IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30339

MROSE DEVELOPMENT CO., LLC; and JASON SCHUMACHER,

Petitioner and Appellees,

VS.

TURNER COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent and Appellant.

APPEAL FROM THE FIRST JUDICIAL CIRCUIT
TURNER COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID KNOFF
CIRCUIT COURT JUDGE

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL 15-26A-3(1), (2) and/or (4).

REQUEST FOR ORAL ARGUMENT

The Appellant respectfully requests the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. **May a circuit court permissibly "determine anew" the decision of a Board of County Commissioners to grant or deny a land developer's application to amend the County's zoning ordinance to change a property's zoning designation under the de novo standard with no deference to the Board's decision?**

The lower court held it was required to apply a de novo standard under SDCL 7-8-30.

- *South Dakota Department of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, 900 N.W.2d 840
- *Carmody v. Lake County Board of Commissioners*, 2020 S.D. 3, 938 N.W.2d 433
- *McLaen v. White Township*, 2022 S.D. 26, 974 N.W.2d 714
- *Little v. Hanson County Drainage Board, Hanson County*, 2022 S.D. 63, 981 N.W.2d 657

II. **Did the circuit court err as a matter of law in holding that under the Turner County zoning ordinance, the Board of County Commissioners was required to enact Ordinance #86-22 to rezone farmland because the developer's intended use for the land – although flatly prohibited in its current zoning district – would be a permissive use if the ordinance was amended to place the property in a different zoning district?**

The circuit court held that under the zoning ordinance, the Board of County Commissioners did not have any discretion on the matter, but rather had a ministerial duty to grant the land developer's application for change of zone and amend the zoning ordinance to rezone the farmland in question from the "A-1 Agricultural" district to "LR Lake Residential" district.

- *South Dakota Department of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, 900 N.W.2d 840
- *Carmody v. Lake County Board of Commissioners*, 2020 S.D. 3, 938 N.W.2d 433
- *Hines v. Board of Adjustment of City of Miller*, 2004 S.D. 13, 675 N.W.2d 231

III. **Was the Board of County Commissioners' decision to deny a land developer's application to rezone farmland from its "A-1 Agricultural District" to "Lake Residential" in order to build a two-phase housing subdivision with "light commercial development" legally justified?**

The circuit court held that the decision of the Board of County Commissioners was not legally justified because it had no discretion to deny the developer's application to rezone the farmland under its zoning ordinance.

- *South Dakota Department of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, 900 N.W.2d 840
- *Little v. Hanson County Drainage Board, Hanson County*, 2022 S.D. 63, 981 N.W.2d 657
- *Surat v. America Township, Brule County Board of Supervisors*, 2017 S.D. 69, 904 N.W.2d 61

STATEMENT OF THE CASE

On July 18, 2022, MROSE Development Co., LLC and Jason Schumacher (collectively "MROSE" or the "land developer") filed a Petition for Judicial Review under SDCL 7-8-29 against the Turner County Board of County Commissioners ("Board" or "County") in Turner County of the First Judicial Circuit. (R. 1). The petition sought to have the circuit court overturn the Board's decision not to amend its zoning ordinance to grant MROSE's application to rezone certain property from the "A-1 Agricultural District" to "LR Lake Residential." (R. 1). According to MROSE's petition:

> In reaching its conclusion the Board erroneously failed to consider the purposes and intent of the Turner County Comprehensive Development Plan and failed to consider that Petitioner's proposed change of zone would not only comport with the Development Plan's goals but would appreciably enhance the west bank of Swan Lake and cut down on pollution and run off which is incident to the agricultural purposes for which the land is currently zoned.

(R. 2). The County admitted service of the petition on July 19, 2022. (R. 15).

A hearing on the petition for judicial review was held at the Turner County Courthouse in Parker before the Honorable David Knoff, Circuit Judge, on December 7, 2022. (R. 334).

On February 9, 2023, the lower court issued its oral ruling on the record. (R. 436; App. 8). Essentially, the court held that because the farmland in question was adjacent to a lake, and because residential development violating the otherwise applicable density requirements for the Agricultural District are permitted in the Lake Residential District, the

County was required as a matter of law to grant MROSE's application to *rezone* the property from "A-1 Agricultural" to "LR Lake Residential." (R. 441-47; App. 12-19). As the court explained:

> And the – really what it comes down to is this Developers Agreement. Does it fall within the 2007 ordinance and this should be approved as long as it would meet the requirement of a – the lake development area? The exact language of that is "a lake residential district." Or is this something that should have to go through the zoning process again for this particular piece of property to be rezoned?

(R. 440; App. 12). Although it recognized that the property was zoned "A-1 Agricultural District," the court held that because it was next to a lake, the property "would also fall under what is defined in Article 6 of the zoning application – or of the zoning rules from 2007 that would fall within that lake residential description." (R. 441; App. 13).

As a result, the court held that because the farmland in question was zoned "A-1 Agricultural District" but next to a lake, and the developer intended to use it to build a residential subdivision—which is *not* permitted in the Agricultural District but *is* permitted in the Lake Residential District—the Board of County Commissioners had a "ministerial duty" to vote to grant the developer's application to *rezone* the farm to "LR Lake Residential." (R. 445-47; App. 16-18).

On April 4, 2023, the lower court rejected the County's proposed findings of fact and conclusions of law. (R. 282; App. 23).

On April 24, 2023, the lower court signed and entered the written findings of fact and conclusions of law proposed by MROSE. (R. 287; App. 3). Among the conclusions of law was its holding that the appropriate standard of review of the County Commission's decision to deny the rezoning application was "de novo" under SDCL 7-8-30 and that "[u]nder the de novo standard the Circuit Court should determine 'anew the question ... independent of the County Commissioner's decision.'" (R. 290 at # 1, 3; App. 4) (citing *Schrank v. Pennington County Board*, 1998 S.D. 108, ¶ 15, 584 N.W.2d 680, 682).

In applying de novo review, the court agreed that the farmland in question was zoned for the Agricultural District, but held that because it is next to a lake and residential development is a permitted use in the Lake Residential District, "the County therefore had no discretion to reject the Petitioner's application to rezone the property at issue." (R. 289-90 at # 3, 12; App. 4-5).

The Court thus held that "[t]he County's decision to deny the zoning application in this case is not legally justified and the Court therefore remands this matter back to the County with instructions to approve the zoning application as submitted." (R. 291 at # 8; App. 7).

That same day, the lower court entered its judgment, holding that "the Turner County decision to deny the Petitioners' zoning application is reversed and remanded with instruction to approve the application[.]" (R. 280; App.

1). The judgment further incorporated "the oral Findings of Fact and Conclusions of Law provided by the Court on February 10, 2023, and the written Findings of Fact and Conclusions of Law entered by the Court thereafter." (R. 280-81; App. 1-2).

This appeal followed.

STATEMENT OF THE FACTS

Should farmland near a lake that is zoned agricultural be rezoned to turn it into a residential subdivision—and who should make that decision?

Christe Stewart owns 145 acres of farmland in Turner County. In 2022, MROSE Development Co. ("MROSE"), a limited liability company based in Sioux Falls and owned by a land developer from Minnehaha County (Schumacher), wanted to turn the farmland adjacent to Swan Lake into a residential housing subdivision that the developer intended to name the "Bright Shores Subdivision" to be constructed in two separate phases. (R. 5, 179, 189, 200, 337, 347).

Turner County

Home to the oldest county fair in South Dakota with one of the largest 4-H enrollments, Turner County takes its agriculture seriously.[1] Its residents and the land within its county lines are governed by the

[1] The first Turner County Fair was held on the Devereaux property near Parker on October 13-16, 1880. The fair was a huge success but on the third day, snowflakes began to fall and were rolled by the winds into a blizzard heralding the terrible winter of 1880-81 described by Laura Ingalls Wilder in her autobiographical children's novel *The Long Winter*.

democratically elected Turner County Board of County Commissioners. (R. 120 at § 27.02(27); App. 47). Zoning is governed by the "2008 Revised Zoning Ordinance for Turner County" based on the Turner County Comprehensive Development Plan adopted on August 14, 2007 by the Board of County Commissioners under SDCL Ch. 11-2. (R. 33 at § 1.02; R. 137, 139; App. 30).

For rural areas, the primary goal of the Comprehensive Plan is to "[p]reserve the rural area for agricultural production and open space" and the primary policy for such areas is to "[p]reserve and protect the agricultural productivity of rural land by restricting the development of non-farm residential sites" and "[m]aintain a residential density of not more than one building per site per quarter-quarter section." (R. 167).

The express purpose of the County's 2008 Revised Zoning Ordinance is as follows:

> These regulations are designed to carry out the goals and objectives of the plan; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration or scattering of population; and to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provision of transportation, water, drainage, sewerage, schools, parks, or other public requirements.
>
> These regulations have been made with reasonable consideration to the character and intensity of the various land uses and the need for public facilities and services that would develop from those uses. These regulations are necessary for the best physical development of the county. The regulations are intended to preserve and protect existing property uses and values against adverse or unharmonious adjacent uses by zoning all unincorporated land except those areas where joint zoning

jurisdiction has been granted to a municipality.

(R. 33 at § 1.02; App. 30).

Article 2.00 (Districts and Boundaries) of the zoning ordinance divides the land in Turner County into following the zoning districts:

> **2.02 Districts Designated.** In order to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of a lot that may be occupied; the size of the yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes; the county is hereby divided into the following districts:
>
> | | |
> |---|---|
> | A-1 Agricultural | I-1 Industrial |
> | RR Rural Residential | I-2 Industrial |
> | R-1 Residential | F Floodplain |
> | LR Lake Residential District | PD Planned Development |
> | C Commercial | |

(R. 34 at § 2.02; App. 31).

All unincorporated land is located in one of these zoning districts. Under the ordinance, "[e]xcept as otherwise provided, no building shall be erected, converted, enlarged, reconstructed, or structurally altered, nor shall any structure or land be used ... [e]xcept for a purpose permitted in the district in which the structure or land is located[.]" (R. 115 at § 26.01(A)(1); App. 43). The ordinance also says that "[w]here these regulations and any other rules or regulations conflict or overlap, whichever imposes the *more stringent restrictions* shall prevail." (R. 115, § 26.01(A)(3), § 26.04; App. 43).

A-1 Agricultural District

Article 3.00 governs property, like the farmland in question, zoned as "A-1 Agricultural District." (R. 36; App. 32). The County's express intent for property zoned A-1 Agricultural is as follows:

> It shall be the intent of this district to provide for a vigoruous agricultural industry by preserving agricultural production those agricultural lands beyond areas of planned urban development.
>
> It is recognized that because of the nature of both agricultural activities and residential subdivisions, that these two uses are generally poor neighbors *and therefore a concentration of housing in the A-1 Agricultural District shall be discouraged*.

(R. 36 at § 3.01; App. 32) (emphasis supplied).

Under the ordinance, *permissive* uses for this district include, among others: Agriculture; Concentrated Animal Feeding Operations (Small or Medium); Wind Energy Turbines; Rock, Sand, or Gravel Extraction; and Mineral Exploration. (R. 36-39 at § 3.02; App. 32-35).

Conditional uses for property zoned as A-1 Agricultural include, among others: Concentrated Animal Feeding Operations (Large); Ethanol Production Facilities; Livestock Sales Barns; Stables; Ammonia Storage and Distribution Facilities; Shooting Ranges; Landfills and Dumps; Sewage Disposal Ponds; and Airports/Heliports. (R. 39-41 at § 3.03; App. 35-37).

As set forth above, the ordinance makes specific findings that residential development in the agricultural district "shall be discouraged." (R. 36 at § 3.01; App. 32). However, building eligibilities[2] for single-family

[2] Under the ordinance, an "eligible building site" or "building eligibility" is defined as one "which fulfills the requirements for the construction or placement of a residential dwelling or manufactured home. To compute the number of eligible building sites on a lot of record of forty acres or more, the total acreage of the parcel shall be divided by forty acres. The resulting whole number is the number of building sites eligible on the lot of record." (R. 123-24 at § 27.02(65); App. 50-51).

dwellings are included as permissive uses under certain specific conditions that strictly limit their number and "density"[3] based on acreage and impose additional restrictions. (R. 36-38 at § 3.02(B) & (K); App. 32-34). These include signing and filing a "Right to Farm Notice Covenant" that waives the occupant's rights to object to the presence of agricultural activities, as well as other limitations intended to protect the intended agricultural use and character of the land. (R. 36-38 at § 3.02(B) & (K); App. 32-34). As presently zoned as "A-1 Agricultural," Stewart could build three or four single family homes on the land adjacent to the lake with its current building eligibilities, but the land developer cannot build an entire residential subdivision with light commercial infrastructure without violating the ordinance. (R. 373-74).

This approach codified by the zoning ordinance is wholly consistent with the Comprehensive Plan, which also recognizes that "[t]he density approach offers more assurance that farming will continue as the domina[nt] land use in agriculturally zoned areas" and that "[r]outine farming practices are threatened by the emergence of non-farm residences in agricultural areas, undermining the freedom that farmers enjoy in operating their businesses." (R 170-72).

LR Lake Residential District

Article 6.00 of Turner County's zoning ordinance sets forth the

[3] Under the ordinance, "Density" refers to "[t]he number of families, individuals, dwelling units, or housing structures per unit of land." (R. 123 at § 27.02(57); App. 50).

requirements for the "LR Lake Residential District." This district was created "to provide for orderly residential development around lakes." (R. 46 at § 6.01; R. 269; App. 38). Section 6.02 (Permissive Uses) provides that "A building or premises shall be permitted to be used for the following purposes in the LR Lake Residential District," the first listed purpose of which is a "Single family dwelling." (R. 46 at § 6.02; App. 38). Of course, property must be located *within* the "LR Lake Residential District" and zoned as such for this section of the ordinance to apply. (R. 115 at § 26.01(A)(1); App. 43).

There is no limitation on the number or density of dwellings that can be built on property located within the "LR Lake Residential District," nor any requirement for covenants waiving the right to object to agricultural uses of the land. The Comprehensive Plan recognizes that "Swan Lake is an important recreational area for the residents of Turner County" that "provides beach, boat, and recreation access." (R. 164). The Plan therefore cautions that "[i]t is vital that Turner County carefully review development proposals in the Swan Lake area in an effort to preserve the Swan Lake environment." (R. 164).

Change of Zone

Article 21.00 of the zoning ordinance establishes the procedures under which persons or entities may apply to have property located in one zoning district rezoned to a different district. (R. 107 at § 21.01; R. 272; App. 41). After such an application is submitted to the Office of Planning and Zoning

and a recommendation made by the Planning Commission, the Turner County Board of Commissioners may act on the application and, after holding a public hearing, has discretionary authority to alter the boundaries of the zoning districts to effect the change of zone. (R. 107 at §§ 21.01, 21.03, 21.04; App. 41). This is consistent with the statutory procedures enacted by the Legislature governing county zoning decisions. *See* SDCL §§ 11-2-13, -14, -28.1, -29, -30.

Although the Turner County Zoning Ordinance does not provide for appeals from the grant or denial of an application for change of zone, limited appellate rights from that discretionary decision are granted under state law. *See* SDCL §§ 7-8-27, -28, -29, -32; *Ridley v. Lawrence County Comm'n*, 2000 S.D. 143, ¶¶ 7-11, 619 N.W.2d 254, 257-59.

April 15, 2022
Change of Zone Application filed by MROSE

On April 15, 2022, MROSE and Schumacher filed an application to rezone farmland owned by Christe Stewart from its designation as part of the "A-1 Agricultural District" to the zoning designation "LR Lake Residential" under the zoning ordinance. (R. 31, 175, 340, 348).[4] A real estate agent and land developer, Schumacher had done several market studies regarding the

[4] In the section for "Present zoning district," MROSE mistakenly checked the wrong box and *incorrectly* indicated that the property is currently zoned "Lake Residential." (R. 382-83). However, it is undisputed that the property is zoned "A-1 Agricultural." (R. 382-83). This may have contributed to some of the confusion.

financial profitability of developing Lake Madison and other lakes in the Watertown area. (R. 343).

As the landowner, Stewart also signed the application. (R. 175, 222). Currently, the land is a working farm growing crops of corn and beans. (R. 340). The rezoning application explained that MROSE was requesting:

> **1.0 Explanation of request in full detail:**
>
> **The Rezoning of Farmland to Lake Residential to include:**
>
> **- Proposal of 15 Lake Front Properties of +/- Half Acre Lots.**

(R. 176, 223). The Development Agreement and Declaration of Covenants and Restrictions privately signed between MROSE and Stewart also provided for "light commercial usage" and "light commercial development" on the farmland in question, although the rezoning application neglected to mention that fact. (R. 202, 205, 236, 239, 341-42) ("Developer anticipates platting the Development into blocks, lots, streets and other common areas to be used principally for residential purposes as part of residential lake development *and associated light commercial development* supporting the residential lake development").

County Commission proceedings

On May 31, 2022, the Turner County Board of County Commissioners met in regular session where the issue of the Zoning District Amendment (submitted as Ordinance #86-22), had its first reading. (R. 19, 356). On June 8, 2022, the Board of Commissioners met in regular session for the second

reading. (R. 22). A motion to approve the ordinance resulted in a tie vote (2-2). (R. 22, 345, 356). Although the motion did not carry, the Board determined that it would consider the issue again at a subsequent meeting. (R. 22, 345, 356-57).

On June 28, 2022, the Board met in regular session to hear testimony from residents both in favor of and against the rezoning. (R. 23, 345). It was clear that there was substantial public opposition to the planned development. (R. 353, 364, 365). Swan Lake is not equivalent to Lake Madison nor a candidate to emulate it: the lake is small and extremely shallow and the west side, which extends out into prime farmland and wildlife areas, is basically the only undeveloped shore. (R. 353, 365-66). Congestion, density, and incompatibility with the agricultural character and use of the surrounding land were legitimate public concerns. (365-66).

After testimony was closed, a motion to approve the ordinance to rezone the property from "Agricultural District" to "Lake Residential" failed by a vote of 3-2. (R. 23, 345-46). Meetings of the Turner County Board of County Commissioners are not recorded or transcribed, and the official minutes of the meeting recorded only the motion offered and the vote on the motion. (R. 384-85).

STANDARD OF REVIEW

Both the circuit court and this Court review an administrative or policy decision of a Board of County Commissioners under SDCL 7-8-27

under the abuse of discretion standard to determine whether the administrative board has acted unreasonably, arbitrarily, or manifestly abused its discretion. *See Little v. Hanson County Drainage Board, Hanson County*, 2022 S.D. 63, ¶ 13, 981 N.W.2d 657, 662 & n. 2; *McLaen v. White Township*, 2022 S.D. 26, ¶ 30, 974 N.W.2d 714, 724-25; *Miles v. Spink County Board of Adjustment*, 2022 S.D. 15, ¶ 49, 972 N.W.2d 136, 152 n.19; *Carmody v. Lake County Board of Commissioners*, 2020 S.D. 3, ¶ 29, 938 N.W.2d 433, 442; *South Dakota Department of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, ¶ 33, 900 N.W.2d 840, 852-53.

"An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Little*, 2022 S.D. 63, ¶ 13, 981 N.W.2d at 662 (citation omitted). "This standard is narrow," as this Court has emphasized, "thus, 'a court is not to substitute its judgment for that of an agency.'" *McLaen*, 2022 S.D. 26, ¶ 43, 974 N.W.2d at 727 (quoting *Troy Township*, 2017 S.D. 50, ¶ 33, 900 N.W.2d at 852-53).

"The burden of proof on appeal is on the party challenging the decision made by the board." *Little*, 2022 S.D. 63, ¶ 13, 981 N.W.2d at 662 (quoting *Carmody*, 2020 S.D. 3, ¶ 29, 938 N.W.2d at 442). This Court reviews the circuit court's legal conclusions, including its conclusions regarding the proper construction and application of statutes and county zoning ordinances, de novo. *See McLaen*, 2022 S.D. 26, ¶ 30, 974 N.W.2d at 724-25; *Surat*

Farms, LLC v. Brule County Board of Commissioners, 2017 S.D. 52, ¶ 12, 901 N.W.2d 365, 369.

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN APPLYING THE DE NOVO STANDARD TO "DETERMINE ANEW" THE ADMINISTRATIVE QUESTION OF WHETHER TO GRANT OR DENY THE LAND DEVELOPER'S APPLICATION TO REZONE FARMLAND.

In the lower court's written findings of fact and conclusions of law, it held that "[t]his petition is brought pursuant to SDCL 7-8-30 which provides for de novo appeal from the decisions of a County Commission" and that "[u]nder the de novo standard the Circuit Court should determine 'anew the question ... independent of the County Commissioner's decision.'" (R. 290 at ¶¶ 1, 3) (citing *Schrank*, 1998 S.D. 108, ¶ 15, 584 N.W.2d at 682). Based on that standard of review, the court ordered Turner County to approve MROSE's application to amend the zoning ordinance to change the zoning district for the farmland from A-1 Agricultural to LR Lake Residential.

That was an error of law and a violation of the constitutional separation of powers under this Court's precedent. In *Troy Township*, this Court made clear that de novo review is not constitutionally permissible when reviewing an administrative body's decisions on appeal unless the decision to be reviewed was quasi-judicial in nature. That is so even where, as here, the Legislature expressly has authorized such review. "The purpose of this limitation is to help ensure the independence of the Judicial Branch

and to prevent the Judiciary from encroaching into areas reserved for the other branches." *Troy Township*, 2017 S.D. 50, ¶ 14, 900 N.W.2d at 846 (quoting *Morrison v. Olson*, 487 U.S. 654, 677-78 (1988)).

However, de novo review of an administrative body's decision does not offend the constitutional separation of powers where the decision appealed was quasi-judicial. *See McLaen*, 2022 S.D. 26, ¶ 41, 974 N.W.2d at 727. "Quasi-judicial actions are akin to the ordinary business of courts or are actions that could have been determined as an original action in circuit court." *McLaen*, 2022 S.D. 26, ¶ 41, 974 N.W.2d at 727 (citations omitted) (cleaned up). As this Court recently explained:

> The Township's decision in response to the McLaens' request to install culverts under Township roads and drain into a Township right-of-way was administrative in nature. The decision did not involve adjudicating existing rights between specific individuals, and the McLaens could not have asked the circuit court in the first instance to approve their request. Because the Township's decision was one of policy, the circuit court properly applied the abuse of discretion standard of review.

Id., 2022 S.D. 26, ¶ 42, 974 N.W.2d at 727-28 (citing *Troy Township*, 2017 S.D. 50, ¶ 22, 900 N.W.2d at 849-50).

In *Carmody v. Lake County Board of Commissioners*, as well, this Court held that "[a]lthough SDCL 7-8-30 prescribes do novo review, the separation of powers doctrine requires us to determine whether the Board's decision to grant the permit applications was an exercise of its administrative

power or its quasi-judicial power." 2020 S.D. 3, ¶ 20, 938 N.W.2d at 439. As this Court explained in that case:

> Here, Lake County adopted drainage ordinances and a permit system and applies its governing water management regulations to its drainage plan to determine whether to grant a permit. In this process, the Board accepts applications for permits, a staff member prepares a report, and the Board holds a hearing on the application. The permit hearing is a meeting in an unbalanced public forum. Therefore, although community members can have their voices heard, the Board's decision to issue a permit is one of policy resting soundly within the discretion of the Board. It exists separate and apart from the Board's role as an adjudicatory body resolving complaints asserting a drainage dispute between neighboring landowners.

Id., 2020 S.D. 3, ¶ 22, 938 N.W.2d at 439.

The same holds true here. SDCL 11-2-13 authorizes a county board of commissioners to adopt a zoning ordinance to regulate and restrict, among other things, "the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes." SDCL 11-2-14 grants a county board of commissioners discretionary authority to "divide the county into districts of such number, shape, and area as maybe deemed best suited to carry out the purposes" of SDCL Ch. 11-2, "and within the districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, buildings, structures, or lands." Property owners may petition for a change of zoning district, *see* SDCL 11-2-28.1, and after a public hearing, *see* SDCL 11-2-29, "the board shall by resolution or ordinance, as appropriate, either adopt or reject the amendment, supplement, change, modification, or repeal, with or

without changes." SDCL 11-2-30. These are all administrative, legislative, policy, and discretionary functions that in no sense qualify as quasi-judicial for which de novo review might permissibly be applied.

In the present case, the land developer brought a petition under SDCL 7-8-27 challenging the Turner County Board of County Commissioners' decision, by a 3-2 vote, *not* to enact Ordinance #86-22, which would have amended the zoning ordinance to move the farmland sought to be developed as a residential subdivision from the A-1 Agricultural District to the LR Lake Residential District. (R. 19, 22, 23). That clearly was an administrative policy decision owed deference as a matter of constitutional law. As a result, "de novo review is not constitutionally permissible in this case[.]" *Troy Township*, 2017 S.D. 50, ¶ 13, 900 N.W.2d at 846. The circuit court thus erred as a matter of law in overturning the Board of County Commissioners' denial of the motion to approve Ordinance #86-22 based on an unconstitutional standard of review.

II. THE CIRCUIT COURT MISCONSTRUED THE ZONING ORDINANCE AND ERRED AS A MATTER OF LAW IN HOLDING THAT THE COUNTY HAD A MINISTERIAL DUTY TO GRANT THE LAND DEVELOPER'S APPLICATION TO REZONE FARMLAND.

In its decision below, the lower court did not hold that the Board of County Commissioners' decision was arbitrary and capricious or an abuse of discretion. Rather, in both its oral ruling and written findings and conclusions, the court construed the Turner County 2008 Revised Zoning

Ordinance as *requiring* the Board of County Commissioners to grant the land developer's application and amend its ordinance to rezone the farmland into a different zoning district as a matter of law.

Just as in a recent case decided by this Court, here "[t]here is no dispute that the property is in a district that is currently zoned agricultural." *Dakota Contractors, Inc. v. Hanson County Board of Adjustment*, 2023 S.D. 38, ¶ 18 (July 26, 2023). In the lower court's view, even though the farmland sought to be rezoned indisputably is located in the A-1 Agricultural District in which the proposed residential subdivision with light commercial development would never be permitted under the zoning ordinance, the fact that the farmland was adjacent to a lake and the proposed intended use *would* be allowed in the LR Lake Residential District, that meant that the Board of County Commissioners had a ministerial duty to amend its zoning ordinance to grant the change of zone as a matter of law. As the court explained:

> And the – really what it comes down to is this Developers Agreement. Does it fall within the 2007 ordinance and this should be approved as long as it would meet the requirement of a – the lake development area? The exact language of that is "a lake residential district." Or is this something that should have to go through the zoning process again for this particular piece of property to be rezoned?

(R. 440; App. 12). In arriving at this conclusion, the court apparently construed the section of the ordinance governing property that is already zoned *within* the LR Lake Residential District as applying to *any* property in

any zoning district that is next to a lake and held that "under the ordinance in this particular case, if a development meets or is within the guidelines of the zoning ordinance and it's on the lakefront, then really their decision becomes somewhat more ministerial in nature." (R. 446; App. 18).

In its written findings of fact (most of which actually are legal conclusions construing the zoning ordinance) and conclusions of law, the lower court reiterated that because a residential development of single family dwellings is a "permitted use" for property located within the LR Lake Residential District, and because the ordinance states that a permitted use "shall" be allowed, that meant that under the zoning ordinance the County had "no discretion to refuse permitted uses on lake front property" and was required to amend its ordinance as a matter of law to rezone the property, even though it was in the A-1 Agriculture District and was *not* in the LR Lake Residential District. (R. 288-89 at ¶¶ 9, 13, 16; App. 4-5).

This culminated in the legal conclusion (incorrectly labeled a finding of fact) that: "Based on the plain and ordinary language contained in Article 6.02, of the 2008 Turner County Ordinances, residential development is a permitted use on lake front property, and the County therefore had no discretion to reject the Petitioner's application to rezone the property at issue." (R. 289 at ¶ 12; App. 5). On that basis—and that basis alone—the lower court held that "[t]he County's decision to deny the zoning application in this case is not legally justified and the Court therefore remands this

matter back to the County with instructions to approve the zoning application as submitted." (R. 291 at ¶ 8; App. 7).

All of this reasoning is the product of multiple errors of law of which the fundamental misconstruction of the zoning ordinance is most prominent. This Court interprets "zoning ordinances in accord with the rules of statutory construction supplemented by any rules of construction within the ordinances themselves." *Hines v. Board of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 233-34.

Under the ordinance, the land in Turner County is divided into nine zoning districts. (R. 34; App. 31). Included in the nine are "A-1 Agricultural" and "LR Lake Residential," which are separate districts with entirely different zoning regulations. (R. 34; App. 31). All land is zoned into one—and only one—of these nine districts and "[e]xcept as otherwise provided, no building shall be erected, converted, enlarged, reconstructed, or structurally altered, nor shall any structure or land be used: . . . [e]xcept for a purpose permitted on the district in which the structure or land is located." (R. 115 at § 26.01; App. 43).[5]

The farmland here is in the A-1 Agricultural District, which does not permit residential developments or light commercial development. The fact that the LR Lake Residential District does permit residential subdivisions

[5] The only exception is the County's sole zoning overlay district, the "APO Aquifer Protection" district. (R. 34 at § 2.02; App. 31).

has no bearing on the issue, because that is not the district in which this farmland is located, even if it happens to be adjacent to a lake. The mere fact that land happens to be adjacent to a lake does not automatically place it—or entitle it to be placed—in the Lake ***Residential*** District, as the lower court incorrectly held. Turner County's zoning ordinance—not topography—determines the permitted uses of land within a zoning district. The requirement under the ordinance to allow permissive uses for land in the LR Lake Residential District only applies to land that already is in the LR Lake Residential District. It does not require the Board of County Commissioners to *rezone* land in another district to LR Lake Residential, nor is there any other such requirement in the zoning ordinance.

All of the lower court's findings and conclusions, and its judgment in this case, thus are based on an entirely incorrect premise of law and a fundamental legal misconstruction of the zoning ordinance. This Court should reverse with instructions to deny the land developer's Petition for Judicial Review.

III. THE COUNTY'S DECISION TO DENY THE LAND DEVELOPER'S APPLICATION TO REZONE THE FARMLAND WAS LEGALLY JUSTIFIED AND NOT ARBITRARY OR CAPRICIOUS NOR A MANIFEST ABUSE OF DISCRETION.

As discussed above, the lower court's findings, conclusions, and judgment were based solely on its misconstruction of the zoning ordinance. Even while erroneously applying a de novo standard of review, the lower court thus declined to find that that in denying the developer's application to

rezone the property, the Board of County Commissioners acted unreasonably, arbitrarily, or manifestly abused its discretion. *See Carmody*, 2020 S.D. 3, ¶ 30, 938 N.W.2d at 442; *Troy Township*, 2017 S.D. 50, ¶ 17, 900 N.W.2d at 848; *Little*, 2022 S.D. 63, ¶ 13, 981 N.W.2d at 662. This Court should reverse the lower court's legal conclusion that denial of the zoning change was not legally justified, and should not entertain contrary justifications for affirmance from the land developer on appeal.

As this Court has emphasized, "[t]he arbitrariness standard is narrow, and under that standard a court is not to substitute its judgment for that of an agency." *Carmody*, 2020 S.D. 3, ¶ 30, 938 N.W.2d at 442; *Troy Township*, 2017 S.D. 50, ¶ 33, 900 N.W.2d at 852-53. On appeal to the circuit court, the land developer had the affirmative burden of proof to demonstrate that the decision by the Board of County Commissioners to deny its application to rezone the farmland violated the arbitrariness or abuse of discretion standard. *See Little*, 2022 S.D. 63, ¶ 13, 981 N.W.2d at 662. The developer completely failed to carry that burden.

MROSE and Schumacher framed their Petition for Judicial Review as follows:

> In reaching its conclusion the Board erroneously failed to consider the purposes and intent of the Turner County Comprehensive Development Plan and failed to consider that Petitioner's proposed change of zone would not only comport with the Development Plan's goals but would appreciably enhance the west bank of Swan Lake and cut down on pollution and run off which is incident to the agricultural purposes for which the land is currently zoned.

(R. 2). The circuit court wisely declined to adopt the grounds for relief sought in the land developer's petition, which are questions of policy addressed to the discretion of the administrative board, in this case the Turner County Board of County Commissioners. In other words:

> This is a practical legislative determination which has been entrusted to the discretion of the Board, not to the courts. The wisdom of its decision is not our concern, since we are not at liberty to substitute our judgment for that of the [County] board on a matter inherently legislative. If the rule were otherwise[,] the circuit courts would become administrative boards . . . deciding matters that are nonjudicial.

Troy Township, 2017 S.D. 50, ¶ 26, 900 N.W.2d at 851 (quoting *Dunker v. Brown County Board of Education*, 121 N.W.2d 10, 16 (S.D. 1963)).

As in *Troy Township*, "[t]he administrative proceedings at issue here were informal and not like a trial, producing little in the way of a reviewable record. Moreover, the issue is best described as a mix of policy and fact (weighing the competing public interests involved)." 2017 S.D. 50, ¶ 33, 900 N.W.2d at 852 n.11. "Therefore, the arbitrariness standard of review is appropriate." *Id.* As a result, neither the circuit court nor this Court should examine whether the Board's decision was correct or in the public interest. *See id*, 2017 S.D. 50, ¶ 26, 900 N.W.2d at 851.

In *Troy Township*, the Department of Game, Fish and Parks made the argument that:

> A lack of relevant or competent information is evidenced by Troy Township's failure to provide a transcript of the hearing, failure to provide a defensible reason why vacating the public highways

> better serves the public interest, and its failure to analyze public interest.

2017 S.D. 50, ¶ 40, 900 N.W.2d at 855. As this Court held in that case:

> These conclusory claims amount to little more than another invitation to infer wrongdoing. Moreover, the Department's argument overlooks the fact that the Townships' board members are necessarily residents of their respective townships; have first-hand knowledge of the highways and conditions at issue; and as the Department itself points out, are fully aware of the competing interests.

Id. Should the land developer seek to assert the same appellate arguments here, the same reasoning would hold true.

The Turner County Board of County Commissioners is fully aware of its zoning ordinances and their purpose and effect, and has firsthand knowledge of the development and conditions of agricultural land in the county, for which the concentration of housing is expressly "discouraged" under its zoning ordinance. (R. 36 at § 3.01; App. 32). The Board is also fully aware of the current development around Swan Lake and the precious nature of that recreational resource to all county residents. It had the benefit of an analysis by the Planning Commission of the proposal submitted by the land developer. It held a public hearing in which it heard from the land developer and residents on all sides of the issues, including those with substantial concerns about density and the ability of the lake environment to absorb additional infrastructure. (R. 23, 345, 353, 364-66).

Ultimately, the Board elected to exercise its discretion to deny the request to amend its zoning ordinance and place this farmland in a different

zoning district to accommodate yet another residential subdivision, and associated "light commercial development," around a small and shallow lake that already is almost fully developed and for which the Comprehensive Plan expressly advises exercising caution in allowing further development because the public depends on free access in order to take advantage of its recreational opportunities. (R. 164).

In other words, the Board of County Commissioners followed the proper process without exception and made the discretionary administrative determination that this farmland should not be rezoned. "At times," as this Court has acknowledged, "this process will necessarily involve subordinating one public interest for another." *Troy Township*, 2017 S.D. 50, ¶ 31, 900 N.W.2d at 852. "[T]his balancing of competing public interests is a policy question and, therefore, not one properly answered by the courts." *Id.*; *see also Carmody*, 2020 S.D. 3, ¶ 20, 938 N.W.2d at 439 n.2 ("Circuit courts are not citizen boards charged with regulating drainage systems . . . Rather, in acting on the applications for drainage permits, the Board prospectively balances the considerations set forth in the statutes and related ordinances to administer the county drainage plan").

Certainly, the land developer here did not carry its evidentiary burden to prove otherwise. This Court thus should reverse the circuit court's legally erroneous decision and remand with instructions to deny and dismiss the Petition for Judicial Review with prejudice. At the barest minimum, this

Court should reverse and remand with instructions to remand this matter back to the Board of County Commissioners for additional consideration. *See Surat v. America Township, Brule County Board of Supervisors (Surat I)*, 2017 S.D. 69, ¶17, 904 N.W.2d 61, 67 (holding that because "the court incorrectly applied de novo review to the Board's decision" and "[c]onsidering the nature of the question involved in this case and the evidentiary record, the circuit court should remand the matter back to the Board").

CONCLUSION

WHEREFORE, Appellant Turner County Board of County Commissioners respectfully requests that this Honorable Court reverse the circuit court's decision and remand with instructions to deny and dismiss the Petition for Judicial Review with prejudice.

Respectfully submitted this 1st day of August, 2023.

JOHNSON, JANKLOW & ABDALLAH LLP

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 6,436 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT and the APPENDIX were served via Odyssey File and Serve upon the following:

Shawn M. Nichols
Andrew Hurd
CADWELL SANFORD DEIBERT & GARRY
200 East 10th Street – Suite 200
Sioux Falls, SD 57104
snichols@cadlaw.com

Attorneys for Appellees

on this 1st day of August, 2023.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

APPENDIX

Page

STATE OF SOUTH DAKOTA) :SS COUNTY OF TURNER)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
In the matter of change of zone application File: PZ9.2022, MROSE DEVELOPMENT CO., LLC, and JASON SCHUMACHER, Petitioners, vs. TURNER COUNTY BOARD OF COUNTY COMMISSIONERS, Respondents.	62CIV22-000048 **JUDGEMENT**

The Court having issued its Findings of Fact and Conclusions of Law in this matter in the record on February 10, 2023, and the Court thereafter having issued writing Findings of Fact and Conclusions of law, it and the Court having held an evidentiary hearing in this matter on December 7, 2022 with the Petitioners appearing personally and through their counsel of record, Shawn Nichols, and the Respondent appearing through the State's Attorney, Katelynn Hoffman, and the Court having considered the arguments of the parties, the brief submitted, the exhibits and evidence presented, and the Court having issued its oral ruling on this matter on February 10, 2023, it is hereby

HEREBY ORDERED, ADJUDGED AND DECREED, that the Turner County decision to deny the Petitioners' zoning application is reversed and remanded with instruction to approve the application;

FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment shall incorporate the oral Findings of Fact and Conclusions of Law provided by the Court on February

10, 2023, and the written Findings of Fact and Conclusions of Law entered by the Court thereafter.

FURTHER ORDERED, ADJUDGED AND DECREED that judgment shall be entered in favor of the Petitioners in accordance with the foregoing.

4/24/2023 9:48:25 AM

BY THE COURT:

The Honorable David Knoff
Circuit Judge

Attest:
Wingert, Lacey
Clerk/Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF TURNER)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
In the matter of change of zone application File: PZ9.2022, MROSE DEVELOPMENT CO., LLC, and JASON SCHUMACHER, Petitioners, vs. TURNER COUNTY BOARD OF COUNTY COMMISSIONERS, Respondents.	62CIV22-000048 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Petitioners in this case having submitted a petition for judicial review regarding zoning determination made by the Respondent, Turner County Board of County Commissioners, and the Court having had an held an evidentiary hearing in this matter on December 7, 2022 with the Petitioners appearing personally and through their counsel of record, Shawn Nichols, and the Respondent appearing through the State's Attorney, Katelynn Hoffman, the court having considered the arguments of the parties, the brief submitted, the exhibits and evidence presented, and the Court having issued its oral ruling on this matter on February 10, 2023, the court pursuant to SDCL § 15-6-52, enters the following of Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

This dispute involves an application by the Petitioners to rezone lake front property on Swan Lake, in Turner County, South Dakota from agricultural zoning to residential zoning.

1. The zoning application was heard by the Turner County Board of Commissioners on June 28, 2022, at which time County denied the application.

2. The Petitioners thereafter promptly filed a petition for judicial review pursuant to SDCL § 7-8-29.
3. The lake front property at issue in this petition and included in the application which was introduced as hearing Exhibit C, is currently zoned agricultural.
4. In 2007, Turner County adopted its comprehensive plan set forth a general statement regarding future land use development, and also providing that the County would adopt zoning and subdivision regulations to carry out the policies and recommendations of the comprehensive plan.
5. Further to the 2007 comprehensive plan, in 2008 Turner County adopted zoning ordinances detailing how land development should proceed within Turner County.
6. The 2008 ordinances specifically include provisions related to the development on lake front property.
7. Article 6 of the 2008 ordinances make plain in section 6.01 that the ordinance was adopted to "provide for orderly residential development around lakes".
8. Further to this purpose, article 6.02 provides for the following permitted uses among lakeshore property: "single family dwellings, preservation areas, agriculture, attached garages and antennas 35 feet or less."
9. Article 6.02 mandates that the permitted uses "shall" be allowed, and otherwise gives the County no discretion to refuse permitted uses on lake front property.
10. By contract, Article 6.02 provides for additional conditional uses under which the County has discretion to allow these additional conditional uses outlined by the ordinance.
11. The lake front property at issue in the zoning application in this matter is owned by Christe Stewart. Although the application was submitted by MRose Development, LLC,

based on the testimony provided in this matter, the Court finds that Christe Stewart has an ownership interest in MRose Development, LLC, and therefore the Petitioners has standing to assert this appeal.

12. Based on the plain and ordinary language contained in Article 6.02, of the 2008 Turner County Ordinances, residential development is a permitted use on lake front property, and the County therefore had no discretion to reject the Petitioner's application to rezone the property at issue.
13. The Court finds that the use of the word "shall", within Article 6.2 confirms that the permitted use of residential development, is non-discretionary.
14. The Courts findings as to the meaning of Article 6 is further supported by the language in Article 1 of the 2008 Turner County ordinances which provides that ordinances apply to the zoning classification of "all unincorporated land". The land at issue is not in an incorporated area and therefore Article 6.02 governs its zoning classification.
15. Similar, Article 2.01 provides that the 2008 ordinances apply to all unincorporated land within Turner County.
16. The Court determines that the statements throughout the 2008 ordinances setting forth that there is a lake residential district, and that residential use is permitted within the lake residential district provides that such use is permitted, and that if the County had discretion to deny such use, the mandatory use of the word "shall" in Article 6.02 would be meaningless.
17. The Court finds that the proposed land use within the application proposed by MRose Development, LLC, meets all the elements of Article 6.

18. Turner County is therefore was bound to follow its 2008 Zoning Ordinances when making a determination on the application at issue.

19. Had the County wanted to reserve for itself discretion as to land use along the lake shore property, it has the ability as the legislature body, to amend or change the ordinances to allow for such discretion, but it did not.

20. To the extent any of the forgoing Findings should be deemed Conclusions of Law, the same shall be treated as though they were set forth below under the Conclusions of Law below.

CONCLUSIONS OF LAW

1. This petition is brought pursuant to SDCL 7-8-30 which provides for de novo appeal from the decisions of a County Commission.

2. Zoning ordinances are to be interpreted according to the same rules of statutory construction as legislation. See *Cordell v. Codington County*, 526 NW 2d 115, 117 (SD 1995).

3. Under the de novo standard the Circuit Court should determine "anew the question... independent of the County Commissioner's decision." *Schrank v. Pennington County* Bd., 1998 SD 108, ¶15.

4. The words and phrases within the Turner County ordinances should be given their plain and ordinary meaning. When the ordinance language is clear, certain and unambiguous, there is no need to resort to rules of construction and the only thing left for the Court to declare the meaning of the ordinance as expressed therein. See *Save the City of Sioux Falls v. the City of Sioux Falls*, 2014 SD 35, ¶8.

5. The plain and ordinary meaning of article 6.01 of the 2008 Turner County ordinances provide for single family dwellings as a permitted use in lake residential district.
6. The application at issue in this case requested residential zoning along Swan Lake all in accordance and conformity with article 6.02 of the Turner County 2008 ordinances, et. seq.
7. MRose Development, LLC, is an aggrieved party by statute by virtue of Christe Stewart maintaining ownership interest in that entity and has standing under SDCL 7-8-27 to bring this zoning appeal.
8. The County's decision to deny the zoning application in this case is not legally justified and the Court therefore remands this matter back to the County with instructions to approve the zoning application as submitted.
9. As permitted by SDCL 15-6-52 (b), the Court incorporates in these Findings of Fact and Conclusions of Law, the oral determination set forth on the on February 10, 2023.
10. If any of the above Conclusions of Law are deemed to be Findings of Fact, they should be set forth above as Findings of Fact.
11. Judgment should be entered in favor of the Petitioners as set forth herein in the form attached hereto as required by SDCL 15-6-52(a).

4/24/2023 9:51:21 AM

BY THE COURT:

Attest:
Wingert, Lacey
Clerk/Deputy

The Honorable David Knoff
Circuit Judge

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF TURNER — FIRST JUDICIAL CIRCUIT

In the Matter of Change of Zone Application File: PZ9.2022, MROSE DEVELOPMENT, CO., LLC, JASON SCHUMACHER, Petitioners, vs. TURNER COUNTY BOARD OF COMMISSIONERS, Respondents.	No. 62CIV22-48 JUDGE'S RULING

BEFORE: THE HONORABLE DAVID KNOFF
Circuit Court Judge

For the Petitioners: SHAWN NICHOLS
CADWELL, SANFORD, DEIBERT & GARRY
P.O. Box 2498
Sioux Falls, SD 57101

For the Respondents: KATELYNN HOFFMAN
TURNER COUNTY STATE'S ATTORNEY
P.O. Box 700
Parker, SD 57053

PROCEEDINGS: The above-entitled proceeding commenced at approximately 4 o'clock on Thursday, the 9th day of February 2023.

INDEX OF STATE'S EXAMINATIONS

NAME	PG
NONE	

INDEX OF STATE'S EXHIBITS

NO.	DESCRIPTION	OFF	REC	DEN
NONE				

(Whereupon, the following proceedings were had, to wit:)
THE COURT: All right, so this comes before the Court. This is Turner County Civil File 22-48 MRose Development L.L.C. and Jason Schumacher vs Turner County Board of County Commissioners. Shawn Nichols is appearing on behalf of the plaintiffs. Katelynn Hoffman is appearing on behalf of the County, Turner County Board of County Commissioners.

The housekeeping matter as I was going through the file, the exhibits, there were a few exhibits that were offered, and then there were also exhibits that were attached to a brief that the parties were referencing and the main one being the 2008 ordinances and the comprehensive plan.

And my understanding is the parties intended those exhibits to be part of the record. When they're attached to the brief, they're not necessarily - well, if you were to go on Odyssey, it would be very difficult to - you have to basically dig through or go into the brief to find the exhibits.

So I just want to make sure the parties were expecting the Court to utilize those, the comprehensive plan and the zoning ordinance from 2008, and, if so, then I think as part of just a housekeeping measure, I'd probably just ask those to be filed separately. I'm not sure I can extract those out of the brief, so is that the parties' understanding, that the Court was to utilize those?

MR. NICHOLS: That was my intent, Your Honor, and I can go ahead and file them.

THE COURT: All right, and Ms. Hoffman?

MS. HOFFMAN: Yes, Your Honor.

THE COURT: All right. So and I - both parties referenced them, and we talked about them and - but I just think I probably should have mentioned that on the day of the hearing to just have those pulled out, but I think I had printed everything up and just thought it was - sometimes they're attached to affidavits so the Court does utilize those. So in any event, that will just be resolved.

And so why don't you just go ahead and - and file those. I can just look. If that works - I don't remember who - let's see. I think it would be probably Exhibit 3 and 4, because I have Exhibit 1 and 2, the Development Agreement, the Master Declaration of Covenants, and then Exhibit C which was the County Change of Zone Application. And so if you just want to mark those 3 and 4, then that will just be clear for the record and get those filed.

So the Court went through the briefs, went through the ordinances - or the ordinance in detail of 2007, and the Court understands the background of the plaintiff had done a development plan, Developers Agreement that included a development around the lake in Turner County, then presented that - their plans to the County, and ultimately, that was

approved and then went in front of the County Commission where it went to a vote. And there was a little bit of a mix-up with the vote. There was a tie and some misunderstanding of how to proceed with that, and then it failed.

And the - really what it comes down to is this Developers Agreement. Does it fall within the 2007 ordinance and this should be approved as long as it would meet the requirement of a - the lake development area? The exact language of that is "a lake residential district." Or is this something that should have to go through the zoning process again for this particular piece of property to be rezoned?

So the background: 2007, there was a comprehensive plan which then gave rise to the 2008 ordinance which Turner County implemented. Those provide - in going through those ordinances, they provide for several different classifications of land and development of property within Turner County, so MRose Development, which includes Jason Schumacher intended to develop land owned by Christe Stewart.

The Court also notes that, from the testimony heard at the hearing, that she was a - is a part owner of MRose Development, and so the Court does believe that she has standing to - or that through MRose Development, she has standing to bring this suit.

The Court finds that the property apparently is owned as agricultural, and I do that by that's what the parties had stated that the property was zoned; however, I don't have any particular document showing me exactly what this property is zoned other than with the Exhibit C. The Change of Zone Application shows that it is going from agricultural to the lake residential.

The Court also, in looking at the zoning application, finds that this particular property being lakefront property would also fall under what is defined in Article 6 of the zoning application - or of the zoning rules from 2007 that this would fall within that lake residential district description.

The property abuts Swan Lake. There's really no disagreement as to that. This is lakefront property. The district intended to provide for orderly, residential development around the lake, and I don't know if there are more lakes within Turner County, but in any event, it would be around all lakes within Turner County. It states right within the zoning ordinance it's for the residential development.

There are two types of uses the County prescribed when they adopted the zoning ordinances, and that includes both permitted uses under 6.02 and then conditional uses under 6.03. And the Court's not going to just restate exactly

verbatim the ordinances, but it does say that a building or premises shall be permitted to be used for the following purposes in that lake residential district, and it does include single-family dwellings, which the Court understands the Development Agreement to be - or to encompass.

And it also can be used for agricultural land, which I think there's no dispute right at this point in time it's being used. If not the immediate lake shore area, at least the property that is owned is being used as agricultural property.

2008 when the Commission enacted the ordinance, those specifically allowed uses. It appears that if it is a permissive use, there really is no discretion because "shall" is mandatory. So - and it says "it shall be permitted to be used." That is far different than a conditional use, which is "may," which does give your Planning Commission or the County Commission a more discretionary way of looking at that.

So when the change in the zoning classification was requested by the County, the County looks to determine whether it's bound by the ordinance that it did create back in 2008. In effect, is the County required to apply this lakefront property under Article 6, or can they just make a determination of whether or not they want to do that is discretionary?

The law in South Dakota is that zoning ordinances are carefully construed. They're interpreted according to the rules of statutory construction and any rules of construction included within those ordinances. The Court is to, when interpreting the ordinances, use the plain language of the ordinances.

I have to assume the legislative body, in this case the Turner County Commission back in 2008, meant what they said when they passed those ordinances, and they give the words and phrases their plain meaning and effects. Particularly when the language is clear, certain, and unambiguous, and there's no reason for construction, the only function for the Court to do is declare the meaning of the statute clearly expressed. The citation for that is Save Our Neighborhood Sioux Falls vs City of Sioux Falls 2014 South Dakota 35 Paragraph 8. The previous citation the Court gave was Hoffman vs Van Wyck 2017 South Dakota 48.

So looking at the ordinances again, I went through Article 1 and starting with Page 1 when it says "the purpose," it says, "The regulations are intended to preserve and protect existing property uses and values against adverse and - or unharmonious adjacent uses by zoning all unincorporated land except those areas where zoning jurisdiction has been granted to a municipality."

So it states right in there that it is zoning all of the

unincorporated land, the - also that this - these regulations right at the beginning are in conformance with Chapter 11-2 of the South Dakota Codified Laws. So it was intended to be zoned.

Then I go on to the next page, Article 2.01. It says "the regulations and zoning district boundaries set forth in the ordinance shall apply to all unincorporated land within Turner County except those areas which have been approved for municipal joint zoning jurisdiction." And it designates a lake residential district.

Now, it states there are maps; however, those aren't in the record. And whether or not it states that, there are - and whether there is uncertainty, it does say under 2.05 where there are rules where uncertainty as to boundaries arise - and it talks about if there was boundaries by a road, certain property, an unplatted property, it should be determined by the use or - of a scale appearing on a map or a legal description is indicated. So there are ways that, if there's a question as to these boundaries, that that can be determined.

6.01 said the district is intended to provide for orderly residential development around lakes. Here we have Swan Lake. In Definitions of Article 27, it says the word "shall" is mandatory, and it says "not directory." I think it meant "not discretionary," but it - in any event, it's

mandatory.

And so clearly there was intended to pass an overall comprehensive zoning ordinance for Turner County, and so the question is: Does it have teeth and does it have meaning or not?

The Court does determine that all these statements that there's zoning, that there's lake - there's a lake residential district, that it's mandatory, that they're allowed certain types of buildings. It would all be rendered meaningless, if in every instance where a person came in and would meet the requirements within the plain reading of the zoning ordinance would have to, in fact, rezone the ordinance or go through the entire zoning process again.

Now, that's not to say that these zoning ordinances are written perfectly, because if there is a question as to zoning, there's a section - I believe it was Section 20 that they then move into that addresses how to do that. But the Court believes that it would be a requirement that the County would have to follow the 2008 zoning ordinances when making their decisions, because they can be bound by the rules that they make. They're the legislative body, and if they do not want to follow any of these particular rules, then they should go through and make sure they delineate what is zoned, what area; otherwise, again, the Court finds that these just - these zoning rules are just, instead of being zoning

rules, it's actually just a comprehensive plan again to say "well, this is going to be a lake area at some point in time, even though it's on a lake and it's there. We already agreed as the County that building shall be allowed on there as long as they meet the qualifications." So in looking at that plain language, the Court just finds that the Commission created that and they should have to follow their own rules.

Also if - County's argument that they should have to go through the rezoning process of 11-2-28.1, first of all, these were created under 11-2 already as it states within the documents, but then Article 20 then becomes somewhat meaningless, because you shouldn't have to redo the zoning process if there's a process within Article 20.

And so when the Court reads Article 20 in concert with Article 6 and tries to make sense of these together, the Court believes that those articles map out for the County the process to be followed, and under the ordinance in this particular case, if a development meets or is within the guidelines of the zoning ordinance and it's on the lakefront, then really their decision becomes somewhat more ministerial in nature. They just need to make sure that it meets the qualifications of their ordinance and then to proceed forward.

And there can be situations where it would be less ministerial, and that would be under Permitted Uses - or

excuse me - Conditional Uses where it may very well be that the County would say "no, we're not going to allow that. We don't think it's appropriate" and have their hearing. But the Court believes that, when the zoning ordinance provides a permitted use with the - with the mandatory language in that use, the Court believes that then the County would be bound by that.

So based on the Court's review of the matter, I do believe the County to be bound by the ordinances the same as a landowner, so as the landowner has to follow the letter of the law the ordinance or get a conditional use or a variance, so does the County, so are they required to follow the ordinance. And so it's not a unilateral or one-sided zoning ordinance; it's for both the benefit of the County and benefit of the landowner.

So the Court is going to find that the plaintiffs have met their burden. I am going to order that the Turner County Board of County Commissioners, their decision's reversed and they are required to zone the property and follow their 2008 revised zoning ordinances.

And so with that, I will require counsel for plaintiff to prepare an order and also file those, that zoning ordinance and comprehensive plan.

So I'm going to start with the plaintiff. Do you have any questions?

MR. NICHOLS: I don't think so, Your Honor.
THE COURT: All right. Ms. Hoffman, do you have --
MR. NICHOLS: (Undistinguishable) look to see if, by law, I'm required to have Findings of Fact and Conclusions of Law, so I would just ask if I could get a transcript of today's hearing in this.
THE COURT: Yeah, and you'll have to request that through the court reporter, and the - the - if the parties want to prepare Findings of Fact and Conclusions of Law, the parties can present those. You'd have, I believe under statute, 5 days, and I will wait to sign an order until that time passes, but with that, then, anything else from the State - or from the County? Excuse me.
MS. HOFFMAN: No.
THE COURT: Okay, if there's nothing else, then parties are excused, and I would appreciate if you would, when you prepare the order, to share it with Miss Hoffman to make sure that --
MR. NICHOLS: Of course.
THE COURT: -- she is agreeable with that, or if there's any disagreement, then the Court can just address that so you can let me know and any other matters that you want to address with the Court if it - it comes up, so if you'd just please do that, I'd appreciate that. So if there's nothing else, then the parties are excused. Thank you.

(End of recording at 4:18 p.m.)

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
) ss:
COUNTY OF DAVISON)

CERTIFICATE OF TRANSCRIBER

I, Stephanie L. Moen, RPR, Official Court Reporter, and Notary Public within and for the State of South Dakota, hereby certify that I transcribed from an FTR recording the proceedings of the foregoing case described on Page 1 of this transcript, and that to the best of my knowledge and belief, this transcript contains a true and accurate record of the recording made of the proceedings described herein.

To all of which I have hereunto set my hand this 1st day of June 2023.

/s/ Stephanie L. Moen
Stephanie L. Moen, RPR
Official Court Reporter

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF TURNER)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

In the matter of change of zone application
File: PZ9.2022

62CIV.22-48

MRose Development Co., LLC, and
Jason Schumacher,
Petitioners,
vs.

Turner County Board of County
Commissioners,
Respondent.

Respondent's Proposed
Findings of Fact and
Conclusions of Law

Respondents Turner County Board of County Commissioners ("Respondents") submit their Objection to Petitioner's Proposed Findings of Fact and Conclusions of Law and propose our own as follows:

FINDINGS OF FACT

1. Christe Stewart, of Sioux Falls, owns land proposed and referred to as Bright Shores Subdivision on Swan Lake, Turner County, South Dakota.

2. The subject land is zoned agricultural.

3. MRose Development Co., LLC of Sioux Falls, Jason Schumacher of Tea, and Stewart as landowner, petitioned Turner County for a change of zone from the agricultural district to the lake residential district.

4. Changing the zoning classification of any property equates to an amendment of the zoning ordinance. (SDCL 11-2).

5. Changing the zoning classification of this property from the agricultural district to the lake residential district is required before considering whether landowner Stewart's use of such property is then inherently permitted under the lake residential district or requires further application under Turner County 2008 Revised Zoning Ordinance.

6. In 2022, Petitioners applied for a change of zone pursuant to SDCL 11-2-28.1 which was noticed for hearing and considered by the Turner County Planning Commission on May 10, 2022.

7. The Turner County Planning Commission recommended to the Turner County Board of Commissioners approval of the rezone application pursuant to SDCL 11-2-28.2 and SDCL 11-2-29.

8. The Turner County Board of Commissioners held at least one public hearing based on the proposed amendment to the ordinance, pursuant to SDCL 11-2-30.

9. On June 28, 2022, the proposed amendment to the zoning ordinance, rezoning agricultural land to lake residential, was not adopted by the County Commission. Therefore, the subject land remains zoned agricultural.

10. On July 15, 2022, MRose Development Co., LLC and Jason Schumacher filed a petition for judicial review alleging that they are aggrieved persons within the meaning of SDCL 7-8-29.

11. In 2007, Turner County adopted a Comprehensive Plan which set forth the zoning for all areas of Turner County to include the subject area which has historically and according to that plan, been zoned agricultural.

12. In 2008, Turner County adopted its 2008 Revised Zoning Ordinances which in part identifies each zoned area and its corresponding permitted and conditional uses.

13. All of Turner County land is incorporated.

14. Turner County Zoning Ordinance Article 3.01 provides for vigorous agricultural industry by "preserving for agricultural production those agricultural lands beyond areas of planned urban development."

15. Article 3.01 further provides that agricultural activities and residential subdivisions are "generally poor neighbors and therefore a concentration of housing in the A-1 Agricultural District shall be discouraged."

16. The Agricultural District, pursuant to Article 3.02, allows, as a permitted use, one single family dwelling in each quarter-quarter section with a building site of at least 2.5 acres.

17. In conjunction with SDCL 11-2-19 and SDCL 11-2-28 through 11-2-29, Article 21.00 directs the application and hearing process for a change of zone.

18. Article 21.04 of the 2008 Zoning Ordinance gives further authority to the Board of County Commissioners to "make changes in the zoning map in accordance with or in rejection or modification of the recommendations of the Planning Commission."

From the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. The petition is brought pursuant to SDCL 7-8-30 which provides for a de novo review of the decision made by a county commission.

2. The Circuit Court, upon review in a matter appealed pursuant to SDCL 7-8-30, must determine whether a board of county commissioners' decision was arbitrary or capricious, in which case the court should reverse the decision and remand to the board for further proceedings.

3. Petitioners are not persons aggrieved within the meaning of SDCL 7-8-29 as Stewart, the landowner, is not named in the petition. Jason Schumacher and MRose do not have an appropriate property interest as required by 7-8-27. The subject land is owned solely by Stewart. Schumacher and MRose hold only a potential future interest pending a successful project.

4. To make a finding that the County Commissioner's decision was arbitrary or capricious, there must be a showing that the actions of the board were based on personal, selfish, or fraudulent motives, or on false information, or characterized by a lack of relevant and competent evidence to support the action taken.

5. The decision to keep the zoning the status quo and in line with the Comprehensive Plan, does not amount to a showing that the Board's decision was arbitrary or capricious.

6. The court cannot find evidence that the decision was made in such a manner and must affirm the commission's decision.

7. Even if an application met all the standards as set forth in the ordinance, that does not entitle an applicant to absolute approval of any question.

8. The Board of County Commissioners retains authority to change, reject, or modify the recommendation of the Planning Commission as to rezone applications and, in making such decision, must weigh the application against both the Zoning Ordinance and the

Comprehensive Plan, as directed by Article 21.00 of the 2008 Revised Zoning Ordinance and SDCL Chapter 11-2.

9. If any of the above Conclusions of Law are deemed to be Findings of Fact, they should be set forth above as Findings of Fact.

10. Judgment should be entered in favor of the Respondents.

Dated this 10th day of April, 2023.

Katelynn B. Hoffman
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of April, 2023, a true and correct copy of the foregoing was served via Odyssey File and Serve upon:

Shawn M. Nichols
Counsel for the Petitioners
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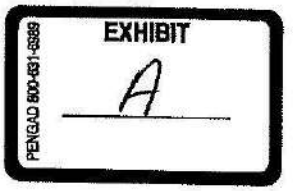
Katelynn B. Hoffman
Turner County State's Attorney
Counsel for Respondent

2008 Revised Zoning Ordinance

for

Turner County



Prepared by the South Eastern Council of Governments at the direction of the Planning Commission and County Commission of Turner County, South Dakota

Table of Contents

Article 1.00
Title and Purpose

1.01 Title. These regulations may be referred to as the 2008 Revised Zoning Ordinance for Turner County.

1.02 Purpose. These regulations have been based upon the Turner County Comprehensive Development Plan adopted on August 14, 2007 by the Board of County Commissioners, and are in conformance with Chapter 11-2 of the South Dakota Compiled Laws. These regulations are designed to carry out the goals and objectives of the plan; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration or scattering of population; and to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provision of transportation, water, drainage, sewerage, schools, parks, or other public requirements. These regulations have been made with reasonable consideration to the character and intensity of the various land uses and the need for public facilities and services that would develop from those uses. These regulations are necessary for the best physical development of the county. The regulations are intended to preserve and protect existing property uses and values against adverse or unharmonious adjacent uses by zoning all unincorporated land except those areas where joint zoning jurisdiction has been granted to a municipality.

Article 2.00
Districts and Boundaries

2.01 Application of Regulations and Boundaries. The regulations and zoning district boundaries set forth in this ordinance shall apply to all unincorporated land within Turner County except those areas which have been approved for municipal joint zoning jurisdiction.

2.02 Districts Designated. In order to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of a lot that may be occupied; the size of the yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes; the county is hereby divided into the following districts:

A-1 Agricultural	I-1 Industrial
RR Rural Residential	I-2 Industrial
R-1 Residential	F Floodplain
LR Lake Residential District	PD Planned Development
C Commercial	

The following districts shall be designated as zoning overlay districts, imposing special regulations on the properties that fall within these overlay districts without abrogating the requirements imposed by the underlying land use district regulations:

APO Aquifer Protection

2.03 Incorporated by Reference. The following are hereby adopted and incorporated by reference:

A. The official zoning map(s) of the 2008 Revised Zoning Ordinance, together with all the explanatory matter thereon and attached thereto, is hereby adopted by reference and is declared to be a part of these regulations. The maps shall be filed with the Register of Deeds.

B. The Flood Insurance Rate Map is hereby adopted by reference and declared to be a part of these regulations. Areas shown as Zone A, AO or A1- A30 on the F.I.R.M. but which are zoned A-1 Agricultural on the zoning map shall be governed by the provisions of the F Floodplain District.

C. The approved plans submitted in conjunction with any Planned Development are hereby adopted by reference and declared to be a part of these regulations.

2.04 Boundaries of Districts; Maps. The boundaries of the districts are shown upon the maps which have been made a part hereof by reference. The various districts and their boundaries which have been designated on these maps shall have the same force and effect as if they were all fully set forth herein.

Article 3.00
A-1 Agricultural District

3.01 Intent. It shall be the intent of this district to provide for a vigorous agricultural industry by preserving for agricultural production those agricultural lands beyond areas of planned urban development. It is recognized that because of the nature of both agricultural activities and residential subdivisions, that these two uses are generally poor neighbors and therefore a concentration of housing in the A-1 Agricultural District shall be discouraged.

3.02 Permissive Uses. A building or premises shall be permitted to be used for the following purposes in the A-1 Agricultural District:

A. Agriculture.

B. A single-family dwelling if the following provisions for building eligibility are met:

1. Each quarter-quarter section shall have one building eligibility when all the following conditions are met:

   a. There are no other dwellings on the quarter-quarter section.

   b. The building site shall be a minimum of 2.5 acres.

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

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

   e. Prior to any building permit being issued for any new single family residence located in the A-1 Agriculture District, a Right to Farm Covenant shall be filed on the parcel of land upon which the new structure will be located. Only the following shall constitute a Right to Farm Covenant: **"RIGHT TO FARM NOTICE COVENANT**
   You are hereby notified that the property on which you are constructing a structure is in or near agricultural land, agricultural operations or agricultural processing facilities or operations. You may be subject to inconvenience or discomfort from lawful agricultural or agricultural processing facility operations. Agricultural operations may include, but are not limited to, the following: the cultivation, harvesting, and storage of crops; livestock production; ground rig or aerial application of pesticides or herbicides; the application of fertilizer, including animal waste; the operation of machinery; the application of irrigation water; and other accepted and customary agricultural activities conducted in accordance with Federal, State, and County laws. Discomforts and inconveniences may include, but are not limited to: noise, odors, fumes, dust, smoke, burning, vibrations, insects, rodents, and/or the operation of machinery

(including aircraft) during any 24-hour period. If you live near an agricultural area, you should be prepared to accept such inconveniences or discomforts as a normal and necessary aspect of living in an area with a strong rural character and an active agricultural sector. You are also notified that there is the potential for agricultural or agricultural processing operations to expand. This notification shall extend to all landowners, their heirs, successors or assigns and because it is required pursuant to the issuance of a building permit, may not be removed from the record title without consent of the Turner County Planning Commission."

C. Elementary or high school.

D. Historical sites.

E. Church.

F. Neighborhood utilities.

G. Antenna support structure.

H. A building eligibility may be used within a farmstead provided:

1. The building eligibility exists on property contiguous to and under the same ownership as the farmstead.

2. There will be no more than two dwellings within the farmstead.

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

I. Wind energy conversion system.

J. Greenhouses and nurseries provided there is no retail sale of products conducted on the premises.

K. A single-family dwelling located on a lot of record in accordance with the following:

1. A lot of record consisting of less than 80 acres and containing no other dwellings shall have one building eligibility.

2. A lot of record consisting of 80 acres or more shall qualify for building eligibility as follows:

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

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

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

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

L. Concentrated Animal Feeding Operation (Small) provided:

1. The operation shall meet the requirements of Section 13.09(E)(1) and Section 13.09 (E)(5).

2. The operation shall not be in the Aquifer Protection Overlay District, over a mapped shallow aquifer or a flood plain (unless State Permitted).

M. Concentrated Animal Feeding Operation (Medium) provided:

1. The operation shall meet the requirements of Section 13.09(E)(1) and Section 13.09 (E)(5).

2. The operation shall not be in the Aquifer Protection Overlay District, over a mapped shallow aquifer or a flood plain (unless State Permitted).

N. Concentrated Animal Feeding operation (existing) shall be allowed to expand by up to 1,000 animal units provided:

1. The operation is located in a farmstead or property contiguous to, and smaller than, the aforementioned farmstead.

2. The operation shall not be located in the Aquifer Protection Overlay District, over a mapped shallow aquifer or a flood plain (unless State Permitted).

3. The operation shall not exceed 1000 animal units.

4. There is conformance with South Dakota Department of Environment and Natural Resources design standards for any newly constructed waste containment facility. A registered professional engineer shall certify the plan specifications and the construction of the facility.

5. Approval by the Planning Director of a nutrient management plan which has been prepared in conformance with the South Dakota Department of Environment and Natural Resources standards.

6. The operation shall meet the requirements of Table 1 in Section 13.09(E)(1) and Section 13.09(E)(5).

O. 501(d) Non-Profit Religious and Apostolic Association in conformance with Article 13.12.

P. Rock, sand, or gravel extraction.

Q. Mineral exploration.

R. Off-premise signs in conformance with Article 18.00.

3.03 Conditional Uses. A building or premises may be used for the following purposes in the A-1 Agricultural District if a conditional use permit has been obtained in conformance with the requirements of Article 20.00:

A. Airport/heliport.

B. Group day care.

C. Private campground.

D. Garden center.

E. Kennel.

F. Stable.

G. Roadside stand.

H. Fireworks sales provided the length of sales does not exceed nine (9) days.

I. Golf course, golf driving range.

J. Private outdoor recreation facility.

K. Trap shoot, rifle range, pistol range.

L. Public facility owned and operated by a governmental entity.

M. Telecommunication and broadcast tower in conformance with Article 13.11.

N. Bed and breakfast establishment.

O. Sanitary landfill, solid waste transfer station, rubble dump, commercial compost site.

P. Sewage disposal pond.

Q. Cemetery.

R. Pet cemetery.

S. Livestock sales barn.

T. Concentrated Animal Feeding Operation (Large).

U. Electrical substation.

V. Public utility facility.

W. Agriculturally related operations involving the handling, storage and shipping of farm products.

X. The transfer of a building eligibility from one parcel to another parcel when all the following conditions are met:

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

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

    a. Agricultural productivity of the soil.

    b. Soil limitations.

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

3. The minimum lot size shall be 2.5 acres but a larger area may be required when soil conditions warrant.

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

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

Y. Manufactured home in conformance with Article 13.05(C) if there is building eligibility on the parcel.

Z. Major home occupation in conformance with Sections 13.0302 and 13.0303.

AA. Facilities for the storage and distribution of anhydrous ammonia.

BB. Ethanol Production Facilities.

3.04 Accessory Uses. Accessory uses and buildings permitted in the A-1 Agricultural District are buildings and uses customarily incident to any permitted use in the district.

3.05 Parking Regulations. All parking within the A-1 Agricultural District shall be regulated in conformance with the provisions of Article 16.00.

3.06 Sign Regulations. Signs within the A-1 Agricultural District shall be regulated in conformance with the provisions of Article 17.00.

3.07 Density, Area, Yard and Height Regulations. The maximum height and minimum lot requirements within the A-1 Agricultural District shall be as follows:

A. General Requirements:

Lot area.....2.5 acres *
Lot width .....125'
Front yard .....75'
Side yard .....30'
Rear yard .....30'
Maximum height .....35' **

* Unless a larger lot size is required by the granting of a conditional use permit.

** There shall be no height limit for farm structures or wind energy conversion systems.

B. There shall be a required front yard on each street of a double frontage lot.

C. If a lot of record has less area or width than herein required and its boundary lines along the entire length abutted lands under other ownership on July 8, 1998, and have not since been changed, such parcel of land may be used for any use permitted in this district.

D. Buildings with side yard setbacks less than required herein may have additions erected in line with the existing building and provided further that said additions will be erected no closer to the lot line than the existing building.

E. Buildings may be located within the required front yard but no closer to the public right-of-way than a legal nonconforming building provided the building is no greater than 150 feet from the nonconforming building.

Article 6.00
LR Lake Residential District

6.01 Intent. This district is intended to provide for orderly residential development around lakes.

6.02 Permissive Uses. A building or premises shall be permitted to be used for the following purposes in the LR Lake Residential District:

A. Single family dwelling.

B. Preservation areas and facilities.

C. Agriculture, horticulture and ranching uses.

D. Attached garages.

E. Public parks.

F. Antennas 35 feet or less in height.

6.03 Conditional Uses. A building or premises may be used for the following purposes in the LR Lake Residential District if a conditional use permit for such use has been obtained in conformance with the requirements of Article 20.00:

A. Amusement, cultural and recreation areas and facilities.

B. Manufactured home park.

C. Manufactured home not in a manufactured home park.

D. Multiple dwellings.

E. Nursing home.

F. Elementary or high school.

G. Antennas over 35 feet in height.

H. Signs (on-site or off-site).

I. Electrical substation.

J. Public utility facility.

K. Any structure or building moved into the LR District.

L. Sewer septic tank and drain field.

6.04 Density, Area, Yard and Height Regulations. The maximum height and minimum lot requirements within the LR Lake Residential District shall be as follows:

A. General requirements:

All Uses

Density .....-
Lot area .....-
Lot width.....100'
Lot depth.....75'
Front yard .....10' *
Side yard .....10'
Rear yard .....10' **
Maximum height .....35'

* Front yard shall be measured form the lot line along the road.

** Rear yards shall be measured from the high water mark (1252.9 feet mean sea level (msl) as determined by the South Dakota Department of Environment and Natural Resources).

6.05 Additional LR District Regulations. To be a permitted Use or Conditional Use in the LR District, such use shall be conditional upon the property owner meeting the following performance standards.

A. Any structure must utilize either a central wastewater collection and treatment system, or a sealed, leak proof and corrosion resistant holding tank for effluent generated by said structure. A conditional use may be allowed for a septic tank and sewer drain field, if the Board determines that the septic tank and drain field meet County standards and does not pose any significant public health or pollution risk.

B. Except for boathouses, piers and docks, all structures (including basements) shall be constructed so that the lowest floor is no less than 3 feet above the high water mark.

C. Natural shrubbery shall be preserved as far as practicable, and where removed, shrubbery shall be replaced, not closer than twenty-four (24) inches to the property line, with other vegetation that is equally effective in retarding runoff, preserving natural beauty and preventing erosion. No shrubbery shall exceed forty (40) inches in height.

D. Filling, grading, lagooning or dredging which would result in substantial detriment to natural waters by reason of erosion, sedimentation or impairment of fish and aquatic life is prohibited.

E. No non-licensed or inoperative motorized vehicle shall be parked or stored in the LR District, unless such vehicle is parked or stored in a fully enclosed building.

F. No trash or refuse, such as inoperative motorized vehicles or boats, farm machinery, scrap metals, waste tires, waste oil or antifreeze, lead acid batteries, household appliances or above ground or below ground fuel tanks will be allowed in the LR District or on public property.

G. No building or structure may be moved into the LR District without the owner of the property having first applied for a moving permit and a conditional use permit. No permit may be granted unless the structure to be moved in meets County building and zoning standards and is consistent in character with the other structures in the area.

H. No fence shall exceed forty-eight (48) inches in height at any location on the property.

I. No person shall drive, park, camp, or start any fire, except in designated areas, in or on any designated public use area in the LR District.

Article 21.00
Change of Zone

21.01 Application to County or by County for Zoning Change. Any person, firm, or corporation desiring a change in regulations, restrictions, or boundaries of the zoning map of any property from one zoning district classification to another zoning district classification under this ordinance, shall make application for such change with the Office of Planning and Zoning. Such application form shall be provided by the Office and be completed in full by the applicant.

The Board of County Commissioners may from time to time on its own motion, after public notice and hearing, and after a recommendation by the Planning Commission amend, supplement, or change the boundaries or regulations herein or subsequently established.

21.02 Fees. Upon the filing of any application for a zoning district classification change with the Office of Planning and Zoning, the applicant shall pay to the County the appropriate fee as designated in Article 25.00.

21.03 Planning Commission Hearing. Upon the filing of an application and payment of the fee, the Office of Planning and Zoning shall set a date for at least one public hearing at which time the Planning Commission will consider such requests for a change in zoning district classification. The date for a public hearing shall be a day when the Planning Commission is regularly scheduled to meet.

A. Legal Notice. The Planning Director shall cause to be published a legal notice as required in SDCL 11-2-29.

B. Signs. A sign(s) to be provided by the Office of Planning and Zoning shall be posted on or near the property at least five days prior to the scheduled hearing.

C. Planning Commission Recommendation. The Planning Commission shall consider all applications for zoning district classification changes and make a recommendation to the Board of County Commissioners.

21.04 Board Hearing. The Board of County Commissioners shall conduct at least one public hearing on all applications which have been forwarded to them from the Planning Commission.

A. Legal Notice. The Board shall cause to be published a legal notice as required in SDCL 11-2-19.

B. Signs. A sign(s) to be provided by the Office of Planning and Zoning shall be posted on or near the property at least five days prior to the scheduled hearing.

C. Hearing. Upon the day of such public hearing, the Board shall review the decisions and recommendations of the Planning Commission on all applications. The Board, in making its determination on such applications, may make changes in the zoning map in accordance with or in rejection or modification of the recommendations of the Planning Commission.

21.05 Reapplication. No application requesting a zoning district classification change on any property whose application includes any such property either entirely or substantially the same as that which has been denied by the Board, shall again be considered by the Planning Commission before the expiration of six months from the date of the final action of the Board.

Article 26.00
General Provisions

26.01 General Regulations. The following general regulations shall apply to all zoning districts:

A. Except as otherwise provided, no building shall be erected, converted, enlarged, reconstructed, or structurally altered, nor shall any structure or land be used:

1. Except for a purpose permitted in the district in which the structure or land is located;

2. Except in conformance with the height and minimum lot requirements, and the parking and sign regulations, and any other applicable requirements of the district in which the structure or land is located;

3. Except in conformance with any Federal, State or County codes as may be applicable. Where these regulations and any other rules and regulations conflict or overlap, whichever imposes the more stringent restrictions shall prevail.

B. The density and yard requirements of these regulations are minimum regulations for each and every building existing at the effective date of these regulations and for any building hereafter erected or structurally altered. No land required for yards or other open spaces about an existing building or any building hereafter erected or structurally altered shall be considered a yard or lot area for more than one building.

C. Every building hereafter erected or structurally altered shall be located on a lot as herein defined and in no case shall there be more than one main building on a lot except as otherwise provided in these regulations.

D. Cooperatives, condominiums, and all other forms of property ownership do not affect the provisions of these regulations and all requirements shall be observed as though the property were under single ownership.

26.02 Violation and Penalty. Violations shall be treated in the manner specified below:

A. The owner or agent of a building or premises in or upon which a violation of any provision of these regulations has been committed or shall exist, or the lessee or tenant of an entire building or entire premises in or upon which violation has been committed or shall exist, or the agent, architect, building contractor or any other person who commits, takes part or assists in any violation or who maintains any building or premises in or upon which such violation shall exist, shall be guilty of a misdemeanor and shall be punished by a fine not to exceed $500.00, 30 days in jail, or both. Each and every day that such violation continues may constitute a separate offense.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure or land is used in violation of these

regulations, the appropriate authorities of Turner County, in addition to other remedies, may institute injunction, mandamus or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance or use, or to correct or abate such violation, or to prevent the occupancy of said building, structure or land.

26.03 Warning and Disclaimer of Liability. The degree of flood protection required by these regulations is considered reasonable for regulatory purposes and is based on scientific and engineering considerations. On rare occasions, greater floods can and will occur, and flood heights may be increased by man-made or natural causes. These regulations do not imply that land outside the flood zone or uses permitted within such areas will be free from flooding or flood damages. These regulations shall not create liability on the part of Turner County or on any officer or employee thereof for any flood damages that result from reliance on these regulations or any administrative decision lawfully made thereunder.

26.04 Interpretation, Abrogation, and Severability. In interpreting and applying the provisions of these regulations, they shall be held to be the minimum requirements for the promotion of the public safety, health, convenience, comfort, morals, prosperity, and general welfare. It is not the intent to repeal, abrogate or impair any existing easements, covenants or deed restrictions. However, where these regulations and other regulations, easement, covenant or deed restriction conflict or overlap whichever imposes the more stringent restrictions shall prevail. All other regulations inconsistent with these regulations are hereby repealed to the extent of this inconsistency only. If any section, clause, provision or portion of these regulations is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of these regulations shall not be affected thereby.

26.05 Saving Clause. These regulations shall in no manner affect pending actions either civil or criminal, founded on or growing out of any regulations hereby repealed. These regulations shall in no manner affect rights or causes of action, either civil or criminal, not in suit that may have already accrued or grown out of any regulations repealed.

26.06 Purpose of Catch Heads. The catch heads appearing in connection with the sections of these regulations are inserted simply for convenience to serve the purpose of an index. The introductory statements found at the beginning of each article are to serve as general references only. The catch heads, introductory statements, and illustrative examples of zoning terms shall be wholly disregarded by any person, office, court, or other tribunal in construing the terms and provisions of these regulations.

26.07 Effective Date. These regulations shall be in full force and effect from and after its passage and publication as provided by law.

Article 27.00
Definitions

27.01 Purpose. For the purpose of these regulations certain terms are hereby defined. Words used in the present tense shall include the future; the singular number shall include the plural and the plural the singular; the word 'building' shall include the word 'structure' and 'premises'; the word 'shall' is mandatory and not directory; the words 'used' or 'occupied' include the words 'intended', 'designed' or 'arranged to be used or occupied'; the word 'lot' includes the words 'plot', 'parcel' or 'tract', and the word 'person' includes a firm, association, organization, partnership, trust, company or corporation as well as an individual. Any word not herein defined shall be as defined in any recognized standard English dictionary.

27.02 Definitions.

01. ABANDONED SIGN. A sign or sign structure which contains no sign copy, contains obliterated or obsolete sign copy, or is maintained in an unsafe or unsightly condition for a period of six months shall be considered an abandoned sign.

02. ACCESSORY BUILDING OR USE. A subordinate building or portion of the main building, the use of which is incidental to and customary in connection with the main building or the main use of the premises and which is located on the same lot with such main building or use. An accessory use is one which is incidental to the main use of the premises.

03. ADULT ARCADE. Any place to which the public is permitted or invited and in which coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image producing devices are maintained to show images involving specific sexual activities or specific anatomical areas to persons in booths or viewing rooms.

04. ADULT BOOKSTORE OR VIDEO STORE. A commercial establishment that offers for sale or rent any of the following as one of its principal business purposes:

    1. Books, magazines, periodicals, or other printed matter, photographs, films, motion pictures, videocassettes or reproductions or slides, or other visual representations that depict or describe specific sexual activities or specific anatomical areas.

    2. Instruments, devices, or paraphernalia that are designed for use in connection with specific sexual activities.

05. ADULT CABARET. Any nightclub, bar, restaurant, or other similar commercial establishment that regularly features:

    1. Persons who appear in a state of nudity or seminudity.

2. Live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.

3. Films, motion pictures, videocassettes, slides or other photographic reproductions that are characterized by the depiction or description of specific sexual activities or specific anatomical areas.

06. ADULT MOTION PICTURE THEATER. A commercial establishment in which, for any form of consideration, films, motion pictures, videocassettes, slides, or other similar photographic reproductions that are characterized by the depiction or description of specific sexual activities or specific anatomical areas are predominantly shown.

07. ADULT ORIENTED BUSINESS. Any adult arcade, adult bookstore or video store, cabaret, adult live entertainment establishment, adult motion picture theater, adult theater, massage establishment that offers adult service, or nude model studios.

08. ADULT SERVICE. Dancing, serving food or beverages, modeling, posing, wrestling, singing, reading, talking, listening, or other performances or activities conducted for any consideration in an adult oriented business by a person who is nude or seminude during all or part of the time that the person is providing the service.

09. ADULT THEATER. A theater, concert hall, auditorium, or similar commercial establishment that predominantly features persons who appear in a state of nudity or who engage in live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.

10. AGRICULTURE. The use of land for agricultural purposes including farming, dairying, raising, breeding, or management of livestock, poultry, or honey bees, truck gardening, forestry, horticulture, floriculture, viticulture, and the necessary accessory uses for packaging, treating or storing the produce providing that the operation of any such accessory use shall be secondary to the normal agricultural activities. This definition shall not include intensive agricultural activities such as concentrated animal feeding operations and agribusiness activities.

11. AIRPORT. A place where aircraft can land and takeoff, usually equipped with hangers, facilities for refueling and repair, and various accommodations for passengers, including heliports.

12. ANIMAL UNIT. A unit of measurement based on the amount of waste produced by the animal. For the purposes of this ordinance animal units (AU) shall be calculated according to the following chart. Animal units relate to inventory rather than annual production. Animal units are computed by multiplying the number of head of a particular animal times the corresponding animal unit equivalent. Other animal species equivalent which are not listed will be based on species' waste production.

clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this ordinance; or

2. The aquifer is greater than fifty (50) feet but less than one hundred feet (100) below the land surface with thirty (30) feet or less of continuous, overlying, low to extremely low permeability geological material that may be a combination of weathered and unweathered till, shale, or till and shale.

20. AUTOMOBILE SALES. The use of any building, land area, or their premises for the display and sale of new or used automobiles, pickups, trucks, panel trucks or vans, all-terrain vehicles, motorcycles, snowmobiles, trailers, or recreational vehicles and including any warranty repair work and other repair service conducted as an accessory use.

21. AUTOMOBILE SERVICE STATION. Shall mean any building or premise which provides for the retail sale of gasoline, oil, tires, batteries, and accessories for motor vehicles and for certain motor vehicle services, including washings, tire changing, repair service, battery service, radiator service, lubrication, brake service, wheel service, and testing or adjusting of automotive parts. Automobile repair work may be done at a service station provided that no rebuilding of engines, spray paint operations, or body or fender repair is permitted. Gasoline pumps and gasoline pump islands shall be located more than twelve (12) feet from the nearest property line.

22. AUTOMOBILE STORAGE YARD. The temporary storage of vehicles which are impounded, licensed, and operable, in an unroofed area.

23. BANNERS. A temporary sign composed of lightweight material either enclosed or not enclosed in a rigid frame secured or mounted so as to allow movement of the sign caused by movement of the atmosphere; i.e. pennants, twirling signs, balloons, or other gas-filled figures, ribbons, or other similar moving devices.

24. BAR/LOUNGE. An establishment that is licensed to sell alcoholic beverages, including beer, by the drink.

25. BED AND BREAKFAST ESTABLISHMENT. A private single-family residence which is used to provide limited meals and temporary accommodations for a charge to the public.

26. BILLBOARD. A sign which directs attention to a business, commodity, service, or entertainment conducted, sold, or offered at a location other than the premises on which the sign is located. Also, an off-premise sign.

27. BOARD OF COUNTY COMMISSIONERS. The governing body of Turner County.

28. BOARDINGHOUSE. A building, other than a hotel or apartment hotel, where for compensation and by prearrangement for definite periods, lodging, meals, or lodging and meals are provided for three or more persons.

29. BROADCAST. To convey, generate, transmit or receive electromagnetic signals regardless of frequency, power level or communications use.

30. BROADCAST TOWER. Shall mean a structure, not including offices or studio, for the transmission or broadcast of radio, television, radar, or microwaves.

31. BUILDABLE AREA. That portion of the lot that can be occupied by the principal use, thus excluding the front, rear and side yards.

32. BUILDING. Any structure, either temporary or permanent, forming an open, partially enclosed, or enclosed space constructed by a planned process of materials and components to be designated and used for the shelter or enclosure of any person, animal, or property of any kind. For the purpose of these regulations, retaining walls, concrete slabs, utility poles and fences are not considered structures.

33. BUILDING, DETACHED. A building surrounded by open space on the same lot.

34. BUILDING ELIGIBILITY. See 'eligible building site'.

35. BUILDING, HEIGHT OF. The vertical distance from the grade to (a) the highest point of a flat roof, (b) the deck line of a mansard roof, or (c) the average height between eaves and ridge for gable, hip, and gambrel roofs.

36. BUILDING LINE. Is a line on the lot running parallel to and the required horizontal distance from the nearest property line.

37. BUILDING, PRINCIPAL. A non-accessory building in which is conducted the principal use of the lot on which it is located.

38. BUS/TRUCK TERMINAL. An area and building where buses, trucks, and cargo are stored; where loading and unloading are carried on regularly; and where minor maintenance of these types of vehicles is performed.

39. CAMOUFLAGE. A covering or disguise of any kind to hide or conceal.

40. CAMPGROUND. A plot of ground consisting of two or more campsites where camping units can be located and occupied as temporary living quarters.

41. CATHODIC PROTECTION. A technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell; protection of a tank through the application of either galvanic anodes or impressed current.

42. CHANGE OF OPERATION. A cumulative increase of 1000 or more animal units which are confined at an unpermitted concentrated animal feeding operation.

43. CHANGE OF USE. Substitution of one thing for another specifically regarding use of land or use of a building.

44. COMMERCIAL RECREATION FACILITY. A recreation facility operated as a business and open to the public for a fee.

45. CONCENTRATED ANIMAL FEEDING OPERATION. A lot, yard, corral, building or other area where animals have been, are, or will be stabled or confined for a total of 90 days or more during any 12 month period; and where crops, vegetation, forage growth, or post-harvest residues are not sustained over any portion of the lot or facility.

46. CONTAINMENT FACILITY, PRIMARY. The tank, pit, container, pipe, enclosure, or vessel of first containment of a regulated substance.

47. CONTAINMENT FACILITY, SECONDARY. A second level of containment outside the primary containment facility designed to prevent a regulated substance from reaching land or waters outside the containment area.

48. COMPREHENSIVE PLAN. The adopted long-range plan intended to guide the growth and development of the area, including analysis, recommendations and proposals of economy, housing, transportation, community facilities, and land use.

49. CONDITIONAL USE. A use that would not be appropriate generally or without restriction throughout the zoning district, but which if controlled, would promote the public health, safety and welfare.

50. CONTAMINATION, AIR. A concentration of any radioactive or toxic material which is a product, by-product, or otherwise associated with any exploration, mining or milling operation that increases ambient air radiation levels by 50 mrems from the background levels established prior to the commencement of such activity, measured at the perimeter of the mining or milling site or at the top of an exploration hole.

51. CONTAMINATION, WATER. A concentration of any radioactive or toxic material which is a product, by-product, or otherwise associated with any exploration, mining or milling operation that exceeds the maximum contaminate levels established by the Federal Safe Drinking Water Act and regulations promulgated thereunder.

52. CONTRACTOR'S SHOP AND STORAGE YARD. Use of land or building(s) for storage and preparation of materials and equipment used by that same individual(s) in conducting the business of construction and repair work, generally completed at some other on-site location.

53. DAY CARE. The providing of care and supervision of a child or children as a supplement to regular parental care, without transfer of legal custody or placement for adoption, with or without compensation, on a regular basis for a part of a day.

54. DAY CARE, CENTER. Is normally in a facility used only for providing day care nursery or pre-kindergarten services, and is limited in number over twelve (12) by the square footage of useable space available. The ratio is presently thirty-five (35) square feet per child indoors and fifty (50) square feet per child outdoors.

55. DAY CARE, FAMILY. Care is done in a family home and the number of children cared for is limited to a maximum of six (6) children under fourteen. Included in that count are the providers' own children six years and under. See (Home Occupation).

56. DAY CARE, GROUP. Is normally in a family home. The number of children cared for is seven (7) to twelve (12) children under the age of fourteen including the provider's own children six years and under.

57. DENSITY. The number of families, individuals, dwelling units, or housing structures per unit of land.

58. DISTRICT. An area for which regulations governing the use of buildings and premises, the height of buildings, the size of yards and the intensity of use are uniform.

59. DWELLING. A building, or portion thereof, constructed in conformance with the International Building Code, and used exclusively for human habitation, including single-family, two-family, and multiple-family dwellings, but not including hotels, motels, or lodging houses. This definition does not include a mobile home or manufactured home (see subsection 112).

60. DWELLING, SINGLE FAMILY. A building designed for or occupied exclusively by one family.

61. DWELLING, TWO FAMILY. A building designed for or occupied exclusively by two families.

62. DWELLING, MULTIPLE. A building designed for or occupied exclusively by three or more families.

63. DWELLING UNIT. One or more rooms in a dwelling occupied or intended to be occupied as separate living quarters by a single family as defined herein.

64. ELECTRICAL SUBSTATION. A premises which may or may not contain buildings, where the interconnection and usual transformation of electrical service takes place between systems. An electrical substation shall be secondary, supplementary, subordinate, and auxiliary to the main system.

65. ELIGIBLE BUILDING SITE (BUILDING ELIGIBILITY). A site which fulfills the requirements for the construction or placement of a residential dwelling or manufactured home. To compute the number of eligible building sites on a lot of record of forty acres or

more, the total acreage of the parcel shall be divided by forty acres. The resulting whole number is the number of building sites eligible on the lot of record.

66. EXPLORATION. The act of searching for or investigating a mineral deposit. It includes, but is not limited to, sinking shafts, tunneling, drilling core and bore holes and digging pits or cuts and other works for the purpose of extracting samples prior to commencement of development of extraction operations, and the building of roads, access ways, and other facilities related to such work. Any and all shafts, tunnels, or holes shall not exceed 18 inches in diameter unless the conditional use for exploration provides for a larger diameter. The term does not include those activities which cause no or very little surface disturbance, such as airborne surveys and photographs, use of instruments or devices which are hand-carried or otherwise transported over the surface to make magnetic, radioactive, or other tests and measurements, boundary or claim surveying, location work, or other work which causes no greater land disturbance than is caused by ordinary lawful use of the land by persons not involved in exploration.

67. FAMILY. One or more individuals, related by blood or law, occupying a dwelling unit and living as a single household unit. A family shall not include more than three (3) adults who are unrelated by blood or law, in addition to persons actually related by blood or law the following persons shall be considered related by blood or law for the purposes of this ordinance: (1) A person residing with the family for the purpose of adoption; (2) Not more than six (6) persons under eighteen (18) years of age, residing in a foster home licensed or approved by a governmental agency; (3) Not more than four (4) persons nineteen (19) years of age or older residing with the family for the purpose of receiving foster care licensed or approved by a governmental agency; and (4) any person who is living with the family at the direction of a court.

68. FARMSTEAD. An area which existed on July 8, 1998 and encompasses a farm dwelling or dwellings and other agricultural buildings and structures devoted to and used in connection with a farming operation. A farmstead is generally bounded on one or more sides by a tree belt, is located on one or more quarter-quarter section parcels or equivalent area, and does not include crop land, hay land or pasture.

69. FLOOD INSURANCE RATE MAP (F.I.R.M.). An official map of Turner County on which the Federal Insurance Administration has delineated the areas of flood hazard and their potential for flooding.

70. FLOOD PLAIN. A land area adjoining a river, creek, watercourse or lake which is likely to be flooded and which is designated as Zone A, A0 or A1- A30 on the F.I.R.M.

71. FLOOD PROOFING. A combination of structural provisions, changes, or adjustments to properties and structures subject to flooding primarily for the reduction or elimination of flood damages to properties, water, and sanitary facilities, structures, and contents of buildings in a flood hazard area.

taxation, a private college or university that maintains and operates educational programs in which credits are transferable to a college or university that is supported entirely or in part by taxation or a structure to which the following apply:

1. A sign is not visible from exterior of the structure and no other advertising appears indicating that a nude person is available for viewing.

2. A Student must enroll at least three days in advance of a class in order to participate.

3. No more than one nude or seminude model is on the premises at any time.

122. NUDE, NUDITY OR STATE OF NUDITY. Any of the following:

1. The appearance of a human anus, genitals, or a female breast below a point immediately above the top of the areola.

2. A state of dress that fails to opaquely cover a human anus, genitals, or a female breast below a point immediately above the top of the areola.

123. OFFICE OF PLANNING AND ZONING. The office designated by the Board of County Commissioners to administer and enforce this ordinance.

124. OUTDOOR STORAGE. The keeping, in an unroofed area, of any goods, junk, material, merchandise, or vehicles in the same place for more than twenty-four (24) hours. Goods, material, merchandise, or vehicles shall not include items listed, nor be of a nature as indicated in the definition of a salvage or junkyard as defined herein.

125. PARKING SPACE. An area, enclosed or unenclosed, sufficient in size to store one automobile, together with a driveway connecting the parking space with a street and permitting ingress and egress of an automobile.

126. PERMISSIVE USES. Any use allowed in a zoning district and subject to the restrictions applicable to that zoning district.

127. PERSONAL SERVICES. Establishments primarily engaged in providing services involving the care of a person or their apparel. Including but not limited to: laundry or dry cleaning, garment services, coin operated laundry, photographic and art studios, beauty shop, barber shop, shoe repair, reducing salon and health club, and clothing rental.

128. PLACE OF WORSHIP. A structure where persons regularly assemble for worship, ceremonies, rituals, and education relating to a particular form of religious belief and which a reasonable person would conclude is a place of worship by reason of design, signs, or architectural or other features.

129. PLANNING COMMISSION. The duly appointed planning board of the County responsible for reviewing and approving applications for development and preparation of plans and ordinances.

179. YARD, REQUIRED FRONT. The required front yard shall extend across the front of a lot between the property lines. There shall be a required front yard on each street side of a corner lot. The required front yard with the smallest required front yard may be referred to as the side-street-side front yard.

180. YARD, REQUIRED REAR. The required rear yard shall extend across the rear of a lot between the property lines. On corner lots, the required rear yard may be to the rear of either street. On interior lots, the required rear yard shall, in all cases, be at the opposite end of the lot from the front yard.

181. YARD, REQUIRED. A required yard shall mean the required open space between a property line and a building line. The open space shall be unoccupied and unobstructed from the ground upwards except as otherwise provided in this ordinance.

182. YARD, REQUIRED SIDE. The required side yard shall extend between the required front yard line and the required rear yard line. There shall only be one required side yard on a corner lot.

183. YARD, SIDE. A yard between the main building and the side line of the lot, and extending from the front yard line to the rear yard line.

184. ZONING DISTRICT. A specifically delineated area within which regulations and requirements uniformly govern the use, placement, spacing, and size of land and buildings.

185. ZONING PERMIT. A document signed by the Planning Director or an authorized representative as a condition precedent to the commencement of a use or the erection, construction, reconstruction, restoration, alteration, conversion, or installation of a building, which acknowledges that such use or building complies with the provisions of the zoning regulations or an authorized variance therefrom.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30339

MROSE DEVELOPMENT CO., LLC and JASON SCHUMACHER,

Petitioners/Appellees,

vs.

TURNER COUNTY BOARD OF COUNTY COMMISSIONERS

Respondent/Appellant.

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

The Honorable David Knoff, Circuit Court Judge

RESPONSE BRIEF OF APPELLEES

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STATEMENT REGARDING CITATION CONVENTIONS

Appellees MROSE Development and Jason Schumacher adopt the following citation conventions: Citations to the settled record of the Clerk's Record Index will be denoted "R-____". Citations to the hearing Transcript will be denoted "T-____". Citations to the Appellant's Brief will be denoted "AB-____".

JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL 15-26A-3(1), (2) and/or (4).

ISSUES PRESENTED

Issue I. Whether the County preserved its argument that the Board of Commissioners' decision regarding Developer's Application for change of zone was administrative or non-quasi-judicial, when it failed to argue the same to the circuit court.

The Circuit Court did not address the distinction between legislative and quasi-judicial acts nor the materiality of that distinction.

- *LP6 Claimants, LLC v. S.D. Dep't of Tourism*, 2020 S.D. 38, 945 N.W.2d 911
- *A-G-E Corp. v. State*, 2006 S.D. 66, 719 N.W.2d 780
- *Legrand v. Weber*, 2014 S.D. 71, 855 N.W.2d 121

- SDCL § 7-8-30

Issue II. Whether denying an application to rezone certain real property on the basis that its prior, now deceased, owner would not have wanted it developed is an arbitrary reason to deny the application.

The Circuit Court did not make findings on arbitrariness as to these specific facts. The Circuit Court found that the Board's decision was arbitrary on other grounds.

- *State v. Troy Twp.*, 2017 S.D. 50, ¶ 24, 900 N.W.2d 840, 850
- *Surat Farms, LLC v. Brule Cnty. Bd. of Comm'rs*, 2017 S.D. 52, 901 N.W.2d 365
- *Surat v. Am. Twp.*, 2017 S.D. 69, 904 N.W.2d 61
- *Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, 596 N.W.2d 347

Issue III. Whether the Turner County Board of County Commissioners acted arbitrarily in disregarding the County's Comprehensive Development Plan when making its determination as to whether to grant an application for change of zone.

The Circuit Court, although not using the term "arbitrary," determined that the Board's decision fell outside the permissible range of decisions available to it when it denied the proposed rezone, contrary to Turner County's Comprehensive Development Plan.

- *State v. Troy Twp.*, 2017 S.D. 50, ¶ 24, 900 N.W.2d 840, 850
- *Surat Farms, LLC v. Brule Cnty. Bd. of Comm'rs*, 2017 S.D. 52, 901 N.W.2d 365
- *Knecht v. Evridge*, 2020 S.D. 9, 940 N.W.2d 318

STATEMENT OF THE CASE

This matter involves Turner County's (the "County") denial of a developer's request to rezone certain lake shore frontage on Swan Lake from agricultural to residential. The land sought to be rezoned, and all

the land surrounding that area, is owned by Christe Stewart ("Stewart"). Stewart is also a member of MROSE Development Co., LLC ("MROSE"), operated by Jason Schumacher ("Schumacher") (collectively "Developer"), which is seeking to have the land rezoned.

Turner County has a Comprehensive Zoning Plan and more specific ordinances that pertain to land use for residential property along Swan Lake. Despite Developer's Application meeting, and in many cases exceeding, the standards pertaining to the land-use Developer sought, the Turner County Board of County Commissioners (the "Board" or the "County") denied Developer's application (the "Application") to rezone by a 3-2 vote without any explanation or justification at the time of the hearing. Commissioner Miller changed his vote from "aye" to "nay" in between readings without explanation or justification. Developer has since learned that Commissioner Tony Ciampa voted against the proposed change because he believed Stewart's now deceased father would not have wanted the land to be used for residential development. That is not a legitimate or legal basis for denying the petition.

Judicial review of the proceedings is further complicated because the County kept virtually no records of the Commission proceedings. There is no staff report in the record analyzing the issue. And there is

no transcript of the proceedings, despite the County Auditor being required to compile one pursuant to SDCL § 7-8-29. This makes it difficult, if not impossible, for the Developer to reference with 100% accuracy specific portions or conversations that were had during the readings. This was prejudicial to the Developer during the Circuit Court's hearing on its Petition.

Because the County did not preserve the argument relating to the circuit court's standard of review, this Court should affirm the circuit court's ruling. Alternatively, the Application meets the land use requirements of the Turner County Comprehensive Development Plan, and the Board's decision to deny the petition was arbitrary, capricious, and without reference to legitimate legal bases for denying the Application. The Court should remand this case to the circuit court with instruction to remand to the Board for rehearing upon the proper standards.

FACTS

Stewart owns land on Swan Lake in Turner County. She has partnered with Developer to build 15 houses on Stewart's land around the lake. Stewart owns roughly 145 acres on the west side of Swan Lake that was her family's farm land. (T-339:13-21; 337:25). Stewart was born and raised on that farm. She wants to develop the land

residentially so that she can move back to the Swan Lake area to retire, and to have a place that her children and grandchildren can visit and enjoy. (T-368:18-24). Stewart has managed and run the farm for the past sixteen years. (T-369:20-21). Developer sought to develop 15 residential lots along the lake's west side. (T-338:1-2). It's the only portion of the lakeshore not developed except for some land managed by the Department of Game, Fish, and Parks. (T-338:2-3).

Developer took a number of steps to ensure that the proposed development would meet both the legal and physical criteria for development. Developer hired a professional civil engineer to assist with plotting out the lots where they would make most sense. (T-338:14-18). Developer contacted the relevant natural resource conservation authority regarding potential water protection zones and restrictions regarding impact on wildlife, and Developer was informed that there were no such restrictions. (T-338:22-24). Developer contacted all relevant authorities necessary for planning the development. (T-339:4-6).

Developer also fashioned a Master Declaration of Covenants and Restrictions which were to apply to the residential development and ensure that the development was kept "high and tight." (T-342:9-11). Developer put these rules in place to "preserve the value and the

areas[]" of the development. (T-342:13-14). Throughout the process of planning this development, Developer strove to go "above and beyond" the requirements and restrictions imposed by Turner County's ordinances to ensure that the development conformed to the area. (T-342:25; 343:1-2).

Developer also met with neighbors along the lake to go over the proposed plan. (T-338:14). At this meeting, the neighbors expressed their concerns that they did not want more neighbors, did not want people from Sioux Falls moving down to the Swan Lake area, and one expressed concern that a development might interfere with their view of the sunset. (T-353:9-13).

On or about April 15, 2022, Developer submitted its Application with the Turner County Planning and Zoning Department which was approved. (R-222; T-338:12-13). The Application sought to change the zoning designation of the pertinent real property from an A-1 – Agricultural District to LR – Lake Residential District. (R-222). The Turner County Board of Adjustment recommended that the Board approve the applied-for rezone. (T-356:9-10).

Developer's Application then went in front of the Board for a determination as to whether the relevant Turner County ordinance would be revised to rezone the area in question. (T-356:11-14; R-22).

There is no transcript of what transpired during any of the readings of the proposed ordinance change. At the first reading, there was no vote, but public comment was taken. (T-356:13-15).

There was then a second reading on June 8, 2022. (R-22). Only four of the five members of the Board were present, and the Board voted 2-2 on the Application. (R-22). After some deliberation, the Board came to the conclusion that it was required to have a second reading and vote on the petition again. (T-345:4-13). No explanation was given after the first hearing as to why the Board members voted as they did. (T-345:14-21).

The second reading of the Application was held on June 28, 2022. (R-23). At the conclusion of this reading, the Board voted 3-2, rejecting the Application. *Id.* Commissioner Miller, who had voted "aye" at the first reading, changed his vote to "nay" at this second reading. (R – 22-23). No explanation was given for this change or for any of the Commissioner's decisions at this second reading. (T-347:15-18; 371:2-6; 371:7-14). After the hearing, Schumacher asked the Commissioners if he could get a reason why the Application was denied. (T-346:11-3). The Commissioners' response was that they did not have to provide Developer with the basis for their decision. (T-346:14).

Testimony was taken at the hearing on Developer's Petition for Judicial Review from an individual named Doug Berens ("Berens") who lives on Swan Lake. (T-359:10). Berens testified that, before the final reading and vote on the Application, he spoke with Commissioner Tony Ciampa ("Commissioner Ciampa") and asked him why he had voted in opposition to the proposed change. (T-363:6-12) Commissioner Ciampa told Berens that he knew Stewart's father and that Stewart's father did not want the land developed "back then." (T-364:2-5). Commissioner Ciampa voted against the Application. (R – 22-23).

On July 18, 2022, Developer filed a Petition for Judicial Review pursuant to SDCL § 7-8-29. (R – 1-14). The Petition asked the circuit court to review two issues. First, whether the Board's decision complied with the County's Comprehensive Zoning Plan and other ordinances; and, second, whether the Board's decision was "contrary to the record" or otherwise arbitrary and capricious. *Id.*

Testimony was presented as to the arbitrary nature of the Board's decision. Developer asked the board for an explanation of its decision, and the Board told Developer that it did not have to provide a reason for its decision. (T-345:14-21; 347:15-18; 371:2-6; 371:7-14). The County failed to keep a transcript or record or the proceedings, and the Board has essentially retained a monopoly over access to the Board's

reasoning or lack thereof. Additionally, there was testimony by a resident of Swan Lake that one of the Commissioners based his decision on his belief that Stewart's now-deceased father would not have wanted the land developed. (T-363:23-25; 364:1-9).

After the hearing and briefing, the circuit court reversed the decision of the Board. The circuit court concluded that the Board did not have discretion to deny Developer's Application. The circuit court remanded the case back to the Board, ordering that it grant the applied for change of zoning. The County appeals that decision.

STANDARD OF REVIEW

When the appeal is from any order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous." SDCL § 15-26A-10.

It is well settled that "[w]hen an issue is raised for the first time on appeal this Court need not consider it." *State v. Krouse*, 2022 S.D. 54, ¶ 46 n.7, 980 N.W.2d 237, 250 (quoting *LP6 Claimants, LLC v. S.D. Dep't of Tourism*, 2020 S.D. 38, ¶ 24, 945 N.W.2d 911, 918). The County's argument that the trial court applied the incorrect standard of review to the Developer's Petition for Judicial Review "cannot survive because it was not asserted below." *LP6 Claimants*, 2020 S.D. 38, ¶ 24,

945 N.W.2d at 918 (citing *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 19, 719 N.W.2d 780, 786).

If the Court determines that the County has not waived the argument it now presents, the Supreme Court reviews a County Commission's decision after an appeal to the circuit court by, "'appl[ying] the clearly erroneous standard to factual findings, but accord no deference to the legal conclusions of the circuit court.'" *Chavis v. Yankton Cnty.*, 2002 S.D. 152, ¶ 8, 654 N.W.2d 801, 804; *see also Surat Farms, LLC v. Brule Cnty. Bd. of Comm'rs* (*Surat I*)[1], 2017 S.D. 52, ¶ 12, 901 N.W.2d 365, 369. When the decision of the County Commissioners that is being reviewed is legislative or non-quasi-judicial, then this Court's review is limited to "the question . . . whether the [Board] 'acted unreasonably, arbitrarily, or . . . manifestly abused [its] discretion.'" *Surat I*, ¶ 10, 901 N.W.2d 365, 369 (quoting *State v. Troy Twp.*, 2017 S.D. 50, ¶ 24, 900 N.W.2d 840, 850) (alterations in original). The Court is to examine whether

> the [Board] has relied on factors which [the Legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

[1] There are two cases decided by this Court regarding the Surats and their farming entity. The first (2017 SD 52) was published on August 30, 2017, and the second (2017 SD 69) was published on November 8, 2017. Developer will designate 2017 SD 52 as *Surat I* and 2017 SD 69 as *Surat II*.

> [board], or is so implausible that it could not be ascribed to a difference in view or the product of . . . expertise.

Surat v. Am. Twp. (*Surat II*), 2017 S.D. 69, ¶ 13, 904 N.W.2d 61, 66 (alterations in original) (citations omitted).

Though the circuit court did not make an explicit finding as to arbitrariness, it essentially found that the County abused its discretion by failing to adhere to its own ordinances and making a decision beyond the permissible options available to it. The circuit court did not expressly address arbitrariness, likely because it deemed such analysis unnecessary due to the confusion regarding the applicable standard of review. The circuit court did, however, reject the County's proposed finding that "[t]he decision to keep the zoning status quo and in line with the Comprehensive Plan, does not amount to a showing that the Board's decision was arbitrary or capricious." (R-285).

This Court may review of the record outside of the circuit court's written findings, and make a legal determination regarding the arbitrariness of the Board's decision which would not conflict with or lack deference to the trial court's factual findings. *See* SDCL § 15-26A-10; *Niemi v. Fredlund Twp.*, 2015 S.D. 62, ¶ 27, 867 N.W.2d 725, 732 (the Supreme Court reaches its "legal conclusions independent from the conclusions reached by the [circuit] court") (alterations in original);

Poindexter v. Hand Cnty. Bd. of Equalization, 1997 S.D. 71, ¶ 16, 565 N.W.2d 86, 91 ("[A] trial court may still be upheld if it reached the right result for the wrong reason") (citations omitted) (alterations in original). If the Court finds that the Board's "decision was 'arbitrary or capricious' . . . the Court 'should reverse the decision and remand to the Board for further proceedings.'" *Chavis*, 2002 S.D. 152, ¶ 7, 654 N.W.2d 801, 804 (quoting *In re Approval of Frawley Development*, 2002 SD 2, ¶ 7, 638 N.W.2d 552, 554); *see also Surat II*, 2017 S.D. 69, ¶ 11, 904 N.W.2d 61, 65.

ARGUMENT

I. By failing to present the argument to the trial court, the County waived the argument that the circuit court erroneously applied the de novo standard of review to a legislative decision by the County.

The County failed to preserve the argument that it now presents to the Court by failing to argue it below. In its argument to the circuit court regarding the Petition for Judicial Review, the County argued that the Board's action was a quasi-judicial act rather than an administrative act. In its brief, the County stated:

> A permitted use does not require board action by the planning commission or county commission but is rather administrative in nature . . . That action, under the zoning ordinances and comprehensive plan, is an administrative process or non-quasi-judicial act. An administrative act, or non-quasi-judicial act, includes those done in the public interest without "adjudicating existing rights of specific

> individuals." *State of SD, Dept of Game, Fish and Parks v. Troy Township*, 900 N.W.2d 849-850 (SD 2017). *Policy changes, however, like a rezone, is [sic] quasi-judicial.* An action is quasi-judicial if it investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . *Here, the County Commission's action is quasi-judicial* in that it includes the action of a non-judicial body exercising their functions and powers in a judicial manner.

(R-269-270; Respondent's Post-Hearing Brief at 2-3) (emphasis added); *see also* (R-268 ("the trial court is instructed to determine anew all matters of fact without ascribing any presumption of correctness to the Board's finding on the evidence"; (R-270 ("A rezone as indicated by the statute is a quasi-judicial procedure")); *Id.* ("Here, Petitioner has applied for and invoked a quasi-judicial procedure").

The County now argues the exact opposite. For the first time, the Court argues that the actions of the Board are administrative or non-quasi-judicial when making determinations regarding zoning changes. *See* (AB – 18-19 ("[The actions available to the Board regarding an application for change of zone] are all administrative, legislative, policy, and discretionary functions *that in no sense qualify as quasi-judicial* for which de novo review might permissibly be applied.") (emphasis added). Such argument has been waived by the County's failure to raise that argument below. The Supreme Court "will not address arguments that are raised for the first time on appeal."

Legrand v. Weber, 2014 S.D. 71, ¶ 26, 855 N.W.2d 121, 129 (citing *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, 425).

II. Even if the Court decides the County has not waived the standard of review argument, the Board's decision was still arbitrary.

In order for the Board's decision to be legitimate, the Board "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Troy Twp.*, 2017 S.D. 50, ¶ 33, 900 N.W.2d at 853 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32 (1983)). The Board's decision is arbitrary when

> the [Board] has relied on factors which [the Legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the [board], or is so implausible that it could not be ascribed to a difference in view or the product of . . . expertise.

Surat II, 2017 S.D. 69, ¶ 13, 904 N.W.2d at 66 (alterations in original) (citations omitted).

"A decision is arbitrary . . . when it is 'not governed by any fixed rules or standard.'" *Troy Twp.*, 2017 S.D. 50, ¶ 33, 900 N.W.2d at 853 (citing *Kirby v. Hoven Sch. Dist. No. 53-2*, 2004 S.D. 100, ¶ 5, 686

N.W.2d 905, 906). The Court has also defined the Board's action as arbitrary and capricious when it is "based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken." *Coyote Flats, L.L.C. v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, ¶ 14, 596 N.W.2d 347, 351 (citations omitted).

A. The Board acted arbitrarily when it rejected the Developer's zoning proposal based on assumptions about the wishes of Stewart's now-deceased father.

Commissioner Ciampa's decision to reject the Application based on the supposed wishes of the landowner's now-deceased father was arbitrary and such consideration is not one of the "factors which [the Legislature] . . . intended [him] to consider." *Surat II*, 2017 S.D. 69, ¶ 13, 904 N.W.2d 61, 66 (citations omitted). It is a decision that was wholly divorced from the facts presented or the substantive merits of the Developers Application. It was not based on any fixed standard that can be applied to other like-petitioners in Turner County. It is an exception that would appear to apply only to petitions brought by Stewart. Further, Commissioner Ciampa's decision was based on a purely personal speculation about Stewart's father's wishes while he was alive. This decision was not made in accordance with the legally

recognized standard for reviewing zoning change petitions. It was reached without considering any of the evidence presented to the Board about the development's feasibility or its compliance with the Comprehensive Development Plan.

In *State v. Troy Township*, this Court examined decisions made by, among other entities, the Troy Township Board of Supervisors regarding its decision to vacate certain highways despite protest from the South Dakota Department of Game, Fish, and Parks that such decision would deprive the Department of access to certain public waterways. 2017 S.D. 50, ¶ 1, 900 N.W.2d at 843. On appeal, this Court ruled that the Troy Board of Supervisors had acted arbitrarily in approving the vacation of certain highways. *Id.* ¶ 42, 900 N.W.2d at 855. This is despite the circuit court affirmatively finding that the Board of Supervisors had "reviewed the condition of the highways within its borders and identified those that no longer served the public interest in expending Township resources to improve or maintain." *Id.* ¶ 34, 900 N.W.2d at 853. That was the only finding that the Board of Supervisors was required to make in order to justify vacating the highways. *Id.*

This Court nevertheless found that that the Board of Supervisor's decision was arbitrary based on statements made by the Chairman of

the Board of Supervisors which indicated that the "Township considered factors the Legislature did not intend it to consider in deciding whether to vacate the highway." *Id.* ¶ 42, 900 N.W.2d at 855. According to witnesses who testified before the circuit court the Chairman had said: "[T]his is our land, these are our roads, this is our water, and these are our fish and you're not gonna have access to them." *Id.* The Chairman also joined other plaintiffs in a lawsuit against the State, the Department of Game, Fish, and Parks, and others, seeking declaratory and injunctive relief regarding the public's right to use the waters and ice over the plaintiffs' private property for recreational purposes. *Id.*

Much like in *Troy Township*, there is evidence in the record in this case regarding statements made by Commissioner Ciampa which indicate that the Board made its decision based on factors the Legislature did not intend. The Board may adopt a zoning ordinance "[f]or the purpose of promoting health, safety, or the general welfare of the county[.]" SDCL § 11-2-13. What Commissioner Ciampa believed about the former landowner's wishes is irrelevant to the determination that was before the Board. The Court should remand this matter to the circuit court with instructions that it be remanded to the Board for regearing. *See Surat II*, 2017 SD 69, ¶ 18, 904 N.W.2d at 67; *Troy Twp.*,

2017 S.D. 50, ¶ 52, 900 N.W.2d at 858; *Chavis*, 2002 S.D. 152, ¶ 7, 654 N.W.2d at 804.

B. The Board's decision to reject Developer's zoning proposal was arbitrary as it was made without reference to the County's Comprehensive Zoning Plan.

The Board's decision to reject Developer's Application for change of zone was arbitrary because it failed to consider important aspects of the Comprehensive Development Plan (the "CDP") in Turner County. When the decision of the County Commissioners is legislative, the Court's review is limited to "the question . . . whether the [Board] 'acted unreasonably, arbitrarily, or . . . manifestly abused [its] discretion.'" *Surat I*, ¶ 10, 901 N.W.2d 365, 369 (quoting *Troy Twp.*, 2017 S.D. 50, ¶ 24, 900 N.W.2d at 850) (alterations in original). The Board abused its discretion by ignoring the CDP, thus making a choice outside of permissible range of options available to it. *See Knecht v. Evridge*, 2020 S.D. 9, ¶ 20, 940 N.W.2d 318, 326 ("An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.") (citations omitted).

"An administrative board 'must examine the relevant data *and articulate a satisfactory explanation* for its action including a "rational connection between the facts found and the choice made."'" *Troy Twp.*,

2017 S.D. 50, ¶ 33, 900 N.W.2d at 853 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43) (emphasis added). Instead, the Board here told the Developer that it was not required to provide it an explanation for the Board's decision. "Because I said so" is the hallmark of arbitrariness.

There is no evidence in the record that the Board actually considered any of the things that the County suggests in its Pre-Trial Brief. This post-hoc articulation of reasons which the Board could have plausibly relied upon is not sufficient to justify its decision—particularly in the face of testimony that the Board flatly refused to give any reasons whatsoever for the denial at the time of the hearing on Developer's Application. Just because there is language in the CDP which may support the Board's decision does not mean those reasons were actually considered.

Additionally, many of the reasons argued as to why the CDP supports the Board's decision are simply inapplicable to the facts of this case. Stewart owns the farmland sought to be rezoned as well as hundreds of acres of farm land which surround that area. In its briefing to the circuit court, the County focused on the CDP's language with respect to agriculture and the desire to protect agricultural uses and avoid instances where residential and agricultural land are adjacent.

(R-28) ("Both the Comprehensive Plan and the Turner County Ordinances strongly favor preservation of agricultural opportunities and land resources"); (R-29) ("The goal stated . . . throughout the Comprehensive Plan, is to reduce conflicts with farming, preserve farmland and environmentally sensitive areas and minimize conflicts with agricultural uses").

These concerns, however, are mitigated when the applicant owns both the land sought to be rezoned and the agricultural land surrounding it. It is fully within Stewart's power to protect the development she seeks to build from conflicting agricultural uses. Stewart also intends to live in the development, so she has a vested interest in reducing or eliminating such conflicts. Further, those concerns regarding the "protection" and "preservation" of agricultural land completely ignore the fact that Stewart could simply decide not to farm that land any longer. The County cannot compel Stewart to continue that use even though it may limit her use of the land.

The CDP expressly contemplates residential development along the lake shore, and the development plan sought to be implemented by the developer meets and exceeds the requirements therefor. This would not be "unrestricted residential development" but would be contiguous with existing residential housing around the lake. (R-228). There has

been no legitimate reason articulated for denying the Application. Because the Board failed to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made[,]'" it abused its discretion and acted arbitrarily in denying Developer's Application. *Troy Twp.*, 2017 S.D. 50, ¶ 33, 900 N.W.2d at 853.

CONCLUSION

For the forgoing reasons, Developer respectfully requests that this Court affirm the ruling of the circuit court, or in the alternative, to remand the case to the circuit court with instructions to further remand to the Board for additional proceedings predicated upon lawful bases for examining the Application.

Dated this 2nd day of October, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 4,516 words, excluding the table of contents, table of cases, signature block, and certificates of counsel. I have relied on the word and character count of the word-processing program used to prepare this Certificate.

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The undersigned attorney hereby certifies that a true and correct copy of the foregoing was electronically filed and served through Odyssey File and Serve System to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30339

MROSE DEVELOPMENT CO., LLC; and JASON SCHUMACHER,

Petitioner and Appellees,

VS.

TURNER COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent and Appellant.

APPEAL FROM THE FIRST JUDICIAL CIRCUIT
TURNER COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID KNOFF
CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. THE COUNTY DID NOT WAIVE ITS ARGUMENT THAT THE CIRCUIT COURT APPLIED AN INCORRECT STANDARD OF REVIEW.

In its opening brief, the Turner County Board of County Commissioners argued that "[t]he Circuit Court erred as a matter of law in applying the de novo standard to 'determine anew' the administrative question of whether to grant or deny the land developer's application to rezone farmland." (Opening Brief at 16). In its opposition brief, both in the section addressing the standard of review and in argument section one, MROSE protests that this is a new argument never made below and therefore is waived on appeal. (Brief at 9-13).

MROSE is incorrect. It certainly is true, as MROSE acknowledges (Brief at 11), that the lingering presence of the "de novo" standard of review set forth in SDCL 7-8-30 and outdated case law applying that standard in impermissible contexts contributed to confusion by the lower court and was responsible for some incorrect terminology and inconsistent language used by the parties below regarding the proper standard of review to be applied.

However, despite some confusion in using the proper terms—including misuse of the term "quasi-judicial"—the County steadfastly maintained and consistently argued to the lower court throughout the proceedings below that the Board's decision to deny MROSE's application to rezone the property in

question must be accorded substantial deference and may only be reversed under the "arbitrary and capricious" standard.

Without question, the circuit court was presented with the opportunity to rule—and did rule—on the issue of the proper standard of review. First, it expressly *rejected* the County's proposed conclusions of law that:

> The Circuit Court, upon review in a matter appealed pursuant to SDCL 7-8-30, must determine whether a board of county commissioners' decision was arbitrary or capricious, in which case the court should reverse the decision and remand to the board for further proceedings. ...
>
> The decision to keep the zoning status quo and in line with the Comprehensive Plan does not amount to a showing that the Board's decision was arbitrary or capricious.
>
> The court cannot find evidence that the decision was made in such a manner and must affirm the commission's decision.

(App. 25; R. 284 – marked as "Not Adopted By Court"). These proposed conclusions were consistent with the County's arguments made throughout its briefing that the "arbitrary and capricious" standard of review applied:

> The Court here is tasked with determining whether the board of county commissioners' decision was arbitrary or capricious. . . . If the court finds no evidence that a board of county commissioners made its decision with personal, selfish or fraudulent motives, or false information, the circuit court must affirm a commission's decision. This is the standard here while keeping in mind the court has also said, "County decision makers are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances."

(R. 26 – Pre-Hearing Brief; *see also* R. 253 – Post-Hearing Brief).

And second, instead of applying the standard of review advocated by the County, the lower court adopted the standard proposed by MROSE:

> This petition is brought pursuant to SDCL 7-8-30 which provides for de novo appeal from the decisions of a County Commission. ...
>
> Under the de novo standard the Circuit Court should determine "anew the question . . . independent of the County Commissioner's decision."

(App. 6; R. 290 – Findings of Fact and Conclusions of Law).

In sum, the record is clear that the legal issue regarding the proper standard of review to be applied by the circuit court to the zoning decision on which the Board of County Commissioners deliberated and voted was presented to the circuit court, fully and fairly litigated, decided by the circuit court, and thereafter properly raised by the County on appeal. *See Huron Center, Inc. v. Henry Carlson Co.*, 2002 S.D. 103, ¶ 9, 650 N.W.2d 544, 547 (holding that issue was properly preserved for appellate review when briefed to circuit court). As a result, the issue was preserved for appellate review. MROSE's waiver argument misses the mark and should be rejected.[1]

Finally, MROSE appears to have conceded in its appellate brief that the "de novo" standard applied by the circuit court to "determine the question anew" is not the correct standard. Rather, as MROSE acknowledges, "this

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[1] Even if this issue had not been presented below, this Court retains discretion to consider such issues where "'the question raised for the first time is one of substantive law which is not affected by any factual dispute, for under such circumstances the parties may present the issue as thoroughly in the appellate court as it could have been presented below.'" *Paweltzki v. Paweltzki*, 2021 S.D. 52, ¶ 40, 964 N.W.2d 756, 768-69 (citation omitted); *see also* SDCL 15-26A-10 ("When the appeal is from any order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous").

Court's review is limited to 'the question . . . whether the [Board] acted unreasonably, arbitrarily, or . . . manifestly abused [its] discretion.'" (Brief at 10). As this Court has confirmed:

> *Troy Township* serves broadly as a guidepost informing circuit courts that de novo review does not apply unless the administrative actions "require the exercise of purely judicial power." . . .
>
> The permit hearing is a meeting in an unbalanced public forum. Therefore, although community members can have their voices heard, the Board's decision to issue a permit is one of policy resting soundly within the discretion of the Board. It exists separate and apart from the Board's role as an adjudicatory body resolving complaints asserting a drainage dispute between neighboring landowners.

Carmody v. Lake County Board of Commissioners, 2020 S.D. 3, ¶¶ 17-22, 938 N.W.2d 433, 438-39 (quoting *S.D. Dep't of Game, Fish & Parks v. Troy Township*, 2017 S.D. 50, ¶ 15, 900 N.W.2d 840, 847). The same is true for a decision by the Board of County Commissioners on whether to amend its zoning ordinance to change the boundaries of its established zoning districts. On appeal, this Court is fully authorized to review whether the lower court applied the correct standard under the circumstances.

II. MROSE ESSENTIALLY CONCEDES THAT THE CIRCUIT COURT'S CONSTRUCTION AND APPLICATION OF THE ZONING ORDINANCE WAS WRONG AS A MATTER OF LAW.

Like the dog that didn't bark in the famous Sherlock Holmes tale, the most notable feature of MROSE's appellee brief is what is not there. Conspicuously absent is any defense or even discussion of the Circuit Court's reasoning or analysis entered below. Nor is there any rebuttal or opposition

to the County's arguments demonstrating that the circuit court's construction and application of the county zoning ordinance was incorrect as a matter of law. None whatsoever. In fact, MROSE essentially has conceded legal error by taking the affirmative position that "[t]he Court should remand this matter to the circuit court with instructions that it be remanded to the Board for re[h]earing." (Brief at 17).

As a result, there appears to be no disagreement that, as set forth in the opening brief, the lower court erred as a matter of law in construing the Turner County 2008 Revised Zoning Ordinance as requiring the Board of County Commissioners to grant the land developer's application and amend its ordinance to rezone the farmland into a different zone as a matter of law. And there is no disagreement that this Court should reverse the lower court's legally erroneous decision. Rather, the remaining disagreement centers on what the instructions accompanying a reversal and remand should be.

III. MROSE FAILED TO MEET ITS HEAVY BURDEN TO DEMONSTRATE THAT THE BOARD'S DECISION NOT TO AMEND ITS ZONING ORDINANCE WAS ARBITRARY AND CAPRICIOUS.

MROSE has argued that "[i]f the Court finds that the Board's 'decision was arbitrary or capricious . . . the Court should reverse the decision and remand to the Board for further proceedings.'" (Brief at 12) (citation omitted). It offers up two theories for why this Court should make an appellate finding that the vote by the elected Board of County Commissioners not to enact an amendment to the County's zoning ordinance to rezone land

in the A-1 Agricultural District to LR Lake Residential was arbitrary and capricious or an abuse of discretion. Each theory was presented to the circuit court, which implicitly rejected them by declining to adopt them or make any findings of fact that might support them in any way.

Neither theory has merit. This Court should not adopt them on appeal. As this Court has made clear, "[t]he arbitrariness standard of review is narrow, and under that standard, 'a court is not to substitute its judgment for that of the agency.'" *Troy Township*, 2017 S.D. 50, ¶ 33, 900 N.W.2d at 852-53 (citation omitted). Under its zoning ordinance and comprehensive plan, the County retains broad discretion regarding the prospective question of whether and how to alter its legislatively enacted zoning districts. It does not abuse its discretion, nor act arbitrarily or capriciously, by declining to overturn the status quo established by its zoning ordinance and declining to enact substantial and controversial changes that are inconsistent with its comprehensive plan.

A. The plumbing remark

The first theory presented by MROSE is that the circuit court should have overturned the County's choice, made by its elected representatives serving on the Board of County Commissioners, not to amend its zoning ordinance on the basis of testimony from a person who purportedly spoke to one of the board members at some point before the final vote.

The context of the comment was that a board member who is a plumber was performing some work installing a water heater for a customer who was a strong advocate for the proposed housing development. The customer asked the plumber why he previously had voted against the ordinance to rezone the land in question. According to the story, the plumber—perhaps to politely extract himself from an uncomfortable conversation with a paying customer—commented that he did not think the farmer who had owned the land (now owned by his daughter) would want to see it turned into a housing development.[2] Here is the relevant testimony:

> Q: Mr. Berens, did you, in fact, have an opportunity to talk to Commissioner Ciampa about his vote?
>
> A: Yes, I did.
>
> Q: And when was that?
>
> A: It would have been sometime before the last meeting. I'm not sure of the date. It would have been a week or two maybe before.
>
> Q: And if I were to represent to you that the last meeting was in June 8th of, I think, 2022, would that refresh your memory as to when you would have had that conversation?
>
> A: I would say it was right at the last of May. I – I really can't put a specific date on it. If I could go back, I called Mr. Ciampa to help me put a water heater in my

[2] The county objected to this testimony as inadmissible hearsay. The court allowed the testimony as part of an offer of proof and stated it would take the matter under advisement and determine whether or not to consider it in light of SDCL 19-19-801(2). (R. 360-63). The court apparently did not consider the testimony because it never mentioned it or relied on it in any way in its subsequent oral decision, findings of fact and conclusions of law, or judgment.

neighbor's house that I take care of. And she was coming back from Arizona, and I turned the water on, flooded her house, so I needed help putting the water heater in, and Mr. Ciampa is the plumber.

So me and him were putting it in, and it come up, this discussion on the lake. And I just asked him more or less, you know, why he voted "no."

Q: What did he tell you?

A: And his comment was that he knew Christe's father way back when and that her father had said that he really didn't want it developed back then, so – that was back then. That's his – I mean. . . .

. . .

Q: How long was your conversation with Mr. Ciampa about the decision of the Board?

A: For just that. When he said, you know, he opposed it, I just – it wasn't very long. I mean, we were together for maybe an hour, but the actual questions about it when he said he – "no" to it, that stopped my – I had my answer, you know, why he opposed it.

Q: And you don't know if that's the only reason why he opposed it. That's just one of the statements he made about it.

A: That's just the one statement that he made, and then I didn't ask anymore.

(R. 363-64, 366). The circuit court properly declined the invitation to find that this stray and innocuous comment justified substituting the court's judgment for the collective judgment of the Turner County Board of County Commissioners on whether the Turner County Revised Zoning Ordinance should be amended.

As part of its argument, MROSE attempts to analogize the "plumbing remark" to the unique situation in *Troy Township*. The effort is unpersuasive. In that case, this Court considered whether the arbitrariness standard of had been met for decisions made by three different townships (Valley, Butler, and Troy) to vacate various roads under SDCL 31-3-6. In that statute, the South Dakota Legislature provided that a township may vacate a highway only if it first determines that "the public interest will be better served by the proposed vacating, changing, or locating of the highway." *Troy Township*, 2017 S.D. 50, ¶ 34. 900 N.W.2d at 853 (quoting SDCL 31-3-6). The board of supervisors for each township had voted to vacate various roads within their respective jurisdictions following public hearings.

Following a challenge by the Department of Game, Fish and Parks to those votes, this Court held on appeal that they were policy decisions that courts are not authorized to decide:

> This is a practical legislative determination which has been entrusted to the discretion of the Board, not to the courts. The wisdom of its decision is not our concern, since we are not at liberty to substitute our judgment for that of the [township] board on a matter inherently legislative. If the rule were otherwise[,] the circuit courts would become administrative boards . . . deciding matters that are nonjudicial.

Id. at ¶ 26, 900 N.W.2d at 851 (quoting *Dunker v. Brown County Bd. of Education*, 121 N.W.2d 10, 16 (S.D. 1963)). "Therefore," this Court held, "we will not examine whether the Townships were correct in determining that the public interest will be better served by vacating the highways." *Id.*

In examining the issue of whether the Department had met the high burden of proving that the decisions were arbitrary and capricious, this Court made clear that courts may not simply infer that boards or agencies acted with an improper purpose. Rather, the presumption is exactly the opposite, that "[a]dministrative officials are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances." *Id.* at ¶ 38, 900 N.W.2d at 854 (citation omitted). The Department argued that:

> A lack of relevant or competent information is evidenced by Troy Township's failure to provide a transcript of the hearing, failure to provide a defensible reason why vacating the public highways better serves the public interest, and its failure to analyze public interest. In fact, the testimony indicates otherwise.

Id. at ¶ 40, 900 N.W.2d at 855 (citation omitted). This Court rejected that argument, explaining:

> These conclusory claims amount to little more than another invitation to infer wrongdoing. Moreover, the Department's argument overlooks the fact that the Townships' board members are necessarily residents of their respective townships; have firsthand knowledge of the highways and conditions at issue; and as the Department itself points out, are fully aware of the competing interests.

Id. As a result, this Court affirmed the lower court's conclusion that the Valley and Butler township boards had not acted in an arbitrary and capricious manner in voting to vacate the township roads in question.

Regarding Troy Township, however, this Court held that the arbitrariness standard had been met. That holding was made on the basis of uncontested and frankly brazen statements by the board chairman that the

action taken to vacate the road had not been done to serve the public interest, which was a statutory precondition under SDCL 31-3-6. Rather the road closure had been done for the express purpose of denying the public access to non-meandered waters located in or around Troy Township in conjunction with a private lawsuit brought by the board members seeking declaratory and injunctive relief to prohibit recreational use of waters located on their privately-owned farms. Specifically, the board chairman had announced that: "[T]his is our land, these are our roads, this is our water and these are our fish and you're not gonna have access to them." *Id.* at ¶ 42, 900 N.W.2d at 855. As this Court recognized, vacating a road for the sole purpose of benefitting private landowners violated the statute's requirement that such action could only be taken in the public interest. As a result, this Court reversed with instructions that "[t]he court must remand the issue back to the Troy Township Board of Supervisors for rehearing." *Id.* at ¶ 52, 900 N.W.2d at 858.

In this present case, as the lower court presumably recognized, there is nothing like that. There is no credible suggestion that the vote held by the Turner County Board of County Commissioners violated any statute or any ordinance in any way. To the contrary, the County's decision *not* to enact new legislation to alter its established zoning districts was entirely consistent with the discretion provided by its governing zoning ordinance and comprehensive plan, which specifically cautions against overdevelopment

around Swan Lake and encourages preservation of the agricultural and low-density residential character of land already designated as part of its agricultural district. *See Powers v. Turner County Board of Adjustment*, 2022 S.D. 77,¶ 29, 983 N.W.2d 594, 605 ("Yet Petitioners fail to explain how the Board's actions were inconsistent with their discretion to make a case-by-case determination").

A single comment made by a single commissioner when pressed by one of his plumbing customers in a private setting that he did not think the landowner's father would have wanted his farm to be turned into a housing development does nothing to undermine the presumption that the board members are "objective and capable of judging controversies fairly on the basis of their own circumstances." *Id.* at ¶ 38, 900 N.W.2d at 854.

Certainly, the suggestion that such a comment was made does not empower a court to overrule the board's decision or order the County to amend its zoning ordinances to accommodate a multiphase housing and light commercial development on agricultural district land near a lake. Whether or not to enact a zoning amendment is a policy decision for the County to make through its representative governing boards.

If testimony about a stray remark made by a member of a county or municipal board in a private conversation was enough to satisfy the arbitrariness standard, every decision made by a locally elected governmental board would be subject to litigation and the prospect of being

summarily negated and overruled by a judge. This Court should not find on appeal that the County's decision not to change its zoning ordinance was arbitrary and capricious based on a story relayed by a resident about a purported comment by one of the board members in an unrelated setting.

B. The Comprehensive Plan

The other theory put forward by MROSE is that the lower court should have found that the County's decision not to enact changes to its zoning ordinance should be deemed to have been arbitrary and capricious because that decision supposedly "was made without reference to the County's Comprehensive Zoning Plan." (Brief at 18).

There are several flaws in that proffered theory, a primary one being that it is not accurate. The County followed its established process for considering zoning district amendments as set forth in Article 21.00 of its zoning ordinance to the letter. First it held a Planning Commission hearing:

> **21.03 Planning Commission Hearing.** Upon the filing of an application and payment of the fee, the Office of Planning and Zoning shall set a date for at least one public hearing at which time the Planning Commission will consider such requests for a change in zoning district classification. The date for a public hearing shall be a day when the Planning Commission is regularly scheduled to meet.
>
> A. Legal Notice. The Planning Director shall cause to be published a legal notice as required in SDCL 11-2-29.
>
> B. Signs. A sign(s) to be provided by the Office of Planning and Zoning shall be posted on or near the property at least five days prior to the scheduled hearing.
>
> C. Planning Commission Recommendation. The Planning Commission shall consider all applications for zoning district classification changes and make a recommendation to the Board of County Commissioners.

(App. 41; R. 107). And then the Board met to consider the amendment:

21.04 Board Hearing. The Board of County Commissioners shall conduct at least one public hearing on all applications which have been forwarded to them from the Planning Commission.

A. Legal Notice. The Board shall cause to be published a legal notice as required in SDCL 11-2-19.

B. Signs. A sign(s) to be provided by the Office of Planning and Zoning shall be posted on or near the property at least five days prior to the scheduled hearing.

C. Hearing. Upon the day of such public hearing, the Board shall review the decisions and recommendations of the Planning Commission on all applications. The Board, in making its determination on such applications, may make changes in the zoning map in accordance with or in rejection or modification of the recommendations of the Planning Commission.

(App. 41; R. 107). As set forth by the Turner County State's Attorney, the 2008 Zoning Ordinance and Comprehensive Plan were specifically available for review by the Board members and set forth in the record. (R. 27, 31-173).

What MROSE really appears to be arguing is that the Board's decision not to adopt Ordinance #86-22 as a new zoning district amendment must be overruled by the courts as a matter of law because the "reason" for declining to adopt it is not set forth in the official minutes. But that is true of virtually all such votes. It is the votes themselves and outcome of the motion that are recorded, as was done here:

ORDINANCE #86-22 SECOND READING
ZONING DISTRICT AMENDMENT CHRISTE STEWART

Chairman Miller called for testimony in favor & against the rezoning.
Motion by Kaufman, seconded by Ciampa, to close testimony. Motion carried.
Motion by Van Hove, seconded by Hybertson, to approve the second reading and adopt Ordinance #86-22 for Christe Stewart's property located in Section 16 of Swan Lake Township, rezone from AG To Lake Residential. Roll call vote was taken: Ciampa nay, Hybertson aye, Kaufman nay, Miller nay and Van Hove aye. Motion failed.

(R. 23, 384). The reason for this is obvious. Board members frequently may vote the same way on a particular motion, but for different reasons. As with an election or any other type of vote, although there is always a collective outcome, there is not necessarily a singular or collective reason or rationale.

Certainly, there is no requirement that the County interrogate the individual members of its governing boards to set forth the various reasons they may have cast their votes on the myriad of issues that come before them. (R. 385).

Even so, the Turner County State's Attorney set forth an entirely rational and "satisfactory explanation" for the County choosing not to reshuffle its zoning districts in order to squeeze one more housing subdivision and accompanying commercial development in the area adjacent to Swan Lake. (R. 27-29). Specifically, the County's decision furthers the goal of the Comprehensive Plan to "[p]reserve the rural area for agricultural production and open space" and the primary policy for such areas to "[p]reserve and protect the agricultural productivity of rural land by restricting the development of non-farm residential sites" and "[m]aintain a residential density of not more than one building per site per quarter-quarter section." (R. 167). In that vein, the Comprehensive Plan also recognizes that "[t]he density approach offers more assurance that farming will continue as the domina[nt] land use in agriculturally zoned areas" and that "[r]outine farming practices are threatened by the emergence of non-farm residences in agricultural areas, undermining the freedom that farmers enjoy in operating their businesses." (R 170-72).

The Comprehensive Plan also specifically warns that "Swan Lake is an important recreational area for the residents of Turner County" that "provides beach, boat, and recreation access." (R. 164). The Plan therefore

cautions that "[i]t is vital that Turner County carefully review development proposals in the Swan Lake area in an effort to preserve the Swan Lake environment." (R. 164).

In declining to adopt the proposed ordinance, moreover, the County was adhering to express purpose of its 2008 Revised Zoning Ordinance:

> These regulations are designed to carry out the goals and objectives of the plan; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration or scattering of population; and to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provision of transportation, water, drainage, sewerage, schools, parks, or other public requirements.
>
> These regulations have been made with reasonable consideration to the character and intensity of the various land uses and the need for public facilities and services that would develop from those uses. These regulations are necessary for the best physical development of the county. The regulations are intended to preserve and protect existing property uses and values against adverse or unharmonious adjacent uses by zoning all unincorporated land except those areas where joint zoning jurisdiction has been granted to a municipality.

(R. 33 at § 1.02; App. 30). Further:

> It is recognized that because of the nature of both agricultural activities and residential subdivisions, that these two uses are generally poor neighbors *and therefore a concentration of housing in the A-1 Agricultural District shall be discouraged*.

(R. 36 at § 3.01; App. 32) (emphasis supplied).

Contrary to the suggestion made by MROSE, there also is no requirement that county board meetings be recorded and transcribed, though MROSE certainly was free to have done so if it wished. (R. 384-85). Turner

County has never made a practice of recording such meetings. (R. 384-85). If the Legislature had any desire to impose such affirmative burdens on local governments, presumably it would enact such legislation.

Ultimately, as in *Troy Township*, 2017 S.D. 50, ¶ 40, 900 N.W.2d at 855, "[t]hese conclusory claims" by MROSE "amount to little more than another invitation to infer wrongdoing," something this Court consistently has instructed the lower courts not to do. Although it ordered the County to amend its zoning ordinance based on a fundamental misconstruction of how that ordinance is structured and what it requires—clear legal error that not even MROSE will defend on appeal—the circuit court wisely declined to adopt the theories now advocated by MROSE for this Court to find that the County's decision not to affirmatively amend its zoning ordinance meets the high burden required by the arbitrariness standard.

This Court likewise should reject MROSE's invitation to do so because the decision to amend its zoning ordinance "is a practical legislative determination which has been entrusted to the discretion of the Board, not to the courts." *Id.* at ¶ 26, 900 N.W.2d at 851 (citation omitted). "If the rule were otherwise[,] the circuit courts would become administrative boards . . . deciding matters that are nonjudicial." *Id.*; *see also McLean v. White Township*, 2022 S.D. 26, ¶ 52, 974 N.W.2d 714, 730.

CONCLUSION

WHEREFORE, Appellant Turner County Board of County Commissioners respectfully requests that this Honorable Court reverse the circuit court's decision and remand with instructions to deny and dismiss the Petition for Judicial Review with prejudice.

Respectfully submitted this 23rd day of October, 2023.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,384 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was served via Odyssey File and Serve upon the following:

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