IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29226

SIERRA CLUB,

Petitioner/Appellant,

vs.

CLAY COUNTY BOARD OF ADJUSTMENT,
TRAVIS MOCKLER, AND JILL MOCKLER,

Respondents/Appellees.

Appeal from the Circuit Court
First Judicial Circuit
Clay County, South Dakota

The Honorable Tami A. Bern, Presiding Judge

BRIEF OF APPELLANT

Mitchell A. Peterson
Reece M. Almond
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
Sioux Falls, SD 57104
Telephone: (605) 336-2880

Attorneys for Petitioner/Appellant

James Simko
Cadwell, Sanford, Deibert & Garry, LLP
300 East 10th Street – Suite 200
Sioux Falls, SD 57104
Telephone: (605) 336-0828

Attorneys for Respondent/Appellee
Clay County Board of Adjustment

Brian J. Donahoe
Daniel B. Weinstein
Donahoe Law Firm, P.C.
401 East 8th Street, Suite 215
Sioux Falls, SD 57103
Telephone: (605) 367-3310

Attorneys for Respondents/Appellees
Travis Mockler and Jill Mockler

Notice of Appeal filed January 8, 2020

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PRELIMINARY STATEMENT

In this brief, Appellant-Petitioner, Sierra Club, will be referred to as "Sierra Club." Appellee-Respondent Clay County Board of Adjustment will be referred to as "the Board," and Appellees-Respondents Travis Mockler and Jill Mockler will be referred to as "Mocklers."

Citations to the certified record are designated as ("CR. ___").

JURISDICTIONAL STATEMENT

Sierra Club appeals the Order signed December 13, 2019, by the Honorable Tami A. Bern of the Circuit Court for the South Dakota First Judicial Circuit, Clay County, that dismissed Sierra Club's Petition. Sierra Club filed a Notice of Appeal of the Circuit Court's Order on January 8, 2020. (CR. 95) The Order is reviewable by this Court pursuant to SDCL 15-26A-3(2).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in determining Sierra Club did not have representational standing under SDCL 11-2-35.

The Circuit Court erred when it found the Petition was not brought under SDCL 11-2-35 and, thus, failed to analyze representational standing under that statute.

Relevant Authority:

- SDCL 11-2-35
- SDCL 15-6-8
- *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, 756 N.W.2d 399
- *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977)

II. Whether the Circuit Court erred in determining Sierra Club lacked direct standing to bring the Petition under SDCL 11-2-61.

The Circuit Court erred when it found Sierra Club lacked direct standing under SDCL 11-2-61 by finding Sierra Club was not "aggrieved."

Relevant Authority:

- SDCL 11-2-61
- *Huber v. Hanson Cnty. Planning Comm'n*, 2019 S.D. 64, 936 N.W.2d 565
- *Abata v. Pennington Cnty Bd. of Comm'rs*, 2019 S.D. 39, 931 N.W.2d 714

III. Whether the Circuit Court erred in determining Sierra Club lacked representational standing to bring the Petition under SDCL 11-2-61.

The Circuit Court erred in determining Sierra Club lacked representational standing under SDCL 11-2-61 by finding participation of its members is necessary.

Relevant Authority:

- SDCL 11-2-61
- *Huber v. Hanson Cnty. Planning Comm'n*, 2019 S.D. 64, 936 N.W.2d 565
- *Abata v. Pennington Cnty Bd. of Comm'rs*, 2019 S.D. 39, 931 N.W.2d 714
- *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977)

STATEMENT OF THE CASE

The Clay County Planning Commission issued a conditional use permit for a concentrated animal feeding operation to Mocklers. Sierra Club appealed that decision in accordance with the zoning ordinances for Clay County. The Board heard the appeal and approved the issuance of a conditional use permit. Thereafter, Sierra Club appealed the Board's decision by filing its Petition, seeking relief that included reversal of the Board's decision, and an order that either revoked the conditional use permit or required an unbiased county commission to hear Sierra Club's appeal. (CR. 1)

After filing its Petition, Mocklers moved, pursuant to SDCL 15-6-12(b)(1), to dismiss the Petition arguing lack of subject matter jurisdiction due to Sierra Club's purported lack of standing. (CR. 26) The Board joined Mocklers' motion. (CR. 40)

In her December 13, 2019 Order, the Honorable Tami A. Bern of the Circuit Court for the South Dakota First Judicial Circuit, Clay County, determined Mocklers' motion was a facial challenge to jurisdiction, granted the motion to dismiss, and dismissed Sierra Club's Petition after concluding Sierra Club lacked direct standing to bring the Petition and, further, that Sierra Club lacked representational standing to bring the Petition because the claims asserted and the relief requested require the participation of Sierra Club's individual members. (CR. 89)

Sierra Club has appealed the Circuit Court's decision to dismiss the Petition for lack of subject matter jurisdiction. Mocklers have not appealed the Circuit Court's determination that their motion was a facial challenge to jurisdiction.

STATEMENT OF FACTS

Because the Circuit Court determined Mocklers' motion to dismiss was a facial attack, the entire factual universe for purposes of this appeal is contained in the Petition. (CR. 1-13) The pertinent facts contained therein are as follows:

The Permitting Process

Mocklers applied for a conditional use permit to operate a concentrated animal feeding operation ("CAFO") for 2,499 hogs and 500 cattle. (CR. 2) The Clay County Planning Commission ("Planning Commission") held two hearings regarding the application and then issued a permit to Mocklers. (CR. 2)

The Clay County zoning ordinances ("the Ordinances") afford any person aggrieved to appeal a Planning Commission decision related to conditional use permits. (CR. 2) Under the Ordinances, appeals of conditional use permits must be heard by the Clay County Commission ("County Commission"), not the Board. (CR. 6)

Sierra Club, who was and is aggrieved by the Planning Commission's decision to issue Mocklers the conditional use permit (as set forth in more detail below), timely appealed the Planning Commission's decision under the Ordinances. (CR. 2) The Board, and not the County Commission, heard the appeal. (CR. 2-3) Although the County Commission and Board were made up of the same individuals, that the Board heard the appeal resulted in a different vote requirement and burden of proof that favored Mocklers over Sierra Club. (CR. 6-7) The Board ultimately voted to deny Sierra Club's appeal and upheld the Planning Commission's issuance of the conditional use permit contingent upon Mocklers submitting a revised to-scale map. (CR. 3)

Not only did the wrong county entity consider Sierra Club's appeal, Sierra Club was not provided a fair and impartial hearing, because Board members had actual bias or an unacceptable risk of bias. (CR. 9-10) Evidence of such bias included: the Board overlooked and excused the Mocklers' failure to comply with requirements of the Ordinances and certain deadlines; disparate speaking times for opponents and the Mocklers; hostility and disrespect shown by the Board and its agents toward opponents; the Board unilaterally yielding opponent's speaking time to the attorney representing the Mocklers to answer questions and failing to provide the balance of time for comments; applying the incorrect burden of proof; and allowing Travis Mockler to influence the hearing and the Board's procedural decisions through his illegal participation at the hearing. (CR. 9-10)

Furthermore, the Board upheld issuance of the permit even though (1) the Mocklers failed to obtain a letter opinion from the Natural Resources Conservation Service District as required by the Ordinances, (2) the Ordinances do not allow for a mixed-species CAFO, (3) if the Ordinance do allow for a mixed-species CAFO, the Mocklers' proposed CAFO would be classified as a "Large" CAFO and would not comply with the Ordinances, and (4) the Mocklers failed to meet required deadlines under the Ordinances and imposed by the Board. (CR. 6-10)

Sierra Club Was/Is Aggrieved

Sierra Club is a nonprofit environmental organization founded in 1892 with over 790,000 members, including 194 members in Clay County, South Dakota. (CR. 3) Sierra Club's mission is to protect the wild places of the earth, to practice and promote the responsible use of the earth's ecosystems and resources, to protect and restore the

quality of the natural and human environment, and to use all lawful means to carry out these objectives. (CR. 3) Sierra Club's organizational objectives include protection and preservation of air, water, and soil resources from contamination resulting from operation of CAFOs. (CR. 3)

The tributaries, streams, creeks, rivers, lakes, and other water sources impacted negatively by the Mocklers' proposed CAFO are enjoyed by Sierra Club's members and are at the heart of Sierra Club's organizational mission to protect. (CR. 4) Sierra Club's members use the to-be-affected water sources for recreation, fishing, enjoyment, and other purposes, and they will be negatively impacted by leaching, pollution, and runoff from the proposed CAFO. (CR. 4) The members live, work, recreate, and engage in other activities that will be adversely impacted by pollution from the proposed CAFO. (CR. 4)

Furthermore, Sierra Club's members are persons who: (a) own land near the proposed site of the CAFO; (b) own land in Clay County that will be adversely affected by the CAFO; (c) are South Dakota tax payers; (d) are Clay County tax payers; (e) are otherwise interested in the subject matter of the Petition; (f) are aggrieved by the Board of Adjustment's decision as set forth in the Petition; or (g) a combination of the foregoing (a) through (f). (CR. 4-5)

Sierra Club and its members were/are aggrieved by the Board's decision to uphold the issuance of the conditional use permit, because, among other reasons, it creates a serious risk of pollution, diminished water quality, diminished air quality, increased odors, increased flies and pests, increased noise, increased glare, negative economic impacts, decreased property values, incompatibility with surrounding area and

properties, negative impacts on ecology and wildlife, and dilapidation and deterioration of roads thereby increasing the tax burden on Sierra Club's members. (CR. 5) Sierra Club and its members were/are aggrieved in ways the general public was/is not aggrieved. (CR. 5)

STANDARD OF REVIEW

This Court's review of the Circuit Court's decision dismissing the Petition for lack of subject matter jurisdiction is de novo. *See Huber*, 2019 S.D. 64, ¶ 10, 936 N.W.2d 565, 569 ("Issues of jurisdiction are questions of law, and we review a dismissal for lack of jurisdiction de novo.").

"In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). "South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' " *Gruhlke*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409 (quoting SDCL 15-6-8(a)(1)). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume the general allegations embrace those specific facts that are necessary to support them.") (internal quotations omitted).

ARGUMENT

Sierra Club's Petition requested the Circuit Court either (1) declare the conditional use permit issued to the Mocklers void, because the Mocklers' application failed to comply with the Ordinances, or (2) remand this matter back to the county with instructions to have a neutral, unbiased board consider Sierra Club's appeal in a fair proceeding that comports with due process. (CR. 1-12) The Circuit Court, however, found Sierra Club lacked standing to bring its Petition and dismissed the same for lack of subject matter jurisdiction. (CR. 89, 143-151)

"Judicial review of decisions by boards and commissions is statutory and established by the Legislature." *Huber*, 2019 S.D. 64, ¶ 11, 936 N.W.2d at 569. "Judicial review 'may be had only on compliance with such proper conditions as the legislature may have imposed.' " *Id*.

Because the relief requested in the Petition could have been provided under either SDCL 11-2-35 or SDCL 11-2-61 and Sierra Club has standing under both statutes, the Circuit Court erred in finding Sierra Club lacked standing to bring the Petition.

I. Sierra Club Has Representational Standing under SDCL 11-2-35

A. Petition Asserts a Claim for Relief under SDCL 11-2-35

The Circuit Court found the Petition did not assert a claim under SDCL 11-2-35. (CR. 150-51) That finding was erroneous.

The Petition provides that it is brought under "SDCL 11-2-61 through 11-2-65, and *all other* constitutional provisions, *statutes*, case law, or common law *that may be applicable*." (CR. 1 (emphasis added)) Further, the Petition requests relief in the form of a reversal under SDCL 11-2-61, "or, alternatively, remand the Decision for further

proceedings consistent with the Court's judgment." (CR. 5) Moreover, the Petition provides: "Specifically, Petitioners request that the Court reverse the decision of the Board and revoke (or void) the CUP granted to Applicant. *Alternatively, the Court should remand this matter back to the Board for further investigation and consideration in compliance with directions from the Court*." (CR. 11 (emphasis added)) The Petition also requests "alternatively, a remand of the Applicant to a neutral Board with no participation by disqualified members." (CR. 12)

These assertions and requests for relief fall squarely under SDCL 11-2-35, which provides:

> Any taxpayer of the county may institute mandamus proceedings in circuit court to compel specific performance by the proper official or officials of any duty required by this chapter and by any ordinance adopted thereunder.

That the Petition failed to specifically cite SDCL 11-2-35 is inconsequential, as South Dakota is a notice-pleading state. *Gruhlke*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409 ("South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' ") (quoting SDCL 15-6-8(a)(1)). Therefore, the Circuit Court erred when it refused to consider whether Sierra Club has representational standing under SDCL 11-2-35.

B. Sierra Club Has Representational Standing under SDCL 11-2-35

"Any taxpayer of the county" may seek relief under SDCL 11-2-35. Because Sierra Club is not a taxpayer of Clay County, it must rely on representational standing based on injuries to its members, who are taxpayers of Clay County, to establish standing under SDCL 11-2-35.

In *Hunt*, 432 U.S. 333, 343 (1977), the United States Supreme Court summarized the criteria that must be satisfied for representational standing to exist:

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Because all three criteria are met here, Sierra Club has representational standing to seek relief under SDCL 11-2-35.

With respect to criterion (a), Sierra Club has 194 members in Clay County and its members "are Clay County tax payers," (CR. 3-4). These members, as taxpayers in Clay County, would have standing under SDCL 11-2-35 in their own right. Therefore, criterion (a) is satisfied.

Criterion (b) is also satisfied given Sierra Club's mission/purpose "is to explore, enjoy, and protect the wild places of the earth, to practice and promote the responsible use of the earth's ecosystems and resources, to educate and enlist humanity to protect and restore the quality of the natural and human environment and to use all lawful means to carry out these objectives," and to protect and preserve "air, water and soil resources from contamination resulting from operation of CAFOs such as the CAFO proposed by Applicant." (CR. 3-4) Issuance of the conditional use permit will negatively impact the tributaries, streams, creeks, rivers, lakes, and other water sources of the area and "creates a serious risk of pollution, diminished water quality, diminished air quality, increased odors, increased flies and pests, increased glare, negative economic impacts, decreased property values, incompatibility with surrounding area and properties, negative impacts on ecology and wildlife, and dilapidation and deterioration of roads thereby increasing

the tax burden on Petitioner's members." (CR. 4-5) Thus, the interests Sierra Club seeks to protect are germane to its purpose.

Criterion (c) is also satisfied because the claims made and relief requested in the Petition do not require the individual participation of Sierra Club's members. The conduct of Sierra Club or its members is not at issue in this proceeding. It is the conduct of the county that is at issue, and the relief requested involves declaratory relief (i.e., declaring permit void) or, in the alternative, injunctive relief (i.e., remanding for a neutral, unbiased County Commission to consider the appeal). *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."). Accordingly, individual participation of Sierra Club's members is unnecessary.

Therefore, all three criteria are satisfied and Sierra Club has representational standing under SDCL 11-2-35. As such, the Circuit Court erred when it found Sierra Club lacked standing to bring the Petition.

II. Sierra Club Has Direct Standing and Representational Standing under SDCL 11-2-61

The Petition also asserts a claim under SDCL 11-2-61, which affords "[a]ny person or persons, jointly or severally, or any taxpayer, or any officer, department, board, or bureau of the county, aggrieved by any decision of the board of adjustment" to appeal such a decision. Sierra Club has both direct standing and representational standing under SDCL 11-2-61.

A. Sierra Club Has Direct Standing under SDCL 11-2-61

An organization need not rely on representational standing if it can sue in its own right. *See Arkansas ACORN Fair Housing, Inc. v. Greystone Develop., Ltd.*, 160 F.3d 433, 434 (8th Cir. 1998) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 378 (1982)). Because SDCL 11-2-61 provides standing to "person or persons, jointly or severally," Sierra Club has direct standing.

In passing SDCL 11-2-61, the Legislature provided standing to "person or persons, jointly or severally." SDCL ch. 11-2 does not define the term "person." Two other SDCL Title 11 Chapters define person and do so in the same manner. Both SDCL 11-7-1(11) and SDCL 11-8-1(12) define person as "any individual, firm, partnership, limited liability company, corporation, company, association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof[.]" Sierra Club—as a nonprofit environmental organization with over 790,000 members—is an association and thus falls within the definition of "person" as defined in SDCL Title 11.

Moreover, in drafting SDCL 11-2-61, the Legislature permitted a collection of individuals to challenge a board of adjustment's decision by use of the terms "persons" (i.e., person in the plural) and "jointly" (i.e., with another person; together) when identifying who can bring such an action. Thus, Sierra Club's status as a nonprofit organization and collection of individuals poses no obstacle for it to assert direct standing under SDCL 11-2-61, as the plain language of the statute recognizes a group of persons jointly aggrieved can appeal a decision. In fact, it makes sense from a judicial economy perspective to allow a collection of persons (e.g., Sierra Club) to commence a single,

united action under SDCL 11-2-61 rather than having several different actions commenced by different individuals.

The second standing requirement under SDCL 11-2-61 is that Sierra Club had to be aggrieved by the county proceedings. As set forth in the Petition, Sierra Club was and will be aggrieved in several ways.

First, Sierra Club appealed the Planning Commission's issuance of a conditional use permit. (CR. 2) Rather than comporting with the Ordinances and having the County Commission hear the appeal, the Board heard Sierra Club's appeal. (CR. 2) This resulted in different vote requirements and a burden of proof that favored Mocklers and disfavored Sierra Club. (CR. 6-7) Therefore, Sierra Club was aggrieved by having the wrong county entity consider its appeal.

Next, Sierra Club was aggrieved by having its due process rights violated. Not only was Sierra Club entitled to have the proper county board hear its appeal, it was entitled to have a fair and unbiased board consider its appeal. *See Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶¶ 20-21, 772 N.W.2d 643, 651 (recognizing due process standards apply to quasi-judicial proceedings involving conditional use permits). But that is not what it received; rather, certain Board members were biased, had an unacceptable risk of bias, had unalterably closed minds, and conflicts of interest. (CR. 9-10) As a result, Sierra Club's due process rights were violated. Put differently, Sierra Club was aggrieved. *Id*.; *see also Abata*, 2019 S.D. 39, ¶ 13, 931 N.W.2d 714, 719 (recognizing claim of injury resulting from a violation of due process rights).

Also, the issuance of the conditional use permit aggrieved Sierra Club. The issuance of the conditional use permit creates a serious risk of pollution, diminished

water quality, diminished air quality, increased odors, decreased property values, incompatibility with surrounding area and properties, and negative impacts on ecology and wildlife. (CR. 4-5) The proposed CAFO will negatively impact the tributaries, streams, creeks, rivers, lakes, and other water sources. (CR. 4-5) These negative impacts will aggrieve Sierra Club because, as a nonprofit environmental organization, its mission is to protect the wild places of the earth, to practice and promote the responsible use of the earth's ecosystems and resources, and to protect and preserve air, water, and soil resources from contamination resulting from operation of CAFOs such as the CAFO proposed by Mocklers. (CR. 3-4) Therefore, Sierra Club was aggrieved, or at the very least, sufficiently pleaded that it was. *See Huber*, 2019 S.D. 64, ¶ 18, 936 N.W.2d at 571 (finding allegations that a CAFO would result in offensive odors sufficient to show a person is aggrieved); *Abata*, 2019 S.D. 39, ¶ 13-14, 931 N.W.2d at 720 (recognizing concerns regarding water quality, dust, health issues, decreased property values, environmental harm, and increased traffic sufficient to establish standing). *See also Lujan*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume the general allegations embrace those specific facts that are necessary to support them.") (internal quotations omitted).

For these reasons, Sierra Club has direct standing under SDCL 11-2-61, and the Circuit Court erred when it found Sierra Club lacked direct standing.

B. Sierra Club also Has Representational Standing under SDCL 11-2-61

To have representational standing to bring suit on behalf of its members, the same three criteria discussed above must be met: (a) its members would otherwise have

standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt*, 432 U.S. 333, 343 (1977).

Criteria (b) and (c) are satisfied here for the same reasons they were satisfied above, which leaves criterion (a), i.e., whether its members would otherwise have standing to sue in their own right. Sierra Club's members would otherwise have standing under SDCL 11-2-61, because they are persons aggrieved. (CR. 4-5 (providing various examples of how Sierra Club's members are aggrieved).) *See Huber*, 2019 S.D. 64, ¶ 18, 936 N.W.2d at 571 (finding allegations that a CAFO would result in offensive odors sufficient to show a person is aggrieved); *Abata*, 2019 S.D. 39, ¶ 13-14, 931 N.W.2d at 720 (recognizing concerns regarding water quality, dust, health issues, decreased property values, environmental harm, and increased traffic sufficient to establish standing). Thus, criterion (a) is satisfied, and Sierra Club has representational standing under SDCL 11-2-61. *See Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 675 P.2d 344 (Idaho Ct. of App. 1983) (noting association of landowners who lived around property that had been issued a conditional use permit had representational standing to challenge the issuance of said permit). Therefore, the Circuit Court erred when it found Sierra Club lacked standing.

III. Circuit Court Erred When It Found the Petition Requires the Participation of Sierra Club's Individual Members

The Circuit Court found Sierra Club lacked representational standing because, it held, "the claim asserted and the relief requested require the participation of individual members of [Sierra Club]." (CR. 89) Specifically, the Circuit Court noted that Sierra

Club must rely on evidence, through sworn affidavits or testimony, from its members to establish they are aggrieved and, therefore, they are indispensable. (CR. 149) This was an incorrect interpretation of the law.[1]

To have representational standing, neither the claim asserted nor the relief requested can require the participation of individual members in the lawsuit. *See Hunt*, 432 U.S. 333, 343 (1977). Here, the claim is that a county board acted illegally and the relief sought is declaratory and injunctive. Therefore, the actions of Sierra Club's members are irrelevant to the claim, and the remedy sought does not require quantification of damages or anything similar such that Sierra Club's members must be parties to the litigation. This is the precise type of case where representational standing is appropriate. *See Hunt*, 432 U.S. at 344 (noting a "request for declaratory and injunctive relief" does not require individualized proof and can be "properly resolved in a group context"); *Warth*, 422 U.S. at 515 ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."); *Glengary-Gamlin Protective Ass'n, Inc.*, 675 P.2d 344 (noting association of landowners who lived around property that had been issued a conditional use permit had representational standing to challenge the issuance of said permit).

[1] Because Sierra Club has direct standing and does not need to rely on representational standing, the Circuit Court's finding that Sierra Club does not have representational standing is irrelevant. However, Sierra Club is addressing the Circuit Court's ruling in the event this Court concurs with the Circuit Court's finding that Sierra Club lacks direct standing.

The Circuit Court held that Sierra Club's members will need to provide evidence later in the litigation, and thus, they are "indispensable" parties. First, Sierra Club disputes that evidence from its members is necessary to prosecute the Petition. Certainly evidence from its members may assist in the prosecution of the Petition, but such evidence is not needed to establish the county acted illegally, as the county's own records and testimony from county representatives will likely establish the illegality. Second, even if evidence from Sierra Club's members is necessary, that does not make them indispensable parties. There is a difference between a person (1) needing to participate in a lawsuit as a named party, and (2) providing evidence via testimony or sworn affidavit. Nonparties often provide evidence that assists with the prosecution or defense of claims. That does not mean they are indispensable parties. Thus, that Sierra Club may rely on evidence from its members to assist in the prosecution of the Petition does not mean its members are indispensable parties. For these reasons, the Circuit Court erred when it held Sierra Club's members are indispensable parties to this matter.

CONCLUSION

The Petition asserts the county acted illegally and seeks declaratory and injunctive relief regarding the same. Sierra Club has both direct and representational standing to challenge the county's conduct, and the Circuit Court erred when it held otherwise. Therefore, Sierra Club respectfully requests the Court reverse the Circuit Court's decision and remand this matter back to the Circuit Court so that the Petition can be heard on its merits.

REQUEST FOR ORAL ARGUMENT

Petitioner respectfully requests oral argument.

Dated at Sioux Falls, South Dakota, this 27th day of March, 2020.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitchell A. Peterson
Reece M. Almond
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 3,903 words and 21,143 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 27th day of March, 2020.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitchell A. Peterson
Reece M. Almond
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on February 27, 2020.

The undersigned further certifies that an electronic copy of "Brief of Appellant" was emailed to the attorneys set forth below, on February 27, 2020:

James Simko
CADWELL SANFORD DEIBERT & GARRY, LLP
300 East 10th Street – Suite 200
Sioux Falls, SD 57104
jsimko@cadlaw.com
Attorneys for Appellee Clay County Board of Adjustment

Brian J. Donahoe
Daniel B. Weinstein
DONAHOE LAW FIRM, P.C.
401 E. 8th Street, Suite 215
Sioux Falls, SD 57103
brian@donahoelawfirm.com
daniel@donahoelawfirm.com
Attorneys for Appellees Travis Mockler and Jill Mockler

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitchell A. Peterson
Reece M. Almond
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellant

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STATE OF SOUTH DAKOTA) :SS COUNTY OF CLAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
SIERRA CLUB, Petitioner, vs. CLAY COUNTY BOARD OF ADJUSTMENT, TRAVIS MOCKLER, and JILL MOCKLER, Respondents.	13CIV19-120 **ORDER** FILED DEC 13 2019 Jessica Borse Clay County Clerk of Courts 1st Judicial Circuit Court of South Dakota

A hearing on the Respondents Motions to Dismiss for Lack of Subject Matter Jurisdiction came before the Court for consideration on December 4, 2019 at 1:30 p.m. in the Clay County Courthouse with the Honorable Tami A. Bern presiding. The parties appeared through their counsel of record: Mitchell A. Peterson for the Petitioners, James S. Simko for Respondent Clay County Board of Adjustment, and Brian J. Donahoe for the Respondents Travis and Jill Mockler. The Court, having considered the arguments of the parties and the submissions of record, made its ruling for the reasons set forth on the record at the hearing, and those reasons are incorporated by reference as if set forth in full here in this Order.

THEREFORE, pursuant to the decision at the hearing, specifically, that the Respondents made a facial attack on Petitioner's allegations in the pleadings, and that under the applicable standard for such a Motion to Dismiss, Petitioner lacks direct standing and that Petitioner lacks representational standing because the claim asserted and the relief requested require the participation of individual members of Petitioner, it is hereby:

ORDERED, ADJUDGED AND DECREED that Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that JUDGMENT dismissing the appeal under SDCL § 11-2-65 is GRANTED, with each party to bear its own costs and disbursements.

Dated this _____ day of December, 2019.

BY THE COURT:
Signed: 12/13/2019 8:44:27 AM

The Honorable Tami A. Bern
Circuit Court Judge

ATTEST:
Angela Madsen, Clerk

Attest:
By Zimmerman, Nadyne, Deputy Clerk/Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF CLAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
SIERRA CLUB, Petitioners, vs. CLAY COUNTY BOARD OF ADJUSTMENT, TRAVIS MOCKLER, and JILL MOCKLER, Respondents.	CIV. 19- **PETITION**

Under SDCL 11-2-61 through 11-2-65, and all other constitutional provisions, statutes, case law, or common law that may be applicable, Petitioner Sierra Club ("Petitioner") presents to the Court this duly verified Petition seeking a writ of certiorari and reversal of the decision set forth below, which decision is illegal as explained in this Petition.

PARTIES AND PROCEDURAL BACKGROUND

1. Respondent Clay County Board of Adjustment ("the Board") is the Clay County Board of County Commissioners acting as the Board as set forth in the Clay County Zoning Ordinance a/k/a 2013 Revised Zoning Ordinance for Clay County and as amended thereafter through Ordinance No. 2017-1 ("the Ordinances").

2. Respondents Travis Mockler and Jill Mockler (collectively "Applicant") are the applicants for and recipients of a conditional use permit ("CUP") to operate a concentrated animal feeding operation ("CAFO"), which CUP and Board decision granting the CUP are described in more detail below in this Petition.

Filed: 9/26/2019 7:43 AM CST Clay County, South Dakota 13CIV19-000120

3. On or about February 28, 2019, Applicant applied for a CUP for an animal feeding operation for hogs, cattle, and related structures ("the Application") for property located at 30451 464th Avenue in Pleasant Valley Township, Clay County, South Dakota, with the following legal description E 700', N 1440' SW ¼ 12-94N-52W, Clay County, South Dakota ("the CAFO site"); the Application sought a CUP for 2,499 hogs and 500 cattle.

4. On March 25, 2019, and April 29, 2019, the Clay County Planning Commission ("the Planning Commission") held hearings ("the Planning Commission Hearings") regarding the Application after which hearings the Planning Commission purported to grant the Application and issue the CUP to Applicant ("the Planning Commission's Decision").

5. Section 11.06 of the Ordinances allows applicants or any other person aggrieved to appeal the Planning Commission's decisions with respect to CUPs.

6. Petitioner, who was and is aggrieved by the Planning Commission's Decision and the issuance of the CUP to Applicant, timely filed an appeal of the Planning Commission's Decision as allowed under the Ordinances.

7. Petitioners' request for an appeal of the Planning Commission's Decision was accepted, and a hearing was scheduled for June 11, 2019.

8. On June 11, 2019, the Board, and not the Board of County Commissioners, held a hearing on Petitioner's appeal of the Planning Commission's Decision.

9. The June 11, 2019, hearing was continued by the Board until July 30, 2019, at which time the hearing continued in front of the Board.

10. The July 30, 2019, hearing was continued by the Board until August 27, 2019, at which time the hearing continued in front of the Board.

11. At the conclusion of the August 27, 2019, hearing, the Board voted to deny Petitioner's appeal and uphold approval of the Application and issuance of the CUP to Applicant contingent upon Applicant submitting a revised to-scale map showing the precise location of structures for the CAFO. (The three hearings before the Board on June 11, July 30, and August 27 of 2019 shall be collectively referred to as "the Board Hearings").

12. The county entity taking action on Petitioner's appeal and issuing the CUP was the Board, not the Board of County Commissioners.

13. The decision of the Board to deny Petitioner's appeal and uphold approval of the Application and issuance of the CUP to Applicant ("the Board's Decision") (the Planning Commission's Decision and the Board's Decision, and the Hearings related thereto, shall be collectively referred to as "the Decision")) was made and filed on or after August 27, 2019.

14. In order to comply with the timing requirements of SDCL chapter 11-2 and to avoid the prejudice from waiting for the filing of the Board's Decision after Applicant provides the required to-scale map, Petitioner is presenting this Petition to the Court and commencing this civil action now.

15. Petitioner is a nonprofit environmental organization founded in 1892 with over 790,000 members, including 194 members in Clay County, South Dakota, and 1,293 members throughout South Dakota. Petitioner's mission is to explore, enjoy, and protect the wild places of the earth, to practice and promote the responsible use of the earth's ecosystems and resources, to educate and enlist humanity to protect and restore the quality of the natural and human environment and to use all lawful means to carry out these objectives. Petitioner's organizational objectives include protection and preservation of air, water and soil resources from contamination resulting from operation of CAFOs such as the CAFO proposed by Applicant.

Accordingly, participation in this civil action is germane to Petitioner's interests it seeks to protect and advance as an organization.

16. Petitioner has organizational standing because its Clay County members have sufficient standing to participate as individuals in this Petition. Petitioner's Clay County members participated in the underlying proceedings in opposition to Applicant and prior to the issuance of the CUP, and their appeal as an aggrieved party was accepted by the County. Neither the claims asserted nor the relief requested in this civil action requires the participation of Petitioner's individual members.

17. The tributaries, streams, creeks, rivers, lakes, and other water sources impacted negatively by Applicant's proposed CAFO are enjoyed by Petitioner's members and are at the heart of Petitioner's organizational mission to protect. Petitioner's members use to-be-affected water sources for recreation, fishing, enjoyment, and other purposes, and they will be negatively impacted by leaching, pollution, and runoff from Applicant's proposed CAFO and lands where manure from Applicant's CAFO will be applied.

18. Petitioner's members live, work, recreate, and engage in other activities that will be adversely impacted by pollution from Applicant's proposed CAFO.

19. Petitioner's members would otherwise have standing to pursue this civil action individually, the interests Petitioner seeks to protect are germane to its organizational purpose, and neither the claim asserted nor the relief requested requires the participation of Petitioner's individual members in this civil action.

20. Petitioner's members are persons who: (a) own land near the proposed site of Applicant's CAFO; (b) own land in Clay County that will be adversely affected by the Decision as described in this Petition; (c) are South Dakota tax payers; (d) are Clay County tax payers; (e)

are otherwise interested in the subject matter of this Petition; (f) are aggrieved by the Decision as set forth in this Petition; or (g) a combination of the foregoing (a) through (f).

21. Petitioner and its members are aggrieved by the Decision and related issuance of the CUP to Applicant, because, among other reasons, the Decision creates a serious risk of pollution, diminished water quality, diminished air quality, increased odors, increased flies and pests, increased noise, increased glare, negative economic impacts, decreased property values, incompatibility with surrounding area and properties, negative impacts on ecology and wildlife, and dilapidation and deterioration of roads thereby increasing the tax burden on Petitioner's members.

22. Petitioner and Petitioner's members are aggrieved by the Decision in ways the general public is not aggrieved.

GROUNDS FOR ILLEGALITY

23. Petitioner restates and incorporates by reference all other allegations contained in this Petition.

24. Under SDCL 11-2-61, anyone 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.

25. Under SDCL chapter 11-2, and SDCL 11-2-61 more specifically, Petitioner presents this Petition appealing the Decision and issuance of the CUP to Applicant.

26. The Court should reverse the Decision under the writ of certiorari standard as set forth in SDCL chapter 11-2 or, alternatively, remand the Decision for further proceedings consistent with this Court's judgment.

27. Under current South Dakota Supreme Court authority, any of the following thirteen bases requires reversal under a writ of certiorari standard: (1) the Board arbitrarily or willfully disregarded undisputed proof; (2) the Decision was based on fraud; (3) the Board exceeded its jurisdiction; (4) the Board failed to regularly pursue its authority; (5) the Board engaged in any act forbidden by law; (6) the Board neglected to do any act required by law; (7) the Board failed to engage in independent thought; (8) the Board failed to follow the guidelines or requirements of the applicable ordinances; (9) the Board exceeded its authority; (10) members of the Board voting in favor of the Decision were disqualified due to actual bias, unacceptable risk of actual bias, unalterably closed minds, conflicts of interest, partiality, not being disinterested in the proceedings, prohibited *ex parte* communications, or not being free from bias or predisposition; (11) the Board made errors of law; (12) the Board applied an incorrect legal standard; or (13) the Decision is otherwise illegal.

28. As set forth in this Petition, reversal of the Decision is required on one or more of the aforementioned thirteen grounds under existing writ of certiorari precedent based on the following:

a. Petitioner properly and timely submitted its appeal of the Planning Commission Decision as allowed under Ordinances § 11.06. The appeal should have been heard by the Board of County Commissioners, not the Board. While the Board generally hears appeals under Article 9 of the Ordinances, CUP appeals specifically must be heard by the Board of County Commissioners under Article 11 of the Ordinances, specifically Ordinances § 11.06. Accordingly, the wrong county entity took action on the appeal. The Board had no authority to deny Petitioner's appeal or approve the CUP issuance. Notice of the appeal hearings was improper, because the wrong entity acted. The vote requirements and burden of proof were

different and favored Applicant over Petitioner based on the improper procedure followed by the Board (having the Board under Article 9, instead of the Board of County Commissioners under Article 11, act on Petitioner's appeal), which means the Board lacked authority and jurisdiction, and Petitioner's Due Process rights were violated.

b. Under § 3.07(e) of the Ordinances,"[A]pplicant shall obtain a letter opinion from the Natural Resource Conversation Service District (NRCS) to determine whether the operation will be considered an Animal Feeding Operation (AFO) or a Concentrated Animal Feeding Operation (CAFO). The letter shall state how the NRCS made that determination." Applicant failed to obtain this NRCS letter, therefore, there was no authority to issue the CUP or to deny Petitioner's appeal. There is no authority under the Ordinances or otherwise to excuse Petitioner from complying with this requirement.

c. There is no authority under the Ordinances to issue a mixed-species CAFO CUP. Ordinances § 3.07(4) provides a table for determining the class or size of a CAFO (Small, Medium, or Large) based on the number of a particular animal species. The Board issued a CUP to the Applicant to have up to 999 head of mature cattle and 2,499 head of swine weighing more than 55 pounds as part of a single CAFO with a single "Medium" CUP. This is not authorized or allowed under the Ordinances, making the Decision illegal.

d. Alternatively, even if a mixed-species CAFO were allowed under the Ordinances, the Board issued a "Medium" CUP for a CAFO that is actually a "Large" CAFO. The Board issued a CUP to the Applicant to have up to 999 head of mature cattle and 2,499 head of swine weighing more than 55 pounds as part of a single CAFO with a single "Medium" CUP. In reality, 999 head of cattle (and even as few as 300 head) by itself is a "Medium" CAFO. In reality, 2,499 head of swine over 55 pounds (and even as few as 750 head) by itself is a

"Medium" CAFO. This mixed-species CAFO is not allowed. But even if the Ordinances are construed by this Court to allow such a permitting practice, Applicant's particular CAFO must be considered a "Large" CAFO. Accordingly, a "Medium" CUP cannot be used to permit Applicant's "Large" CAFO, and the Decision to the contrary is illegal.

e. Alternatively and additionally, under the definitions in the Ordinances, "Two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other (within one mile), or if they use a common area or system for the disposal of manure." Applicant in reality has at least two CAFOs, each of which is at the maximum limit for classification as a "Medium" CAFO. Due to their common ownership and less than one mile proximity, Applicant's two "Medium" CAFOs must be combined for permitting purposes. When that is done, the Ordinances do not allow issuance of a CUP for two commonly owned CAFOs within one mile where the species are different. Alternatively, Applicant's two CAFOs must be combined to be a "Large" CAFO and the Decision to the Contrary is illegal.

f. Applicant's proposed mixed-species CAFO, if theoretically authorized under the Ordinances, requires a "Large" CAFO CUP. All evidence in the records demonstrates Applicant cannot meet the setbacks and other requirements for Large CAFOs. Accordingly, the Court should reverse the Decision and revoke Applicant CAFO CUP, as the Board had no authority to permit Applicant's Large CAFO under the guise of being a Medium CAFO or two medium CAFOs. Alternatively, if the Court determines Applicant needs a "Large" CAFO CUP, this case should be remanded for findings with respect to Applicant's compliance with "Large" CAFO requirements and a related decision by the appropriate county entity.

g. Applicant failed to meet required deadlines under the Ordinance and the Decision, including submission of information prior to the Hearings and submission of a to-scale map. Applicant's "plan" for the CAFO was a moving target that was never fully considered by the Board or the Planning Commission, which prejudiced Petitioner's ability to oppose the ever-changing plan, which violates Petitioner's Due Process rights and also means there was no authority to approve the CUP without a definitive plan being submitted. Due to Applicant's failure, the Board lacked authority to approve the CUP or to deny Petitioner's appeal. Applicant's failure and the Board's practice of "looking the other way" constitutes a violation of Petitioner's Due Process rights, an inadequate opportunity for Petitioner and its members to be heard (in a fully prepared manner), and demonstration of the Board's bias and disqualification.

h. Respondent Travis Mockler (an Applicant and member of the Board) participated in the Hearing when he was disqualified from participating in the Hearing; reversal or, alternatively, remand to a neutral Board with no participation by disqualified members is required.

i. Petitioner was not provided a fair and impartial hearing due to the Board's actual bias or unacceptable risk of actual bias, which is a violation of Petitioner's Due Process rights, a violation of its statutory and legal rights, and grounds for reversal and remand of the Decision. Evidence of such bias includes, but is not limited to, the following: the Board overlooked and excused Applicant's failure to comply with requirements of the Ordinances and its own deadlines; disparate speaking times for opponents and Applicant; hostility and disrespect shown by the Board and the Board's agents (including the state's attorney and the zoning administrator) toward opponents; the Board unilaterally yielding opponent's (a member of Petitioner) speaking time to the attorney representing Applicant to answer questions and failing to provide the balance

of her time for comments; the zoning administrator's incorrect statement of the burden of proof which was not corrected by the Board or the state's attorney and which the Board effectively adopted; and allowing the Applicant to influence the Hearing and the Board's procedural decisions through his illegal participation in the Hearing.

j. Applicant failed to meet his burden of proving compliance with the CAFO-specific and other conditional use requirements of Ordinances.

k. The Board ignored and failed to consider the generally applicable CUP requirements in the Ordinances, and instead made the Decision based only on whether the CAFO-specific requirements of the Ordinances were met (which requirements were not met).

l. Members of the Board voting in favor of granting the CUP to Applicant and thereby denying Petitioner's appeal were disqualified due to actual bias, unacceptable risk of actual bias, unalterably closed minds, conflicts of interest, partiality, not being disinterested in the proceedings, and not being free from bias or predisposition, or a combination of these factors, in a manner that violates Petitioner's legal and due process rights, therefore, remanding this matter for rehearing before an unbiased Board is required.

29. All of the actions, omissions, events, procedural deficiencies, and other matters set forth in detail in Paragraph 28 (and its subparagraphs) of this Petition shall be considered for purposes of all bases for reversal under the writ of certiorari standard set forth above in this Petition or as otherwise permitted for the relief requested in this Petition.

30. If any act or omission set forth in Paragraph 28 (and its subparagraphs) of this Petition (or anywhere else in this Petition) is, in fact, a Due Process violation, then it shall be considered by the Court for purposes of evaluating compliance with Due Process and fashioning

an appropriate remedy even if a Due Process violation is not expressly mentioned in connection with that act or omission.

31. The Board approved the Application and issued the permit for Applicant's CAFO despite Applicant's failure to comply with all requirements of Ordinances, which constitutes arbitrary or willful disregard of undisputed proof, exceeding the Board's jurisdiction, failure to regularly pursue authority, engaging in acts forbidden by law, and neglecting to perform acts required by law.

32. The Board arbitrarily or willfully disregarded undisputed proof as set forth in this Petition which entitles Petitioner to reversal of the Decision and all other relief allowed by law.

33. The Board exceeded its jurisdiction as set forth in this Petition which entitles Petitioner to reversal of the Decision and all other relief allowed by law.

34. The Board failed to regularly pursue its authority as set forth in this Petition which entitles Petitioner to reversal of the Decision and all other relief allowed by law.

35. The Board engaged acts forbidden by law or neglected to do acts required by law as set forth in this Petition entitling Petitioner to reversal of the Decision and all other relief allowed by law.

36. For the reasons set forth above, the Court should grant Petitioner's requested writ of certiorari. Specifically, Petitioners request that the Court reverse the decision of the Board and revoke (or void) the CUP granted to Applicant. Alternatively, the Court should remand this matter back to the Board for further investigation and consideration in compliance with directions from the Court.

WHEREFORE, Petitioner requests the following relief in the form of a writ of certiorari, order, judgment, or other form allowed by law:

a. all relief requested in this Petition;

b. all relief allowed under SDCL chapter 11-2, including, but not limited to, reversal or modification of the Decision under SDCL 11-2-65;

c. reversal of the Decision;

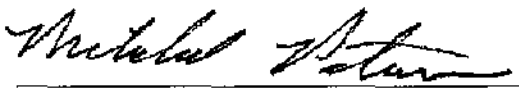
d. voiding the CUP the Board granted to Applicant;

e. alternatively, a remand of the Application to a neutral Board with no participation by disqualified members; and

f. for all other relief allowed by law.

Dated at Sioux Falls, South Dakota, this 26th day of September, 2019.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.



Mitchell A. Peterson
206 West 14th Street, PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Attorneys for Petitioner

VERIFICATION

I hereby verify that the matters set forth in the foregoing Petition are true and accurate based on my personal knowledge and on my best information and belief, and that I have authority to execute this Verification on behalf of Petitioner.

Susanne Skyrm

Susanne Skyrm on behalf of Petitioner

Subscribed and sworn to before me this 25th day of September, 2019.

Caitlin Collier

Notary Public, South Dakota
My Commission expires: 10-26-2021

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29226

SIERRA CLUB,

Petitioner/Appellant,

vs.

CLAY COUNTY BOARD OF ADJUSTMENT,
TRAVIS MOCKLER and JILL MOCKLER,

Respondents/Appellees.

Appeal from the First Judicial Circuit
Clay County, South Dakota

The Honorable Tami A. Bern
Circuit Court Judge

BRIEF OF APPELLEES TRAVIS MOCKLER AND JILL MOCKLER

ATTORNEYS FOR APPELLANT SIERRA CLUB:

Mitchell A. Peterson
Reece M. Almond
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
Sioux Falls, SD 57104
Telephone: (605) 336-2880

ATTORNEYS FOR RESPONDENT/APPELLEE CLAY COUNTY BOARD OF ADJUSTMENT:

James S. Simko
Cadwell, Sanford, Deibert & Garry, L.L.P.
200 East 10th Street, Suite 200
Sioux Falls, SD 57104
Telephone: (605) 336-0828

ATTORNEYS FOR RESPONDENTS/APPELLEES TRAVIS MOCKLER AND JILL MOCKLER:

Brian J. Donahoe
Daniel B. Weinstein
Donahoe Law Firm, P.C.
401 East 8th Street, Suite 215
Sioux Falls, SD 57103
Telephone: (605) 367-3310

Notice of Appeal filed January 8, 2020

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PRELIMINARY STATEMENT

In this brief, Appellees/Respondents, Travis Mockler and Jill Mockler, will be referred to as "Mocklers." Appellee/Respondent, Clay County Board of Adjustment, will be referred to as "the Board," and Appellant/Petitioner, Sierra Club, will be referred to as "Sierra Club."

Citations to the certified record are designated as ("CR. ___").

JURISDICTIONAL STATEMENT

Sierra Club appeals the Order signed December 13, 2019, by the Honorable Tami A. Bern of the Circuit Court for the South Dakota First Judicial Circuit, Clay County, that dismissed Sierra Club's Petition. Sierra Club filed a Notice of Appeal of the Circuit Court's Order on January 8, 2020. (CR. 95.) The Order is reviewable by this Court pursuant to SDCL 15-26A-3(2).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court properly determined Sierra Club's Petition failed to assert a cognizable claim for mandamus relief under SDCL 11-2-35.

The Circuit Court properly found the Petition was not brought under SDCL 11-2-35.

Relevant Authority:

- SDCL 11-2-35
- SDCL 11-2-6.1
- *Hallberg v. South Dakota Board of Regents*, 2019 S.D. 67, 937 N.W.2d 568
- *Sorensen v. Sommervold,* 2005 S.D. 33, 694 N.W.2d 266

II. Whether the Circuit Court properly determined it lacked subject matter jurisdiction because Sierra Club had no basis to establish "persons aggrieved" status under SDCL 11-2-61.

The Circuit Court properly dismissed the Petition because Sierra Club had no grounds to stand on.

Relevant Authority:

- SDCL 11-2-55
- SDCL 11-2-61
- *Cable v. Union Cty, Bd. of Cty. Commn'rs*, 2009 S.D. 59, 769 N.W.2d 817
- *Lake Hendricks Improvement Ass'n v. Brookings County Planning and Zoning Com'n, 2016 S.D. 48, 882 N.W. 2d 307*
- *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989)

STATEMENT OF THE CASE

The Clay County Planning Commission ("Planning Commission") issued a conditional use permit for a concentrated animal feeding operation to Mocklers and the Board properly affirmed that decision. The initial appeal within the County (appealing the decision of the Planning Commission to the Board of Adjustment) was brought by the local chapter, Living River Group, a subchapter of the South Dakota chapter of the national Sierra Club, Inc. The Sierra Club, Inc., a California non-profit corporation and national organization, then appealed the Board's decision to Circuit Court. Its appeal sought relief to reverse the Board's decision granting Mocklers' permit. (CR. 1.)

After the Petition was filed, Mocklers moved, pursuant to SDCL 15-6-12(b)(1), to dismiss the Petition facially and factually, contesting subject matter jurisdiction due to Sierra Club's lack of standing. (CR. 26, 65.) The Board joined Mocklers' motion. (CR. 40.)

On December 13, 2019, the Honorable Tami A. Bern of the Circuit Court for the South Dakota First Judicial Circuit, Clay County, issued an Order granting Mocklers' motion to dismiss on the basis that Sierra Club lacked direct standing to bring the Petition and, further, that Sierra Club lacked representational standing to bring the Petition because the claims asserted and the relief requested require the participation of Sierra Club's individual members. (CR. 89.)

Sierra Club has appealed the Circuit Court's decision to dismiss the Petition for lack of subject matter jurisdiction.

STATEMENT OF FACTS

On or about February 28, 2019, Mocklers applied for a conditional use permit ("CUP") to operate an animal feeding operation ("AFO") consisting of a new operation housing 2,499 hogs, expansion of an existing cattle feedlot to an enclosed building, and related structures on property located at 30451 464th Avenue in Pleasant Valley Township, Clay County, South Dakota, legally described as: E 700', N 1440', SW ¼ 12-94N-52W, Clay County, South Dakota. (CR. 2.) On March 25, 2019, and April 29, 2019, the Clay County Planning Commission held hearings on Mocklers' application and approved a CUP. *Id.* The local subchapter (Living Rivers Group of the South Dakota Chapter of Sierra Club, Inc.) appealed the Planning Commission's decision to the Board, and the Board held hearings on Mocklers' CUP application on June 11, 2019, July 30, 2019, and August 27, 2019. *Id.* Travis Mockler specifically questioned the right of the local chapter to bring such an appeal and squarely put that issue before the Board of Adjustment. (CR. 86.) At the conclusion of the August 27, 2019, hearing, the Board upheld the Planning Commission's decision to grant Mocklers' CUP, contingent upon their submission of a revised map indicating the exact location of the structures associated with the AFO. (CR. 3.)

The Sierra Club, Inc., a California non-profit corporation and national organization, did not bring the appeal before the Board. (CR. 1.) It attempted to plead cursory but unsupported facts alleging that it was a "person aggrieved" by the county zoning decision in this case. *Id.* Not being a party to the appeal, below, and being challenged on a facial and factual basis in a motion to dismiss, Sierra Club had an obligation to support its factual claims and set forth specific evidence establishing

standing to bring this appeal. It failed to do so. The Petition was properly dismissed, and the decision of the Circuit Court must be affirmed.

LEGAL STANDARD

Actions are subject to dismissal when the court lacks subject matter jurisdiction over the claims. SDCL 15-6-12(b)(1). "Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide." *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990). "In order to properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments." *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993) (internal citation omitted). "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true, and the motion [to dismiss] is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.* (internal citation omitted).

In a factual attack to jurisdiction, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of SDCL 15-6-12(b)(5) safeguards. *Osborn*, 918 F.2d at 729 n. 6 (citations omitted; addressing Fed. R. Civ. P. 12(b)(6), the equivalent of SDCL 15-6-12(b)(5)). In factual attacks, the court must also weigh the evidence and resolve disputed issues of fact affecting the merits of the jurisdictional dispute. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction - its very power to hear the case - there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the Petitioners'

allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. *Id. at 730.*

Finally, the procedural circumstances of this case are different from those of a typical appeal of a final zoning decision by a Board of Adjustment. The provisions of the Clay County Zoning Ordinance make its Planning Commission the county decision-maker on applications for conditional use permits. (CR. 2.) That decision may be appealed within the county prior to commencing an appeal in the Circuit Court, in this case, to the Clay County Board of Adjustment. (CR. 2); SDCL 11-2-53(2). In this instance, the appeal was brought by Living River Group, a local subchapter of the South Dakota Chapter of the national Sierra Club, Inc. The appeal raised a concern from Travis Mockler, who immediately questioned whether the Living River Group was a "person aggrieved" by the Planning Commission's decision. That issue was again raised at the Board's final meeting, when Mocklers were represented by counsel, and not waived. The appeal to the Circuit Court was met with an immediate motion to dismiss based on standing. Such an appeal from the Planning Commission to the Board is the equivalent of an inter-agency appeal and subsequent appeal to the court like an appeal under the federal Administrative Procedures Act. In such appeals, the local entity, Living Rivers Group, should have made a record of its ability to meet standing in the record before the Board. Alternatively, Sierra Club must produce evidence when challenged before the court when initially bringing an appeal and has not set forth specific facts in the Petition.[1]

[1] This distinguishes the case at bar from *Cable, supra* or *Huber v. Hanson Cty. Planning Comm'n*, 2019 S.D. 64, ¶ 18, 936 N.W.2d 565, 571, wherein this Court found "general allegations" sufficient at the pleading stage under *Lujan, supra.* More importantly, those pleadings set forth factual allegations of harm unique to the petitioner appealing, for example, "unmanageable manure and odor control on Hubers' adjacent property. *Huber*, 2019 S.D. 64, ¶

The Sierra Club, Inc. is well aware of the standards of review for such cases and knew or should have known it would be required to support a claim of standing with evidence to establish standing upon a challenge. *Sierra Club v. E.P.A.*, 292 F.3d 895 (2002), 54 ERC 1878, 352 U.S. App. D.C. 191, 32 Envtl. L. Rep. 20,738.

> In contrast to the plaintiff in a case that has not yet progressed beyond the pleading stage in the district court — at which stage the court "'presum[es] that general allegations embrace those specific facts that are necessary to support the claim,'" *Id.* (quoting *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189, 111 L. Ed. 2d 695 (1990)) — a petitioner seeking review in the court of appeals does not ask the court merely to assess the sufficiency of its legal theory. Rather, like a plaintiff moving the district court for summary judgment, the petitioner is asking the court of appeals for a final judgment on the merits, based upon the application of its legal theory to facts established by evidence in the record. Consistent with *Defenders of Wildlife*, therefore, the petitioner must either identify in that record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals. *See Amfac Resorts, L.L.C. v. DOI*, 282 F.3d 818, 830 (D.C. Cir. 2002) ("[The petitioners] are not confined to the administrative record. ...Beyond the pleading stage, they must support their claim of injury with evidence").
>
> The petitioner's burden of production in the court of appeals is accordingly the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing "by affidavit or other evidence." *Defenders of Wildlife*, 504 U.S. at 561, 112 S. Ct. at 2137. Its burden of proof is to show a "substantial probability" that it has been injured, that the defendant caused its injury, and that the court could redress that injury. *American Petroleum*, 216 F.3d at 63.

Id. 292 F.3d at 899; 352 U.S. App. D.C. at 195. This standard is also recognized by the federal Eighth Circuit Court of Appeals. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844 (2013). *Cable v. Union Cty, Bd. of Cty. Commn'rs*, 2009 S.D. 59, 769 N.W.2d 817.

18. The allegations in the Petition here are not allegations of facts which separate the harms alleged from those harms of the general public.

> The Supreme Court has not addressed "the manner and degree of evidence required" when a petitioner is seeking appellate review of an administrative action, nor has this circuit addressed the matter. The District of Columbia Circuit has equated such a petition with a motion for summary judgment, in that both request a final judgment on the merits. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Accordingly, parties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary judgment in a district court. *Id.* Our colleagues on the Seventh Circuit have also taken this approach. *See Citizens Against Ruining the Env't v. EPA,* 535 F.3d 670, 675 (7th Cir. 2008). This reasoning is sound; because parties in the League's position seek the type of relief available on a motion for summary judgment, they correspondingly should bear the responsibility of meeting the same burden of production, namely "specific facts" supported by "affidavit or other evidence." *See Lujan,* 504 U.S. at 561, 112 S. Ct. 2130.
>
> The EPA raises a factual challenge to our subject matter jurisdiction by attacking the facts asserted by the League with respect to standing, and therefore the League must establish standing "without the benefit of any inferences in [its] favor." *Defenders of Wildlife, Friends of Animals & Their Env't v. Lujan*, 911 F.2d 117, 120 (8th Cir. 1990), *rev'd on other grounds,* 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Parties seeking to litigate in federal court "have the burden of establishing jurisdiction," including standing, "by a preponderance of the evidence." *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990). *But see Sierra Club*, 292 F.3d at 899 (imposing a burden of proof to establish elements of standing to a "substantial probability" (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000))). The League seeks to assert both a procedural and a substantive challenge to the letters. We address separately its standing to make each claim. *See Int'l Bhd. of Teamsters v. Pena,* 17 F.3d 1478, 1483-84 (D.C. Cir. 1994).

Iowa League of Cities, 711 F.3d at 869-70. This Court has looked favorably upon and uses federal cases to address standing on such appeals. At the hearing, Mocklers accepted as true the statements made by Sierra Club in its verified Petition, but argued that these were insufficient and that no inference from the allegations was appropriate or accurate (they are unsupported conclusions). (CR. 113); (CR. 120-121, 137-138, 140-141).

When faced with an immediate challenge to standing, Sierra Club needed to address why it had standing and support that claim with evidence. This is especially true when the entity bringing the appeal was not a party to the underlying county zoning appeal and did not set forth specific facts in the pleadings to support the claimed status for standing.

ARGUMENT

I. The Circuit Court Properly Dismissed Sierra Club's Claim For Relief Under SDCL 11-2-35 – Dismissal Was Appropriate.

Sierra Club erroneously contends that standing is present under the standard set forth by SDCL 11-2-35 (Writ of Mandamus). Remarkably, however, there is no mandamus relief requested in the Petition. (CR. 1-12.) Sierra Club further concedes that SDCL 11-2-35 is not cited in the Petition and the term mandamus is entirely absent therein. Sierra Club's Brief, pp. 8-9. More importantly, the Petition fails to plead the elements required for mandamus relief. As such, Sierra Club's argument that failing to specifically cite SDCL 11-2-35 is inconsequential because South Dakota is a notice-pleading state actually undermines its position here.

Under notice pleading requirements, "even if a [Petition] sets forth a detailed set of facts, a failure to plead each element of a claim is fatal." *Hallberg v. South Dakota Board of Regents*, 2019 S.D. 67, ¶ 28, 937 N.W.2d 568, 577 (citation omitted). Mandamus is appropriate only if the petitioner can demonstrate a "'clear legal right to performance of the specific duty sought to be compelled'" and the respondent has "'a definite legal obligation'" to perform that duty. *Sorensen v. Sommervold*, 2005 S.D. 33, ¶ 6, 694 N.W.2d 266, 268. This was not pled. Sierra Club does not allege that the Board failed to enforce the mandates of the ordinance and does not seek to compel the

Board to perform its duties under the ordinance. *Jensen v. Lincoln Bd. Com'rs*, 2006 S.D. 61, ¶ 9, 718 N.W.2d 606, 610. Instead, Sierra Club's allegations are couched as claims for certiorari relief: Petition is brought under "SDCL 11-2-61 through 11-2-65." (CR. 1.) And, presumably declaratory relief: "Alternatively, the court should remand this matter back to the Board for further investigation and consideration in compliance with directions from the Court" (CR.11) (emphasis added). Sierra Club does not request that the Board take a ministerial act or otherwise comply with a mandatory duty. Lack of such request is fatal to Sierra Club's claim.

Even if, as alleged by Sierra Club, mandamus relief was sought through the Petition – which it was not – such a claim would fail as a matter of law. Under South Dakota law, an appeal seeking a writ of certiorari is the exclusive avenue to challenge a county board's decision to issue or deny a conditional use permit.

> Any appeal of a decision relating to the grant or denial of a conditional use permit **shall** be brought under a petition, duly verified, for a writ of certiorari directed to the approving authority and, notwithstanding any provision of law to the contrary, shall be determined under a writ of certiorari standard regardless of the form of the approving authority. The court shall give deference to the decision of the approving authority in interpreting the authority's ordinances.

SDCL 11.2.61.1 (emphasis added). Because the plain language of SDCL 11-2-61.1 makes clear that Sierra Club cannot challenge the Board's decision via mandamus, whether Sierra Club could gain standing under SDCL 11-2-35 is wholly irrelevant and inapplicable to the instant matter. Again, Sierra Club did not seek such relief and did not timely file for a writ of mandamus to direct the Board to take a ministerial act or otherwise comply with a mandatory duty. *Elliot v. Board of County Com'rs of Lake County*, 2007 S.D. 6, ¶ 13 727 N.W.2d 288, 290. Dismissal was appropriate here.

II. The Circuit Court Lacked Subject Matter Jurisdiction Because Sierra Club Had no Basis to Establish "Person Aggrieved" Status – Dismissal Was Appropriate.

"A litigant must have standing to bring a claim in court." *Lippold v. Meade Cty. Bd. Of Com'rs*, 2018, S.D. 7, ¶ 18, 906 N.W. 2d , 922 (citing *Cable*, 2009 S.D. at ¶ 21, 769 N.W.2d at 825-26). Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing. *Id.* (citing *Lake Hendricks Improvement Ass'n v. Brookings County Planning and Zoning Com'n*, 2016 S.D. 48, ¶ 19, 882 N.W. 2d 307, 313). This Court has clearly stated:

> "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." *Cable*, 2009 S.D. 59, ¶ 20, 769 N.W.2d at 825 (quoting *In re Koch Expl. Co.*, 387 N.W.2d 530, 536 (S.D. 1986)). It "can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ." *Id.* When "the right to an appeal is purely statutory ... no appeal may be taken absent statutory authorization. An attempted appeal from which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it." *Elliott v. Bd. of Cty. Com'nrs of Lake Cty.*, 2005 S.D. 92, ¶ 15, 703 N.W.2d 361, 368 (quoting *Appeal of Lawrence Cty.*, 499 N.W.2d 626, 628 (S.D. 1993)). And "when procedure is prescribed by the [L]egislature for reviewing the action of an administrative body, review may be had only on compliance with such proper conditions as the [L]egislature may have imposed." *Id.* (quoting *Appeal of Heeren Trucking Co.*, 75 S.D. 329, 330-31, 64 N.W.2d 292, 293 (1954)). Here, the Legislature identified certain classes of plaintiffs entitled to bring suit under SDCL chapter 11-2. So, absent being one of the classes of plaintiffs the Legislature authorized to petition the circuit court, "review may not be had" because there is no compliance with the conditions imposed by the Legislature. *See id.*

Lake Hendricks, 2016 S.D. 48, ¶¶ 15-16, 882 N.W. 2d at 312 (internal citations omitted).

Sierra Club contends that it has organizational standing because "its Clay County members have sufficient standing to participate as individuals in its Petition," its members participated in the underlying proceedings in opposition to Mocklers' CUP, its

appeal as an aggrieved party was accepted by the County[2] and neither the claims asserted nor the relief requested requires participation of Petitioners' individual members. (CR. 4.) An organization has standing as the representative of its members when three conditions are satisfied.

> [A]n association has standing to bring suit, on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members of the lawsuit.

Minnesota Federation of Teachers v. Randall, 891 F.2d 1354, 1358 (8th Cir. 1989) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977). That court has previously noted that each of these three requirements must be met in order to establish representational standing. *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 690 (8th Cir. 1979) (emphasis added). As noted, this Court uses the federal standing cases as authority. *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825, citing *Lujan v. Defs. of*

[2] The fact that Sierra Club's appeal, as an aggrieved party, was permitted at the county level is simply a red herring. Mocklers did not waive the issue and it bears no significance to the instant matter. The *Cable* case explicitly defines the term "persons aggrieved" with regard to standing in a civil action brought to contest a county zoning decision. *See Cable*, 2009 S.D. 59, ¶ 25, 769 N.W.2d at 827 (The right to appeal by a "person aggrieved" requires a showing that the person suffered "a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county[.]") (citation omitted). At the administrative level, the county is tasked with interpreting the terms in its ordinance. However, the zoning administrator, members of the planning commission and members of the Board are not lawyers and never addressed the phrase "persons aggrieved" as a term of art with specific requirements as identified in *Cable*. South Dakota law is clear on the meaning of "persons aggrieved" as applied under SDCL 11-2-61. Accordingly, this Court must abide by the established precedent set forth in *Cable* to determine whether Sierra Club or its members qualify as "persons aggrieved" by the county's decision. They do not. Sierra Club and its local subchapter likewise have no standing to appeal the Clay County Planning Commission's decision to grant Mocklers' CUP to the Board. Furthermore, as explained below, the administrative appeal was wrongfully allowed over objection by the Mocklers.

Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (*Lujan II*). Here, Sierra Club cannot even satisfy the first condition. As explained below, none of Sierra Club's members have standing as "persons aggrieved" under SDCL 11-2-61. Dismissal was appropriate.

a. Sierra Club and Its Members Are Not "Persons Aggrieved" and Had no Grounds to Stand on; Dismissal Was Appropriate.

Pursuant to SDCL 11-2-61,

> Any person or persons, jointly or severally, or any taxpayer, or any officer, department, board, or bureau of the county, aggrieved by any decision of the board of adjustment 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 presented to the court within thirty days after the filing of the decision in the office of the board of adjustment.

(emphasis added). SDCL 11-2-61 was amended by the Legislature in 2016 to clarify that decisions by a board of adjustment may only be appealed by persons "aggrieved." Cf. *Lake Hendricks*, 2016 S.D. 48, ¶ 17, n.2, 882 N.W. 2d at 313; SDCL 11-2-61. This Court has held that "[Petitioner's members] must satisfy three elements to establish standing as an aggrieved person such that a court has subject matter jurisdiction." *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825.

> First, the plaintiff must establish that he suffered an injury in fact -"an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan II*, 504 U.S. at 560, 112 S. Ct. at 2136, 119 L. Ed. 2d 351 (internal citations omitted). Second, the plaintiff must show that there exists a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains. *Benson*, 2006 S.D. 8, ¶ 22, 710 N.W.2d at 141. The causal connection is satisfied when the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan II*, 504 U.S. at 560, 112 S. Ct. at 2136, 119 L. Ed. 2d 351 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976)). Finally, the plaintiff must show it is likely, and not

> merely speculative, that the injury will be redressed by a favorable decision. *Benson*, 2006 S.D. 8, ¶ 22, 710 N.W.2d at 14.

Cable, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825.

Sierra Club contends that its members are aggrieved by the Board's decision to grant Mocklers' conditional use permit because, "among other reasons, the [Board's] Decision creates a serious risk of pollution, diminished water quality, diminished air quality, increased odors, increased flies and pests, increased glare, negative economic decreased property values, incompatibility with surrounding areas and properties, negative impacts on ecology and wildlife and dilapidation and deterioration of road there by increasing the tax burden on Petitioners' members." (CR. 5.) Sierra Club further states that its members "are aggrieved by the Decision in ways that the general public is not aggrieved." *Id*. Unfortunately, under South Dakota law, none of those reasons are sufficient to gain standing as a "person aggrieved" for purposes of appealing a county board's decision.

> The right to appeal by a "person aggrieved" required a showing that the person suffered "a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county[.]" *Id.* at 137-38. "[O]nly such persons as might be able affirmatively to show that they were aggrieved in the sense that by the decision of the board they suffered the denial of some claim of right, either of person or property, or the imposition of some burden or obligation in their personal or individual capacity, as distinguished from any grievance they might suffer in their capacities as members of the body public." *Cuka v. School Bd. of Bon Homme School Dist. No. 4–2 of Bon Homme County*, 264 N.W.2d 924, 926 (S.D. 1978) (quoting *Camp Crook Independent School Distr. No. 1 v. Shevling*, 65 S.D. 14, 26, 270 N.W. 518, 524 (1936); *Blumer v. School Board of Beresford Ind. Sch. Dist. No. 68 of Union County*, 250 N.W.2d 282, 284 (S.D. 1977)). When the threatened injury "will affect not only the other freeholders besides the plaintiffs, but all the inhabitants of that local district, whether they are freeholders or not[,] the injury is not personal but rather an injury to all citizens and members of the community." *Wood v. Bangs*, 46 N.W. 586, 588, 1 Dakota 179 (Dakota Terr. 1875).

Cable, 2009 S.D. 59, ¶ 26, 769 N.W.2d at 825.

No unique or personal injury has been alleged by Sierra Club's members, as all Clay County taxpayers would potentially be affected by each and every "risk" identified above. Further, Sierra Club's members fail to provide sufficient reason as to why they are aggrieved in ways that the general public is not. *See Cable*, 2009 S.D. 59, ¶ 28, 769 N.W.2d at 828 (Petitioners are "required to plead a unique and personal injury as opposed to a general taxpayer injury in order to proceed under [SDCL 11-2-61]." This has not been done. Any injury suffered by Sierra Club's members in terms of the proposed AFO's impact on the water sources in and around Clay County will be shared by all taxpayers and electors. All claimed injuries in the Petition are conclusory statements which have no factual support to distinguish them from alleged harm impacting other taxpayers or residents of the area. Sierra Club relied solely on its interest in the environment and use of natural resources for farm to itself as an organization. Other statements as to harm to its Clay County members are devoid of facts as to harms or injuries unique from the general public. Thus, their generalized allegation does not pass muster under South Dakota case law for Sierra Club or its members to gain standing as a "persons aggrieved" under SDCL 11-2-61. *Id.* Without standing, this Court does not have subject matter jurisdiction over this action, and Sierra Club's' claims must be dismissed. *Cable*, 2009 S.D. 59, ¶ 51, 769 N.W. 2d 817, 825. Dismissal was appropriate here.

b. The Circuit Court Properly Determined Sierra Club Cannot Proceed in This Action Without the Participation of Its Individual Members to Establish Standing.

As explained above, under SDCL 11-2-61, the appeal of a county zoning decision may only be brought by "persons aggrieved." Under *Cable*, to satisfy this requirement, Sierra Club is "required to plead a unique and personal injury as opposed to a general taxpayer injury." *Cable*, 2009 S.D. 59, ¶ 28, 769 N.W.2d at 828 (emphasis added). Put simply, this cannot be done without the participation of Sierra Club's individual members residing in Clay County because fact-intensive individual inquiry is required under the *Cable* analysis to achieve persons aggrieved status. *See e.g. Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-603 (7th Cir. 1993) (organizational standing is denied in "situations in which it is necessary to establish 'individualized proof,' … for litigants not before the court in order to support the cause of action."); *see also e.g. Spindex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282, 1292-1293 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 317, 193 L. Ed. 2d 227 (2015) (organization lacked standing because participation by individual members would be required).

The Sierra Club alleges that the organization will be harmed by pollution from the proposed land use because its mission is to prevent pollution. (CR. 4.) Like Mr. Cable in the *Cable* case, a showing of alleged harm to the party bringing the appeal is not sufficient. That harm must be different from or unique to harms to the general public. Again, no personal or unique injury different from that of the general public can be alleged without the participation of Sierra Club's members that are Clay County residents. Sierra Club, as an organization, alleges no interest in the subject matter of the

Board's decision, other than the interests of its individual members. There is no allegation in its Petition that the national Sierra Club is harmed by the proposed land use, such as a claim that the organization owns property there itself or has a lease or other interest in Clay County directly impacted by the proposed farm operation. Each and every allegation in the Petition is a general harm (albeit with a conclusory recitation of the "person aggrieved" standard by claiming at paragraph 22, without a single supporting fact, that it and its members "are aggrieved by the Decision in ways the general public is not aggrieved."). Its vague allegation of injury to Clay County waterways demonstrates no specific and direct effect on any unique or person interest sufficient to confer standing. (CR 3-4.) Its specific allegations of harm are equally nebulous or speculative, and none address the actual organization itself:

> Petitioner and its members are aggrieved by the Decision and related issuance of the CUP to Applicant, because, among other reasons, the Decision creates a serious risk of pollution, diminished water quality, diminished air quality, increased odors, increased flies and pests, increased noise, increased glare, negative economic impacts, decreased property values, incompatibility with surrounding area and properties, negative impacts on ecology and wildlife, and dilapidation and deterioration of roads, thereby increasing the tax burden on Petitioner's members.

(CR. 4.) This is merely a laundry list of policy reasons to oppose the proposed land use, without any direct allegation of harm to the national organization.

Claims of environmental damage are by their nature capable of being made by a great number of parties; it is therefore important to limit the entitlement to judicial review to those parties capable of demonstrating a direct, specific, legally cognizable interest distinct from the interests of the general public. *See e.g. Citizens for Safe Waste Management v. St. Louis County*, 810 S.W.2d 635, 639 (Mo. App. 1991). Because Sierra Club cannot proceed in this action without the participation of its members, it lacked

organizational standing to bring suit. *Minnesota Federation of Teachers,* 891 F.2d at 1358 (8th Cir. 1989). All of the harm alleged is direct to Sierra Club's members, not the organization itself. Put simply, the Sierra Club has suffered no injury in fact absent that which is alleged by its Clay County residents. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 476-7 (1982) (organization that claimed no injury to itself as an organization could present no claim to standing different from the standing of the members it sought to represent). It further has no legally protected interest that is affected by the disputed zoning decision and therefore suffered no judicially cognizable harm. Notably, there is no procedural right implicated here because the local subchapter brought the appeal from the Planning Commission to the Board, not the national Sierra Club. Thus, because the petitioner before the Circuit Court was not a party to the administrative appeal, there is no direct procedural right at issue. It must therefore establish a procedural right of its members. *Lujan,* 504 U.S. at 573 n. 8, 112 S. Ct. 2130 (the violation of a procedural right can constitute an injury in fact "so long as the procedures in question are designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of his standing."); *see also Sierra Club v. Glickman,* 156 F.3d 606, 616 (5th Cir. 1998). Had Sierra Club, Inc. been the appellant, some procedural rights might have been implicated. If a petitioner "is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA,* 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007); *see also Sierra Club v. EPA,* 699 F.3d 530, 533 (D.C. Cir. 2012). Likewise, the absence of any evidence being presented to the Board by the local

subchapter, Living Rivers Group of the South Dakota chapter, renders the Sierra Club without any evidence to establish standing even for its individual members.

An organization with no legally protected interest and no cognizable injury that is merely concerned with the protection of natural resources does not have standing to contest a zoning decision or act as petitioners in a proceeding to review the action of a board of adjustment without pleading individual member injury. *See Sierra Club,* 405 U.S. at 740 (1972) (Organization's mere interest in a problem, no matter how long standing 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" by agency action); *see also e.g. Citizens for Safe Waste Management,* 810 S.W.2d at 639 (Mo. App. 1991) (citations omitted) (in order to gain standing the organization must itself demonstrate a legally cognizable interest separate and apart from the interests of its members); *Sierra Club v. EPA,* 292 F.3d at 901 (proffered evidence of maps, address lists and declaration of professor from another case with a different regulatory Rule "are 'legally insufficient' to demonstrate that at least one member of the organization lived at the time of filing and continues to live in a place affected by the Rule" at issue). Direct stake organizational standing cannot be based on a mere "organizational interest in [a] problem"; cognizable harm to the organization must be present.[3] *Sierra Club,* 405 U.S. at 739 (1972). There is no such harm here, and a member must be part of this suit for standing.

[3] Sierra Club does not contend that the organization itself has suffered any legally cognizable injury. There are no allegations of economic injury, it has not alleged that the organization was prohibited from engaging in lawful activity, and no lawful activity has been nullified or unwound by the Clay County zoning decision. These are examples of those relatively rare instances in which courts have accepted organizations' grounds to support the theory of direct stake organizational standing. *See* Ryan Baasch, *Reorganizing Organizational Standing*, 103 Va. L.

No "person aggrieved" (a representative member) brought the lawsuit, nor, as explained below, brought the appeal to the Board from the determination of the Planning Commission. Without a representative member, there is no standing to sue. Likewise, the Board was without jurisdiction to hear the appeal from the Planning Commission and exceeded its authority. Mocklers were entitled to dismissal on those grounds as well. This Court may dismiss on any appropriate grounds on this *de novo* review. "We will affirm the circuit court if there is a basis on the record to do so." *Osman v. Karlen & Associates*, 2008 S.D. 16, ¶ 23, 746 N.W.2d 437, 444 (citations omitted).

c. For the Same Reasons, the Appeal of the Planning Commission's Decisions Was Improper, as the Sierra Club or a Local Chapter Are Not "Persons Aggrieved" Under the Clay County Zoning Ordinance, and the Board of Adjustment Exceeded Its Authority to Act.

As noted in the Petition at paragraph 4, the Planning Commission held public hearings on Mocklers' application for approval of a conditional use permit and granted that permit on April 29, 2019 (CR. 2.) Pursuant to Section 11.06 of the Clay County Zoning Ordinance, appeal of that decision to the Board is allowed for a "person aggrieved" by the Planning Commission decision. *Id.* Sierra Club, Inc. claims that it brought that appeal. *Id*. Instead, the local subchapter actually brought the appeal. For the same reasons set forth above, the local subchapter is not considered a "person aggrieved" under South Dakota law as understood at the time of adoption of the Clay County Zoning Ordinance and later amendments. It is axiomatic that Sierra Club was not "persons aggrieved" to take an appeal of the decision by the Planning Commission; they

Rev. Online 18 (2017). No such injury is alleged here. Dismissal was appropriate, and this appeal lacks justification as to this particular project.

lacked standing before the Board, just as they lack standing before this Court on the statutory appeal.

Mocklers raised this issue and preserved it for appeal at the public hearing by the Board. (CR. 86, 117.) Travis Mockler specifically asked, at the first meeting of the Board of Adjustment, what "person aggrieved" had brought the appeal of the Planning Commission decision, and how that term would be interpreted by the Board of Adjustment. *Id.* That issue was never decided by the Board, and at the final meeting, it was made clear that the issue of whether Sierra Club could be a "person aggrieved" was preserved. Because neither the local subchapter nor the national Sierra Club is a "person aggrieved" under South Dakota law, the Board had no authority to hear the appeal of the Planning Commission's decision to grant the conditional use permit. The action of the Planning Commission on April 29, 2019, must stand. Any conditions or requirements imposed at the Board would not apply.

The Board was not authorized to hear an appeal from the Planning Commission. SDCL 11-2-55 only allows an appeal of a zoning decision to the Board of Adjustment by a "person aggrieved" by that decision. There is no statutory authority for an appeal from the Planning Commission from others who are merely taxpayers or otherwise interested in the zoning decision, where that body is duly authorized under the county zoning ordinance to decide conditional uses pursuant to SDCL 11-2-17.3 and SDCL 11-2-17.4. Because the Zoning Ordinance uses a term which is commonly understood to have a specific legal meaning, and is consistent with SDCL 11-2-55 statutory authority, Sierra Club must have standing as a "person aggrieved" in order to appeal, even to the Board. Without this, the Board had no authority to act, and by the terms of its own Zoning

Ordinance, had no jurisdiction over the appeal of the Planning Commission decision. The Petition would be properly dismissed because the Board exceeded its authority and could not entertain the appeal by this club. Its action was thus a nullity and the Planning Commission decision must stand. This is an appropriate inquiry on appeal under SDCL 11-2-61.

> Our case law indicates that the scope of review of a writ under SDCL chapter 11-2 is "whether the *board of adjustment had jurisdiction over the matter* and whether it pursued in a regular manner the authority conferred upon it." *Elliott,* 2005 S.D. 92, ¶ 14, 703 N.W.2d at 367 (quoting *Hines v. Bd. of Adjustment of City of Miller,* 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 234) (emphasis added). "The test of jurisdiction is whether there was power to enter upon the inquiry[.]" *Becker v. Pfeifer,* 1999 S.D. 17, ¶ 15, 588 N.W.2d 913, 918 (quoting *Janssen v. Tusha,* 68 S.D. 639, 5 N.W.2d 684, 685 (1942)).

Lake Hendricks Improvement Ass'n v. Brookings County Planning and Zoning Com'n, 2016 S.D. 48, ¶ 26, 882 N.W.2d 307, 315. The Board had no "power to enter upon the inquiry" where the local subchapter of Sierra Club had no standing. *Id.*

Because the Board had no jurisdiction, it had no authority to act. An appeal to the Circuit Court includes determining if the Board exceeded its authority, which is a claim raised by Sierra Club itself. (CR. 6.) Its action must be reversed if the Circuit Court were to do anything at all. This is no mere technicality. Because Sierra Club's initial argument for appeal is a claim that the Board lacked authority to act, a court would be required to review the authority at issue. Likewise, Mocklers could and did raise the issue of lack of jurisdiction or authority for the Board to act. This was all within the proper scope of an appeal under SDCL 11-2-61. *Lake Hendricks Improvement Ass'n*, 2016 S.D. 48, ¶ 26, 882 N.W. 2d at 315. Assuming, *arguendo*, that Sierra Club is correct in claiming that the Board of County Commissioners alone could entertain the appeal, the

standard on appeal of a county commission decision is the same now. *Id.* (applying *certiorari* standard); SDCL 11-2-61.1 (applying *certiorari* standard of review to all zoning appeals); *Cable, supra*, applying "aggrieved person" standing.

Of course, the Mocklers' agreement that the Board had no authority to act does not, of itself, result in a lack of standing. That comes about because the relief sought by Sierra Club is not available or will not solve the problem the case seeks to address. The Circuit Court inquiry into the authority of the Board would require analysis of the Board's authority for that appeal. This would, in turn, trigger a standing analysis. For the reasons set forth above, there was no standing for appeal to the Board. In that case, because the Board of Adjustment could not hear an appeal, the court appeal would result in *less conditions or restrictions* than the Planning Commission imposed. In this particular case, it cannot be presumed that the Board of County Commissioners, who are the same people who make up the Board of Adjustment, would make a different decision *if* the case were remanded, and *if* the Board of County Commissioners found standing to appeal the Planning Commission's decision. It is important to keep in mind that that "certiorari will not lie to review technical lack of compliance with law or be granted to correct insubstantial errors which are not shown to have resulted in prejudice or to have caused substantial injustice[.]" *Adolph,* 2017 S.D. 5, ¶ 7, 891 N.W.2d at 381, quoting *State ex rel. Johnson v. Pub. Utils. Comm'n of S.D.*, 381 N.W.2d 226, 230 (S.D. 1986); 14 Am. Jur. 2d *Certiorari* § 14, Westlaw (database as of February 2017). At best, Sierra Club argues that a failure of a procedural right that is not substantive, and does not result in a direct harm to it, since it was not the party taking part in the county appeal. Thus, Sierra Club cannot appeal, as there is no redress in this case. To establish redress, the

U.S. Supreme Court has insisted that there must be a "substantial likelihood" that the relief sought from the court if granted would remedy the harm. *See Lujan*, 504 U.S. 555, 595 (1992); *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 612-617 (1989) (plurality opinion); *Allen v. Wright*, 468 U.S. 737, 751 (1984). In *Spokeo, Inc. v. Robins*, the Supreme Court explained that a concrete injury requires that an injury must "actually exist" or there must be a "risk of real harm," such that a plaintiff who alleges nothing more than a bare procedural violation of a federal statute cannot satisfy the injury-in-fact requirement. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016). Where, as here, Sierra Club asserts a violation of an ordinance or statute as a procedural right, the party bringing the action "must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population." *Id*., citing *Lujan, supra,* at 578, 112 S. Ct. 2130.

Beyond that, the allegations in support of the appeal are centered on matters that do not raise specific injury or harm to Sierra Club as an organization or its individual members, apart from their concerns as citizens or taxpayers in Clay County. In this case, Sierra Club (whether local subchapter or national organization) does no more than seek protection of the "undifferentiated public interest" in faithful execution of the law. *Lujan, supra,* at 577, 112 S. Ct., at 2145; *see also Fairchild v. Hughes*, 258 U.S. 126, 129-130, 42 S. Ct. 274, 275, 66 L. Ed. 499 (1922). "This does not suffice." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106, 118 S. Ct. 1003, 116 (1998). In the end, standing cannot be established and the appeal is simply not allowed by statute. SDCL 11-2-61.

CONCLUSION

In sum, the Circuit Court lacked subject matter jurisdiction over this action because Sierra Club had no grounds to make the appeal under SDCL 11-2-61. Neither Sierra Club nor its members are persons aggrieved under SDCL 11-2-61 because no unique or personal injury alleged is different from that which will be suffered by all Clay County taxpayers. Further, even if Sierra Club's Clay County members did have standing to bring suit – which they do not – the Club lacks organizational standing because the "persons aggrieved" standard requires individualized proof of injury unique to members of its organization. Clearly, this burden cannot be met without the participation of Sierra Club's individual members. No such person (individual members) have timely appealed. Likewise, even after raising the issue before the Board of Adjustment, no "person aggrieved" was identified, and the appeal of the Planning Commission was not proper. Thus, the entire proceeding of the Board of Adjustment exceeded its authority to act. If a Court were to undertake an appeal under the applicable *certiorari* standard, no redress is available to the Sierra Club or its chapters or local groups. The decision of the Circuit Court dismissing the case for lack of standing should be affirmed.

Dated this 20th day of March, 2020.

DONAHOE LAW FIRM, P.C.

/s/ Brian J. Donahoe
Brian J. Donahoe
Daniel B. Weinstein
401 East 8th Street, Suite 215
Sioux Falls, SD 57103-7008
Telephone: (605) 367-3310
Facsimile: (866) 376-3310
Email: brian@donahoelawfirm.com
daniel@donahoelawfirm.com
Attorneys for Appellees Travis and Jill Mockler

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellees Travis and Jill Mockler complies with the type volume limitation set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word, this Brief contains 7,743 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 365.

Dated this 20th day of March, 2020.

/s/ Brian J. Donahoe
Brian J. Donahoe

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Brief of Appellees Travis Mockler and Jill Mockler** was filed and served electronically using the South Dakota Supreme Court email address, and the original and two hard copies sent by U.S. Mail to the Clerk of the Supreme Court, and that an electronic of the same was emailed upon the following individuals:

Mitchell A. Petersen
Reece M. Almond
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
mpeterson@dehs.com
ralmond@dehs.com
Attorneys for Appellant

James S. Simko
Cadwell, Sanford, Deibert & Garry, L.L.P.
200 East 10th Street, Suite 200
Sioux Falls, SD 57104
jsimko@cadlaw.com
Attorneys for Appellee Clay County Board of Adjustment

Dated this 20th day of March, 2020.

/s/ Brian J. Donahoe
Brian J. Donahoe

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29226

SIERRA CLUB,

Petitioner/Appellant,

vs.

CLAY COUNTY BOARD OF ADJUSTMENT, TRAVIS MOCKLER AND JILL MOCKLER,

Respondents/Appellees.

APPELLEE CLAY COUNTY BOARD OF ADJUSTMENT'S JOINDER IN APPELLEES TRAVIS MOCKLER AND JILL MOCKLER BRIEF

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

HONORABLE TAMI A. BERN
Presiding Judge and Circuit Court Judge

Attorneys for Petitioner/Appellant:

Mitchell A. Peterson
Reece M. Almond
Davenport, Evans Hurwitz & Smith LLP
206 West 14th Street
Sioux Falls, SD 57104
(605) 336-2880

Attorneys for Respondent/Appellee Clay County Board of Adjustment

James S. Simko
Cadwell Sanford Deibert & Garry
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

Attorneys for Respondents/Appellees Travis Mockler and Jill Mockler

Brian J. Donahoe
Daniel B. Weinstein
Donahoe Law Firm, PC
401 East 8th Street - Suite 215
Sioux Falls, SD 57103
(605) 367-3310

Notice of Appeal filed January 8, 2020

Appellee Clay County Board of Adjustment, by counsel of record, joins in the Brief submitted by Appellees Travis Mockler and Jill Mockler for all the reasons and authorities set forth therein, except Footnote 2 and Argument Section II c. The Mocklers did not commence an appeal to the Circuit Court challenging the Board's authority and jurisdiction to impose conditions in connection with granting the Conditional Use Permit and that issue is not properly before this Court.

Dated at Sioux Falls, South Dakota, this 31st day of March, 2020.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____

James S. Simko
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828
jsimko@cadlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Appellee Clay County Board of Adjustment Joinder in Appellees Travis Mockler and Jill Mockler Brief with the Clerk of Court at SCClerkBriefs@ujs.state.sd.us pursuant to Rule 13-11 and served by e-mail to the following:

Mitchell A. Petersen
Reece M. Almond
Davenport, Evans, Hurwitz & Smith, LLP
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
mpeterson@dehs.com
ralmond@dehs.com
Attorneys for Appellant

Brian J. Donahoe
Daniel B. Weinstein
Donahoe Law Firm
401 East 8th Street - Suite 215
Sioux Falls, SD 57103
brian@donahoelawfirm.com
daniel@donahoelawfirm.com
Attorneys for Appellees Travis Mockler and Jill Mockler

this 31st day of March, 2020.

The undersigned further certifies that the original and two (2) copies of the foregoing Appellee Clay County Board of Adjustment Joinder in Appellees Travis Mockler and Jill Mockler Brief were mailed to:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

by U.S. Mail, postage prepaid, this 31st day of March, 2020.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____

James S. Simko
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828
jsimko@cadlaw.com

IN THE SUPREME COURT
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CLAY COUNTY BOARD OF ADJUSTMENT,
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Appeal from the Circuit Court
First Judicial Circuit
Clay County, South Dakota

The Honorable Tami A. Bern, Presiding Judge

REPLY BRIEF OF APPELLANT

Mitchell A. Peterson
Reece M. Almond
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
Sioux Falls, SD 57104
Telephone: (605) 336-2880

Attorneys for Petitioner/Appellant

James Simko
Cadwell, Sanford, Deibert & Garry, LLP
200 East 10th Street – Suite 200
Sioux Falls, SD 57104
Telephone: (605) 336-0828

Attorneys for Respondent/Appellee
Clay County Board of Adjustment

Brian J. Donahoe
Daniel B. Weinstein
Donahoe Law Firm, P.C.
401 East 8th Street, Suite 215
Sioux Falls, SD 57103
Telephone: (605) 367-3310

Attorneys for Respondents/Appellees
Travis Mockler and Jill Mockler

Notice of Appeal filed January 8, 2020

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INTRODUCTION

Mocklers' response brief has multiple, significant shortcomings. For example, Mocklers relegated *Huber v. Hanson County Planning Commission*, this Court's most recent decision on standing under SDCL 11-2-61, to a single footnote. Another recent standing case—*Abata v. Pennington County Board of Commissioners*—is conspicuously absent from Mocklers' brief.

Another shortcoming in Mocklers' response is that they failed to scrutinize the statutory language of SDCL 11-2-61, which ultimately is what controls whether Sierra Club has standing. In doing so, Mocklers ignore the fact that such language allows "persons" (plural) who are "jointly" aggrieved to commence an action under SDCL 11-2-61.

Also, Mocklers attempt to rely on factual assertions that are not in the Petition (which is improper given the Circuit Court determined Mocklers' motion to dismiss was a facial attack and Mocklers did not appeal that determination) nor the certified record (which is improper as a matter of basic appellate procedure, *see* SDCL 15-26A-60(5) ("Each statement of a material fact shall be accompanied by a reference to the record where such fact appears.")). These shortcomings are addressed in more detail below.

More generally, it is important not to lose sight of the forest through the trees. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). No concerns have been raised as to Sierra Club's ability or willingness to

vigorously advocate for and prosecute the issues presented in the Petition. In fact, given Sierra Club's resources, expertise, and member support, it is likely that the issues presented in the Petition will be more "illuminated" than if Sierra Club's individual members were to prosecute the Petition on their own. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289-90 (1986). With that in mind, Sierra Club offers the following reply arguments.

REPLY ARGUMENT

I. Sierra Club Sufficiently Pleaded a Claim for Relief under SDCL 11-2-35, and Sierra Club Has Representational Standing Thereunder

Because South Dakota still adheres to the rules of notice pleading, meaning Sierra Club's Petition "need only contain a short and plain statement of the claim showing that the pleader is entitled to relief," Sierra Club sufficiently pleaded a claim for relief under SDCL 11-2-35. *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409. *See also Richards v. Lenz*, 539 N.W.2d 80, 87 (S.D. 1995) ("[W]e are required to construe pleadings liberally for the purpose of determining its effect with a view of doing substantial justice between the parties.").

Mocklers argue that because the Petition does not contain the word "mandamus," it failed to plead a claim under SDCL 11-2-35. This Court's recent decision, *Huber v. Hanson Cnty. Planning Comm'n*, 2019 S.D. 64, 936 N.W.2d 565, proves Mocklers' argument is wrong. In *Huber*, the pleader failed to include the word "certiorari" in his petition seeking relief under SDCL 11-2-61. Nevertheless, this Court found the pleader sufficiently pleaded a claim under SDCL 11-2-61. *Id.* at ¶¶ 14-22, 936 N.W.2d at 570-72. That is because notice pleading does not require the pleader utilize specific or technical words or forms. SDCL 15-6-8(e); *East Side Lutheran Church of Sioux Falls v.*

NEXT, Inc., 2014 S.D. 59, ¶ 13 n.6, 852 N.W.2d 434, 439 n.6 (recognizing a pleader does not need to specifically outline each separate cause of action). Therefore, that the Petition did not include the word "mandamus" is inconsequential.

Mocklers also argue the Petition failed to plead each element of a claim under SDCL 11-2-35. That is not so. SDCL 11-2-35 allows any taxpayer to institute mandamus proceedings "to compel specific performance by the proper official or officials of any duty required by this chapter and by any ordinance adopted thereunder." The Petition does just that. The Ordinances required Sierra Club's appeal of the Planning Commission decision to be heard by the board of county commissioners, not the board of adjustment. (CR. 6-7) Yet, the board of adjustment heard Sierra Club's appeal, which resulted in different voting requirements and burdens of proof that favored Mocklers over Sierra Club. (CR. 6-7) Accordingly, the Petition asks the Circuit Court to compel specific performance of the county to have the board of county commissioners, not the board of adjustment, consider Sierra Club's appeal of the Planning Commission decision so that the proper voting requirements and burdens are employed, which is a duty required under the Ordinances. (CR. 6-7, 12) Nothing more was required to plead a claim under SDCL 11-2-35 given South Dakota's liberally-construed notice pleading standards. *See Gruhlke*, ¶ 17, 756 N.W.2d at 409; *Richards*, 539 N.W.2d at 87.

Lastly, Mocklers argue a claim under SDCL 11-2-35 was not available to Sierra Club, because certiorari relief was Sierra Club's exclusive remedy. This argument fails to recognize the two separate and distinct reliefs requested by the Petition. Yes, the Petition challenges the grant of the conditional use permit and requests that it be revoked, which is why certiorari relief was pleaded. The Petition *also* challenges the county's

conduct in having the wrong entity consider Sierra Club's appeal of the Planning Commission's decision, which is why mandamus relief is the appropriate relief. *See* SDCL 11-2-35. Both claims, which are not mutually exclusive, can proceed simultaneously, *see* SDCL 15-6-8(e)(2) ("A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses."); *Huber*, ¶ 21, 936 N.W.2d at 571, and Mocklers cite no authority saying otherwise.

In sum, Sierra Club sufficiently pleaded a claim under SDCL 11-2-35. And, as explained in Sierra Club's opening brief, Sierra Club has representational standing under SDCL 11-2-35. Notably, Respondents do not dispute Sierra Club has representational standing under SDCL 11-2-35.

II. Sierra Club Has Direct Standing and Representational Standing under SDCL 11-2-61

A. Sierra Club Has Direct Standing under SDCL 11-2-61

As explained in Sierra Club's opening brief, Sierra Club has direct standing under SDCL 11-2-61, because SDCL 11-2-61 affords "any person or *persons, jointly* or severally" aggrieved by a decision of a board of adjustment the right to appeal said decision and Sierra Club, as a nonprofit environmental organization, is a "person" as defined in SDCL Title 11 and was aggrieved by the Board's decision.

Respondents do not contest Sierra Club is a "person" as defined in SDCL Title 11 or that SDCL 11-2-61 permits a collection of individuals (i.e., person in the plural) jointly aggrieved to appeal a decision.

Mocklers do argue that Sierra Club was not "aggrieved" by the Board's decision. In doing so, Mocklers attempt to impose a heightened pleading requirement on Sierra

Club, claiming Sierra Club needed to present specific evidence to establish standing. This argument fails.

The Circuit Court determined Mocklers' motion to dismiss was a facial challenge to jurisdiction (and Mocklers did not appeal that determination). (CR. 89) "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true[.]" *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Further, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)[.]" *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 175. "General allegations suffice at the pleading stage because it is presumed that general allegations embrace those specific facts that are necessary to support the claim." *Huber*, ¶ 18, 936 N.W.2d at 571 (internal quotations omitted). Accordingly, Sierra Club did not need to present specific evidence of standing.

Furthermore, Sierra Club's Petition[1] puts forth sufficient facts to establish it was aggrieved by the Board's decision. Mocklers claim "[a]ll of the harm alleged is direct to Sierra Club's members, not the organization itself." (Mocklers' Brief at 18.) Mocklers seemingly failed to read those paragraphs of the Petition alleging harm specific to Sierra Club, or are being intentionally obtuse. Sierra Club was aggrieved by the Board's decision in the following ways (which were more thoroughly discussed in Sierra Club's

[1] Even if Sierra Club was required to put evidence into the record, it did through its Petition. Because the Petition is verified, it has the same effect as an affidavit. *See In re Petition for Writ of Certiorari as to the Determination of Election on the Brookings School District's Decision to Raise Additional General Fund*, 2002 S.D. 85, ¶ 8, 649 N.W.2d 581, 584 (recognizing that a verification is "an affidavit of the truth of the matter stated").

opening brief): (1) the wrong entity considered Sierra Club's appeal of the Planning Commission's decision (CR. 6-7); (2) Sierra Club's due process rights were violated because the Board was biased and had an unacceptable risk of bias (CR. 9-10);[2] and (3) issuance of the conditional use permit will negatively impact the air, water, and soil resources that Sierra Club seeks to protect (CR. 3-5). Also, Sierra Club was aggrieved in ways the general public was not aggrieved. (CR. 5) Given these factual assertions in the Petition, Sierra Club sufficiently pleaded direct standing under SDCL 11-2-61. *See Huber*, ¶ 18, 936 N.W.2d at 571 (finding allegations that a CAFO would result in offensive odors sufficient to show a person is aggrieved); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume the general allegations embrace those specific facts that are necessary to support them.") (internal quotations omitted). The Circuit Court erred when it found otherwise. Reversal is appropriate.

B. Sierra Club also Has Representational Standing under SDCL 11-2-61

Even if Sierra Club did not have direct standing under SDCL 11-2-61 (which it does), it has representational standing thereunder, because (a) its members would otherwise having standing to sue in their own right; (b) the interests it seeks to protect are

[2] *See Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 20, 772 N.W.2d 643, 651 ("For the property owner seeking the conditional use permit and for other affected property owners, due process requires fair and impartial consideration by the Turner County Board of Adjustment."); *Multistar Indus., Inc. v. U.S. Dept. of Transp.*, 707 F.3d 1045, 1054 (9th Cir. 2013) ("Notably, for standing purposes, a plaintiff alleging a procedural due process violation need not demonstrate that it would prevail had it been afforded adequate process.") (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978 ("The right to procedural due process . . . does not depend upon the merits of a claimant's substantive assertions.")).

germane to the organization's purpose; and (c) participation of its individual members is unnecessary. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). *See also Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members.").

Respondents do not dispute prong (b) of *Hunt* is satisfied here. Mocklers, however, argue that Sierra Club's members would not otherwise have standing and that Sierra Club's members must participate in the lawsuit. These arguments miss the mark.

1. Sierra Club's Members would Otherwise Have Standing under SDCL 11-2-61

Mocklers claim Sierra Club's members would not otherwise have standing under SDCL 11-2-61 because they are not persons aggrieved. The Circuit Court specifically found Sierra Club met this prong of *Hunt*, (CR. 148), and Mocklers failed to appeal that finding. Accordingly, Mocklers' arguments related to prong (1) of *Hunt* were waived. *See* SDCL 15-26A-22; *Schuck v. John Morrell & Co.*, 529 N.W.2d 894, 897 (S.D. 1995) ("An issue is not properly preserved for appeal when a party fails to file a notice of review with . . . the Supreme Court (pursuant to SDCL 15-26A-22) and, therefore, the issue is waived.").

Even if Mocklers' arguments were not waived, Mocklers ignore this Court's latest decision on standing under SDCL 11-2-61, namely *Huber v. Hanson Cnty. Planning Commission*, which is odd given their counsel was attorney of record in the *Huber* matter.

In *Huber*, this Court held that to have standing under SDCL 11-2-61, one must be aggrieved in ways taxpayers in general are not aggrieved.[3] *Id*. at ¶ 17, 936 N.W.2d at 571. For example, this Court found that a property owner living near a proposed CAFO has standing to challenge issuance of a conditional use permit because of odor concerns, even though odor may affect many. *Id*. at ¶ 18, 936 N.W.2d at 571. And that makes sense, as someone living near a proposed CAFO will experience noxious odor in a manner that other general taxpayers will not.

Here, as set forth in the Petition, Sierra Club's members will be aggrieved in ways taxpayers in general are not aggrieved (CR. 4-5); thus, they would otherwise have standing under SDCL 11-2-61 and *Huber*. Mocklers' claim "[a]ny injury suffered by Sierra Club's members in terms of the proposed CAFO's impact on the water sources in and around Clay County will be shared by all taxpayers and electors." (Mocklers' Brief at 15.) Noticeably absent from this factual representation is a citation to the certified record. That is because there is zero evidence in the record to support that assertion, and more importantly, the representation is not in the Petition, which is the sole factual source for purposes of a facial challenge to jurisdiction. *See Hutterville Hutterian Brethren, Inc.*, ¶ 20, 791 N.W.2d at 175.

The Petition makes clear that Sierra Club's individual members' injuries are different from taxpayer injury in general and, thus, standing exists. (CR. 4-5) To start, Sierra Club's members participated in the underlying county proceedings where their due process rights were violated by the Board. (CR. 4) Next, the members live, work,

[3] Stated differently, although a taxpayer's taxes may go up as a result of a challenged decision, such a generic taxpayer injury is insufficient to establish standing under SDCL 11-2-61.

recreate, and engage in other activities that will be adversely impacted by pollution from the proposed CAFO. (*Id*.) General taxpayers who do not live, work, recreate, or engage in other activities that will be adversely affected by the CAFO will not be aggrieved in the same manner as Sierra Club's members. Also, the members will be aggrieved, because, among other reasons, issuance of the conditional use permit creates serious risk of pollution, diminished water quality, diminished air quality, increased odors, increased flies and pests, increased noise, increased glare, negative economic impacts, decreased property values, incompatibility with surrounding area and properties, negative impacts on ecology and wildlife, and dilapidation and deterioration of roads. (CR. 5) Not all taxpayers in general will share all these injuries. Stated differently, Sierra Club's members are aggrieved in ways the general public is not aggrieved. (*Id*.) Accordingly, Sierra Club's members would have standing under SDCL 11-2-61. *See Huber*, ¶ 18, 936 N.W.2d at 571; *Abata v. Pennington Cnty. Bd. of Comm'rs*, 2019 S.D. 39, ¶¶ 13-14, 931 N.W.2d 714, 720 (recognizing water quality, dust, increased traffic, and reduced property values sufficient for purposes of establishing standing).

Rather than cite the most recent case on standing under SDCL 11-2-61, Mocklers rely almost exclusively on *Cable v. Union County Board of County Commissioners*, 2009 S.D. 59, 769 N.W.2d 817. *Cable*, however, does not control here.

Cable involved this Court's interpretation of SDCL 7-8-27, which affords "any person aggrieved" by a decision of a board of county commissioners standing to appeal such decision. In *Cable*, the Court concluded that the plaintiff was not a person aggrieved within the meaning of SDCL 7-8-27 because his injuries were not unique when compared with the injuries suffered by others living within a mile of a proposed refinery

site. *Cable*, ¶ 32, 769 N.W.2d at 829; *Abata v. Pennington Cnty. Bd. of Comm'rs*, 2019 S.D. 39, ¶ 10, 931 N.W.2d 714, 719 (explaining *Cable* decision). In other words, to appeal under SDCL 7-8-27, a plaintiff's injuries cannot be shared by others; the injuries must be very unique to the plaintiff.

To start, the uniqueness requirement imposed by *Cable* is confounding. The holding means that as long as a decision injures multiple people in the same manner, no appeal under SDCL 7-8-27 can be had. For example, a board of county commissioners could permit a nuclear waste facility that emits a radiation cloud a mile away from the facility. And according to the rationale of *Cable*, as long as at least two county residents live within a mile of the facility and will be exposed to radiation poisoning, neither would have a claim under SDCL 7-8-27, because their injuries (i.e., radiation poisoning) would not be unique. Certainly that is not what the Legislature intended when it drafted SDCL 7-8-27. Not surprisingly, this Court recently called into question the rationale of *Cable*, noting that *Cable's* strict application of the federal case-or-controversy requirement is improper given state courts are not governed by Article III. *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, ¶ 14 n.15, 877 N.W.2d 340, 348 n.15 ("This law is clear, and our task is to simply apply the South Dakota Constitution

and this statutory language without the judicial 'gloss' of the 'case or controversy' limitation in Article III of the federal Constitution.").[4]

Moreover, the statutory language of SDCL 11-2-61 differs materially from that of SDCL 7-8-27 such that the same uniqueness requirement does not exist. *See Arnoldy v. Mahoney*, 2010 S.D. 89, ¶ 18, 791 N.W.2d 645, 653 ("Standing . . . is *controlled by statute*.") (emphasis added). SDCL 11-2-61 affords standing to "[a]ny person or persons, jointly or severally" aggrieved by a decision of a board of adjustment. Markedly, SDCL 11-2-61 permits any number of persons who are jointly aggrieved to bring an appeal. In other words, there need not be a unique injury. By definition, when persons are jointly aggrieved, their injuries would not be unique, as at least two persons would suffer from that injury. Given SDCL 11-2-61 permits persons (i.e., person in the plural) who are jointly aggrieved standing to appeal, *Cable* does not apply and there is no *ultra*-unique-injury[5] requirement for standing under SDCL 11-2-61. *C.f. Abata*, ¶ 11, 931 N.W.2d at 719 ("[T]he statutory basis for this appeal is different than in *Cable*, and thus its analysis does not control here."). Mocklers do not even grapple with this material difference

[4] Even if this Court were to consider Article III's case-or-controversy limitation, recent Supreme Court precedent demonstrates standing exists when there is a risk of diminution of property values like there is here for Sierra Club's members. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 n.1 (2018) (recognizing a landowner has standing, even under Article III, to challenge a U.S. Fish & Wildlife designation that affects property values); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (holding that a zoning ordinance that "greatly ... reduce[d] the value of appellee's lands and destroy[ed] their marketability for industrial, commercial and residential uses" constituted a "present invasion of appellee's property rights").

[5] The injury does need to be "unique" in the sense that it differs from injury suffered by taxpayers in general. In other words, a taxpayer would not be able to appeal under SDCL 11-2-61 solely by claiming he or she is injured as a taxpayer. For example, a CAFO will cause deterioration of roads, which in turn will cause the county to spend more money to maintain said roads. That type of general, county-wide injury, by itself, would not be sufficient to confer standing under SDCL 11-2-61.

between the statutory language in SDCL 11-2-61 and the language *Cable* analyzed. That is because SDCL 11-2-61's language plainly cuts against Mocklers' argument.

Also, the statutory scheme of SDCL ch. 7-8 differs from SDCL ch. 11-2. SDCL 7-8-28 allows fifteen taxpayers to bring an appeal without being aggrieved. Therefore, if a county commission decision affects many people, the statutory remedy is gathering fifteen signatures for an appeal. In *Cable*, the Court highlighted this component of SDCL ch. 7-8 when requiring a unique injury to confer single-person standing under SDCL 7-8-27. *Cable*, ¶ 26 n.6, 769 N.W.2d at 827 n.6 ("It is important to note that in the event the allegedly illegal decision of a county board of supervisors affects all taxpayers in a particular body politic, or a portion thereof, an appeal must be brought under SDCL 7-8-28 by fifteen named taxpayers who must petition the state's attorney to undertake the appeal."). SDCL ch. 11-2 has no similar statute allowing a certain number of taxpayers to appeal a decision of a board of adjustment. For this additional reason, *Cable* is inapposite.[6]

In sum, the Petition asserted sufficient facts establishing Sierra Club's members would have standing to bring this appeal in their own right under SDCL 11-2-61. *See Huber*, ¶ 18, 936 N.W.2d at 571. Accordingly, this prong of *Hunt* is satisfied.

[6] Another distinction between SCDL 7-8-27 and SDCL 11-2-61 is that decisions made by the county commission under SDCL 7-8-27 are typically going to be legislative decisions (*Cable*, for example, involved a rezoning), whereas decisions made under SDCL 11-2-61 are quasi-judicial decisions. If one wants to appeal a legislative decision, the grievance needs to be very unique; otherwise the remedy is either through the 15-taxpayer appeal, referendum, or at the ballot box.

2. Sierra Club's Members' Participation Is Not Necessary

To have representational standing under *Hunt*, participation (i.e., as named parties) by individual members cannot be necessary. This is the prong of *Hunt* the Circuit Court determined Sierra Club did not satisfy, which was in error as explained in Sierra Club's opening brief. Mocklers join the Circuit Court and argue member participation is necessary.

Mocklers again rely almost exclusively on *Cable*'s ultra-unique-injury requirement to claim Sierra Club's members must be parties. But, as explained above, *Cable's* ultra-unique-injury requirement has no application in this case. In fact, applying *Cable's* rationale and requiring an ultra-unique injury would likely preclude representational standing from ever existing in appeals under SDCL 11-2-61, because representational standing often presupposes multiple people (i.e., the members of the organization) share in the same injuries.[7] The plain language of SDCL 11-2-61, however, recognizes that "persons" can share in the same injuries (i.e., by being "jointly" aggrieved) and still have standing to bring an appeal. Such language actually invites the use of representational standing.

The Legislature's invitation to use representational standing is not surprising. Given the type of development that occurs in rural South Dakota (e.g., concentrated animal feeding operations and wind energy systems), it is common for board of adjustment decisions to affect several persons living around where a proposed project is

[7] Importantly, representational standing does not require that all members of the organization share in the injuries. *See Warth*, 422 U.S. at 511 ("The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.") (emphasis added).

planned. That creates the potential for several individual appeals under SDCL 11-2-61 for a single project. Rather than have several individuals commence different appeals, it is often more efficient if an organization, like Sierra Club, brings a single appeal utilizing representational standing. In *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289-90 (1986), the Supreme Court recognized "the special features, advantageous both to the individuals represented and to the judicial system as a whole," representational standing provides.

> [A]n association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack. These resources can assist both courts and plaintiffs. . . . The interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.
>
> In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all. The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

Id. (internal citations and quotations omitted). Put simply, representational standing often provides a more efficient and effective adversarial process.

Furthermore, focusing on the third prong of *Hunt*—namely whether member participation is necessary—representational standing is appropriate because the relief available under SDCL 11-2-61 is limited. *See* SCDL 11-2-65 (limiting relief to reversal, affirmance, or modification of the underlying decision). "[W]hether an association has

standing to invoke the courts remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986). *See also Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind."). The exclusive relief available to Sierra Club under SDCL 11-2-61 is reversal or modification of the Board's decision. Participation from its individual members is unnecessary to administer such relief. *Id*. at 288. For this reason, and the reasons stated in Sierra Club's opening brief, member participation is not necessary here.

The cases relied on by Mocklers are distinguishable and do not advance their argument. For example, Mocklers cited *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993). That case actually supports Sierra Club's position that it has representational standing. While the court did not make a determination regarding whether the association had representational standing, it did note: "Declaratory, injunctive, or other prospective relief will usually inure to the benefit of the members actually injured and thus individualized proof of damages is often unnecessary." *Id*. at 603. In other words, when the relief requested is declaratory or injunctive in nature, representational standing is especially acceptable. That is precisely the relief Sierra Club requested here. The court also recognized the judicial efficiencies that exist with representational standing, because having a single plaintiff file a single suit is much more

preferable than, say, for example, 194 Sierra Club members residing in Clay County each filing separate actions. *Id*. at 602.

Mocklers also cited *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc*., 770 F.3d 1282 (9th Cir. 2014). That case involved a chiropractic association seeking relief on behalf of its members based on claims that a healthcare provider improperly refused to pay for certain treatment or paid at an improperly low rate. *Id*. at 1292-93. Because the allegations included "*variations* in payments wrongfully withheld, in the treatments for which payment has been withheld, and in the individual situations of [the association's] members," the allegations were specific to the individual members of the association and they, therefore, needed to participate in the proceeding. *Id.* (emphasis added). The situation here is much different, as there are no variations as to the wrongs committed here. Sierra Club's members would complain about the same wrongs committed (i.e., violating due process, failing to follow the Ordinances, and illegally issuing a conditional use permit).

Next, Mocklers cited *Citizens for Safe Waste Management v. St. Louis Cnty.*, 810 S.W.2d 635 (Mo. Ct. App. 1991). There, the court refused to allow representational standing in any zoning cases whatsoever. *Id*. at 639 ("We decline to apply in zoning cases the liberalized federal rule of organizational standing."). Here, as discussed above, the plain language of SDCL 11-2-61 invites the use of representational standing, as it allows "persons" who are "jointly" aggrieved to bring an appeal. Moreover, the persuasive value of *Citizens for Safe Waste Management* is questionable, because a more recent Missouri Court of Appeals decision allowed representational standing to be used to

challenge an ordinance. *Bldg. Owners and Mgrs. Ass'n of Metro. St. Louis, Inc. v. City of St. Louis, MO*, 341 S.W.3d 143, 148-50 (Mo. Ct. App. 2011).

Mocklers also cited *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). That case is not about representational standing; it does not even cite *Hunt*. Thus, it does not advance Mocklers' position.

In all, Sierra Club's members need not participate in an appeal under SCDL 11-2-61, the third prong of *Hunt* is satisfied, and representational standing is appropriate. *See Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 675 P.2d 344 (Idaho Ct. of App. 1983) (noting association of landowners who lived around property that had been issued a conditional use permit had representational standing to challenge the issuance of said permit).

III. Mocklers' Claim regarding Illegality of Appeal of the Planning Commission's Decision to the Board Was Waived and, Further, Is Not Supported by the Record

Mocklers also argue the Board should never have heard Sierra Club's appeal in the first place, claiming Sierra Club could not bring such an appeal under the Ordinances. This argument undoubtedly fails for three reasons.

First, this argument was waived because Mocklers failed to appeal the Board's decision to hear the appeal within 30 days pursuant to SDCL 11-2-61. Mocklers are arguing the Board acted illegally when it considered Sierra Club's appeal of the Planning Commission's decision, claiming Sierra Club was not a "person aggrieved" under the Ordinances. To claim the Board acted illegally when it heard Sierra Club's appeal, Mocklers needed to present the circuit court with a verified petition setting forth that the

Board's decision was illegal within 30 days of the decision. SDCL 11-2-61. There is no evidence Mocklers presented any such petition to the circuit court in compliance with SDCL 11-2-61. Accordingly, that argument was waived. *See Hay v. Bd. of Comm'rs for Grant Cnty*., 2003 S.D. 117, ¶ 11, 670 N.W.2d 376, 379-80. Notably, the Board agrees with Sierra Club. (*See* Appellee Clay County Board of Adjustment's Joinder).

Second, Mocklers never raised this argument to the Circuit Court. Accordingly, it was waived for that reason as well. *See State v. Gard*, 2007 S.D. 117, ¶ 14, 742 N.W.2d 257, 261 ("Ordinarily an issue not raised before the trial court will not be reviewed at the appellate level.").

And third, the argument is not supported by the record. Mocklers again make factual assertions without any citation to the record. Mocklers attempt to create some distinction between the entity that appealed the Planning Commission's decision and the entity that appealed the Board's decision. Mocklers fail to provide any citation to the certified record to support such a distinction, because such a distinction is not supported by the certified record. More importantly for purposes of a facial attack, Mocklers fail to cite to the Petition to support their contrived distinction. *Hutterville Hutterian Brethren, Inc.*, ¶ 20, 791 N.W.2d at 175 ("[T]he court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)[.]"). The Petition is clear; the same entity—Sierra Club—appealed both decisions. (CR. 1-5)

For these reasons, Mocklers' final argument fails as well.

CONCLUSION

Sierra Club respectfully requests the Court finds Sierra Club has standing to prosecute its Petition and reverses the Circuit Court's decision so that this matter can be heard on its merits.

Dated at Sioux Falls, South Dakota, this 29th day of May, 2020.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitchell A. Peterson
Reece M. Almond
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 4,424 words and 28,390 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 29th day of May, 2020.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitchell A. Peterson
Reece M. Almond
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Reply Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on April 29, 2020.

The undersigned further certifies that an electronic copy of "Reply Brief of Appellant" was emailed to the attorneys set forth below, on April 29, 2020:

James Simko
CADWELL SANFORD DEIBERT & GARRY, LLP
200 East 10th Street – Suite 200
Sioux Falls, SD 57104
jsimko@cadlaw.com
Attorneys for Appellee Clay County Board of Adjustment

Brian J. Donahoe
Daniel B. Weinstein
DONAHOE LAW FIRM, P.C.
401 E. 8th Street, Suite 215
Sioux Falls, SD 57103
brian@donahoelawfirm.com
daniel@donahoelawfirm.com
Attorneys for Appellees Travis Mockler and Jill Mockler

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mitchell A. Peterson
Reece M. Almond
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellant