for the first time on appeal."); *Sedlacek v. S.D. Teener Baseball Program,* 437 N.W.2d 866, 868 (S.D.1989) (stating that where a party "failed to develop the record" on an issue "we deem that issue abandoned"); *Fortier v. City of Spearfish,* 433 N.W.2d 228, 231 (S.D.1988) ("Since this issue was not framed in the pleading and was not addressed by the affidavits in support of or resistance to the motion for summary judgment, we do not believe the issue was properly before the trial court. Therefore, we will treat the issue as not being properly before us....").

To raise a legal argument on appeal in an answering brief without first addressing it below puts the adverse party at an extreme disadvantage. *Hall v. State ex rel. S. Dakota Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27. Had the issue been raised below, the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration. *Id.* Likewise, the trial court would have been made aware of the issue and given an opportunity to rule on it. *Id.*

In the underlying case, the circuit court only addressed the parties' competing motions for summary judgment (SR. 566, 569, 674, 676, 684, 698), holding the other motions (SR. 649, 653, 663, 665) in abeyance and took the matter under advisement. Defendant's "Motion for Summary Judgment/Dismissal" solely raised the issue of the Lease being "illusory and unenforceable" as the basis for summary judgment. SR. 566, ¶ 3. The circuit court issued an Order: Granting Defendant's Motion for Summary Judgement, holding:

> IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is GRANTED because there are no genuine issues of material fact, as the 99-year lease is an illusory contract that Plaintiff can unilaterally modify the terms of at any time with no recourse for Defendant. As Such, Defendant is entitled to judgment as a matter of law. The Court need not address the other arguments raised by Defendant in his Motion.
>
> IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED.

SR. 1030.

Sindorf for the first time on appeal raises the arguments that this Court should alternatively affirm the circuit court's position on the grounds that; "The Lease is unlawful because it violates the non-waivable provisions of SDCL [§] 43-32-8," and "The Lease is Unconscionable and Should Not Be Enforced." AB, 16-24, and 25-26. These arguments are improperly raised here for the first time as they were not raised below to the circuit court. *See e.g. Hall*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27; *LP6 Claimants, LLC*, 2020 S.D. 38, ¶ 24, 945 N.W.2d 911, 918; *Cain*, 2005 S.D. 39, ¶ 22, 694 N.W.2d 709, 714; *People in Int. of D.S.*, 2022 S.D. 11, 970 N.W.2d 547, 555; *Stanley*, 2017 S.D. 32, ¶ 26, 896 N.W.2d 669, 678; *A-G-E Corp.*, 2006 S.D. 66, ¶ 19, 719 N.W.2d 780, 786. As such Vivos will not address the arguments of Sindorf regarding; SDCL § 43-32-8 or unconscionability.

B. Affirmance of the circuit court's voidance of the Lease makes Sindorf and all current lessees' "trespassers," not month-to-month tenants.

Vivos' replies to a sub argument of Sindorf regarding a question that was not answered by the circuit court, "what is the legal status of lessees" now that the Lease is deemed illusory. This question looms heavy in light of the circuit court's decision and was raised by Sindorf in his briefing. AB, 29. Vivos believes this question is not before

the Court and does not bear answering but responds in an abundance of caution to state its position if this Court answer this question as to what the prior lessees are now.

Sindorf might have avoided an eviction action but lost the war in terms of his, as well as every other lessee under the Leases property interest in their bunker and improvements. To rectify this paradox Sindorf created, Sindorf asserts a contradictory position; wanting to "have their cake and eat it too," or rather here, "find the entire Lease invalid, illegal at formation, and ask this Court impose with no defined terms, a month-to-month tenancy for those lessees under the illegal Lease!" AB, 29.

Sindorf seeks affirmation that the "Modification of the Community Rules and Regulations" of the Lease invalidates the entire Lease; however, if this Court were to affirm the circuit court that the current lessees under that lease would not be trespassers but tenants on a month-to-month basis. AB, 29. It is inapposite within Sindorf's arguments that "Waiver and Ratification Cannot Validate an Illegal Contract" "because the contract at issue here was illegal at formation, cannot be waived into existence" but then somehow the lessees here have a month-to-month tenancy after having no lease to start with? AB, 26. If there is no valid lease interest and the entire Lease is voided—which Sindorf vehemently argues—there cannot be a month-to-month tenancy and Sindorf cites no authority to support that proposition. AB. 29, *see* citation to SDCL § 43-32-4 (which relates to hiring of lodgings and is not pertinent to the issue at hand).

Prior lessees would then become trespassers. South Dakota Law defines a trespasser, as "any person who enters on the property (Vivos xPoint) of another (Vivos) without permission (lessee without a lease) and without an invitation, express or implied." SDCL § 20-9-11.1. "It is a well-settled principle that, in the absence of an

agreement that the landlord will pay for improvements or a statute imposing liability on the landlord, a tenant is not entitled to compensation for improvements made to the leasehold even though they cannot be removed by the lessee." *Kaberna v. Brown*, 2015 S.D. 34, ¶ 18, 864 N.W.2d 497, 503 (quoting *Com. Tr. & Sav. Bank v. Christensen*, 535 N.W.2d 853, 858 (S.D. 1995); 49 Am.Jur.2d Landlord and Tenant § 902 (1995).

Here, the Lease (if valid), ¶ 13, provides upon termination that "[p]rior to vacating the premises the Bunker Lessee shall remove all personal property contained in its Bunker Structure, but any improvements and fixtures permanently affixed or attached to the Bunker Structure may not be removed." If the Lease is invalid, this clause does not control. Sindorf has not cited any statute that imposes liability on the landlord. SDCL § 43-33-2 states:

> Except as provided by § 43-33-3, when a person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land unless he chooses to require the former to remove it.

Com. Tr. & Sav. Bank, 535 N.W.2d 853, 858 (S.D. 1995).

At present, like in South Dakota precedent directly on point, the landlord did not request any improvements and even under a theory of unjust enrichment, the lessees would not be entitled to restitution. *Id.*; *Whitson v. Lende,* 442 N.W.2d 267 (S.D.1989). The general rule is that illegal contracts–illegal by reason of being expressly prohibited by law–are unenforceable, and no one can acquire any legal right under such a contract. *Norbeck & Nicholson Co. v. State*, 32 S.D. 189, 142 N.W. 847, 849 (1913). If one of the parties has performed in whole or in part, he cannot avoid the contract and recover from the adversary party a reasonable compensation for such performance. *Id.* No right, therefore, arises out of an illegal transaction even on the theory of constructive contracts.

Id. The law leaves the parties to illegal contracts where it finds them and gives them no assistance in extricating themselves from the situation in which they have placed themselves–no recovery can be had for services rendered thereunder, either on the express contract, or on an implied contract, or on quantum meruit. *Id.*

Sindorf argues here, as he did to the circuit court, the entire Lease is void, there is no ability to ratify or severe any portion of the Lease, it is void from the outset. AB, 5-14. If this Court affirms the circuit court decision and then chooses to address the legal status of Sindorf, and naturally then all the other prior lessees, or direct the circuit court to clarify that legal status, it should find that Sindorf and as unfortunate casualties of that holding, all prior lessees are now trespassers with zero property interest, lease interest, and with no ability to recover improvements.[1]

C. Sindorf is not entitled to Attorney Fees.

The circuit court did not award attorney fees and for the first time now Sindorf requests attorney fees pursuant to SDCL § 21-16-11. AB, 29. Sindorf should not receive fees at the circuit court or appellate level. First, this request is untimely as it is being raised on appeal for the first time. *Supra.* Second, Sindorf did not prevail on any basis that the forcible entry and detainer (hereinafter "FED") action was wrongful or otherwise, neither party prevailed on the FED. Third, generally, a FED action "cannot be brought in

[1] Vivos respectfully requests the Court adhere to the general principal that issues not raised before the trial court are not considered on appeal due to the inability to develop a record and dispute factual issues. Specifically, here declining to consider the claims of unconscionability and breach of SDCL § 43-32-8. However, the issue of "what now" as to the legal status of Sindorf and all other individuals who previously were lessees' is more of a consequence of the circuit court's holding. The "what now" as to Sindorf and all other Vivos xPoint lessees is not before this Court directly, answering that question results in implications for all other lessees who are not parties here, could have different facts, claims or damages, and doing so will result in a decision affecting their interests regardless of this Court's decision. *See Paweltzki v. Paweltzki*, 2021 S.D. 52, ¶ 40, 964 N.W.2d 756, 768; *State v. Chant*, 2014 S.D. 77, ¶ 7, 856 N.W.2d 167, 169; *Sharp v. Sharp*, 422 N.W.2d 443, 445 (S.D. 1988).

connection with any other [action] except for rents and profits or damages[.]" *VOR, Inc. v. Est. of O'Farrell*, 2025 S.D. 2, ¶ 26, 17 N.W.3d 252, 259–60 (citing SDCL § 21-16-4); *see also LPN Tr. v. Farrar Outdoor Advert., Inc.*, 1996 S.D. 97, ¶ 8, 552 N.W.2d 796, 798. However, some "inquiry may be made into equitable considerations in an unlawful detainer action, as long as those considerations are relevant to the *right of possession.*" *Id.* (quoting *LPN Tr.*, 1996 S.D. 97, ¶ 9, 552 N.W.2d at 798 (emphasis in *VOR*). In line with that theory, the argument that "the entire lease is void" should have been a separate action from the FED and the circuit court should not have addressed, let alone decided the Lease is illusory as that question is not within the realm of consideration for FED cases. *See id.*

Sindorf's position which the circuit court adopted is that the entire Lease is void so there can be no FED action, as there is not a valid Lease to enforce a FED. Moreover, even if attorney fees were to be awarded (which they should not be) they would need to be apportioned to services regarding the FED, the majority of the briefing, arguments below as well as to this Court are on the property interest of whether the Lease is valid or not valid and relates to the parties interests to property, not the FED.

CONCLUSION

Vivos respectfully for the aforementioned reasons asks this Court to REVERSE the circuit court, as Vivos' unilateral ability to modify *only* the Rules, not the material terms of the Lease, is in accordance with South Dakota as well as other jurisdictions precedent and any arguments not raised to the circuit court should not be considered here.

Dated October 15, 2025

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ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66, Eric M. Schlimgen, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 23 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The footnotes are Times New Roman 10 point. The word processor used to prepare this brief indicates that there are a total of **23 pages, 4,254** words, and **21,529 characters** (no spaces) in the body of the Brief.

/s/ Eric M. Schlimgen
ERIC M. SCHLIMGEN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 2025, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed to:

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The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date written above.

/s/ Eric M. Schlimgen
ERIC M. SCHLIMGEN