IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, acting through
the Attorney General

Petitioner/Appellee

-vs-

BUFFALO CHIP, SOUTH DAKOTA,

Respondent/Appellant

Appeal No. 28916

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE GORDON D. SWANSON
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED
March 4, 2019

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PRELIMINARY STATEMENT

In this brief, the Appellant, Buffalo Chip, South Dakota, will be referred to as "Buffalo Chip." The Appellee, State of South Dakota, will be referred to as "the State." The Meade County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The Appendix to this brief will be referred to as "App." followed by the corresponding page number.

JURISDICTIONAL STATEMENT

This is an appeal from the trial court's Judgment of Dissolution, which was filed on February 22, 2019. (App. 3-4, CR 117-118.) Notice of Entry was served on February 25, 2019. (CR 119-120.) Buffalo Chip filed a Notice of Appeal on March 4, 2019. (CR 123.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because Buffalo Chip is appealing from a judgment.

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED BY ALLOWING THE STATE TO BRING AN ACTION TO VACATE BUFFALO CHIP'S ARTICLES OF INCORPORATION AND ANNUL BUFFALO CHIP'S EXISTENCE.

The Circuit Court denied Buffalo Chip's motion to dismiss, and held that the State was permitted to proceed under SDCL 21-28-2(3) and SDCL 9-3-20.

Lippold v. Meade Cnty. Bd. of comm'rs, 2018 S.D. 7, 906 N.W.2d 917.

Merchants' Nat. Bank v. McKinney, 2 S.D. 106, 48 N.W. 841 (1891).

SDCL 21-28-12.

SDCL 21-28-2(3).

SDCL 9-3-20.

II. WHETHER THE CIRCUIT COURT ERRED BY FINDING THAT SDCL 9-3-1 REQUIRED BOTH 100 LEGAL RESIDENTS AND 30 VOTERS IN THE AREA TO BE INCORPORATED IN ORDER FOR THE MEADE COUNTY COMMISSION TO SET AN ELECTION ON THE QUESTION OF INCORPORATION.

Although the applicable version of SDCL 9-3-1 stated "[n]o municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters," the Circuit Court interpreted the disjunctive language in SDCL 9-3-1 to require both 100 residents and 30 voters.

State v. Lafferty, 2006 S.D. 50, 716 N.W.2d 782.

Lewis & Clark Rural Water System., Inc. v. Seeba, 2006 S.D. 7, 709 N.W.2d 824.

SDCL 9-3-1.

STATEMENT OF THE CASE

On March 14, 2018, the State applied to this Court for permission to commence an action pursuant to SDCL Chapter 21-28 and SDCL 15-25-1. On May 10, 2018, this Court denied the application.

On May 29, 2018, the State filed a document entitled "Petition for, or in the Nature of, a Writ of Quo Warranto." (CR 2-4.) In response, Buffalo Chip filed a Motion to Dismiss and supporting brief on July 2, 2018. (CR 8-17.) Buffalo Chip's motion came on for hearing before the Circuit Court, the Honorable Gordon Swanson, on July 31, 2018. On August 3, 2018, the Circuit Court denied Buffalo Chip's Motion to Dismiss

(App. 3; CR 40-41.) On August 8, 2018, Buffalo Chip filed its Answer. (CR 42-46.)

On January 25, 2019, the parties filed cross motions for summary judgment. (CR 50, 66-67.) The parties included in their submissions a Stipulated Statement of Undisputed Material Facts. (App. 7-9; CR 62-64.) The motions were heard by the Circuit Court on February 12, 2019. On February 22, 2019, the Circuit Court entered a Judgment of Dissolution. (App. 1-2; CR 117-118.) Buffalo Chip filed its Notice of Appeal on March 4, 2019. (CR 123.)

STATEMENT OF FACTS

The parties submitted a Stipulated Statement of Undisputed Material Facts to the Circuit Court. (App. 7-9; CR 62-64.) The facts which appear below were derived from that statement, as well as this Court's decision in Lippold v. Meade Cnty. Bd. of comm'rs, 2018 S.D. 7, 906 N.W.2d 917.

A petition for incorporation for the town of Buffalo Chip, South Dakota, was filed with the Meade County Board of Commissioners on February 20, 2015. Lippold at ¶ 3, 906 N.W.2d at 919. The Meade County Board of Commissioners approved an amended petition on February 27, 2015. Id. at ¶ 5, 906 N.W.2d at 919-20. Specifically, the Board found that the proposed area of incorporation had more than

thirty voters as required by SDCL 9-3-1 and that more than a quarter of the voters signed the amended petition in satis-

faction of SDCL 9-3-5. Pursuant to SDCL 9-3-6, the Board ordered the incorporation of Buffalo Chip City and scheduled an election on May 7, 2015, for voters to decide whether to assent to incorporation. Id. at ¶ 5, 906 N.W.2d at 920.

After the successful election on May 7, 2015, Buffalo Chip filed Articles of Municipal Incorporation with the South Dakota Secretary of State on May 20, 2015. (CR 62.) According to the census submitted in support of the petition to incorporate, Buffalo Chip did not have at least one hundred legal residents at the time of incorporation. (Id.) It did, however, have more than thirty registered voters at the time of incorporation. (Id.) When Buffalo Chip was incorporated, SDCL 9-3-1 provided: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." (CR 63.) SDCL 9-3-1 was amended by the South Dakota Legislature in 2016. (Id.; CR 94.)

Other municipalities with less than one hundred legal residents were incorporated when the prior version of SDCL 9-3-1 was in effect. For instance, the municipal incorporation of Brant Lake was approved by the Lake County Commission in 2016. According to meeting minutes dated

February 2, 2016, the resident population of the territory at the time was 63. (Id.)

The purpose of the case filed by the State is to annul

the corporate existence of Buffalo Chip and vacate its articles of incorporation. (Id.) Going back to at least July 1, 1939, the State is unaware of it obtaining leave to bring an action in the nature of quo warranto under SDCL Chapter 21-28 against any municipality claiming the interpretation of SDCL 9-3-1 urged in this action. (Id.)

ARGUMENT

A. Quo warranto may not be used to annul the existence of a municipal corporation.

Buffalo Chip moved the Circuit Court to dismiss the State's action, arguing that, pursuant to SDCL 21-28-12, the civil remedy of quo warranto could not be used to dissolve a South Dakota municipal corporation. The Circuit Court denied that motion and allowed the State's case to proceed. This Court's standard of review of a trial court's denial of a motion to dismiss is the same as its review of a motion for summary judgment – "is the pleader entitled to judgment as a matter of law?" Steiner v. County of Marshall, 1997 S.D. 109, ¶ 16, 568 N.W.2d 627, 631 (quoting Estate of Billings v. Deadwood Congregation, 506 N.W.2d 138, 140 (S.D. 1993)) (internal citations omitted). When the issue presents a question of law, the Court reviews the trial court's decision de novo, with no deference given to the trial court's legal conclusions. Thompson v. Summers, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390 (citing City of Colton v. Schwebach, 1997 S.D. 4, ¶ 8, 557 N.W.2d

769, 771).

1. SDCL 21-28-12 precludes the State's attempt to dissolve Buffalo Chip.

Buffalo Chip is a municipal corporation. It is undisputed that it filed Articles of Incorporation with the South Dakota Secretary of State on May 20, 2015. The State's prayer for relief seeks to exclude Buffalo Chip from its corporate rights, privileges, and franchises and to dissolve the municipal corporation of Buffalo Chip. (CR 4.) The relief sought is not legally available, and the Circuit Court erred in its interpretation of the applicable provisions of SDCL Chapter 21-28.

SDCL 21-28-12 is the statute that controls the use of quo warranto to vacate articles of incorporation or annul the existence of corporations, and it states:

> An action may be brought by any state's attorney in the name of the state or by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, for the purpose of vacating the charter or articles of incorporation, or for annulling the existence of corporations **other than municipal**, whenever such corporation shall:
>
> (1) **Offend against any of the laws creating, altering, or renewing such corporation;**
> (2) Violate the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation by abuse of its power;
>
> (3) Have forfeited its privileges of franchises by a failure to exercise its powers;

(4) Have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises;

(5) Exercise a franchise or privilege not conferred upon it by law.

(Emphasis added.)

In SDCL 21-28-12, the South Dakota Legislature specifically carved out the annulment of the existence of municipal corporations from the operation of SDCL Chapter 21-28. The State argued, and the Circuit Court agreed, that SDCL 21-28-2(3) authorizes the State's action. The State's exclusive reliance on SDCL 21-28-2(3) is an obvious attempt to avoid the prohibition found in SDCL 21-28-12.

SDCL 21-28-2(3) cannot be read in isolation. Rather, SDCL 21-28-2 and 21-28-12 must be read *in pari materia*. "To determine legislative intent, this Court will take other statutes on the same subject matter into consideration and read the statutes together, or *in pari materia*." Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756 (citing Loesch v. City of Huron, 2006 S.D. 93, ¶ 8, 723 N.W.2d 694, 697). "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." Goetz v. State, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. Reading these statutes *in pari materia*, SDCL 21-28-12

must be read to restrain the use of quo warranto with respect to municipal corporations.

The Circuit Court's interpretation was erroneous, for a couple reasons. First, SDCL 21-28-2(3) merely identifies *who* is entitled to bring a quo warranto action in the three enumerated situations stated therein. *Who* is not the issue. Whether SDCL Chapter 21-28 authorizes an action to vacate the articles of incorporation and annul or dissolve the existence of a municipal corporation is the issue. That question is not answered by SDCL 21-28-2(3); it is answered by SDCL 21-28-12.

Second, SDCL 21-28-2(3) is inapplicable to a *de jure* municipal corporation such as Buffalo Chip. It only addresses the situation "[w]hen any association or number of persons shall act within this state as a corporation, *without being duly incorporated.*" (Emphasis added.) The plain meaning that can be ascribed to subpart (3) is that, when a group is holding itself out as corporation even though it never completed the steps to incorporate, it may be challenged by a states attorney or person with a special interest. For instance, if Buffalo Chip had gone through the election process but never submitted Articles of Incorporation for filing with the Secretary of State, the State's argument under SDCL 21-28-2(3) may have some appeal.

That is not the situation presented in this case. Buffalo Chip is not just acting like a municipal corporation. It jumped through *all* the proverbial hoops in 2015 and actually became a municipal corporation. In Lippold v. Meade Cnty. Bd. of comm'rs, 2018 S.D. 7, 906 N.W.2d 917, this Court acknowledged that "Buffalo Chip City became and still is an acting municipality." Id. at ¶ 25, 906 N.W.2d at 924. "The evidence established at trial reveals Buffalo Chip City is governed by an acting board of sworn trustees and is engaging in acts of a municipality, including taking out loans and obtaining licenses and sales-tax exemptions. It is **at the very least** a de facto corporation. . . ." Id. (Emphasis added.)

Buffalo Chip is more than a *de facto* corporation; it is a *de jure* municipal corporation. In Lippold, this Court distinguished between *de facto* and *de jure* corporations:

> *De facto* means "[a]ctual; existing in fact; having effect even though not formally or legally recognized." Black's Law Dictionary (10th ed. 2014). A *de facto* corporation is "one so defectively created as not to be a *de jure* corporation, but nevertheless the result of a bona [fide] attempt to incorporate under existing statutory authority, coupled with the exercise of corporate powers, and recognized by the

courts as such on the ground of public policy in all proceedings except a direct attack by the state questioning its corporate existence." 1 McQuillin, supra, § 3.103. A *de jure* corporation stands in contrast to a *de facto* corporation and is "[a] corporation formed in accordance with all applicable laws and recognized as a corporation for liability purposes." Black's Law Dictionary (10th ed. 2014).

Id. at ¶ 7, 906 N.W.2d at 922-23.

Buffalo Chip was formed in accordance with all applicable laws and was recognized as a municipal corporation by the State. Buffalo Chip's incorporation was never challenged by the Meade County States Attorney on behalf of the State. Pursuant to SDCL 9-3-14, Buffalo Chip filed its canvas of votes with the Secretary of State. It also filed Articles of Incorporation. At that point, the State was put on notice of Buffalo Chip's incorporation and made aware that Buffalo Chip was incorporating with less than one hundred (100) residents. The filing of the articles by the Secretary of State was the last step required for Buffalo Chip to become a municipal corporation. See SDCL 6-10-1 ("No political subdivision of the state of South Dakota may legally be incorporated or dissolved until notice of such incorporation or dissolution has been filed in the office of the secretary of state.").

The State had a decision to make - it could either make inquiry into the incorporation or file the Articles of Incorporation. The Secretary of State filed the Articles of Incorporation, and Buffalo Chip has been a *de jure* municipal corporation since May 20, 2015.

The State is now trying to vacate Buffalo Chip's Articles of Incorporation and annul Buffalo Chip's existence. Simply by virtue of the relief it is seeking in this lawsuit, the State's action is prohibited by SDCL 21-28-12. The State cannot obtain relief that the South Dakota Legislature has not allowed. Nor could the Circuit Court create a right to such relief. See Stover v. Critchfield, 510 N.W.2d 681, 686 (S.D. 1994) (the duty of a court is to apply the law objectively as found, and not to revise it). The Circuit Court should have dismissed the State's action

because, as a matter of law, the State sought relief that could not be obtained.

2. SDCL 9-3-20 allowed the State to inquire into the organization of Buffalo Chip contemporaneously with its formation, not years after the State filed its Articles of Incorporation.

The Circuit Court also relied on SDCL 9-3-20, which authorizes the State to inquire into the regularity of the organization of an acting municipality. SDCL 9-3-20 appears in the chapter of the code detailing the process by which municipalities are incorporated. The obvious implication from

SDCL 9-3-20 appearing in that sequence of statutes is that the time for the State to make its inquiry was some time *before* the State filed the Articles of Incorporation and put Buffalo Chip on the map as a city. Indeed, the last step in the process was Buffalo Chip's notice to the State, and there is no question that Buffalo Chip completed this step. See SDCL 9-3-14; SDCL 6-10-1.

Buffalo Chip has been a municipality for nearly four years. The State did not inquire into the regularity of the organization of Buffalo Chip until years after Buffalo Chip's Articles of Incorporation were filed. The Legislature's decision to limit the State's ability to inquire goes back to this Court's discussion of Merchants' National Bank v. McKinney, 2 S.D. 106, 48 N.W. 841 (1891), in Lippold:

> Further, the facts and legal issues in McKinney are substantively similar to the Buffalo Chip City conundrum. The Legislature delegated the authority to order the incorporation of proposed municipalities to the Board. Petitioners sought to incorporate Buffalo Chip City. The Board found the petitioners satisfied the statutory requirements, and the Board ordered incorporation and set an election for voters to assent to or reject incorporation. The voters assented and Buffalo Chip City became an acting

> municipality. Because it was at least a de facto corporation, its status and actions were "good as to the public and third persons." McKinney, 2 S.D. at 115, 48 N.W. at 843. If the circuit court had stayed the election, Buffalo Chip City would not have become an acting municipality before the court decided the case. But Buffalo Chip City became and still is an acting municipality. The evidence established at trial reveals Buffalo Chip City is governed by an acting board of sworn trustees and is engaging in acts of a municipality, including taking out loans and obtaining licenses and sales-tax exemptions. It is at the very least a de facto corporation, and Appellees are barred from seeking relief under both McKinney and SDCL 9-3-20.

Lippold at ¶ 25, 906 N.W.2d at 924.

McKinney recognized that collateral attacks could not be made regarding the formation of a county. The Legislature has likewise specifically precluded the State's ability to annul the existence of a municipal corporation. While SDCL 9-3-20 gives the State the authority to inquire into the organization of the Buffalo Chip, the time to do so was before it accepted Buffalo Chip as a municipal corporation and filed its Articles of Incorporation. Indeed, the State would

have known from the census Buffalo Chip submitted in 2015 that it did not have one hundred (100) residents. The Meade County States Attorney would have known well before that time. A challenge could and should have been made at that time. Instead, the State filed Buffalo Chip's Articles of Incorporation and began treating it like a municipality. At this point, Buffalo Chip is a *de jure* municipal corporation, which has been engaging in acts of a municipality for nearly four years.

The only way to reconcile SDCL 9-3-20 with SDCL Chapter 21-28 is that the State is the only entity with authority to question the incorporation of a municipality, but once Buffalo Chip completed all the steps to become a municipal corporation, even the State is not entitled to use quo warranto to annul its existence. The State's authority is limited by South Dakota law, as prescribed by the Legislature. SDCL 21-28-12 simply does not allow the State to annul the existence of a municipal corporation.

B. The version of SDCL 9-3-1 in effect at the time Buffalo Chip was incorporated allowed for incorporation with at least 30 voters.

The Circuit Court's interpretation of SDCL 9-3-1 implicates a question of law, which is reviewed de novo. Martinmaas v. Engelmann, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (questions of law such as statutory interpretation are reviewed by the Court de novo). The Circuit Court concluded that the applicable version of SDCL 9-3-1 in 2015 meant something other than it said. SDCL 9-3-1 contained the disjunctive word "or" when Buffalo Chip was incorporated, such that municipal

incorporation was possible with either 100 residents or 30 voters. The Circuit Court's interpretation of the language - that "or" actually meant "and" - is incorrect.

The applicable version of SDCL 9-3-1 at the time of Buffalo Chip's incorporation stated: "No municipality shall be incorporated which contains less than one hundred legal residents **or** less than thirty voters." (Emphasis added.) Notably, the two criteria in the statute were separated by the disjunctive word "or." See State v. Lafferty, 2006 S.D. 50, ¶ 7, 716 N.W.2d 782, 785 (referring to the word "or" as a disjunctive word); 1A Sutherland Statutes and Statutory Construction § 21:14 (7th ed. 2009) ("The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately."). Thus, the existence of one of these two criteria satisfies the minimum population requirement. See Lake Hendricks Improvement Ass'n v. Brookings Cnty. Planning & Zoning Comm'n, 2016 S.D. 48, ¶ 22, 882 N.W.2d 307, 314 (legislature's use of the word "or" suggests an intent to create disjunctive list); State v. Krebs, 2006 S.D. 43, ¶ 12, 714 N.W.2d 91, 96 (holding that because the applicable statute in the case listed its factors in the disjunctive, "any one or more" of the factors sufficed to support the trial court's findings under the statute).

The version of SDCL 9-3-1 that existed in 2015 was clear on its face. "'This [C]ourt assumes that statutes mean what they say and that legislators have said what they meant.'" Farm Bureau Life Ins. Co. v. Dolly, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 199-200 (quoting In re Petition of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D. 1984). "'When the language in a statute is clear, certain[,] and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.'" Id. (quoting Rowley v. S.D. Bd. of Pardons & Paroles, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363-64 (further citations omitted)).

In 2016, the South Dakota Legislature amended SDCL 9-3-1, and it now reads as follows:

> A municipality may not be incorporated unless it contains at least one hundred legal residents and at least forty-five registered voters. For the purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition or is an active duty member of the armed forces whose home of record is within the proposed municipality.

This Legislative act begs the question - if the

Legislature intended for SDCL 9-3-1 to be read conjunctively, why did it need to amend it in this fashion? "It is. . .an established principle of statutory construction that, where the wording of an act is changed by amendment, it is evidential of an intent that the words shall have a different construction." Lewis & Clark Rural Water System., Inc. v. Seeba, 2006 S.D. 7, ¶ 17, 709 N.W.2d 824 (quoting South Dakota Subsequent Injury Fund v. Federated Mut. Ins., 2000 S.D. 11, ¶ 18, 605 N.W.2d 166, 170).

The amendments to SDCL 9-3-1 reflect the legislative intent to enlarge the number of incorporators and to require *both* 100 legal residents and 45 registered voters. These were significant amendments that changed the meaning of SDCL 9-3-1. As it read in 2015, SDCL 9-3-1 clearly required either 100 residents or 30 voters for municipal incorporation. The Circuit Court erred in concluding that both were required.

CONCLUSION

For these reasons, Buffalo Chip respectfully urges the Court to reverse the Circuit Court's decision.

Respectfully submitted this day 17th of April, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 17 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 3,730 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 17th day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the appellant, hereby certifies that on the 17th day of April, 2019, a true and correct copy of **APPELLANT'S BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLANT'S BRIEF** were mailed by

first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 17th day of April, 2019.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, acting through
the Attorney General

Petitioner/Appellee

-vs-

BUFFALO CHIP, SOUTH DAKOTA,

Respondent/Appellant

Appeal No. 28916

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE GORDON D. SWANSON
CIRCUIT COURT JUDGE

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NOTICE OF APPEAL FILED
March 4, 2019

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

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STATE OF SOUTH DAKOTA, acting through the Attorney General,	:	46CIV18-000198
Petitioner,	:	
v.	:	**NOTICE OF ENTRY OF JUDGMENT**
BUFFALO CHIP, SOUTH DAKOTA,	:	
Respondent.	:	

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PLEASE TAKE NOTICE that on the 22nd day of February, 2019, the Honorable Gordon Swanson made and entered Judgment of Dissolution in this case. The Judgment of Dissolution was filed February 22, 2019. A true and correct copy of the Judgment of Dissolution is attached and herewith served upon you and made a part of this notice.

Dated this 25th day of February, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2019, I electronically served a true and correct copy of the foregoing Notice of Entry of Judgment using the Odyssey File & Serve system which will automatically send email notification of such service to the following:

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STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

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STATE OF SOUTH DAKOTA, acting through the Attorney General,	:	46CIV18-000198
Petitioner,	:	
v.	:	**JUDGMENT OF DISSOLUTION**
BUFFALO CHIP, SOUTH DAKOTA,	:	
Respondent.	:	

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Both parties filed motions for summary judgment. The motions were fully briefed, and on February 12, 2019, the Court held a hearing at which the parties were represented by counsel of record. After considering the oral and written arguments of counsel and all of the other documents on file, including those submitted in connection with Buffalo Chip's motion to dismiss, which the Court denied by order dated August 3, 2018, the Court stated the basis for its decision on the record: (1) under SDCL §§ 9-3-20 and 21-28-2(3), the State has the authority to bring this action and to seek relief declaring that Buffalo Chip was not lawfully incorporated and ordering dissolution of its municipal incorporation; (2) Buffalo Chip rather than its trustees is the appropriate party because the State seeks dissolution of the municipal corporation as an entity; (3) based on common sense and the plain language of SDCL § 9-3-1 as in effect when Buffalo Chip was incorporated, the statute required that a municipality have at least 100 residents and at least 30 registered voters to be incorporated; (4) it would not make sense for the Legislature to authorize the incorporation of a municipality with no residents, which would be possible under Buffalo Chip's interpretation of SDCL § 9-3-1; and (5) because Buffalo Chip had less than 100

residents at the time of its incorporation, incorporation was contrary to SDCL § 9-3-1 and therefore invalid. Accordingly, it is hereby

ORDERED AND ADJUDGED that Buffalo Chip was not lawfully incorporated as a municipality in South Dakota; it is further

ORDERED AND ADJUDGED that Buffalo Chip is hereby precluded from exercising its corporate rights, privileges, and franchises, and is dissolved; and it is further

ORDERED AND ADJUDGED that a copy of this Judgment must be filed and recorded in the Office of the Secretary of State and in the office of the Register of Deeds in Meade County.

Dated this ____ day of February, 2019.

BY THE COURT:

Signed: 2/22/2019 3:26:00 PM

The Honorable Gordon Swanson
Circuit Court Judge

Attest:
Adams, Denise
Clerk/Deputy

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF MEADE)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Acting through the Attorney General,
Petitioner,
Vs.

BUFFALO CHIP, SOUTH DAKOTA,
Respondent.

46CIV18-198

ORDER DENYING MOTION TO DISMISS

Currently pending before the Court is a Motion to Dismiss filed by Respondent, Buffalo Chip City. A hearing was held on the motion on July 31, 2018, at which Petitioner appeared through counsel, James Moore, and Respondent appeared through counsel, John Dorsey.

The procedural history of the dispute in this matter is recounted largely in the Supreme Court's opinion in *Lippold v. Meade County Board of Commissioners*, 2018 SD 7. After *Lippold* was decided by the Court, Petitioner (hereafter "State") brought the present action, styled as a Petition for Writ of Quo Warranto. State seeks a declaration that Respondent was not a properly formed municipality; and asks that it be dissolved. In support of its Petition, the State cites SDCL 9-3-20, which (as acknowledged by the Supreme Court in *Lippold*) gives the State the authority to "inquire into the regularity of the organization of any acting municipality." State also relies on SDCL 21-28-2(3), which allows, *inter alia*, "any person who has a special interest in the action," to bring a quo warranto action ... "when any association or number of persons shall act within this state as a corporation, without being duly incorporated."

In support of its motion to dismiss, Respondent offers several grounds as alternative rationale.

First, Respondent contends that SDCL 21-28-12, the statute allowing quo warranto actions to vacate or annul corporations, prohibits this action. That statute expressly excepts municipal corporations from its reach. However, State does not rely in any way on that statute, but rather 21-28-2(3), as noted above. The State qualifies as a person with "a special interest in the action," given its status under SDCL 9-3-20 as the only entity that may inquire into the regularity of an acting municipality's organization. Respondent offers no good reason to graft the "other than municipal" language from 21-28-12 onto 21-28-2(3). The two statutes reach different situations; and following one does no disservice to the other.

Next, Respondent recognizes that SDCL 9-3-20 allows the State to inquire into the "regularity of the organization of any acting municipality," but claims that the authority to 'inquire into' has no real effect: arguing that even if the inquiry shows that the city was improperly formed nothing can be done about it after the county commission approves the incorporation. Certainly, the

legislature vested the county commission with the authority to pass on the propriety of the municipal incorporation process (SDCL Ch. 9-3), and enter an order declaring the municipality incorporated by the adopted name. SDCL 9-3-12 goes on to say that the commission's order is conclusive as to all suits by or against that municipality. However, it strains logic to suggest that SDCL 9-3-12 goes so far as to fully immunize the commission's decision to approve the municipality's formation from any review whatsoever. SDCL 7-8-27 generally allows appeals from all decisions made by county commissioners, and SDCL 9-3-20 specifically authorizes the State to inquire into the propriety of a municipality's formation, which is in effect a review of the county commission's action. Although divining legislative intent can be a nebulous undertaking, it travails reason to suggest that the legislature intended the State's ability to 'inquire into' the regularity of a city's formation to mean that nothing can be done if that formation was found to have been done in contravention of the law.

Respondent relies heavily on *Merchants' Nat. Bank v. McKinney*, 2 SD 106, 48 NW 841 (1891), for the proposition that even the existence of a government subdivision formulated through outright fraud (conceded) cannot be challenged. Respondent dismisses the key limitation in *McKinney*. Specifically, the Court there held that the *de facto* corporation (Douglas County) was valid as to third parties and the public. The present case does not involve a challenge by third parties or by the public: but the State of South Dakota itself, which beyond any doubt has the authority to establish and enforce procedures for the creation and operation of government subdivisions.

Respondent makes other arguments in support of its motion (i.e. the municipal dissolution process in SDCL Ch. 9-6, the Meade County State's Attorney's apparent inaction during the incorporation process, usurpation of legislative and the Secretary of State's powers, and disenfranchisement of voters) which, in short, do not warrant discussion.

Based on the foregoing, it is hereby

ORDERED that Respondent's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that the State's request for leave to proceed with the present quo warranto action is granted.

Dated this 3rd day of August, 2018.

BY THE COURT:

Gordon D. Swanson
Circuit Court Judge

Attest:
Keszler, Linda
Clerk/Deputy

FILED

AUG 03 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By_____

STATE OF SOUTH DAKOTA)SS COUNTY OF MEADE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, acting through the Attorney General, Petitioner, vs. BUFFALO CHIP, SOUTH DAKOTA, Respondent.	)	46 CIV18-000198 **STIPULATED STATEMENT OF UNDISPUTED MATERIAL FACTS**

Comes now the above-named parties, by and through their respective attorneys of record, and stipulate to this statement of undisputed material facts. The parties reserve the right to challenge the relevancy of any of the facts set out below. The following facts are true and correct:

1. Buffalo Chip, South Dakota filed Articles of Municipal Incorporation with the South Dakota Secretary of State on May 20, 2015, after an election was held on May 7, 2015, as authorized by the Meade County Board of County Commissioners, which was satisfied with the legality of the election and made an order declaring that the municipality had been incorporated by the name adopted.
2. According to the census submitted in support of the petition to incorporate Buffalo Chip, Buffalo Chip, South Dakota did not have at least one hundred legal residents at the time of incorporation.
3. Buffalo Chip, South Dakota did have more than thirty registered voters at the time of incorporation.

4. When Buffalo Chip, South Dakota was incorporated, SDCL § 9-3-1 provided: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters."
5. SDCL § 9-3-1 was amended by the South Dakota Legislature, SL 2016 Ch 48, Section 1. Effective July 1, 2016, SDCL § 9-3-1 henceforth now provides: "A municipality may not be incorporated unless it contains at least one hundred legal residents and at least forty-five registered voters. For purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition or is an active duty member of the armed forces whose home of record is within the proposed municipality."
6. The municipal incorporation of Brant Lake was approved by the Lake County Commission in 2016. According to the meeting minutes dated February 2, 2016, the resident population of the territory at the time was 63.
7. The purpose of the action in this matter is to annul the existence of the corporate existence of Buffalo Chip, South Dakota, and vacate its articles of incorporation.
8. The State of South Dakota is unaware of having been granted leave to bring an action in the nature of quo warranto under SDCL Chapter 21-28 against any municipality claiming an interpretation of SDCL § 9-3-1 as is alleged in this action since July 1, 1939.
9. The State has a valid interest in maintaining the integrity of the electoral process and in ensuring that all municipal corporations are properly incorporated in compliance with state law. While such interest exists, the existence of that interest does not, on its own,

confer standing or jurisdiction as it may relate to actions which have not been authorized or are prohibited by the legislature.

Dated: 23 January 2019

WOODS, FULLER
SHULTZ & SMITH, P.C.

By: _____
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Dated: 1-22-19

WHITING, HAGG HAGG
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By: _____
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S.D. Codified Laws § 9-3-1

Copy Citation

Current through acts received as of February 27th from the 2019 General Session of the 94th South Dakota Legislative Assembly

LexisNexis® South Dakota Codified Laws Annotated Title 9 Municipal Government (Chs. 9-1 — 9-55) Chapter 9-3 Incorporation of Municipalities (§§ 9-3-1 — 9-3-29)

9-3-1. Minimum population required.

A municipality may not be incorporated unless it contains as least one hundred legal residents and at least forty-five registered voters. For the purposes of this section, a person is a legal resident in the proposed municipality if the person actually lives in the proposed municipality for at least ninety days of the three hundred sixty-five days immediately preceding the filing of the petition or is an active duty member of the armed forces whose home of record is within the proposed municipality.

History

SDC 1939, § 45.0302; 2016, ch 48, § 1, eff. July 1, 2016.

▼ Annotations

Notes

Amendment Notes

The 2016 amendments to this section by ch. 48 rewrote the section, which formerly read: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters."

21-28-2. Persons entitled to bring action--Grounds for action. An action may be brought by any state's attorney in the name of the state, upon his own information or upon the complaint of a private party, or an action may be brought by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, against the party offending in the following cases:

(1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state;

(2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office;

(3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

Source: CCivP 1877, § 534; CL 1887, § 5348; RCCivP 1903, § 573; RC 1919, § 2784; SL 1919, ch 289, § 4; SDC 1939 & Supp 1960, § 37.0509.

21-28-12. Action to vacate corporate charter or articles--Persons entitled to bring action--Grounds. An action may be brought by any state's attorney in the name of the state or by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof, for the purpose of vacating the charter or articles of incorporation, or for annulling the existence of corporations other than municipal, whenever such corporation shall:

(1) Offend against any of the laws creating, altering, or renewing such corporation;

(2) Violate the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation by abuse of its power;

(3) Have forfeited its privileges of franchises by a failure to exercise its powers;

(4) Have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises;

(5) Exercise a franchise or privilege not conferred upon it by law.

Source: CCivP 1877, § 532; CL 1887, § 5346; RCCivP 1903, § 571; RC 1919, § 2782; SL 1919, ch 289, § 2; SDC 1939 & Supp 1960, § 37.0502.

9-3-20. Regularity of incorporation questioned only by state. The regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the state.

Source: PolC 1877, ch 24, § 53; CL 1887, § 1078; RPolC 1903, § 1467; RC 1919, § 6159; SDC 1939, § 45.0111.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28916

STATE OF SOUTH DAKOTA, acting through the Attorney General,

Petitioner/Appellee

v.

BUFFALO CHIP, SOUTH DAKOTA,

Respondent/Appellant

Appeal from the Circuit Court
Fourth Judicial Circuit
Meade County, South Dakota

THE HONORABLE GORDON D. SWANSON

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Notice of Appeal filed March 4, 2019

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Jurisdictional Statement

The town of Buffalo Chip, South Dakota, appeals from the circuit court's judgment dissolving its corporate existence. (SR 117.) The judgment of dissolution is dated February 22, 2019. Notice of entry is dated February 25, 2019. (SR 119.) Buffalo Chip filed a notice of appeal on March 4, 2019. (SR 123.)

Statement of the Issues

1. A statute provides: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." SDCL § 9-3-1. A rule of standard English provides that when a list of acts is prohibited in the disjunctive, none of the acts is allowed, as in "no food or drink allowed in the courtroom." Based on this plain meaning of the statute, could a municipality be legally incorporated with less than 100 legal residents?

   The circuit court held that a common-sense interpretation of this statute precludes a municipality from incorporating with less than 100 residents, in part because, if the statute were read to allow a municipality to incorporate as long as it had at least 30 voters, then a municipality could incorporate with no residents.

   Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)

   Schane v. International Brotherhood of Teamsters, 760 F.3d 585 (7th Cir. 2014)

   Klein v. Sanford USD Med. Ctr., 2015 S.D. 95, 872 N.W.2d 802

2. This Court held in *Lippold* that under SDCL § 9-3-20, only the State may challenge the incorporation of a de facto municipality, and that such a challenge is usually made through a quo warranto or other direct proceeding. SDCL § 21-28-12 exempts municipal incorporations from its allowance of an action to vacate an entity's articles of incorporation, while SDCL § 21-28-2(3) allows the State to challenge any number of persons acting as a corporation without being duly incorporated. Construing these statutes together, and in the context of *Lippold* and the common-law writ of quo warranto, was the State's challenge proper?

   The circuit court held that the State's action was proper based on SDCL § 21-28-2(3) and § 9-3-20, which would be meaningless if another statute preluded the State's petition.

   Lippold v. Meade County Bd. of Comm'rs, 2018 S.D. 7, 906 N.W.2d 917

   Merchants Nat'l Bank v. McKinney, 2 S.D. 106, 48 N.W. 841 (S.D. 1891)

SDCL §§ 9-3-20, 21-28-12, 21-28-2(3)

Statement of the Case

This case is the sequel to a dispute between neighboring city and county residents, the Meade County Board of Commissioners, the City of Sturgis, and Buffalo Chip Campground, LLC. These parties litigated the validity of the municipal incorporation of the town of Buffalo Chip. On appeal from a judgment voiding the county commission's order approving the incorporation and setting an election, this Court reversed, holding that the circuit court lacked jurisdiction because only the State of South Dakota, which was not a party, could challenge the incorporation of Buffalo Chip. *Lippold v. Meade County Bd. of Comm'rs*, 2018 S.D. 7, ¶ 31, 906 N.W.2d 917, 926. This Court's decision is dated January 24, 2018.

On March 14, 2018, the State of South Dakota filed a petition with this Court seeking leave to commence an action in the nature of quo warranto. (Appellee's App 001.) The State asked the Court to exercise its original jurisdiction over the proceeding. Buffalo Chip opposed the petition. On May 10, 2018, this Court denied the petition with leave to file in circuit court. (*Id*. 008.)

On May 29, 2018, the State filed in circuit court a petition for, or in the nature of, a writ of quo warranto. (SR 2.) The petition asked the court to hold that under SDCL § 9-3-1, a municipality may not be incorporated with less than 100 residents, and that Buffalo Chip, which had less than 100 residents at the time of its incorporation, was therefore not properly incorporated. The State asked the circuit court to dissolve the corporation.

Buffalo Chip moved to dismiss the petition because SDCL § 21-28-12 precluded the State from challenging a municipal incorporation. (SR 8.) The circuit court held a

hearing on July 31, 2018, and denied the motion to dismiss by order dated August 3, 2018. (SR 40.) Buffalo Chip answered the petition. (SR 42.) The parties stipulated to the material facts, and then filed cross motions for summary judgment without having conducted any formal discovery. (SR 50, 62, 66.) The court held a hearing on the motions for summary judgment on February 12, 2019. The court granted the State's motion, denied Buffalo Chip's motion, and entered a judgment that Buffalo Chip was not lawfully incorporated under SDCL § 9-3-1, and was therefore dissolved. (SR 117.) The judgment was automatically stayed pending appeal under SDCL § 15-26A-38.

Statement of the Facts

Buffalo Chip filed articles of municipal incorporation with the South Dakota Secretary of State on May 20, 2015, after an election was authorized by the Meade County Board of County Commissioners under SDCL § 9-3-6. The election was held on May 7, 2015. A majority of those voting approved the municipal incorporation. (SR 62, ¶ 1.) After the election, an appeal from the Meade County Commissioners' order authorizing the election was filed, litigated, and decided on appeal as *Lippold*. The State's quo warranto petition followed.

According to the census submitted in support of the petition to incorporate as required by SDCL § 9-3-3, Buffalo Chip had less than 100 legal residents at the time of incorporation, but more than 30 voters. (SR 62, ¶¶ 2-3.) As in effect at the time of the election, SDCL § 9-3-1 read: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." The statute was amended in 2016 to read: "A municipality may not be incorporated unless it contains at least one hundred legal residents and at least forty-five registered voters." SDCL § 9-3-1.

Argument

This Court reviews an order denying a motion to dismiss under a de novo standard. *Upell v. Dewey Cty. Comm'n*, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72. Questions of statutory interpretation are also reviewed de novo. *Id.*

1. The State's quo warranto petition was proper.

Buffalo Chip argues that the State's quo warranto petition should have been dismissed because SDCL § 21-28-12, which allows the State to sue to vacate a corporate charter or articles of incorporation, exempts municipal corporations. The circuit court denied Buffalo Chip's motion based on SDCL § 21-28-2(3), which allows the State to proceed when any association of persons acts without being duly incorporated. The circuit court also relied on this Court's decision in *Lippold* that, under SDCL § 9-3-20, only the State may inquire into the regularity of the organization of any acting municipality. *Lippold*, ¶ 24, 906 N.W.2d at 924. The circuit court's refusal to dismiss was correct.

a. The State properly proceeded under *Lippold,* SDCL §§ 9-3-20 and 21-28-2(3), and the common law

As the circuit court noted, the State's petition relies on SDCL §§ 21-28-2(3) and 9-3-20, not § 21-28-12. An action may be brought under SDCL § 21-28-2(3) in the name of the State "[w]hen any association or number of persons shall act within this state as a corporation, without being duly incorporated." The code cross-references SDCL § 9-3-20, which this Court held in *Lippold* precluded the City of Sturgis and the neighboring city and county residents from challenging the incorporation of Buffalo Chip. *Lippold*, ¶ 24, 906 N.W.2d at 924. While this Court did not discuss the mechanics of an action to challenge the regularity of a municipal corporation, the decision left no doubt that the

State has the authority to challenge a municipal corporation. The Court wrote that its "conclusion is supported by common-law precepts regarding de facto corporations, by our precedent, and by precedent from other jurisdictions." *Id.* ¶ 21, 906 N.W.2d at 922. Quoting 1 Eugene McQuillin, *The Law of Municipal Corporations* § 3:107 (3d ed.), the Court found the law "well established that 'an inquiry into the legal existence of a municipality is in general reserved to the state in a proceeding by quo warranto or other direct proceeding.'" *Id.* Buffalo Chip's argument that the State has no remedy contradicts the language of SDCL § 9-3-20 and the holding in *Lippold* .

There are three legal avenues that support the State's challenge. First, SDCL § 9-3-20 may itself be the vehicle for the State's challenge. Like constitutional provisions that are self-executing, the statute authorizes an action that does not require some other mechanism for its implementation. *See, e.g, State v. Bradford,* 12 S.D. 207, 80 N.W. 143, 144 (1899) ("A constitutional provision may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced . . . .") (quoting Cooley, Const. Lim. at p. 100 (5th ed)). In terms of the merits of the State's challenge to any municipal incorporation, SDCL § 9-3-20 provides no more and no less guidance than any provision in SDCL Ch. 21-28. Ultimately, the merits of the action depend on whether the municipality complies with other provisions of South Dakota law, in this case SDCL § 9-3-1. As this Court recognized in *Lippold*, an action by the State was recognized at common law as a quo warranto proceeding. *Lippold*, ¶ 21, 906 N.W.2d at 922. If the State's challenge requires a statutory basis, however, SDCL § 9-3-20 is as solid a foundation as the provisions of SDCL Ch. 21-28.

Second, the State's petition was proper under SDCL § 21-28-2(3), which provides that an action may be brought in the name of the State "[w]hen any association or number of persons shall act within this state as a corporation, without being duly incorporated."[1] The Alaska Supreme Court has referred to a similar statute as "the modern equivalent of quo warranto," suggesting that the statute was correctly applied here. *Port Valdez v. City of Valdez*, 522 P.2d 1147, 1153 n. 18 (Alaska 1974). Buffalo Chip argues that this statute does not apply because it "merely identifies *who* is entitled to bring a quo warranto action." (Buffalo Chip Br. at 8.) That is, while the statute authorizes the State to file an action, the only permissible action is the one authorized by SDCL § 21-28-12, which exempts municipal corporations. (*Id.*) This argument, which is not supported by any authority, could just as well be applied to § 9-3-20. In either case, it would deprive the language of those statutes of any meaning. In the case of § 21-28-2(3), if the statute merely addressed *who* may bring an action, it would be surplusage--SDCL § 21-28-12 also addresses who may bring an action to annul the existence of a corporation. This Court avoids interpretations that render part of a statute surplusage. *Hollman v. South Dakota Dep't of Social Services*, 2015 S.D. 21, ¶ 9, 862 N.W.2d 856, 859. *See also* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts at 176* (2012) ("If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent

[1] The Wisconsin Supreme Court held that a similar statute containing the same operative language applied to municipal incorporations as well as private corporations. *City of Waukesha v. Salbashian*, 382 N.W.2d 52, 56-57 (Wis. 1986).

operation, the latter should be preferred."). Thus, SDCL § 21-28-2(3) authorizes an action to challenge a municipal incorporation.

Buffalo Chip also argues that the SDCL § 21-28-2(3) does not apply because Buffalo Chip completed all of the steps to incorporate, but the statute applies only when a group of persons holds itself out as a corporation "even though it never completed the steps to incorporate." (Buffalo Chip Br. at 8-9.) This argument, which again is not based on any legal authority, wrongly assumes that "Buffalo Chip was formed in accordance with all applicable laws." (*Id.* at 10.) To the contrary, the substantive issue in this appeal is whether Buffalo Chip's corporate existence is invalid because it lacked at least 100 legal residents under SDCL § 9-3-1. Moreover, "duly incorporated" means "properly incorporated." *DULY, BLACK'S LAW DICTIONARY* at 611 (10th ed) (defining *duly* as "in a proper manner; in accordance with legal requirements"). No authority establishes that the statutory language limits a challenge to following the procedure prescribed by law as opposed to otherwise being in compliance with the law. Incorporation is more than ministerial compliance with certain steps under SDCL Ch. 9-3. While Buffalo Chip complied with the process culminating in an election authorized by the Meade County Commission, "[t]he statutory requirements for a sufficient petition [to incorporate] were conditions precedent to the right to hold such an election." *Klaudt v. City of Menno,* 28 N.W.2d 876, 877 (S.D. 1947). A failure to meet any of the requirements on which the election was based renders an election void and subject to challenge at any time after the election. *Id.* Here, the flaw in the process, and the reason that the incorporation is unlawful, is the lack of at least 100 legal residents as required by SDCL § 9-3-1.

Third, the State's petition was pleaded in the nature of quo warranto, which is a common-law remedy. Although SDCL Ch. 21-28 provides a statutory basis for quo warranto petitions, the chapter does not displace the common law. The first statute in the chapter provides: "The remedies formerly attained by a writ of scire facias, writ of quo warranto, and proceedings by information in the nature of quo warranto, may be obtained by civil actions under the provisions of this chapter." SDCL § 21-28-1. The statute does not say that the chapter abolishes the common-law writs. To the contrary, the circuit court's authority to issue common-law writs is expressly reserved by statute. "The circuit court has the power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and all other writs necessary to carry into effect its judgment, decrees, and orders, and to give to it a general control over inferior courts, officers, boards, tribunals, corporations, and persons." SDCL § 16-6-15.

This Court considered a similar question long ago, in *Wright v. Lee*, a lawsuit involving the right of a foreign corporation to do business in South Dakota. 4 S.D. 237, 55 N.W. 931 (1893). On rehearing, the Court considered an argument that it had erred in its first opinion in the case by relying on sections 5345 and 5346 of the Compiled Laws as a basis for the State to challenge the incorporation of a foreign corporation. *Id.* at 933-34. Section 5345 was the initial enactment of what is today SDCL § 21-28-1. The Court described the statutes as "providing that the remedies heretofore reached by writ of quo warranto, and proceedings by information in the nature of quo warranto, might be obtained by civil action, as provided in said sections." *Id.* at 934. The foreign corporation challenged the Supreme Court's reliance on the statutes, based on the argument that they were repealed by implication when the South Dakota Constitution was

adopted. *Id.* In rejecting the argument, this Court distinguished a California case in which "the legislature had expressly abolished the writ of quo warranto," providing instead that "the remedies obtainable under the abolished writ and proceedings might thereafter be obtained by civil actions, in the manner thereinafter provided." *Id.* By contrast, the legislature of Dakota Territory "made no attempt to abolish either," and if it had, the attempt would have failed "for the powers and jurisdiction of the territorial courts were established by the organic act, and included the power and right to issue all common-law writs." *Id.* Thus, "[t]he civil action provided by those sections [5345, 5346] was therefore not exclusive, but cumulative." *Id.*

Nothing in South Dakota law since has changed this analysis of the survival of common-law writs. "'As a general precept, common law is in force, except where it conflicts with the will of the sovereign power as expressed through the constitution, statutory enactments, and ordinances.'" *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 15, 753 N.W.2d 895, 903 (quoting *State v. Shadbolt*, 1999 S.D. 15, ¶ 13, 590 N.W.2d 231, 233)). When the legislature revises "'the whole subject of a former [statute] and [the revised statute is] clearly designed as a substitute,'" the former the statute is repealed, even if no words of repeal are used. *Id.* (quoting *Boston Ice Co. v. Boston and M.R.R.*, 86 A. 356, 360 (N.H. 1913)). "'The rule is the same when the common law is revised by statute.'" *Id.*

This understanding that a common law remedy survives makes particularly good sense in the case of the State's power to challenge incorporation, municipal or otherwise. A municipal corporation is a creature of statute; it has no inherent powers and none of the attributes of sovereignty. *Donovan v. City of Deadwood*, 538 N.W.2d 790, 792 (S.D.

1995). What the state creates, the state may take away. *State ex rel. Shields v. Farmers Union Coop. Brokerage*, 70 S.D. 14, 13 N.W.2d 809, 811 (1994).

Whether all of these legal underpinnings for the State's petition apply or only one, this Court's decision in *Lippold* and the language of SDCL § 9-3-20 would be meaningless if the State were, as a matter of law, unable to challenge the incorporation of Buffalo Chip.

b. The State timely filed its petition, which was not a collateral attack.

Buffalo Chip argues that the only way to reconcile SDCL § 9-3-20 with Chapter 21-28 is to conclude that while the State may challenge the incorporation of a municipality, it may not do so after "Buffalo Chip completed all the steps to become a municipal corporation." (Buffalo Chip Br. at 14.) Because SDCL § 9-3-20 is located in the chapter addressing the procedure for municipal incorporation, Buffalo Chip argues, a challenge must occur before its articles of incorporation were filed. (*Id.* at 12.) Buffalo Chip does not argue laches, estoppel, or waiver, and cites no authority for this proposition other than *Merchants National Bank v. McKinney*, 2 S.D. 106, 48 N.W. 841 (1891). (*Id.* at 12-13.)

Nothing in the Court's opinion in *McKinney* supports this argument. In *Lippold*, this Court explained that the decision in *McKinney* "acknowledged the distinction between de facto and de jure organizations and the general inability *of the public* to challenge the existence of a de facto organization." 2018 S.D. 7, ¶ 22, 906 N.W.2d at 923 (emphasis added). While Douglas County as a de facto organization could not be collaterally attacked, the State's challenge under SDCL § 9-3-20 is a direct attack authorized by the legislature, not a collateral attack by a member of the public. Buffalo Chip's status as a de facto municipality means that "its status and actions were 'good as

to the public and third persons.'" *Id.* ¶ 25, 906 N.W.2d at 924 (quoting *McKinney*, 2 S.D. at 115, 48 N.W. at 843). *McKinney* cannot reasonably be read to preclude the State's direct challenge because it was not made sooner.

The State was not a party to the proceedings in *Lippold*, in which the challengers prevailed in circuit court. As soon as the case was concluded and this Court's holding was clear that only the State could challenge the municipal incorporation of Buffalo Chip, the State asked this Court to exercise its original jurisdiction over its application to proceed. The State acted within three months of this Court's decision on appeal. Again, Buffalo Chip has not argued laches, wavier, or estoppel. Its failure to cite any authority other than *McKinney* constitutes a waiver on appeal of any other argument based on the timeliness of the State's filings. *See, e.g., Behrens v. Wedmore*, 2005 S.D. 79, ¶ 55, 698 N.W. 2d 555, 577.

2. SDCL § 9-3-1 prohibits municipal incorporation with less than 100 residents.

The pivotal statute in this appeal provides: "No municipality shall be incorporated which contains less than one hundred legal residents or less than thirty voters." SDCL § 9-3-1. The statute is a prohibition (it begins with a negative) and it contains a conjunction (*or*), which is disjunctive. A rule of standard English is that when a list of acts is prohibited in the disjunctive, none of the acts is allowed. Thus, the plain meaning of the statute is that if a proposed municipality lacks either 100 legal residents or at least 30 voters, it may not be incorporated. Because Buffalo Chip had less than 100 legal residents at the time of incorporation, its incorporation was contrary to statute and therefore invalid.

a. The statute requires interpretation, but is not ambiguous.

In construing the statutory language, the Court must give its words and phrases "their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Wheeler v. Cinna Bakers*, 2015 S.D. 25, ¶ 6, 864 N.W.2d 17, 20. Interpretation must be based on "what the legislature said, rather than what the courts think it should have said." *MGA Ins. Co. v. Goodsell*, 2005 S.D. 118, ¶ 9, 707 N.W.2d 483, 485. Interpretation is not only the process of resolving ambiguous language, but also applying a text to particular circumstances. *Reading Law* at 53.[2] Here, the parties offer different understandings of a one-sentence statute; in particular, the dispute is about the meaning of a single word, *or*. This divergence of understanding is not surprising given that "*[e]very* use of 'and' or 'or' as a conjunction involves *some* risk of ambiguity." Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" and "Or,"* 2 Tex. Tech L. Rev. 235, 253 (1971). With respect to *or*, the issue is generally whether it is used in its inclusive sense (A or B, or both), or its exclusive sense (A or B, but not both). Bryan A. Garner, *A Dictionary of Modern Legal Usage* 624 (2d ed.).

b. When a list of acts is prohibited in the disjunctive, none is allowed.

Citing authority from this Court, Buffalo Chip argues that *or* is always disjunctive, regardless of context; words must be given their plain meaning; and any contrary understanding changes the plain meaning of *or* to *and.* (Buffalo Chip Br. at 14-

[2] This Court has repeatedly cited and relied on this book. *See Argus Leader Media v. Hogstad*, 2017 S.D. 57, ¶¶ 7-10, 902 N.W.2d 778, 781-83; *Rowley v. South Dakota Bd. of Pardons and Paroles*, 2013 S.D. 6, ¶ 26, 826 N.W.2d 360, 368 n. 5 (Severson, J., dissenting); *In re Estate of Colombe*, 2016 S.D. 62, ¶ 29, 885 N.W.2d 350, 358.

15.) Thus, Buffalo Chip understands the statute to mean that as long as one of the statutory conditions (at least 100 legal residents or at least 30 registered voters) is satisfied, a City may be incorporated. This analysis, however, is not correct. As another court facing the same issue said, "the point is merely that determining the meaning of *or* in a sentence is not just a matter of declaring that the word is disjunctive. Context matters." *Schane v. International Bhd. of Teamsters*, 760 F.3d 585, 590 (7th Cir. 2014). Buffalo Chip's argument is not sufficient to determine whether the use of *or* in SDCL § 9-3-1 is inclusive or exclusive because it does not address the particular grammatical context of the statute, which is a prohibition.

The circuit court's construction of the statute, by contrast, accounts for the grammar of the statute. As explained in the canon addressing conjunctions and disjunctions in *Reading Law*, "*And* joins a conjunctive list, *or* a disjunctive list—but with negatives, plurals, and various specific wordings there are nuances." *Reading Law* at 116. The nuance in interpreting SDCL § 9-3-1 requires the reader to recognize that the statute is a prohibition—it prohibits municipal incorporation under the enumerated circumstances. There are two forms of a prohibition involving a list of conditions. The conjunctive prohibition is "you must not do A, B, and C." The disjunctive prohibition is "you must not do A, B, or C." *Id.* at 119. "With the conjunctive list, the listed things are individually permitted but cumulatively prohibited. With the disjunctive list, none of the listed things is allowed." *Id.* Thus:

> After a negative, the conjunctive *and* is still conjunctive: *Don't drink and drive*. You can do either one, but you can't do them both. But with *Don't drink or drive*, you cannot do either one: Each possibility is negated. This singular-negation effect, forbidding doing *anything* listed, occurs when the disjunctive *or* is used after a word such as *not* or *without*. (The disjunctive prohibition includes the conjunctive prohibition: Since you may not do any of the prohibited things, you

> necessarily must not do them all.) The principle that "not A, B, *or* C" means "not A, not B, *and* not C" is part of what is called *DeMorgan's theorem*.

Id. An example, one suggested by the South Dakota Municipal League in an amicus brief before this Court in *Lippold*, is "No food or drink in the courtroom." This could not reasonably be read to mean that either food or drink is allowed, but both are prohibited. It means neither is allowed.

Buffalo Chip unwittingly provided an example supporting the circuit court's decision in briefing below. In opposing the State's motion for summary judgment, it cited SDCL § 22-19A-1, which is the criminal statute defining stalking. (SR 88-89.) It begins with "no person may" and then lists three subsections of prohibited acts, joined by *or*. As explained above, the use of a negative with *or* means not A, not B, and not C. A person may not do any of the listed acts. Thus, satisfying any one of the subsections constitutes stalking. Similarly, no municipality may have less than 100 legal residents or less than 30 voters. Neither is allowed. If the Court were to construe SDCL § 22-19A-1 as Buffalo Chip reads SDCL § 9-3-1, a person could do the things listed in any one of the subsections, as long as it did not do them all, without violating the statute. That is not a correct reading of the statute.

The Seventh Circuit provided another example in *Schane*. In construing the language of a pension-plan provision, the court considered two examples. The first is straightforward: *parent means someone who has a son or daughter*. 760 F.3d at 589. "No one would contend that a man who has a daughter is not a 'parent' because he does not also have a son." *Id.* The second example, however, contains a negative: "*'non-parent' means someone who does not have a son or daughter*." *Id.* If a man with a daughter but not a son claims that he is a *non-parent* because *or* is disjunctive, the

problem becomes clear. Someone with either a son or daughter is obviously a parent. Buffalo Chip's singular reliance on *or* being disjunctive, however, would require an interpretation that a man with a daughter is a non-parent because he does not also have a son. "The flaw in the man's argument is easy to spot. To be a non-parent, a person must not have a son or daughter—which is to say, he must not have a son *and* he must not have a daughter." *Id.* The contention that *or* does not mean *and* does not a yield a correct interpretation.

All of these examples were argued before the circuit court, but Buffalo Chip ignores them on appeal.

The prohibition in SDCL § 9-3-1 is *don't incorporate a municipality with less than 100 legal residents or less than 30 legal voters*. Because the list is disjunctive, neither condition in the list is allowed. Each possibility is negated. Not A, and not B. It is that simple.

c. Buffalo Chip's interpretation would allow municipalities with no residents.

Aside from the grammar involved, construing SDCL § 9-3-1 as Buffalo Chip suggests could lead to absurd results. As the circuit court concluded, it would be possible to incorporate a municipality with zero residents or zero voters. Not only would such a result contradict the heading of the statute, "minimum population of municipalities," but a zero-voter municipality would be unable to seat a functioning government because residence is required of all elected municipal officers. *See* SDCL § 9-8-1 (requiring mayor and aldermen to be voters and residents of the municipality); § 9-9-2 (requiring commissioners to be residents and voters of the municipality). This Court should not adopt an interpretation that produces an absurd result. *See, e.g., Klein v. Sanford USD*

Med. Ctr., 2015 S.D. 95, ¶ 14, 872 N.W.2d 802, 806. This was the basis for the circuit court's decision, but Buffalo Chip ignores it on appeal.

d. The later amendment is irrelevant.

Finally, the South Dakota Legislature amended SDCL § 9-3-1 in 2016. After July 1, 2016, the statute reads: "A municipality may not be incorporated unless it contains at least one hundred legal residents and at least forty-five registered voters." Aside from changing the number of registered voters, the amendment did not change the meaning of the statute. Regardless, the amendment, which amounts to legislative interpretation of the statute, is not binding on the Court. *Hot Springs Ind. School Dist. v. Fall River Landowners Assoc.*, 262 N.W.2d 33, 38 (S.D. 1978). If the Court considers the amendment, it must decide whether the purpose of the amendment was to clarify or alter the law. *Id.* at 39. The change in the required number of registered voters altered the law, but the change in language addressing both conditions clarified which criteria must be satisfied.

Nothing in the text of the amending legislation indicates that the purpose of House Bill 1199, which eventually became law in 2016, was intended to alter the meaning of SDCL § 9-3-1 other than the change in the number of registered voters. The Meade County Commission approved the incorporation of Buffalo Chip on May 13, 2015, but the litigation following the incorporation was not decided by the circuit court until August 24, 2016, well after the legislation. *Lippold*, ¶¶ 9, 14, 906 N.W.2d at 920, 921. This is not a case in which a legislative change was intended to reverse the outcome of a case. *See, e.g., Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, ¶ 17 n.9, 821 N.W.2d 224, 230 n. 9 (discussing amendment after lawyers involving in pending litigation appeared before the Legislature and Legislature was aware of cases interpreting the

statute). The only fair inference that can be drawn about the amendment of SDCL § 9-3-1 is based on the grammatical construction of the statute before and after its amendment. Thus, the fact of amendment adds nothing to the analysis and is therefore irrelevant.

Conclusion

SDCL § 9-3-20 would be meaningless, and this Court's decision in *Lippold* misguided at best, if SDCL § 21-28-12 precluded the State's petition challenging the incorporation of Buffalo Chip.

Buffalo Chip's arguments about SDCL § 9-3-1 fail to account for a grammatical understanding of the statutory language, persuasive examples that Buffalo Chip's understanding is wrong, and common-sense concern that the Legislature would not have sanctioned the creation of municipalities with no residents.

The State respectfully requests that the circuit court's judgment of dissolution be affirmed.

Dated this ___ day of May, 2019.

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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 2010, Times New Roman (12 point) and contains 4,843 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ___ day of May, 2019.

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Appendix

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, acting through
the Attorney General

Petitioner/Appellee

-vs-

BUFFALO CHIP, SOUTH DAKOTA,

Respondent/Appellant

Appeal No. 28916

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

THE HONORABLE GORDON D. SWANSON
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. Quo Warranto is not authorized to annul the existence of a municipal corporation.

The State's argument regarding three different avenues for challenging the municipal incorporation of the Buffalo Chip would be quite compelling, if not for the existence of SDCL 21-28-12. The State makes absolutely no attempt to read SDCL 21-28-12 together with SDCL 21-28-2(3) and SDCL 9-3-20. Instead, it asks the Court to ignore SDCL 21-28-12 and apply SDCL 21-28-2(3), SDCL 9-3-20, and nebulous common law principles as though SDCL 21-28-12 does not exist.

To ignore SDCL 21-28-12 is to ignore a basic tenet of statutory construction. "To determine legislative intent, this Court will take other statutes on the same subject matter into consideration and read the statutes together, or *in pari materia*." Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756 (citing Loesch v. City of Huron, 2006 S.D. 93, ¶ 8, 723 N.W.2d 694, 697).

> The object of the rule of *pari materia* is to ascertain and carry into effect the intent of the legislature. It proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. For purposes of determining legislative intent, we must assume that the legislature in enacting a provision has in mind previously enacted statutes relating to the same subject matter. As a result, the provision should be read, if possible, in accord with the legislative policy embodied in those prior statutes.

Id. at ¶ 16, 801 N.W.2d at 757 (quoting Loesch, 2006 S.D. at ¶ 8, 723 N.W.2d at 697).

SDCL 9-3-20, SDCL 21-28-2, and SDCL 21-28-12 were all enacted in 1939. The proper interpretation of these enactments must give meaning to all three, not just the statutes that suit the State's argument. When the language of these three statutes is carefully analyzed, it becomes clear that quo warranto cannot be used under the circumstances presented here and Buffalo Chip's argument does not conflict with SDCL 9-3-20 and Lippold v. Meade Cnty. Bd. of comm'rs, 2018 S.D. 7, 906 N.W.2d 917.

Beginning with SDCL 9-3-20, the State argues that it "may itself be the vehicle for the State's challenge." SDCL 9-3-20 says nothing about authorizing a cause of action. Rather, the effect of SDCL 9-3-20 is to limit who has standing to bring a challenge. See Lippold, 2018 S.D. at ¶ 26, 906 N.W.2d at 924 ("Because the appeal from the County's decision inquired into the regularity of the organization of Buffalo Chip City, SDCL 9-3-20 deprived Appellees of standing and thus the circuit court of subject- matter jurisdiction."). SDCL 9-3-20 only permits the State to inquire into the regularity of the organization of an acting municipality, and precludes other persons or entities from bringing the challenge.

The State's discussion of SDCL 21-28-2(3) also

demonstrates a complete disregard for SDCL 21-28-12. The State directs the Court to Port Valdez v. City of Valdez, 522 P.2d 1147 (Alaska), and City of Waukesha v. Salbashian, 382 N.W.2d 52 (Wis. 1986), to support the idea that SDCL 21-28-2(3) applies to municipal corporations. However, the State fails to mention that the statutory schemes in Alaska and Wisconsin do not contain a provision that bears any semblance to SDCL 21-28-12. In other words, unlike South Dakota, those states do not appear to have legislatively prohibited the use of quo warranto to annul the existence of a municipal corporation.

The overarching problem with the State's argument is that it fails to reconcile and give effect to language in SDCL 9-3-20 and SDCL 21-28-2(3) that makes those sections inapplicable in the context of this case. SDCL 9-3-20 describes an inquiry into the regularity of the organization of an "*acting* municipality," not merely a "municipality." (Emphasis added.) The Legislature saw fit to use the term "acting municipality" rather than just "municipality." "[I]t is presumed that the legislature does not intend to insert surplusage in its enactments. And, where possible, the law must be construed to give effect to all of its provisions." US W. Commc'ns v. Pub. Utils. Comm'n, 505 N.W.2d 115, 123 (S.D. 1993).

Similarly, SDCL 21-28-2(3) applies to "[w]hen any association or number of persons shall *act* within this state

as a corporation, *without being duly incorporated*." (Emphasis added.) SDCL 21-28-12, on the other hand, relates to an action "vacating the charter or articles of incorporation, or for annulling the existence of corporations *other than municipal . . .*" (Emphasis added.) A fair reading of SDCL 9-3-20, SDCL 21-28-2(3), and SDCL 21-28-12 is that the legislature has purposely drawn a distinction in the law between *"acting"* municipalities and municipal corporations that have actually incorporated.

Of course, this begs the question - are there "acting municipalities" that are not municipal corporations? By examining the records of the South Dakota Secretary of State, the Court will quickly realize that there are a number of "acting" municipalities across the State that have never incorporated.[1] In other words, not every "acting municipality" is a municipal corporation. Many acting municipalities are nothing more than de facto corporate entities that look like a municipal corporation but have never taken the step of filing articles of incorporation with the Secretary of State's office to actually create a corporate entity. See SDCL 6-10-1 ("No political subdivision of the state of South Dakota may legally

[1] By both statute and case law, the Court may take judicial notice of public or official records, including articles of incorporation. See SDCL 19-19-201; Nelson v. Web Water Dev. Ass'n, 507 N.W.2d 691, 693 (S.D. 1993) (quoting Nauman v. Nauman, 336 N.W.2d 662, 664-65 (S.D. 1983)).

be incorporated or dissolved until notice of such incorporation or dissolution has been filed in the office of the secretary of state.")

For instance, the undersigned live and practice in Brown County. There are 14 towns in Brown County: Aberdeen, Groton, Frederick, Westport, Warner, Columbia, Stratford, Houghton, Mansfield, Bath, Ferney, Hecla, Verdon, and Claremont. Every single one of those towns acts like a town, appears on published maps, and has a sign on the highway as you enter the town. They are all clearly acting municipalities. Of those 14, only 6 are incorporated. The Court will search the Secretary of State's records in vain for any municipal corporation called Claremont, Verdon, Ferney, Bath, Mansfield, Houghton, Columbia, or Frederick.[2]

The interpretation urged by Buffalo Chip does not deprive SDCL 9-3-20 or SDCL 21-28-2(3) of their meaning, as argued by the State. (Appellee's Brief, pg. 6.) Rather, this interpretation limits the scope of SDCL 9-3-20 and SDCL 21-28-2(3) to *acting* municipalities that have not incorporated. A lot of these communities exist in this State, so SDCL 9-3-20 and 21-28-2(3) very clearly have a role in the State's

[2] Buffalo Chip acknowledges that communities existed prior to 1939, and SDCL 9-3-21 validated prior applications and ratified their existence. Nonetheless, while these municipalities may be unassailable due to their grand-fathered status, their status is still a de facto municipality that remains unincorporated.

governance.

But they do not apply here, because Buffalo Chip has incorporated. SDCL 21-28-12 plainly prohibits the action brought by the State. The State cannot obtain relief that the South Dakota Legislature has not allowed. Nor could the Circuit Court create a right to such relief. See Stover v. Critchfield, 510 N.W.2d 681, 686 (S.D. 1994) (the duty of a court is to apply the law objectively as found, and not to revise it).

The State also argues that Buffalo Chip did not argue laches, waiver, or estoppel. (Appellee's Brief, pg. 11.) It is true that Buffalo Chip's argument is based primarily on the application of SDCL 21-28-12 to bar the State's action. However, the State's argument is misguided for a couple reasons. First, Buffalo Chip pled these equitable defenses in its Answer. (CR 45.) Second, the State's argument is hyper-technical. Buffalo Chip's substantive argument in the Appellant's Brief was that the State's acceptance of Buffalo Chip's Census and Articles of Incorporation - without raising any issues whatsoever - resulted in the loss of its ability to challenge Buffalo Chip's organization. This act could certainly be viewed as a waiver. "[W]aiver exists 'where one in possession of any right, whether confirmed by law or contract, and with full knowledge of the material facts, does or forbears something inconsistent with the existence of the right or of

his intention to rely on it.'" Phipps v. First Fed. Sav. & Loan Ass'n, 438 N.W.2d 814, 817 (S.D. 1989) (quoting Western Cas. & Sur. Co. v. American Nat'l Fire Ins. Co., 318 N.W.2d 126, 128 (S.D. 1982) (quoting Wieczorek v. Farmers' Mut. Hail Ins. Ass'n, 61 S.D. 211, 216-17, 247 N.W. 895, 897 (1937)). The State knew from the Census Buffalo Chip submitted in 2015 that it did not have one hundred (100) residents. It filed the Articles of Incorporation in spite of this, allowing Buffalo Chip to become a *de jure* corporation.

Finally, the State's common law argument should also be rejected, as demonstrated by its own cited authority. In Hohm v. City of Rapid City, this Court noted that the rules of the common law remain in force, except where they conflict with the will of the sovereign power. 2008 S.D. 65, ¶ 14, 753 N.W.2d 895, 903. The Court also stated:

> One of the methods of expressing the "will of the sovereign power" in SDCL 1-1-23 (originally RevCodeTerrDak, Civil Code § 3 (1877)) to override the common law is "[b]y statutes enacted by the Legislature[.]" **Thus, in case of a conflict, the statute controls.**

Id. (emphasis added).

"In South Dakota the common-law writ of quo warranto has been statutorily recognized." State v. Jensen, 2003 S.D. 55, ¶ 10, 662 N.W.2d 643, 646. SDCL Chapter 21-28 developed a complete scheme for the pursuit of the remedy of quo warranto. It also set limitations on the availability of that relief.

To the extent a litigant could pursue a common law remedy of quo warranto in order to annul the existence of a municipal corporation, that right has been expressly abrogated by statute. SDCL 21-28-12 is a clear expression of the South Dakota Legislature's intent to limit the State's ability to vacate the charter or annul the existence of a municipal corporation. The State cannot use the common law to end-run what the South Dakota Legislature has done.

B. Buffalo Chip was properly incorporated with at least 30 voters.

Buffalo Chip believes the argument in the preceding section is dispositive. The State's challenge is not authorized. However, even if the Court hears the State's challenge, the Circuit Court and the State's interpretation of the former SDCL 9–3-1 is erroneous for two reasons: (1) it fails to account for the sentence structure of SDCL 9-3-1; and (2) it fails to account for the 2016 legislative changes to SDCL 9-3-1, which support Buffalo Chip's interpretation of the former version of the statute.

1. The State's grammatical argument fails to account for the sentence structure of SDCL 9-3-1.

The State relies on the phrase "No food or drink in the courtroom," and similarly-worded sentences to illustrate

where the word "or" takes on a conjunctive role. But, as the State argues, context matters. Sentence structure also matters.

For instance, suppose a non-profit entity hosted a benefit concert and required concert goers to bring non-perishable food items for admission. In an advertisement, they state: "No person may be admitted to the concert if they fail to bring two cans of food or a quart of fruit juice." Anyone reading this sentence would surely understand that they either need to bring two cans of food or a quart of fruit juice if they want to be admitted to the concert. SDCL 9-3-1 operates the same way.

The distinction is the location of the negative term "no" relative to the disjunctive phrase in the sentence. Where the "no" is located in the State's example differs from its placement in SDCL 9-3-1. In the State's example, the "no" is located immediately prior to the phrase "food or drink." It is the combination and the close

proximity within the sentence of the negation and the disjunctive phrase that changes the meaning of "or."

"This equivalence arises when a speaker combines a negation (like 'not have') with a disjunctive word (like 'or')." Schane v. Int'l Bhd. of Teamsters Union Local No. 710 Pension

Fund Pension Plan, 760 F.3d 585, 589 (7th Cir. 2014). The example from Schane - "non-parent" means someone who *does not* have a son *or* daughter - also fits this mold, where the negation immediately precedes and relates to the disjunctive phrase. It is the way the negation combines with the disjunctive phrase that matters.

In SDCL 9-3-1, the "no" precedes and relates to the term "municipality," *not* the terms legal residents or voters. The phrase which the Court has to interpret reads: "which contains less than one hundred legal residents **or** less than thirty voters." There is no negation in this phrase. Likewise, in Buffalo Chip's above example, the "no" relates to and combines with "person," not the canned food or fruit juice.

The principle of logic relied upon by the State, known as De Morgan's theorem, really has no application to SDCL 9-3-1. "Under DeMorgan's Theorem the denial of the alternation [not A or B] is equivalent to the conjunction of the denials [not A and not B]." United States v. One 1973 Rolls Royce by & Through Goodman, 43 F.3d 794, 815 n.19 (3rd Cir. 1994). That is not what is happening in SDCL 9-3-1, because the "no" does not pertain to the legal residents or voters.

The State's examples fail to account for the sentence structure in the pre-2016 version of SDCL 9-3-1. The

reasonable, common sense construction of that statute is that the term "or" is "used as a function word to indicate an alternative."[3] Either 100 residents or 30 registered voters was SDCL 9-3-1's clear requirement at the time Buffalo Chip was incorporated.

2. The legislative changes to SDCL 9-3-1 are relevant to the Court's construction of the statute.

The State's suggestion that the amendments to SDCL 9-3-1 are irrelevant inaccurately portrays the state of the law. "The general rule as stated in 73 Am.Jur.2d Statutes § 178 indicates that the courts regard it as proper to take into consideration in determining the meaning of a statute, subsequent action of the legislature, or the interpretation which the legislature subsequently places upon the statute." Hot Springs Independent School Dist. No. 10 v. Fall River Landowners Assoc., 262 N.W.2d 33, 38 (S.D. 1978). "There are no principles of construction which prevent the utilization by the courts of subsequent enactments or amendments as an aid in arriving at the correct meaning of a statute." Id. "[W]here the wording of an act is changed by amendment, it is evidence of an intent that the words shall have a different construction." Id. at 39 (citing In re Dwyer, 49 S.D. 350, 354, 207 N.W. 210 (1926)).

[3] https://www.merriam-webster.com/dictionary/or

The State's argument that the changes to SDCL 9-3-1 were mere clarifications is impossible to reconcile with the legislative history and the ultimate changes to the statute. The purpose of the 2016 amendment is encapsulated in its title: "An Act to revise the criteria for incorporation of a new municipality." 2016 S.D. HB 1119, 2016 S.D. Laws 48. The testimony at the legislative hearings made clear that the legislation was brought because of the incorporation of Buffalo Chip, and it was expressly stated that the intent was to "raise the bar" for municipal incorporation.[4] Not only was the number of voters changed from 30 to 45, the language of SDCL 9-3-1 was also changed from "no municipality" to "a municipality may not. . ."

Most importantly, the statute changed the requirement from needing only 100 legal residents *or* 30 voters, to requiring both 100 legal residents *and* 45 voters. SDCL 9-3-1 was substantively altered, not simply clarified. The South Dakota Legislature's actions evinced an intent to change the construction of SDCL 9-3-1 and require more than was required when Buffalo Chip incorporated.

3. The municipalities with no residents argument is a red herring, considering reality and the other requirements of SDCL Chapter 9-3.

[4] Audio recordings of the testimony are available at: http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1119&Session=2016

The State claims that Buffalo Chip's interpretation of SDCL 9-3-1 could lead to absurd results. (Appellee's Brief, pg. 15.) This argument ignores the other provisions of Chapter 9-3 that must be met for a municipality to incorporate, and assumes a far-fetched set of facts that borders on impossibility.

For instance, as part of an application to organize a municipality, a census must be taken. SDCL 9-3-3. The idea that a census could include zero residents is a hypothetical that stretches the imagination. Also, twenty-five percent of the voters of the proposed municipality must sign the petition. SDCL 9-3-5. While voters do not have to be residents, as they can be landowners, it would be virtually impossible for a town to be formed with thirty or more landowning, non-resident voters in the small area to be incorporated.

What SDCL 9-3-1 more likely contemplates is the formation of a small town. South Dakota has many small municipalities that could have easily formed with more than thirty voters and less than one-hundred residents. Two such municipalities have formed within the last four years. (CR 63.) Incorporating a small town is not an absurd result.

CONCLUSION

For all of these reasons, Buffalo Chip respectfully urges the Court to reverse the judgment of the Circuit Court.

Respectfully submitted this day 17th of June, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 14 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 2,949 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 17th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the appellant, hereby certifies that on the 17th day of June, 2019, a true and correct copy of **APPELLANT'S REPLY BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLANT'S REPLY BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 17th day of June, 2019.

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