IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NOPE-LINCOLN COUNTY, INC., a South Dakota non-profit corporation, MIKE HOFFMAN, MICHELLE JENSEN, JAY WHITE, and TOM EIESLAND,
Plaintiffs-Appellants,

v.

DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and KELLY WASKO, Secretary,
Defendants-Appellees.

 # 30890

41CIV23-000877

Appeal from
Circuit Court, Second Judicial Circuit, Lincoln County, South Dakota
The Honorable Jennifer Mammenga, Circuit Judge, Presiding

APPELLANTS' BRIEF

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com
Attorney for Plaintiffs-Appellants

Grant M. Flynn
Assistant Attorney General
SD ATTORNEY GENERAL
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501
(605) 773-3215
Attorney for Defendants-Appellees

NOTICE OF APPEAL FILED NOVEMBER 12, 2024

Filed: 11/21/2024 7:59 AM CST Supreme Court, State of South Dakota #30890

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTORY STATEMENT

The individual Plaintiffs and Appellants, each of whom lives within a mile or two of the State's proposed new Prison site - Michelle Jensen, Mike Hoffman, Jay White and Tom Eiesland - will be referenced by their last names or generally as Appellants. NOPE-Lincoln County, Inc., also an Appellant, will be referenced as NOPE. Appellee Department of Corrections is referenced as "DOC," the State of South Dakota, "State" and Kellie Wasko, Secretary of DOC, as "Secretary." Lincoln County's Comprehensive Plan and Zoning Ordinance are referenced as "Plan" and "Ordinance," respectively. Citations to the Clerk's Record, appear as "CR."

JURISDICTIONAL STATEMENT

The Circuit Court entered the Memorandum Decision and Order[1] on October 23, 2024, dismissing Plaintiffs' Verified Complaint with prejudice. CR139. Notice of entry of the Order was served November 7, 2024. CR162. Notice of Appeal was filed November 12, 2024. CR187. This Court has jurisdiction under SDCL 15-26A-3(2).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Appellants' docketing statement, filed November 12, 2024, states these issues:

Issue 1:

> Whether the Circuit Court erred in determining that, apart from Hoffman and Jensen, Plaintiffs do not have standing as "persons aggrieved," to maintain a declaratory judgment action against the State for the specific ends and purposes as expressly sought in Complaint, ¶ I-4(S), at 25, CR25.
>
> The trial court found that two individuals and the nonprofit entity did not have standing to complain, Order, at 11 (CR151-2).
>
> Legal Authority:
> SDCL 11-2-1.1, 11-2-61

[1] Hereafter referenced as "Order."

Sierra Club v. Clay County Board of Adjustment, 2021 SD 28, 959 N.W.2d 615.
Powers v. Turner County Board of Adjustment, 2022 SD 77, 983 N.W.2d 594.
Abata v. Pennington County Board of Commissioners, 2019 SD 39, 931 N.W.2d 714

Issue 2:

Whether the Circuit Court erred in concluding the doctrine of sovereign immunity inhibits a declaratory judgment action against the State, as the Secretary's duties are asserted to be discretionary in nature.

The trial court found the Secretary's duties are discretionary and thus the doctrine precludes further question by Appellants, Order, at 17, CR156.

Legal Authority:
Dan Nelson Automotive, Inc. v. Viken, 2005 SD 109, 706 N.W.2d 239
Dakota Systems, Inc. v. Viken, 2005 SD 27, 694 N.W.2d 23

Issue 3:

Whether the Circuit Court erred in failing to find that the action, in seeking to determine that the State should pursue a conditional use permit or a re-zoning before the County planning commission, is actually concerned with the performance of (or the Secretary's refusal to perform) a ministerial act.

The trial court found the duties conferred by HB1017 are discretionary, Order, at 17, CR156, while making no finding as to whether the Secretary had a ministerial duty also to comply with the requirements of the County's Plan and Ordinance.

Legal Authority:
SDCL 11-2-24
Truman v. Griese, 2009 SD 8, 762 N.W.2d 75.

Issue 4:

Whether the Circuit Court erred in determining that *City of Rapid City v. Pennington County* allows the State, as a proposing governmental entity with the power of eminent domain, to avoid application of the "balancing of interests" in favor of the "general rule."

The trial court found that if the County can avoid City zoning when building a jail, as in *City of Rapid City*, the State may avoid County zoning rules in locating a Prison, Order, at 20, CR159.

Legal Authority:
Lincoln County v. Johnson, 257 N.W.2d 453 (S.D. 1977)
City of Rapid City v. Pennington County, 2003 SD 106, 669 N.W.2d 120

Issue 5:

Whether the Circuit Court erred in concluding, without benefit of evidentiary proceedings, that even if the "balancing of interests" rule were extended to Plaintiffs, the Complaint must be dismissed for failure to state a claim.

The trial court concluded that, whether under the general rule or the balancing of interest's test, the State's selection of the Farm is not subject to the County's Plan and Ordinance, Order, at 22, CR161.

Legal Authority:
Lincoln County v. Johnson, 257 N.W.2d 453 (S.D. 1977)
Governmental Immunity from Local Zoning, 84 Harv. L. Rev. 869 (1971)
Official Opinion 77-13, 1977 S.D. Op. Atty. Gen. 26
Stype, *Government Immunity from Local Zoning Restrictions: The Balancing Test of Brownfield v. State*, Ohio St. L. Journal, Vol. 43, No. 1 (1982), 229-266.

STATEMENT OF THE CASE

Appellants, as individual property owners in the adjoining townships of Dayton or LaValley, of Lincoln County, have thus far been denied any opportunity to be heard on a proposed, highly consequential land use now inching towards fruition. The territorial prison was constructed in Sioux Falls some 140 years ago, but the State now proposes to move the site, with occupants and staff – the resulting scope being on the order of a town or small city[2] – out into the countryside, at the intersection of two narrow gravel roads. The neighboring landowners, Appellants being fairly representative, do not welcome the State's efforts, have brought their Complaint in an effort to gain some adversarial

[2] *See* Exhibit A-3 to Complaint, CR29-30: 1,500 inmates and some 400 employees. It is generally understood that many of the latter number – *but few if any of the former* – will need to commute daily to this rural site, there being no apartment houses, rental homes, or housing developments nearby. The volume of vehicle traffic alone seems perilous.

hearing, whether that be in connection with either a conditional use permit or re-zoning effort before the County's planning commission or, in the alternative, an evidentiary hearing conducted by the Circuit Court. Complaint, ¶ I-4 (S), *et seq*., CR25.

Rather than afforded a hearing, Appellants are dismissed with prejudice. They are now in peril of experiencing a radical, permanent transformation of their rural, agrarian-focused homes, farms and properties, as unwilling neighbors of the State's unplanned, intended stark, industrial-like project, with no opportunity to be heard.

STATEMENT OF FACTS

Appellants (other than NOPE) are neighbors, all living within a relatively short distance of the "Farm," a 320-acre parcel situated at the intersection of two township gravel roads, 278th Street and 477th Avenue, Dayton Township. Complaint, ¶¶ A-1, E-4, CR1, 8. Appellant White lives one mile west in LaValley Township (*Id.*, ¶ B-2, CR3), Eiesland lives just one-quarter mile east (*Id.*, ¶ B-3, CR3-4), while Hoffman and Jensen live about one mile northeast of the site (*Id.*, ¶ B-1, CR3). NOPE, incorporated on October 13, 2023, has hundreds of members, largely composed of individuals residing in Dayton and LaValley Townships, members seeking to preserve a "way of rural life in the A-1 Agricultural District, consistent with Lincoln County's Plan." *Id.*, ¶ B-4, CR4.

The Farm was the property of C. Alfred (deceased 1974) & Ethilda Haug (deceased 1990). *Id.*, ¶ A-1, CR1. The couple had no children; Ethilda died intestate and without collateral heirs. As a consequence, the Farm escheated to the State in 1992. *Id.* Thus, the site of the State's major project, for which hundreds of millions are set aside, seems to have been cast many decades earlier with the passing of an elderly, intestate widow. The State now proceeds without any regard for the County's Plan and Ordinance or the invested land use property interests of the neighbors, including Appellants.

The Farm is within the County's Plan and described as part of the "A-1 Agricultural District" under the *2009 Revised Zoning Ordinance*. *Id.*, ¶ D-3, CR6. It is located about seven miles from Canton, and five miles from Harrisburg. *Id.*, ¶¶ F-8, F-9, CR9. The property has been used exclusively for agricultural purposes since settlement (*Id.*), the last number of years having been rented, by the widow Haug and then by the State also, to neighbor and adjoining owner, Eiesland. *Id.*, ¶ E-2, CR7.

In May 2023, DOC issued a document seeking land for a new Prison. *Id.*, ¶ F-2, CR10. The site should be within 20 miles of Sioux Falls, "near interstate and on or near a paved road." *Id.* The project represents a projected investment of some $600 million, will employ 400 or more personnel, and house 1,500 offenders, "similar to a town." *Id.*, and Exh. A-3, CR29. Some weeks prior to October 6, 2023, DOC privately disclosed to various County officials the Farm had been selected as the site of a new State Prison, which the Secretary describes as the "best choice." *Id.*, ¶¶ A-4, F-4, CR2, 11. On October 6, the State announced the Farm would serve as the new Prison site. *Id.* In response to written inquiry from counsel, the Secretary expressed her reliance upon S.D. Const. Article XIV, §§ 1, 2, the power of condemnation expressed in SDCL 1-15-14, the Attorney General's opinion (1977 S.D. Atty. Gen. 26), the doctrine of sovereign immunity as provided for in S.D. Const. Article III, § 27, as well as HB 1017 (2023). In short, the Secretary asserts, "neither zoning ordinances nor land use approvals are required for state-owned property." Complaint, Exh. F-3, CR31-2.

This action was filed November 3, 2023, asserting, *inter alia*, the Farm is rural in character, lacks infrastructure suitable for a town of several thousand, is not near the interstate highway nor is it situated on or near a paved road. The key assertions in ¶¶ I-4(S), (T) and (U) of Complaint, CR25, propose as follows:

S. That consistent with the test described in *Lincoln County*, the State should be directed to pursue, before the Lincoln County Planning Commission, a CUP within the A-1 Agricultural District, or, in the alternative, the State may elect to seek a re-zoning before that agency to a district that may support a Prison use, provided such relief or remedies are deemed consistent with the County's Plan by the County's commissions or boards; thereafter, either the State or the opponents in the County proceedings, may seek judicial review, consistent with Ch. 11-2, SDCL.

T. That if the State refuses to comply with zoning procedures, but intends to proceed with development of the Farm into a Prison, then this Court should then conduct proceedings to determine whether, based on actions and acts previously taken by the Legislature, or hereafter, the State is deemed immune from the limits and restrictions of the County's Plan and Zoning Ordinance, and further, in applying the Balancing of Interests test, whether State's nonconforming use of the Farm is to be excused.

U. That in the event State continues to assert the zoning immunity claim, Defendants should be required to present evidence to this Court, in a contested matter to apply the Balancing of Interests test, the State having the burden of proof and with an opportunity for Plaintiffs to be heard, concerning: (a) all relevant details of the proposed Prison, including security systems and on-site personnel and equipment to counteract security threats within the Prison and the neighborhood; (b) the proposed mitigation concepts and systems the State intends to design, install, provide and secure for the benefit of Plaintiffs and other property owners, and (c) the details of the State's site selection process, including: (i) all relevant information as to other potential sites considered for the [Prison]; (ii) the reasons such alternate sites were not selected, in favor of the Farm, with the identity of the individuals or persons responsible for making the selection of the Farm; (iii) facts bearing on the individual and collective costs of infrastructure needs of the Prison at the Farm, including the need for emergency response and services from the nearby towns (Canton, Harrisburg, and Worthing, and perhaps others), and including also medical and emergency services and law enforcement response needs; (iv) disclosure and distinction of those infrastructure costs required for the Farm, if used as a Prison site as will be absorbed or funded by the State, versus those that will be laid off onto other local governmental units, including the Township and County. Plaintiffs must be afforded the right to cross examine the witnesses presented by the State and to rebut evidence adduced. This Court may then determine, in light of the probable adverse effects on the properties of others including Plaintiffs, whether the State's site selection process has been fully reasonable, entirely straight-forward and neither arbitrary nor capricious, and otherwise lawful in all respects.

The State responded with a Motion to Dismiss with prejudice, and to stay discovery served by Plaintiffs. SDCL 15-6-12(b)(5), CR44. Lincoln County submitted a brief as amicus curiae. CR113. A motion to amend the complaint was filed January 18, 2024, CR133.[3] Argument was presented on January 22, 2024. The Circuit Court's Order was filed October 23, 2024, notice of entry was given on November 7, 2024, CR162, and Appellants' notice of appeal was filed November 12, 2024, CR187.

STANDARD OF REVIEW

Applications of law and statutory interpretation issues are "questions of law that are reviewed de novo." *Krsnak v. South Dakota Dept. of Env. and Nat. Resources*, 2012 S.D. 89, ¶ 8, 824 N.W.2d 429, 433 (citing *State v. Goulding*, 2011 S.D. 25, 799 N.W.2d 412, 414).

ARGUMENT

> ***Issue 1:*** Whether the Circuit Court erred in determining that, apart from Hoffman and Jensen, Plaintiffs do not have standing, as "persons aggrieved," in a declaratory judgment action against the State for the specific ends and purposes expressly sought in Complaint, ¶ I-4 (S)(T) and (U), at 25-6, CR25-6.

Each of the individual Plaintiffs own land "adjacent to the [Farm] in question." Order, at 4, CR4. As to White and Eiesland, however, that ownership was found insufficient to support standing, while given their stated loss in fair market value and the ability to sell a parcel was deemed sufficient for standing on the part of Hoffman and

---

[3] The motion (*see* Appendix D to Appellants' opening brief) seeks to amend Complaint, at ¶ D-3, noting the adoption of a new zoning ordinance on August 3, 1995; the *"A" Rural and Public Use District* became the *A-1 Agricultural District*, while "[p]ublicly owned or operated properties" would henceforth be "conditional uses" rather than permissive uses, as was otherwise the case at the time of the proposed landfill at issue in *Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977).

Jensen. The Court's analysis seems premised on the thought that this case is intended to prevent DOC from purchasing and using the Farm as a Prison site. In reality, the case merely seeks a declaration that the Farm is not to be used for that purpose *without* having initiated either the conditional use or re-zoning process provided for under the County's Ordinance. The respective interests of all of the individual Plaintiffs are not materially different from each other. One Plaintiff should not be deemed to have no standing simply because that party has no present intention or desire of offering their property for sale.

It seems readily apparent that *if* the State were to initiate proceedings before the County's planning commission, each of the individual Plaintiffs, as landowners adjacent to the Farm, and residing on their properties, would be recognized as an "aggrieved person" in pursuit of lawful efforts under the Ordinance, no different than the parties "living in close proximity" to a proposed CAFO, at issue in *Powers v. Turner County Board of Adjustment*, 2022 SD 77, ¶ 17, 983 N.W.2d 594, 601. Plaintiffs are not merely taxpayers, members of the general public living *somewhere* in the County; rather, they are at the very epicenter of the State's proposed, unplanned land use.[4]

Proximity to a potentially problematic land use was sufficient to support standing for neighboring landowners in *Abata v. Pennington County Bd. of Commissioners*, 2019 S.D. 39, ¶¶ 10, 14, 931 N.W.2d 714, 719-20. Now that a Prison proposes to become a neighbor, where a corn field has always been, this fact should not be deemed less supportive of standing than the nearby mining operation at issue in *Abata*.

---

[4] Tom Eiesland lives just one-quarter mile east of the Farm. Complaint, ¶ B-3, CR3. The Court, Order, at 11, CR150, finds that a "wish not to have a prison located by one's property is not an injury in fact." Eiesland maintains that it is a sufficient injury, as neither the Plan nor the Ordinance would ordinarily permit *that* proposed use to flourish in the *A-1 Agricultural District*.

NOPE, organized a few days after the State's Announcement, has hundreds of members, "largely composed of individuals residing in Dayton and LaValley Townships . . . seeking to preserve a way of rural life in the A-1 Agricultural District, consistent with Lincoln County's Plan." Complaint, ¶ B-4, CR4. The Circuit Court cites *Sierra Club v. Clay County Board of Adjustment*, 2021 SD 28, 959 N.W.2d 615, as supportive of the conclusion that NOPE lacks representational capacity. Our reading of *Sierra Club* leads to an exact opposite conclusion, as this Court determined that Sierra Club did have representational capacity, at ¶ 32, and we submit, NOPE likewise has such capacity. This case has been dismissed with prejudice on the State's motion – but in that process, no one has asserted that *any* of the three relevant inquiries[5] under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) have failed as to NOPE itself. As such, the Circuit Court's determinations as to the lack of standing on the part of Eiesland, White and NOPE are in error.

> ***Issue 2:*** Whether the Circuit Court erred in concluding the doctrine of sovereign immunity inhibits a declaratory judgment action against the State, as the Secretary's duties are asserted to be discretionary in nature.

The Circuit Court concluded the action for declaratory relief is precluded by the doctrine of sovereign immunity, as expressed in Article III, Section 27, S.D. Constitution, such that the State is immune and entitled to dismissal of the Complaint, CR156. The heart of the Complaint, however, proclaims that the day - as appropriately envisioned nearly fifty years ago by this Court in *Lincoln County*, 257 N.W.2d at 457 - has finally arrived. The State proposes to construct a new mega million-dollar project, having no

---

[5] The prerequisites of representational standing are met *if* (a) the members otherwise have standing to sue in their own right; (b) the interests sought to be protected are germane to the organization's purpose, and (c) neither the claim asserted nor relief requested requires the direct participation of individual members in the lawsuit. *Sierra Club*, ¶ 18.

relationship to agricultural uses, smack dab in the middle of an agricultural zoning district. The proposed land use seems wildly out-of-step, and out-of-place, given the County's Plan and Ordinance, even if such might be allowed as a conditional use.[6]

The Circuit Court seemingly views the case as one challenging the right of DOC to purchase the Farm. Agricultural real estate is usually bought and sold on the basis of the highest bidder. The question here is narrower – is the State privileged, on its own authority, to make some use of the Farm for some specific purpose that, almost certainly, is not otherwise a permissive use within the *A-1 Agriculture District*, as planned by the County? The Circuit Court then concludes that the particular question may *not* even be asked. Order, at 17, CR156.

The Complaint, at ¶¶ I-4 (S), (T), and (U), CR25, seeks a declaration of respective rights associated with the bundle of rights associated with fee ownership of the Farm. Buying the Farm to use in the production of agricultural goods is one thing – but converting the widow Haug's former lands for use as a Prison site is quite another. The Complaint seeks to establish that the State *must* seek either a conditional use permit, or a re-zoning of the Farm, before commencing the use the State is now rushing towards.

The case of *Dan Nelson Automotive Inc. v. Viken*, 2005 S.D. 109, 709 N.W.2d 239 is noteworthy, holding that the State is a "person" within the meaning of SDCL 21-24-2, and thus amenable to suit invoking the Declaratory Judgment Act. Beyond that, DOC's acquisition of ownership of the Farm is not challenged by Appellants – but the effort to convert the Farm into a Prison site, assertedly in contravention of the Plan and Ordinance, is challenged. Selecting a parcel of real estate might be discretionary – but the Secretary's discretion does not embrace whether she should (or should not) comply also

[6] An academic question, as the State refuses to make application for a CUP.

with the provisions of the County's Plan and Ordinance otherwise governing the use of the property selected pursuant to the exercise of that discretion.

The Secretary cannot simply ignore the unmistakable constraints of the County's Plan and Ordinance. The legislature did not speak prior to the Attorney General's opinion in 1977, and has not audibly or visibly spoken since. A fair reading of HB 1017 confirms that body remains silent on the topic of State immunity from local zoning.[7]

In *Dan Nelson Automotive*, ¶ 27, this Court clearly stated that some actions may be brought against state officers and agencies. The Complaint seeks relief such that the "balancing of interests" rule may be applied to the State, as an extension of the rule established in *Lincoln County*. A "declaratory judgment action . . . seeking relief from an invalid act or an abuse of authority by an officer or agent is . . . not prohibited by principles governing sovereign immunity." *Dakota Systems*, 2005 SD 27, ¶ 9, 694 N.W.2d at 28 (quoting *Northwall v. Dep't of Revenue*, 263 Neb. 1, 7, 637 N.W.2d 890, 896 (2002).

If the legislature had intended that the DOC or any other State agency be unrestrained by County zoning regulations, it has been remarkably opaque in saying so. The State's claimed immunity from zoning should be clearly and expressly stated – but that is simply not the case. Having now purchased the Farm, the Secretary's clear and avowed refusal to follow the County's Plan and Zoning Ordinance concerning the proclaimed future use of that property is the entire focus of the Complaint. When action

---

[7] The Order, at 20, CR159, concludes that when taken together, HB 1017, SDCL ch. 1-15, and the holdings in *Lincoln County* and *City of Rapid City*, as further addressed in Issue 4, the balancing of interests rule does *not* pertain when the State's plans conflict with County's Plans and Ordinances. Being sheltered by the "general rule," the State then simply foregoes any pursuit of zoning approvals and permits. How, when or where are such land use conflicts with the State to be adjudicated?

is taken or threatened "either because of a misconstruction or misapplication by the officer of a statute, the action is not in fact against the state [for purposes of sovereign immunity] but is rather against the individual because of [her] lack of power and authority to do the thing complained of." *Berlowitz v. Roach*, 252 Wisc. 61, 65, 30 N.W.2d 256, 258 (1947), as cited in *Dan Nelson Automotive*, ¶ 28.

The Complaint seeks a declaration as to the balancing of interests rule – specifically, that the rule be extended to the State. The Circuit Court reads the Complaint as one challenging the act of *selecting and purchasing* the Farm (as a discretionary act). The State can purchase whatever land it chooses to purchase (keeping in mind, it *already* owned this Farm, albeit in trust for education purposes). Rather, the challenge was to the claim that the State has *no* duty to perform a ministerial act (taking such further actions as are required by Plan and Ordinance) prior to converting the Farm into the functional equivalent of a "town" (insofar as infrastructure is concerned).

The opinion of Attorney General Janklow – that the "general rule" of State immunity from local zoning ordinances should pertain in South Dakota - was issued in January 1977.[8] A matter of first impression in this state, the general rule was thought to be most applicable, as it "emanates from notions of state sovereignty which places the actions of the sovereign beyond the call to question of a derivative governmental body and its laws."[9] Further, the Attorney General opined, the State of South Dakota has not manifested an intent to diminish the doctrine of immunity. *Id.* Given the Attorney

---

[8] A date just weeks before the amicus brief in *Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977), urging, as the Court noted, that the balancing of interest test be adopted in that County-City dispute.

[9] 1977 S.D. Op. Atty. Gen. 26, at 2.

General's reasoning, whether the general rule should retain viability for the State's land use in conflict with County zoning is the question presented here. Further, whether the conflict arises out of the performance of discretionary – *or ministerial* – acts of the State's agent seems central to the question. The Circuit Court concluded the acts of the Secretary are *all* discretionary in nature and thus this Complaint is precluded by the doctrine. Order, at 15-16, CR154-5.

Nothing in the litany of the Secretary's delegated duties, as cited in the Order, at 16, CR155, actually pertain to the rights and interests of others, including Appellants already invested and living near the proposed site. The "health, safety, or general welfare of the county," as enumerated in SDCL 11-2-13, as an example, is of no particular moment to or an apparent interest of the Secretary's focus. The power to guard those interests is delegated to the County in the form of planning and zoning, a feature highly relevant to the public interest as a whole.

The Circuit Court erred in concluding that the doctrine of sovereign immunity fully protects the State. The Secretary might have discretion to purchase land. The implicit claim that the Secretary is *also* fully exempt from the constraints of established zoning regulations is not assured when the legislature fails to use explicit language to provide for the State's claimed exemption.[10] The discretion to acquire the Farm (whether for investment or other purposes, without changing the use) is one thing - but the Secretary's decision, to pursue a much different use – and simply on her own motion – is

[10] "A familiar principle of statutory construction . . . is that a statute should not be construed to impair pre-existing law in the absence of an explicit legislative statement to the contrary." *Matter of Estate of O'Keefe*, 1998 SD 93, ¶ 10, 583 N.W.2d 138, 140, citing *In re Estate of Cotton*, 104 Ohio App. 3d 368, 662 N.E.2d 63, 64 (1995) (other citations omitted.)

quite another. A new use the scale of a "town" (the Secretary's own words, Complaint Exh. A-3, CR30) is clearly intended.

The State's assertion that this high-density, infrastructure-needy objective is *completely* within her discretion seems specious, cut from whole cloth. The Plan and Ordinance themselves do not provide for a carve-out that favors the State, even as the terms of the delegated zoning power to the County, along with the legislature's recent direction for the Secretary to acquire land for a new Prison, all fail to support the claims of having ample, sufficient discretion. At most, the State finds support in the Janklow opinion, postulating a general rule of State exemption resting upon a foundation of the sovereign immunity doctrine – which, in turn, is arguably viable *only* if the Secretary is functioning entirely within the bounds of discretion.

> ***Issue 3:*** Whether the Circuit Court erred in failing to find that the action, in seeking to determine that the State should pursue a conditional use permit or re-zoning before the County planning commission, is actually concerned with the performance of (or the Secretary's refusal to perform) a ministerial act.

This statement of the issue assumes the "balancing of interests" rule should be rightfully extended, in the public interest, to include the actions of the State in purchasing real estate for a determined change of use. The current lawful zoning and land uses, per the Plan and Ordinance, should always be considered, as would any *prudent buyer* of real estate.

In terms of the general rule as applied in this case by the Circuit Court, Order, at 20-1, CR159-60, the fact the State holds the power of eminent domain (citing to SDCL 1-15-14, at 20, CR159), trumps the public interest in planning and zoning.[11] Regardless, are not the constraints of SDCL 11-2-24, along with the public interest in comprehensive

planning and zoning, destroyed by this application of the general rule, just as the *Lincoln County* amicus brief of the Attorney General had warned?[12] The general rule applied by the Circuit Court, furthermore, seems foundationally different from that form of the general rule Attorney General Janklow found persuasive.

The Complaint, in line with ¶ I-4(S) *et seq.*, CR25, hopes to direct the Secretary to the County's planning commission for consideration of the Farm's intended, future use. This case is at most a challenge to the Secretary's *refusal* (relying upon 1977 S.D. Op. Atty. Gen. 26 and statutory provisions) to perform the ministerial acts in pursuit of approvals for the Farm's intended use or a re-zoning application for that use.

The Circuit Court, at 17, CR156, concludes that *all* of the duties conferred upon the Secretary "were discretionary and properly delegated, including the authority to select the location of the new prison site." As such, the Order continues: "[T]he State is immune from suit under the doctrine of sovereign immunity and is entitled to dismissal of Plaintiffs' claims on this basis." Appellants maintain the Secretary *may* have discretion in acquiring property as an *intended* site, even as the Secretary has acted quite imprudently in selecting the Farm as the site of the new Prison.

In *Gaspar v. Freidel*, 450 N.W.2d 226 (S.D. 1989), at note 1, the Court stated: "Whether sovereign immunity shields an individual state employee from liability turns on whether the acts are discretionary or ministerial. Numerous factors are to be weighed when deciding whether an act is discretionary or ministerial. See, e.g., *National Bank of*

---

[11] The Farm was acquired years ago by means of escheat, SDCL 21-36-1, *et seq.*

[12] *See* Appendix C, at 23. *See* also note 25, *infra*. SDCL 11-2-24 is for a County what SDCL 11-6-19 once was to a City, as relevant to Issue 4, *infra*, and the Court's rationale in *City of Rapid City v. Pennington County*, 2003 SD 106, ¶ 5, 669 N.W.2d 120, 122. The legislature later repealed the City version in 2010, along with the related "override" provisions of 11-6-21, while retaining the County's version in ch. 11-2, SDCL.

South Dakota v. Leir, 325 N.W.2d 845, 848 (S.D. 1982). Generally, discretionary acts require the exercise of judgment, whereas ministerial acts involve the implementation of the judgment decisions of others."

The Secretary invokes the general rule (which, as discussed in Attorney General Janklow's opinion, seems to rest on the doctrine of sovereign immunity, not the power of eminent domain[13]), hoping to avoid the inference of ministerial duties being required of her prior to converting the Farm for use as a new Prison. We would suggest it is the duty of *every* property owner to pursue zoning permits or compliance to match or support the owner's intended use, unless the property is already in perfect harmony with the Plan and Ordinance. Having discretion to purchase the Farm should not embrace also some claim of privilege to ignore also the Plan and Ordinance. If the zoning class or district is not presently correct for the intended use, the correct rule is – or should be - that the Secretary must proceed as required by the Plan and Ordinance. Just as any prudent landowner must do when hoping to develop a new "town" out in the countryside on a parcel presently zoned for agriculture and lacking all suitable infrastructure, the Secretary should be directed to perform the rather *ministerial act* of coming before the County's planning commission, whether for a conditional use permit or for re-zoning.

A ministerial act "envisions direct adherence to a governing rule or standard with a compulsory result," to be performed "in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action." *Truman v. Griese*, 2009 S.D. 8, ¶ 21, 762 N.W.2d 75, at 80-81. The Secretary claims to have full and complete discretion in her selection of the Farm. The Complaint merely seeks to direct DOC's Secretary to

---

[13] However, the trial court's Order, at 20, CR159, cites the condemnation power, SDCL 1-15-14, in concluding the State is immune from County zoning under the general rule.

now proceed with the ministerial act required of *all* property owners – the pursuit of proper zoning permits or re-zoning *if* the Farm is now to be used as a Prison site.

> ***Issue 4:*** Whether the Circuit Court erred in determining that *City of Rapid City v. Pennington County* allows the State, as a proposing governmental entity with the power of eminent domain, to avoid application of "balancing of interests" rule in favor of the "general rule."

In 1975, the City of Sioux Falls took steps to acquire and develop a landfill site within Lincoln County, the site being zoned "A" Rural and Public use under the County's Ordinance. Lincoln County sued for injunctive relief, alleging a violation of the Ordinance. Just over one year later, the trial court ruled in favor of City, yielding an appeal to this Court and the decision in *Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977). The Attorney General appeared as amicus curiae. The decision notes, at 458, the Attorney General's advocacy, on written brief and in argument, for the "balancing of interests" rule, offering "the greatest flexibility and fairness," as noted at 457, and:

> . . . [requiring] that one government unit (intruding unit) be bound by the zoning regulations of another governmental unit (host unit) in the use of its extraterritorial property purchased or condemned, in the absence of specific legislative authority to the contrary.

The Court noted that the legislative authority in Title 11 (county, municipal and comprehensive zoning) did not uncover any exemptions – there was "no legislative guidance either way."[14] In delegating the legislature's zoning power to the counties, the statutes remain essentially the same today – there is no stated or express exemption from the County's zoning and planning powers as to the State's use or development of property within any given County choosing to exercise that power.[15]

---

[14] *Id.*, at 456, and note 4 of opinion.

[15] The State relies on the 1977 opinion of Attorney General Janklow as a cudgel, as convenient.

The so-called "general rule" was also considered in *Lincoln County*, but without citing the Janklow opinion given just a few months earlier. As discussed by the Court, the general rule turned on the essential question of whether the "agency in question has the power to condemn or appropriate land by the power of eminent domain." *Id.*, at 456. If that power has been given, then the agency wielding that power, *ipso facto*, is deemed to trump another governmental unit's zoning power. Although the Circuit Court determined that the general rule is "likely applicable" here,[16] that rule has *not* been judicially adopted in this jurisdiction while being out of step with the "balancing of interests" rule adopted in *Lincoln County*. The particular version of the general rule adopted for this case is stated thusly: "As it pertains to DOC specifically, the broad authority granted to the Department by SDCL 1-15-14 to take private property by condemnation to construct correctional facilities demonstrates to the Court that the Legislature does not intend for DOC to be subject to restrictive zoning ordinances or other property laws." Order, at 20, CR159.

The "general rule" serves as a wrecking ball for the County's Plan and Ordinance – particularly given a project of *this* magnitude. Comparable to a "town," the Prison's proposed site is presently devoid of infrastructure essential to support the population or the resulting, daily vehicular traffic.[17] The Secretary and others within DOC may have

---

[16] Order, at 20-21, CR159-60. The Janklow opinion describes a general rule based on *sovereign immunity* as the rationale for State immunity from County zoning. Sovereign immunity was not discussed in *Lincoln County* as a basis for the "general rule." Rather, the "emerging 'balancing of interests' rule," was adopted, at 457, with application to the State itself to be determined later, in an appropriate case.

[17] Essential infrastructure can be built or installed - but at what cost, and with what adverse effect to others? The legislature's purpose and design of SDCL 11-2-12 and -13 are undermined, when the State proposes to do just as the State wants to do, without regard to the County's Plan and Ordinance.

the highest marks for the design and operation of Prisons, yet know nothing about the Plan or Ordinance. The legislature's expressed concerns for "protecting and guiding the physical, social, economic, and environmental development of the county" (SDCL 11-2-12) are trampled if the Secretary's own plans trump the County's Plan.[18]

City of Rapid City v. Pennington County, 2003 S.D. 106, 669 N.W.2d 120 is the second of two South Dakota cases which mention the "balancing of interests" rule; the Circuit Court, at 19, CR158, deems that this decision is most analogous to the case at hand. In *City of Rapid City*, Pennington County proposed to convert a juvenile detention center into a jail-work release facility, within Rapid City's zoning area. The County applied to the City for amendments to the plan and change in zoning, which were denied by the Planning Commission and the City council. Under the express authority of SDCL 11-6-21, the County voted unanimously to override the denial, and proceeded on with the proposed project. The City sought to enjoin the County's efforts, based on *Lincoln County*. The trial court denied relief, and the City appealed to this Court, which held that since the Rapid City jail project was still within Pennington County, the extraterritorial rule of *Lincoln County* (the City's proposed landfill was in the County, but was also not within the City's zoning jurisdiction) did *not* fit the circumstances presented. *Id.*, at ¶ 14. The County's statutory override of the City's rulings was deemed effective.

The dissent of Justice Sabers points out that the County has effectively granted itself a "permanent variance from the City's comprehensive plan." *Id.*, at ¶ 19. The dissent further notes that a dispute of "this magnitude between two government entities

---

[18] As the Secretary asserts in the Announcement of October 6, 2023, Complaint, ¶ A-4.

requires an objective resolution as a matter of public policy" - the "interests of each government should be balanced." *Id.* The magnitude of the conflict here is substantial.

The statute relied upon by Pennington County, SDCL 11-6-21 - invoked for an effective override of Rapid City's zoning denials - was repealed a few years later.[19] Hence, that power no longer exists. The fact that this statute controlled the outcome is never mentioned in the Circuit Court's further discussion of that case:

> To require the state to be subject to local zoning laws in constructing a prison, while the county is exempt when building a jail, goes against the Supreme Court's rationale in *City of Rapid City* – especially considering that county jails do not necessarily need to be located within a city or town, but state correctional facilities have no option but to exist within a county. Order, at 20, CR159.

The legislature's zoning power delegation is not obligatory – each County retains the right not to take up that power, but *if or when* taking it up, the power must be implemented and applied according to that delegation.[20] An unmistakable, clear expression of legislative exemption or other waiver of local zoning in favor of the State is absent here, beyond what Attorney General Janklow knit together in his opinion.[21]

The Circuit Court, Order, at 20, CR159, has misread *City of Rapid City v. Pennington County.* The resulting import is that this Court stepped away from the

---

[19] SL 2010, ch. 71, §§ 1 to 5.

[20] *Cary v. City of Rapid City*, 1997 SD 18, ¶¶ 12, 21, 559 N.W.2d 891, 894-5, city ordinance did not provide "standards and guidelines" for an override of the delegation of the police power to protesting neighboring owners; an offense to SD Const Art III, § 1, concerning legislative power delegation. This case is a different twist – one landowner (State) is judicially allowed to sabotage the Plan and Ordinance at will, without recourse for those who have invested according to the Plan and Ordinance. Meanwhile, the State asserts these acts of sabotage are fully blessed under the Legislature's opaque, non-specific delegations. That the "balancing of interests" rule must be finally extended to the State seems readily apparent to these Appellants.

[21] Off. Op. 77-13, 1977 S.D. Op. Atty. Gen. 26.

"balancing of interests" rule in 2003, and thus "[requiring] the state to be subject to local zoning laws in constructing a prison, while a county is exempt [from City ordinance] when building a jail" was deemed contrary to the Court's rationale in *City of Rapid City*. However, the holding in *that* case reflects that the Court was being rather pragmatic – sending the dispute back for some further hearing for the purpose of "balancing the interests" would be an effort in futility, so long as the County held the benefit of a statutory bypass (or overrule) mechanism. That is the clear import of the second to the last sentence of the majority opinion.[22]

The balancing of interests rule remains fully viable, even if in *Lincoln County*, the rule was not extended to the State. For *certain* state agencies "such as public utility commissions or state highway authorities," the duties are statewide, a "scope transcending local boundaries." *Id.*, at 457. In that instance, as the Court observed, requiring the state agency to "comply with local zoning regulations" *might* complicate the performance of the public service. While the Court's noted concern might be valid in certain cases,[23] the DOC has no exemption claim simply because the agency has custody of convicted felons from *all* areas of South Dakota. If allowed to become a Prison, the Farm will fester (for perhaps a century or more) as a locally painful wound, yet visible on the visage of the County's Plan and Ordinance.

In any event, in *Lincoln County*, at 457, this Court noted "there is no state agency or authority of that nature and scope involved [here] and we leave the acceptability of that test [to the State] for another day under proper circumstances." The proper

---

[22] 2003 SD 106, ¶¶ 14, 15.

[23] Such as, an Ordinance requiring warning signs with a red background, while state officials require the uniform use of yellow signs throughout a state-wide use. Far-fetched,

circumstances have finally arrived in the form of this appeal! The State should not be further excused from complying with the County's Plan and Ordinance. The Farm is entirely embraced by the County's Plan and Ordinance, representing the public interest objectives of planning and zoning, of benefit to all who are now invested in this neighborhood and are mutually subject to both the constraints and the benefits of the Plan and Ordinance. In the midst of this peaceful (if dusty) valley, the State suddenly proposes to convert its windfall control of the Farm into an unfettered use no longer concordant with the intentions and objectives of either the neighbors or the County's Plan.

Now, the Secretary asserts, the Farm is the "best place" for a new Prison! The truth of that claim should be fully measured by the Plan and Ordinance, whether before the planning Commission or a "balancing of interests" hearing before the Circuit Court. As Justice Sabers observed in his dissent,[24] a dispute of this "magnitude between two government entities requires an objective resolution as a matter of public policy. . . ."

The land use conflict presented here is both intense and permanent, given the State's proclivity, once established, to keep a Prison for a very long time. The judicial and legislative branches of South Dakota should not merely stand aside, as if the Secretary's discretion spills over to fully protect the public interest in sound planning and zoning. This project now fast approaches where the two dusty gravel roads intersect in Dayton Township. The Secretary has her hands on the wheel of the Farm, but is evidently neither skilled nor interested in honoring the County's Plan and Ordinance.[25]

---

perhaps. This proposed Prison implicates *only* Lincoln County's Plan and Ordinance. The Attorney General warned against nullifying SDCL 11-2-24, see note 25, *infra*.

[24] *City of Rapid City*, 2003 SD 106, ¶ 20, 669 N.W.2d at 125.

[25] The Attorney General's amicus brief, excerpted in Appendix C, at 23, in # 12091, *Lincoln County v. Johnson*, plainly states: "[I]f the [use creates] a violation of the zoning

Issue 5: Whether the Circuit Court erred in concluding, without benefit of evidentiary proceedings, that even if the "balancing of interests" rule were extended to Plaintiffs, the Complaint must still be dismissed for failure to state a claim.

The rule adopted in *Lincoln County* – the balancing of interests rule – seems likely to have resulted from the Attorney General's amicus brief [26] urging that a "balancing of all the interests" process be employed, such being "inherently within the equitable powers of the courts." The Attorney General, at 30, cites *Town of Oronoco v. City of Rochester*, 197 N.W.2d 426 (Minn. 1972) as an example of the test, noting the court was weighing "the interests represented by the city's eminent domain powers against those represented by the police powers of the surrounding subdivision." The resulting decision, 257 N.W.2d at 459, notes *Oronoco* in note 7 of the decision, while recommending, at note 9, "an excellent analysis" of the issue in 84 Harvard Law Review 869 (1971). A decision of the Florida court of appeals, *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So.2d 571, 579 (Fla.App 1975) was also favorably referenced in Justice Morgan's opinion, at 458.[27]

---

ordinance, SDCL 11-2-24 requires approval by the county. If the power of eminent domain were to create an exception to this rule, the exception would completely nullify the statute . . . . SDCL 11-2-24 (Supp. 1976) applies only to the construction of public ways, spaces, buildings, and utilities. These are developments which in every case are supported by the eminent domain power. To carve out an exception based on eminent domain would destroy the entire effect of SDCL 11-2-24 (Supp. 1976)." Just months earlier, the Attorney General opined the State has the benefit of the general rule, based on that very power, in effect destroying SDCL 11-2-24. Prior to the Complaint, the State relied on the Attorney General's opinion. *See* Complaint, Exhibits A-3, F-3, CR29-32.

[26] *See* Appendix C, at 30. The Attorney General's amicus brief to this Court in March 1977, is neither harmonious with Official Opinion 77-13, dated January 25, 1977, nor, we think, the position taken by the Attorney General in this case.

[27] The Florida Court of Appeals, writing in *City of Temple Terrace*, at 575, notes the Harvard Law Review author "persuasively argued" the balancing of interests principle.

The process to be followed is that the "intruding unit should apply to the host unit's zoning authority for a specific exception or for a change in zoning, whichever is appropriate." *Id.*, at 457. The host unit may then weigh the applicant's need for the use, and "its effect upon the host unit's zoning plan, neighboring property, environmental impact, and the myriad other relevant factors to be considered for modern land use planning and control." *Id.* 457-58. Further, if the intruding unit is dissatisfied with the decision, it may pursue judicial review, with the circuit court to "balance the competing public and private interests essential for an equitable resolution of the conflict." *Id.*, 458. This two-step process is in accord with the Complaint, ¶ I-4(S), (T) and (U), CR25.

The author of the Harvard Law Review article cited in *Lincoln County* offers nine points as "fundamental considerations" of the "balancing of interests" test:

1. Is there any statutory guidance as to which interest should prevail? Does the statute explicitly authorize immunity or does it merely direct a particular government unit to perform a certain function without mentioning any possible exemption from local zoning regulation?
2. Do the zoning ordinances and any other manifestationof the local planning process comprehend alternative locations for the particular facility?
3. Did the government unit consider alternative locations for the facility?
4. What is the scope of the political authority of the government unit performing the function relative to the body instituting the zoning ordinance?
5. Has there been any independent supervisory review of the proposed facility by a government unit of "higher" authority such as a state-wide planning commission? Was this review designed by statute to be exclusive?
6. How essential is the facility to the local community? To the broader community?

7. How detrimental is the proposed facility to the surrounding property?
8. Has the governmental unit made reasonable attempts to minimize the detriment to the adjacent landowners' use and enjoyment of their property?
9. Has there been any attempt to comply with the zoning procedure for obtaning an amendment or a variance? Have the adversely affected landowners been given an opportunity to present their objections to the proper nonjudicial authorities?

In giving due consideration to these factors, guided perhaps by the experitise of special masters, "courts must determine the reasonableness of granting immunity" and, in the absence of explicit statutory guidelines, the "burden of proof [is] on the party who is seeking to establish the reasonableness of the proposed zoning evasion." *Id.*, 84 Harv. L. Rev. at 884.[28]

Plaintiffs attempted to discover some of the answers to the nine questions listed in the Harvard Law Review article; at this point, the interrogatories posed to the State on November 30, 2023, remain unanswered. On review of the Complaint, and the allegations in Part F (Complaint, at 10, *et seq.*) in particular, it seems certain that *no one* – including Lincoln County officials and the Plaintiffs – know much if anything about the State's plans to convert the Farm into the site for this new Prison, particularly in light of the nine numbered points offered by the Harvard Law Review article.

Noting the developing "balancing of interests" concept, the Attorney General's opinion, Official Opinion 77-13, at 2, states the concept "may have merit in an

---

[28] Plaintiffs did initiate written discovery in an effort to learn what steps or actions the Secretary had taken, consistent with the author's nine factors, but responses were not provided. The Circuit Court did not consider or attempt to determine any of these factors.

adjudicatory setting." Others [29] have envisioned a similar setting for applying the test, whether before the local planning agency, the trial court, or both.[30]

Here, however, the Plaintiffs were afforded no such privilege and opportunity. The Court, based on nothing beyond the Complaint, several briefs and the oral argument of counsel, states: "even if a balancing of interests is undertaken, . . . the likely result will be that the necessity of construction of a new prison outweighs the interests of the surrounding landowners." Order, at 21, CR159-160. This conclusion was reached without the Court having the benefit of *any* of the answers to the nine stated inquiries, as penned by the unknown Harvard Law Review writer. Equally crucial, Appellants submit, the Court makes no claim to have considered *any* of the nine criteria of that article. Without those answers, or any apparent consideration of the criteria, it is *not* the balancing of interests test that is being applied. Rather, it is more in the nature of the "general rule" – the State has eminent domain powers along with souvereign immunity – and these powers suffice to trump all else, including the public interest in coherent, comprehensive land use planning and zoning, as the legislature has delegated to the counties. Such divided houses do not stand for very long, someone once said.

---

[29] Including Justice Sabers in dissent, *City of Rapid City*, 2003 SD 106, ¶ 20: "[The] question should be determined on the merits by an objective fact finder, the circuit court." The dissent turned on Rapid City's denial of zoning, which was then overridden by the County based on SDCL 11-16-21. The statute was repealed in 2010. Here, the State pays no attention to County zoning, does nothing to afford Plaintiffs a forum – all without benefit of *any* statute providing for State exemption from County zoning. State is determined to run the table with no zoning compliance proposed, as the Circuit Court finds no reason to apply the balancing of interests rule to the State. Thus, public interest in a Prison located *somewhere* has trumped, without serious questioning in the context of an adjudicatory proceeding, the public interest in the County's Plan and Ordinance.

[30] See, e.g., Stype, Gregory, *Government Immunity from Local Zoning Restrictions: The Balancing of Brownfield v. State*, Ohio St. L. Jour., vol. 43, no. 1 (1982), 229-266; MacBeth, Scott, *Zoning and Planning: The Economics of State Land Use and the*

Yes, there are several cases, cited by the Court,[31] where the need for a correctional facility means that the State is deemed immune from the local zoning ordinance and plan; but is that the correct decision *here* - where no one seems to know much about the State's fervent goal of using the Farm as the site for a new Prison? The balancing of interests rule is to be a particularized, specific inquiry, considering all of the circumstances, rather than merely a generic recognition of land use labels. Here, the Court has done little more than to conclude: *if it is a Prison that the State wants, then a Prison is what the State will get, and right there.* Thus, the State wins simply because a new Prison upon the widow Haug's Farm is wanted *now*, the public interest for planning and zoning for the Farm within that specific zoning district and its environs, be damned.

Appellants strongly suspect the State's attraction to the proposed Prison site –*a Farm at 279th St. & 477th Ave, a gravel road intersection.* – is more about the fact the State already owns this gifted (as in taken, albeit by terms of the escheat law) property for more than 30 years, and it is now time for the Farm to become very useful to the State. The Farm *is* within 20 miles of Sioux Falls, thus meeting at least that particular criterion. Given the means and methods of how the State acquired ownership of the Farm, the

---

Balancing of Interests Test [Herrmann v. Board of County Commissioners of Butler County, 246 Kan. 152, 785 P.2d 1003 (1990)], 30 Washburn L.J. 148 (1990).

[31] *Herrmann v. Board of County Commissioners*, 785 P.2d 1003 (Kan. 1990). This case represents the balancing of interests test being applied, with both planning board and court hearings, but where the opponents "conceded the State had acted reasonably" in selection of the proposed site. *Id.*, at 1006. The federal court was also requiring the State to construct new facilities or a "large number of felons" would be released, at 1009. Here, Appellants do *not* concede the State has acted reasonably in selecting the former Farm of the widow Haug, being a considerable distance from existing medical and law enforcement resources, among other apparent shortcomings, such as roads, sewers and fire protection – not to mention non-compliance with the Plan and Ordinance.

fervent focus of the Secretary on *this* Farm seems almost foreordained; thus, the historical happenstance of the widow Haug dying without heirs and having no will, conferring a windfall to the State, seems also to have pre-determined the a site of this mega-project. The Secretary asserts that the widow's former Farm – lacking all manner of infrastructure essential to support a contemplated "town" – is really and truly the very "best place" for this new Prison.[32] Appellants submit there should be a proceeding conducted by the Circuit Court or, perhaps, the planning commission (or both), focused on the "balancing of interests" test, where the State has the burden of proof and after discovery, Appellants also have the right to contest any and all such assertions.

CONCLUSION

The Circuit Court erred in dismissing the Complaint with prejudice, concluding that even under the "balancing of interests" test, the Plaintiffs fall short. A proper application of *that* test requires adjudicatory proceedings, which is precisely what these parties have sought by their Complaint.

Respectfully submitted:

Date: November 21, 2024

/s/ A.J. Swanson

A.J. Swanson, State Bar of South Dakota # 1680
aj@ajswanson.com
Attorney for Appellants

ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070

NOPE-LINCOLN COUNTY, INC., a South Dakota non-profit corporation, MIKE HOFFMAN, MICHELLE JENSEN, JAY WHITE, and TOM EIESLAND, *Appellants*

[32] In *City of Rapid City*, 2003 SD 106, it seems logical Pennington County prefers the jail have proximity to law enforcement and other services. Of course, not having been afforded a hearing, Appellants are left to wonder whether the Secretary has been as careful here in deciding this very rural site is actually the "best place" for a Prison.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Brief complies with the requirements set forth in South Dakota Codified Laws, being 24 pages in length. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 9,416 words and 48,066 characters, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities, and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: November 21, 2024 /s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellants' Brief (together with Appendices A, B, C and D) in the above referenced case was served upon each of the following persons, as counsel for Appellees and also as counsel for amicus curiae, Lincoln County Board of Commissioners, each having been accomplished by Odyssey, or by electronic mail, at the addresses stated below:

Grant M. Flynn
Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
atgservice@state.sd.us

Drew W. DeGroot
Deputy State's Attorney
104 N. Main St., Suite 200
Canton, SD 57013
ddegroot@lincolncountysd.org

Further, in addition to electronic filing of Appellants' Brief, with Appendices annexed, via Odyssey, the signed original of Appellants' Brief (with Appendices A, B, C and D annexed) was transmitted via U.S. Mail to the Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol, Pierre, SD 57501.

All such service being accomplished the date entered below:

Date: November 21, 2024 /s/ A.J. Swanson
A.J. Swanson, Attorney for Appellants

APPENDICES
TO APPELLANTS' BRIEF
TABLE OF CONTENTS:

Appendix A

Appendix B

Appendix C

Appendix D

APPELLANTS' OPENING BRIEF
30890

APPENDIX A

Memorandum Decision and Order, Circuit Judge Jennifer Mammenga, filed October 23, 2024

CR139-161

(Pagination 1 to 23, inclusive)

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
	:SS	
COUNTY OF LINCOLN)		SECOND JUDICIAL CIRCUIT

MICHELLE K. JENSON, MICHAEL J. HOFFMAN, JAY W. WHITE, THOMAS M. EIESLAND, and NOPE – LINCOLN COUNTY, INC., a South Dakota non-profit corporation, Plaintiffs, **DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and KELLIE WASKO, Secretary,** Defendants,	41 CIV 23-877 **MEMORANDUM DECISION AND ORDER**

On November 2, 2023, Plaintiffs filed a Complaint seeking declaratory judgment and injunctive relief as to the South Dakota Department of Corrections' decision to construct a prison in rural Lincoln County, South Dakota. On December 13, 2023, the State filed a Motion to Dismiss the lawsuit, alleging several legal grounds in support of its motion. On January 4, 2024, Plaintiffs filed their response. Four days later, the Lincoln County Board of Commissioners, via the Lincoln County's State's Attorney, filed an Amicus Curiae Brief in Opposition to Defendants' Motion to Dismiss. This Court held a hearing on the Motion to Dismiss on January 22, 2024. Attorney Arvid J. Swanson appeared on behalf of Plaintiffs. Assistant Attorney General Grant Flynn appeared on behalf of the Defendants. After hearing the arguments of counsel and considering the parties' briefs, the Court took its decision under advisement.

FACTUAL BACKGROUND

House Bill 1017 was proposed in the 2023 South Dakota Legislative Session to authorize the Department of Corrections (DOC) to purchase property for a new state-run men's prison, to contract for the design of the prison, to make appropriations, and to declare an emergency. The Bill was read to the South Dakota House of Representatives on January 10, 2023. The next day, the Bill was referred to the Joint Committee on Appropriations, who then passed the Bill to the House. On February 27, 2023, the House passed the Bill to the Senate. The Senate passed the Bill on March 1, 2023. Governor Kristi Noem signed the Bill into law on Monday, March 27, 2023. It reads as follows:

> An Act to authorize the Department of Corrections to purchase certain real property, to contract for the design of a prison facility for offenders committed to the Department of Corrections, to make an appropriation therefor, to transfer funds to the incarceration construction fund, and to declare an emergency.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:
>
> **Section 1.** The Department of Corrections may purchase, on behalf of the State of South Dakota, real property for offenders committed to the Department of Corrections.
>
> **Section 2.** The Department of Corrections is hereby authorized to contract for the planning and site preparation of a prison facility for offenders committed to the Department of Corrections, including architectural services, engineering services, and other services as may be required to accomplish the project.
>
> **Section 3.** There is hereby appropriated from the general fund the sum of $25,359,551 and appropriated from the incarceration construction

fund the sum of $26,640,449 in other fund expenditure authority to the Department of Corrections, for the purpose authorized in sections 1 and 2 of this Act.

Section 4. The state treasurer shall transfer the sum of $87,031,734 from the general fund and $183,685,079 from the general revenue replacement fund to the incarceration construction fund for the purpose of the future construction of a state prison facility described pursuant to this Act.

Section 5. The administration of the design of the project authorized in this Act shall be under the general charge and supervision of the Bureau of Administration as provided in chapter 5-14.

Section 6. Any amounts appropriated in this act not lawfully expended or obligated shall revert in accordance with the procedures prescribed in chapter 4-8.

Section 7. The secretary of the Department of Corrections shall approve vouchers and the state auditor shall draw warrants to pay expenditures authorized by this Act.

Section 8. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

2023 S.D. Sess. Laws ch. 195 (HB 1017).

On October 6, 2023, DOC Secretary Kellie Wasko publicly announced that in response to the authority granted to the Department via House Bill 1017, the selected location for the new prison was to be on state-owned land in rural Lincoln County. The land consists of two 160-acre parcels located between the towns of Canton and Harrisburg at the corner of 278th Street and 477th Avenue. It is currently classified

for use as an A-1 Agricultural District in Lincoln County. The South Dakota Office of School and Public Lands originally obtained the land through escheat from an order by the circuit court in 1992 after the prior landowners, Alfred and Ethlida Haug, died without wills or apparent heirs. On October 6, 2023, the South Dakota Board of Appraisals formally appraised the land for sale. The Commissioner of School and Public Lands then sold the land to DOC for its appraised value, approximated at $7.91 million.

Individually named Plaintiffs Mike Hoffman, Michelle Jensen, Jay White, and Tom Eiesland each own property adjacent to the land in question. Complaint, pp. 3-4, ¶¶ B-1-4. Neighbors Opposed to Prison Expansion (NOPE), a non-profit organization including hundreds of members who are interested property owners and farming entities near the land in question, is also a plaintiff to the suit. *Id.* p. 4, ¶ B-4. *Id.*

In their Complaint, Plaintiffs seek declaratory judgment and injunctive relief to prevent DOC from using the land to build a prison at the proposed site. The State, DOC, and Secretary Wasko (Defendants), subsequently filed a Motion to Dismiss, arguing that: (1) that Plaintiffs lack standing; (2) the claim against Defendants is barred by the doctrine of sovereign immunity; (3) this Court lacks jurisdiction to hear the case due to separation of powers; (4) state law preempts county zoning ordinances; and (5) Plaintiffs have failed to state a claim upon which relief may be granted.

LAW AND ANALYSIS

I. Separation of Powers

Plaintiffs ask this Court to find that DOC's selected prison site violates both their due process rights as citizens and property owners, as well as the County's zoning ordinances. Defendants argue that the Court is barred from ruling in this matter as it would be a violation of the separation of powers doctrine.

Article II of the South Dakota Constitution states: "The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution." S.D. Const. art. II. The separation of powers doctrine incorporates three general prohibitions: "(1) no branch may encroach on the powers of another, (2) no branch may delegate to another branch its essential constitutionally assigned functions, and (3) quasi-legislative powers may only be delegated to another branch with sufficient standards." *Jans v. Dep't of Public Safety*, 2021 S.D. 51, ¶ 11, 964 N.W.2d 749, 753 (citing *Gray v. Gienapp*, 2007 S.D. 12, ¶ 17, 727 N.W.2d 808, 812). "Each branch, so long as it acts within the limitations set by the constitution, may exercise those powers granted to it by the constitution without interference by the other branches of government." *Id.* (quoting *Gray*, 2007 S.D. 12, ¶ 17, 727 N.W.2d at 812). The South Dakota Legislature enjoys broad power that may only be curtailed by constitutional limitations.

> The South Dakota Constitution, unlike the Constitution of the United States, does not constitute a grant of *legislative power*. Instead, our constitution is but a limitation upon the legislative power and the legislature may exercise that power in any manner not expressly or

> inferentially proscribed by the federal or state constitutions. Thus, except as limited by the state or federal constitutions, the *legislative power* of the *state legislature is unlimited.* What the representatives of the people have not been forbidden to do by the organic law, that they may do. Consequently, in determining whether an act is unconstitutional, we search the state and federal constitutions for provisions which prohibit its enactment rather than for grants of power.

Gray, 2007 S.D. 12, ¶ 22, 727 N.W.2d at 813 (quoting *Doe v. Nelson*, 2004 S.D. 62, ¶ 25, 680 N.W.2d 302, 312) (emphasis in original).

This Court may not "exercise or participate in the exercise of functions which are essentially legislative or administrative." *State, Dep't of Game, Fish & Parks v. Troy Twp., Day Cnty.*, 2017 S.D. 50, ¶ 14, 900 N.W.2d 840, 846 (quoting *Fed. Radio Comm'n v. Gen. Elec. Co.*, 281 U.S. 464, 469, 50 S.Ct. 389, 390, 74 L.Ed. 969 (1930) (additional citations omitted). As noted by the Court in *Troy Township*, a circuit court is not at liberty to substitute its judgment on questions of policy regarding matters that are inherently legislative. *Id.* at ¶ 26. To conclude otherwise would render circuit courts administrative bodies deciding matters that are nonjudicial. *Id.* This Court is not being asked to opine as to whether the proposed build site is the best place for the new prison. Rather, Plaintiffs ask this Court to rule upon whether HB 1017 confers the power on the State to circumvent Lincoln County's zoning ordinances to build the prison, which they argue is a violation of their constitutional due process rights. This question falls within the ordinary business of the courts and "within the limitations set by the constitution." *Jans*, 2021 S.D. 51, ¶ 11, 964 N.W.2d at 753 (citation omitted).

The State has not shown that addressing Plaintiffs' claims would be a violation of the separation of powers doctrine. Therefore, the State's Motion to Dismiss on this basis is denied.

II. Standing

This Court does not have subject-matter jurisdiction unless the parties have standing. *Pickerel Lake Outlet, Ass'n, v. Day Cnty.*, 2020 S.D. 72, ¶ 7, 953 N.W.2d 82, 86 (quoting *Lippold v. Meade Cty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice[.]" *Sierra Club v. Clay Cnty. Board of Adjustment*, 2021 S.D. 28, ¶ 27, 959 N.W.2d 615, 625 (quoting *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 22, 769 N.W.2d 817, 826) (alteration in original).

Plaintiffs seek declaratory relief under SDCL Chapter 21-24 and injunctive relief under SDCL Chapter 21-8. Their request for declaratory relief "comports with the purpose of the Declaratory Judgments Act, which is to declare rights, status, and other legal relations." *Benson v. State*, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141 (citation omitted) (cleaned up). "The Declaratory Judgment Act is remedial in nature and should be construed liberally, 'particularly . . . when the construction of statutes dealing with zoning, taxation, voting or family relations presents matters involving the public interest in which timely relief is desirable.'" *Abata v. Pennington Cnty. Board of Comm'rs*, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719 (quoting *Kneip v. Herseth*, 87 S.D. 642, 648, 214 N.W.2d 93, 96-97 (1974)). The purpose of declaratory judgment is to "enable parties to authoritatively settle their rights in advance of any invasion

thereof." *Abata*, 2019 S.D. 39, ¶ 11, 931 N.W.2d at 719 (quoting *Benson*, 2006 S.D. 8, ¶ 21, 710 N.W.2d at 141). "However, a court cannot be required to 'speculate as to the presence of a real injury.'" *Id.* (quoting *Boever v. S.D. Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)).

> Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

SDCL 21-24-3.

Plaintiffs must establish standing, in part, by having "personally . . . suffered some actual or threatened injury as the result of the putatively illegal conduct of [Defendants]." *Abata*, 2019 S.D. 39, ¶ 12, 931 N.W.2d at 719 (quoting *Benson*, 2006 S.D. 8, ¶ 21, 710 N.W.2d at 141). The central tenets of standing require Plaintiffs to show that they (1) suffered an injury in fact; (2) there is a causal connection between their injury and Defendants' conduct; and (3) the likelihood that their injury will be redressed by a favorable decision. *Id.* (quoting *Benson*, 2006 S.D. 8, ¶ 21, 710 N.W.2d at 141).

As the Plaintiffs seek judgment and declaration as to the State's purported violation of Lincoln County's zoning ordinances, this Court also examines the standing requirements as set forth in SDCL Chapter 11-2, which governs potential complaints concerning county planning and zoning decisions.

> For the purposes of this chapter, a person aggrieved is any person directly interested in the outcome of and aggrieved by a decision or action or failure to act pursuant to this chapter who:
>
> (1) Establishes that the person suffered an injury, an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical;
>
> (2) Shows that a causal connection exists between the person's injury and the conduct of which the person complains. The causal connection is satisfied if the injury is fairly traceable to the challenged action, and not the result of the independent action of any third party not before the court;
>
> (3) Shows it is likely, and not merely speculative, that the injury will be redressed by a favorable decision, and;
>
> (4) Shows that the injury is unique or different from those injuries suffered by the public in general.

SDCL 11-2-1.1.

While standing has not been analyzed in the context of a landowner's suit against the State, the South Dakota Supreme Court has previously addressed citizen and landowner standing when they challenge decisions made by counties. *See, e.g., Abata*, 2019 S.D. 39, ¶ 14, 931 N.W.2d at 720 (citizens had standing to seek declaratory relief from the passing of a county's zoning ordinance without proper statutory notice); *Powers v. Turner County Board of Adjustment* (*Powers I*), 2020 S.D. 60, ¶ 24, 951 N.W.2d 284, 294 (landowners had standing to challenge a county board's decision to grant a conditional use permit for an animal feed location near their properties); *Sierra Club*, 2021 S.D. 28, 959 N.W.2d 615 (holding that an association had individual and representative standing at the motion to dismiss stage to challenge a county zoning decision to grant a concentrated animal feeding operation

(CAFO)); *Powers v. Turner County Board of Adjustment* (*Powers II*), 2022 S.D. 77, 983 N.W.2d 594 (holding private citizens had standing at the writ of certiorari stage to challenge the same). *But see Cable*, 2009 S.D. 59, ¶ 32, 769 N.W.2d at 829 (citizen lacked standing in a SDCL 7-8-27 challenge of a decision by a county board because the plaintiff was not a "person aggrieved" within the meaning of that statute). Collectively, Plaintiffs criticize DOC's choice for the proposed prison site, mainly due to its lack of infrastructure. *Id.* p. 4, ¶ B-5. Plaintiffs generally assert that they, as property owners subject to the County's zoning ordinances, have not been afforded due process in DOC's decision because they have not been given an opportunity for their objections to be heard. The individually named Plaintiffs allege that the construction of the prison will affect their interests in their properties, thereby causing injury. The Court must consider each Plaintiff's standing.

Plaintiffs Mike Hoffman and Michelle Jensen have listed a parcel near the proposed build site for sale at $430,000 and "now think it unlikely" that it will sell based on DOC's announcement, and they further allege that the fair market value of their properties near the proposed build site have fallen after the State's announcement of DOC's intent to construct a prison. Complaint, p. 3, ¶ B-1. Plaintiff Jay White asserts that his investment in his property would have been valued at $1,000,000 prior to DOC's announcement. *Id.* p. 3, ¶ B-2. Plaintiff Tom Eiesland "desires to retain his property interests" in the area. *Id.* pp. 3-4, ¶ B-3. To have standing, Plaintiffs must demonstrate a factual assertion as to the "concrete and particularized injury" brought upon them by DOC's selection of this land for the

prison site. *Powers II*, 2022 S.D. 77, ¶ 16, 983 N.W.2d 594, 601. This Court finds that on the face of the Complaint only Plaintiffs Jensen and Hoffman have alleged an injury in fact to the value of their properties. They have shown a causal connection between their injury and the planned location of the state prison as affecting their property values. Further, they demonstrate a likelihood that the injury will be redressed by a favorable decision, because if DOC is prevented from building the state prison in the intended location there will be no injury to their property. Therefore, this Court finds that Plaintiffs Jensen and Hoffman have standing to bring their claims. Plaintiffs White and Eiesland, however, have failed to establish standing. White claims that his property had a value of approximately $1,000,000 before the state announced their intent to build a prison at the Lincoln County location; however, White does not assert that this announcement negatively impacted the value of his property. Complaint, p. 3, ¶ B-2. Similarly, Eiesland's claimed injury is simply that he "desires to retain his property interest in this area . . . without further developmental pressure arising from the location of a new prison in this rural area." *Id.* p. 4, ¶ B-3. A wish to not have a prison located by one's property is not an injury in fact. At best, the Court can infer from the tenor of the Complaint that White and Eiesland believe they will suffer economic harm if the prison is built at the proposed site. However, as pled, their claims require the Court to speculate as to what their injuries may be, and for that reason, Plaintiffs White and Eiesland do not satisfy the injury in fact prong of the standing test.

NOPE lacks standing entirely to sue on its own right. This Court looks to *Sierra Club v. Clay County Board of Adjustment*, wherein the Sierra Club argued it was an aggrieved "person" able to sue because a county-approved CAFO would "negatively impact the air, water, and soil resources that Sierra Club seeks to protect." 2021 S.D. 28, ¶ 14, 959 N.W.2d at 621. The Court held that the asserted injury was insufficient to establish the Sierra Club's standing, as it was an injury experienced "in equal measure by all or a large class of citizens." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975)).

NOPE is listed in the Complaint as a corporation seeking to preserve a rural way of life consistent with the Lincoln County Comprehensive Plan. The organization does not plead an injury other than what appears to be an assertion that the County ordinances should govern DOC. NOPE's standing to sue is lacking because an entity's desire for enforcement of an ordinance is contemplated "in equal measure" by the public in general as it is to an individual landowner. *See Sierra Club*, 2021 S.D. 28, ¶ 17, 959 N.W.2d at 622 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972)) ("[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved[.]'").

NOPE also lacks standing to bring a suit on behalf of its members. A three-part test is applied to determine whether an association has representative standing. *Cable*, 2009 S.D. 59, ¶ 44, 769 N.W.2d at 831; *Sierra Club*, 2021 S.D. 28, ¶ 18, 959

N.W.2d at 622. In order to demonstrate representative status, NOPE must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* (quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977)). In *Sierra Club*, the Court found that the feed lot's potential to create a decline in neighboring property value, increased odors, and diminished air quality were insufficient to show "injuries unique to members of an organization." *Id.*, 2021 S.D. 28, ¶ 27, 959 N.W.2d at 625.

While this Court recognizes NOPE's earnest desire to promote the continuation of rural Lincoln County's agrarian way of life, it cannot find that that the organization has established any injury that would afford each member standing to file suit in this matter. NOPE is composed of hundreds of members residing in nearby townships and farming entities yet alleges no specific injuries other than general complaints about violations of Lincon County zoning ordinances or displeasure as to the fact that a prison will be in this portion of the County. NOPE has failed to demonstrate that it will sustain any unique injuries as compared to the public in general.

Based on the analysis above, the Court finds that only Plaintiffs Hoffman and Jensen have established standing to sue in this matter. Defendants' Motion to Dismiss is granted on the issue of standing as to Plaintiffs Eiesland, White and NOPE.

III. Sovereign Immunity

Article III, Section 27 of the South Dakota Constitution sets forth the doctrine of sovereign immunity. "The Legislature shall direct by law in what manner and in in what courts suits may be brought against the state." S.D. Const. Art. III, § 27. This doctrine "prevents the governing acts of the state, its agencies, other public entities, and their employees from attack in court without the state's consent." *Dan Nelson, Automotive, Inc. v. Viken*, 2005 S.D. 109, ¶ 27, 706 N.W.2d 239, 249 (quoting *Wulf v. Senst*, 2003 S.D. 105, ¶ 20, 669 N.W.2d 135, 142). A suit against a state agent is deemed to be against the State. *McGee v. Spencer Quarries, Inc.*, 2023 S.D. 66, ¶ 29, 1 N.W.2d 614, 623-24 (citing *High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, 737 (S.D. 1980)). Plaintiffs' suit is thus "not maintainable unless sovereign immunity is waived." *Id.*

The South Dakota Supreme Court has consistently held that sovereign immunity is not waived when a state agent's duty is discretionary. Waiver, however, is implicit if the duty is ministerial. *McGee*, 2023 S.D. 66, ¶ 30 (quoting *Wulf*, 2003 S.D. 105, ¶ 20, 669 N.W.2d at 142).

> [A] ministerial act is defined as absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by law prescribing and defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a governing rule or standard with a compulsory result. It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.

Id. (emphasis omitted) (quoting *Truman*, 2009 S.D. 8, ¶ 21, 762 N.W.2d at 80-81).

Defendants argue that Secretary Wasko's decision to pick this specific location for the new prison was wholly discretionary based on the broad language of HB 1017. Conversely, Plaintiffs contend that DOC's intended use of the land, which runs afoul of Lincoln County zoning ordinances, is not within the scope of the authority granted by HB 1017, and therefore was a ministerial decision. Plaintiffs' position necessarily requires a characterization of Secretary Wasko's duties, and whether the authority conferred upon her by HB 1017 resulted in the undertaking of ministerial or discretionary duties.

Distinguishing ministerial and discretionary acts "requires an individualized inquiry." *McGee*, 2023 S.D. 66, ¶ 34 (quoting *King v. Landguth*, 2007 S.D. 2, ¶ 13, 726 N.W.2d 603, 608). Such distinguishment "must avoid a mechanistic approach to the question and exemplifies the difficulties inherent in the ministerial/ discretionary dichotomy." *Id.* (quoting *Hansen v. SD Dept. of Transp.*, 1998 S.D. 109, ¶ 23, 584 N.W.2d 885, 886). "[T]he distinction between discretionary and ministerial acts is often one of degree, since any official act that is ministerial will still require the actor to use some discretion in its performance." *Id.* (quoting *Wulf*, 2003 S.D. 105, ¶ 23, 669 N.W.2d at 144).

HB 1017 authorized DOC to purchase real property and to contract for the design of a prison facility. Pursuant to the authority granted to her as Secretary of the DOC, Secretary Wasko acted on this authorization. *See* SDCL 24-1-1 and -13, Secretary Wasko was not commanded or ordered to make the decision. HB 1017 stated that DOC "may" purchase property and was "authorize[d]" to contract. The

Bill did not provide direction "with such certainty that nothing remain[ed] for judgment or discretion." *McGee*, 2023 S.D. 66, ¶ 30 (quoting *Truman*, 2009 S.D. 8, ¶ 21, 762 N.W.2d at 80–81). Rather, much remained for judgment or discretion. HB 1017 was silent as to when the purchase should be made, how much the property could be purchased for, where the property should be located, or how much existing infrastructure, if any, must be on the purchased land. The location selection and subsequent building process most certainly "involve[s] policy making or the exercise of professional expertise and judgment,'" and is not merely an action that requires Secretary Wasko to just follow orders. *Id.* at ¶ 41 (quoting *King v. Landuth*, 2007 S.D. 2, ¶ 13, 726 N.W. 2d, 603, 608 (citations omitted)).

The Court further finds that the Legislature's delegation of these duties was not unconstitutional, as it is permissible to delegate quasi-legislative power to administrative agencies "in order to execute or carry out existing legislation." *Boever v. S. Dakota Bd. Of Acct.*, 1997 S.D. 34, ¶ 10, 561 N.W. 2d 309, 312 (citation omitted). The Legislature may delegate authority so long as it provides: "(1) a clearly expressed legislative will to delegate power, and (2) a sufficient guide or standard to guide the agency." *Id.* The authority conferred upon Secretary Wasko and DOC by HB 1017 and SDCL Ch. 1-15 to select a location for the prison to be built satisfies both prongs. SDCL 1-15-1.3 and -10 authorize DOC to govern the state's penitentiaries and to contract for the purchase of land, and HB 1017 specifically authorizes DOC to contract for the planning and preparation for the building of a new prison. Further, chapter 1-15 provides instruction to DOC as to how the prison facilities shall be run.

The duties conferred upon Secretary Wasko by HB 1017 were discretionary and properly delegated, including the authority to select the location of the new prison site. For this reason, the State is immune from suit under the doctrine of sovereign immunity and is entitled to dismissal of Plaintiffs' claims on this basis.

IV. Failure to State a Claim and Preemption

Defendants argue that Plaintiffs fail to state a claim against the State upon which relief may be granted, as the State is not subject to governance by Lincoln County's zoning ordinances. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *LP6 Claimants, LLC v. South Dakota Dep't of Tourism and State Development*, 2020 S.D. 38, ¶ 12, 945 N.W.2d 911, 915 (citation omitted). "[W]hile the court must accept allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Id.* (citation omitted).

Plaintiffs argue that HB 1017 does not authorize DOC to override Lincoln County's zoning ordinances and comprehensive plan. They ask this Court to follow the South Dakota Supreme Court's holding in *Lincoln Cnty. v. Johnson*, 257 N.W.2d 453 (S.D. 1977), wherein the Court adopted the "balancing of interests" rule to determine whether one governmental entity is subject to another entity's zoning laws.

> This rule requires that one governmental unit (intruding unit) be bound by the zoning regulations of another governmental unit (host unit) in the use of its extraterritorial property purchased or condemned, in the absence of specific legislative authority to the contrary. If the proposed

> use is nonconforming the intruding unit should apply to the host unit's zoning authority for a specific exception or for a change in zoning, whichever is appropriate. The host zoning authority is then in a position to consider and weigh the applicant's need for the use in question and its effect upon the host unit's zoning plan, neighboring property, environmental impact, and the myriad other relevant factors to be considered for modern land use planning and control. If the intruding unit is dissatisfied with the decision of the host zoning authority it may seek appropriate judicial review, wherein the circuit court can balance the competing public and private interests essential to an equitable resolution of the conflict. In addition to the zoning factors considered by the host authority the trial court can consider the applicant's legislative grant of authority, the public need therefor, alternative locations in less restrictive zoning areas and alternative methods for providing the needed improvements. If, after weighing all pertinent factors the court finds the host government is acting unreasonably, the zoning ordinance should be held inapplicable to the proposed improvement.

Id. at 457-58.

In adopting the "balancing of interests" rule, however, the Supreme Court cited to other cases that apply the "general rule,"[1] which dictates "that the mere grant of eminent domain power to a governmental unit automatically renders the unit immune from zoning regulations." *Id.* at 456. The Supreme Court went on to note that the expansiveness of the general rule has been modified in some jurisdictions, such as in the case of *St. Louis Cnty. v. City of Manchester*, 360 S.W.2d 638 (1962):

> [T]he Manchester court suggests that the scope of political authority of a governmental unit seeking the exemption is a significant factor in determining whether immunity from local zoning regulations should be granted. The reasoning is that state agencies such as public utility commissions or state highway authorities have a political jurisdiction and a concomitant planning responsibility statewide in scope transcending local boundaries. To be compelled to comply with local zoning regulations might well thwart the state agency's attempt to perform its public service function

Lincoln County, 257 N.W.2d at 457.

[1] Use of the "general rule" was also promoted by Attorney General Official Opinion No. 77-13.

Notably, the Supreme Court declined to rule on the acceptability of the general rule when a state agency was the entity seeking exemption from the zoning laws, as at issue in *Lincoln County* was whether the city of Sioux Falls was required to comply with the county's zoning ordinances when it attempted to build a landfill in an area where the city did not have zoning authority. *Id.* at 457.

However, in the most analogous case to the current matter, *City of Rapid City v. Pennington Cnty.*, 2003 S.D. 106, 669 N.W.2d 120, the Supreme Court held that its ruling in *Lincoln County* did not apply when Pennington County sought to build a jail within the exterior boundaries of Rapid City, despite the city planning commission's disapproval. *Id.* at ¶ 14, 669 N.W.2d at 125. In its decision, the Supreme Court cited to several cases in which courts have held that jails are a necessary or essential governmental function, and thus are not subject to municipal zoning ordinances. *Id.* at ¶ 11 (citing to *Lane v. Zoning Bd. of Adjustment of the City of Talladega*, 669 So.2d 958, 959 (Ala.Civ.App.1995) (operating a county jail is a governmental function); *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 380 Mass. 706, 405 N.E.2d 637, 640 (1980) (operating a county jail is an essential governmental function); *Metro. Dade Cnty. v. Parkway Towers Condo. Ass'n*, 281 So.2d 68, 69 (Fla.Dist.Ct.App.1973) (county could override its own zoning as it "possessed the right at common law to place a governmental function [prison work release facility] on any site selected within the County as directed by the Board of County Commissioners"); *Los Angeles Cnty. v. City of Los Angeles*, 212 Cal.App.2d 160, 28 Cal.Rptr. 32, 34 (1963) ("essential functioning of the county"); *Green Cnty. v.*

City of Monroe, 3 Wis.2d 196, 87 N.W.2d 827, 829 (1958)). While Justice Sabers dissented, urging the Court to extend its holding in *Lincoln County*, stating "[i]t is doubtful that the Legislature intended these results," and that the case should be remanded to the circuit court for a balancing of the parties' interests, the majority of the Supreme Court disagreed. *Id.* at ¶¶ 18-21 (Sabers, J., dissenting).

Based upon the language of HB 1017, SDCL ch. 1-15, and the holdings in *Lincoln County* and *City of Rapid City*, this Court finds that the "balancing of interests" rule does not govern when a state agency's building plan would conflict with local or county zoning laws. As it pertains to DOC specifically, the broad authority granted to the Department by SDCL 1-15-14 to take private property by condemnation to construct correctional facilities demonstrates to the Court that the Legislature does not intend for DOC to be subject to restrictive zoning ordinances or other property laws. To require the state to be subject to local zoning laws in constructing a prison, while a county is exempt when building a jail, goes against the Supreme Court's rationale in *City of Rapid City* — especially considering that county jails do not necessarily need to be located within a city or town, but state correctional facilities have no option but to exist within a county. Further, a county by its very nature is a legislative creation, and therefore seemingly lacks the authority to preempt state law. "[C]ounties . . . are not sovereign entities; they are subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions." *Edgemont Sch. Dist. 23-1 v. South Dakota Dept. of Revenue*, 1999 S.D. 48, ¶ 14, 593 N.W.2d 36, 40. For these reasons, the general rule is more

likely applicable in actions concerning DOC's operation of its facilities, and Defendants are not subject to Lincoln County's zoning ordinances or comprehensive plan.

However, even if a balancing of interests is undertaken, this Court finds that the likely result will be that the necessity of the construction of a new prison outweighs the interests of the surrounding landowners. A prison, like a jail, is a necessary government function, and must be located somewhere. See *Pennington Cnty.*, 2003 S.D. 106 at ¶ 12, 669 N.W.2d 120, 124; *see also Evans v. Just Open Gov't*, 251 S.E.2d 546, 550 (Ga. 1979). Further, courts in several jurisdictions have held that even when applying the balancing of interests test, state correctional facilities are immune from local zoning ordinances. See e.g., *Hermann v, Board of Cnty Comm'rs*, 785 P.2d 1003 (Kan. 1990) (under balancing of interests test, the state is immune from local zoning restrictions in seeking to construct a correctional facility); *Dearden v. City of Detroit*, 269 N.W.2d 139 (Mich. 1978) (the state department of corrections was not bound by local zoning ordinance when leasing a facility for use as a prerelease center); *Hongisto v. Mercure*, 72 A.D.2d 850 (N.Y. App. Div. 1979) (use of a mobile-home part as part of state prison facility site was state action exempt from town zoning ordinances); *General State Authority v. Moosic*, 310 A.2d 91 (Pa. Commw. Ct. 1973) (state's construction of correctional facility was governmental function not subject to borough zoning ordinances); *Snohomish Cnty. v. State*, 648 P.2d 430 (Wash. 1982) (state was not subject to county zoning ordinances in constructing prison).

Understandably, no one wants a prison constructed next door to where they live, but "[i]f construction of a [correctional facility] was dependent upon local land use regulation it is difficult to conceive of where such a project could find a welcome." *Mayor & Council of Town of Kearny v. Clark*, 516 A.2d 1126, 1129 (N.J. App. Div. 1986).

For these reasons, whether applying the general rule or balancing of interests test, Defendants' selection of the proposed prison site is not subject to Lincoln County's zoning laws and comprehensive plan. Plaintiffs, therefore, do not state a claim upon which relief can be granted by this action and Defendants' Motion to Dismiss may be granted on this basis.

CONCLUSION

This Court does not violate the separation of powers doctrine in addressing Plaintiffs' claims, as their arguments do not require the court to substitute its judgment as to matters of policy that fall within the purview of the State and its agents. This Court finds that Plaintiffs Hoffman and Jensen have standing to sue, but Plaintiffs Eiesland, White, and NOPE lack standing to sue the State in this matter. As to all Plaintiffs' claims, Defendants are immune from suit under the doctrine of sovereign immunity. Plaintiffs have further failed to state a claim upon which relief may be granted by this Court, as DOC should not be subject to Lincoln County's zoning regulations or comprehensive plan, regardless of whether the balancing of interests or general rule applies. Having found those issues to be

dispositive, this Court declines to address any additional arguments raised by the parties.

ORDER

Based upon the foregoing Memorandum Decision and the analysis therein, it is ORDERED that Defendants' Motion to Dismiss is GRANTED, with prejudice. This Order specifically incorporates the Court's Memorandum Decision.

Dated this 23rd day of October, 2024.

BY THE COURT:

Jennifer D. Mammenga
Circuit Court Judge

ATTEST:
BRITTAN ANDERSON,
Clerk of Courts

BY_____
Deputy (Seal)

APPENDIX B

Selected Provisions, SDCL

11-2-1.1. Aggrieved persons-Requirements

For the purposes of this chapter, a person aggrieved is any person directly interested in the outcome of and aggrieved by a decision or action or failure to act pursuant to this chapter who:

(1) Establishes that the person suffered an injury, an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical;

(2) Shows that a causal connection exists between the person's injury and the conduct of which the person complains. The causal connection is satisfied if the injury is fairly traceable to the challenged action, and not the result of the independent action of any third party not before the court;

(3) Shows it is likely, and not merely speculative, that the injury will be redressed by a favorable decision, and;

(4) Shows that the injury is unique or different from those injuries suffered by the public in general.

Source:

SL 2020, ch 41, § 1.

History:

Added by S.L. 2020, ch. 41,s. 1, eff. 7/1/2020.

11-2-12. Purposes of comprehensive county plan

The comprehensive plan shall be for the purpose of protecting and guiding the physical, social, economic, and environmental development of the county; to protect the tax base; to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provisions of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements; to lessen governmental expenditure; and to conserve and develop natural resources.

Source:

SL 1941, ch 216, § 3; SDC Supp 1960, § 12.20A03; SL 1967, ch 20, § 2; SL 1975, ch 113, § 6.

11-2-13. Adoption of zoning ordinance

For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

Source:

SL 1941, ch 216, § 2; SDC Supp 1960, § 12.20A02; SL 1967, ch 20, § 3 (1); SL 2000, ch 69, §4.

11-2-24. Construction to be approved by planning commission when covered by comprehensive plan-County commissioners overruling commission's disapproval

If a board has adopted the comprehensive plan or any part thereof, no street, road, park, or other public way, ground, place, space, public building or structure, public utility, whether publicly or privately owned, if covered by the comprehensive plan or any adopted part thereof, may be constructed or authorized in the county or within its subdivision jurisdiction, until the location and extent thereof has been submitted to and approved by the planning commission. In case of disapproval, the commission shall communicate its reasons to the board. By majority vote of the board members elect, a board may overrule the disapproval.

Source:

SL 1967, ch 20, § 5; SL 1975, ch 113, § 13; SL 1979, ch 92; SL 2000, ch 69, §17.

11-2-61. Petition to court contesting decision of board-Requirements

Any person or persons, jointly or severally, or any officer, department, board, or bureau of the county, aggrieved by any decision of the board of adjustment may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality. The petition shall be a petition for writ of certiorari presented to the court within thirty days after the filing of the decision in the office of the board of adjustment. The board of adjustment shall respond to the petition within thirty days of receiving the notice of the filing and shall simultaneously submit the complete record of proceedings of the board appealed from, in the form of a return on a petition for writ, without need for a court order or formal issuance of writ.

A petitioner to the circuit court under this section shall pay all transcript costs required to complete the record of proceedings of the board appealed from.

Source:

SL 2000, ch 69, §31; SL 2003, ch 78, §6; SL 2004, ch 101, §6; SL 2016, ch 71, §6; SL 2020, ch 41, § 11.

History:

Amended by S.L. 2020, ch. 41,s. 11, eff. 7/1/2020. Amended by S.L. 2016, ch. 71,s. 6, eff. 7/1/2016.

APPELLANTS' OPENING BRIEF
30890

APPENDIX C

Amicus Brief of the Attorney General to the
South Dakota Supreme Court
Filed March 3, 1977

 # 12091

Excerpt Only for Issue 1A:

IS THE CITY OF SIOUX FALLS IN LOCATING A SOLID WASTE DISPOSAL SITE OUTSIDE THE JOINT CITY-COUNTY PLANNING AND ZONING JURISDICTION ESTABLISHED BY SDCL 11-6-11, REQUIRED TO SUBMIT SUCH SITE TO THE COUNTY FOR APPROVAL UNDER SDCL 11-2-24?

(Original Pagination Title Pages, i, ii, iii, and iv, and
1 to 31, inclusive)

12091 RESERVE

AMICUS CURIAE BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

LINCOLN COUNTY, SOUTH DAKOTA,
AND DELAPRE TOWNSHIP,

Plaintiffs and Respondents

v.

ARTHUR B. JOHNSON AND VIOLET V.
JOHNSON, SIOUX FALLS DEVELOPMENT
FOUNDATION, INCORPORATED, and
CITY OF SIOUX FALLS, A Municipal
Corporation,

Defendants and Appellants.

SUPREME COURT
STATE OF SOUTH DAKOTA
F I L E D

MAR 3 1977

Clerk

APPEAL FROM THE CIRCUIT COURT
OF LINCOLN COUNTY, SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT

HONORABLE JOHN L. WILDS
PRESIDING JUDGE

WILLIAM J. JANKLOW
ATTORNEY GENERAL OF SOUTH DAKOTA

WARREN NEUFELD
ASSISTANT ATTORNEY GENERAL
State Capitol Building
Pierre, South Dakota 57501

Attorneys for Amicus Curiae

RICHARD BOGUE
Canton, South Dakota
State's Attorney for Plaintiff and Appellant Lincoln County

SAM W. & JEFF MASTEN
Canton, South Dakota
Attorneys for Plaintiff and Appellant Delapre Township

BOYCE, MURPHY, MCDOWELL & GRABENFIELD
Sioux Falls, South Dakota
Attorneys for Sioux Falls Development Foundation Inc.

SCHLAGER, SCHLAGER & SECHSER
Sioux Falls, South Dakota
and
WOODS, FULLER, SCHULTZ & SMITH
Sioux Falls, South Dakota
Attorneys for City of
Sioux Falls

(Appeal perfected November 8, 1976)

AMICUS CURIAE BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

LINCOLN COUNTY, SOUTH DAKOTA,
AND DELAPRE TOWNSHIP,

Plaintiffs and Respondents

v.

ARTHUR B. JOHNSON AND VIOLET V. JOHNSON, SIOUX FALLS DEVELOPMENT FOUNDATION, INCORPORATED, and CITY OF SIOUX FALLS, A Municipal Corporation,

Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT
OF LINCOLN COUNTY, SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT

HONORABLE JOHN L. WILDS
PRESIDING JUDGE

WILLIAM J. JANKLOW
ATTORNEY GENERAL OF SOUTH DAKOTA

WARREN NEUFELD
ASSISTANT ATTORNEY GENERAL
State Capitol Building
Pierre, South Dakota 57501

Attorneys for Amicus Curiae

RICHARD BOGUE
Canton, South Dakota
State's Attorney for Plaintiff and Appellant Lincoln County

SAM W. & JEFF MASTEN
Canton, South Dakota
Attorneys for Plaintiff and Appellant Delapre Township

BOYCE, MURPHY, MCDOWELL & GREENFIELD
Sioux Falls, South Dakota
Attorneys for Sioux Falls Development Foundation Inc.

SCHIAGER, SCHIAGER & SECHSER
Sioux Falls, South Dakota
and
WOODS, FULLER, SCHULTZ & SMITH
Sioux Falls, South Dakota
Attorneys for City of Sioux Falls

(Appeal perfected November 8, 1976)

I N D E X

CASES CITED:

STATUTES:

STATUTES (Continued)

REFERENCE:

1 (B)

MAY THAT MUNICIPALITY DENY THE ELECTORS OF THE AFFECTED TOWNSHIP, WHICH IS LOCATED IN ANOTHER COUNTY, A RIGHT TO VOTE GRANTED IN SDCL CHAPTER 34-16B, OR IGNORE ANY LOCAL STANDARDS ON SITING AND CONSTRUCTION?

STATUTES

II (A)

WAS THE RECORD MADE BY RESPONDENTS INSUFFICIENT TO ENTITLE THEM TO JUDGMENT WHEN THE COMPLAINT AND SUPPORTING AFFIDAVITS ESTABLISHED A PRIMA FACIE CASE WITH FEASIBLE ALTERNATIVES UNDER SDCL 21-10A-1, et seq?

CASES CITED:

STATUTES:

AMICUS CURIAE BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

LINCOLN COUNTY, SOUTH DAKOTA,
AND DELAPRE TOWNSHIP,

Plaintiffs and Respondents

v.

ARTHUR B. JOHNSON AND VIOLET V.
JOHNSON, SIOUX FALLS DEVELOPMENT
FOUNDATION, INCORPORATED, and
CITY OF SIOUX FALLS, A Municipal
Corporation,

Defendants and Appellants.

PRELIMINARY STATEMENT

Because of excessive distances and limited time, the State as Amicus Curiae has not had access to the settled record in this matter as indexed by the Clerk of Courts and has only seen, as of this writing, the brief of the appellants Lincoln County and Delapre Township. References to the settled record will be made directly to the portion of the record cited - for example: "memorandum opinion," "plaintiff's complaint," etc. - followed by the page or paragraph number to which reference is made. References to the appellant's brief will be made in the same manner and will be preceded by the designation (AB).

PROCEDURAL HISTORY AND ULTIMATE FACTS

The State has no objection to the procedural history as set out in appellant's brief (AB 2-3) and agrees with the appellant's statement of ultimate facts insofar as it acknowledges the standard admission of allegations in the complaint that normally accompanies a defendant's motion for summary judgment.

INTEREST OF AMICUS CURIAE

The State of South Dakota and its agency, the Department of Environmental Protection (DEP), are charged with the administration of South Dakota's Solid Waste Act, SDCL 34-16B as amended. Included in that chapter is a policy statement - something rarely stated by the Legislature.[1]

---

[1]The entire text of SDCL 34-16A-1 (Rev. 1972) is as follows: 34-16B-1. Declaration of public policy--Purpose of chapter.--It is hereby declared to be the public policy of the state to regulate and control the collection, transportation, processing, resource recovery, and disposal of solid wastes in a manner that will protect the public health and safety, conserve our natural resources, enhance the beauty and quality of our environment, prevent air pollution or water pollution, and prevent the spread of disease and creation of nuisances. It is also declared that local and regional solid waste management systems be supported to the extent practicable for the efficient and economical development of such systems. To these ends it is the purpose of this chapter to provide for a co-ordinated state-wide program of solid waste management, for an appropriate distribution of responsibilities among the state and local units of government, and to facilitate co-operation with federal, state, and local agencies responsible for the prevention, control, or abatement of air, water, and land pollution.

SDCL 34-16B-1 states in part:

> It is also declared that local and regional solid waste management systems be supported to the extent practicable for the efficient and economical development of such systems. To these ends it is the purpose of this chapter to provide for a co-ordinated state-wide program of solid waste management, for an appropriate distribution of responsibilities among the state and local units of government, and to facilitate co-operation with federal, state and local agencies responsible for the prevention, control or abatement of air, water, and land pollution. (Emphasis supplied.)

To aid in this co-ordination of solid waste management, a mandatory duty is placed upon every county and municipality to develop a plan for a solid waste management system[2] to be approved by the Board of Environmental Protection (BEP). SDCL 34-16B-17 and 34-16B-21.[3] It is interesting to note that no

---

[2] SDCL 34-17B-2(4) states: "Solid waste management system," the entire process of storage, collection, transportation, processing and disposal of solid wastes by any person engaging in such process as a business or by any municipality, authority, county or any combination thereof.

[3] SDCL 34-16A-17. Plans for county systems--Submission to committee.--The board of county commissioners in each county of the state shall plan, initiate, and provide a solid waste management system to adequately handle solid wastes generated or existing within the boundaries of such county. Said plan shall be submitted to the committee for approval on a specified date.

SDCL 34-16B-21. Plans for municipal systems--Submission to committee.--All municipalities shall develop and submit to the committee for approval on a specified date a plan to provide a solid waste management system and shall provide for the disposal of solid wastes generated or existing within the incorporated limits of such municipality or in the area to be served thereby without harmful effects to the inhabitants.

other similar municipal service is made mandatory. A city is not required to provide drinking water or sewer service, but it is required to provide solid waste management. Compare SDCL 9-47-1, 9-48-2, and 34-16B-17 and 34-16B-21, as amended.

It is the State's position that in the submission and approval of the required plans, the subdivisions and the Board of Environmental Protection can eliminate redundancies and conflicts between adjacent proposed solid waste management systems. The question to be answered here is the extent of the State's power to implement the public policy "to provide for a co-ordinated state-wide program of solid waste management." SDCL 34-16B-1. A corollary to this is the extent of local governments to exercise their powers under the comprehensive planning and zoning statutes, the solid waste act and the South Dakota Environmental Protection Act, SDCL 21-10A.

It is the State's position that in the final analysis the resolution of all these competing interests will be had only by balancing the competing interests to determine whether the proposed activity has the bottom-line conclusion of serving the public interests to the greatest degree possible. For this reason, the State has a vital interest in this case because this litigation has the potential of defining the outer limits of the State's authority under SDCL 34-16B and other statutes.

In addition, the State finds itself in the position of having to require suitable solid waste disposal from the City

of Sioux Falls. The city is currently utilizing a disposal site that sits directly in the Skunk Creek Aquifer -- one of the most probable sources of new drinking water for the city. The proposed disposal site that is the subject of this litigation has been found satisfactory by the Board of Environmental Protection. The State's wish is to see Sioux Falls comply with the solid waste act, and the State's interest in this case is to determine the extent that the State's enforcement efforts can be vetoed by local governments in the exercise of collateral statutory powers.

Finally, one of the major issues on appeal here is the effect and extent of the South Dakota Environmental Protection Act, SDCL 21-10A. This is the first time the act will be interpreted in this Court. It is of utmost importance to the State that the first interpretation of this statute is an interpretation that will be a sound foundation for the building of an environmental common law in South Dakota.

QUESTIONS PRESENTED

The State agrees, with one exception, that the questions presented by the appellants are the proper ones for review. The State would, however, rephrase appellants' question I(A) to read:

> IS THE CITY OF SIOUX FALLS IN LOCATING A SOLID WASTE DISPOSAL SITE OUTSIDE OF THE JOINT CITY-COUNTY PLANNING AND ZONING JURISDICTION ESTABLISHED BY SDCL 11-6-11, REQUIRED TO SUBMIT SUCH PROPOSED SITE TO THE COUNTY FOR APPROVAL UNDER SDCL 11-2-24?

ARGUMENT AND AUTHORITIES

I (A)

IS THE CITY OF SIOUX FALLS IN LOCATING A SOLID WASTE DISPOSAL SITE OUTSIDE THE JOINT CITY-COUNTY PLANNING AND ZONING JURISDICTION ESTABLISHED BY SDCL 11-6-11, REQUIRED TO SUBMIT SUCH PROPOSED SITE TO THE COUNTY FOR APPROVAL UNDER SDCL 11-2-24?

THE TRIAL COURT DID ERR.

The State submits that the trial court was mistaken in basing its decision below on SDCL 11-2-31.[4] The trial court stated in reference to this section that "no county can have jurisdiction over a municipality by virtue of the county's comprehensive plan." Memorandum Opinion 3. In reading all of the planning and zoning statutes relating to counties and muncipalities, however, it becomes plain that SDCL 11-2-31 is not intended to address the problem of municipal subservience to county comprehensive planning and zoning.

The trial court failed to recognize the valid distinction between a <u>county</u> comprehensive plan for county purposes and a <u>municipal</u> comprehensive plan for municipal purposes.

---

[4] SDCL 11-2-31. Preparation by county commission of municipal plans and controls--Adoption by municipality.--The governing body of any municipality may request a county planning commission to submit to such governing body a comprehensive plan <u>for the municipality</u> setting forth such provisions as the planning commission deems applicable to the municipality for its best interests, or to prepare official controls to apply to the area within the municipality. Notwithstanding the adoption of the comprehensive plan and recommendations for the municipality, the plan and recommendations shall not become binding until official controls are adopted by the municipality in accordance with the plan. (Emphasis supplied.)

There is also a correlative distinction between the county drafting its own comprehensive plan and zoning ordinances and the county drafting a municipal comprehensive plan and zoning ordinances at the request of the municipality. When the county drafts its own plan and zoning ordinances it is exercising its own governmental and legislative powers. When a county drafts a municipal plan and ordinances at the request of the municipality, it is acting solely as an independent contractor on a consulting basis and no exercise of the county's governmental powers vis-a-vis the municipality is contemplated. SDCL 11-2-31 addresses the drafting of a municipal plan and municipal zoning ordinances by a county; this lawsuit is concerned only with the county's governmental powers and its own comprehensive plan and zoning ordinances.

SDCL 11-2-31 does nothing more than provide an option whereby a municipality can utilize the planning and technical services of the county, and the municipality upon adopting the documents so produced may then administer and enforce that comprehensive plan and those zoning ordinances as if they were the municipality's own work product. A similar approach, whereby a municipality and county may contract to provide joint planning services for the municipality and even the complete abdication of the municipal planning

function to the county, is provided by SDCL 11-2-7 and 11-2-8.[5] Even at this level, however, SDCL 11-2-7, 11-2-8, and 11-2-31 address only the issue of how a county may assist a municipality in developing a municipal comprehensive plan which is a different specie from a county comprehensive plan. Clearly, SDCL 11-2-31 is inapposite to the resolution of this dispute. The trial court felt that SDCL 11-2-31 allows a municipality to choose immunity from a county comprehensive plan generally applicable within the county's sphere of jurisdiction; the true effect of that section is to allow a municipality to request and accept or reject, a draft of a municipal comprehensive plan prepared by county officials for other than county purposes.

To say that SDCL 11-2-31 does not give Sioux Falls immunity from the Lincoln County planning and zoning powers, however, is not the same as saying that Sioux Falls is subject

---

[5] SDCL 11-2-7. Contracts to provide planning and zoning services to municipalities--Municipal powers exercised by county board.--The governing body of any municipality may contract with the board for planning and zoning services to be provided by the county, and the contract may provide that the municipality shall pay such fees as are agreed for the services performed. Under the provisions of the contract the municipal governing body may authorize the county planning and zoning commission, on behalf of the city, to exercise any of the powers otherwise granted to municipal planning and zoning commissions under chapters 11-4 and 11-6.

SDCL 11-2-8. Joint county-municipal planning activities--County planning commission as municipal planning commission.--The contract between the governing body of the municipality and the board may provide among other things for joint county-municipal planning activities, or it may designate the county planning commission as the planning commission for the municipality.

to those governmental powers in this case. The powers of Lincoln County vis-a-vis Sioux Falls in this case must be determined according to law.

MUST THE CITY SUBMIT TO APPROVAL UNDER SDCL 11-2-24?

The appellants place great reliance on SDCL 11-2-24[6] for the proposition that what can be characterized as "public development" is prohibited in Lincoln County unless approved by the county planning commission. This assertion is made without regard to whether the proposed disposal site complies with the Lincoln County zoning ordinance. The true meaning of SDCL 11-2-24, however, is not all that clear, and in the absence of any substantial legislative history in this state, it appears that this Court will have to divine that elusive concept called legislative intent from the face of the statute itself.

On its face, there is little doubt that SDCL 11-2-24 requires the approval of the county planning commission for

---

[6] SDCL 11-2-24 (Supp. 1976) Construction to be approved by planning commission when covered by comprehensive plan--County commissioners overruling commission's disapproval.--Whenever any board of county commissioners shall have adopted the comprehensive plan or any part thereof, then and thenceforth, no street, road, park, or other public way, ground, place, space, no public building or structure, no public utility, whether publicly or privately owned, if covered by the comprehensive plan or any adopted part thereof or adjunct thereto, shall be constructed or authorized in the county or within its subdivision jurisdiction, until and unless the location and extent thereof shall have been submitted to and approved by the planning commission, provided that in case of disapproval, the commission shall communicate its reasons to the board. By vote of not less than two-thirds of its entire membership, the board shall have power to overrule such disapproval.

public development. The more important questions, however, are under what circumstances is this approval required and are there any other provisions of law which may override the approval requirement of SDCL 11-2-24?

WHEN IS APPROVAL REQUIRED?

The truly important language of SDCL 11-2-24 is the qualifying phrase in the middle of that section which specifies approval for a project only "if covered by the comprehensive plan or any adopted part thereof or adjunct thereto." SDCL 11-2-24. As the annotations in the pocket part to the statutes point out, this qualifying phrase as it now reads was the result of an amendment in 1975. The amendment changed the phrase by the addition of the words "or adjunct thereto."

Before discussing the meaning of this amendment, it is important to note what the effect of SDCL 11-2-24 was prior to this change. That section as it read prior to 1975[7]

---

[7] SDCL 11-2-24 (1967). Construction to be approved by planing commission when covered by comprehensive plan--County commissioners overruling disapproval by planning commission.--Whenever any county planning commission shall have adopted the comprehensive plan or any part thereof, then and thence forth, no street, road, park, or other public way, ground place, space, no public building or structure, no public utility, whether publicly or privately owned, if covered by the comprehensive plan or any adopted part thereof, shall be constructed or authorized in the county or within its subdivision jurisdiction, until and unless the location and extent thereof shall have been submitted to and approved by the planning commission, provided that in case of disapproval, the commission shall communicate its reasons to the board. By vote of not less than two-thirds of its entire membership, the board shall have power to overrule such disapproval.

was intended only as an aid to counties that had adopted comprehensive plans but had not implemented those plans by adopting zoning ordinances, subdivision regulations or any other of the more specific land use controls. The old SDCL 11-2-24 enabled counties with only a comprehensive plan to determine on an ad hoc basis how much and what kind of public development would be allowed in the absence of the more specific guidance given by a zoning ordinance. By definition a comprehensive plan is nothing more than a non-specific statement of general policy that can be enforced only on a case-by-case basis.[8]

In fact, a glance at the session laws which reflect the enactment of the original law reveals the purpose of the old SDCL 11-2-24. This was to reflect the "Legal Status of the Comprehensive Plan." SL 1967, ch. 20, §5. The section was intended to set out the manner and the extent of the enforceability of the comprehensive plan, and that original enforceability was intended only as one means of controlling public development in the absence of more specific controls such as zoning and subdivision ordinances. The original law reflected the fact that when only the comprehensive plan is in force some means must be found to make the plan enforceable and to effect the policies and goals stated in the plan. That law also reflected

---

[8] SDCL 11-2-1(6) (Supp. 1976) defines comprehensive plan as follows: "Comprehensive plan," a document which describes in words, and may illustrate by maps, plats, charts, and other descriptive matter, the policy, goals and objectives of the board to interrelate all functional and natural systems and activities relating to the development of the territory under its jurisdiction.

the reality that the only way to enforce a document as vague and ephemeral as a comprehensive plan is to do so on an ad hoc, case-by-case basis.

This approach is entirely consistent with the provision made for interim zoning in the original act and carried forward in SDCL 11-2-10.[9] There is a certain logic in allowing public and governmental development to be controlled by the comprehensive plan under SDCL 11-2-24. Public development after all is often a major if not the controlling factor affecting the course of private development. If this control proved to be ineffective, the county was given the additional tool of interim zoning which could be slightly more specific in its language and broader in its coverage than the comprehensive plan and still require less research and input

---

[9] SDCL 11-2-10 (Supp. 1976). Temporary zoning controls--Purpose--Public hearing required--Duration of controls--Renewal.--If a county is conducting or in good faith intends to conduct studies within a reasonable time, or has held or is holding a hearing for the purpose of considering a comprehensive plan or official controls, the board in order to protect the public health, safety, and general welfare may adopt as an emergency measure a temporary zoning map and temporary zoning ordinance and other temporary official controls, the purpose of which shall be to classify and regulate uses and related matters as constitutes the emergency. Before adoption or renewal of such emergency measure or measures, the board shall hold at least one public hearing, notice of the time and place of which shall be given at least ten days in advance by publication in a newspaper having general circulation in the county. Such measures shall be limited to one year from the date they become effective and may be renewed for one year. In no case shall such measures be in effect for more than two years.

than the final adoption of full scale zoning and subdivision ordinances.

Under this system which existed prior to the 1975 amendments, it is apparent that if a county comprehensive plan addressed the subject of where roads, streets and utilities should be generally located, those matters were "covered by the comprehensive plan or any adopted part thereof." SDCL 11-2-24 (1967). In other words, the terms "covered by" in the original act were synonymous with the phrase "addressed by." Any mention of a type of public development whether generally allowing it in an area or prohibiting it in another was sufficient to make that development be "covered by the comprehensive plan."[10]

In 1975, SDCL 11-2-24 was amended to add to the activating language of that section the phrase "or adjunct thereto." See SDCL 11-2-24 (Supp. 1976). The term "adjunct" was explained by an amendment to another section of the county comprehensive planning statute which made it clear that

---

[10] It is interesting to note here that a provision almost identical to SDCL 11-2-24 was in effect for municipalities at the time the statute authorizing county comprehensive planning was adopted. The municipal statute, however, has survived to this date without any significant amendment and particularly without the addition of the words "or adjunct thereto." See SDCL 11-6-19 (Supp. 1976). The significance of this fact is uncertain, but its recognition may broaden the Court's understanding in this case.

> Zoning ordinances, subdivision ordinances, the official zoning map, and other official controls as deemed necessary, shall be included as adjuncts to and in accordance with the comprehensive plan. SDCL 11-2-11 (Supp. 1976). (Emphasis supplied.)

There can be little doubt that SDCL 11-2-24 is no longer a means solely for enforcing the rather general and vague policy concepts contained in a comprehensive plan. It is now, in addition, a means for enforcing the specific allowances and prohibitions established in the "adjunct thereto"--the zoning and subdivision ordinances and other official controls.

The State submits, however, that with respect to the activating language of SDCL 11-2-24, it is still not abundantly clear when a specific proposed public development is "covered by the comprehensive plan. . .or adjunct thereto." Several factors arise when adjuncts to the comprehensive plan are included within the scope of SDCL 11-2-24 which make the use of the definition "addressed by" for the statutory term "covered by" totally unsettling and less comfortable than when used with reference to SDCL 11-2-24 prior to the 1975 amendment.

The first is the fact that with the adoption of the adjuncts to the comprehensive plan, or official controls, the need for ad hoc review and analysis of every proposed public development should to a large extent dissolve. The reason for this is that official controls apply not only to public development but to private development and private property as well and must, therefore, be specific to avoid any violation

of the due process standard for vagueness. By the terms of SDCL 11-2-24 (Supp. 1976) zoning ordinances apply to "dwellings, buildings, and structures," making it clear that private property may be affected.

The comprehensive plan, on the other hand, is enforceable by SDCL 11-2-24 (Supp. 1976) only against public development, and governmental subdivisions are not considered persons within the scope of the protections of the due process clauses of the United States or state constitutions. Risty v. Chicago, R.I. & P. Ry, 270 U.S. 378, 46 S.Ct. 236, 70 L.Ed. 641 (1926); Williams v. Book, 75 S.D. 173, 61 N.W.2d 290 (1954). By being applicable only against public development a comprehensive plan and its enforcement may be vague in a manner that would violate due process were the comprehensive plan to be applied against private property. A comprehensive plan, to be useful and flexible, must be somewhat vague and perhaps even impermissibly so. Its constitutionality, however, is saved by making the plan applicable only against public development.

The refinement of a comprehensive plan into official controls, however, and enforcement of those controls against private property require a greater degree of specificity to pass muster before the due process clause. These controls must inform the ordinary citizen in the conduct of his affairs when, where, and in what manner he is crossing the bounds of the law.

With this kind of specificity in effect under the official controls the need for ad hoc, case-by-case review of every development whether public or private, is unnecessary and simply places another unjustified administrative burden on inadequately staffed and poorly funded county governments.

Even where official controls do not have dual applicability to public and private development but apply only to public development, the controls must be specific making the case-by-case review of each development superfluous. SDCL 11-2-15 (1967) allows the inclusion of maps, highways and streets "showing the exact. . .dimensions. . .including specific controls for setbacks." (Emphasis supplied.) Official controls may also include "maps for other public facilities. . .showing exact location, size, boundaries and other related features." SDCL 11-2-16 (1967) (Emphasis supplied.) Even subdivision regulations[11] are to "include specific regulations and controls pertaining to other elements incorporated in the comprehensive plan or establishing standards and procedures to be employed in land development." SDCL 11-2-17 (1967). (Emphasis supplied.)

---

[11] It may be noted that subdivision plats are submitted to the county for approval, but such submission is specifically authorized by SDCL 11-2-17 (1967) which allows subdivision regulations to establish "procedures to be employed in. . . the approval of land plats." See also SDCL 11-3-8 (1967). Such submission is not a requirement of SDCL 11-2-24 (Supp. 1976). It appears that when the Legislature wishes to require or allow universal submission to the county under official controls it is quite capable of specifically expressing that desire in unambiguous terms.

The second reason which is a corollary to the first, and may be justified on the same basis, is that not only will the adoption of official controls provide the specificity which allows developers, both public and private, to determine to a large extent for themselves what is allowed and what is prohibited, but that same specificity relieves the county of the burden of a separate interpretation of the generally applicable comprehensive plan with regard to each and every public development. The very purpose of official controls is to avoid the vagaries of the non-specific comprehensive plan requiring constant analysis and interpretation by county officials.

A third reason is that by extending the pre-1975 usage of the term "covered by " to the additional requirements provided by official controls, the entire activating clause of SDCL 11-2-24 (Supp. 1976) becomes surplusage and is meaningless. When dealing only with comprehensive plans the original usage of "covered by" made good sense. A comprehensive plan may address itself to parks and roads but may say nothing about water treatment plants or armories. In that case the latter two uses would not be "covered by" the comprehensive plan.

In the case of official controls, and, especially in this case, zoning ordinances, everything is "covered by" these controls under the pre-1975 usage of that term. In the case of typical Euclidean zoning several classifications of land uses

are developed. The highest classification may be reserved to single family dwellings. The second classification would probably allow multiple family dwellings plus all uses allowed by the first classifications. Each succeeding classification would allow a new and "lower" use of the land in addition to those permitted by higher classifications. This process continues adding more uses at each step until the last classification of land use is made, and it is this last classification which, in exhaustion, allows "everything else."

In addition, even when certain uses are excluded by the official controls either by specific prohibition or the failure to specifically allow such uses, those uses are "covered by" the official controls if that phrase is used as it was prior to 1975. By this analysis it is easy to see that extension of the pre-1975 usage of "covered by" to official controls would make the phrase unnecessary in the statute. To reiterate, the simple reason is that once, as in this case, a zoning ordinance is enacted <u>everything</u> is "covered" in the pre-1975 sense of the word. If everything is covered then there is no need to put the activating language "if covered by the comprehensive plan or any adopted part thereof or adjunct thereto" in the statute. The statute would operate with the same effect if that language were omitted.

The Lincoln County zoning ordinance involved in this case is a perfect example of this. Section 305, subdivision 1 of the ordinance states:

> No building shall be erected, converted, enlarged, reconstructed or structurally altered, nor shall any building or land be used except for a purpose permitted in the [zoning] district in which the building or land is located. Zoning Ordinance at 11. (Emphasis supplied.)

The effect of this section is that every use which is not specifically allowed by a land use classification is generally prohibited. This illustration and, the State submits, every zoning ordinance extant merely shows that everything is "covered by" this ordinance and every ordinance if the term "covered by" is taken to be synonymous with "addressed by." If this meaning is adopted as appellants implicitly argue there will be no need to determine "if [a development is] covered by the comprehensive plan or any adopted part thereof or adjunct thereto" because everything will be "covered." Such an interpretation would make the above quoted language unnecessary and is to be avoided.

The State submits that to avoid this result an interpretation should be adopted which would allow some things to be covered by the ordinance while allowing other things not to be covered. Such an interpretation would put the activating language back into use by allowing that language to be selective in determining when SDCL 11-2-24 (Supp. 1976) will or will not have an effect. If appellants' implicit contention is adopted there would be no such option and SDCL 11-2-24 (Supp. 1976) would always apply.

The State suggests that a two-tiered meaning be given to the phrase "covered by." When only the comprehensive plan or parts thereof have been adopted the original pre-1975 meaning of "addressed by" should be used. This usage obviously serves a good purpose in this situation. When a zoning ordinance, however, has been adopted the meaning of "covered by" should be contracted to mean "prohibited by." In this manner the activating language of SDCL 11-2-24 (Supp. 1976) would serve a purpose by allowing that section to be selective in its operation. To rule otherwise would cause the section to be triggered constantly contrary to the plain meaning of the word "if" which is obviously used in the activating phrase to require application of the section to be dependent upon some contingency and not be continuous.

The only real drawback in this interpretation is the argument that if the Legislature intended the word "covered" to have two different meanings it would have used two different words. This is a valid consideration, but the State submits that multi-leveled approaches to the meaning of single phrases is nothing new. The most common example is the phrase "equal protection" as contained in the Fourteenth Amendment to the United States Constitution. That approach which requires no citation requires that statutes be upheld on one level if there appears a rational basis for the discriminatory effect and that statutes be upheld on another level only if an overriding state

interest can justify invidious discrimination.

If the Court adopts this interpretation, the next issue is whether the use of this land for a sanitary landfill violates the Lincoln County zoning ordinance. The area in which the landfill is located is zoned for "Rural and Public Use" according to the first map in the zoning ordinance which map is also appended to appellants' brief.

Article IV of the Lincoln County zoning ordinance lists the permissible uses for a district labelled "Rural and Public Use." Section 402 of that article provides in part:

> A building or premises shall be used only for the following purposes:
>
> 3. Publicly owned or operated properties, fairgound, military installations, other than overhead electric transmission lines. (Zoning Ordinance at 12.) (Emphasis supplied.)

It is interesting to note that other uses which may not necessarily be compatible with residential uses or farming are also specifically allowed by the ordinance. Subdivision 5 of section 402 specifically allows "Railroad tracks and yards and similar railroad facilities." Zoning Ordinance at 12.

The State submits that on the basis of the record before it, this Court may affirm the trial court's order granting summary judgment to Sioux Falls to the extent of any claim for relief based upon the Lindoln County zoning ordinance or upon SDCL 11-2-24 (Supp. 1976). The record is undisputed that the proposed landfill is publicly owned and would be publicly

operated if a preliminary injunction were not still in effect. Paragraph III of the amended complaint of Delapre Township affirmatively alleges those facts. This Court would be totally within its powers to affirm that portion of the trial court's order on this alternative ground. In the alternative the Court may remand for proceedings to determine whether there is in fact a violation of the zoning ordinance requiring county approval under SDCL 11-2-24 (Supp. 1976).

DOES OTHER POLICY OVERRIDE SDCL 11-2-24?

Assuming that the Court does not adopt the interpretation of SDCL 11-2-24 (Supp. 1976) advanced by the State, the State submits that other policy considerations at work in this case would override SDCL 11-2-24 (Supp. 1976).

Eminent domain is not a factor here. Sioux Falls has consistently maintained throughout this case that because it possesses the power of eminent domain under SDCL 34-16B-25 (Rev. 1972),[12] it is not subject to SDCL 11-2-24 (Supp. 1976) or the Lincoln County zoning ordinance. Numerous cases have been cited in the court below to support that position.

---

[12] SDCL 34-16B-25 (Rev. 1972). Municipal acquisition of property--Shares of parties to regional or county solid waste authority.--Municipalities are authorized to acquire by gift, devise, lease, purchase, or eminent domain real or personal property necessary to the installation and operation of a solid waste management system either individually or as a party to a regional or county solid waste authority, each member's share shall be fixed at the time of purchase with provisions for a division of proceeds upon determination of the region of the withdrawal from regional participation.

Without discussing these cases, the State submits that if there is no violation of the zoning ordinance the presence of eminent domain is irrelevant since neither the ordinance nor SDCL 11-2-24 (Supp. 1976) would prohibit the landfill. On the other hand if there is a violation of the zoning ordinance, SDCL 11-2-24 requires approval by the county. If the power of eminent domain were to create an exception to this rule, the exception would completely nullify the statute without regard to which interpretation of the statute is favored. SDCL 11-2-24 (Supp. 1976) applies only to the construction of public ways, spaces, buildings, and utilities. These are developments which in every case are supported by the eminent domain power. To carve out an exception based on eminent domain would destroy the entire effect of SDCL 11-2-24 (Supp. 1976).

OTHER POLICY CONSIDERATIONS.

The State's contention here is that Sioux Falls when operating outside the joint three-mile planning jurisdiction is generally subject to county zoning authority. This zoning power must be exercised in a reasonable manner for if every county could totally exclude such a landfill, Sioux Falls may be left with no alternatives for solid waste disposal except total recycling or dumping in the Atlantic Ocean. The first alternative is not yet past the first experimental stages and both alternatives are currently so costly as to be prohibitive. To force Sioux Falls into this situation would vio-

late the express policy of the solid waste act which requires "that local and regional solid waste management systems be supported to the extent practicable for the efficient and economical development of such systems." SDCL 34-16B-1 (Rev. 1972) (Emphasis supplied.) Even if SDCL 11-2-24 (Supp. 1976) is applicable here, it applies to public development generally and must give way to the policy requirements to be enforced in the specific area of solid waste management. The fact that the duty to plan and provide a solid waste management system is mandatory weighs heavily for the proposition that SDCL 11-2-24 (Supp. 1976) is not an absolute bar to the establishment of a sanitary landfill. SDCL 34-16B-21 (Rev. 1972).

In applying such a balancing approach two immediate questions arise: What are the factors to be weighed in determining whether to allow the establishment of this or any other landfill and what is the proper forum in which to conduct the examination necessary to the resolution of these interests?

The factors present in this case have already been discussed in part--mandatory compliance with the solid waste act; the very real health hazard posed by the present Sioux Falls disposal site; and the express legislative policy to provide economically reasonable and feasible solid waste management systems are some of the factors weighing in favor

of Sioux Falls. On the other side are the interests represented by local subdivisions validly exercising their police powers; the issue of whether there are actually any social, economic, or environmental resources which the police powers are designed to protect; possible social, economic, or environmental disruption from the proposed site; possible harm to township and county roads and the ability of local subdivisions to maintain those roads.

It must be made clear that what the State is proposing is not an absolute pre-emption of local controls by the solid waste act nor is it willing to admit an absolute veto of the solid waste act by local police powers. The bottom line conclusion of the State's proposition here is that local police powers, validly exercised, are initially applicable,[13] but must, if necessary, give way when they would block the mandatory requirements of the solid waste act and when the bottom line evaluation of the proposed site reveals that this sanitary landfill provides the optimum economic,

---

[13] Note SDCL 34-16B-27 (Rev. 1972). Local standards for sites and facilities.--Notwithstanding the provisions of §§34-16B-5 to 34-16B-11, inclusive, any local governing body may by ordinance or resolution adopt standards for the location, design, construction, and maintenance of solid waste disposal sites and facilities more restrictive than those adopted by the state department of health under the provisions of this chapter.

social, and environmental benefits to all interests affected and at the same time minimizes the economic, social, and environmental detriment to all affected interests.

The next question is what forum is proper for the resolution of these issues. It may be suggested that the Board of Environmental Protection under its duty to provide for a co-ordinated statewide solid waste management system should be able to resolve these issues at either the solid waste management system plan approval stage or at the determination of a permit application for a specific site.

The State opposes this solution for several reasons all of which are based on the basic premise that the Board of Environmental Protection and the DEP are creations of the Legislature, and their jurisdiction must be limited to that expressly granted by statute or necessarily implied thereunder.

The Board and the DEP must strive to provide a co-ordinated state-wide solid waste management system and it appears from the statute that the main tool for accomplishing this is the review of individual system plans. It must be remembered, however, that the Board and the DEP are <u>environmental</u> bodies, and the thrust of the Legislature's charge to these bodies is environmental to be tempered with economic feasibility. The power to review system plans, therefore, goes only to the economic and environmental concerns such as the elimination of redundant solid waste management services

and the optimum environmental acceptability of a proposed management system. Zoning ordinances and other local controls go far beyond environmental and economic concerns. They address social concerns and a full spectrum of other factors. The Board and DEP were simply not established to handle these factors and allowing them to make judgments in foreign fields without express statutory authority may be establishing a dangerous precedent.

Nor is the permit process the proper place for concerns which are not environmental. The solid waste act limits the Board's consideration in permit proceedings to its own rules.[14] "Such rules and regulations shall include but not be limited to, the disposal site location, construction, operation, compliance deadline, and maintenance of the disposal or disposal process as necessary to implement the purpose and intent of this chapter." SDCL 34-16B-4 (Rev. 1972.) (Emphasis supplied.) The State submits that the purpose and intent of SDCL 34-16B is mainly environmental and the full exercise of

---

[14] SDCL 34-16B-9 (Rev. 1972). Powers of committee with respect to permits.--In addition to any other powers conferred on it by law the committee shall have the power and duty to issue, revoke, modify, or deny permits, in compliance with chapter 1-26 and under rules and regulations of the committee authorization for the construction and the operation or maintenance of solid waste disposal sites and facilities. (Emphasis supplied.)

equitable powers should not be attempted within such a limited context.

It must be recognized that the Board and DEP are required by SDCL 21-10A-8 (Supp. 1976) to assess any alleged impairment of the natural resources and not allow any activity which would have that effect so long as there is a reasonable and prudent alternative consistent with the public health, safety and welfare.[15] There can be little doubt that this is express authority to venture out beyond the specific prohibition of the Board's rules in order to assess unique environmental consequences of each situation. The area of this statute, however, is still restricted to environmental concerns, and there is considerable doubt as to whether road damage is a detriment to a natural resource or whether the protection of a tax base which is a purpose of planning and zoning is environmental in nature.

---

[15] SDCL 21-10A-8 (Supp. 1976). Detrimental conduct prohibited when reasonable alternative available.--In any such administrative, licensing or other proceedings, as described in §21-10A-2, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

Furthermore, even if local controls are environmental in nature as provided in SDCL 34-16B-27 (Rev. 1972), see n.13 supra, there is considerable doubt as to the authority of the Board and DEP to enforce local ordinances and resolutions. If the Board is to enforce such local controls, may it also pass on the constitutionality of the ordinance? It seems that if a control is to be enforced, the object of the enforcement should also be given the chance to challenge the validity of the local ordinance. To open the door even a hair's width in this area may lead to dangerous consequences. The State submits that the Board's authority must be limited to the environmental concerns outlined by the Solid Waste Act, SDCL 34-16B, and by the South Dakota Environmental Protection Act, SDCL 21-10A.

The Board of Environmental Protection and DEP are legislatively created bodies of limited jurisdiction. When certain provisions of the law are to be enforced by these bodies specific direction in that area has been given by the Legislature. Permits are to be decided "under rules and regulations of the committee." SDCL 34-16B-9 (Rev. 1972). Approval of plans for the coordination of a statewide solid waste management system is limited by policy directive to the environmental aspects of solid waste management. Additional environmental aspects are to be considered solely on their own merits as directed by SDCL 21-10A-8 (Supp. 1976), but nowhere is any specific direction given for the Board or DEP to enforce local

regulations or statutes setting road weight limits. The duty of balancing all the interests to determine whether the mandatory requirements of the solid waste act or the local police powers shall prevail should not be delegated to an administrative agency.

Instead, the State submits that such a balancing of interests is inherently within the equitable powers of the courts. Such equitable powers will, without fail, constantly be called upon for the resolution of seemingly irresolvable conflicts. Whether the stage is set by an attempt to enforce a local zoning ordinance or local disposal standards, the issues will inevitably be framed to allow the court to measure the interests presented and forge the best solution possible.

Without going into case law in great detail since the parties to this action will undoubtedly do so to a sufficient degree, the State would submit that this balancing test is similar to that used in Oronoco v. City of Rochester, 197 N.W.2d 426 (Minn. 1972) and is unlike that used in O'Connor v. City of Rockford, 52 Il1.2d 360, 288 N.E.2d 432 (1972). In Oronoco, the court determined that it must weigh the interests represented by the city's eminent domain powers against those represented by the police powers of the surrounding subdivision. In that case the city was allowed to establish the sanitary landfill. The present action requires a similar analysis but the competing interests of the mandates of the solid waste act and the local police powers are involved here.

In contradistinction, O'Connor held that a state permit was the only control allowed on solid waste disposal. In that case, however, the Illinois Environmental Protection Agency had been given explicit authority to consider local zoning ordinances in the adoption of its rules.

The Oronoco situation parallels this case, and the State commends the approach used there to this Court.

I (B)

MAY THAT MUNICIPALITY DENY THE ELECTORS OF THE AFFECTED TOWNSHIP, WHICH IS LOCATED IN ANOTHER COUNTY, A RIGHT TO VOTE GRANTED IN SDCL CHAPTER 34-16B, OR IGNORE ANY LOCAL STANDARDS ON SITING AND CONSTRUCTION?

NO RIGHT TO VOTE.

The State can understand Delapre Township's desire to control what is not the most desirable of activities within its boundaries. The township's arguments, however, are without legal basis or foundation and are insufficient.

First of all, no portion of SDCL 34-16B grants any right to vote in this matter. SDCL 34-16B-17.1 (Supp. 1976) does give a county the power to "grant and regulate rights and franchises for the purpose of collection and disposal of solid waste. . .in those parts of the county not subject to the jurisdiction of a municipality." The State submits, however, and the DEP has always interpreted this section to address only the means by which a county may "plan, initiate, and provide a solid waste management system to adequately handle

APPENDIX D

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LINCOLN	)	SECOND JUDICIAL CIRCUIT

NOPE – LINCOLN COUNTY, INC., a South Dakota nonprofit corporation, MIKE HOFFMAN, MICHELLE JENSEN, JAY WHITE, and TOM EIESLAND, *Plaintiffs,* vs. DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and KELLIE WASKO, Secretary, *Defendants.*	41CIV23-000877 MOTION TO AMEND COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs now submit this Motion to Amend Complaint, supported by the unsworn declaration of their counsel, A.J. Swanson, annexed as Exhibit A, and propose this motion be considered by the Court during the course of hearing on Monday, January 22, 2024, upon the motion of the Office of Attorney General, on behalf of Defendants, to dismiss the complaint with prejudice.

MOTION

Plaintiffs move to amend their complaint so that Paragraph D-3, and all other provisions of the complaint having like or similar allegations (such as Paragraph E-13, for example), be restated in the following manner (additions shown by underlining and deletions by striking):

> **D-3.** Contemporaneous with the 1990 Plan (adopted in or about 1970), Lincoln County, through the actions of the planning commission and county board, adopted the Zoning Ordinance, along with a zoning map, each of which continues in existence today as the *2009 Revised Zoning Ordinance* ("LCZO"). At all times since approximately ~~1970~~ August 3, 1995, the Farm, as is the case with all lands contiguous to and in the general area of the Farm, including the lands of Plaintiffs, have been planned and zoned as part of the *A-1 Agricultural District*, and during the approximate period of 1972 to August 2, 1995, the Farm was planned and zoned as part of the so-called *"A" Rural and Public Use District.*

Filed: 1/18/2024 9:47 AM CST Lincoln County, South Dakota 41CIV23-000877

BASIS FOR MOTION

Central to the Complaint in this case, and in order to consider the relative merits of Defendants' motion to dismiss, is the continuing impact of the Supreme Court's decision in *Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977). As noted at 454, the proposed site for the City's new landfill was in Delapre Township, Lincoln County, within the "A" Rural and Public Use District. The significance of this district does not seem to be further disclosed within the Court's unanimous opinion.

However, with the help of the Attorney General's amicus brief, written by Assistant Attorney General Warren Neufeld, and submitted under the name of Attorney General William J. Janklow,[1] we note, at 21, the quoted language of Section 402 of the County's zoning ordinance at that time. In pertinent part, any kind of "[p]ublicly owned or operated properties" was said to be one of the "permissible uses" within the Rural and Public Use District. Thus, as the Assistant Attorney General further noted, also at 21-2, the proposed use for a landfill was "publicly owned and would be publicly operated," but for the preliminary injunction that had been granted by the trial court. As such, at the time the *Lincoln County* case reached the Supreme Court, there was *no* actual conflict between the proposed use – *a landfill owned and operated by the public* – and the Lincoln County zoning ordinance's list of permissible or permissive uses.

This situation would change with Lincoln County's adoption of the 1995 zoning ordinance and the uses permitted in the A-1 District as a *matter of right* – versus those that are *conditional*. The Court's attention is directed to Paragraph E-10 of the complaint, which remains unamended by this motion and remains correctly stated in original form.

[1] With the Court's permission, a scan of this amicus brief from March 1977 was provided to the Court and all counsel by e-mail on Sunday, January 14, 2024.

Filed: 1/18/2024 9:47 AM CST Lincoln County, South Dakota 41CIV23-000877

Hence, in *Lincoln County*, the City's proposed use did conform as a permissive use, since the landfill was publicly owned and operated. This must be contrasted with the current Lincoln County zoning ordinance, as recounted in Paragraph E-10, which requires issuance of a conditional use permit (and the engagement of the planning commission in a process that affords notice and opportunity for hearing) if one now wishes to locate within the A-1 Agricultural District a "[p]ublic facility owned and operated by a governmental entity" (Section 3.04N, Zoning Ordinance). We believe it is possible – *perhaps even likely* – the proposed Prison is such a "public facility." But, the public character of the use proposed neither excuses nor waives compliance with the requirements of the Zoning Ordinance.

CONCLUSION

As Plaintiffs' counsel intends to touch on the foregoing matters in further discussion of the *Lincoln County* decision in argument, this motion is submitted in advance of hearing on Monday, January 22, 2024, requesting also that the Court expressly recognize Plaintiffs' right to amend without leave prior to Defendants' responsive answer, assuming further the Court does not grant the pending motion to dismiss with prejudice.

Dated at Canton, South Dakota, this 18th day of January, 2024.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com

Attorney for Plaintiffs,
NOPE – LINCOLN COUNTY, INC., MIKE HOFFMAN, MICHELLE JENSEN, JAY WHITE, and TOM EIESLAND

Filed: 1/18/2024 9:47 AM CST Lincoln County, South Dakota 41CIV23-000877

Exhibit A

DECLARATION OF A.J. SWANSON

A.J. Swanson, counsel for Plaintiffs and residing at 27454 482nd Ave., Canton, SD 57013, aware of the provisions of South Dakota law regarding false declarations and testimony, hereby declare under penalty of perjury as follows:

1. In Plaintiffs' Response to Defendants' Motion to Dismiss (SDCL § 15-6-12(b)(5)), at note 44, this assertion appears, responding to Defendants' claim that the current zoning ordinance has closed off Lincoln County to the State's proposed Prison:

> Such as August 3, 1995, the effective date of the revised zoning ordinance predating the current version; this writer has direct knowledge and recollection of that work as, from start to finish, the ordinance was written entirely by Plaintiffs' counsel and provided to the Planning Commission and County Board that year as a courtesy. At that point in history, this Court is avidly assured, a suggestion that the old penitentiary on North Drive might – *someday* - seek to move to the southwest corner of Dayton Township, with gravel roads and no water or sewer service, would be taken as pure foolishness, not worth the time or effort to consider nor to make explicit provision within the ordinance itself.

2. The foregoing claim of authorship of the 1995 version of the County's zoning ordinance is true. I had not previously written a zoning ordinance but as a guideline, I placed a large print version of Minnehaha County's 1990 Revised Zoning Ordinance (which still exists by that name) on one side of my computer, with handwritten notes on the other, and proceeded with the work over the course of many months. This effort was undertaken and completed at the request of the zoning director, Donald Pottratz, who had been my government teacher at Canton High School in 1964 or 1965. As the work progressed, drafts were either mailed or faxed to the County Board members and the Planning Director, and also the State's Attorney, at a personal expense to me of several hundreds of dollars. (The County Board, at the time, promised reimbursement of those expenses, but that check was apparently lost in the mail.) I recall discussing the *Lincoln County v. Johnson* case with Pottratz and several commissioners, the City's bold move having touched a raw nerve and, as I recall, had caused the joint-planning

exercise within 3 miles of City limits to be terminated by the County. Ultimately, to my knowledge the City's landfill was built in Wall Lake Township of Minnehaha County, not in Delapre Township or Lincoln County.

3. I do not presently have available a legible copy of the former zoning ordinance that would have been in effect at the time of the *Lincoln County* case. I do recall from memory the replacement or revised ordinance became effective August 3, 1995. Some of the old ordinance language, however, appears in the Attorney General's amicus brief in *Lincoln County v. Johnson*, which was recently received from old records at USD Law School. The writer quotes some of the language of former Section 402 at page 21, with "permissible uses" (which I believe would have been listed as "permissive uses" in the ordinance) to include "[p]ublicly owned or operated properties." The amicus brief then suggests the landfill at issue would have been a permissive use and thus there was *no* conflict with the Lincoln County ordinance as it then existed.

4. This was a main point of concern in writing new language for the 1995 version. Section 3.04 specifies "conditional uses" being allowed in the A-1 district once the use or project conforms to the requirements of the ordinance, such uses to include "[p]ublic facility owned and operated by a government entity" (Section 3.04(N) of current ordinance, and believed to be identical in text to that written for the 1995 version; in preparing this declaration, I have verified this language also matches *exactly* the text that was then and remains within the Minnehaha County Zoning Ordinance of 1993, Section 3.04(O).

Dated: January 18, 2024 /s/ A.J. Swanson

Declarant: A.J. Swanson

APPENDIX D

•

PAGE D-6

Lincoln County's zoning ordinance is referenced in Part D of the Complaint (CR6-7), including the assertion the lands of Plaintiffs and the site of the Prison are all part of the A-1 Agricultural District.

Lincoln County's ordinances are accessible at https://lincolncountysd.org, having been compiled, codified and published by American Legal Publishing, Cincinnati, Ohio, www.amlegal.com.

Provisions concerning the A-1 Agricultural District (previously known as "A" Rural and Public Use District at the time of the decision in *Lincoln County v. Johnson*), are part of the 2009 Revised Zoning Ordinance ("LCZO", and include Section 3.04, as referenced in Complaint, ¶ E-10, CR9.

The pertinent provisions of Section 3.04, LCZO, are published by American Legal Publishing as § 154.056, Permissive Uses, § 154.057, Permitted Special Uses, and § 154.058, Conditional Uses (*see* pages D-7, -8, and -9, *infra*). These provisions were downloaded from the publisher's site on November 19, 2024.

The Motion to Amend Complaint (CR133-35), appearing at pages D-1, D-2 and D-3, along with the Declaration of Counsel (CR136-7), pages D-4 and D-5, *supra*, note the important distinctions between permissive and conditional uses for the A-1 Agricultural District (formerly known as "A" Rural and Public Use District), effective August 3, 1995.

§ 154.056 PERMISSIVE USES.

A building or premises shall be permitted to be used for the following purposes in the A-I Agricultural District:

(A) Agriculture;

(B) A single-family dwelling if the following provisions for building eligibility are met. Each quarter-quarter section shall have one building eligibility when all the following conditions are met.

(1) There are no other dwellings on the quarter-quarter section.

(2) The building site shall be a minimum of one acre.

(3) Approval has been granted by the appropriate governing entity for access onto a public road.

(4) The remaining portion of the quarter-quarter section is retained as agricultural land or in its present use.

(5) Prior to any building permit being issued for any new single family residence located in the A-I Agriculture District, a right to farm covenant shall be filed with the county's Register of Deeds on the parcel of land upon which the new structure will be located. Only the following shall constitute a right to farm covenant:

"RIGHT TO FARM NOTICE COVENANT

You are hereby notified that the property on which you are constructing a structure is in or near agricultural land, agricultural operations or agricultural processing facilities or operations. You may be subject to inconvenience or discomfort from lawful agricultural or agricultural processing facility operations. Agricultural operations may include, but are not limited to, the following: the cultivation, harvesting, and storage of crops; livestock production; ground rig or aerial application of pesticides or herbicides; the application of fertilizer, including animal waste; the operation of machinery; the application of irrigation water; and other accepted and customary agricultural activities conducted in accordance with Federal, State, and County laws. Discomforts and inconveniences may include, but are not limited to: noise, odors, fumes, dust, smoke, burning, vibrations, insects, rodents, and/or the operation of machinery (including aircraft) during any 24-hour period. If you live near an agricultural area, you should be prepared to accept such inconveniences or discomforts as a normal and necessary aspect of living in an area with a strong rural character and an active agricultural sector. You are also notified that there is the potential for agricultural or agricultural processing operations to expand. This notification shall extend to all landowners, their heirs, successors or assigns and because it is required pursuant to the issuance of a building permit, may not be removed from the record title without consent of the Lincoln County Planning Commission."

(C) Elementary or high school;

(D) Historical sites;

(E) Church;

(F) Neighborhood utility facility;

(G) Antenna support structure; and

(H) Minor home occupation in conformance with §154.243

(Ord. 0904-05, passed 5-20-2009)

§ 154.057 PERMITTED SPECIAL USES.

(A) A building or premises may be used for the following purposes in the A-I Agricultural District in conformance with the requirements prescribed herein.

(B) A building or premises intended to be used for the following purposes, where the prescribed requirements will not be met, shall obtain a conditional use in conformance with the requirements of §§ 154.375 through 154.386:

(1) A building eligibility may be used within a farmstead, provided:

(a) The building eligibility exists on property contiguous to and under the same ownership as the farmstead;

(b) There will be no more than two dwellings within the farmstead; and

(c) The residential structure may be a single-family dwelling, manufactured home, or mobile home.

(2) Wind energy conversion system in conformance with §154.241;

(3) Off-premises signs in conformance with §§154.335 through 154.340;

(4) Greenhouses and nurseries, provided there is no retail sale of products conducted on the premises;

(5) A single-family dwelling located on a lot of record in accordance with the following:

(a) A lot of record consisting of less than 80 acres and containing no other dwellings shall have one building eligibility;

(b) A lot of record consisting of 80 acres or more shall qualify for building eligibility as follows.

1. The acreage of the lot of record shall be divided by 40 acres. The resulting whole number minus the number of existing dwellings shall represent building eligibility.

2. If there is more than one building eligibility, each additional building site shall be required to obtain a conditional use.

(c) Approval has been granted by the appropriate governing entity for access onto a public road; and

(d) Any parcel conveyed from a lot of record must be a minimum of one acre. The remaining portion of the lot shall be retained as agricultural land or in its present use.

(6) Concentrated animal feeding operation (Class D), provided:

(a) The operation shall meet the requirements of §154.250(D)(2)(e) and (F).

(b) The operation shall not be in the Aquifer Protection Overlay District, over a mapped shallow aquifer or a floodplain.

(7) Concentrated animal feeding operation (existing) shall be allowed to expand by up to 300 animal units, provided:

(a) The operation is located in a farmstead or property contiguous to the farmstead.

(b) The operation shall not be located in the Aquifer Protection Overlay District, over a mapped shallow aquifer, or a floodplain.

(c) The operation shall not exceed 500 animal units.

(d) There is conformance with the state's Department of Environment and Natural Resources design standards for any newly constructed waste containment facility. A registered professional engineer shall certify the plan specifications and the construction of the facility.

(e) Approval by the Planning Director of a nutrient management plan which has been prepared in conformance with the state's Department of Environment and Natural Resources standards.

(f) The operation shall meet the requirements of the table in §154.250(D)(2)(e) and (F).

(8) *Cannabis cultivation facility.*

(a) Medical cannabis cultivation facilities shall provide proof of registration with the State Department of Health, and shall, at all times, maintain a valid, accurate, and up-to-date registration with the State Department of Health. Should registration be revoked at any time, any permitted special use or conditional use shall immediately become void.

(b) The facility shall not operate within 1,000 feet, measured by a straight line in all directions, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises of a facility to the nearest property line of a public or private school.

(c) The facility must operate entirely within an indoor, enclosed, and secure facility.

(d) There shall be no emission of dust, fumes, vapors or odors which can be seen, smelled or otherwise perceived from beyond the lot line for the property where the facility is operating.

(Ord. 0904-05, passed 5-20-2009; Ord. 1802-38, passed 2-27-2018; Ord. 2011-13, passed 11-10-2020; Ord. 2106-30, passed 6-22-2021; Ord. 2207-06, passed 7-5-2022) Penalty, see § 154.999

Cross-reference:

Operation of medical cannabis facilities, see § 111.02

Permitting and licensing of medical cannabis establishments, see §111.03

§ 154.058 CONDITIONAL USES.

A building or premises may be used for the following purposes in the A-1 Agricultural District if a conditional use has been obtained in conformance with the requirements of §§ 154.375 through 154.386:

(A) Rock, sand, or gravel extraction in conformance with §154.249;

(B) Mineral exploration in conformance with §154.246;

(C) Airport/heliport;

(D) Group day care;

(E) Private campground;

(F) Garden center;

(G) Kennel;

(H) Stable;

(I) Roadside stand;

(J) Fireworks sales, provided the length of sales does not exceed nine days;

(K) Golf course, golf driving range;

(L) Private outdoor recreation facility;

(M) Trap shoot, rifle range, pistol range;

(N) Public facility owned and operated by a governmental entity;

(O) Telecommunication and broadcast tower in conformance with §154.252;

(P) Bed and breakfast establishment;

(Q) Sanitary landfill, solid waste transfer station, rubble dump, commercial compost site;

(R) Sewage disposal pond;

(S) Cemetery;

(T) Pet cemetery;

(U) Livestock sales barn;

(V) Concentrated animal feeding operation - new (Class A, B, or C);

(W) Electrical substation;

(X) Public utility facility;

(Y) Agriculturally related operations involving the handling, storage, transporting, and shipping of farm products;

(Z) The transfer of a building eligibility from one parcel to another parcel when all the following conditions are met.

(1) The transfer of building eligibility shall occur only between contiguous parcels under the same ownership. For purposes of this section, ***SAME OWNERSHIP*** means two or more parcels of land owned or controlled by an individual or combination of individuals, corporations, partnerships, or other legal entities, with said owners described uniformly on the deed or other legally binding conveyance of each parcel.

(2) Suitability as a building site based on the following factors:

(a) Agricultural productivity of the soil;

(b) Soil limitations; and

(c) Orientation of the building site(s) with respect to road circulation and access to public rights-of-way.

(3) The minimum lot size shall be one acre but a larger area may be required when soil conditions warrant.

(4) The parcel from which the eligibility is transferred shall continue as agricultural land or remain in its present use.

(5) Approval has been granted by the appropriate governing entity for access onto a public road.

(AA) Manufactured home in conformance with §154.247(C) if there is building eligibility on the parcel;

(BB) Major home occupation in conformance with §§154.244 and 154.245;

(CC) Facilities for the storage and distribution of anhydrous ammonia;

(DD) Operations related to the recycling, handling, grinding, processing, storage, and shipment of wood and wood products; and

(EE) Hunting lodge.

(Ord. 0904-05, passed 5-20-2009; Ord. 1802-38, passed 2-27-2018; Ord. 2011-13, passed 11-10-2020)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30890

NOPE – LINCOLN COUNTY, INC.,
a South Dakota nonprofit corporation,
MIKE HOFFMAN, MICHELLE JENSEN,
JAY WHITE, and TOM EIESLAND,

Plaintiffs and Appellants,

v.

DEPARTMENT OF CORRECTIONS,
STATE OF SOUTH DAKOTA, and
KELLIE WASKO, Secretary,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE JENNIFER D. MAMMENGA
Circuit Court Judge

APPELLEE'S BRIEF

Arvid J. Swanson
524 North Main Avenue, Suite 110
Sioux Falls, SD 57104
Telephone: (605) 271-7113
Email: aj@ajswanson.com

ATTORNEY FOR PLAINTIFFS
AND APPELLANTS

MARTY J. JACKLEY
ATTORNEY GENERAL

Grant M. Flynn
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR DEFENDANTS
AND APPELLEES

Notice of Appeal filed November 12, 2024

Filed: 1/6/2025 10:43 AM CST Supreme Court, State of South Dakota #30890

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

OTHER REFERENCES:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30890

NOPE – LINCOLN COUNTY, INC.,
a South Dakota nonprofit corporation,
MIKE HOFFMAN, MICHELLE JENSEN,
JAY WHITE, and TOM EIESLAND,

Plaintiffs and Appellants,

v.

DEPARTMENT OF CORRECTIONS,
STATE OF SOUTH DAKOTA, and
KELLIE WASKO, Secretary,

Defendants and Appellees.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiffs/Appellants, NOPE – Lincoln County, Inc., Mike Hoffman, Michelle Jensen, Jay White, and Tom Eiesland, are individually and collectively referred to as "Plaintiff" or "Plaintiffs." Defendants/Appellees, Department of Corrections, State of South Dakota, and Kellie Wasko, are individually and collectively referred to as "Defendant" or "Defendants." The settled record in the underlying case is denoted as "SR," followed by the e-record pagination.

JURISDICTIONAL STATEMENT

On October 23, 2024, the Honorable Jennifer D. Mammenga entered a Memorandum Decision and Order in *NOPE – Lincoln County,*

Inc., et. al. v. S.D. Dept. of Corrections, et. al., Lincoln County Civil File Number 23-877. SR:139-61. Defendant filed his Notice of Appeal on November 12, 2024. SR:187. This Court has jurisdiction under SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT NOPE – LINCOLN COUNTY, INC., JAY WHITE, AND TOM EIESLAND LACKED STANDING?

The trial court found that NOPE – Lincoln County, Inc., Jay White, and Tom Eiesland lacked standing.

Sierra Club v. Clay County Board of Adjustment, 2021 S.D. 28, 959 N.W.2d 615

Powers v. Turner County Board of Adjustment (Powers II), 2022 S.D. 77, 983 N.W.2d 594

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

II.

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANTS WERE ENTITLED TO SOVEREIGN IMMUNITY?

The trial court found that Defendants were entitled to the protections of sovereign immunity.

Article III, Section 27 of the South Dakota Constitution

Dan Nelson, Auto., Inc. v. Viken, 2005 S.D. 109, 706 N.W.2d 239

Truman v. Griese, 2009 S.D. 8, 762 N.W.2d 75.

McGee v. Spencer Quarries, Inc., 2023 S.D. 66, 1 N.W.3d 614

Boever v. S. Dakota Bd. Of Acct., 1997 S.D. 34, 561 N.W.2d 309

III.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT DEFENDANT WASKO'S SELECTION OF THE PRISON SITE WAS AN ACT OF DISCRETION?

The trial court determined that Defendant Wasko's selection of the prison site was a proper exercise of her discretion.

City of Rapid City v. Pennington Cnty., 2003 S.D. 106, 669 N.W.2d 120

IV.

WHETHER THE TRIAL COURT CORRECTLY APPLIED THE "GENERAL RULE" RATHER THAN THE "BALANCING OF INTERESTS" RULE?

The trial court applied the "general rule" but also determined that Defendants would prevail under the "balancing of interests" rule.

City of Rapid City v. Pennington Cnty., 2003 S.D. 106, 669 N.W.2d 120

Lincoln County v. Johnson, 257 N.W.2d 453 (S.D. 1977)

V.

WHETHER THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANTS WOULD PREVAIL EVEN IF THE "BALANCING OF INTERESTS" RULE WAS APPLIED?

The trial court applied the "general rule" but also determined that Defendants would prevail under the "balancing of interests" rule.

City of Rapid City v. Pennington Cnty., 2003 S.D. 106, 669 N.W.2d 120

Lincoln County v. Johnson, 257 N.W.2d 453 (S.D. 1977)

STATEMENT OF THE CASE

Plaintiffs filed their Verified Complaint on November 3, 2023. SR:1-36. Defendants entered an Admission of Service on November 13, 2023. SR:39. Defendants filed a Motion to Dismiss on December 13, 2023, to which Plaintiffs responded on January 3, 2024; and Defendants replied on January 12, 2024. *See* SR:44-45; 75-112; 121-32. Lincoln County also filed an Amicus Curiae brief in support of Plaintiffs' position on January 8, 2024. SR:113-120. A hearing was held on the Motion to Dismiss on January 22, 2024. SR:139. Judge Mammenga filed a Memorandum Decision and Order on October 23, 2024, dismissing Plaintiffs' Verified Complaint with prejudice. SR:139-61. Plaintiffs filed a Notice of Appeal on November 12, 2024. SR:187.

STATEMENT OF FACTS

Plaintiffs initiated the present action via a Verified Complaint for Declaratory Judgment and Injunctive Relief. *See generally* SR:1-36. Plaintiffs oppose Defendant Department of Corrections' (hereinafter "DOC") plan to construct a new men's prison in Lincoln County, South Dakota. SR:27-28. Through their Complaint, Plaintiffs challenge Defendant Wasko's discretion to select the site for the prison and assert that Defendants are obligated to abide by Lincoln County's local zoning ordinances. *See generally* SR:1-36. Defendants assert, and the trial court agreed, such is not the case.

The land at issue consists of two 160-acre parcels located in rural Lincoln County and legally described as:

- Township 99N Range 49W SE¼ of Section 30 ≈ 160 Acres
- Township 99N Range 49W NE¼ of Section 31 ≈ 160 Acres

SR:47, 70. The land was properly appraised by the Board of Appraisal and sold by the Commission of School & Public Lands to Defendant DOC. SR:47-48, 70. After which, Defendant Wasko publicized her intent to construct the new men's prison on that property pursuant to the authority granted to DOC by the Legislature through HB 1017. *See* SR:48. *See also* 2023 S.D. Sess. Laws Ch. 195. Plaintiffs' opposition to the intended use of this property brings it to this Court's attention.

STANDARD OF REVIEW

To survive a motion to dismiss, a plaintiff must provide factual allegations sufficient to "raise a right to relief above the speculative level." *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964–65, 167 L. Ed. 2d 929 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do . . ." to overcome a motion to dismiss. *Id.* "This Court 'reviews the trial court's grant or denial of a motion to dismiss by determining whether the pleader was entitled to judgment as a matter of law.'" *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 6, 706 N.W.2d 239, 242. "Questions of law are reviewed de novo." *Id.* (cleaned up).

ARGUMENTS

Plaintiffs raise several challenges to the trial court's dismissal of their Complaint. Plaintiffs challenge the court's determination of standing, the application of sovereign immunity, and the rule of law applied by the lower court. Appellant's Brief:1-3. Each of Plaintiffs' challenges lack merit. The lower court correctly determined each of these issues. And as will be shown below, the judgment must be affirmed.

I.

NOPE – LINCOLN COUNTY, INC., JAY WHITE, AND TOM EIESLAND LACK STANDING.

Plaintiffs are four Lincoln County landowners as well as a non-profit corporation made up of additional landowners in Lincoln County. The trial court correctly determined that three out of these five Defendants did not meet the standing requirements as Defendants White, Eiesland, and NOPE failed to demonstrate a "concrete and particularized injury." SR:148. *See also Powers v. Turner County Board of Adjustment (Powers* II*)*, 2022 S.D. 77, ¶ 16, 983 N.W.2d 594, 601.

"[T]o establish standing in a declaratory judgment action . . . a litigant must show: (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision." *Pickerel Lake Outlet Ass'n v. Day*

Cnty., 2020 S.D. 72, ¶ 10, 953 N.W.2d 82, 87 (quoting *Abata v. Pennington Cty. Bd. of Comm'rs*, 2019 S.D. 39, ¶ 12, 931 N.W.2d 714, 719). "[A] court cannot be required to speculate as to the presence of a real injury[.]" *Id.* For an injury in fact, Plaintiff must demonstrate an injury that is "(a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (*Lujan* II)). "Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." *Powers v. Turner Cnty. Bd. of Adjustment*, 2020 S.D. 60, ¶ 13, 951 N.W.2d 284, 290 (quoting *Lippold v. Meade Cty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922).

Plaintiffs White, Eiesland, and NOPE – Lincoln County, Inc. (hereinafter "NOPE") pled only conjectural and hypothetical injuries that were insufficient to grant standing. The trial court rightfully noted that Plaintiff White's claim of injury was "that his property had a value of approximately $1,000,000 before the state announced their intent to build a prison . . ." SR:149. But Plaintiff White made no claim that DOC's "announcement negatively impacted the value of his property." *Id.* Similarly, Plaintiff Eiesland pointed only to his "desire to retain his property interest in this area . . ." as an injury in fact. *Id.* Neither claim

constitutes a "concrete and particularized" injury as required for standing. *Cable*, 2009 S.D. 59 at ¶ 21.

In their brief, Plaintiffs assert that "[o]ne Plaintiff should not be deemed to have no standing simply because that party has no present intention or desire of offering their property for sale." Appellant's Brief:8. This statement encapsulates Plaintiffs' misunderstanding as to Plaintiffs White, Eiesland, and NOPE's standing while simultaneously misstating the Court's ruling. Plaintiffs' Complaint implies that the value of Plaintiffs White and Eiesland's property will be negatively impacted by the construction of the prison at the intended location. SR:149. However, their Complaint fails to state even this implication. *Id.* As the trial court found, neither White nor Eiesland claimed even a conjectural or hypothetical injury, let alone an injury that was concrete and particularized. *Cable*, 2009 S.D. 59 at ¶ 21.

While it is possible that Plaintiffs White or Eiesland might suffer an injury due to the construction of the prison, their Complaint is insufficient on its face as it fails to plead any such injury. SDCL 15-6-8(a). *See also Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.*, 2022 S.D. 64, ¶ 14, 981 N.W.2d 645, 650. Because this Court cannot be compelled to speculate as to Plaintiff's claimed injury, Plaintiffs White and Eiesland have not pled sufficient facts to support their standing. *Pickerel Lake Outlet Ass'n v. Day Cnty.*, 2020 S.D. 72 at ¶ 1 (quoting *Abata*, 2019 S.D. 39 at ¶ 12).

Likewise, Plaintiff NOPE lacks standing to bring suit on its own behalf or on behalf of its members. Plaintiff NOPE seeks to "preserve a way of life consistent with the Lincoln County Comprehensive Plan." SR:150. Plaintiff NOPE's desire to enforce the Lincoln County Zoning Ordinances "is contemplated 'in equal measure' by the public in general as it is to an individual landowner . . . ," and such a generalized injury is insufficient to garner standing. *Sierra Club v. Clay County Board of Adjustment*, 2021 S.D. 28, ¶ 14, 959 N.W.2d 615, 622.

Further, Plaintiff NOPE lacks standing to bring suit on behalf of its members. For representative standing, Plaintiff NOPE must demonstrate that (1) "its members would otherwise have standing to sue in their own right . . . ," (2) "the interests it seeks to protect are germane to the organization's purpose . . . ," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Cable*, 2009 S.D. 59 at ¶ 44. Plaintiffs rely on *Sierra Club* to support NOPE's standing but fail to recognize the dispositive factual distinctions. Appellant's Brief:8-9. Plaintiff NOPE failed to plead such concrete and particularized injuries as were present in *Sierra Club*. SR:150-51.

In *Sierra Club*, this Court held that "loss in property value, increased odors, and diminished air quality, sufficiently set forth injuries unique to its members." *Sierra Club v. Clay County Board of Adjustment*, 2021 S.D. 28 at ¶ 27. The trial court found that

Defendants Hoffman and Jensen pled facts sufficient to allege that the value of their property might be diminished by the construction of the prison. SR:148. Contrarily, Plaintiff's objectives of enforcing local ordinances and preserving its members' way of life is insufficient to impart standing in this matter. *Id.* The injuries complained of by Plaintiff NOPE are not concrete or particularized and would be experienced "in equal measure by all or a large class of citizens." SR:150. *See also Sierra Club*, 2021 S.D. 28 at ¶ 14.

For these reasons, the trial court correctly determined that Plaintiffs White, Eiesland, and NOPE lack standing.

II.

DEFENDANTS ARE ENTITLED TO THE PROTECTIONS OF SOVEREIGN IMMUNITY.

Pursuant to the sovereign immunity doctrine as set forth in Article III, Section 27 of the South Dakota Constitution, "the state, it's agencies, other public entities, and their employees" are immune from suit absent the state's consent. *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 27, 706 N.W.2d at 249 (quoting *Wulf v. Senst*, 2003 S.D. 105, ¶ 20, 669 N.W.2d 135, 142). Sovereign immunity is considered waived, and consent to suit given, where the action seeks to compel a state officer to perform a duty that is "purely ministerial and involve[s] no discretionary power." *Id.*

> Such actions are permitted because "[s]overeign immunity does not bar suits against state officials acting in excess of their statutory authority or pursuant to an unconstitutional

> statute." Therefore, "a declaratory judgment action attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is . . . not prohibited by principles governing sovereign immunity."

Id. (cleaned up).

This Court defined what constitutes a ministerial act in *Truman v. Griese*, 2009 S.D. 8, 762 N.W.2d 75.

> [A] ministerial act is defined as *absolute, certain, and imperative,* involving merely the execution of a specific duty arising *from fixed designated facts* or the execution of a set task imposed by law prescribing and *defining the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion,* being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a *governing rule or standard* with a compulsory result. *It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.*

Id. at ¶ 21 (quoting *Hansen v. South Dakota Dept. of Transp.*, 1998 S.D. 109, ¶ 18, 584 N.W.2d 881, 885) (emphasis in original). Any duties not included within that definition are discretionary. *Id.* "In order to find a duty 'ministerial,' we must find a 'governing rule or standard' so clear and specific that it directs the government actor without calling upon the actor to ascertain how and when to implement that rule or standard." *Id.* at ¶ 22.

The trial court appropriately recognized that categorizing ministerial and discretionary acts necessitates a fact intensive inquiry. SR:153. *See also McGee v. Spencer Quarries, Inc.*, 2023 S.D. 66, ¶ 34, 1 N.W.3d 614, 625-26. As such, the court considered the grant of

authority in HB 1017 as well as Defendant Wasko's statutory authority. SR:153. HB 1017 permitted Defendant DOC to purchase property and enter contracts for the construction of the prison but did not require either. SR:153. Left to Defendant Wasko's discretion were the issues of "when the purchase should be made, how much the property could be purchased for, where the property should be located, or how much existing infrastructure, if any, must be on the purchased land." SR:154. Such decisions do not constitute ministerial acts as defined by this Court. *See Truman*, 2009 S.D. 8 at ¶ 21.

Further, this discretion was properly delegated to Defendant Wasko by the Legislature. When the Legislature delegates its authority, it must provide "(1) a clearly expressed legislative will to delegate power, and (2) a sufficient guide or standard to guide the agency." SR:154. *See also Boever v. S. Dakota Bd. Of Acct.*, 1997 S.D. 34, ¶ 10, 561 N.W.2d 309, 312. As the trial court noted, the Legislature has accomplished both in this instance. SR:154. Pursuant to SDCL 1-15-1.3, Defendant Wasko administers all programs of DOC. Additionally, the state's penitentiaries are under the "direction and control" of the secretary. SDCL 1-15-1.4. Finally, SDCL 1-15-10 authorizes Defendant DOC to make contracts for the erection of buildings and the purchase of land. Combined with the general grant of authority found in HB 1017, these statutes demonstrate both a

legislative will to delegate power and a sufficient standard to guide the agency. *Boever*, 1997 S.D. 34 at ¶ 10.

As discussed in detail below, Plaintiffs claim that Defendant Wasko had a ministerial duty to follow Lincoln County's zoning ordinances. Appellants' Brief:14-17. Plaintiffs make no other allegation supporting the State's waiver of sovereign immunity or consent to suit. Appellant's Brief:9-14. Should this Court agree with Defendants and the trial court that Defendant Wasko had no ministerial duty to comply with Lincoln County's Zoning Ordinances, then Defendants are immune from suit based on sovereign immunity. *Dan Nelson, Auto., Inc.*, 2005 S.D. 109 at ¶ 27.

III.

DEFENDANT WASKO'S SELECTION OF THE PRISON SITE WAS A PROPER EXERCISE OF HER DISCRETION.

Plaintiffs assert that Defendant Wasko had a ministerial duty to comply with Lincoln County's Zoning Ordinances. Appellant's Brief:16-17. Simply put, this assertion is unfounded. As the trial court noted, the case most analogous to the present facts is *City of Rapid City v. Pennington Cnty.*, 2003 S.D. 106, 669 N.W.2d 120. In *City of Rapid City*, this Court concluded that the construction of prisons and jails is an essential governmental function that cannot be impeded by local zoning laws and relied on cases from multiple jurisdictions to support this holding. SR:157. *See also City of Rapid City*, 2003 S.D. 106 at

¶ 11 (citing *Lane v. Zoning Bd. of Adjustment of the City of Talladega*, 669 So.2d 958, 959 (Ala. Civ. App. 1995)) (operating a county jail is a governmental function); *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 380 Mass. 706, 405 N.E.2d 637, 640 (1980) (operating a county jail is an essential governmental function); *Metro. Dade County v. Parkway Towers Condo. Ass'n*, 281 So.2d 68, 69 (Fla. Dist. Ct. App. 1973) (county could override its own zoning as it "possessed the right at common law to place a governmental function [prison work release facility] on any site selected within the County as directed by the Board of County Commissioners"); *Los Angeles County v. City of Los Angeles*, 212 Cal.App.2d 160, 28 Cal.Rptr. 32, 34 (1963) ("essential functioning of the county"); *Green County v. City of Monroe*, 3 Wis. 2d 196, 87 N.W.2d 827, 829 (1958).

This Court acknowledged that "the placement and construction of certain public facilities, like jails, may not be popular with city residents . . . ." *City of Rapid City*, 2003 S.D. 106 at ¶ 9. The statutes addressed in this case are not relevant here, but the rationale continues to apply. "The erection and operation of a county jail is a governmental function necessary to the general administration of justice and particularly in the enforcement of the criminal laws." *Id.* at ¶ 12 (quoting *Green County v. City of Monroe*, 3 Wis. 2d 196, 87 N.W.2d at 829 (1958)).

As with a county's responsibility to establish and maintain a jail, Defendants not only have a statutory responsibility to govern the

penitentiaries and other correctional facilities but also a legislative mandate to construct a new prison. *See* SDCL 1-15-1.3; 2023 S.D. Sess. Laws Ch. 195. Because Defendants are acting under their duty to perform the essential governmental function of building a prison, they are not bound by local zoning rules. *City of Rapid City*, 2003 S.D. 106 at ¶ 14. As such, Defendants were under no ministerial duty to comply with those ordinances.

IV.

THE GENERAL RULE IS THE PROPER STANDARD.

Upon consideration of HB 1017, SDCL Ch. 1-15, and the relevant caselaw, the trial court determined that the "general rule" rather than the "balancing of interests" rule is most applicable to the present situation. SR:158. This Court applied no "balancing" inquiry to Pennington County's decision to build a jail within the city limits of Rapid City, contrary to the City's zoning laws. *City of Rapid City*, 2003 S.D. 106 at ¶ 14. Rather, this Court specifically held that the "balancing of interests" test set forth in *Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977), was not applicable because the County's use of the land was not extraterritorial. *Id.*

In *Lincoln County*, the City of Sioux Falls attempted to build a solid waste facility in an area of the county that was outside of the city's planning and zoning jurisdiction and not zoned for that purpose by the county. *City of Rapid City*, 2003 S.D. 106 at ¶ 13; *Lincoln County*, 257

N.W.2d at 454. This Court held that an "intruding governmental unit" was bound by the zoning regulations of another governmental unit with regard to the use of "extraterritorial" property. *Id.* *See also Lincoln County*, 257 N.W.2d at 457-58.

In *City of Rapid City*, as here, the governmental unit intending to construct the institution is not "intruding." *Id.* at ¶ 14. Both Pennington County and the state operated within their own geographical borders. The prison site does not constitute extraterritorial property as it relates to the state because the property lies within South Dakota. *Id.* Based on these factual distinctions, this Court chose not to employ the balancing of interests test in *City of Rapid City* in favor of the "general rule." Given the similar facts, this Court should employ the "general rule" here. Further, it would be absurd, and contrary to the holding in *City of Rapid City*, to determine that the state is subject to local zoning laws when building a prison, but a county is exempt from those same laws when constructing a jail. SR:158. *See also City of Rapid City*, 2003 S.D. 106 at ¶ 13. For these reasons, continuation of the general rule as applied in *City of Rapid City* is appropriate here.

V.

UNDER EITHER THE "GENERAL RULE" OR THE "BALANCING OF INTERESTS RULE", DEFENDANTS PREVAIL.

Should this Court disagree and determine that the "balancing of

interests" standard applies to the present case, Defendants still prevail. As the trial court determined, the most likely result from balancing the interests would be that the necessity of the prison would outweigh the concerns of the landowners. SR:159. As this Court held, construction and operation of jails, and by extension prisons, constitutes a "governmental function necessary to the general administration of justice and particularly in the enforcement of the criminal laws." *City of Rapid City*, 2003 S.D. 106 at ¶ 12.

Likewise, many courts have found that when the interests are balanced the necessity of prisons causes them to be exempt from local zoning laws. SR:159. *See Hermann v. Board of Cnty. Comm'rs.*, 785 P.2d 1003 (Kan. 1990) (under balancing of interests test, the state is immune from local zoning restriction in seeking to construct a correctional facility); *Dearden v. City of Detroit*, 269 N.W.2d 139 (Mich. 1978) (the state department of corrections was not bound by local zoning ordinances when leasing a facility for use as a prerelease center); *Hongisto v. Mercure*, 72 A.D.2d 850 *N.Y. App. Div. 1979 (use of a mobile-home park as part of state prison facility site was state action exempt from town zoning ordinances); *General State Authority v. Moosic*, 310 A.3d 91 (Pa. Commw. Ct. 1973) (state's construction of correctional facility was governmental function not subject to borough zoning ordinances); *Snohomish Cnty. v. State*, 648 P.2d 430 (Wash. 1982) (state was not subject to county zoning ordinances in constructing prison).

Building and operating prisons constitutes an essential governmental function of the state. If an entity of local government could prevent the construction of a prison through their zoning ordinances, it would be impossible for the state to build a prison anywhere. *See Evans v. Just Open Gov't*, 242 Ga. 834, 839, 251 S.E.2d 546, 550 (1979) (concluding "It is true that nobody would be pleased at the erection of a jail in the vicinity of his residence, but it must be built somewhere."); *Mayor & Council of Town of Kearny v. Clark*, 213 N.J. Super. 152, 158, 516 A.2d 1126, 1129 (App. Div. 1986) (holding "[i[f the construction of a county jail was dependent upon local land use regulation it is difficult to conceive of where such a project could find a welcome.").

Here, Plaintiffs have offered few, if any, concrete injuries to support their opposition to the current prison plan. SR:8, 26. Plaintiffs assert, without providing support, that the prison project will disrupt the uniformity of the area, the present zoning scheme, the local infrastructure, and their property values. *Id.* The trial court found that three out of five Plaintiffs lacked standing to even bring the present suit. SR:151. Plaintiffs provide no appraisals, no market analysis, no cost estimations to the county regarding the infrastructure, and no concrete claim as to how the prison will damage the current zoning plan. Were the parties to present evidence on their divergent interests it is impossible to imagine that Plaintiffs' vague and conclusory complaints

regarding property values and quality of life would be sufficient to overcome the state's necessity for a prison. SR:159-60. Even if the Court chooses to balance these interests against each other, the essential governmental function of constructing a prison must outweigh Plaintiffs concerns. *See Lincoln County v. Johnson*, 257 N.W.2d at 457-58. *See also City of Rapid City*, 2003 S.D. 106 at ¶ 12.

CONCLUSION

Based upon the foregoing arguments and authorities, Defendants respectfully requests that the trial court's decision be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Grant M. Flynn
Grant M. Flynn
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,796 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 6th day of January, 2025.

/s/ Grant M. Flynn
Grant M. Flynn
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 6th, 2025, a true and correct copy of Appellee's Brief in the matter of *NOPE – Lincoln County, Inc., A South Dakota Nonprofit Corporation, Mike Hoffman, Michelle Jensen, Jay White, And Tom Eiesland v. Department Of Corrections, State Of South Dakota, and Kellie Wasko, Secretary*, was served electronically through Odyssey File and Serve upon Arvid J. Swanson at aj@ajswanson.com.

/s/ Grant M. Flynn
Grant M. Flynn
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NOPE-LINCOLN COUNTY, INC., a South Dakota non-profit corporation, MIKE HOFFMAN, MICHELLE JENSEN, JAY WHITE, and TOM EIESLAND,
Plaintiffs-Appellants,

v.

DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and KELLY WASKO, Secretary,
Defendants-Appellees.

 # 30890
41CIV23-000877

Appeal from
Circuit Court, Second Judicial Circuit, Lincoln County, South Dakota
The Honorable Jennifer Mammenga, Circuit Judge, Presiding

APPELLANTS' REPLY BRIEF

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com
Attorney for Plaintiffs-Appellants

Grant M. Flynn
Assistant Attorney General
SD ATTORNEY GENERAL
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501
(605) 773-3215
Attorney for Defendants-Appellees

NOTICE OF APPEAL FILED NOVEMBER 12, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

With the passing of the Widow Hauge, a decedent having neither heirs nor will, the State of South Dakota came into title of her Farm in 1992, a parcel comprised of 320 acres, astride a township gravel road, within the zoning jurisdiction of Lincoln County.[1]

On October 6, 2023, upon the decision of Secretary Kellie Wasko, the State announced the Farm is the site of a new Prison, the functional equivalent of a new "town of 1,500 persons," plus some 400 employed personnel.[2] This project is to be pursued without regard to or any effort to comply with the County's plan and zoning ordinance.[3] Since approximately 1970, the neighboring or nearby properties of Appellants, together with the Farm, have been planned and zoned as part of the *A-1 Agricultural District.*[4]

Lacking either a clear and certain statutory exemption or applicable decisional precedent, the State's agent[5] claims *Attorney General Opinion 77-13*[6] as legal grounds for her selected Prison site. The State's brief never mentions the opinion, while the Attorney General's amicus brief in *Lincoln County v. Johnson* [7] is likewise silent. This silence is compelling, Appellants maintain, as the Attorney General's submission to the Court in 1977 is at odds with the present arguments of State's counsel. Acting at the

---

[1] See Verified Complaint, ¶ A-1, CR1.

[2] *Id.*, ¶ A-3, CR2.

[3] *Id.*, and Exhibit A-3 to Verified Complaint, CR30.

[4] *Id.*, ¶ D-3, CR6.

[5] Secretary Wasko, author of October 20, 2023 letter, Exhibit F-3 to Verified Complaint, CR32.

[6] See appendix, Appellants' reply brief.

[7] 257 N.W.2d 453 (S.D. 1977). Appendix C to Appellants' Brief, is a 31-page excerpt of the Attorney General's amicus brief, as pertains to issue I-A in that case, # 12091.

behest of one key officer and with the avid assistance of other officers, the State claims the protective immunity garb, as an imposing, plan-crashing aggressor – a veritable zoning ordinance scofflaw[8] – fully prepared to impose extensive development that clashes with the County's established, ordinance-governed land use and investment.[9] When confronted by the case below, the State argued – *with some success, just as it now further argues* - that the complaining parties simply have *no* standing to make *any* challenge. We begin there, as Appellants herewith reply.

REPLY ARGUMENT

A. The Standing of Litigant Parties Otherwise Bound by Zoning Ordinance Provisions When Faced with a Zoning Scofflaw.

The concept of notice and opportunity for hearing on the part of property owners is well ingrained in South Dakota's planning statutes, both in the adoption of plans and ordinances and in the process of administering the provisions of an ordinance that "serve to limit the use of private property."[10] Those landowners, having properties subject to the ordinance, it is thus further asserted, have a constitutional right to due process.[11] So it is

---

[8] A word coined in 1924 in a contest funded by Delcevare King of Quincy, Mass., as an effort to sting and shame those who flaunt the law. This case involves zoning, rather than the consumption of alcohol during Prohibition – but the term fits the State perfectly. On the strength of this one Attorney General's opinion – to which the trial court made but passing reference (see Appendix A, at 18, n. 1), and is otherwise not cited in any known decision – the State, as an apparent standard practice, uses this handy tool to avoid County zoning ordinances everywhere. The State seems fully prepared to charge ahead – having endured no hearings anywhere, avoiding accountability to any citizen or neighbor.

[9] "[O]rderly development by enacting and enforcing zoning ordinances" being a significant function of local government, *Schafer v. Deuel County Bd. of Com'rs*, 2006 S.D. 106, ¶ 12, 725 N.W.2d 241, 245.

[10] *Armstrong v. Turner County Board of Adjustment*, 2009 SD 81, ¶ 19, 772 N.W.2d 643.

[11] Numerous notice and hearing rights are provided for in ch. 11-2, SDCL, none of which actually came into play where, as here, the property owner, claiming immunity, refuses to initiate the determinative process provided for under the zoning ordinance.

in Lincoln County, and with those Appellants who are landowners, as described in the Complaint.[12] The State boldly plans a new, substantial, expensive prison right where two gravel township roads now meet, but without bothering to either seek or obtain leave of the County's zoning authorities. The brief of Appellees argues (as the trial court did hold) that several neighboring landowners lack standing as they've not clearly stated the harm or loss. This action was itself triggered by the State's own bold assertions of plans (on behalf of the Secretary of Department of Corrections), unwilling to follow the steps or to observe the procedural safeguards required by the ordinance. The complaint seeks nothing more than to require that the State follow the steps and observe the procedural safeguards afforded by the ordinance.[13]

The State's brief, at 7-10, offers views as to why individual plaintiffs lack standing to challenge this scofflaw: White and Eiesland (both of whom have adjoining properties) "have not pled sufficient facts," and do not claim even a "conjectural or hypothetical injury, let alone an injury that was concrete and particularized," offering only an implication that the value of property will be "negatively impacted by the construction of the prison." However, the course of action intended by the State, thus far blessed by the trial court, is that the dusty, remote Farm, forming part and parcel of the very same zoning district as the properties of Appellants, all close at hand, is to be radically transformed, and in relatively short order, into a veritable compact city of 2,000, in dire need of infrastructure. All of this permanent change is expected to ripen without

---

[12] NOPE-Lincoln County, Inc. owns no land, but all other Appellants do, and in close proximity to the site where the State – at the direction of one person, Defendant Kelly Wasko – now proposes to construct in this remote, rural location, a facility that henceforth must meet the housing and sanitary needs of about 2,000 persons.

[13] *See* ¶ I-4 (S), (T) and (U) of Verified Complaint, CR25.

any opportunity for hearing because, of course, there is *no* proposal, plan or application being submitted to the County's Planning Commission. Under the State's calculation, the denial of such rights to Appellants counts for nothing in the ledger for standing. The premise (and promise) of due process is entirely empty when the State is a scofflaw property owner, bent on radical change, even while claiming to be fully insulated by the General Rule.

The State cites a number of cases on standing.[14] None of them are truly on point, since the facts in each clearly show a voluntary process, conducted by adversaries, upon an application, before a local board. There is not one property owner acting in the role of a zoning scofflaw in the whole lot. At hand is one very well-funded owner, intent[15] on wreaking change and chaos in a dusty corner of the County, openly dismissive of the very plan and ordinance long regarded as balancing and protecting the interests of all property owners.

Appellants further assert the State's position on zoning immunity constitutes an injury to their individual property rights, as ostensibly protected by the County's plan and ordinance, developed and implemented over many decades according to the legislative

---

[14] *Powers v. Turner County Board of Adjustment*, 2022 S.D. 77, 983 N.W.2d 594 being one, applying the "persons aggrieved" four-part test of SDCL 11-2-1.1. This case should embrace a substantially broader premise for satisfying standing – *Powers* was afforded an opportunity for hearing by a local board having jurisdiction.

[15] Even if that scofflaw has the very best of intentions in doing so. The resulting crash between public interest in land use planning – and public interest in public safety and corrections – will soon transpire. Has the State's agent done her best in identifying the Farm as the very best site for this Prison? Under the present course, no hearing, no findings, and no determinations; the potential risk of harm to sound land use planning, in one of the nation's fastest growing counties (Lincoln County) seems obvious. The recriminations are unlikely to end any time soon. The risk of harm to Appellants and their respective investments in property under the plan and ordinance seems too obvious to require more for standing beyond what has been said.

directives collected in ch. 11-2, SDCL. As determined in *Benson v. State*, 2006 SD 8, ¶ 22, 710 N.W.2d 131, 141, standing sufficient to bring legal actions requires an assertion by a litigant that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."

The gravamen of the complaint made is *not* that Defendants have acquired ownership of the Farm – they can invest in farmland all they wish. Given the unfortunate circumstances of the Widow Haug, the State, by terms of a probate decree entered in Lincoln County, has already owned the Farm - for one purpose or another - for more than thirty years. What is challenged is the State's persistent notion that it holds some complete privilege (whether by terms of HB 1017, or SDCL 1-15-10, or some other arguably applicable law) to *disregard* the County's Plan and Ordinance. The Farm, duly planned and zoned by the County for all these years, is about to burst forth as an *entirely* different creature – a compact, city-sized use, in dire need of infrastructure and highway routes and services, precisely where *nothing* of the kind now exists.

B. The "Balancing of Interests" Test Remains Viable, Even if Not Yet Fully Extended to the State.

In *Lincoln County v. Johnson*, 257 N.W.2d 453, 457 (S.D. 1977), this Court clearly adopted the balancing of interests rule – it is to apply when an "intruding unit" (the City of Sioux Falls, in that case) proposes a facility or other land use within the zoning jurisdiction of a "host unit" (Lincoln County). In such cases, assuming the use is "nonconforming," the intruder is to apply to the host for a "specific exception or for a change in zoning, whichever is appropriate."[16] This process would then permit the host to "consider and weigh the applicant's need for the use in question and its effect upon the

host unit's zoning plan, environmental impact, and the myriad other relevant facts to be considered for modern land use planning and control."[17] Further, if the intruder is dissatisfied with the host authority's decision, it may pursue judicial review, with the court to "balance the competing public and private interests essential to an equitable resolution of the conflict."[18]

The *Lincoln County* court's unanimous decision did expressly curb the balancing of interests test to the activities of local governments – but whether the test should be extended to a state agency was left "to another day under proper circumstances."[19] It seems odd that a state agency (and officer), writing without hesitation as of October 20, 2023,[20] so boldly relies on Attorney General Janklow's opinion, 77-13, as supporting the State's claim of absolute freedom from County's Plan and Ordinance. Rendered in January 1977, the opinion is not mentioned in the Attorney General's amicus brief submitted in *Lincoln County* just a few months later, nor cited by any known decision of this Court. While mentioned only in passing by the trial court, and now not at all in the State's brief, it is evident that Attorney General Janklow's opinion has yet managed to

---

[16] *Id.*, 457.

[17] *Id.*, 457-8.

[18] *Id.* When the test does pertain, the language of the *Lincoln County* court suggests a rigorous, evidence-based examination of an intruder's plans – not a summary dismissal of a legal challenge by private landowners, where (as here) the "balancing of interests" test is purportedly applied by the trial court but the challengers come up short, based on nothing more than the allegations in their complaint.

[19] *Id.*, 457. Has not that day arrived, and are these circumstances not entirely proper?

[20] The date of Defendant Wasko's letter, *see* Exhibit F-3 to Verified Complaint, CR32-3.

endure on *some* level – and for *some* purpose - at least in the hearts and minds of State officials such as Defendant Wasko.[21]

The ultimate rationale of the Attorney General's opinion, at 3, is based on the doctrine of sovereign immunity: "[T]he right of a local governmental entity to assert its zoning ordinances or land use regulations against the State is innocuous absent a right to enforce its enactments in an adjudicatory hearing." Given the nature of the relief sought and the identity of the defendants named, however, the underpinnings seem to hang in tatters in light of *Dan Nelson Auto. Inc. v. Viken*, 2005 SD 109, ¶ 30, 706 N.W.2d 239, 251 and *Dakota Systems Inc. v. Viken*, 2005 S.D. 27, ¶ 9, 694 N.W.2d 23, at 28. Appellants seek relief against *Secretary Wasko*, as author of the October 20, 2023 letter. It was *Secretary Wasko*, Appellants further understand, who determined that the Farm will serve very nicely as a veritable city, notwithstanding the current agricultural zoning and a dearth of suitable infrastructure required to support such density of use.[22]

Appellants are not seeking monetary relief from the State or Secretary Wasko – rather, the challenge is to the Secretary's notion that, by virtue of one or another source of legal imprimatur, she will be able to bring forth a new Prison from the dust of the Farm, albeit in total disregard of the County's Plan and Ordinance. As is suggested by *Dan*

---

[21] Defendant Wasko is no better sheltered from a declaratory judgment action, challenging her Prison site selection, than Revenue Secretary Viken might have claimed. Here, Secretary Wasko's actions are an abuse to her actual authority.

[22] Hence, the term "scofflaw" – the late Dr. Allan Metcalf, a linguist, once opined this was the most successful word coinage of the 20th century, "a term whose success as a word is proportional to its failure to eradicate the thing it describes." The State's claimed immunity from local zoning rules arises not from a plain reading of the zoning statutes or ordinances; rather, it is some construct, based on a variety of legal theories generally related to the State as a superior entity, unobliged to follow county zoning rules. Much like declaring that the imbibing of alcohol might be flatly prohibited for you and thee – but not for me.

Nelson Automotive Inc. v. Viken, 2005 SD 109, ¶ 31, 706 N.W.2d 239, the complaint presented to the trial court *only* required a determination of whether the Secretary of Department of Corrections was acting without legal authority by proceeding to develop the Farm into this Prison, notwithstanding the procedural and substantive constraints of the County's Plan and Ordinance. In *Dan Nelson Automotive*, the issue was whether the Secretary had authority to impose an excise tax. Here, the issue is whether Secretary has *actual authority* to proceed with the intended development of the Farm, in spite of the confines or limits of the Plan and Ordinance.

C. Even if Selection of the Farm is a Discretionary Act, it Seems a Foolish One; Use as a Prison Site Without Zoning Compliance is not Discretionary.

The State, *in effect*, continues to assert that HB 1017, by providing that the Department of Corrections "may purchase, on behalf of the State of South Dakota, real property for offenders committed to the Department of Corrections," the legislature actually intended to say "real property, wherever it wishes and without regard to any and all zoning ordinances to the contrary." Thus, as the argument goes, Secretary Wasko was given full and complete discretion to do as she chooses – and a discretionary act of a state official is never subject to question.

The legislature has written (and amended) the planning and zoning statutes many times over the past many years. And yet, this exemption or immunity from local zoning powers that the State persistently claims to possess and enjoy, is never clearly and unmistakably stated, not anywhere, and not even once. The "duty of the court is to apply the law objectively as found, and not to revise it." *In the Matter of Petition of Famous Brands*, 347 N.W.2d 882 (S.D. 1984), citing 73 Am.Jur.2d, Statutes, § 179 (1974). Words

and phrases are to be given "their plain meaning and effect." *Matter of Certification of Question of Law from U.S. District Court*, 402 N.W.2d 340 (S.D. 1987).

By the selection of "real property" somewhere in South Dakota and for purposes of establishing a new Prison site, is Secretary Wasko also entitled to exercise this claimed discretionary function in a manner that otherwise violates the vested property rights of Appellants? By terms of HB 1017, the Secretary is limited to the "purchase" of such property; thus, real property cannot be merely taken or seized! But do not Appellants themselves possess and enjoy also a mutual property right and interest arising under the County's plan and zoning ordinance? These are rights that will be readily defeated, rendered utterly meaningless, as the Secretary carries out her real property acquisition *and* development functions in complete disregard of the County's Plan and Ordinance. Secretary Wasko has self-determined herself to be unfettered by such zoning plans and ordinances. The Secretary has acquired the Farm, an act facially permitted by HB 1017. If developing the Farm into a Prison, however, she will manage also to trample the existing, vested rights of Appellants – *as neighboring landowners invested in their respective properties subject to the County's historic Plan and Ordinance* – without either notice or any opportunity to be heard on the issues.

The County ordinance establishes the *A-1 Agricultural District*.[23] This district is common to and inclusive of the Farm and the various properties of Appellants.[24] Ordinance Section 154.058(N) provides a conditional use for a "Public facility owned and operated by a governmental entity." Arguably, this might accommodate even an

[23] See Appendix D, Appellant's Brief.

[24] Verified Complaint, ¶¶ A-2, A-4, CR2.

outsized use such as a Prison. Or, the State might try its hand at changing the applicable zoning district, notwithstanding the County's Plan. Or, the State might locate other lands already zoned for such an intensive use as it proposes to establish here. So long as Secretary Wasko professes faith in a pseudo doctrine rendering the State utterly immune from the County Plan and Ordinance, spurred along by State officials willing to affirm that her beliefs are fully warranted, just how *that* might have turned out will never be known.

The claim of vested discretion to acquire the Farm is one thing; to assert that it also includes of necessity the Legislative will and direction to develop the Farm into a new Prison site, with city-like needs for infrastructure, without *any* requirement that the Secretary comply also with the County's Plan and Ordinance, is quite another. This doctrine is cut from whole cloth, garnished by the sovereign immunity-based opinion of Attorney General Janklow. In *Lincoln County*, the Court provided clear and certain notice that the issue of the State's zoning immunity was unresolved but would be addressed when that day arises. After nearly fifty years, the issue seems fully ripe, if not overly so.

D. The Trial Court and State Both Misstate the Holding in *City of Rapid City v. Pennington County*

In *City of Rapid City v. Pennington County*, 2003 S.D. 106, 669 N.W.2d 120, the County proposed to convert a former juvenile detention center into a jail-work release facility, within the planning jurisdiction of the City. City's planning commission and council both disapproved this change in use. Under the provisions of SDCL 11-6-21[25],

[25] A so-called "override" statute permitting the County to do so, despite City's disapprovals. The statute was repealed in 2010, SL 2010, ch. 71, §§ 1 to 5. Both the trial court's Order (see Appendix A to Appellant's Brief), and the State's brief here fail to mention this crucial statute.

the County unanimously overruled the City and proceeded with the project nonetheless. City sought injunctive relief, relying on *Lincoln County v. Johnson*. The trial court denied relief and Rapid City appealed. The override statute was deemed to control. The trial court had held that the *Lincoln County* decision did not apply, because a facility in Rapid City was also within Pennington County, and the extraterritorial doctrine used in *Johnson* did not apply. This Court, however, simply held, at ¶ 14, that *Lincoln County* was not applicable because of the override statute.

The dissent of Justice Sabers begins (at ¶ 18): "[T]he majority opinion's interpretation of the statute allows the County to completely override the will of City and its residents with no judicial recourse. In situations like this, the invading entity should be required to bring the case before the circuit court in accord with our decision in *Lincoln County v. Johnson.*" Further, Justice Sabers noted (at ¶ 20) "[t]aking the majority opinion's interpretation of the statute to its logical end shows the alarming, potential results. For example, this holding allows a county to purchase land on Main Street in any town or city and place a sewage treatment plant on that parcel," there being no objective analysis of the respective interests of the City and County. Justice Sabers thought it doubtful the Legislature intended these results.[26] Likewise, Appellants suggest, the same kinds of doubts expressed by Justice Sabers should surround the circumstances here, with Secretary Wasko continuing to press this State's immunity doctrine as some veritable Kryptonite, fully effective for neutralizing the best of County's plans and ordinances.

There is a clear suggestion in State's brief, at 16, that the balancing of interests test cannot pertain here as Lincoln County is *wholly* within South Dakota, and thus what

[26] In time, the Legislature did repeal the statute Justice Sabers found troubling. Notably, the State claims the benefit of no statute having the clarity of SDCL 11-6-21.

the State seeks to accomplish is not extraterritorial as to the state. The brief then further suggests the balancing of interests test was not employed in *City of Rapid City* because, likewise, Rapid City is *wholly* within Pennington County. The State's contention, however, seems fully demolished by the concluding line of Justice Konenkamp's writing (at ¶ 14): "We agree that the holding in *Lincoln County* is not applicable here because SDCL 11-6-21 specifically outlines the process for overruling a planning commission's disapproval of a county's attempt to create a county jail facility."

Pennington County was able to build and convert the facility to a work-release center because of that former statute, which seems considerably more than what now actually supports the efforts of Secretary Wasko. The State's brief, also at 16, echoes the trial court's conclusions, CR158, in making this assertion:

> Further, it would be absurd, and contrary to the holding in *City of Rapid City*, to determine that the state is subject to local zoning laws when building a prison, but a county is exempt from those same laws when constructing a jail.

But this assertion is *not* the holding of the case – plainly this is a misrepresentation of that holding. But such claims of "absurdity" do bring to mind other factual absurdities we think plainly exist here: Pennington County, at least, realized that a work-release facility would need to have *some* relationship to workplaces in order to be successful; it also doesn't hurt to have such a facility near doctors, hospitals, fire stations, law enforcement and the like, not to mention good roads, served by crewed snow plows. (And also not to mention sanitary sewers and fresh water supplies.)

But where does the State, through its empowered agent, propose to locate this new, major Prison? *Exactly where none of these features now exist*. So, we are constrained to ask: from this rural site some miles south of Harrisburg, and also some

miles north of Canton, how far is it to the nearest emergency center? Or law enforcement center? Secretary Wasko proposes to accomplish *all* of this without any application, notice or hearing before any agency, body or court, thus violating the rights of all those – including Appellants – who thought their property investments and safety interests would be protected by a County-developed, County-enforced Plan and Ordinance. Has the State invested too much power and discretion in the hands of merely one person, even one able to leap tall buildings in a single bound while also wrestling the County's Plan and Ordinance (along with the rights of Appellants arising thereunder) into an abject nullity?

The case of *Schafer v. Deuel County Board of Commissioners*, 2006 SD 106, ¶13, 725 N.W.2d 241, 246-7, provides an overview of the intended objectives of zoning:

> [T]he due process requirements (i.e. the right to notice and a hearing) granted in SDCL ch. 11-2 serve several important functions including: safeguarding against the arbitrary exercise of power, informing the decision makers, affording the affected landowners with the opportunity to formally voice their concerns and present evidence in opposition to opposed measures, and providing an avenue for expression of public opinion. Kenneth Young, Anderson's American Law of Zoning § 4.11 and § 4.03 (4th ed. 1996).

As expressed by *Schafer*, these are the rights and privileges that Appellants claim as property owners and residents in proximity to the Farm. Now that Secretary Wasko is in possession of both legal title and the keys to the Farm, Appellants are informed that any safeguards as to the exercise of her powers are dismissed. No other decision makers now exist – the decisions that need to be made, have been made already - by the Secretary. There is neither hearing nor opportunity to voice concerns, to present evidence in opposition to the Secretary's plans and designs. Simply put, whatever avenue *formerly* existing for the expression of public opinion, *is no longer open for business.*

This is . . . breathtaking, if not frightening.

E. SDCL 11-2-24 Also Stands in the Way of Secretary Wasko

The Attorney General's amicus brief to the Court in *Lincoln County*[27] considers, over the course of many pages, the import of SDCL 11-2-24, both as originally adopted in 1967 and as amended in 1975. The statute provides for the "location and extent" of any "public building or structure" to be submitted to and approved by the planning commission; if disapproved, the reasons are to be communicated to the County Board, and a majority of the elected members may overrule the disapproval. It would seem this statutory requirement should be observed, unless it is a case of the Legislature not actually intending that the meaning of any "public building or structure" be read as any "State-owned public building or structure." The issue does not seem to have been addressed in the State's brief or in the Circuit Court's Order.

The mentioned amicus brief, of course, brought to the attention of the Court the "balancing of interests" test that was then clearly adopted in Justice Morgan's unanimous opinion for the Court, albeit without having extended that test to the actions and activities of the State. It is now time to do so.

As expressed by the Legislature, the purpose of the County's Plan is to "[protect] and [guide] the physical, social, economic, and environmental development of the county; to protect the tax base; to encourage a distribution of population or mode of land utilization that will facilitiate the economical and adequate provisions of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements; to lessen governmental expenditure; and to develop natural resources." SDCL 11-2-12. Secretary Wasko may have all the required expertise and knowledge

---

[27] See Appendix C to Appellants' Brief.

reasonably required to design and run a prison – *even this new, intended Prison*. But we daresay that the Secretary knows little or nothing as to how best to protect and guide the County's development, or to protect the County's tax base, or facilitiate the economical and adequate provision of transportation, roads, water supply, drainage, sanitation, education, recreation or other public requirements. Or, for that matter, how best to lessen the amount of governmental expenditures!

The County's Plan and Ordinance, together, have a history of some fifty years of labor and effort, collectively exerted by a host of past and present elected officials, hired personnel and citizen volunteers, whether serving on the Planning Commission or in pursuit of other official tasks and the like. *Even now*, these persons await the appropriate use or zoning applications from Secretary Wasko, whether ultimately including the Farm – or perhaps some other site selected by the Secretary within this County. The balancing of interests test, as envisioned in *Lincoln County*, must be extended to the State. Only this result might yet avoid a catastrophic derailing of the public interest, as expressed in both SDCL 11-2-12 (Plan) and -13 (Ordinance), by any further, attempted performance of responsibilities of actual, direct concern to this unelected Secretary.

CONCLUSION

Appellants pray for relief accordingly.

Respectfully submitted:

Date: January 13, 2025

/s/ A.J. Swanson

A.J. Swanson, State Bar of South Dakota # 1680
aj@ajswanson.com
Attorney for Appellants

ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070

NOPE-LINCOLN COUNTY, INC., MIKE HOFFMAN, MICHELLE JENSEN, JAY WHITE, and TOM EIESLAND, *Appellants*

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Brief complies with the requirements set forth in South Dakota Codified Laws, being 15 pages in length. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 4,792 words and 24,750 characters, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities, and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: January 13, 2025 /s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellants' Reply Brief in the above referenced case was served upon each of the following persons, as counsel for Appellees or as counsel for amicus curiae herein, having been accomplished by electronic mail, at the addresses stated below:

Grant M. Flynn
Assistant Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501
atgservice@state.sd.us

Drew W. DeGroot
Deputy State's Attorney
104 N. Main St., Suite 200
Canton, SD 57013
dedegroot@lincolncountysd.org

Further, the signed original of Appellant's Brief was transmitted via U.S. Mail to the Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol, Pierre, SD 57501, as well as filing by electronic service in portable document format to the Clerk of the South Dakota at: SCClerkBriefs@ujs.state.sd.us.

All such service being accomplished the date entered below:

Date: January 13, 2025 /s/ A.J. Swanson
A.J. Swanson, Attorney for Appellants

APPENDIX TO APPELLANTS' REPLY BRIEF

Official Opinion No. 77-13, Applicability of local zoning regulations to state property.

(3 pages, Annexed)

OFFICIAL OPINION NO. 77-13, Applicability of local zoning regulations to state property

January 25, 1977

Dr. Richard L. Bowen
Commissioner of Higher Education
State Office Building #3
Pierre, South Dakota 57501

Official Opinion No. 77-13

Applicability of local zoning regulations to state property

Dear Dr. Bowen:

You have requested an official opinion based on the following facts:

FACTS:

The Corporation for Public Broadcasting is developing a satellite system for transmission of Public Broadcasting Service programming. As a part of the system, The University of South Dakota as a public broadcasting licensee under the Board of Regents, has been designated as a site for location of a receive-only-earth-terminal. A part of the financial/legal consideration in establishing the system is local zoning ordinance control over the site.

Based on the above facts you ask:

QUESTION:

Whether or not State, or more specifically, Board of Regents property at the University in Vermillion is subject to local zoning ordinances.

The issue raised by your request is one of first impression in South Dakota. Consequently, my opinion must, of necessity, be predicated on the general rule as established by the decisional law of other jurisdictions in the United States.

It is the general rule that zoning regulations or land use restrictions do not apply against state owned property absent a clear manifestation of a contrary legislative intent. 8 E. McQuillin, MUNICIPAL CORPORATIONS § 25.15 (3rd ed. 1976). See *Floyd v. New York State Urban Development Corp.*, 70 Misc. 2d 187, 333 N.Y.S. 2d 123 (1972); *Berger v. State*, 72 N.J. 206, 364 A.2d 993 (1976); *Township of Lower Allen v. Commonwealth*, 10 Pa. Cmwlth. 272, 310 A.2d 90 (1973). Various jurisdictions have adopted specific factors which they feel are indicia of legislative intent either upholding or dissolving immunity in particular instances and which have given rise to three minority rules:

(1) The "governmental-proprietary" distinction has been borrowed from the tort immunity area. Prospective activities of the acting governmental unit are denominated as being governmental in nature or proprietary with only the former category maintaining immunity. This test of discernment has generally been applied only to subordinate governmental units. *City of Charleston v. Southeastern Const. Co.*, 134 W. Va. 666, 64 S.E.2d 676 (1950), *Washington Twp. v. Ridgewood Village*, 46 N.J. Super. 152, 134 A.2d 345 (1957), aff'd, 26 N.J. 578, 141 A.2d 308 (1958), *Kedroff v. Town of Springfield*, 256 A.2d 457 (1969).

(2) A strong minority of jurisdictions have placed dispositive weight on the grant of eminent domain authority by the Legislature to the particular entity-the feeling being that the grant of power to condemn is ipso facto an expression of legislative intent to grant immunity. *Seward County Bd. of Com'rs. v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), *State v. Allen*, 158 Ohio St. 168, 107 N.E.2d 345 (1952); *Aviation Services v. Board of Adjustment*, 20 N.J. 275, 119 A.2d 761 (1956).

(3) The recent trend in legislative discernment, now espoused in a distinct minority of states, is to weigh the relative merits of the competing governmental interests of the state and its representative agencies, as against the legitimate local interest, *Rutgers State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972); *Town of Oronoco v. City of Rochester*, 197 N.W.2d 426 (1972).

While the former two rules have been criticized as too mechanistic with a tendency for producing inconsistent results, the latter view may have merit in an adjudicatory setting. It is my opinion, however, that the State of South Dakota has not manifested an intent to diminish the doctrine of immunity.

The general rule articulated *supra* emanates from notions of state sovereignty which places the actions of the sovereign beyond the call to question of a derivate governmental body and its laws. Immunity from local zoning regulations is a corollary of the doctrine of immunity from suit, a doctrine which is constitutionally mandated in article III, § 27, of the Constitution of South Dakota. That provision reads as follows:

The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.

This provision has been construed as granting the Legislature absolute authority to determine not only how and whether the State may be sued, but even if the State may be sued. *Sigwald v. State*, 50 S.D. 37, 208 N.W. 162 (1926). This state has persistently asserted its immunity from suit as an inherent right of its sovereignty.

This insistence by the State on its immunity from suit is controlling in the instant situation since the right of a local governmental entity to assert its zoning ordinances or land use regulations against the State is innocuous absent a right to enforce its enactments in an adjudicatory hearing.

Addressing your more particular question concerning Board of Regents property: Since title thereto is held in the name of the State of South Dakota, any suit to enforce zoning regulations against said property would be prohibited by the State immunity doctrine.

Therefore, the answer to your question is NO.

Respectfully submitted,

William J. Janklow
Attorney General

WJJ:DF:jo