IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTAIN THE SUPREME COURT

APPEAL NUMBER 27293

HIGH PLAINS RESOURCES, LLC., Applicant and Appellee

Vs.

FALL RIVER COUNTY BOARD OF COMMISSIONERS, AND SUE GANJE, IN HER CAPACITY AS FALL RIVER COUNTY AUDITOR ONLY, Respondent and Appellants

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Appeal from

Seventh Judicial Circuit

Fall River County, South Dakota

The Honorable Robert Mandel, Circuit Court

APPELLANTS' BRIEF

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Notice of Appeal filed on December, 22, 2014

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PRELIMINARY STATEMENT

Throughout this brief, Appellant Fall River County Board of Commissioners, will be referred to as "County Commissioners." Sue Ganje, the Fall River County Auditor, will be referred to as "Ganje." Appellee High Plains Resources, LLC. will be referred to as "High Plains."

The Fall River County Clerk of Courts certified record of the appeal will be referred to as "CI" followed by the specific page numbers corresponding with the Clerk's index. The transcript of the trial will be referred to as "TR" followed by the specific page reference number. Exhibits will be referred to as "EXH" followed by the specific exhibit number or letter.

JURISDICTIONAL STATEMENT

This is an appeal from the entry of a PermanentWrit of Prohibition by the Honorable Robert Mandel, Circuit Court Judge, for the Seventh Judicial Circuit, Fall River County, South Dakota, on November 21, 2014. CI 211. Notice of Entry of Permanent Writ of Prohibition and Findings of Fact and Conclusions of Law was given on December 2, 2014. CI 213. Appellants filed a Notice of Appeal on December 22, 2014. CI 225. Since this is an appeal from a final judgment, the jurisdiction in this Court is based upon SDCL 15-26A-3(1).

STATEMENT OF ISSUES

1.

Did High Plains have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the referral of Fall River Resolution #2014-16?

The trial court held in the negative.

Relevant Authority:

Sorenson v. Rickman, 486 N.W.2d 259, 261 (S.D. 1992)

2.

Did a violation of the open meetings law (SDCL 1-25-1.1) and the open records law (SDCL 1-27-1.16) void the passage of Resolution #2014-09?

The trial court held in the negative.

Relevant Authority:

McEhanny v. Anderson, 1999 SD 78

Hansmeyer v. Nebraska Pub. Power Dist., 6 Neb. App. 889 (1998)

Olson v. Cass, 349 N.W.2d 435 (S.D. 1984)

SDCL 1-25-1.1

SDCL 1-27-1.16

3.

Did Fall River Resolution #2014-09 properly set forth the location, purpose and size of the proposed petroleum contaminated soil farm?

The trial court held in the affirmative.

Relevant Authority:

SDCL 34A-6-103

STATEMENT OF THE CASE

This is a case involving a writ of prohibition to stop Fall River County from counting the ballots on a referred measure to stop the construction of petroleum contaminated soil farm in Fall River County.

Pursuant to SDCL 21-29-1, High Plains filed an Affidavit and Application for Writ of Prohibition on September 19, 2014. CI 1. The application requested that the Court issue a Writ of Prohibition directing the County Commissioners and Sue Ganje, the auditor, to desist and refrain from counting votes cast in the November 4, 2014, referendum election concerning Resolution #2014-16. CI 1. On September 19, 2014, the Circuit Court issued an Alternative Writ of Prohibition consistent with the application and scheduled the hearing on the permanent writ of prohibiton. CI 36. The Alternative Writ of Prohibition did not prohibit Fall River voters from voting on the referred issue. CI 36.

The hearing on the Permanent Writ of Prohibition was held on October 31, 2014. After taking testimony and receiving evidence, the Circuit Court issued a Permanent Writ of Prohibition and entered Findings of Fact and Conclusions of Law on November 21, 2014. CI 205 and 211. The Permanent Writ permanently restrained the County Commissioners and the auditor from counting the votes cast in the November 4, 2014 referendum election concerning Fall River Resolution #2014-16. CI 211.

STATEMENT OF FACTS

1. The ballots

As a result of the issuance of the writ of prohibition by the trial court, the ballots related to the referral of Fall River County Resolution #2014-16 are sitting in a ballot box in the Fall River County Auditor's Office. The ballots have not been counted.

2. March 25, 2014 County Commission Meeting, Resolution #2014-09

On March 18, 2014, Sundstroms conveyed to High Plains the following property:

Lot A of a portion of Dean Tract 2 located in the NW1/4NE1/4NW1/4SW1/4,NE1/4NW1/4NW1/4SW1/4, and S1/2NE1/4NW1/4SW1/4 of Section 2, Township 9 South, Range 2 East, BHM, Fall River County, South Dakota, as shown on Plat filed in Book 24 of Plats, page 97.

hereinafter "High Plains Property," EXH A.

High Plains Property is located just outside the city limits of Edgemont, South Dakota. Exhibit G.

SDCL 34A-6-103 requires that an application to the Board of Minerals and Environment for a general permit for the disposal of solid waste must be accompanied by a resolution approving the proposed facility. As a result of this statute, High Plains had its agent, Mr. Keith Anderson, meet with the County Commissioners to get approval for the appropriate resolution.

Approximately one week after the purchase of the High Plains property, Keith Anderson of Andersen Engineering called Sue Ganje, the Fall River County Auditor. TR 28. Because the auditor is responsible for the commissions agenda, Anderson asked Ganje to be put on the Fall River County Commission agenda for March 25, 2014. TR 28, 41. Anderson asked that the agenda item be listed as "Land Farm General Permit." TR 29; EXH B. Anderson did not provide a copy of the proposed resolution to the auditor or the Fall River County Commission prior to the meeting. TR 28.

The auditor posted the agenda for the March 25, 2014 meeting in pertinent part as follows:

9:20 Keith Andersen, Andersen Engineering – Plat; Review of Resolution for Land Farm General Permit

EXH B.

The agenda made no mention that High Plains Resources was involved in this resolution or that it was for the acceptance of petroleum contaminated waste into Fall River County. EXH B. Keith Andersen brought a resolution to the meeting, but had no copies for the public. TR 21, 26; EXH C. The auditor did not prepare Resolution #2014-09. TR 30.

The confusion over the "Land Farm General Permit" agenda item is evident from the minutes of the March 25, 2014 meeting. EXH C. Commissioner Falkenburg first made a motion to accept Resolution #2014-09. EXH C. Then Commissioner Falkenburg withdrew his motion. EXH C. Even though the agenda clearly allows the commissioners at 9:00 to identify "Conflict of Interest Items for Board Members," Commissioner Falkenburg didn't realize until after he made the motion to approve the resolution that he had a conflict. EXH C. Then Commissioner Cassens made the motion to approve the resolution. EXH C. Commissioner Cassesns motion was seconded by Commissioner Allen. EXH C. Resolution #2014-09 was passed. EXH C

Without the benefit of the resolution before the meeting and the limited nature of the the listed agenda item, Commissioner Allen, who seconded the motion to approve Resolution #2014-09, thought the vote was to approve a plat, which is what Anderson usually requests from the commission. TR 34. Commissioner Allen didn't know that he was voting to bring petroleum contaminated waste from the oilfields into Fall River County. TR 18.

Sitting in the audience for the commissioner meeting on March 25, 2014 was Ed Harvey, a concerned citizen. TR 18. Harvey is a member of the Clean Water Association and Dakota Rural Action which are concerned about the environment. TR

21. No other members of these groups were at the March 25, 2014, meeting. TR 22. When Harvey read the agenda item "Land Farm General Permit," he did not understand the agenda item and didn't know that the resolution would allow petroleum waste to be trucked into Fall River County. TR 19; Exhibit B. Consistent with Commissioner Allen's recollection, Harvey thought the Fall River Commission was voting to approve a plat. TR 21. Harvey does not believe that the "Land Farm General Permit" agenda item provided an adequate notice to the public that oilfield waste would be trucked into a sight just outside of Edgemont, South Dakota. TR 22.

3. Rescission of Resolution #2014-09 and County Commission Meeting of June 19, 2014

The Fall River County County Commission agenda dated June 19, 2014, clearly listed "Commission Consideration for Action on Resolution 2014-09 and Possible New Resolution Regarding the Proposed Solid Waste Facility for a Petroleum Contaminated Soil Farm." EXH D. At the June 19, 2014 meeting, the Fall River Commission unanimously rescinded Resolution #2014-09. EXH E. The specific reason for the rescission was "Resolution #2014-09 based on it not being descriptive of the actual scope of the facility, as reflected on the agenda for the March 25, 2014 meeting date." EXH E.

The minutes of the June 19, 2014 meeting reflect that "several people were on hand to reiterate their concerns over the safety of the operation and the possible negative impact on natural resources." EXH E. With adequate notice of the petroleum contaminated soil farm, approximately forty members of the public were present for the Fall River County Commission meeting on the petroleum contaminated soil farm. TR 22. After being properly informed, Harvey spoke in opposion to the petroleum

contaminated soil farm at that subsequent meeting. TR 27. Concerns about the petroleum contaminated soil farm included "the safety of the operation, the permit process, regulation and liability should environmental clean-up be required in the future." EXH E. The proponents of the petroleum contaminated soil farm stated that "the process was controlled and would handle soils contaminated with refined hydrocarbons, not radioactive matters, and would treat soils that currently go to landfills." EXH E.

After the lengthy discussion, the Fall River County Commission passed Resolution #2014-16 which is virtually identical to Resolution #2014-09. EXH E. The exception is that Resolution #2014-16 includes language requiring High Plains to post an "adequate bond." EXH E.

4. Referral of Resolution #2014-16 and testimony at permanent writ hearing

A petition referring Resolution #2014-16 was filed with the Fall River County Auditor. The Fall River County Commission unanimously approved the placement of the ballot question on the November 4, 2014 General Election ballot. EXH F.

At the time of the hearing on the Permanent Writ of Prohibition on October 31, 2014, Anderson stated that the petroleum contaminated soil farm is just a proposal. TR 44. High Plains Resourses has not submitted an application to the Department of Environment and Natural Resources (DENR). TR 46. Anderson doesn't know where the petroleum contaminated soil would come from to fill the land farm. TR 51. Anderson admitted that he really didn't know what was going into the petroleum contaminated soil farm. TR 44. He had no idea of what the price per truckload of waste would be or what the charge for tipping fees would be. TR 49.

ARGUMENT

STANDARD OF REVIEW

"The circuit court's conclusions of law are reviewed de novo." Tolle v. Lev, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444 (quoting Johnson v. Sellers, 2011 S.D. 24, ¶ 11, 798 N.W.2d 690, 694). When examining the application of a legal doctrine to established facts, the review of the issue will be based upon the de novo standard. Huether v. Mihm Transportation Co., 2014 SD 93, ¶ 14 (quoting Stockwell v. Stockwell, 2010 S.D. 79, ¶ 16).

Factual issues are reviewed under the clearly erroneous standard. . Huether v. Mihm Transportation Co., 2014 SD 93, ¶ 14.

1. Did High Plains have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the referral of Fall River Resolution #2014-16?

"A writ of prohibition is an extraordinary remedy." Doe v. Nelson, 2004 SD 62, ¶ 7;

South Dakota Bd of Regents v. Heege, 428 N.W.2d 535, 537 (SD 1988). South Dakota statutory and case law require that a writ of prohibition may only be issued where the person seeking the writ is without other plain, speedy, and adequate remedy in the ordinary course of the law. SDCL 21-30-2; Sorenson v. Rickman, 486 N.W.2d 259, 261 (S.D. 1992); S.D. Bd. of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988).

High Plains has two plain, speedy and adequate remedies to contest Fall River County Commissioners placing the petroleum contaminated soil farm resolution on ballot. Thus, the writ of prohibition should not have been issued.

A. Election contest statutes (SDCL 12-22) provide the applicant an adequate remedy without the need of a writ of prohibition.

First, SDCL 12-22-1 and -3 provide another legal remedy, short of a writ of prohibition, to allow High Plains to challenge Resolution #2014-16 being placed on the ballot. These are the election contest statutes.

SDCL 12-22-1 defines an election "contest" as a "legal proceeding other than a recount, instituted to challenge the determination of any election under the provisions of this title . . ." Title 12 is the title governing the conduct of elections in the State of South Dakota. SDCL 12-22-14 specifically gives instruction as to how to word a contest on a submitted question. Besides a recount, there is no limiting language as to the types of issues that can be addressed in an election contest pursuant to SDCL 12-22.

SDCL 12-22-3 allows a contest of a submitted question by "any registered voter who was entitled to vote on a referred or submitted question . . ." The Affidavit and Application for Writ of Prohibition were signed by Kerry Barker who is the manager of High Plains Resources, LLC and a registered voter in Fall River County. CI 1.

In a case directly on point, the South Dakota Supreme Court has had the opportunity to review the election contest statutes contained in SDCL 12-22 in the context of a Writ of Prohibition filed against a referred measure. Sorenson v. Rickman, 486 N.W.2d 259, 261 (S.D. 1992). In Sorenson, the applicant requested a writ of prohibition to stop a resolution passed by the City of Deadwood being submitted to a vote of the citizens of Deadwood. Id. at 260. The South Dakota Supreme Court held that a Writ of Prohibition is an improper remedy to stop a referred measure from being voted upon. Id. The reason for this holding is that the "state election contest statutes [in SDCL 12-22] already provide an adequate remedy at law. Sorenson v. Rickman, 486 N.W.2d 259, 261 (S.D. 1992); *See* SDCL 21-30-2. In denying the Writ of Prohibition, the South

Dakota Supreme Court found that since the applicant "possessed a plain, speedy, adequate remedy, he was not entitled to issuance of the writ [of prohibition]." Id. In summary, the South Dakota Supreme Court stated, "We believe the only fair challenge to this expression of the voters' will lies with the election contest statutes." Id. at 262.

B. High Plains' notice of appeal in 23 CIV 14-89 evidences another adequate remedy without the need for a writ of prohibition.

Second, High Plains has filed with the trial court a Notice of Appeal. This appeal is contained in Fall River County file #23CIV14-89. The Notice of Appeal states the issue as follows:

> Plaintiff [High Plains Resources, LLC] appeals and challenges as factually unsupported and legally defective Defendant's [Fall River Board of County Commissioners] decision to permit the referral of Resolution #2014-16.

The Affidavit and Application for Writ of Prohibition on file herein seeks the same result as the notice of appeal. CI 1. The Affidavit and Application for Writ state the relief sought as follows:

> Directing both Respondents [Fall River County Board of County Commissioners and Auditor] to desist and refrain from counting or otherwise tabulating votes cast in the November 4, 2014, referendum election concerning referred Resolution #2014-16.

CI 1.

The permanent writ of prohibition is challenging the same Resolution #2014-16 as the Notice of Appeal. By their own pleadings High Plains acknowledges that they have an adequate remedy at law without the need for a Writ of Prohibition.

2. Did a violation of the open meetings law (SDCL 1-25-1.1) and open records law (1-27-1.16) void the passage of Resolution #2014-09?

The second and third issues addressed herein are the result of High Plains' argument that Resolution #2014-09 can't be rescinded by the County Commission. CI 205. In response to that argument, the County argues that Resolution #2014-09 is void for the failure to comply with the open meetings laws and open records law, and for High Plains failure designate the purpose and size of the proposed petroleum contaminated soil farm as required by SDCL 34A-6-103.

The agent of High Plains, Keith Anderson, is the one that created the confusion over Resolution #2014-09. Instead of placing on the agenda a resolution for solid waste management application for a petroleum contaminated soil farm, Mr. Andersen characterized the resolution as a "Resolution for Land Farm General." TR 29; Exhibit B. It was never mentioned in the agenda that Mr. Andersen's client was High Plains or that they were applying to the DENR for acceptance of petroleum contaminated waste at the High Plains property abutting the City of Edgemont. EXH B. The first county commissioner to make the motion to approve Resolution #2014-09 was confused and had to withdraw his motion when he determined he had a conflict. EXH C. The county commissioner who seconded the motion to approve Resolution #2014-09 thought he was voting on a plat. TR 34. Besides the public not being given proper notice, it is apparent that not even the County Commissioners were given adequate notice of what they were voting on.

The County Commissioners acknowledged in the recission of Resolution #2014-09 that the March 25, 2014, agenda item was "not being descriptive of the actual scope of the facility. EXH E.

The Nebraska Court of Appeals had the opportunity to deal with a similar inadequate notice to a meeting. Hansmeyer v. Nebraska Pub. Power Dist., 6 Neb. App. 889 (1998). In that case the Nebraska Court of Appeals was confronted with an agenda item titled "Work Order Reports" and then the governmental body went on to approve a $47 million for the construction of a 96 mile transmission line across privately held property. Id. at 894. The Nebraska Court of Appeals stated that the innocuous agenda item "camouflaged the true nature of what would be discussed and voted upon and did not give the public meaningful notice so as to enable the public to observe and participate in the decision-making process." Id.

Just as in Hansmeyer, the purpose of the South Dakota open meetings law is to ensure that the public is duly informed and given adequate opportunity to discuss the issues. Olson v. Cass, 349 N.W.2d 435 (S.D. 1984); SDCL 1-25-1.1. The agenda item was presented by a High Plains Resources agent and at the meeting there were not any copies of the resolution for the public to be adequately informed that petroleum contaminated waste was the item for consideration. and TR 41, 21. Just as in Hansmeyer, the agenda item "Resolution for Land Farm General" was "camouflage" for the controversial issue of accepting drilling/petroleum waste into Fall River County. The purpose of the agenda requirement of the open meeting laws is to give "some notice of the matter[s] to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting." Schauer v. Grooms, 280 Neb. 426 (2010).

Having violated the South Dakota open meetings law the first passage of Resolution 2014-16 is void. Pokorny v. City of Schuyler, 202 Neb. 334, 339-40, 275 N.W.2d 281,

285 (1979). In McEhanny v. Anderson, the Honorable John Fitzgerald, judge 7th Judcial Circuit, South Dakota, concluded as a matter of law that the City of Edgemont had violated the open meetings laws and as a result the actions of the Edgemont City Council in violation of the open meetings law were not valid. 1999 SD 78, ¶ 19 (finding II by the trial court). The South Dakota Supreme Court did not disturb this finding by Judge Fitzgerald. Id. That being the case there is no need to discuss the rescission of the passage of the resolution on March 25, 2014. The passage of Resolution #2014-09 on March 25, 2014, was done in violation of the open meetings law and as such was invalid. McEhanny v. Anderson, 1999 SD 78, ¶ 19 (finding II by the trial court); Pokorny v. City of Schuyler, 202 Neb. 334, 339-40, 275 N.W.2d 281, 285 (1979).

Further complicating the matter was the failure of Anderson to provide a copy of Resolution #2014-09 to the public at the time of the hearing. TR 28. SDCL 1-27-1.16 requires the County Commission to have at least one copy of Resolution #2014-09 available during the meeting for inspection by the public. It is uncontested that the public was denied the opportunity to see a copy of Resolution #2014-09 prior to its approval by the County Commission. Ed Harvey did not have the ability to review Resolution #2014-09 prior to it being passed. TR 21.

3. Did Fall River Resolution #2014-09 properly set forth the location, purpose and size of the proposed petroleum contaminated soil farm?

High Plains argued to the trial court and the trial court agreed that SDCL 34A-6-103 prohibits the rescission of Resolution of #2014-09. CI 205. Thus, Resolution #2014-16 is invalid and referring Resolution #2014-16 to a vote of the people was improper. CI 205.

SDCL 34A-6-103 provides that onece an resolution by the County Commission is approved then "it may only be rescinded by the county before the new permit or first authorization is issued and only if a significant change in the size, purpose, or location of the proposed facility has occurred." (emphasis added).

There is no issue as to the first part of the quoted language. No permit has been issued to High Plains for the petroleum contaminated soil farm. In fact, High Plains has not even made an application with DENR for the construction of the petroleum contaminated soil farm. TR 46. High Plains' agent admitted that the petroleum contaminated soil farm is just a proposal. TR 44.

The only evidence in the record as to the location of the petroleum contaminated soil farm was presented by the County. EXH A and G. Exhibit A was admitted to show that High Plains had no firm plans for the contaminated soil farm because the High Plains property was purchased on March 18, 2014. EXH A. High Plains got title to the property a mere one week before it appeared before the County Commission for the consideration of Resolution #2014-09 on March 25, 2014. EXH B.

The record is devoid of any indication of the purpose or size of the proposed petroleum contaminated soil farm. To the contrary, High Plains' agent was unable to provide any details on the High Plains proposal. No formal application was submitted to the DENR. TR 46. There is nothing in the record about how High Plains was to

remediate the contaminated soil. TR 50. It is undetermined where the waste will come from or what will be in it. TR 44 and 51. Resolution #2014-09 never addresses the purpose or size of the facility. EXH C.

Without evidence of the size or purpose of the land farm general permit having been presented at the March 25, 2014, meeting, SDCL 34A-6-103 does not prohibit the rescission of Resolution #2014-09.

CONCLUSION

For the foregoing reasons the County Commission and Auditor request the Court to reverse the issuance of the Writ of Prohibition

REQUEST FOR ORAL ARGUMENT

The County Commission and the Auditor request an opportunity to present oral argument.

Dated this 5 day of March, 2015.

FALL RIVER COUNTY STATE'S ATTORNEY

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he mailed two (2) true and correct copies of the Appellant's brief to the individual hereinafter next designated, all on the date below shown, by email and depositing the same in the United States Mail, with first class postage prepaid in an envelope securely sealed and addressed to:

Mr. Kenneth Barker
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on the 6 day of March, 2015.

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APPENDIX

IN THE SUPREME COURT
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Appeal No. 27293

High Plains Resources, LLC,

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Fall River County, South Dakota

The Honorable Robert A. Mandel, Presiding

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Notice of Appeal filed December 22, 2014

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PRELIMINARY STATEMENT

This brief refers to Defendants/Appellants collectively as "County." The Fall River Board of County Commissioners is referred to as "Commissioners." Sue Ganje, as Fall River County Auditor, is referred to as "Ganje." Plaintiff/Appellee High Plains Resources, LLC is referred to as "High Plains."

The Clerk's Register of Actions will be referred to as "RA" followed by the beginning page of the referenced record. The trial transcript will be cited as "TT" followed by the corresponding page and line. The Appendix will be referred to as "App" followed by the appropriate page.

JURISDICTIONAL STATEMENT

High Plains agrees with the information set forth in County's Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES

1. **DID HIGH PLAINS HAVE A PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF THE LAW TO CHALLENGE THE RESCISSION OF RESOLUTION NO. 2014-09 AND THE SUBSEQUENT REFERRAL OF FALL RIVER COUNTY RESOLUTION NO. 2014-16?**

Comment: The trial court found that there was no plain, speedy, and adequate remedy.

Most Relevant Statutes:

SDCL § 7-8-27

Most Relevant Cases:

In re Petition for Writ of Certiorari as to Determination of Election on the Brookings Sch. Dist.'s Decision to Raise Additional General Fund, 2002 S.D. 85, 649 N.W.2d 581

Pennington County v. State ex rel. Unified Judicial System, 2002 S.D. 31 ¶10, 641 N.W.2d 127

Lewis v. Bd. of Comm'rs of Brown County, 182 N.W. 311, 44 S.D. 4 (1921)

2. **DID A VIOLATION OF THE OPEN MEETINGS LAW (SDCL § 1-25-1.1) AND OPEN RECORDS LAW (SDCL § 1-27-1.16) VOID PASSAGE OF RESOLUTION NO. 2014-09?**

Comment: South Dakota law does not support the proposition that open meeting violations render Commission's actions void.

Most Relevant Statues:

SDCL Ch. 1-25
SDCL Ch. 1-27
SDCL § 1-25-1.1

3. **DID FALL RIVER RESOLUTION NO. 2014-09 PROPERLY SET FORTH THE LOCATION, PURPOSE AND SIZE OF THE PROPOSED PETROLEUM CONTAMINATED SOIL FARM?**

Comment: There is no South Dakota requirement that the Resolution No. 2014-09 set forth the location, purpose and size of the proposed land farm.

Most Relevant Statutes:

SDCL § 34A-6-103

Most relevant cases:

State v. Fool Bull, 2009 SD 36, ¶46, 766 N.W.2d 159

Goetz v. State, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675

STATEMENT OF THE CASE

On September 19, 2014, High Plains filed an Affidavit and Application for Writ of Prohibition requesting that the circuit court enter its Writ prohibiting the Fall River County Commission from rescinding Resolution No. 2014-09 and prohibiting the counting of votes concerning the referral of Resolution No. 2014-16. Thereafter, the trial court issued its Alternative Writ of Prohibition. After considering the Application and Affidavit filed by High Plains, the Answer of the County, the briefs submitted and after conducting a hearing and issuing Findings of Fact and Conclusions of Law, the trial court entered its Permanent Writ of Prohibition prohibiting the rescission of Resolution No. 2014-09 and prohibiting the counting of votes cast in the November 4, 2014 referendum election concerning referred Resolution No. 2014-16.

STATEMENT OF FACTS

In March 2014, Keith Andersen ("Andersen"), an engineer retained by High Plains, contacted Ganje. He asked her to place a matter on the March 25, 2014 agenda for the purpose of consideration by the Commission of a resolution authorizing the siting of a petroleum contaminated land farm in Fall River County near Edgemont. (TT 41:13-16). Andersen informed Ganje that in order to file an application with the State Board of Minerals and Environment he needed to first obtain a resolution from the Commissioners authorizing the placement of the facility within Fall River County. (TT 42). Ganje told Andersen that she would place the matter on the Agenda. The two also discussed the possibility of a site visit if the Commission chose to require one. (TT 42) During this initial contact, Ganje asked Anderson if the resolution had been prepared and when told

that it had not been, she told Andersen he could bring it with him to the meeting. (TT 42-43).

On March 25, 2014, Andersen appeared at the Commission meeting. In his testimony before the trial court Andersen stated "[w]e had a fairly extensive discussion with the Commission and the members of the public present about what the proposal was and what the land farm would involve." (TR 43:18-21). The Commissioners reviewed the resolution that Anderson presented at the meeting and made a slight change to it. (TT 43:13-18). Ultimately, after motion and second, Resolution No. 2014-09 was adopted with one Commissioner abstaining due to a conflict of interest. (RA 1).

The minutes of the March 25, 2014 Commission meeting, which included the full resolution, were published in the Hot Springs Star on April 1, 2014, and in the Edgemont Tribune on April 2, 2014. (Application ¶ 8; RA 2; Answer ¶ 2; RA 97). The minutes as published were approved, without change, by the Commission at its April 17, 2014 meeting. (Application, Ex. 3; RA 1). No petition was filed concerning the referral of Resolution No. 2014-09, nor was any challenge of the Commission action in passing the Resolution filed.

At some point subsequent to April 23, 2014 (the last day when an appeal or petition to refer could have been filed),[1] certain members of the community expressed

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[1] SDCL § 7-8-29 states:

> Time allowed for appeal--Service of notice--Transcript of proceedings. Such appeal shall be taken within twenty days after the publication of the decision of the board by serving a written notice on one of the members of the board, when the appeal is taken by any person aggrieved by the decision of the board, and upon the person or persons affected by the decision of the board when the appeal is taken by the state's attorney; and the county auditor shall upon the filing of the required bond and the payment of his fees, which shall be the same as allowed registers of deeds

concerns regarding the proposed facility and on June 19, 2014, the Commission held another meeting concerning the facility. (Respondent's Ex. E; RA 119). At that meeting, the Commission rescinded Resolution No. 2014-09 and then immediately thereafter adopted Resolution 2014-16 which was identical to Resolution No. 2014-09 in all material respects. (Affidavit/Application ¶ 13; RA 3; Findings of Fact, ¶ 14; RA 205; Appellant's Br. 7). On July 18, 2014, a petition to refer Resolution No. 2014-16 was presented to Ganje and subsequently the referral of the Resolution was placed upon the November 4, 2014 general election ballot. High Plain's Affidavit and Application for Writ of Prohibition followed. The Application requested that the circuit court enter its Writ of Prohibition prohibiting the rescission of Resolution 2014-09 and the referral of Resolution 2014-16.

STANDARD OF REVIEW

"The issuance of [a writ of prohibition] is within the sound discretion of the court." *Putnam v. Pyle*, 57 S.D. 250, 232 N.W. 20, 24 (1930). Decisions involving the issuance of such writs are reviewed under the abuse of discretion standard of review. *H & W Contracting, LLC v. City of Watertown,* 2001 S.D. 107 ¶ 24, 633 N.W.2d 167, 175. Findings of fact are reviewed under the clearly erroneous standard and conclusions of law

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for like services, make out a complete transcript of the proceedings of the board relating to the matter of its decision and deliver the same to the clerk of courts.

SDCL § 7-18A-16 states:

Time of filing referendum petition--Submission to voters required. A petition to refer an ordinance or resolution subject to referendum may be filed with the auditor within twenty days after its publication. The filing of such a petition shall require the submission of any such ordinance or resolution to a vote of the qualified voters of the county for its rejection or approval.

are reviewed de novo and overturned only when the trial court erred as a matter of law. *Matter of Estate of O'Keefe*, 1998 SD 92, ¶ 7, 583 N.W.2d 138, 139.

ARGUMENT

1. DID HIGH PLAINS HAVE A PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF THE LAW TO CHALLENGE THE RESCISSION OF RESOLUTION NO. 2014-09 AND THE SUBSEQUENT REFERRAL OF FALL RIVER COUNTY RESOLUTION NO. 2014-16?

County focuses on the issue of the referral of Resolution No. 2014-16. The problem with this focus is that it misses the actual thrust of the trial court's Writ. The issue here is not simply the placement of Resolution No. 2014-16 on the ballot. Rather, the issue is the propriety of the Commissions' action in rescinding Resolution No. 2014-09, thereby clearing the way for the passage and subsequent referral of Resolution No. 2014-16. This misstatement of the issue leads County down a path that fails to address the real issue presented by this case.

County claims that High Plains had two plain, speedy and adequate legal remedies available to address the referral of Resolution No. 2014-16. The first being an election contest and the second an appeal. For the reasons which follow, neither of these remedies addresses the issues in this case because, as the trial court concluded, neither remedy is available to address the question of the legality of the Commission's actions in rescinding Resolution No. 2014-09 and then immediately adopting an identical Resolution, thereby enabling the referral of a matter which otherwise would have been time barred. SDCL § 7-18A-16.

County claims that High Plains had a plain, speedy and adequate legal remedy available to it pursuant to the election contest statutes found in SDCL Ch. 12-22. In

support of this contention County cites *Sorenson v. Rickman*, 486 N.W.2d 259 (S.D. 1992), where the trial court, in issuing a Writ of Prohibition, failed to make a finding that there existed no plain, speedy and adequate legal remedy. As a result of that threshold failure, this Court reversed the trial court's issuance of the Writ. Presumably because of the short timeframe available in *Sorenson*, the Supreme Court went on to address the adequacy of the election contest statutes and found that they were adequate to address the issue in the case. In so holding, the Court stated that "the . . . case involved a single issue; the city council's adoption of a resolution . . ." (*Sorenson*, 486 N.W.2d at 262) and given that fact, the election contest statutes provided an adequate legal remedy to challenge that action.

In contrast to the situation in *Sorenson*, the issues in this case require consideration of matters which extend beyond the mere adoption of Resolution No. 2014-16. The issue here is whether the Commission had the power to rescind Resolution No. 2014-09, and replace it with an identical re-numbered resolution, thereby circumventing the time limits allowed for referral or appeal.

Clearly, an election contest, the purpose of which is to "determine whether [an] election. . . resulted in a free and fair expression of the will of the voters on the merits" would not address the issues in this case because unlike an election contest, this case requires an examination of actions which precede the passage of the Resolution at issue in the election and which are not a part of that process. In *In re Petition for Writ of Certiorari as to Determination of Election on the Brookings Sch. Dist.'s Decision to Raise Additional General Fund*, 2002 S.D. 85, ¶ 13, 649 N.W.2d 581, a case in which the court addressed the adequacy of an alternate remedy to the issuance of a writ, the court

stated at ¶ 13 "the purpose of an election contest, . . . [is] to determine whether the election, despite irregularities, resulted in a free and fair expression of the will of the voters on the merits, and to obtain a new election if it did not." The Court went on to state that "there was no question of the validity of the election process itself. Therefore, an election contest would provide no remedy." Id., at ¶ 14.

Likewise, here, the pending referendum election was the culmination of a series of events and actions, including the rescission of Resolution No. 2014-09, that were beyond the scope of a challenge to the election process and therefore were beyond the scope of such a contest. The central question that requires resolution is the action taken by the Commission to rescind Resolution No. 2014-09. Absent the rescission of that first Resolution, the second Resolution is redundant and its referral and repeal by the voters is meaningless because even if it was repealed through the referendum process, Resolution No. 2014-09 remains in effect.

In order to assess the propriety of the rescission of Resolution No. 2014-09, it is noted that it is well settled that the Commission has only those powers expressly granted to it by the legislature. *Pennington County v. State ex rel. Unified Judicial System*, 2002 S.D. 31 ¶10, 641 N.W.2d 127. SDCL § 34A-6-103 grants to the Commission the jurisdiction to enact a resolution to approve the siting of the facility at issue in this case within the county. This power is granted within a statutory framework whereby the legislature has placed the jurisdiction of permitting waste disposal facilities clearly within the South Dakota Board of Minerals and Environment. Once the Commission has granted its approval and its decision has become final, its role in the process is complete absent a showing that there has been no permit issued and "only if a significant change in

the size, purpose, or location of the proposed facility has occurred." SDCL § 34A-6-103. As the court stated in *Jundt v. Fuller*, 2007 S.D. 62 ¶7, 736 N.W.2d 508, "[o]nce an . . . adjudication has become final it is no longer subject to reconsideration. *See City of Philadelphia Police Dept. v. Civil Service Com'n of the City of Philadelphia,* 702 A.2d 878, 880 (Pa. Commw. Ct. 1997) (tribunal loses jurisdiction to change order once it becomes final)."

There is nothing in this record to support the proposition that "the size, purpose, or location" of this facility has changed since the date that it was approved by the Commission on March 25, 2014, for the simple reason that no such change occurred. For this reason, the Commission lacked the power to rescind Resolution No. 2014-09 by virtue of the clear language of SDCL § 34A-6-103. The dispute in this case is beyond the scope of anything which could be raised in an election contest and consequently an election contest is not an adequate remedy. As in *In re Petition for Writ of Certiorari ...*, the "problem" in this case is beyond anything that could be resolved in an election contest.

County also argues that the "fact" that High Plains filed a notice of appeal regarding the Commission decision to permit the referral of Resolution No. 2014-16, somehow is evidence that an adequate remedy exists foreclosing the "need for a writ of prohibition."[2] County cites no authority to support this proposition and consequently this issue is waived. *State v. Fool Bull*, 2009 S.D. 36, ¶46, 766 N.W.2d 159.

[2] Other than the attachment of a Notice of Appeal as part of County's appendix to it brief, there is no evidence admitted which established that this Notice is part of the record in this case.

Assuming *arguendo* that this issue is considered by the Court, an appeal of the enactment of Resolution No. 2014-16 under SDCL § 7-8-27 would not provide any remedy regarding the rescission of Resolution No. 2014-09. Also, because the rescission was not "a decision . . . upon [a] matter properly before . . ." the Commission, there was no right to appeal that decision. SDCL § 34A-6-103 limits the jurisdiction of the county commission to rescind a resolution passed pursuant to that statutory authority, to those cases where there has been a "significant change in the size, purpose, or location of the proposed facility. . . ." This requirement of a change is a condition precedent to the commission's power to rescind such a resolution.

As stated in *Lewis v. Bd. of Comm'rs of Brown County,* 182 N.W. 311, 44 S.D. 4 (1921), the "statute does not allow appeals from all decisions of the board, but only from decision[s] upon matters properly before it. . . ." In *Lewis*, the statute at issue provided the commission with authority to designate a legal newspaper at its first regular meeting. The Court agreed that such a designation at any other time was not properly before the board and therefore was not the proper subject of appeal. While *Lewis* was distinguished in *Walker v. Bd. of County Comm's of Brule County*, 337 N.W.2d 807 (S.D. 1983), the Court recognized that the distinction resulted from the fact that in *Lewis*, a statute specifically limited the Commission's jurisdiction. Likewise, SDCL § 34A-6-103 limits the Commission's jurisdiction to rescind in the case now before the Court. The change necessary to confer jurisdiction to rescind never occurred and consequently the Commission lacked jurisdiction to rescind. The action of the Commission in rescinding Resolution No. 2014-09 by Motion at the June 19, 2014, meeting was not within its

power at the time it attempted to exercise the power and consequently was not within its power to consider and adopt. The decision was not appealable under SDCL § 7-8-27.

2. DID A VIOLATION OF THE OPEN MEETINGS LAW (SDCL § 1-25-1.1) AND OPEN RECORDS LAW (SDCL § 1-27-1.16) VOID PASSAGE OF RESOLUTION NO. 2014-09?

County claims that when it passed Resolution No. 2014-09 it did so in violation of the South Dakota open meeting statutes in that the Resolution was inadequately described in the agenda. The County claims that the allegedly inadequate agenda description renders the Resolution void *ab initio*. The County cites no South Dakota authority to support its contention because no authority exists.

South Dakota statutes establish the procedures that must be followed in order to accomplish the statutory mandates in SDCL Ch. 1-25 and Ch. 1-27. These statutes require among other things, that the county auditor post a meeting agenda prior to County Commission meetings. The statute requires that the agenda contain "the date, time and location of the meeting." SDCL § 1-25-1.1. There is no dispute that such an agenda was timely posted by Ganje. There is no statutory provision that dictates the descriptive content of agenda items. In this case, the county auditor, after discussing the purpose of the proposed resolution with Andersen, chose to describe the item as "REVIEW RESOLUTION FOR LAND FARM GENERAL PERMIT." High Plains is not responsible for the content of the agenda item. Andersen described the purpose of the Resolution to Ganje. (TT 40-44). The ultimate description that appears on the agenda is in the control of the auditor and is a responsibility of the County officials who now complain of a deficiency in the description that they chose. At the time Resolution No. 2014-09 was passed, it was discussed by Andersen, the Commission and the

members of the public. The Resolution was physically available for review. In the context of the meeting and all the facts it is not at all settled that there was any deficiency in the Agenda description.

Even if the agenda description was less descriptive than hindsight says it could have been, there is no support in South Dakota statutes for the proposition that such deficiency renders Resolution No. 2014-09 void. In fact the statutory remedy provided for a violation of the South Dakota open meeting statutes is that contained in SDCL § 1-25-1.1 which makes a violation of its requirements a Class 2 misdemeanor. There is nothing in South Dakota law that states that any actions taken at the meeting are void. SDCL § 1-25-6, 6.1 and 7 set forth additional procedures available in the event of a violation of the open meeting law but those procedures do not include that the action taken at the meeting is void as County claims.

County cites *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), in support of the proposition that an inadequate description of an item in the meeting agenda results in the action taken concerning the item being void. Examination of Nebraska statutes, however, which were the foundation of the court's opinion in *Hansmeyer*, reveals that Neb. Rev. Stat. § 84-1411 (App. 001-003) specifically requires that the notice of public meetings contain an agenda and that "Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting…" The South Dakota statute contains no requirement that the agenda contain anything more than the "date, time and location of the meeting." SDCL § 1-25-1.1.

In addition to the foregoing, Neb. Rev. Stat. § 84-1414 (App. 004) sets out specific authority and a procedure for a declaration that a resolution may be void or voidable. Specifically, depending on when the action is brought, the action taken by the board may be either void or voidable. There is no such provision under South Dakota statutes. The County's attempt to apply a Nebraska case dealing with Nebraska statutes is inappropriate and beyond the power of South Dakota courts to impose. Adoption of the remedy County seeks is part of the legislative process. The Nebraska statutory scheme establishes timeframes within which action must be taken to declare a public body's action void. If the action is brought within one hundred twenty days from the date the violation occurred, the action can be declared void by the district court. If the action is brought later than one hundred twenty days but within one year, and if the violation is substantial, the action by the public body is voidable by the district court.

Adoption of County's approach in South Dakota, without the limitations set out in the Nebraska statute, would permit anyone at any time to challenge the sufficiency of an agenda description for any action ever taken by a public body. Violators of County ordinances would have a ready defense to any alleged violation by challenging the sufficiency of the county agenda descriptions no matter how far back they may have occurred. There is nothing in South Dakota law to support the outcome which County proposes.

County also claims that *McElhaney v. Anderson*, 1999 S.D. 78, 598 N.W.2d 203 provides authority for the proposition that a deficient agenda description can form the basis for voiding a public body action. A review of *McElhaney* reveals that County's reliance is misplaced because that was not an issue in the appeal of the case and it formed

no part of the Court's opinion in the case. Although the dissent quotes a conclusion of law entered by the trial court which deals with an Open Meetings law violation that conclusion formed no part of the basis for the Court's decision and constitutes no authority for the County's position. The language in *McElhaney* relied on by County does not even rise to the level of dictum since it is nothing more than an observation of a conclusion reached by the trial court which is totally irrelevant to any issue in the case. The decision in no way addresses, let alone ratifies, the trial court's conclusion regarding the claimed open meetings violation.

Finally, County claims that SDCL § 1-27-16 provides authority for its claim that the resolution at issue must be declared void because the public did not have an opportunity to see a copy before its approval. In addition to the reasons set forth above, it is clear that the Resolution No. 2014-09 was available at the March 25, 2014 meeting. The Commissioners read it (TT 39:16-17) and it was available for review while the Commission was considering the Resolution. There was no violation of SDCL § 1-27-16.

3. DID FALL RIVER RESOLUTION NO. 2014-09 PROPERLY SET FORTH THE LOCATION, PURPOSE AND SIZE OF THE PROPOSED PETROLEUM CONTAMINATED SOIL FARM?

County states that "[w]ithout evidence of the size or purpose of the land farm general permit having been presented at the March 25, 2014, meeting, SDCL § 34A-6-103 does not prohibit the rescission of Resolution #2014-09." (Appellant's Br., 15). County again cites no authority to support this proposition and consequently this issue is waived. *State v. Fool Bull*, 2009 SD 36, ¶46, 766 N.W.2d 159.

In the event the issue is considered, the statement is not supported by the record. Andersen testified that he and the Commissioners and members of the public discussed what the proposal was and what the land farm would involve. (TT 40-44). There is nothing in this record to support the assertion that there was any change (let alone a significant change) in the size, purpose, or location of the proposed facility from the date of the adoption of Resolution No. 2014-09 on March 25, 2014, until its rescission on June 19, 2014. The motion approving the rescission states that the reason for the rescission was that the prior resolution was not "descriptive of the actual scope of the facility" not that there had been a change in the size, purpose, or location of the facility.

County is not free to rewrite the legislatively mandated provisions of SDCL § 34A-6-103. In applying the mandates of legislative enactments, it is necessary first to look at the words which the legislature used in the statute and then if the words used have a plain meaning the court's role is to declare that meaning and not engage in statutory construction. *Goetz v. State*, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675. In the case of SDCL § 34A-6-103 the legislature specifically and clearly required that a resolution enacted pursuant to its terms could only be rescinded if there was "a significant change in the size, purpose, or location of the proposed facility. . . ." There is nothing in the statute or this record that would support Respondents' contention that the absence from the resolution of a description of the "actual scope of the facility" is grounds for its rescission.

CONCLUSION

Based upon the forgoing, the trial court's issuance of its Writ should be affirmed.

Dated this 22 day of April, 2015.

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THE APPELLEE RESPECTFULLY REQUESTS THE OPPORTUNITY FOR ORAL ARGUMENT

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of Appellee's Brief and Appendix on the 22 day of April, 2015, by electronic mail on:

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CERTIFICATE OF FILING

I, Timothy J. Vander Heide, attorney for Appellee, certify an original and two copies of Appellee's Brief and Appendix were mailed by first class mail, postage prepaid to:

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

An electronic version of Appellee's Brief and Appendix was also electronically transmitted in Word format to the Clerk of the Supreme Court at scclerkbriefs@ujs.state.sd.us on the 22 day of April, 2015.

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APPELLEE'S APPENDIX

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NUMBER 27293

HIGH PLAINS RESOURCES, LLC, Applicant and Appellee

vs.

FALL RIVER COUNTY BOARD OF COMMISSIONERS, and SUE GANJE, IN HER CAPACITY AS FALL RIVER COUNTY AUDITOR ONLY, Respondents and Appellants

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Appeal from

Seventh Judicial Circuit

Fall River County, South Dakota

The Honorable Robert A. Mandel, Circuit Court

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed on December 22, 2014

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PRELIMINARY STATEMENT

Appellants hereby incorporate the preliminary statement, jurisdictional statement, statement of the case, and statement of the issues herein by reference as though they were fully set forth in this Reply Brief.

STATEMENT OF FACTS

County will rely upon the Statement of Facts contained in Appellants' Brief.

ARGUMENT

1. Did High Plains have a plain, speedy and adequate remedy in the ordinary course of the law to challenge the referral of Fall River Resolution #2014-16?

High Plains' reliance on In Re Petition for Writ of Certiorari as to Determination of Election on the Brookings School District's Decision to Raise Additional General Fund is misplaced. 2002 S.D. 85. By relying on Brookings School District, High Plains is making the mistake that all writs are the same.

High Plains has used the writ of prohibition to bring this action and not a writ of certiorari. A writ of prohibition is provided for in SDCL 21-31. A writ of certiorari is provided for in SDCL 21-31. They are separate judicial remedies.

The South Dakota Legislature determined that the writ of prohibition is the counterpart to the writ of mandamus. SDCL 21-30-1. There is no mention by the legislature that the writ of prohibition is the counterpart to the writ of certiorari.

If High Plains wanted to take advantage of any perceived benefits to its position contained in Brooking School District then High Plains should have

filed a writ of certiorari to advance its position. High Plains did not file a writ of certiorari. Instead, High Plains filed a writ of prohibition to stop the counting of ballots duly cast in an election. That being the case, Sorenson v. Rickman is the controlling authority over the matter herein. 486 N.W.2d 259 (S.D. 1992). In Sorenson, the South Dakota Supreme Court found that a writ of prohibition is an improper remedy to stop a vote. Id. at 260.

In the election contest statues (SDCL 12-22), the South Dakota Legislature has given clear guidance that the people's votes should be counted. SDCL 12-22-4. The only election dispute excluded by the South Dakota Legislature from the election contest statutes is a recount. SDCL 12-22-1. Besides a recount, there are no other limitations to the issues that can be addressed in an election contest. Id.

In the election contest statutes, the South Dakota Legislature has made clear its intent to count the votes. Only after the official canvass can an election contest be initiated. SDCL 12-22-5. High Plains' use of the writ of prohibition is an attempt to circumvent the legislature's directive to count the votes and then proceed with an election contest. In doing so, High Plains stopped the counting of ballots which may have resulted in the voters of Fall River County supporting High Plains' position. By not following the election contest statutes and short circuiting the counting of the votes, the trial court, and now this Court, is being asked to consider a question that the voters might have already resolved in High Plains' favor.

County will at least concede that Brookings School District is relevant on the issue of counting the votes. In Brookings School District, the application for writ of certiorari was made after the votes had been cast and counted. 2002 SD 85. In Brookings School District the votes were not locked in a box pending the resolution of court proceedings. Instead, the facts related to the Brookings School District ballots were stated as follows:

> After a petition to refer this decision to a public vote, a referendum election was held on September 18, 2001. The question for the voters was whether the tax increase should be approved or disapproved. The final vote tally showed that 2,211 approved and 2,181 disapproved the increase.

Id. at ¶ 2.

2. Did a violation of the open meetings law (SDCL 1-25-1.1) and open records law (1-27-1.16) void the passage of Resolution #2014-09?

In a candid description, High Plains acknowledges that the agenda item for the petroleum contaminated soil farm was "less descriptive than hindsight says it could have been." Appellee's Brief, page 13. High Plains does not argue that the agenda item entitled "Resolution for Land Farm general" properly gave the people of Fall River County adequate notice that petroleum contaminated soil was going to be dumped in the county. However, High Plains argues that a violation of the open meetings laws and open records law should not affect its position. Further, High Plains insinuates that the open meetings and open records laws are mere suggestions. Appellee's Brief, page 12 - 13. High Plains argues that even if there is an open meetings law violation then there is nothing that the people of Fall River County can do to stop High Plains from moving forward with its plan to dump petroleum contaminated soil into the County. At most,

High Plains suggests that a county commissioner should be prosecuted for the open meetings law violation. Appellee's Brief, page 13. By making these arguments, High Plains seeks to benefit from the confusion caused by its agent, Keith Anderson, in misnaming the agenda item and failing to provide copies of the resolution to the County Commission prior to the hearing. TR 28 and 29.

High Plains' rational for its position is the "slippery slope argument." If resolution #2014 -09 is void because of inadequate notice to the public, then all county actions could be subject at anytime to challenge for improper notice. Appellee's Brief, page 14. The South Dakota Supreme Court has already reviewed these arguments and rejected them. Pennington County v. Moore, 525 N.W.2d 257 (1994). In Moore, the owner of a salvage yard challenged the Pennington County zoning ordinance. Id. At the time the ordinance was challenged, it had been in effect for 23 years. Id . at 257. The trial court found that Pennington County had failed to properly notice and hold a public hearing on the zoning ordinance. Id. at 257. Notice of the proposed zoning ordinance and a public hearing were required by SDCL 11-2-19. In affirming the trial court's decision to void the Pennington County zoning ordinance, the South Dakota Supreme Court held that the notice and hearing requirements are "mandatory and may not be disregarded by the Commission." Id. at 259 (citing Save Centennial Valley Association, Inc. v. Schultz, 284 N.W.2d 452, 457 (S.D. 1979). In Moore, the South Dakota Supreme Court held that a 23 year old zoning ordinance was void because of the county's failure to adhere to the notice and hearing requirements set out in statute. Pennington County v. Moore, 525 N.W.2d at 260.

Just as in Moore, the issue herein is the remedy to be imposed when a county commission passes a resolution in violation of the notice requirements imposed by South Dakota law. The remedy in Moore, was that a 23 year old statute was found to be void. Id. at 260.

The open meeting law is mandatory. SDCL 1-25-1.1. There is no discretion on the part of the county commission. The open meeting law states, "All public bodies shall provide public notice, with proposed agenda. . . " SDCL 1-25-1.1. The notice requirement is to ensure that the public is duly informed and given adequate opportunity to discuss the issues. Olson v. Cass, 349 N.W.2d 435 (S.D. 1984).

Similarly, the open records law is mandatory and leaves no discretion to the county on compliance. SDCL 1-27-1.16. The open records law states, "If the material is not posted to the governing body's website, at least one copy of the printed material shall be available in the meeting room for inspection by any person while the governing body is considering the printed material." SDCL 1-27-1.16. Reading the resolution and the county commission having the only copy is not compliance. *See* Appellee's Brief, page 15. Ed Harvey, a member of the public at the hearing on the "Land Farm General Permit," did not have the ability to review Resolution #2014-09 prior to it being passed. TR 21.

Having violated the specific notice requirements contained in SDCL 1-25-1.1 and SDCL 1-27-1.16, the County Commission's passage of Resolution #2014-09 should be declared void. *See* McEhanny v. Anderson, 1999 SD 78,¶ 19 (finding II by the trial court); Pennington County v. Moore, 525 N.W.2d 257 (1994).

3. Did Fall River Resolution #2014-09 properly set forth the location, purpose and size of the proposed petroleum contaminated soil farm?

SDCL 34A-6-103 is clear. Once the County Commission adopts a resolution supporting a proposed [solid waste] facility, "it may only be rescinded by the county before the new permit or first authorization is issued and only if a significant change in the size, purpose, or location of the proposed facility has occurred." (emphasis added).

There can't be a "significant change" in size or purpose because as of this date High Plains has never been able to provide any information regarding the petroleum contaminated soil farm's size or purpose. The only evidence submitted as to location was done by the County. EXH A. Resolution #2014-09 never addresses the purpose or size of the facility. EXH C. The record is devoid of any indication of the purpose or size of the proposed petroleum contaminated soil farm.

Without designating the size and purpose of the proposed facility, SDCL 34-6-103 does not prohibit rescission of Resolution #2014-09. There can be no "significant change" were no size or purpose was ever established in the first place.

CONCLUSION

The County Commission and Auditor rely upon all other arguments advanced in the Appellant's Brief and the arguments herein and respectfully request the Court to reverse the issuance of the Writ of Prohibition.

Dated this 7 day of May, 2015.

FALL RIVER COUNTY STATE'S ATTORNEY

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CERTIFICATE OF COMPLIANCE PURSUANT TO SDCL 15-26A-66(b)(4)

The undersigned certifies that the Appellant's Reply Brief filed herein complies with SDCL 15-26A-66. The Appellant's Reply Brief has 1,603 words and has 9,744 characters. In making this representation, the undersigned is relying upon the word and character count of the word-processing system used to prepare the Appellant's Reply Brief.

Dated this 7 day of May, 2015.

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The undersigned hereby certifies that he served a true and correct copy of Appellant's Reply Brief with a certificate of compliance on the 7 day of May, 2015, by electronic mail on:

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