SUPREME COURT STATE OF SOUTH DAKOTA FILED

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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SHAW FAMILY TRUST ESTABLISHED)	
MAY 22, 1991 AS RESTATED ON JULY)	
18, 2019 by and through its acting trustee)	
JILL D. SHAW)	
)	
Plaintiff and Appellee,)	
)	APPELLANTS' BRIEF
γ.)	
)	
RICHARD LOSH and CAROL KAY)	
BIEWICK LOSH)	
	}	-
Defendants and Appellant	ts.	••

Appeal from the Circuit Court, Seventh Judicial Circuit. Custer County, South Dakota.

The Honorable Heidi L. Linngren presiding.

Attorney for Plaintiffs/Appellees: Richard M. Williams P.O. Box 8045 Rapid City, South Dakota 57709

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The Notice of Appeal was filed on December 11, 2024

TABLE OF CONTENTS

rage numbers	
Table of cases	
Table of statutes and other authorities	
Statement of Jurisdiction4	
Statement of the Legal Issues	
Statement of the Case	
Statement of the Facts	
Argument	
Conclusion	
Appendix	
Section A:	
Statement of Material Facts	
Section B	
Judgment	
Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction	
Order on Motion for Declaratory Judgment Regarding the Easement Located on the Plat of Case Subdivision #4 Recorded as 12 Plat 626 over Lot 4 and for the Benefit of Tract Reinke	
Section C – already submitted – both Pleadings in the Record and copies of Hearing Transcript already submitted to Appellees and the Court	
Section D	
South Dakota Constitution Article 5 Sections 1, 4 and 5 South Dakota Statutes Custer County Ordinance No. 2	

TABLE OF CASES

Page Numbers

Ehlebracht v. Deuel CountyPlanning Comm'n, 2022 SD 18, 972 N.W. 2d 4645	
bineoraem v. Death Country lanning Comm n, 2022 3D 16, 912 (4. W. 20 404	
Korstad-Tehben, Inc. v. Pope Architects, Inc., 459 N.W. 2d 565, (S.D. 1990)	8
Lamar Adver. Of S.D., L.L.C. v. City of Rapid City, 2020 SD 30, (44 N.W. 2d 793?	
Porous Media Corp. v. Pall Corp., 186 F. 3d 1077 (8th Cir. 1999)	. 8
Read v. McKennan Hosp., 2000 S.D. 66, 610 N.W. 2d 782	20
Western Nat 7 Mat. Ins. Co. v. GatewayBldg. Sys.Inc., 2016 S.D. 85, 887 N.W. 24 887.	7
TABLE OF STATUTES AND OTHER AUTHORITIES	
Page Numbers	
Page Numbers	
Page Numbers South Dakota Constitution: Article 5, Section 1	

SDCI. Section 1-26-18	18
SDCL Section 1-26-18.3	
SDCL Section 1-26-30	
SDCL Section 1-26-30.2	19
SDCL Section 7-18A-2	
SDCL Section 7-18A-34	7
SDCL Section 11-2-1	
SDCL Section 11-2-1.1	
SDCL Section 11-2-2	
SDCL Section 11-2-13	-
SDCL Section 11-2-25	19
SDCL Section 11-2-28.1	20
SDCL Section 15-5-1	
SDCI. Section 15-6-12(c)	
SDCL Section 15-6-56	
SDCL Section 15-26A-3	
SDCI. Section 15-26A-7	5
SDCL Section 15-26A-12	
SDCL Section 16-6-9	, t
SDCL Section 21-24-1	t
SDCL Section 21-24-10	27
SDCL Section 21-24-13	
Ordinances:	
Custer County Ordinance Number 2	5. 16-1

STATEMENT OF JURISDICTION

Appellants Richard and Carol Losh ("Loshs") respectfully bring this appeal of the Judgment by the honorable judge Heidi Linngren from the Seventh Judicial Circuit in Custer County dated November 15, 2024 before the Supreme Court of South Dakota under the provisions of SDCL Section 15-26A-3 (Appeal from a circuit court judgment); SDCL Section 15-26A-7 (Orders and determinations of trial court subject to review on appeal from judgment), and SDCL Section 21-24-13 (Review of declaratory orders and judgments). Notice of Appeal was filed on December 11, 2024.

The Judgment was issued after the Court had entered its Order on Motion for Declaratory Judgment on November 7, 2024 granting judgment on the pleadings in favor of the Plaintiff, the Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019, and after having entered its Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction, both of which were incorporated by reference into its Judgment. Please see the Record ("R") pp. 168-179, 194-195.

As the Order on Motion for Declaratory Judgment and the Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction were incorporated by reference into the Judgment. SDCL Sections 15-26A-7 and 21-24-13 provide jurisdiction for this Court to review the support for these Orders as well.

STATEMENT OF THE LEGAL ISSUES

Appellants respectfully submit several issues for consideration by the Supreme Court as follows:

(1) Whether the trial court erred in issuing an Order and Judgment allowing for a violation of Custer County Ordinance No. 2 regarding a private access easement.

The Court did not address this issue although it was raised in *Defendants' Brief in Opposition to Motion for Judgment on the Pleadings*, R. pp.129-130, and in *Defendants'*

Response to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Order on

Motions for Judgment on the Pleadings and for Permanent Injunction. R. pp 157-161.

The most relevant statutes are SDCL Sections 11-2-1.1, 11-2-2 and 11-2-13. The most relevant cases are Schafer v. Deuel County Bd. of Comm'rs, 2006 S.D. 106, 725 N.W. 2d 241 and Ehlebracht v. Deuel County Planning Commission 2022 SD 18, 972 N.W. 2d 464.

(2) Whether the trial court erred in not dismissing the Complaint for lack of jurisdiction, improper venue, and failure to state a ripe or justiciable claim or controversy.

The trial Court concluded it had original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts according to the South Dakota Constitution Article V, Section 5. The Court also found civil jurisdiction over the parties and subject matter pursuant to SDCL Section 16-6-9. The Court found jurisdiction over the parties and subject matter pursuant to SDCL Chapter 21-24 for declaratory relief and specifically SDCL Section 21-24-1 providing that "Courts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. R. pp. 174, 205

The trial Court stated venue was appropriate pursuant to SDCL Section 15-5-1 (venue for determination of an interest in real property). R. pp. 174, 205.

The trial Court also concluded a ripe and justiciable controversy existed between Plaintiffs and Defendants. R. p. 176, 207

The most relevant constitutional and statutory provisions are The South Dakota Constitution, Article V, Sections I, 4 and 5; SDCL Section 1-26-1(2) (Definition of "Contested case"); SDCL Section 1-26-30 (Right to judicial review of contested cases Preliminary agency actions); SDCL Section 7-18A-2 (Authority to enact, amend and repeal ordinances and resolutions—penalties for violation); SDCL Section 7-18A-34 (Appeal to circuit court from magistrate court); SDCL Section 11-2-2 (Appointment of county planning commission); SDCL Section 11-2-1.1 (Aggrieved persons-Requirements); SDCL Section 11-2-13 (Adoption of zoning ordinance)

The most relevant cases are Schafer v. Deuel County Bd. of Comm'rs. 2006 SD 106, 725 N.W. 2d 241 and Lamar Adver. of S.D. v. City of Rapid City 2020 SD 30, 944 N.W. 2d 793.

(3) Whether the trial court erred in failing to consider a material question of fact before issuing a judgment on the pleadings.

The Findings of Fact and Conclusions of Law by the trial Court do not specifically declare there are no remaining issues of fact; however the Court does cite several cases as to what facts the court may consider. *Korstad-Tehhen, Inc. v. Pope Architects, Inc.*, 459 N.W. 2d 565, 567 (S.D. 1990); and *Porous Media Corp. v. Pall Corp.*, 186 F. 3d 1077, 1079 (8th Cir. 1999). Along with several other cases at R. pp. 175, 206. However, in issuing its Order granting the Declaratory Judgment the Court made it clear that it did not consider there were any remaining issues of fact.

Appellants contend that questions of fact remain as outlined in *Defendants' Brief* in Opposition to Motion for Judgment on the Pleadings at R. pp 128-130 and in

Defendants' Response to Plaintiff's Proposed Findings of Fact, Conclusions of Law und Order on Motions for Judgment on the Pleadings and for Permanent Infunction at R. pp. 157-161.

The most relevant cases include the cases cited above by Plaintiffs/Appellees.

Also relevant is Western Nat'l Mut. Ins. Co. v. GatewayBldg. Sys., Inc., 2016 SD 85, 887

N.W. 2d 887. The most relevant statutes include SDCL Section 15-6-12(c) (Motion for judgment on the pleadings) and SDCL Section 15-6-56 (Summary judgment).

STATEMENT OF THE CASE

This case began with the filing of a Summons and Complaint seeking a declaratory judgment and injunctive relief in the Circuit Court of the Seventh Judicial Circuit in Custer County on March 7, 2023. R pp. 1-24. The case was brought to a hearing on September 18, 2024 before the honorable Judge Heidi Linngren following a Motion for Judgment on the Pleadings and Motion for Permanent Injunction and Notice of Hearing filed by Plaintiffs/Appellees Shaw Family Trust ("Shaws"). R. pp 31-33, 85-86.

This case involves a private access easement across property owned by the Shaws and referred to as Lot 4 of the Case Subdivision #4. R. pp 10-12. The Loshs' property is referred to as Tract Reinke, R. p 13, and is not shown in the plat subdivision survey as the survey plat was drawn for the purpose of a land auction in October, 2015. However, Tract Reinke borders Lot 4 on the South and the Loshs' private access easement runs. North from the Reinke Tract along the eastern border of Lot 4, property of the Shaws and then turns East to connect with Eggers Lane. Eggers Lane is a driveway that is classified.

as a public road and from the junction with the easement it runs North to connect with Medicine Mountain Road which is a County road. The Loshs have owned the private access easement since 2015.

The Shaws purchased their property in 2020. After initially trying to have the Loshs' private access easement vacated by the Custer County Commissioners in 2021, at R. pp. 72-73, the Shaws hired an attorney to try to persuade the Loshs to agree to various terms and conditions for the use and maintenance of the easement. After failing to reach an agreement with the Loshs for terms for the easement, the Shaws filed their Complaint with the Custer Court as stated above.

In February, 2024 the Shaws filed a *Motion for Judgment on the Pleadings* and a *Motion for Permanent Injunction seeking* an order imposing a list of 15 terms for the use and maintenance of the Loshs' private access easement. R. pp.43-44. The list included a provision allowing the Shaws' use of the easement driveway for their own personal access to a home they were intending to build at some point in the future. R., p.5. The list also included a requirement for general maintenance to occur at least two times per year by licensed, insured and bonded contractors. R. p.43, paragraph 6.

The Loshs eventually hired an attorney and attempted to negotiate a settlement for several months but their attorney rather abruptly moved out of state in July of 2024 and had to withdraw from the case. R. pp. 26-27, 50-52. Thereupon the Shaws filed their second *Notice of Hearing*, R. pp 53-54. In August, 2024 the Loshs filed their *Answer and Motion to Dismiss with Exhibits 1-4*, R. pp. 55-74, although it had been delivered to the Shaws' attorney more than a year earlier in April, 2023 within the 30 day period after receipt of the *Complaint* as was demanded in the *Summons*.

On August 16, 2024, in response to some questions from the Loshs about the nature of the hearing, the Custer County Clerk of Court sent an email stating that all parties were required to appear in person at the hearing and that the hearing would be substantive in nature. R. p.87. However, Ronald Shaw had died in October of 2023 in a car accident and Jill Shaw, as the remaining trustee for the Shaw Family Trust, was excused from having to attend the hearing.

At the hearing on September 18, 2024 the judge offered an explanation for why Jill Shaw was not present for the hearing and thus unavailable for any type of direct questioning or cross examination, explaining that she had

"...presided over the sentencing or disposition of the traffic citation. And Ms. Shaw was present, and I did get quite a history of them, and obviously it was a very tragic accident that happened, and it is very apparent that it is difficult. And throughout those proceedings, essentially, she and her children informed the Court and the court staff that, quite frankly, they hope they never have to come back to South Dakota." Hearing transcript ("Tr."), p. 5.

Toward the end of the hearing the judge seemed to indicate what her thinking would be in preparing her Order as she stated

"So to that end I think that would put this to rest, and then the Shaw Trust can - you know, some of this is the protection to the Shaws as well in seiling the property, if that's what they choose to do." Tr. P.59.

At the conclusion of the hearing the judge indicated she would be entering an Order imposing a list of terms and conditions for the use and maintenance of the Loshs' private access casement driveway that the Shaws would then file with the Custer County Registry of Deeds. The Judge directed that the Shaws' attorney compile a list of the terms that had been discussed at the hearing and then submit it for consideration. The Judge stated that she would allow for a short period of time after the list of terms were

submitted for the parties to add additional comments or objections before she would issue her Order. Tr. pp 44-45, 56-59.

On October 10, 2024 the Loshs filed a Brief in Opposition to the Motion for Judgment on the Pleadings. R. pp.124-136 and the same day the Shaws filed Proposed Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction, with attached Exhibits. R. pp.137-154. Then on October 18, 2024 the Loshs filed Defendants' Response to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Order on Motions for Judgment on the Pleadings and for Permanent Injunction. R. pp.155-163.

On November 7, 2024 the Court entered an Order on Motion for Declaratory

Judgment Regarding the Easement located on the Plat of Case Subdivision#4 Recorded

as 12 Plat 626 over Lot 4 and for the Benefit of Tract Reinke. R. p. 168-171. Also on

November 7, 2024 the Court filed its Findings of Fact and Conclusions of Law and

Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction.

R. p. 172-193.

Based on its Findings of Fact and Conclusions of Law the Court (i) denied the Motion to Dismiss filed by the Loshs as part of their Answer, (ii) denied the Shaws' Motion for Permanent Injunction, and (iii) granted the Shaws' Motion for Declaratory Judgment. The Court also directed the Shaw Family Trust to submit an Order consistent with and incorporating by reference the Court's Findings of Fact and Conclusions of Law to be filed with the Custer Register of Deeds and indexed against the affected properties. Finally, on November 15, 2024 the Court filed its *Judgment* granting the Shaw Family Trust's Motion for Declaratory Judgment. R., pp. 194-195.

On December 11, 2024 the Loshs filed a Notice of Appeal with a Certificate of Service and Appeal Bond along with a Docketing Statement with attached copies of the trial court Orders, Findings of Fact and Conclusions of Law, and the Judgment.

STATEMENT OF THE FACTS

On May 2, 2017 Carol Kay Biewick Losh ("Carol Losh") became the sole owner of the property described as the Reinke Tract in Custer County, R., p.13. The property was purchased in 1972 by Carol Losh's parents. Rex and Mary Biewick, R. p.63. After their death ownership was transferred to Carol and her sister, Lori Biewick as tenants in common, R. p. 56, and after Lori's death the title was placed in Carol's name.

In 2015 Carol Losh obtained a private access easement along the eastern border of Lot 4 of the Case Subdivision #4 allowing for a safe and convenient access route between her property and Eggers Lane. As noted previously, Eggers Lane is actually a neighbor's driveway connecting the northeastern end of the Loshs' access easement with Medicine Mountain Road which is a County road, R. p.12.

On September 18, 2020 Lot 4 was purchased by Ronald and Jill Shaw as trustees of the Shaw Family Trust. R. pp.10-11. The Warranty Deed stated that the property was subject to a list of five provisions including paragraphs B and D as follows:

- B. Highway and public utility rights-of-way and easements as described, platted, or established by prescription
- D. Any zoning, building, or land use regulations, of whatever nature or kind, of any governmental body, law or statute, or violations thereof, that may be applicable to or affecting the real premises herein being sold.

In November of 2021 the Loshs received a Notice of Hearing before the Custer County Board of Commissioners for the stated purpose of the Shaws trying to vacate the Losh's private access casement. Please see Losh's Answer and the attached Exhibit 3.

R. pp.58, 72-73. While Richard Losh attended the hearing and defended the need for the easement, the Shaws did not attend the hearing but instead stated their case in a letter to the Custer Planning Department that was kept confidential and not revealed to the Loshs at that time. The Loshs eventually obtained the letter from the Shaws' attorney and submitted it as Exhibit 5, at R. p.107, in their response brief prior to the circuit court hearing.

After the commissioners voted not to grant the Shaws' request the Loshs sent a letter to the Shaws explaining their rationale and plans for the easement and offering to meet and discuss all respective concerns amicably. R. pp 18-19, 58-59, 114-115. While the Shaws didn't respond personally, an attorney from California acting on behalf of the Shaws contacted the Loshs twice by telephone in January, 2022 with numerous questions about their easement before signing off with an email to the Loshs stating that the Shaws did not believe the depiction of the easement was proper. R. p74. Also, the email stated the Shaws had retained a law firm in Rapid City to advise them in the matter and that the Loshs would be contacted by Marty Jackley or someone on his behalf.

After receiving that email the Loshs went ahead and hired a local company to construct a driveway within the easement area connecting their property with Eggers Lane. The driveway was well graded, constructed and compacted and it included a culvert at the low spot and gutters, or trenches, on both sides of the driveway for proper drainage.

In August, 2022 the Loshs received a letter from an attorney with the Rapid City law firm which they perceived as oddly somewhat threatening. R. p. 20-21. The letter stated that the Shaws did not believe the driveway was adequately constructed and that the Shaws wanted to address safety issues and construction standards. The Shaws also wanted an agreement with terms covering insurance, liability, a maintenance schedule, improvements, allocation of future costs and responsibility for gates and safety of animals. The letter also declared that the Shaws would be using the driveway to access their intended new home despite their stated concerns about safety issues.

The Loshs wrote back in a defensive manner and tone without being fully aware of the laws regarding easements. R. pp. 23-24. The Loshs did not trust the Shaws and suspected there might be some sort of scam or foul power play afoot. The Loshs had concerns that their new neighbors (i) lived out of state, (ii) had already tried to vacate their easement without contacting them, (iii) had refused to speak with them by telephone or respond to their letter, (iv) had already employed two lawyers trying to extinguish or otherwise modify their easement, one of whom had mischaracterized their easement as "secondary" access, (v) had stated concerns about safety and construction of the driveway, (vi) wanted insurance information and a liability agreement, and then (vii) stated that the Shaws would be using the driveway for their own purposes and access to their intended home.

Between August, 2022 and February, 2023 there were no communications between the Loshs and the Shaws or their attorneys. However, in February, 2023 the Loshs noticed that the Shaws had installed a short approach driveway directly from Medicine Mountain Road North of the property onto their property, lot 4, and connecting

with the Loshs' easement driveway near the point where the driveway turned from East-West to North-South. The Loshs noted that the Shaws' new approach to the easement driveway had filled the drainage gutter with compacted dirt without installing a culvert. As such, it presented an obstruction to drainage along the northern gutter of the East-West portion of the driveway.

On February 28, 2023 the Loshs wrote a letter to the Shaws asking them to install a culvert at the point where the Shaws' new approach driveway had connected with the easement driveway so that drainage along the gutter would not be obstructed. R. pp 67-71. In their letter the Loshs acknowledged the Shaws apparent right to use the driveway. However, the response received was a Summons and Complaint. R., pp 1-23.

The Complaint did not mention the Loshs' February letter acknowledging the Shaws' right to use the driveway; however, it did claim "A ripe and justiciable controversy exists between Plaintiffs and Defendants." R., p.8.

The Loshs' Answer and Motion to Dismiss cited incorrect assertions in paragraphs 1 and 20 of the Complaint, R. pp 2, 4 and the failure to mention the Loshs' recognition of South Dakota case law in paragraph 27, R. p.5. More importantly the Loshs included a Motion to Dismiss the Complaint as it did not accurately describe a real controversy or claim worthy of the Court's time and attention.

As described above in the statement of the case, the Loshs hired an attorney who attempted to negotiate a settlement, but after a couple of weeks negotiations stalled and the Loshs attorney eventually moved out of state and withdrew as their representative. Shortly thereafter the Shaws renewed their request for hearing and the hearing was held on September 18, 2024. Two days later the Loshs visited the Custer Planning

Department and obtained a copy of two relevant portions of Custer County Ordinance

No. 2 and submitted the relevant portions the text of the ordinance in *Defendants' Brief in Opposition to Motion for Judgment on the Pleadings*. R., p. 128. Both sections of the

Ordinance restricted the use of private access easements to one (1) residence and one (1)

parcel of property as further described in the argument below.

ARGUMENT

(1) The trial court erred in issuing an Order and judgment allowing for a violation of Custer County Ordinance No. 2 regarding a private access easement.

Section 1 of Article I of the Custer County Ordinance No. 2 authorizes the subsequent Sections 2, 3, 4 and 5 as follows:

Whereas Title 11-2-2 of South Dakota Codified Laws (SDCL) has delegated the responsibility to the Board of County Commissioners of each county to adopt and enforce regulations designed for the purpose of promoting health, safety and the general welfare of the county, the Board of Commissioners of Custer County. South Dakota hereby ordain the following

Section 2 of Article I concerns jurisdiction and provides that

This Ordinance shall govern all unincorporated lands within the jurisdiction of the Board of County Commissioners for Custer County, South Dakota.

Article II of the Ordinance defines private access roads as

Roads that lie within Private Access Easements and provide access into isolated tracts of land where a public right of way is deemed not to be necessary by the Board.

Article III of Custer County Ordinance No. 2 describes the procedure for subdivision of land. Section 1 lists general requirements and paragraph 5 on page 10 of the Ordinance provides for private access roads as follows:

Private Access Roads are allowed and shall be indicated on Plats. easement documents, or access maps within Private Access Easements. Private Access Roads are intended to serve only one (1) residence. The Board may allow a Private Access Road to be shared by two (2) adjoining residences where topography or access restrictions onto Federal. State, or County highways make such sharing necessary. Development of Private Access Roads is not required.

Sections 2, 3 and 4 in Article IV of the Ordinance provide similar guidance regarding private access roads for low density, medium density and high density subdivisions. The second paragraph in each Section states as follows:

Private Access Easements are allowed and may be indicated on the plat. Private Access Roads may serve only one (1) parcel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.

Paragraph 10 in the Order on Motion for Declaratory Judgment Regarding the Easement located on the Plat of Case Subdivision #4 Recorded as 12 Plat 626 over Lot 4 and for the Benefit of Tract Reinke ("Final Order") states in part that

The owners of Lot 4 have the right to use and maintain the Easement Area and Roadway in any manner which will not interfere with Tract Reinke's use of the Easement or Roadway as described in this Order. R. p. 170.

In allowing the Shaws, as owners of Lot 4, to use and maintain the Loshs' private access driveway in any manner, basically as an access route to their own intended future

home, paragraph 10 of the Final Order conflicts directly with the provisions of Custer County Ordinance No.2 that limit the use of private access roads to only one (1) parcel and one (1) residence.

Additionally, in issuing the Order allowing the Shaws' use of the Loshs' private access easement the Court has ignored the provision in paragraph D in the Warranty Deed stating the property is subject to

Any zoning, building, or land use regulations, of whatever nature or kind, of any governmental body, law or statute, or violations thereof that may be applicable to or affecting the real premises herein being sold. R. pp. 10-11.

Clearly the meaning and intent of paragraph D in the Warranty Deed is that the Shaws' Lot 4 property is subject to the provisions in Article IV of the Custer County Ordinance No. 2. The Ordinance itself is authorized by South Dakota Codified Laws and thus should be controlling in this case. Since the trial court's *Order* and *Judgment* contradict the provisions of the County Ordinance duly authorized under South Dakota statutes, the *Order* and *Judgment* should be vacated.

(2) The trial court erred in not dismissing the Complaint for lack of jurisdiction, improper venue, and failure to state a ripe or justiciable claim or controversy.

South Dakota Codified Law Section 7-18A-2 provides counties with the authority to enact, amend or repeal ordinances and to enforce violations with penalties as follows:

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to earry into effect the powers granted to it by law and provide for the enforcement for each violation of any ordinance by means of any or all of the following: (1) A fine of to exceed the fine established by

subdivision 22-6-2(2) for each violation, or by imprisonment foor a period not to exceed thirty days for each violation, or by both the fine and imprisonment; or (2). An action for civil injunctive relief, pursuant to chapter 21-8.

SDCL Section 11-2-1 defines subdivision ordinance as

Any ordinance adopted by the board to regulate the subdivision of land so as to provide coordination of streets with other subdivisions and the major street plan, adequate areas set aside for public uses, water and sanitation facilities, drainage and flood control, and conformity with the comprehensive plan.

and SDCL Section 11-2-25 authorizes that

The board shall provide for the enforcement of the provisions of this chapter and of ordinances, resolutions, and regulations made thereunder, and may impose enforcement duties on any officer, department, agency, or employee of the county.

SDCL Chapter 1-26 provides for Administrative Procedure and Rules. SDCI. Sections 1-26-14 and 1-26-15 provide for declaratory judgments on rules and declaratory rulings by agencies. SDCL Section 1-26-16 requires reasonable notice and a hearing in contested cases while SDCL Section 1-26-18 describes the rights of parties at hearings on contested cases and provides for summary disposition of certain cases. SDCL Section 1-26-18.3 provides for using the Office of Hearing Examiners in certain contested cases and SDCL Section 1-26-19 provides rules of evidence in contested cases. Finally SDCI. Sections 1-26-30 and 1-26-30.2 provides for appeals of agency decisions to the circuit courts in contested cases.

SDCL 1-26-1 defines a "contested case" as a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing. The Section also defines "Agency" to mean each association, authority, board, commission, council, department, division, office, officer,

task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty.

Accordingly, in order to bring any action to establish legal rights and duties of the parties in a dispute between the landowner and the easement holder concerning a private access easement in Custer County the aggrieved party is required to follow the provisions of administrative procedure and rules laid out in Chapter 1-26 of the South Dakota Codified Laws.

In the alternative, the Shaws might have approached the County Commissioners with a request for a conditional use permit or a special permitted use under the provisions of SDCL Sections 11-2-17.3 through 11-2-17.7. Or the Shaws might have petitioned for a change in zoning under the authority of SDCL 11-2-28.1.

However, in the instant case the Shaws chose to bypass the Custer County Board of Commissioners altogether and file their complaint directly in the Circuit Court seeking a remedy which might have been available to them more appropriately under the provisions of SDCL 1-26 and SDCL 7-18A-2 as noted above.

In Lamar Adver. of S.D., L.L.C. v. City of Rapid City, at 2020 S.D. 30, p.44, 944

N.W. 2d 793 the Court, quoting Read v. McKennan Hosp. 2000 S.D.2000 S.D. 66, p.12,
610 N.W. 2d 782, 785, stated the following:

The doctrine of exhaustion of administrative remedies is one of the fundamental principles of administrative law and jurisprudence. Exhaustion is necessary because it allows the administrative agency to exercise its discretion, apply its expertise, and make a factual record upon which to base subsequent judicial review. 2020 S.D. 30, at 44;

In the instant case the Shaws should be held to the standards for aggrieved persons listed in SDCL Chapter 11-2. SDCL Section 11-2-1.1 in the Chapter for county planning and zoning provides a list of requirements for aggrieved persons stating

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

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

However, in this case by attempting to draft a document that would be fair to the Shaws if they decide to sell their property at some point in the future the Court is speculating or hypothesizing as to any or all possible situations which may or may not occur at some point in the future. Tr. pp. 19, 21, 35-45, 52-53.

Yet, truth be told, it appears the Shaws may never return to their Custer County property anyway. Tr., pp. 45, 59. On information and belief the Shaws have never been residents of South Dakota anyway, Tr., p.25. Even the Court in this case has stated that Ms. Shaw "and her children informed the Court and court staff that, quite frankly, they hope they never have to come back to South Dakota". Tr., p.5.

The Court, in speculating as to various hypothetical situations, has deemed it appropriate to impose what amount to restrictive covenants on the Loshs' private access easement in order to benefit the owner of the servient estate. Yet the Court would have served the parties better by referring the Shaws to the County Board of Commissioners and the Board of Adjustment to seek a remedy consistent with the applicable provisions of the Coster County Ordinances.

(3) The trial court erred in failing to consider a material question of fact before issuing a judgment on the pleadings.

The material question of fact that the trial court failed to consider is the authority of the Custer County Ordinance No. 2. While the Shaws did approach the County commissioners initially in requesting that the Loshs' private access easement be vacated, they failed to pursue avenues provided under South Dakota law allowing for either a special permitted use or a conditional use permit. They did not petition for a zoning adjustment and they did not request an administrative hearing. Thus, questions of fact remain as to the conflicts between the Court Order and Judgment on the one hand and the County Ordinances on the other hand where the County Board of Commissioners is given the authority and duty to enforce County Ordinances.

SDC1. 21-24-10 provides that the court may refuse to render a verdict or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

CONCLUSION

Defendants/Appellants Loshs respectfully request of this honorable Court, after reviewing the trial Court's Judgment, Orders and the facts of the matter and considering the arguments presented herein and the authority provided under SDCL 15-26A-12, that they vacate the trial Court's Orders and Judgment and dismiss the Complaint for lack of jurisdiction, improper venue and failure to identify a justiciable case or controversy at this moment in time. .

Dated: 2/27/2025
Signed: Richard Losh

Carol Kay/Cash

CERTIFICATE OF SERVICE

I hereby certify on this 27 5- day of February, 2025 that I have placed a true and correct copy of the foregoing Appellants' Brief in the U.S. mail first class postage prepaid and addressed to

> Richard M. Williams P.O. Box 8045 Rapid City, South Dakota 57709

> > by Richard Soul

CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellants' Brief complies with the page limitation specified in SDCL Section 15-26A-60.

Dated: 2/26/2028 Signed: Richard Losh

APPENDIX

Table of Contents:

Section A.

Statement of material facts required by SDCL Section 15-6-56(c)(1) and (2).

Section B

- (i) Judgment
- (ii) Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction
- (iii) Order on Motion for Declaratory Judgment Regarding the Easement Located on the Plat of Case Subdivision #4 Recorded as 12 Plat 626 and for the Renefit of Tract Reinke i

Section C -

- (i) Excerpts from Defendants' Response to Plaintiffs' Brief in support of Motion for Judgment on the Pleadings and Motion for Permanent Injunction with Exhibits including pages 13-14 (R. 100-101) and Exhibits 5 and 6.
- (ii) already submitted by Court Reporter and Clerk of Custer County Court:

Pleadings in the Record submitted by the Custer Court Clerk Hearing Transcript submitted by the Custer Court Clerk

Section D

- (i) South Dakota Constitution Article 5 Sections 1, 4 and 5
- (ii) South Dakota Statutes
- (iii) Custer County Ordinance No. 2

STATEMENT OF MATERIAL FACTS

- 1. The Findings of Fact and Conclusions of Law incorrectly find that the trial court had original jurisdiction in the case according to the South Dakota Constitution Article V, Section 5 and civil jurisdiction pursuant to SDCL Section 16-6-9. However, Section 4 of Article V states that "Courts of limited jurisdiction consist of all courts created by the legislature having limited original jurisdiction and the legislature has provided counties with the authority to enact and enforce ordinances in SDCL Chapters 7-18A and 11-2.
- 2. In granting the PlaintitIs' Motion for Judgment on the Pleadings the trial court did not consider the relevance and authority of Custer County Ordinance No. 2 and the fact that the Order on Motion for Declaratory Judgment allows for Plaintiffs/Appellees ("Shaws") to violate paragraph 5 of Section 1 of Article III of the Ordinance which states that Private Access Roads are intended to serve only one residence.
- 3. The trial court Order also allows for violation of the second paragraphs of Sections 2, 3, and 4 of Article IV of the Ordinance in permitting Plaintiffs/Appellees ("Shaws") use of the private access easement road to serve more than one parcel; i.e., both the Shaws' Lot#4 and the Loshs' Reinke Tract.
- 4. The trial court Ordered additional terms including the use and maintenance of the Loshs' private access easement road inconsistent with the Custer County Ordinance No.2.

STATE OF SOUTH DAKOTA))\$8.		IN CIRCUIT COURT
COUNTY OF CUSTER)		SEVENTH JUDICIAL CIRCUIT
SHAW FAMILY TRUST ESTABLI)	Case No. 16CIV23-000020
MAY 22, 1991, AS RESTATED ON)	
18, 2019 by and through its acting Ti	rusiėe,)	
JILL D. SHAW,)	JUDGMENT
		}	
Plaintiffs.)	
)	
ν,)	
)	
RICHARD LOSH and CAROL KAY	ſ)	
BIEWICK LOSH.)	
)	
Defendants.)	

The Court having heard argument on September 18, 2024, and thereafter having entered its Order on Motion for Declaratory Judgment on November 7, 2024, granting judgment on the pleadings in favor of the Plaintiff, the Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019, and having entered its Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction, copies of both of which are incorporated into this Judgment by reference, it is now therefore.

HEREBY ADJUDGED, and DECREED as follows:

In accordance with the above-incorporated orders, the Shaw Family Trust's Motion for Declaratory Judgment is GRANTED.

11/15/2024 8:07:27 AM

Attest: Barrera, Ellen Clerk/Deputy BY THE COURT

The Honorable Heidi L. Linngren

Circuit Court Judge Seventh Judicial Circuit

CERTIFICATE OF SERVICE

I hereby certify on November 14, 2024, a true and correct copy of JUDGMENT was electronically filed through South Dakota's Odyssey File and Serve Portal and served by U.S. Mail, first class, postage prepaid, and by email upon the following individuals:

Richard Losh Carol Kay Biewick Losh 1679 S. Kearney Street Denver, Colorado 80224 Email: richardlosh@comcast.net

By: /s/Richard M. Williams

Richard M. Williams

195

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
COUNTY OF CUSTER)\$S }	SEVENTH JUDICIAL CIRCUIT
SHAW FAMILY TRUST ESTABLISHED)	
MAY 22, 1991, AS RESTATE ON JULY)	CASE NO: 16CIV23-20
18, 2019, BY AND THROUGH ITS)	
ACTING TRUSTEE, JILL D. SHAW)	FINDINGS OF FACT AND
,	í	CONCLUSIONS OF LAW AND ORDER
Plaintiff,	`	ON MOTION FOR JUDGMENT ON THE
,	í	PLEADINGS
v.	í.	AND MOTION FOR PERMANENT
	í.	INJUNCTION
RICHARD LOSH AND CAROL KAY	ί.	
BIEWICK LOSH.	í .	
The state boots,	í	
Defendants.	,	
Diviniand.	/	

This matter came before the Court on Plaintiff's Motion for Judgment on the Pleadings and Motion for Permanent Injunction on September 18, 2024. Plaintiff, the Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019, by and through its successor trustee Jill D. Shaw, was represented by its counsel, Richard M. Williams of Gunderson, Palmer, Nelson and Ashmore, LLP; and Defendants Richard Losh and Carol Kay Biewick Losh appeared pro se. The Court having reviewed all of the briefing, having considered evidence subject to judicial notice, and having heard and considered the arguments presented at the hearing, and being fully advised in the premises, the Court does hereby make and enter the following:

FINDINGS OF FACT

1. All findings of fact have been established by a preponderance of the evidence introduced or stipulated to at hearing and are supported by substantial evidence.

2. To the extent any of the following findings of fact may be determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated by reference as a conclusion of law as if set forth in detail.

A. PARTIES

- 1. Jill D. Shaw is acting Trustee for The Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019 ("Shaw Family Trust").
- 2. The Shaw Family Trust holds land in Custer County, South Dakota.
- 3. Richard Losh and Carol Kay Biewick Losh ("Defendants") are residents of Denver County, Colorado.
- 4. Carol Kay Biewick Losh owns land in Custer County.
- Richard Losh and Carol Kay Biewick Losh are husband and wife.

B. FACTUAL BACKGROUND

6. The Shaw Family Trust received property, by Warranty Deed, in Custer County, South Dakota, on September 18, 2020, which is further described as:

Lot 4 of Case Subdivision #4, located in the SW 1/4 and H.E.S. 323 in Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on Plat filed in Book 12 of Plats, Page 626. See attached Exhibit A (Warranty Deed).

- 7. The Shaw Family Trust holds Lot 4 of Case Subdivision #4 ("Case Subdivision"), which was created by the filing of 12 PLAT 626, with the Custer County Register of Deeds, on September 19, 2015. See attached Exhibit B (Case Subdivision Plat).
- 8. The Case Subdivision Plat creates a "66' wide private access easement ("Easement") dedicated with this plat for the owners of Tract Reinke" which generally runs down the eastern property line of Plaintiffs Lot 4 and connects to a public road known as Eggers Lane.
- 9. Other than providing for the width and location of the Easement across Lot 4, the Easement created by the Case Subdivision Plat did not otherwise provide any terms or conditions related to the nature or extent of the Easement.

10. Defendants received property in Custer County, South Dakota, on May 2, 2017, by means of a Personal Representative's Deed. The property is further described as:

Reinke Tract of HES #323 located in the SE1/4 SW1/4 of Section 9, Township 3 South, Range 4 Fast of the Black Hills Meridian, Custer County, South Dakota, as shown on plat recorded in Book 6, page 12. (DOE #4312). See attached Exhibit C (Personal Representatives Deed).

11. As described above, Defendants are the owners of Tract Reinke which was granted a 66' private access easement by the filing of the Case Subdivision Plat as set forth in Exhibit B.

CONCLUSIONS OF LAW

- 12. To the extent that any of the following conclusions of law may be determined to be findings of fact or mixed findings of fact and conclusions of law, the same are incorporated by this reference as a finding of fact as if set forth in detail.
- 13. The burden of proof as to an issue on which a party bears the burden is by a preponderance of the evidence.
- 14. South Dakota Circuit Courts possess original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. S.D. CONST. Art. V, § 5. This Court has civil jurisdiction over the parties and subject matter of this action pursuant to SDCL § 16-6-9.
- 15. This Court has jurisdiction over the parties and the subject matter of this action pursuant to SDCL Chapter 21-24 for declaratory relief, and SDCL § 21-24-1, which provides that "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."
- 16. Venue is appropriate in the Seventh Judicial Circuit, Custer County, pursuant to SDCL § 15-5-1 (venue for a determination of an interest in real property).
- 17. Pursuant to SDCL Ch. 21-24 et seq. of the South Dakota Statutes and Rule 57 of the South Dakota Rules of Civil Procedure, the Court may determine the nature, extent, and use of the Easement in accordance with South Dakota Law.
- 18. Per Rule 12(c) of the South Dakota Rules of Civil Procedure, a party may move for judgment on the pleadings:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56. SDCL 15-6-12(c).

- 19. A motion for judgment on the pleadings "is a remedy to test the legal sufficiency, substance, and form of pleadings." Linda S. Sorensen Revocable Tr. v. Sommervold, 2005 S.D. 33, ¶ 4, 694 N.W.2d 266, 268 (citation omitted). "However, it is only an appropriate remedy to resolve issues of law when there are no remaining issues of fact." Korstad-Tebben, Inc. v. Pope Architects, Inc., 459 N.W.2d 565, 567 (S.D. 1990).
- 20. While generally a court may only consider the facts asserted in the pleadings, it may [also] consider "some materials that are part of the public record or do not contradict the [pleadings]," Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir.), cert. denied, 527 U.S. 1039, 119 S. Ct. 2400, 144 L.Ed.2d 799 (1999), as well as materials that are "necessarily embraced by the pleadings." Piper Jaffray Cos. v. National Union Fire Ins. Co., 967 F.Supp. 1148, 1152 (D. Minn. 1997). See also 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357, at 299 (1990) (court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"). Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999).
- 21. 12 PLAT 626 and the deeds of the respective parties are embraced by the pleadings, constitute public records, and are subject to judicial notice.
- 22. The Declaratory Judgment Act (SDCL ch. 21-24) is intended to allow the Court to provide guidance to parties before the parties have been unnecessarily damaged by an impending conflict.
- 23. The philosophy of the Declaratory Judgment Act establishes that through it the courts seek to enable parties to authoritatively settle their rights in advance of any invasion thereof. Within the bounds of the remedial act's command of a liberal construction and liberal administration is found its ultimate goal of allowing the courts (to be) more serviceable to the people. The achievement of peace through the avoidance of predictable conflict permeates as the Act's main function.

Benson v. State, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141 (citations and internal quotations omitted).

- 24. The Declaratory Judgment Act is particularly suited to resolve disputes regarding written instruments such as easements. SDCL 21-24-3 (declaratory judgment available to establish legal status under a written easement); Hofmeister v. Sparks, 2003 S.D. 35, ¶ 1, 660 N.W.2d 637, 638 (declaratory judgment action to ascertain the legal status of an easement).
- 25. A ripe and justiciable controversary exists between Plaintiffs and Defendants.
- 26. Plaintiffs request the Court declare the rights of the Parties under the Easement created by 12 PLAT 626 and State law.
- 27. The Easement creates a servitude. Defendants are owners of the dominant tenement and Plaintiffs are owners of the servient tenement.
- 28. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. SDCL § 43-13-5.
- 29. The following principle is implicit in SDCL 43-13-5: "[t]he holder of a private easement has the right to limited use or enjoyment of the property only if it is consistent with the general use of the property by the owner, and "neither the physical size nor the purpose or use to which an easement may be put can be expanded or enlarged beyond the terms of the grant of the easement." Vander Heide v. Boke Ranch, Inc., 2007 S.D. 69, ¶ 45, 736 N.W.2d 824, 837 (emphasis added).
- 30. By the terms of the Plat, Defendants are granted only a "66' wide private access easement dedicated with this plat for the owners of Tract Reinke." No other terms or conditions are expressed. Accordingly, other than specifically stated, State law controls the extent and use of the Easement.

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- 31. Plaintiffs, as the owners of the servient tenement retain "all the incidents of ownership in the easement." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 25, 693 N.W.2d. 656, 663.
- 32. Plaintiffs have the "right to use the property in any manner or for any purpose, so long as the owner does not interfere with the use or enjoyment of the easement." *Knight v. Madison*, 2001 S.D. 120, ¶ 7, 634 N.W.2d 540, 543.
- 33. By the terms of the Easement, access is limited to the "owners" of Tract Reinke, Defendants, as owners of Tract Reinke, are the only persons authorized to

170

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- use the easement area. Plaintiffs have the authority to exclude others from the Easement area. Plaintiffs retain the right to "regulate access by third parties to a non-exclusive private roadway easement." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 21, 693 N.W.2d 656, 663.
- 34. "The owner of the servient tenement retains the exclusive legal authority to regulate access by third parties to a non-exclusive private roadway easement." Picardi, 2005 S.D. 24, ¶ 21, 693 N.W.2d 656, 663, (citing Picardi I, 2004 SD 125, ¶ 22, 689 N.W.2d at 892 and Knight, 2001 SD 120, ¶ 8, 634 N.W.2d at 543).
- 35. Plaintiffs retain the right to otherwise use the Easement area. "In the absence of contrary language in the easement, a servient owner may reasonably use that portion of its real property subject to an egress, ingress, and roadway easement for its own purposes up to the point where such uses substantially interfere with the dominant owner's reasonable use of the easement." DeHaven v. Hall, 2008 S.D. 57, ¶31, 753 N.W.2d 429, 439.
- 36. Private access easements cannot be expanded to include commercial uses unless otherwise allowed by the grant of the easement. *Picardi*, 2005 S.D. 24, ¶ 29-30, 693 N.W.2d at 664-65.
- 37. Plaintiffs may fence and gate the Easement area provided that such fencing and gating does not infringe on the rights of the Easement holder to gain reasonable access, "The fee owner of a road has the right to erect a gate to limit public or third-party access to the road, as long as this does not interfere with the ingress and egress rights of the easement holder." Knight v. Madison, 2001 S.D. 120, ¶ 8, 634 N.W.2d 540, 543.
- 38. Plaintiffs may otherwise use the Easement in a manner that does not encumber the reasonable use of the Easement. "This includes the right to use the ditches of the current roadway, and the ditches of any future roadway, for parking, signage, fences, fence posts, curbing, planting or removal of trees, sod, or other vegetation." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 34, 693 N.W.2d 656, 665–66.
- 39. In DeHaven v. Hall, the South Dakota Supreme Court described the dominant estate's obligation for maintenance of an easement:

An easement holder (the dominant estate, in this case Halls) owes a limited duty to the landowner (the servient estate, DeHavens) to repair, and maintain

the easement. The Restatement (Third) of Property (Servitudes) § 4.13 (2000) defines this duty:

Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:

- (1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
- (a) prevent unreasonable interference with the enjoyment of the servient estate, or
- (b) avoid liability of the servient-estate owner to third parties. DeHaven, 2008 S.D. 57, ¶ 23, 753 N.W.2d 429, 437. The Court further quoted the Idaho Supreme Court on this issue:

The duty of maintaining the easement rests with the easement owner (i.e. dominant estate), even when the servient owner landowner uses the easement. That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate. This duty to maintain does not mean that the casement owner is required to maintain and repair the easement for the benefit of the servient estate. DeHaven, 2008 S.D. 57, ¶ 24, 753 N.W.2d at 437 (citing Walker v. Boozer, 95 P.3d 69, 73-74 (2004)).

40. As noted above, the maintenance obligation, in part, is required to "avoid liability of the servient-estate owner to third parties."

Based on the above Findings of Fact and Conclusions of Law, it is therefor, ORDERED as follows:

- 1. The Motion to Dismiss filed by Richard Losh and Carol Kay Biewick Losh as part of their Answer is DENIED.
- 2. The Shaw Family Trust's Motion for Permanent injunction is DENJED.

- 3. The Shaw Family Trust's Motion for Declaratory Judgment is GRANTED. The Shaw Family Trust is directed to submit an Order consistent with, and incorporating by reference, the above Findings of Fact and Conclusions of Law above that shall be filed with the Custer County Register of Deeds and indexed against the affected properties described herein.
- 4. Each Party to the above-captioned matter will be responsible for their own costs and attorney's fees.
- 5. This is a final Order as it disposes of all claims and counterclaims in the above-captioned matter.

Dated this 7th day of November, 2024.

Attest Barrera, €Hen Clerk/Deputy

S.S. S

Heidi L. Linngren

Circuit Court Judge

Seventh Judicial Circuit

17.4 210

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
COUNTY OF CUSTER) SS.)	SEVENTH JUDICIAL CIRCUIT
SHAW FAMILY TRUST ESTABL	ISHED)
MAY 22, 1991, AS RESTATED ON JULY) Case No. 16CfV23-000020
18, 2019, by and through its acting 7	Frustee,)
JILL D. SHAW		ORDER ON MOTION FOR
		DECLARATORY JUDGMENT
Plaintiffs,		REGARDING THE EASEMENT
		LOCATED ON THE PLAT OF CASE
v.		SUBDIVISION #4 RECORDED AS 12
		PLAT 626 OVER LOT 4 AND FOR THE
RICHARD LOSH and CAROL KAY		BENEFIT OF TRACT REINKE
BIEWICK LOSH,)

Defendants.

This matter came before the Court on Plaintiff's Motion for Judgment on the Pleadings and Motion for Permanent Injunction on September 18, 2024. Plaintiff, the Shaw Family Trest Established May 22, 1991, as Restated on July 18, 2019, by and through its successor trustee Jill D. Shaw, was represented by its counsel, Richard M. Williams of Gunderson, Palmer, Nelson and Ashmore, LLP, and Defendants Richard Losh and Carol Kay Biewick Losh appeared pro se.

BACKGROUND

The Shaw Family Trust holds Lot 4 of Case Subdivision #4 ("Case Subdivision"), which was created by the filing of 12 PLAT 626, with the Custer County Register of Deeds, on September 19, 2015. The Case Subdivision Plat creates a "66" wide private access casement [("Easement" or "Easement Area")] dedicated with this plat for the owners of Tract Reinke" which generally runs down the eastern property line of Plaintiffs' Lot 4 and connects to a public road known as Eggers Lane. Other than providing for the width and location of the Easement across Lot 4, the Easement created by the Case Subdivision Plat did not otherwise provide any

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terms or conditions related to the nature or extent of the Easement. The owners of Tract Reinke constructed a roadway ("Roadway") within the Easement Area across Lot 4. The Court further defines the nature and use of the Easement as described and declared in the Order below.

ORDER

The Court having reviewed all of the briefing, having considered evidence subject to judicial notice, and having heard and considered the arguments presented at the hearing, and being fully advised in the premises, it is hereby ORDERED:

- The Court's Findings of Fact and Conclusions of Law entered in the above-captioned matter upon the same date as the execution of this Order are hereby incorporated herein by this reference.
- Tract Reinke is the dominant tenement and Lot 4 is the servient tenement.
- 3. The Roadway is for ingress and egress purposes and shall be maintained, by the owners of Tract Reinke, over and across the Easement Area. To the extent it does not interfere with the reasonable use of the Easement, the areas on either side of the Roadway, within the Easement Area, may be graded to a consistent level, kept free of weeds, and maybe landscaped as desired by the owners of Lot 4.
- 4. The Easement shall be for the purpose of permitting the owners of Tract Reinke, their social guests, or business invitees, access for ingress and egress across the established Roadway. The Easement may not be used for commercial purposes. The Easement may only serve Tract Reinke.
- 5. The Easement shall not be deemed to be an easement to or for the general public or for any public purpose whatsoever, the Easement being strictly limited to a private access easement for the benefit of the residential property owners of Tract Reinke, their successors, and assigns, to the exclusion of all other properties.
- 6. The owners of Tract Reinke must indemnify and hold the owners of Lot 4 harmless from and against any and all actions, suits, damages, liability or other proceedings which may arise as the result of the use of the Easement by the owners of Tract Reinke, their social guests, or business invitees. This section does not require the owners of Tract Reinke to be responsible for or defend against claims or damages arising solely from the errors or umissions of the owners of Lot 4, their social guess, or business invitees. Nothing in this paragraph is intended to impair the insurance coverage or any subrogation rights of either party.

- 7. The owners of Track Reinke must maintain the Roadway within the Easement Area. The owners of Lot 4 have the concurrent right to maintain the Easement Area and Roadway, provided that such maintenance does not interfere with the reasonable use of the Easement by the owners of Tract Rainke. However, in the event that either party, their social guests, or business invitees, damages the Easement or Roadway through negligence or extraordinary use of the Easement or Roadway, that party will repair the damage at their own expense.
- Any rocks or boulders unearthed during maintenance or construction within the Easement Area shall remain the property of Lot 4.
- No chemical herbicides or insecticides may be used in the Easement Area unless agreed to by the owners of Lot 4.
- 10. The owners of Lot 4 have the right to use and maintain the Easement Area and Roadway in any manner which will not interfere with Tract Reinke's use of the Easement or Roadway as described in this Order. The owners of Lot 4 specifically have the right to fine grade the road surface as needed and to remove snow as necessary.
- 11. This Fasement shall include the right of either party to enter upon the Easement Area in order to do those things such as maintenance, repair, grading, and snow removal which are reasonably necessary to effectuate the purpose of this Order.
- 12. Other than the landscaping and maintenance of the Essement Area otherwise described in this Order, the Essement Area shall be kept free of all trash, rubbish, and obstructions including, but not limited to, vehicles and equipment, buildings, and sheds.
- As long as the Easement remains accessible to Tract Reinke, the Easement Area may be fenced and gated by the owners of Lot 4. The owners of Lot 4 must maintain, in working order, any gates placed across the Easement Area. When the Easement is used by Tract Reinke, their social guests, or business invitees, the owners of Tract Reinke must use their best efforts to ensure the gates along the Easement Area are closed and secure.
- 14. The terms of this Order shall run with the land and shall be binding upon and shall inure to the benefit of the parties hereto, their heirs, successors or assigns.

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 A copy of this Order shall be filed with the Custer County Register of Deeds and indexed against the affected properties. BY THE COURT:

11/7/2024 1:14:25 PM

Attest: Bairera, Ellen Clerk/Deputy

By:

Honorable Heidi Linngren Circuit Court Jiudge reasonable maintenance or repairs. Restatement (Third) of Propert. (Servitudes) section 4.13(3) (2000) also generally DeHaven v. Hall 2013 SD 57, P.24, 753 N.W.2d 429, 437.

The Loshs are not aware of any authority, absent good cause, mandating that a holder of a private access easement has a duty to agree to a list of restrictive covenants arbitrarily imposed by the servient landowner.

C. The Loshs have not interfered with the Shaws' use and enjoyment of their land.

There has been no damage whatsoever to the Shaws' property and there have been no attempts to obstruct or limit the Shaws' activities in the casement area. Instead the Loshs have installed a driveway in the casement area which the Shaws have stated they are using for access to their property.

The Shaws have not acted in good faith regarding Loshs' easement.

- (3) The Shaws have made several false assertions regarding the easement area including
 - (a) the letter to the Custer Planning Dept requesting vacation of Loshs' easement erroneously describing the topography of the easement area as steep uneven rocky terrain and unsafe to travel for vehicles of most kind (Defendants' Exhibit 5).
 - (b) the Shaws' attorney continuing to describe the Loshs' former Freeland tract access as being a public highway when he knows better and has been corrected at least once. (see Dofendants' Answer paragraph 20; also Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings and Motion for Permanent Injunction, p.3)

- (2) Moreover, it appears that the Shaws most likely received the February, 2023 letter from the Loshs acknowledging the Shaws' right to use the driveway but failed to refer to it in their subsequent Complaint which was filed with the Court some days later.
- (3) It is unclear as to whether the Shaws really are residents of Custer as claimed in both the Complaint and Plaintiffs' brief, p.2, and whether construction of the Shaws' home is currently in progress as stated in Plaintiffs' brief p.3 as neighbors have reported observing no construction activities on the property thus far.
- (4) Despite numerous opportunities and multiple offers from the Loshs to meet in person, the Shaws have steadfastly refused, instead preferring to act aggressively toward the Loshs through the Court system.
- (5) The Shaws showed no interest in continuing settlement negotiations after the Loshs' attorney moved out of state and withdrew as Loshs' representative.

E. <u>Injunctive relief is not appropriate in this case</u>.

The Loshs have educated themselves by obtaining legal advice since the correspondence and exchange of letters in August, 2022. Since that time the Loshs have recognized and acknowledged not only the Shaws' rights to use and enjoy the land in the easement area as they see fit but also the Loshs have acknowledged their own responsibilities and obligations to provide maintenance and repairs to the driveway as necessary and to indentnify the Shaws and hold them harmless from liability claims by third parties associated with use of the casement driveway. Moreover, the Loshs have maintained a homeowner insurance policy which would cover any such claims from third parties.



GUNDERSON | PALMER | NELSON | ASHMORE ILP

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January 18, 2024

Richard M. Witilams Email: rwilliams@gpna.com Direct Diat: (605) 719-3430

Via Email

richardlosh@comeast.net

Richard Losh 1679 S. Kearney St. Denver, CO 80224

Re: Easement issue in Custer County

GPNA File No. 16088.0002

Dear Richard:

I am in receipt of your letter of December 30, 2023, requesting certain documentation. Attached in response to your request is a copy of a letter from the Shaws to the Custer County Planning Director dated November 12, 2021, and Bates stamped as SHAW 000001. All other documentation should be requested directly from Custer County. I will not be providing any documents or materials that I consider to be privileged through either an attorney-client relationship or work product doctrine.

Sincerely,

/s/ Richard M. Wilhams

Richard M. Williams

RMW:by

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November 12, 2021

Terri Kester, Planning Director

Custer County South Dakota

Good morning, Terri & Custer County Planning members,

This is a letter of request from Ron & IIII Shaw, Lot 4, 12 PLAT 626 Medicine Mountain Rd. for vacating of existing two easements from the property.

Our desire is to clean up the PLAT & for leaving the existing topography of the land as it is today. In the last several decades & last 5 % years since the lots were divided in April of 2015, these two easements have not been astablished or used by Lot 5, Lot 6 or Track Reinke for access to their properties and have an existing fence on the front (Madicine Mountain Rd), one (Freeland Dr.) side and the extending length of whole back of Lot 4 property.

Lot 5 & 6 have an established shared driveway to their homes, with official metal addresses posted at entrance of Medicine Mountain Rd., Track Reinke has for several decades used Freeland Drive access and has an official metal address posted at gate entrance to their property on Freeland Drive, 12035 Freeland Dr.

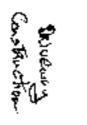
In leaving these existing easements of 66' wide x 930'long & 66' x 490' approximately we will lose a lot of our grazing & gardening land. Currently being is used for hay production for neighbors horses.

The Soil conditions & terrain in the area of both easements have large heavy rocky, steep, off camber existing conditions and would be unsafe to travel for vehicles of most kind. The Lot 5 & 6 front easement is quite steep, rocky and high. The Track Reinke is of the same steep uneven rocky terrain. Both would be very costly to try to develop and seem unnecessary because of established shared driveway, and use of Freeland Dr.

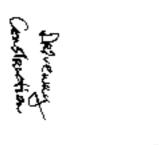
Thank you for your consideration, time, and energy in helping us in this request to vacate 2 easements on property, an ellowing us our continue use of our land.

With respect and gratitude,

Ron & Jill Shaw

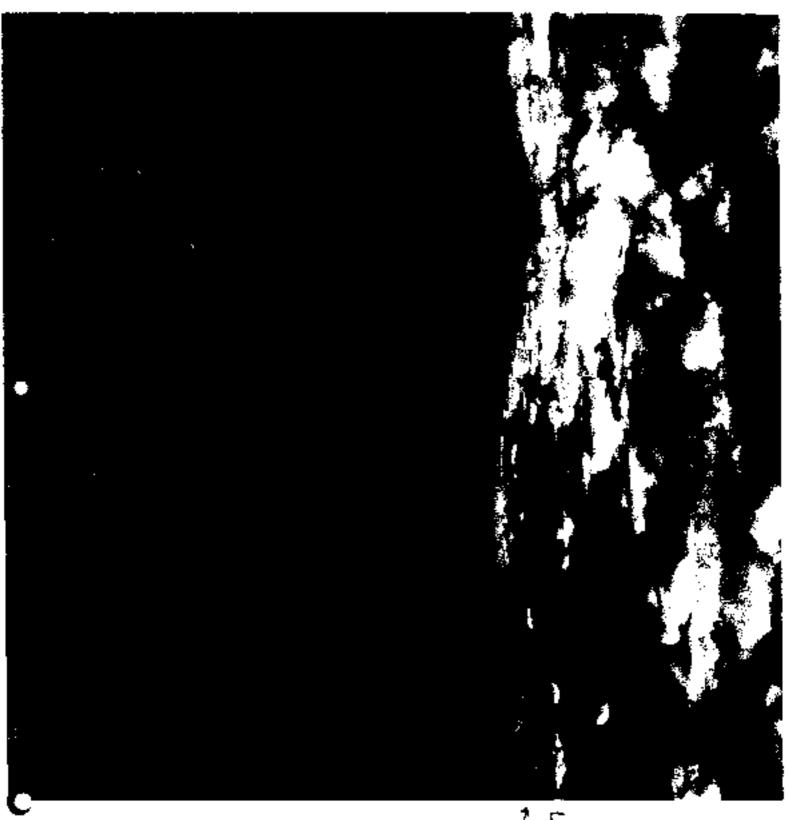












- September



Riveron Looking



Delveway with Culvert installed Eggens
Lane ->

Modicine
Mortain
Roal ->



Note: Pictures do not show gates and fence that are now instabled

Driveway

Losh property.

Medicine. Mondain -> houle

Show -

South Dakota Constitution Article 5 - Judicial Department. § 1 Judicial powers.

§ 1. Judicial powers. The judicial power of the state is vested in a unified judicial system consisting of a Supreme Court, circuit courts of general jurisdiction and courts of limited original jurisdiction as established by the Legislature.

History: 1889 Const., art. V, § 1; amendment proposed by SL 1972, ch 2, approved Nov. 7, 1972.

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South Dakota Constitution Article 5 - Judicial Department. § 4 Courts of limited jurisdiction.

§ 4. Courts of limited jurisdiction. Courts of limited jurisdiction consist of all courts created by the Legislature having limited original jurisdiction.

History: 1889 Const., art. V, §§ 19 to 23; amendment of § 23 proposed by SL 1905, ch 69, approved Nov., 1906; amendment of §§ 19 and 20 proposed by SL 1966, ch 197, approved Nov. 8, 1966; substitution of new section proposed by SL 1972, ch 2, approved Nov. 7, 1972.

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South Dakota Constitution Article 5 - Judicial Department. § 5 Jurisdiction of courts.

 \S 5. Jurisdiction of courts. The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature, and the Supreme Court or any justice thereof may issue any original or remedial writ which shall then be heard and determined by that court. The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.

The circuit courts have original jurisdiction in all cases except as to any limited original sdiction granted to other courts by the Legislature. The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs. The circuit courts have such appellate jurisdiction as may be provided by law.

Imposition or execution of a sentence may be suspended by the court empowered to impose the sentence unless otherwise provided by law.

History: 1889 Const., art. V, §§ 2, 3, 13, 14; § 39 as proposed by SL 1929, ch 83, approved Nov., 1930; amendment proposed by SL 1972, ch 2, approved Nov. 7, 1972.

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JUSTIA

Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-1 - Definition of terms.

Universal Citation:

SD Codified L § 1-26-1 (2023)

Next >

1-26-1. Definition of terms.

Terms used in this chapter mean:

(1)"Agency," each association, authority, board, commission, committee, council, department, division, office, officer, task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term includes a home-rule municipality that has adopted its own administrative appeals process, whose final decisions, rulings, or actions rendered by that process are subject to judicial review pursuant to this chapter. The term does not include the Legislature, the Unified Judicial System, any unit of local government, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute;

(2)"Contested case," a proceeding, including rate-making and licensing in which the legal rights, duties, or privileges of a party are required by law to be dete.

after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in §1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents;

- (3)"Emergency rule," a temporary rule that is adopted without a hearing or which becomes effective less than twenty days after filing with the secretary of state, or both;
- (4)"License," the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;
- (5)"Licensing," the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;
- (6)"Party," each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;
- (7)"Person," all political subdivisions and agencies of the state;
- (8)"Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:
- (a)Statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public;
- (b)Declaratory rules issued pursuant to §1-26-15;
- (c)Official opinions issued by the attorney general pursuant to §1-11-1;
- (d)Executive orders issued by the Governor;
- (e)Student matters under the jurisdiction of the Board of Regents;
- (f)Actions of the railroad board pursuant to \$1-44-28;
- (g)Inmate disciplinary matters as defined in §1-15-20;
- (h)Internal control procedures adopted by the Gaming Commission pursuant to §42-7B-25.1;

- (i)Policies governing specific state fair premiums, awards, entry, and exhibit requirements adopted by the State Fair Commission pursuant to §1-21-10;
- (j)Lending procedures and programs of the South Dakota Housing Development Authority; and
- (8A) Small business," a business entity that employs twenty- five or fewer full-time employees.
- (9)"Substantial evidence," such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion.

Source: SDC 1939, §65.0106; SL 1966, ch 159, §1; SL 1968, ch 210; SL 1972, ch 8, §3; SL 1973, ch 264, §1; SL 1974, ch 16, §§1, 2; SL 1975, ch 16, §§7, 8; SL 1976, ch 14, §§1, 2; SL 1977, ch 13, §1; SL 1977, ch 14; SL 1980, ch 17; SL 1982, ch 20, §2; SL 1983, ch 199, §1; SL 1989, ch 20, §42; SL 1990, ch 343, §9A; SL 1992, ch 8, §3; SL 1995, ch 3, §2; SL 1996, ch 10, §1; SL 1996, ch 130, §15A; SL 1999, ch 6, §1; SL 2004, ch 20, §1; SL 2012, ch 7, §1; SL 2014, ch 73, §1.

Next >

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JUSTIA

Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-14 - Declaratory judgment on rules.

Universal Citation:

SD Codified L § 1-26-14 (2023)

< Previous</p>
Next >

1-26-14. Declaratory judgment on rules.

The validity or applicability of a rule may be determined in an action for declaratory judgment in the circuit court for the county of the plaintiff's residence, if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

Source: SL 1966, ch 159, §7.

< Previous Next >





Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-15 - Declaratory rulings by agencies.

Universal Citation:

SD Codified L § 1-26-15 (2023)

< Previous Next >

1-26-15. Declaratory rulings by agencies.

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. No inmate as defined in §1-15-20.1 may petition an agency for a declaratory ruling on the applicability of statutory provisions, rules, or orders of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases. A copy of all such rulings shall be filed with the director for publication in the Administrative Rules of South Dakota.

Source: SL 1966, ch 159, §8; SL 1979, ch 8, §3; SL 1989, ch 16, §12; SL 1990, ch 20, §3; SL 1993, ch 19, §8; SL 1995, ch 8, §13; SL 1999, ch 6, §3.





Go to Previous Versions of this Section 💌

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-16 - Notice and hearing required in contested cases.

Universal Citation:

SD Codified L § 1-26-16 (2023)

1-26-16. Notice and hearing required in contested cases.

In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

Source: SL 1966, ch 159, §9 (1).

C Previous
Next >

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules

Section 1-26-18 - Rights of parties at hearings on contested cases--Summary disposition of certain cases.

Universal Citation:

8D Codified L § 1-26-18 (2023)

< Previous Next >

1-26-18. Rights of parties at hearings on contested cases—Summary disposition of certain cases.

Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:

(1)If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law; or

(2)At the close of the evidence offered by the proponent of the defendence offered by the proponent of the defendence offered by the proponent of the defendence of the defend

insufficient to sustain the defense or claim.

A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party's interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party's behalf.

Source: SL 1966, ch 159, §9 (3); SL 1972, ch 8, §19; SL 1978, ch 13, §6; SL 2002, ch 16, §1.

< Previous Next >

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JUSTIA

Go to Previous Versions of this Section ~

2023 South Dakota Codified Laws
Title 1 - State Affairs and Government
Chapter 26 - Administrative Procedure
And Rules
Section 1-26-18.3 - Request to use
Office of Hearing Examiners in certain
contested cases.

Universal Citation:

SD Codified L § 1-26-18.3 (2023)

(Previous Next >

1-26-18.3. Request to use Office of Hearing Examiners in certain contested cases.

In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to §1-26-17. This section does not apply to any contested case before the Public Utilities Commission.

Source: SL 1995, ch 8, §18; SL 2003, ch 18, §1; SL 2007, ch 7, §2.

< Previous Next >





Go to Previous Versions of this Section >

2023 South Dakota Codified Laws
Title 1 - State Affairs and Government
Chapter 26 - Administrative Procedure
And Rules
Section 1-26-30 - Right to judicial
review of contested cases--Preliminary
agency actions.

Universal Citation:

SD Codified L § 1-26-30 (2023)

< Previous Next >

1-26-30. Right to judicial review of contested cases--Preliminary agency actions.

A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.





Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-30.2 - Appeal from final action in contested case.

Universal Citation:

SD Codified L § 1-26-30.2 (2023)

< Previous Next >

1-26-30.2. Appeal from final action in contested case.

An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency.

Source: SL 1975, ch 17, §1.

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Go to Previous Versions of this Section →

2023 South Dakota Codified Laws Title 7 - Counties Chapter 18A - Ordinances And Resolutions Section 7-18A-2 - Authority to enact, amend, and repeal ordinances and resolutions--Penalties for violation.

Universal Citation:

SD Codified L § 7-18A-2 (2023)

(Previous Next >

7-18A-2. Authority to enact, amend, and repeal ordinances and resolutions--Penalties for violation.

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers granted to it by law and provide for the enforcement of each violation of any ordinance by means of any or all of the following:

(1)A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to exceed thirty days for each violation, or by both the fine and imprisonment; or

(2)An action for civil injunctive relief, pursuant to chapter 21-8.



Go to Previous Versions of this Section ▼

2023 South Dakota Codified Laws Title 7 - Counties Chapter 18A - Ordinances And Resolutions Section 7-18A-34 - Appeal to circuit court from magistrate court--Trial de novo and jury trial.

Universal Citation:

SD Codified L § 7-18A-34 (2023)

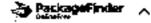
< Previous Next >

7-18A-34. Appeal to circuit court from magistrate court--Trial de novo and jury trial.

In any action or proceeding brought in magistrate court for the violation of an ordinance or resolution passed pursuant to this chapter, the defendant shall have the right to appeal the verdict to the circuit court and the right to a trial de novo and a jury trial in the circuit court.

Source: SL 1975, ch 82, §18.

< Previous Next >



JUSTIA

Go to Previous Versions of this Section ✓

2023 South Dakota Codified Laws Title 11 - Planning, Zoning and Housing Programs Chapter 02 - County Planning And Zoning Section 11-2-1 - Definition of terms.

Universal Citation:

SD Codified L § 11-2-1 (2023)

Next >

11-2-1. Definition of terms.

Terms used in this chapter mean:

- (1)"Board," the board of county commissioners;
- (2)"Commission," "planning and zoning commission," "zoning commission," or "planning commission," any county planning and zoning commission created under the terms of this chapter;
- (3)"Comprehensive plan," a document which describes in words, and may illustrate by maps, plats, charts, and other descriptive matter, the goals, policies, and objectives of the board to interrelate all functional and natural systems and activities relating to the development of the territory under its jurisdiction;

- (4)"Governing body," the board of county commissioners, the city council or city commission:
- (5) "Municipality," a city or town however organized;
- (6)"Temporary zoning or subdivision ordinance," an ordinance adopted as an emergency measure for a limited duration:
- (7) "Subdivision ordinance," any ordinance adopted by the board to regulate the subdivision of land so as to provide coordination of streets with other subdivisions and the major street plan, adequate areas set aside for public uses, water and sanitation facilities, drainage and flood control, and conformity with the comprehensive plan;
- (8)"Subdivision," the division of any tract or parcel of land into two or more lots, sites, or other division for the purpose, whether immediate or future, of sale or building development. The term includes resubdivision. This definition does not apply to the conveyance of a portion of any previously platted tract, parcel, lot, or site if the conveyance does not cause the tract, parcel, lot, or site from which the portion is severed to be in violation of any existing zoning ordinance or subdivision ordinance applying to the tract, parcel, lot, or site;
- (9)"Zoning map," the map that delineates the extent of each district or zone established in the zoning ordinance;
- (10)"Zoning ordinance," any ordinance adopted by the board to implement the comprehensive plan by regulating the location and use of buildings and uses of land.

Source: SL 1967, ch 20, §1; SL 1975, ch 113, §1; SL 1987, ch 29, §55; SL 1992, ch 60, §2; SL 2000, ch 69, §1.

Next >

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JUSTIA

Go to Previous Versions of this Section →

2023 South Dakota Codified Laws Title 11 - Planning, Zoning and Housing Programs Chapter 02 - County Planning And Zoning Section 11-2-1.1 - Aggrieved persons-Requirements.

Universal Citation:

SD Codified L § 11-2-1.1 (2023)

< Previous Next >

11-2-1.1 . Aggrieved persons—Requirements.

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

- (1) Establishes that the person suffered an injury, an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical;
- (2) Shows that a causal connection exists between the person's injury and the conduct of which the person complains. The causal connection is satisfied if the The Conference of Package Finder

traceable to the challenged action, and not the result of the independent action of any third party not before the court;

- (3) Shows it is likely, and not merely speculative, that the injury will be redressed by a favorable decision, and;
- (4) Shows that the injury is unique or different from those injuries suffered by the public in general.

Source: SL 2020, ch 41, § 1.

< Previous Next >

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Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-2 - Appointment of county
planning commission--Number of
members--Acting as zoning
commission.

Universal Citation:

SD Codified L § 11-2-2 (2023)

< Previous Next >

11-2-2. Appointment of county planning commission—Number of members—Acting as zoning commission.

The board of county commissioners of each county in the state may appoint a commission of five or more members to be known as the county planning commission. If a county proposes to enact or implement any purpose set forth in this chapter then the board of county commissioners shall appoint a county planning commission. The total membership of the county planning commission shall always be an uneven number and at least one

member shall be a member of the board of county commissioners. The county planning commission is also the county zoning commission.

Source: SL 1941, ch 216, §4; SDC Supp 1960, §12.20A04; SL 1966, ch 27; SL 1967, ch 20, §2; SL 1968, ch 23; SL 1997, ch 72, §2; SL 1999, ch 64, §1.

< Previous Next >

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Go to previous versions of this Section

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-13 - Adoption of zoning
ordinance.

Universal Citation:

SD Codified L § 11-2-13 (2023)

11-2-13. Adoption of zoning ordinance.

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

Source: SL 1941, ch 216, §2; SDC Supp 1960, §12.20A02; SL 1967, ch 20, §3 (1); SL 2000. ch 69, §4. **Disclaimer:** These codes may not be the most recent version. South Dakota may have more current or accurate information. We make no warranties or guarantees about the accuracy, completeness, or adequacy of the information contained on this site or the information linked to on the state site. Please check official sources.



Go to previous versions of this Section

ŧ

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-17.3 - Conditional use of
real property--Ordinance--Content-Approval or disapproval.

Universal Citation:

SD Codified L § 11-2-17.3 (2023)

< Previous Next >

11-2-17.3. Conditional use of real property--Ordinance--Content--Approval or disapproval.

A county zoning ordinance adopted under this chapter that authorizes a conditional use of real property shall specify the approving authority, each category of conditional use requiring approval, the zoning districts in which a conditional use is available, the criteria for evaluating each conditional use, and any procedures for certifying approval of certain conditional uses. The approving authority shall consider the stated criteria, the objections of the comprehensive plan, and the purpose of the zoning ordinance and the relevant zoning districts when making a decision to approve or disapprove a conditional use

request. Approval of a conditional use request requires the affirmative majority vote of the members of the approving authority who are present and voting.

Source: SL 2004, ch 103, §3; SL 2015, ch 72, §2; SL 2020, ch 41, §2; SL 2023, ch 39, §1.

⟨ Previous Next ⟩

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Go to previous versions of this Section

1

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-17.4 - Conditional use
defined.

Universal Citation:

SD Codified L § 11-2-17.4 (2023)

< Previous Next >

11-2-17.4. Conditional use defined.

A conditional use is any use that, owing to certain special characteristics attendant to its operation, may be permitted in a zoning district subject to the evaluation and approval by the approving authority specified in §11-2-17.3. A conditional use is subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district.

Source: SL 2004, ch 103, §4.

➌

Previous

Next >

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 11 - Planning, Zoning and Housing Programs Chapter 02 - County Planning And Zoning Section 11-2-17.5 - Special permitted uses.

Universal Citation:

SD Codified L § 11-2-17.5 (2023)

< Previous Next >

11-2-17.5. Special permitted uses.

A zoning ordinance adopted under this chapter may also establish a process for certification of special permitted uses upon meeting specified criteria for the use. A use certified as a special permitted use under the zoning ordinance shall be approved if the applicant demonstrates that all specified criteria are met.

Source: SL 2015, ch 72, §1; SL 2020, ch 41, §3; SL 2023, ch 39, §2.

C Previous Next >





Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 11 - Planning, Zoning and Housing Programs Chapter 02 - County Planning And Zoning Section 11-2-17.6 - Special permitted uses--Exceptions.

Universal Citation:

SD Codified L § 11-2-17.6 (2023)

< Previous Next >

11-2-17.6. Special permitted uses—Exceptions.

Any land use that meets the specified criteria for certification under any county zoning ordinance shall be considered a special permitted use. A special permitted use applicant is not subject to the requirements set forth in § 11-2-17.4. A special permitted use is not subject to any public hearing or other requirements for review and approval of conditional uses. Upon adoption of certification provisions, the land use is a permitted use subject to the criteria and enforcement in the same manner as a permitted use.

Source: SL 2020, ch 41, § 4.

⟨ Previous

PaddageFinder 🗼 🕽



Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-17.7 - Conditional use
application--Impact on neighboring
land.

Universal Citation:

SD Codified L § 11-2-17.7 (2023)

< Previous Next >

11-2-17.7. Conditional use application—Impact on neighboring land.

Any alteration, construction, use of earthmoving equipment, or other change pursuant to a zoning permit or allowed land use on neighboring land that began after the date on which an application for a conditional use is received, and that causes the application to fail to meet one or more of the criteria or requirements for conditional use under the zoning ordinance, does not cause the request for a conditional use permit to be considered nonconforming until a final disposition of the conditional use request is determined pursuant to § 11-2-61 or 11-2-65. If the conditional use permit is granted, the conditional use shall be considered a lawful use, lot, or occupancy of land or pro

continued even though the use, lot, or occupation does not conform to the provisions of the ordinance. If the conditional use is not pursued by the applicant for a period of more than one year, any subsequent use, lot, or occupancy of the land or premises shall conform with the zoning ordinance.

Source: SL 2020, ch 41, § 5.

< Previous Next >

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Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws Title 11 - Planning, Zoning and Housing Programs Chapter 02 - County Planning And Zoning Section 11-2-25 - Enforcement provided by county commissioners.

Universal Citation:

SD Codified L § 11-2-25 (2023)

< Previous Next >

11-2-25. Enforcement provided by county commissioners.

The board shall provide for the enforcement of the provisions of this chapter and of ordinances, resolutions, and regulations made thereunder, and may impose enforcement duties on any officer, department, agency, or employee of the county.

Source: SL 1941, ch 216, §9; SDC Supp 1960, §12.20A09; SL 1967, ch 20, §13.

C Previous
Next >

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-28.1 - Petition by
individual landowner for change in
zoning--Notice to abutting and
adjoining landowners--Notice to
county auditor of adjacent county.

Universal Citation:

SD Codified L § 11-2-28.1 (2023)

< Previous Next >

11-2-28.1. Petition by individual landowner for change in zoning—Notice to abutting and adjoining landowners—Notice to county auditor of adjacent county.

An individual landowner may petition the board to change the zoning of all or any part of the landowner's property. The petitioning landowner shall notify abutting and adjoining landowners by registered or certified mail of the petitioned zoning change at least ten days before the public hearing is held on the matter by the planning com

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 05 - Venue Of Actions Section 15-5-1 - Venue based on location of subject matter.

Universal Citation:

SD Codified L § 15-5-1 (2023)

Next >

15-5-1. Venue based on location of subject matter.

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by the statute:

- (1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property;
- (2)For the partition of real property;
- (3)For the foreclosure of a mortgage of real property;
- (4)For the recovery of personal property distrained for any cause;
- (5)For the recovery on a policy of insurance for loss or damage to the property insured such property, for the purposes of this subdivision being deemed til. SpeckageFinder.

Source: SDC 1939 & Supp 1960, §33.0301.

Next >

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Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 06 - Rules Of Procedure In Circuit Courts Section 15-6-12(c) - Motion for judgment on the pleadings.

Universal Citation:

SD Codified L § 15-6-12(e) (2023)

< Previous Next >

15-6-12(c). Motion for judgment on the pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by §15-6-56.

Source: SDC 1939 & Supp 1960, §33.1002; SD RCP, Rule 12 (c), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

C Previous



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Go to Previous Versions of this Section 💌

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 06 - Rules Of Procedure In Circuit Courts Section 15-6-56 - 15-6-56.Summary judgment

Universal Citation:

SD Codified L § 15-6-56 (2023)

⟨ Previous Next >

15-6-56. Summary judgment

< Previous Next >

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 06 - Rules Of Procedure In Circuit Courts Section 15-6-56(a) - Summary judgment for claimant.

Universal Citation:

SD Codified L § 15-6-56(a) (2023)

15-6-56(a). Summary judgment for claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

Source: SD RCP, Rule 56 (a), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

< Previous Next >

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Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 06 - Rules Of Procedure In Circuit Courts Section 15-6-56(b) - Summary judgment for defending party.

Universal Citation:

SD Codified L § 15-6-56(b) (2023)

< Previous Next >

15-6-56(b). Summary judgment for defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Source: SD RCP, Rule 56 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

< Previous Next >

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Go to Previous Versions of this Section →

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 26A - Rules Of Civil Appellate Procedure Section 15-26A-3 - Judgments and orders of circuit courts from which appeal may be taken.

Universal Citation:

SD Codified L § 15-26A-3 (2023)

(Previous Next >

15-26A-3. Judgments and orders of circuit courts from which appeal may be taken.

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

- (1)A judgment;
- (2)An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (3)An order granting a new trial;

- (4)Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;
- (5)An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;
- (6)Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or
- (7)An order entered on a motion pursuant to §15-6-11.

Source: SDC 1939 & Supp 1960, §33.0701; SDCL, §15-26-1; SL 1971, ch 151, §2; SL 1986, ch 160, §2.

< Previous Next >

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 26A - Rules Of Civil Appellate Procedure Section 15-26A-7 - Orders and determinations of trial court subject to review on appeal from judgment.

Universal Citation:

SD Codified L § 15-26A-7 (2023)

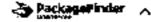
C Previous
Next >

15-26A-7. Orders and determinations of trial court subject to review on appeal from judgment.

On appeal from a judgment the Supreme Court may review any order, ruling, or determination of the trial court, including an order denying a new trial, and whether any such order, ruling, or determination is made before or after judgment involving the merits and necessarily affecting the judgment and appearing upon the record.

Source: SDC 1939 & Supp 1960, §33.0710; SDCL, §15-26-19.

< Previous Next >



Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws Title 15 - Civil Procedure Chapter 26A - Rules Of Civil Appellate Procedure Section 15-26A-12 - Actions available to Supreme Court on decision.

Universal Citation:

SD Codified L § 15-26A-12 (2023)

15-26A-12. Actions available to Supreme Court on decision.

By its judgment, the Supreme Court may reverse, affirm, or modify the judgment or order appealed from, and may either direct a new trial or the entry by the trial court of such judgment as the Supreme Court deems is required under the record.

Source: SDC 1939 & Supp 1960, §33.0710; SDCL, §15-26-26.

C Previous
Next >

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2023 South Dakota Codified Laws Title 16 - Courts and Judiciary Chapter 06 - Circuit Courts Section 16-6-9 - Original civil jurisdiction of circuit court.

Universal Citation:

SD Codified L § 16-6-9 (2023)

16-6-9. Original civil jurisdiction of circuit court.

The circuit court has original jurisdiction as follows:

- In all actions or proceedings in chancery;
- (2)In all actions at law and in equity;
- (3)In all cases where the title or boundary to real property comes in question;
- (4)In all actions for divorce or annulment of marriage;
- (5)In all matters of probate, guardianship, conservatorship, and settlement of estates of deceased persons;
- (6)Proceedings relating to minors under chapters 26-7A, 26-8A, 26-8B, and 26-8C;



(7)In all other cases now or hereafter provided by law granting jurisdiction to the circuit court, and as heretofore granted to district county, municipal, justice of the peace, and police magistrate courts.

Source: CCivP 1877, §28; CL 1887, §4825; RCCivP 1903, §30; RC 1919, §2114; SDC 1939 & Supp 1960, §32.0904; SL 1973, ch 130, §2; SL 1993, ch 213, §94.

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws
Title 21 - Judicial Remedies
Chapter 24 - Declaratory Judgment
Section 21-24-1 - Power of courts to
provide declaratory relief--Form and
effect of declarations.

Universal Citation:

SD Codified L § 21-24-1 (2023)

Next >

21-24-1. Power of courts to provide declaratory relief—Form and effect of declarations.

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Source: SL 1925, ch 214, §1; SDC 1939 & Supp 1960, §37.0101.

Next >



Go to Previous Versions of this Section ➤

2023 South Dakota Codified Laws
Title 21 - Judicial Remedies
Chapter 24 - Declaratory Judgment
Section 21-24-10 - Judgment refused
where controversy would not be
terminated.

Universal Citation:

SD Codified L § 21-24-10 (2023)

< Previous Next >

21-24-10. Judgment refused where controversy would not be terminated.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Source: SL 1925, ch 214, §6; SDC 1939 & Supp 1960, §37.0106.

< Previous Next >

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Go to Previous Versions of this Section >

2023 South Dakota Codified Laws Title 21 - Judicial Remedies Chapter 24 - Declaratory Judgment Section 21-24-13 - Review of declaratory orders and judgments.

Universal Citation:

SD Codified L § 21-24-13 (2023)

< Previous Next >

21-24-13. Review of declaratory orders and judgments.

All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

Source: SL 1925, ch 214, §7; SDC 1939 & Supp 1960, §37.0107.

< Previous Next >

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CUSTER COUNTY ORDINANCE NUMBER 2

AN ORDINANCE PROVIDING REGULATIONS FOR THE SUBDIVISION AND USE OF LAND WITHIN CUSTER COUNTY

EFFECTIVE JANUARY 30, 2007

PROVIDED BY:
CUSTER COUNTY PLANNING DEPARTMENT
420 MT. RUSHMORE ROAD
CUSTER, SD 57730
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TABLE OF CONTENTS

ARTICLE 1 Section 1 Section 2 Section 3 Section 4 Section 5	AUTHORITY AND JURISDICTION Statutory Authorization Jurisdiction Amendments Statements of Policy Severability and Separability	4
ARTICLE II	DEFINITIONS	3
ARTICLE III Section 1 Section 2 Section 3	PROCEDURE FOR THE SUBDIVISION OF LAND	10 11 11
Section 5 Section 5 Section 6	Information Required for Preliminary Plat Review Content of Preliminary Plats Content of Final Plats	15 15 17 19
ARTICLE IV Section 1 Section 2 Section 3 Section 4 Section 5 Section 6 Section 7 Section 8	DESIGN STANDARDS FOR RESIDENTIAL SUBDIVISIONS Conformity to Custer County Ordinance #2 Low -Density Subdivisions Medium-Density Subdivisions High-Density Subdivisions Road Requirements Names Utility and Drainage Easements Drainage Plans	22 23 23 24 25 25 26 26
ARTICLE V Section 1 Section 2	NON-RESIDENTIAL SUBDIVISIONS	27 27 28
ARTICLE VI	SECTION-LINE HIGHWAYS	29
ARTICLE VII	MOBILE HOME PARKS OR COURTS	30
ARTICLE VIII	WASTEWATER DISPOSAL SYSTEMS	31
ARTICLE IX	BUILDING, GRADING AND WASTEWATER DISPOSAL PERMITS	32
ARTICLE X	VARIANCES	38
ARTIČLE YL	VIOLATIONS AND PENALTIES	36

ARTICLE I - AUTHORITY AND JURISDICTION

SECTION 1 - STATUTORY AUTHORIZATION

Whereas Title 11-2-2, South Dakota Codified Laws (SDCL) has delegated the responsibility to the Board of County Commissioners of each county to adopt and enforce regulations designed for the purpose of promoting health, safety, and the general welfare of the county, the Board of Commissioners of Custer County, South Dakota hereby ordain the following:

SECTION 2 - JURISDICTION

This Ordinance shall govern all unincorporated lands within the jurisdiction of the Board of County Commissioners for Custer County, South Dekota.

SECTION 3 - AMENDMENTS

The regulations, restrictions, area, and boundaries set forth in this Ordinance may from time to time be amended, supplemented, revised or repealed as provided by law. The Director of Planning for Custer County is to review this Ordinance annually and make recommendations for revisions to the Board as provided by law.

SECTION 4 - STATEMENTS OF POLICY

If at any time during the course of completion of subdivisions, construction or any other development authorized under the provisions of this Ordinance, the Board becomes aware of impracticable procedures, unforaseen circumstances, or other cogent situations not compatible with the intent of this Ordinance, a Statement of Policy will govern the continuance of the problem area and/or any other projects requiring the application of the same. A Statement of Policy will govern any given situation or peculiar problem area for a period of time not to exceed twelve (12) months.

SECTION 5 - SEVERABILITY AND SEPARABILITY

Should any Article, Section, Subsection or Provision of this Ordinance be found to be or declared invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity or constitutionality of the Ordinance as a whole or any part thereof, other than the portion so declared to be invalid or unconstitutional.

ARTICLE II - DEFINITIONS

Unless specifically defined below, words used in this Ordinance are to be understood in their ordinary sense, except as they may be defined in general by SDCL 2-14.

- ACCESSORY: Incidental to a primary use or structure on the same lot or tract of land.
- APPROACH: That portion of a driveway or private access road located within a public right-of-way between the driving surface of the public road and the boundary of the public right-of-way.
- BOARD: The Board of County Commissioners.
- BUILDING: For the purposes of this Ordinance, the definition of BUILDING is the same as the definition of STRUCTURE as hereinafter defined.
- BUILDING, AGRICULTURAL: Any building used solely for agricultural purposes, such as a barn, livestock shelter, loafing shed, hay storage lean-to, or livestock feeder.
- BUILDING PERMIT: The instrument used by the Planning Department to permit the construction, fabrication, alteration, improvement, storage, destruction or moving of any structure within the procedures and restrictions contained in this Ordinance.
- CLUSTER SUBDIVISION: A residential subdivision with a minimum inclusive area of fifty (50) acres with a common-use area for subdivision residents that encompasses at least fifty percent (50%) of the total subdivision area. The plat of a cluster subdivision shall contain a note stating that the common-use area is not subject to future development except ancillarly subdivision structures and utility or road rights-of-way and that no changes in area, location, or use may be made within the common-use area without prior approval, by resolution, of the Board.
- COMMUNITY WATER SYSTEM: A public water system that serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-four (24) year-round residents.
- DEDICATED PUBLIC RIGHT-OF-WAY: A parcel of land that is conveyed to the public by the notation "DEDICATED PUBLIC RIGHT-OF-WAY" on a recorded plat for use as a public right-of-way.
- DENR: The South Dakota Department of Environment and Natural Resources.

- DUPLEX: A building containing two (2) dwelling units.
- OWELLING: A structure or portion thereof that is used exclusively for human habitation.
- DWELLING, MULTIFAMILY: A building containing three (3) or more dwelling units.
- DWELLING UNIT: One (1) or more rooms, designed, occupied, or intended for occupancy as a separate living quarter, with cooking, sleeping, and sanitary facilities provided within the dwelling unit for the exclusive use of a single family maintaining a household.
- EASEMENT: A grant of one or more of the property rights by the property owner to and/or for use by the public, a corporation, or another person(s) or entity. An easement is self-perpetuating and runs with the land unless otherwise stipulated.
- EASEMENT, CONSERVATION: The grant of a property right stipulating future or additional development.
- FEMA: The Federal Emergency Management Agency.
- GOVERNING BODY: The duly elected officials of a corporate political entity to whom authority is given to make, adopt, revise, and amend ordinances and regulations. Specifically in this Ordinance the Board of County Commissioners.
- GRADING PERMIT: The instrument used by the Planning Department to permit the excavation, grading, or fill of earth or other material within the procedures and regulations contained in this Ordinance. The Grading Permit is intended to regulate: development of residential, public, commercial, and industrial properties; grading of land within or adjacent to FEMA-designated flood hazard areas; and construction of subdivision roads.
- HIGHWAY DEPARTMENT: The Custer County Highway SuperIntendent and/or his/her staff, agents, or assigns.
- HOMEOWNERS ASSOCIATION: An association comprised of homeowners who reside in the subdivision or development or landowners who purchase property in the subdivision or development. The association may assess maintenance or common area fees as set forth in the association by-laws.

IMPROVEMENTS: Changes and additions to land necessary to prepare it for building sites. These include but are not limited to: road paving and curbing, grading, survey monuments, drainage ways, sewers, fire hydrants, water mains, sidewalks, pedestrian ways, and other public works and appurtenances.

LOT: A tract or parcel of land within a subdivision.

LOT AREA: The total level area included within the lot lines.

- MOSILE OR MANUFACTURED HOME: Manufactured structures built on a steel undercarriage with the necessary wheel assembly to be transported to a permanent or semi-permanent site. The wheel assembly can be removed when placed on a permanent foundation, and the steel undercarriage may remain intact if it is a structural component. Manufactured homes must meet Federal Manufactured Home Construction and Safety Standards as outlined in Title VI, Housing and Community Development Act of 1974.
- MOBILE HOME PARK OR COURT: Any parcel of land whereon two (2) or more mobile or manufectured homes as defined herein are placed, located or maintained, or intended to be placed, located or maintained, including all accessory buildings. All land within the park or court shall be held in common ownership, with individual home spaces rented to residents.
- MOBILE HOME SPACE: A plot of ground within a mobile home park or court that is designed as the location for one (1) mobile home and any customary accessory use thereof.
- MOBILE HOME SUBDIVISION: Any parcel of land subdivided as a residential subdivision according to the provisions of this Ordinance, which is intended to be an area where lots are sold to individual mobile home owners.
- MODULAR HOME: A type of manufactured home that will meet most building codes and is subject to standard regional or state building codes for modular construction. A modular home can be transported on a steel undercarriage although the undercarriage is not usually a permanent and necessary or integral structural component and can be removed when the home is placed on a foundation.
- NONCOMMUNITY WATER SYSTEM: A public water system that is not a community water system and regularly serves a transient population of twenty-five (25) or more people each day.

- NONCONFORMING USE: A building, structure or use of land existing at the time of enactment of this Ordinance that does not conform to the regulations herein provided.
- PLANNING COMMISSION: The Planning Commission for Custer County, South Dekote.
- PLANNING DEPARTMENT: The Custer County Planning Director and/or his/her staff, agents, or assigns.
- PLANNING DIRECTOR: The person employed by the Board to coordinate activities between landowners, subdividers, the Planning Commission, other government agencies, and the Board. The Planning Director will also administer other regulatory land development and land use programs.
- PLAT: A map drawn to scale from an accurate survey for the purpose of recording a subdivision of land.
- PLAT, FINAL: A plat that includes all items, certificates and statements as set forth in Article III. Section 8 of this Ordinance.
- PLAT, PRELIMINARY: A plat to be reviewed by the Planning Commission prior to review of a final plat. This plat shall include all items set forth in Article III. Section 5 of this Ordinance.
- PUBLIC RIGHT-OF-WAY: A strip of land defined by right-of-way lines on a plat or easement document that is intended to be occupied by a road, recreation trail, utility line, or other similar use and to be used by the public. Public rights-of-way intended to be occupied by a road shall have a minimum width of sixty-six feet (66').
- PUBLIC ACCESS AND UTILITY EASEMENT: A portion of a parcel of land that is defined by a notation on a recorded plat or easement document as a permanent easement for use as a public right-of-way.
- RECORDED ACCESS: A permanent easement providing legal access to an isolated tract of land.
- RESERVE STRIP: An easement granted to the public for a strip of land to be held in trust until needed for road development or other beneficial public use. The easement may be converted to a Public Access and Utility Easement by resolution of the Board.
- ROADS: Any public or private thoroughfare that affords the principal means of access to abutting property. This term may be used interchangeably with

"street", "roadway", "drive", or "highway". All roads must be within a public right-of-way, excluding Private Access Roads.

- High-Volume Roads Roads of considerable continuity connecting various sections of a community or regions. These roads provide the primary access to subdivisions of land containing more than twentyfive (25) dwelling units.
- Medium-Volume Roads Roads that provide the primary access to subdivisions of land containing six (6) to twenty-five (25) dwelling units.
- Low-Volume Roads Roads that are used or will be used primarily for access to abutting properties containing no more than five (5) dwelling units.
- 4. Private Access Roads Roads that lie within Private Access Easements and provide access into isolated tracts of land where a public right-of-way is deemed not to be necessary by the Board.

ROAD DISTRICT ASSOCIATION: An association of land owners formed under the provisions of SDCL 31-12A, to develop a community or subdivision road district with the Intent and purpose of maintaining the system of roads within the subdivision such that they have the capacity to handle all of the internal traffic and provide adequate ingress and egress to the members of the entire subdivision. The association shall develop rules and by-laws to govern the operation of the association including the election of officers, collection of fees, and the authorization to develop, repair, and maintain all roads within said system. The initial development of all roads within a subdivision is the responsibility of the developer or subdivider. All subdivision roads must meet County Road Specifications as provided by this Ordinance, and be approved by the Highway and Planning Departments.

ROAD, INTERIOR: Any road located within the boundaries of a subdivision.

ROAD SPECIFICATIONS: The required standards to which public roads within Custer County must be constructed.

SANITARY SEWER: A municipal, community, small, or individual sewage disposal system of a type approved by DENR.

SETBACK: The required distance between any structure and any property line on the lot on which it is located.

- SEWER DISTRICT ASSOCIATION: An association of land owners formed to develop a community or subdivision district with the intent and purpose of developing a private sewage system with the capacity to handle the refuse of its members or the entire subdivision. The association shall develop rules and by-laws to govern the operation of the association including the election of officers, collection of fees, and the authorization to develop, repair, and maintain said system. The plans for all sewer district associations shall be submitted to DENR for approval subsequent to any construction or development.
- SPECIFICATIONS: Design standards that have been adopted by the Board.
- STRUCTURE: A combination of materials that form a construction for use, occupancy, or ornamentation whether installed or stored on, above, or below the surface of land or water.
- SUBDIVIDER: The person(s), firm(s), or corporation(s), owning land and in the process of creating a subdivision of said land.
- SUBDIVISION: The creation of any tract or parcel of land by plat or other means into one (1) or more lots, sites, or other creations thereof.
- SUBDIVISION BY CHANGE OF ALIQUOT DESCRIPTION: A subdivision by change of aliquot description is any subdivision of land which will cause the Department of Equalization to change the aliquot description recorded in its property information records.
- SUBDIVISION PRIVATE RIGHTS-OF-WAY: Within a Cluster Subdivision, a strip of land that is defined by right-of-way lines on a plat and is intended to be occupied by a private road, recreation trail, utility line, or other similar use and to be used by subdivision residents, their guests, emergency responders, government employees, utility service employees, and vehicles and/or employees of subdivision service providers. Subdivision Private Rights-of-way shall not be gated or otherwise obstructed and shall be considered the equivalent of public rights-of-way for the platting and subdivision purposes of Ordinance 2. Signage shall be installed, at the developer's expense, at subdivision entrances notifying the public that the subdivision private roads (or trails) are for the use of residents and service vehicles only.
- SUBDIVISION, LOW-DENSITY: A subdivision created by division of land into one (1) or more tract(s), all of which contain five (5) or more acres.
- SUBDIVISION, MEDIUM-DENSITY: A subdivision creeted by division of land into one (1) or more tract(s), of which any lot, tract, or parcel contains two (2) or more acres, but less than five (5) acres.

- SUBDIVISION, HIGH-DENSITY: A subdivision created by division of land into one (1) or more tracts(s), of which any lot, tract, or parcel contains less than two (2), but more than one (1) acre.
- SUPPLEMENTAL MATERIALS: Those plans, reports, narratives, designs, requirements, agreements, covenants, and other materials necessary for the development of a subdivision. These include, but are not limited to, those items listed in Article III. Section 6 of this Ordinance.

USPLSS: United States Public Land Survey System.

- VARIANCE: A specific exception, granted by the Board, to the terms of this Ordinance where such deviation will not be contrary to the public interest and will be granted due to circumstances peculiar to this property. A variance shall not be granted if such issuance violates the intent and spirit of this Ordinance.
- WASTEWATER DISPOSAL PERMIT: The instrument used by the Planning Department to permit construction of an individual or small on-site wastewater system. All systems shall meet the provisions of SDAR 74:53 and Ordinance Number 2.
- WATER DISTRICT ASSOCIATION: An association of land owners formed to develop a community or subdivision district with the intent and purpose of developing a private water carriage system with the capacity to handle the requirements of its members or the entire subdivision. The association shall develop rules and by-laws to govern the operation of the association including election of officers, collection of fees and the authorization to develop, repair, and maintain said system. The plans for all water district associations shall be submitted to DENR for approval prior to any construction or development, as required.

ARTICLE III - PROCEDURE FOR THE SUBDIVISION OF LAND

STATEMENT OF INTENT

It is the intent of the Board that <u>all</u> subdivision of land within Custer County shall be reviewed, either by Access Map Review or by Plat Review, to ensure that the provisions of Ordinance 2, especially the regulations concerning public access and road construction to County Specifications, are uniformly applied to all lands proposed for subdivision.

SECTION 1 - GENERAL REQUIREMENTS

- Plats shall be fited on any parcel that is subdivided into an allquot or nonaliquot part of the USPLSS. However, the Board, upon completion of an Access Map Review per requirements of Section 2 of this Article, may waive the requirement to create and file a plat for subdivision by change of aliquot description. Subdivision by change of aliquot description is not allowed within previously platted parcels or within previously recorded Government Lots, Homestead Entry Surveys (H.E.S.), or Mineral Surveys (M.S.).
- 2. The subdivider is required to install or construct the improvements hereinafter described prior to review of the final plat or access map by the Board. The Board may allow the subdivider to provide a cash or surety bond in lieu of immediate construction of improvements if so recommended by the Planning Commission and the County Highway Department. All improvements required under this Ordinance shall be constructed in accordance with specifications provided by, and under the inspection of, the Highway and Planning Departments.
- All public roads shall be constructed to County Road Specifications. Such road construction will be subject to inspection by the Highway and Planning Departments, during construction and upon completion.
- 4. Maintenance of public roads shall be the responsibility of adjacent landowners unless said maintenance is accepted by the Board. Landowners are encouraged to form a Road District Association as specified in SDCL 31-12A but may petition the Board for acceptance of maintenance by the County as follows:
 - A. This petition shall contain a description of the exact location of the roadway to be maintained by the County.
 - B. A statement shall be included describing the requested maintenance, or improvements the petitioners desire the County to undertake. This statement is to be of sufficient detail to enable the Highway Department and the Board to reasonably determine the likely costs of the proposed action.
 - C. An explanation shall be provided detailing why a Road District Association cannot or should not be formed.
- 5. Private Access Roads are allowed and shall be indicated on plats, easement documents, or access maps within Private Access Easements. Private Access Roads are intended to serve only one (1) residence. The Board may allow a Private Access Road to be shared by two (2) adjoining residences where topography or access restrictions onto Federal, State, or County highways make such sharing necessary. Development of Private Access Roads is not required.

- 6. Storm sewers and drainage structures shall be designed and installed as required by the Highway Department and in accordance with good engineering practice. Culverts shall be designed to withstand the effects of a 25-year, 24-hour rainfall, and may be required to be certified as such by a Professional Engineer. No culvert shall have a diameter of less than eighteen Inches (18").
- 7. All property corners, including the beginning (point of curvature) and ending (point of tangency) of curves along property lines, shall be accurately marked on the ground with a five-eighths inch (5/8") to one and a quarter inch (1½") diameter iron rod at least eighteen inches (18") in length. These bars are to be capped with an aluminum or plastic cap indicating the license number of the surveyor who placed the bar in the ground. Rock monument caps may be used where the corner falls on solid rock.
- The subdivider shall contract with Custer County for the installation of durable road name and traffic signs for all public roads serving the subdivision before the final plat or access map is approved by the Board.
- All required improvements in the subdivision shall be installed under the inspection of the Highway and Planning Departments.
- 10. The Planning Commission may formulate additional written administrative rules that govern the procedure for processing subdivisions. These procedures will outline the responsibility of parties concerned with subdivisions and processing, and they will contain other information necessary to systematize handling and processing.
- Subdivision Review Fees shall be set by the Board.

SECTION 2 - ACCESS MAP REVIEW PROCEDURE

1. The subdivider shall submit a Subdivision Review Application (which consists of a Subdivision Review Application Form, a Subdivision Review Fee, a Statement of Intent, an Access Map, and supplemental materials) to the Planning Department more than three (3) weeks (inclusive) before the next regularly scheduled meeting of the Planning Commission. This submission shall include nine (9) copies of the Access Map, prepared on eight and one-half by eleven inch (8½* x 11*) or larger paper, and nine (9) copies of the Subdivision Review Application Form and any supplemental material. Subdivision Review Fees are due and payable with the Subdivision Review Application.

- 2. Upon official receipt of the Subdivision Review Application, the Planning Department will inform the subdivider of the date, time, and location of the Planning Commission meeting at which the Access Map will be reviewed. The Planning Department shall also mail or provide a copy of the Subdivision Review Application to each Planning Commission meeting. The Planning Department may also solicit comments on the Access Map from County Departments or other agencies before the Planning Commission meeting. The Planning Commission shall review the Subdivision Review Application and approve recommendations to the Board for compliance with this Ordinance at the scheduled meeting.
- The subdivider shall submit with the Subdivision Review Application a Statement of Intent concerning the tract of land to be subdivided in sufficient detail to clearly indicate both present and future purposes of the subdivision, and any subsequent subdivision of land.
- 4. The subdivider shall also submit with the Subdivision Review Application an Access Map that shall be discussed with the Planning Department and the Planning Commission in order to establish the requirements of Ordinance Number 2 which will influence the design of the subdivision. The Access Map is not intended to represent a property survey by a Registered Land Surveyor. The Access Map is intended to graphically represent the intent of the subdivider by showing the locations, with sufficient estimated dimensions to convey the intent of the subdivider, of existing and proposed property lines and public and private roads. The Planning Commission may require the submission of supplemental materials as described in Section 4 of this Article.
- 5. The Board shall review Subdivision Review Applications of proposed subdivisions by change of aliquot description and consider the Planning Commission's recommended conditions of approval of the subdivision. The Board may waive the requirements for Plat Review and plat filling for the subdivision if it finds that, the Access Map is adequate for review purposes; the public roads serving the subdivision meet County Road Specifications and the requirements of Paragraph 3 of Section 4 of this Article (or the subdivider has provided a cash or surety bond in lieu of immediate construction as recommended by the Highway and Planning Departments); the subdivider has entered into contracts with Custer County for installation of road name end traffic signs for all public roads serving the subdivision and; Public Access and Utility Easements have been recorded with the Register of Deeds for all public roads serving the subdivision.

SECTION 3 - PLAT REVIEW PROCEDURE

- The subdivider shall discuss subdivision plans and intent with the Planning Department to determine applicable Custer County Ordinance Number 2 plat and subdivision requirements.
- The subdivider may submit a sketch plan to the Planning Department for Administrative Review in the following manner:
 - A. The subdivider shall submit a sketch plan to the Planning Department more than three (3) weeks (inclusive) before the next regularly scheduled meeting of the Planning Commission. This submission shall consist of nine (9) copies of: a Subdivision Review Application Form; a statement of intent concerning the tract of land to be subdivided in sufficient detail to clearly indicate both present and future purposes of the subdivision, and any subsequent subdivision of land; and a sketch map of the proposed subdivision. A Subdivision Review Fee shall not be charged for this Administrative Review.
 - B. The subdivider shall be present to discuss the sketch plan with the Planning Commission in order to establish the requirements of Ordinance Number 2 which will influence the design of the subdivision for the creation of the preliminary plat. The subdivider may request review of the sketch plan and Planning Commission requirements by the Board.
- 3. The subdivider shall submit a Subdivision Review Application (which consists of a Subdivision Review Application Form, a Subdivision Review Fee, the preliminary plat, and supplemental materials) to the Planning Department more than three (3) weeks (inclusive) before the next regularly scheduled meeting of the Planning Commission. This submission shall consist of ten (10) copies of the preliminary plat, prepared on fifteen by twenty-six inch (15" x 26") paper, and ten (10) copies of the Subdivision Review Application Form and any supplemental material. Subdivision Review Fees are due and payable with the Subdivision Review Application.
- 4. Upon official receipt of the Subdivision Review Application, the Planning Department will inform the subdivider of the date, time, and location of the Planning Commission meeting at which the preliminary plat will be presented. The Planning Department shall also mail or provide a copy of the preliminary plat to each Planning Commission member for review and comment before the Planning Commission meeting. The Planning Department, may also solicit comments on the preliminary plat from County Departments or other agencies before the Planning Commission meeting. The Planning Commission shall review the preliminary plat for compliance with this Ordinance at the scheduled meeting.

- 5. The Planning Commission shall have a maximum of thirty (30) days following the presentation of the preliminary plat at a regular Planning Commission meeting, unless otherwise agreed to by the subdivider, in which to review the preliminary plat and to approve, approve with conditions, or disapprove the preliminary plat. The Planning Commission decision on the preliminary plat may be appealed to the Board.
- 6. Approval by the Planning Commission of a preliminary plat shall be effective for three (3) years from the date of approval. An extension(s) beyond three (3) years, for a period not to exceed one (1) year, may be granted upon agreement between the Planning Commission and the subdivider. Approval of extensions may reflect changes to Ordinance 2.
- 7. Following approval of the preliminary plat by the Planning Commission, the subdivider may proceed with the construction of roads and installation of other indicated improvements. The subdivider may request that the final plat be immediately considered for review by the Planning Commission.
- 8. Alternately, the subdivider may, upon Inspection and approval of roads and other indicated improvements by the Highway and Planning Departments, submit a final plat to the Planning Department more than three (3) weeks (inclusive) before the next regularly scheduled meeting of the Planning Commission. This submission shall consist of ten (10) copies of the final plat prepared on fifteen by twenty-six inch (15" x 26") paper.
- Upon official receipt of the final plat, the Planning Department will inform the subdivider of the date, time, and location of the Planning Commission meeting at which the plat will be presented.
- 10. Upon presentation of the final plat at a regular meeting, the Planning Commission shall have a maximum of thirty (30) days in which to review, prepare, and submit its recommendation, along with the plat, to the Board, provided however, that the subdivider may agree to an extension(s) not to exceed thirty (30) days.
- 11. The subdivider shall submit the mylar original and six (6) paper copies of the final plat to the Planning Department more than six (6) days (inclusive) before the next regularly scheduled meeting of the Board. The final plat, when submitted, shall include corrections required by the Planning Commission and the signatures of the owner(s), the surveyor, the appropriate highway authority(s), and the County Treasurer.
- The Board shall have a maximum of thirty (30) days after receipt of the final plat, unless otherwise agreed to by the subdivider, in which to review

- the final plat and to approve, approve with conditions, table, or disapprove the final plat.
- 13. The Planning Department shall submit the mytar original of the approved final plat to the office of the Register of Deeds to be recorded within fifteen (15) days after approval by the Board or such approval shall become void.
- 14. The Planning Department shall not approve building, grading, or wastewater disposal permits within the newly-platted subdivision until the Board has approved the final plat of the subdivision and the Custer County Register of Deeds has recorded the approved final plat.

SECTION 4 -- INFORMATION REQUIRED FOR PRELIMINARY PLAT REVIEW

The subdivider shall submit the following information to the Planning Department with the Subdivision Review Application:

- A preliminary plat indicating the layout of all property lines, lots, roads, easements, watercourses, parks, and open spaces. This plat should show its relation to any surrounding development, including property lines, roads, and recorded utility easements or visible utilities.
- 2. If any portion of the platted area falls within any area of special flood hazard as identified by FEMA, a note shall be placed on the plat which states "Flood Insurance Rate Map Panel 460018 ***** with an effective date of **/**/** indicates the presence of a flood hazard area within the subdivision area represented on this plat."
- 3. If the proposed subdivision does not adjoin an existing county, state, or federal highway, the developer must provide evidence to the Planning Department that a road that meets current County Road Specifications exists within a public right-of-way that connects the proposed subdivision with such a highway. This requirement does not apply to subdivisions where no new lots are being created (i.e. lot line adjustments or lot consolidations). If a Road District Association governs the connecting road, then the developer shall petition said Association to add all land within the proposed subdivision to the District or enter into a road maintenance agreement with that Road District Association.

The following supplemental materials may be required at the request of the Planning Commission or the Board:

NARRATIVE ON THE INTENDED DEVELOPMENT.

The narrative will describe the nature of the intended development, its integration into surrounding development, and its impact on the community. Any contemplated future development shall be included.

ROADWAY DESIGN PLANS.

When requested, all public roads are to be designed under the direction of a Professional Engineer and his/her seal shall be affixed to all drawings as stipulated in SDCL 36-18-27.1. The design plans shall include the following:

- A. Plan and profile drawings are to be prepared for all proposed public roadways within the subdivision.
- B. The plan view shall indicate stationing, centerline, the location of drainage structures, guardrails, signage, horizontal curve data, superelevation, road right-of-way, benchmarks, horizontal control points, north point, property owners, and other significant features.
- C. The profile view shall indicate the existing centerline grade, the finish centerline grade, the exact location and elevation of all vertical curves, the location of drainage structures, and the estimated emount of cut and fill.
- D. Cross-sections are to be drawn at every full station and every major break in grade. They are to show existing and finish ground lines. Cross-sections are to be drawn at all points where a drainage structure crosses the road. The drainage structure is to be shown.

BRIDGE PLANS

Bridges are to be designed by a Professional Engineer.

PLANS FOR PROPOSED WATER AND SEWER SYSTEMS.

Plans for any proposed water and sewer systems indicating points of connection with existing public systems. If existing systems are not available, reports by a Professional Engineer may be requested that indicate, based on available information, the suitability of the soil to accommodate individual and small on-site wastewater systems.

 ENGINEERS REPORT ON PRIVATE WATER SYSTEMS, SEWER SYSTEMS, AND SIGNIFICANT HYDROLOGIC PROBLEMS

STORM DRAINAGE PLAN.

The storm drainage plan shall be made under the direction of a Professional Engineer. Storm drainage structures are to be designed to withstand the effects of a 25-year, 24-hour rainfall. This plan shall contain the following information:

- A. The location of all proposed drainage ways, streams, and pends within the subdivision.
- B. The location and size of proposed and existing drainage structures, including culverts, bridges, pipes, and drop inlets.
- C. The area of land contributing runoff to each drainage structure.
- The location of easements, rights-of-way, and maintenance access for all drainages.
- E. The direction of water flow throughout the subdivision.
- F. With prior approval of the Planning Department, the drainage plan may be combined with the roadway design plan.
- G. A more detailed drainage plan may be required by the Planning Commission.

SUPPLEMENTAL DATA

If the property involves areas where the soil characteristics, terrain, drainage, geology, ground cover, or location imposes unusual requirements, the Planning Commission may request supplementary data to demonstrate the feasibility of subdividing the land.

SECTION 5 - CONTENT OF PRELIMINARY PLATS

The following information shall be shown on all prefiminary plats:

1. TITLE

Plat titles are to be broken into two parts, a primary title and a secondary title. The primary title shall be the subdivision name and shall comply with Article 4, Section 6 of this Ordinance. The secondary title shall state the names or numbers of the newly created lots of the subdivision and the subdivision name, state the legal parcel(s) from which these lots are taken, and describe the location of the lots being created. If reference is made to an existing plat of record, the book and page number of the plat is to be cited in a note on the plat.

VICINITY MAP

The vicinity map shall show the boundary of the subdivision and the location of internal roads with their relation to external roads. The internal roads shall be drawn with "double lines". Scope and size of the vicinity map shall be approved by the Planning Commission.

NORTH ARROW, BAR SCALE, AND LEGEND.

4. EASEMENTS:

The location of boundary lines for all new, known, and recorded easements shall be shown or indicated. The purpose of the easement shall be indicated.

PUBLIC LAND

The location and dimension of land to be dedicated or reserved for public rights-of-way, parks, open space, or other public use shall be shown. No private roads shall be platted within a subdivision, and no reserve strips shall be platted, except where their control is vested in the Board. Rights-of-way for County-maintained roads shall be drawn and noted on the plat as DEDICATED PUBLIC RIGHT-OF-WAY.

TRACTS

The name of each tract shall be clearly indicated and the exact length and bearing of all property lines shall be shown. Distance units are to be in feet to two (2) decimal places and bearings are to be shown to the nearest second. The erea of the tract shall be shown in acres to at least two (2) decimal places. Tract names shall be subject to the approval of the Planning Commission.

LOTS AND BLOCKS.

Lot and block numbers shall clearly identify each parcel of land. The exact length and bearing of all lot and block lines shall be shown. Distance units are to be in feet to two (2) decimal places and bearings are to be shown to the nearest second. Numbering shall be subject to the approval of the Planning Commission.

ROADS

The plat shall contain the following information:

- A. The location of all existing and proposed road rights-of-way within and adjacent to the subdivision.
- The widths of all existing and proposed rights-of-way.
- C. The names of all public roads shown on the plat. New road names are subject to approval by the Planning Commission.

SECTION 6 - CONTENT OF FINAL PLATS

The following information is required on all final plats.

- 1. The original final plat shall be drawn in waterproof black ink upon mylar. The size of the mylar shall be fifteen by twenty-six inches (15" x 26").
- The title shall be the same as that approved for the preliminary plat.
- The final plat shall show the following:
 - A. The exact location of the exterior boundary lines of the subdivision and all parcels within the subdivision. The exterior boundary is to be the same as that approved on the preliminary plat.
 - B. All property comers are to be identified with a symbol and legend designating the type of monument. This legend shall also indicate the registration number of the surveyor who set the monument, if known or available.
 - C. The length and radius of all curves along boundary lines are to be indicated. The point of curvature (PC) and the point of tangency (PT) are to be shown. These points are property corners and are to be monumented as such.
 - D. All section lines, section comers, and quarter comers are to be shown if surveyed, and a description of the corner monuments included.
 - E. The titles of adjoining subdivisions. These are to be ghost lines.
 - F. The names of former subdivisions, parcels, and tracts that are being subdivided. These are to be shown as ghost lines.
 - G. The exact location of the boundary lines and widths of all public rightsof-way, reservations, easements, and areas dedicated to public use.
 - H. All public rights-of-way shall be designated as either "DEDICATED PUBLIC RIGHT-OF-WAY" or "PUBLIC ACCESS AND UTILITY EASEMENT".
 - All dimensions are to be shown in feet and decimals of a foot to two (2) decimal places.
 - Alt bearings are to be shown to the nearest second.
 - K. The acreage of every new parcel is to be shown to at least two (2) decimal places.
 - True north is to be indicated with a north arrow.

- M. A bar scale shall be included.
- N. Each tract shall be named, and each lot and block shall be numbered.
- O. The primary title shall be the name of the subdivision. The secondary title shall be a complete legal description of the subdivision.
- P. A vicinity map.
- Q. All public roads shall be named. The Planning Commission will accept or reject proposed road names.
- R. Floodplain Note (if FEMA-defined flood hazard area is present within the subdivision): Flood insurance Rate Map Panel 460018 ***** with an effective date of **/**/** indicates the presence of a flood hazard area within the subdivision area represented on this plat.
- S. Water Protection Note: Pursuant to SDCL 11-3-8.1 and 11-3-8.2, the developer of the property described within this plat shall be responsible for protecting any waters of the state, including groundwater, located adjacent to or within such platted area from pollution from sewage from such subdivision and shall in prosecution of such protections conform to and follow all regulations of the South Dakota Department of Environment and Natural Resources relating to the same.
- T. Utility Easement Note: A 20' wide utility easement shall exist centered on all subdivision lot lines not adjacent to public rights-of-way or unplatted land and on the interior side of lot lines that border land that has not been subdivided, unless other suitable utility easements have been shown.
- The following certifications and signatures shall appear on all final plats:
 - A. Every plat shall be certified by the landowner, or his duly authorized agent, as having been made at his request and under his direction for the purposes indicated therein, that he is the owner of all the land included therein, and that the development of this land shall conform to all existing applicable zoning, subdivision, and arosion and sediment control regulations. This certification shall be acknowledged before some officer authorized to take acknowledgment of deeds, and this acknowledgment shall be endorsed on the plat.
 - 8. Every plat shall be certified by the registered land surveyor who actually performed the survey or had the survey performed under his/her direct supervision. His/her official seal shall be affixed thereto as specified in SDCL 36-18-27.1 as being in all respects correct.
 - C. Every plat shall bear a certificate of the County Treasurer that all taxes that are liens upon any land included within the plat, as shown by the records of his/her office, have been fully paid.
 - D. Every plat shall bear a certificate of the appropriate highway or road authority(s) that it appears that every lot has an acceptable approach location onto a public road and the location of the intersection(s) of the proposed subdivision road(s) with the existing public road(s) is hereby approved.

- E. Every plat shall bear a certificate of the County Director of Equalization that he/she has received a copy of such plat.
- F. Every plat shall bear a copy of the resolution of the Board, and this resolution shall state that:

WHEREAS there has been presented to the County Commissioners of Custer County, South Dakota, the within plat of the above described lands, and it appearing to this Board that:

- a. the system of roads conforms to the system of roads of existing plats and section lines of the county,
- adequate provision is made for access to adjacent unplatted lands by public dedication or section line when physically accessible,
- all provisions of the County subdivision regulations have been compiled with,
- d. all taxes and special assessments upon the property have been fully paid, and
- e. the plat and survey have been lawfully executed,

NOW THEREFORE, BE IT RESOLVED that said plat is hereby approved in all respects."

This resolution shall be signed and dated by the Chairperson of the Board and certified by the County Auditor.

- G. Every plat shall beer a certificate of the County Register of Deeds indicating the date and time of recording. This certification shall also indicate the location of filing by plat book and page number.
- 5. The plat preparer shall submit to the Planning Department an electronic copy of the final plat map that is directly importable into ArcView 9.x. The electronic copy shall include a complete layout of the subdivision, including Lot and Block numbers, street names, right-of-way and easement width dimensions, and all lot lines with length and bearing data. The electronic copy shall not include the certification and signature section of the plat. The electronic copy shall be submitted with the final plat and be subject to review and approval by the Planning Department. The Planning Department may accept media, content, and format of data that does not meet the above standards.

ARTICLE IV - DESIGN STANDARDS FOR RESIDENTIAL SUBDIVISIONS

<u>SECTION 1 – CONFORMITY TO CUSTER COUNTY ORDINANCE #2</u>

- All proposed residential subdivisions shall conform to Custer County Ordinance #2
- 2. Residential developments are those that are intended for dwelling purposes. Individual mobile homes are permitted in residential subdivisions and are subject to the same building and lot requirements as other residential dwellings. The following requirements are established to provide for orderly development of residential uses of various types along with accessory uses and structures in a pleasant and stable manner.
- Densities established by Ordinance #2 shall be observed by the subdivider.
- The following activities are permitted under this Section:
 - A. single family dwellings;
 - 8. duplexes:
 - C. Individual mobile homes;
 - D. home occupations and home professional offices; and
 - E. accessory uses and structures normally appurtenant to residential uses and structures.
- Building and Grading Permits are required for new residential and accessory structures constructed in Custer County.
- No more than two (2) dwelling units shall be allowed on any lot, tract or parcel. Each dwelling unit is required to have a separate wastewater disposal system.
- Building and Lot Requirements:
 - A. In no case shall a lot be less than one (1) acre (43,560 square feet) in size.
 - B. The minimum distance between any structure and a public road rightof-way boundary shall be thirty feet (30').
 - C. The minimum distance between any structure and any property line other than a right-of-way shall be fifteen feet (15').
- All sites for parks, schools and other public facilities shown on plats and located within the proposed subdivision shall be dedicated to Custer County or the Independent School District Board, subject to their consent.
- Any improvements the owner proposes to make outside the boundaries of the proposed subdivision, pursuant to the development of the subdivision, shall be submitted to the Planning Commission, in writing, with the preliminary plat. These improvements shall relate to roads, drainage.

utilities, and other improvements necessary to permit development within the subdivision.

SECTION 2 - LOW-DENSITY SUBDIVISIONS

- All public roads shall be constructed to County Road Specifications. Such
 construction will be subject to inspection by both the Highway and
 Planning Departments during construction and upon completion.
- Private Access Easements are allowed and may be indicated on the plat.
 Private Access Roads may serve only one (1) parcel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.
- Development of all required improvements shall be the responsibility of the subdivider.
- Central water systems are not required.
- Central sewer systems are not required. The Planning Commission may request that the subdivider provide further evidence prepared by a competent professional that the subject land is capable of accommodating any proposed wastewater disposal system without causing pollution.

SECTION 3 - MEDIUM-DENSITY SUBDIVISIONS

- All public roads shall be constructed to County Road Specifications. Such construction will be subject to inspection by both the Highway and Planning Departments during construction and upon completion.
- Private Access Easements are allowed and may be indicated on the plat.
 Private Access Roads may serve only one (1) parcel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.
- Development of all required improvements shall be the responsibility of the subdivider.
- 4. Medium-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, shall have an acceptable water supply and distribution plan. All plans for water supply and distribution are the responsibility of the subdivider and will conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include private wells.

5. Medium-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, shall have an acceptable plan for disposal of wastewater. All plans for wastewater disposal are the responsibility of the subdivider and shall conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include individual septic systems, however, the Planning Commission may request that the subdivider provide further evidence prepared by a competent professional that the subject land is capable of accommodating the proposed individual sewer systems(s) without causing pollution.

SECTION 4 - HIGH-DENSITY SUBDIVISIONS

- All public roads shall be constructed to County Road Specifications. Such
 construction will be subject to inspection by both the Highway and
 Planning Departments during construction and upon completion.
- Private Access Easements are allowed and may be indicated on the plat.
 Private Access Roads may serve only one (1) percel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.
- Development of all required improvements shall be the responsibility of the subdivider.
- 4. The water system within the subdivision shall be connected to a public water system where the said system is within one-half (½) mile of the subdivision, except where restricted by the Municipality or limited by lopography.
- 5. High-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, and not located within one-half (½) mile of a public water system, or which cannot be connected to the public water system, shall have an acceptable water supply and distribution plan. All plans for water are the responsibility of the developer and/or subdivider and will conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include private wells.
- 6. The sewer system within the subdivision shall be connected to a public sewer system where said system is within one-half (½) mile of the subdivision, except where restricted by the Municipality or limited by topography.

7. High-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, and not located within one-half (½) mile of a public sanitary sewer system, or which cannot be connected to a public sanitary sewer system, shall have an acceptable wastewater disposal plan. All plans for wastewater disposal are the responsibility of the subdivider and shall conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include Individual septic systems, however, the Planning Commission may request that the subdivider provide further evidence prepared by a competent professional that the subject land is capable of accommodating the proposed individual sewer systems(s) without causing pollution.

SECTION 5 - ROAD REQUIREMENTS

- The Planning Commission and Highway Department shall recommend to the Board the classification of public roads as High-, Medium-, or Low-Volume Roads.
- All public roads within Custer County shall comply with County Road Specifications adopted by the Board.
- 3. A Grading Permit Application must be reviewed and approved by the Highway Department before construction is begun on the approach connecting any private access road or driveway to a public road. Building permits, wastewater disposal permits, or 9-1-1 addresses shall not be issued until said Application is approved.

SECTION 6 - NAMES

- All subdivisions and roads shall be named.
- Subdivision names shall not duplicate or otherwise be confused with the names of existing subdivisions. Subdivision names are subject to approval by the Planning Commission.
- No road name shall be used which will duplicate by spelling or sound or may otherwise be confused with the names of existing roads. All road names are subject to approval by the Planning Commission.

<u>SECTION 7 - UTILITY AND DRAINAGE EASEMENTS</u>

- Easements are to be provided across lots, or adjacent to public rights-ofway, or centered on rear or side lot lines for utilities or drainage where necessary.
- Utility easements shall not be less than twenty feet (20') in width unless
 otherwise approved by the Planning Commission.
- 3. A twenty-foot-wide (20') utility easement shall be provided centered on all subdivision lot lines not adjacent to public rights-of-way or unplatted land and on the interior side of lot lines that border land that has not been subdivided, unless other suitable utility easements have been shown.
- 4. Where a subdivision is traversed by a water course, drainage way or stream, a drainage easement or right-of-way may be required that conforms substantially to the channel banks of such existing or planned drainage way.

<u> ŞECTION 8 -- DRAINAGE PLANS</u>

- The Planning Commission may require a drainage plan for any proposed subdivision. Adequate provision shall be made within each subdivision to provide for needed drainage facilities, and these provisions shall account for the ultimate development within the tributary area.
- A storm sewer plan shall be prepared prior to other utility plans. These
 plans shall give preferential engineering considerations to gravity flow
 improvements.
- Off-premise drainage easements and improvements shall be designed to provide for subdivision runoff into a natural channel.
- 4. Low areas subject to periodic inundation or that fall within an area of special flood hazard as identified by FEMA, shall not be developed until evidence is provided to the Planning Commission that:
 - A. The nature of the land use will not impede surface water runoff and that the land will not be subject to appreciable damage by inundation.
 - B. The area may be filled or improved in such a manner as to prevent such periodic inundation, provided that such fill does not retard the flow of surface waters or result in the increase of water level endangering life and property of others.
 - C. Lowest floor elevations will be established to prevent damage to any structures. (See Ordinance #6, Revised — FLOOD DAMAGE PREVENTION ORDINANCE).

 The Planning Commission may require additional engineering information if they deem it necessary to make decisions regarding areas of questionable drainage.

ARTICLE V - NON-RESIDENTIAL SUBDIVISIONS

SECTION 1 - COMMERCIAL SUBDIVISIONS

- All proposed Commercial Subdivisions shall conform to Custer County Ordinance #2.
- Commercial developments consist of retail, wholesale and service businesses. Non-industrial activities that are incompatible with agricultural and residential developments may be created using the following commercial development requirements. These requirements are established to provide for the orderly, harmonious and safe development of commercial enterprises in the County.
- The following activities with accompanying structures are permitted under this section:
 - A. agricultural uses,
 - B. multi-family residential uses,
 - C. wholesale or retail distribution of goods.
 - D. business or personal services,
 - E. educational and religious services,
 - F. recreational and amusement services.
 - G. medical and health services.
 - veterinarian services (including animal boarding),
 - the provision of food and drink.
 - J. overnight lodging,
 - K. utilities (including water, electric, heating gas and oil, etc.),
 - warehouse and storage except for salvage or junk, and
 - M. communications towers.
- Other uses require approval by the Board. The Board may require public hearings regarding any other use.
- Building and Grading Permits are required for any new commercial buildings constructed in Custer County.
- Building and Lot Requirements:
 - A. For each major use, and buildings accessory thereto, there shall be a lot area of not less than one (1) acre (43,560 square feet).

- No lot shall have a width of less than one hundred feet (100') between any two side lines.
- C. The minknum distance between any structure and a right-of-way boundary line shall be thirty feet (30').
- D. The minimum distance between any structure and any property line other than a right-of-way shall be fifteen feet (15').
- E. The Planning Department and appropriate state agencies must approve a wastewater disposal system.
- F. The Board may require: the installation of fancing or screening plantings; lighting of roadways, driveways, and pedestrian walkways; off-street parking sufficient to serve the major use; and other improvements that it deems necessary for the safe and orderly development of the property.
- 7. All public roads shall be designed, constructed, and maintained to County Road Specifications. Such construction and maintenance shall be subject to inspection by both the Highway and Planning Departments during construction and upon completion. Any public road that does not meet the above minimum standards shall not be approved for use.

SECTION 2 - INDUSTRIAL SUBDIVISIONS

- All proposed Industrial Subdivisions shall conform to Custer County Ordinance #2.
- Industrial developments are businesses that construct, manufacture, fabricate, salvage, transport, mine, or mill products or raw materials. Activities that are incompatible with agricultural, residential or commercial developments may be created using the following industrial development requirements. These requirements are established to protect other nearby activities from undesirable conditions.
- Uses along with accompanying structures for agricultural, residential, and commercial developments are permitted within an industrial development. Industrial uses and structures require the approval of the Board.
- The Board may require public hearings for the establishment of, or any other use within an industrial development.
- Building and Greding Permits are required for any new industrial building constructed in Custer County.
- Building and Lot Requirements:
 - A. For each major use, and buildings accessory thereto, there shall be a lot area of not less than one (1) acre (43,560 square feet).

- B. No lot shall have a width of less than two hundred feet (200') between any two side lines.
- C. The minimum distance between any structure and a public right-of-way boundary line shall be fifty feet (50°).
- D. The minimum distance between any structure and any property line other than a public right-of-way shall be twenty-five (set (25')).
- E. The Planning Department and appropriate state agencies must approve a wastewater disposal system.
- F. The Board may require: the installation of fencing or screening plantings; lighting of roadways, driveways, and pedestrian walkways; off-street parking sufficient to serve the major use; and other improvements that it deems necessary for the safe and orderly development of the property.
- 7. All public roads shall be designed, constructed, and maintained to County Road Specifications. Such construction and maintenance shall be subject to inspection by both the Highway and Planning Departments during construction and upon completion. Any public road that does not meet the above minimum standards shall not be approved for use.

ARTICLE VI - SECTION-LINE HIGHWAYS

Any resident or landowner within Custer County desiring to have a section-line highway developed or improved must petition the Board to that end. Petitions filed under this ordinance shall contain the following:

- A statement describing the exact location of the section-line highway within Custer County.
- A statement describing the requested maintenance, improvement or construction the petitioner desires the County to undertake. This statement is to be of sufficient detail to enable the County Highway Department and the Board to reasonably determine the likely cost of the proposed action.
- An indication of the proposed allocation of costs between the County and the residents or landowners affected by the action.
- 4. A statement by the petitioner(s) indicating whether or not they will post a performance bond, or, in the alternative, what other assurance of adequate performance they can give the Board.
- A scale drawing sufficiently detailed to provide necessary information to assist the Board in the formulation of their response to the petition.

ARTICLE VII - MOBILE HOME PARKS OR COURTS

All mobile home courts in Custer County are classified as Commercial Subdivisions, and they must meet Commercial Subdivision requirements as established by Ordinance #2.

- A mobile home court shall contain not less than six thousand five hundred (6,500) square feet of lot area for each mobile home space.
- A mobile home court plan shall be approved by the Planning Commission.
- The following improvements shall be provided and shown on the mobile home court plan:
 - A. Common recreation space shall be provided at the rate of four hundred (400) square feet of space per mobile home, but in no case shall the common recreation area space be less than four thousand (4,000) square feet.
 - B. Proposed fencing and screen planting.
 - Provisions for the removal of trash and garbage.
 - D. Utility easements and service connections.
 - E. Provisions for the lighting of roadways, driveways, and pedestrian walkways.
 - F. Water availability and quantity must be approved by the appropriate state departments, including DENR, the Department of Commerce, and the South Dakota Department of Health, or the Division of Health Protection.
 - G. A central water system (required).
 - H. A wastewater disposal system approved by the Planning Department and the appropriate state agency. Individual septic tanks and drainfields are not allowed.
 - Graveled off-road parking for each lot adequate to accommodate two:

 (2) vehicles.
- Mobile Home Courts shall not be used for transient or overnight camping purposes.
- Compliance is required with all ordinances and regulations regarding health, plumbing, electrical, building, stormwater discharge, fire prevention and all other applicable ordinances and regulations.
- Any addition or expansion of existing facilities shall be required to meet current standards and receive approval from all appropriate agencies. All improvements must comply with the current requirements of this Ordinance.

ARTICLE VIII - WASTEWATER DISPOSAL SYSTEMS.

- Only persons certified under ARSO 74:53:02 may install or repair individual and small on-site wastewater systems in Custer County. These persons shall be known as certified installers
- Percolation tests shall be performed by a certified installer.
- All wastewater disposal systems shall be designed, installed, and maintained in accordance with the minimum requirements set forth in ARSD 74:53:01 and Article VIII of this Ordinance.
- 4. A site evaluation shall be performed by a Planning Department representative prior to excavation for the installation of a westewater disposal system. This evaluation shall consist of the following:
 - A. A visit to the site must be made by the landowner, or his/her designee, with a representative of the Planning Department. A proposed location for the system shall be determined at this time.
 - B. An eight-foot (8') deep hole shall be dug on the proposed drainfield site. The Planning Department representative shall inspect this hole for indications of soil depth sufficient to allow for the installation of an absorption system. If the water table or geology is suspect, this hole shall sit in an undisturbed state for 24 hours prior to the inspection.
 - C. A percolation test shall be performed on the site by a certified installer in accordance with ARSD 74:53:01:30. Test results shall be annotated on a report filed with the Planning Department.
- 5. Results of the site evaluation are to be reviewed by the Planning Department. The proposed wastewater disposal system will be sized based upon this evaluation and in accordance with ARSD 74:53:01. A Wastewater Disposal Permit shall not be issued until the minimum requirements for the proposed system are approved by the Planning Department.
- 6. The Planning Department shall inspect the installation of all wastewater disposal systems. This inspection shall occur before any part of the wastewater disposal system is covered. This inspection shall ensure that the wastewater disposal system is installed and assembled to the following minimum standards:
 - A. The minimum installation standards required by ARSD 74:53.
 - Schedule 40 PVC pipe shall be installed for the first six feet (6') of the lines entering and exiting the septic tank.

- C. Schedule 40 PVC, or stronger, pipe shall be installed as a sleeve over the portion of sewer connection lines that lie under roads, private access roads, paths, or other areas of high soil compaction.
- D. A cleanout pipe shall be installed in the sewer line connecting the residence to the septic tank. This cleanout shall be at least thirty inches (30") away from the exterior wall of the dwelling foundation and shall have a removable, aboveground cap.
- E. A continuous tracer wire shall be installed along all wastewater disposal system components beginning at the exterior wall of the dwelling foundation.
- F. The installer of any wastewater disposal system that is incorrectly or incompletely installed at the time of the inspection and requires an additional inspection trip by the inspector shall pay a Failed Inspection Fee to the Planning Department before the Planning Department approves the system for use.

Any wastewater disposal system that does not meet the above minimum standards shall not be approved for use by the Planning Department. Wastewater disposal systems that are not approved for use by the Planning Department shall not be allowed to operate within Custer County.

- 7. All inspection reports shall include a sketch of the entire septic system. This sketch shall indicate the location of laterals, the drainfield, seepage bed, and septic tank. Distances, in feet, shall be shown from the septic system to significant monuments or important features. These include, but are not limited to; the location from the house, distance from on-site wells or cisterns, distances from rights-of-way, and distance from roads, driveways, utilities, and property lines.
- Percolation and inspection reports shall be kept on file by the Planning Department.

ARTICLE IX - BUILDING, GRADING, AND WASTEWATER DISPOSAL PERMITS

- 1. Wastewater Disposal Permits are required in Custer County prior to the installation of any individual and small on-site wastewater system. Wastewater Disposal Permits shall not be issued by the Planning Department until percolation test results (which shall be submitted on a form approved by the Planning Department and signed by a certified installer) have been received by the Planning Department.
- Wastewater Disposal Permits are required in Custer County prior to the replacement of any portion of an existing individual and small on-site wastewater system.

- 3. Approved Grading Permits are required in Custer County before commencement of clearing, filling, or grading of: an aggregate total per parcel of one or more acres of land for non-agricultural or non-gardening purposes; approaches; previously undisturbed or undeveloped parcels of land for residential, public, commercial, or industrial uses; land within or adjacent to FEMA-designated flood hazard areas or; land for construction of subdivision roads. Grading Permits are not required for clearing, filling, or grading of land for agricultural (including logging) or gardening purposes or for previously disturbed or developed land for expansion of existing residential, public, commercial, or industrial uses of less than one (1) acre that are located outside of FEMA-designated flood hazard areas.
- 4. Grading Permit Applications shall be accompanied by a site plan map that indicates the extent and areas to be cleared, filled, or excavated. Said map shall convey the location of any existing or proposed: approach; structure; well; cistern; septic tank; absorption field; utility line; driveway; parking area; road; flood hazard boundary; stream or drainage way; water body; rock outcrop; and property line. The estimated total area to be disturbed shall be noted on said map.
- 5. Building Permits are required in Custer County for any of the following:
 - A. construction of all new structures except: appurtenances attached to residential structures (such as decks, porches, or window awnings); storage buildings smaller than one hundred and sixty square feet (160 sq. ft.); canopy-type carports and; agricultural structures smaller than three hundred square feet (300 sq. ft.).
 - B. additions made to any structure.
 - C. buildings that are to be moved from one parcel to another.
 - D. buildings that are to be demolished or removed from the property.
 - E. mobile homes that are to be located within the County, moved from one location to another within the County, or moved out of the County.
 - F. construction or installation of communications towers and other unoccupied structures.
- 6. Building Permits are not required for: remodeling or normal maintenance of existing buildings, or for repair to facilitate such maintenance, provided the area of the structure is not being enlarged; installation of fences, corrals, or similar livestock enclosures; installation of swings or other playground equipment or; finish work such as painting, papering, tilling, carpeting, or cabinetry. Fire or storm damage repair does not require a Building Permit provided the structure is not being enlarged or additions made thereon. A Building Permit for such damage repair is required if the structure is located within an established flood hazard area or the structure is a non-conforming structure under this Ordinance.

- All construction shall conform to South Dakota codes and regulations including, but not limited to, individual and small on-site wastewater systems, stormwater discharge, plumbing, electrical, and standard building codes.
- Building, Grading, and Wastewater Disposal Permits shall only be issued
 to the owner of the property or his/her designated agent or the holder of a
 contract for deed for the property.
- If the work described in any Building, Grading, or Wastewater Disposal Permit has not begun within six (6) months from the date of issuance thereof, said permit shall expire.
- 10. If the work described in any Building, Grading, or Wastewater Disposal Permit has not been substantially completed within one (1) year of the date of issuance thereof, said Permit shall expire. Notice shall be given to persons affected that further work as described in the expired Permit shall not proceed unless and until an extension has been obtained.
- All structures will in general comply with sound engineering and safety regulations normally required by standard building codes.
- There are no exceptions for Building, Grading, or Wastewater Disposal Permits.
- 13. Building, Grading, and Wastewater Disposal Permits shall not be issued for construction on any land in Custer County that has no evident legal access or that fails to conform to the requirements of this Ordinanca.
- Subdivisions that contain residential, commercial, industrial, or other buildings will conform to all requirements of the State of South Dakota.

75. Fees for all Permits shall be set by the Board and shall be due and payable upon submission of the Application for the Permit to the Planning Department. A Late Application Fee shall be added to the Fee for any Permit, where construction, installation, excavation, grading, fill, demolition, or development has commenced before the Application has been submitted to the Planning Department.

ARTICLE X - VARIANCES

The Board, upon the recommendation of the Ptarking Commission, may vary these regulations due to unusual topography or other conditions so that substantial justice may be done and the public interest secured; provided that such variation will not have the effect of nultifying the intent and purpose of this Ordinance.

ARTICLE XI - VIOLATIONS AND PENALTIES.

Any person who violates any provision of this Ordinance or any amendments thereto, or who fails to perform any act required thereunder or who does any prohibited act, shall be guilty of a Class II misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed two-hundred dollars (\$200) or by imprisonment for a period not to exceed thirty (30) days, or by both fine and imprisonment for each offense, pursuant to SOCL Chapter 7-18A-2. Each end every day during which any violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such thereunder

Additionally, any person who violates any provision of this Ordmance or any amendments thereto, or who tails to perform any act required thereunder or who does any prohibited act, shall be subject to an action for civil injunctive relief, pursuant to SDCt. Chapter 21-8

Effective Date: January 30, 2007.

Custer County Commis

Custer County Commissioner

fairman, Custer County Board of Commissioners

In the Supreme Court of the State of South Dakota

SHAW FAMILY TRUST ESTABLISHED MAY 22, 1991 AS RESTATED ON JULY 18, 2019 by and through its acting Trustee, JILL D. SHAW,

Plaintiff and Appellee

VS.

RICHARD LOSH and CAROL KAY BIEWICK LOSH,

Defendants and Appellants

Appeal from the Circuit Court Seventh Judicial Circuit Custer County, South Dakota

The Honorable Heidi L. Linngren

Notice of Appeal filed December 11, 2024

BRIEF OF APPELLEE SHAW FAMILY TRUST ESTABLISHED MAY 22, 1991 AS RESTATED ON JULY 18, 2019 by and through its acting Trustee, JILL D. SHAW

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TABLE OF CONTENTS

	Page
TABLE OF	CONTENTS i
TABLE OF	AUTHORITIES iii
PRELIMINA	ARY STATEMENT 1
JURISDICT	IONAL STATEMENT1
STATEMEN	T OF LEGAL ISSUES AND AUTHORITIES
I.	Whether the Circuit Court erred when it granted Shaw Declaratory Judgment?
STATEMEN	VT OF THE CASE2
FACTS	2
STANDARI	O OF REVIEW 5
ARGUMEN	T AND AUTHORITIES 6
I.	THE CIRCUIT COURT DID NOT ERR IN GRANTING DECLARATORY JUDGMENT TO SHAW
A	. The Declaratory Judgment was Venued in the Proper Court, was Justiciable and Ripe for Review
В	Losh's Arguments Regarding Custer County Ordinances and Exhaustion are Misplaced
	Losh Failed to Preserve His Argument on Appeal
C	Losh does not Challenge the Substance of Court's Findings, Conclusions, or Order
CONCLUSI	ON
REQUEST I	FOR ORAL ARGUMENT 15
CERTIFICA	TE OF COMPLIANCE

CERTIFICATE OF SERVICE	17
APPENDIX	18

TABLE OF AUTHORITIES

CASES:	Page
5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357 at 299 (1990)	6
Abata v. Pennington Cnty. Bd. of Commissisoners, 2019 S.D. 39, 931 N.W.2d 714	
Benson v. State, 2006 S.D. 8, 710 N.W.2d 131	2, 8
Bozied v. City of Brookings, 2001 S.D. 150, 638.N.W.2d 264	5, 6
Claimants, LLC v. S. Dakota Dep't of Tourism & State Dev., 2020 S.D. 38, 945.N.W.2d 911	10
Hall v. State ex rel. S. Dakota Dep't of Transp., 2006 S.D. 24, 712.N.W.2d 22	10
Hofmeister v. Sparks, 2003 S.D. 35, 660. N.W.2d 637	8, 11
Knight v. Madison, 2001 S.D. 120, 624 N.W.2d 540	
Luze v. New FB Co., 2020 S.D. 70, 952 N.W.2d 264	5
Nooney v. StubHub, Inc., 2015 S.D. 102, 873 N.W.2d 497	6
Picardi v. Zimmiond, 2005 S.D. 24, 693 N.W.2d 656	2, 12
Pluimer v. City of Belle Fourche, 1996 S.D. 65, 549 N.W.2d 202	11
Poelstra v. Basin Elec. Power Coop., 1996 S.D. 36, 545.N.W.2d 823	6
Porous Media Corp. v. Pall Corp., 186 F.3d 1077 (8th Cir. 1999)	6
Selway Homeowners Ass'n v. Cummings, 2003 S.D. 11, 657 N.W.2d 307	2, 11
Slota v. Imhoff & Assoc., 2020 S.D. 55, 949 N.W.2d 869	5
State Farm Mut. Auto. Ins. Co. v, Vostad, 520 N.W.2d 273 (S.D.1994)	
State Highway Comm'n v. Sweetman Const. Co., 83 S.D.27, 153 N.W.2d 682 (1967	7)11

State v. Pellegrino, 1998 S.D. 39, 577 N.W.2d 590
Vitek v. Bon Homme Cnty. Bd, of Comm'rs, 2002 S.D. 100, 650 N.W.2d 51310
Watertown Concrete Prods., Inc. v. Foster ex rel. Est. of Foster, 2001 S.D. 9, 630 N.W.2d 10815
CONSTITUTION:
S.D. Const. Art. V § 5
STATUTES:
SDCL Chapter 1-26
SDCL Chapter 21-24
SDCL § 15-5-1 (1)
SDCL § 15-6-6(d)
SDCL § 16-6-9(2) and (3)7
SDCL § 21-24-1
SDCL § 21-24-3
SDCL § 21-24-13

PRELIMINARY STATEMENT

Citations to the record will appear as "(CR ___)" with the page number from the Clerk's Appeal Index. Citations to Appellee Shaw Family Trust Appendix will be designated as "(APP___)" followed by the appropriate page number. Citations to the January 14, 2025, hearing transcript will be designated as "(HT___)".

Appellee Shaw Family Trust will be referred to as "Shaw" and Appellant Richard and Carol Losh shall be referred to as "Losh."

JURISDICTIONAL STATEMENT

The Loshs appeal from the Circuit Court's Order on Motion for Declaratory

Judgment Regarding the Easement Located on the Plat of Case Subdivision #4 Recorded

as 12 Plat 626 Over Lot 4 and for the Benefit of Tract Reinke (the "Order"), filed on

November 7, 2024, which incorporated the Court's Findings of Fact and Conclusions of

Law and Order On Motion for Judgment on the Pleadings and Motion for Permanent

Injunction, entered on the same date (CR 168-171; APP 24-27 (Order); CR 172-179; APP

28-35 (Findings of Fact and Conclusions of Law), and the Judgment entered on

November 15, 2024. (CR 194-195; APP 36-37). The Notice of Entry of Order on

Motion for Declaratory Judgment was filed on November 13, 2024. (CR 180-193).

Losh timely filed a Notice of Appeal, dated December 9, 2024, on December 11, 2024.

(CR 197). The Court has jurisdiction over the matter pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

 Whether the Circuit Court Erred when it Granted Shaw Declaratory Judgment.

The Circuit Court did not err. The Court's Order was correctly based on the interpretation of the Plat, which created the private easement at issue, and South

Dakota law describing the rights and obligations of both the dominant and servient tenement under that easement.

Benson v. State, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131
Knight v. Madison, 2001 S.D. 120, ¶ 7, 634 N.W.2d 540
Picardi v. Zimmiond, 2005 S.D. 24, ¶ 25, 693 N.W.2d 656
Selway Homeowners Ass'n v. Cummings, 2003 S.D. 11, ¶ 19, 657 N.W.2d 307
SDCL 21-24-1

STATEMENT OF THE CASE

Shaw field a Complaint, with attached exhibits A-F, seeking a Declaratory

Judgment and Injunctive Relief. (CR 2-24; APP 1-23). Losh served an Answer and

Motion to Dismiss Complaint, with exhibits 1-4. (CR 55-74). On February 23, 2024,

Shaw filed a Motion for Judgment on the Pleadings and Motion for Permanent

Injunction and Brief in Support of Motion for Judgment on the Pleadings and Motion for

Permanent Injunction. (CR 31-47). A hearing was held on the matter on September 18,

2024. (CR 238; HT 238-308). The Circuit Court, the Honorable Heidi L. Linngren,

granted Shaw's Declaratory Judgment, denied the Shaw's Motion for Permanent

Injunction, and denied Losh's Motion to Dismiss. (CR 292-293; HT 55:25-56:13).

Loshs appeal from the Circuit Court's Order and Judgment. (CR 196-200). Shaw does

not challenge the denial of Shaw's Motion for Permanent Injunction.

FACTS

Shaw is a resident of Custer County, South Dakota. (CR 2; APP 1at ¶ 1). Shaw is the trustee of the Shaw Family Trust which holds land in Custer County, South Dakota. (CR 2, 10-11; APP 1 at ¶¶ 2,3). Richard Losh and Carol Kay Beiwick Losh ("Losh").

husband and wife, are residents of Denver County, Colorado and own land, subject to this litigation, in Custer County, South Dakota. (CR 2; APP 1 at ¶¶ 4-6).

The Shaw Family Trust received property, by Warranty Deed, in Custer County, South Dakota, on September 18, 2020, which is further described as:

Lot 4 of Case Subdivision #4, located in the SW1/4 and H.E.S. 323 in Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on Plat filed in Book 12 of Plats, Page 626.

(the "Property")(CR 10-11; APP 9-10). The Property, consisting of Lot 4 of Case
Subdivision #4 ("Case Subdivision"), was created by the filing of 12 PLAT 626, with the
Custer County Register of Deeds, on September 29, 2015. (CR 12; APP 11). The
Property was undeveloped at the time it was purchased by Shaw. (CR 4-5; APP 3-4 at ¶
21). The Case Subdivision Plat, however, created a "66" wide private access easement
(the "Easement") dedicated with this plat for the owners of Tract Reinke" across the
Property. (CR 12; APP 11). The Easement generally runs from north to south along the
eastern property line of the Property and connects a public road known as Eggers Lane /
Freeland Road, to Tract Reinke which is owned by the Loshs. Id.; (CR 12; APP 11)(CR
56-57). Other than providing for the width and location of the Easement across the
Property, the Easement created by the Case Subdivision Plat did not otherwise provide
any terms or conditions related to the nature, extent, or use, of the Easement. Id.

Losh received their property (Tract Reinke), serviced by the Easement, in Custer County, South Dakota, on May 2, 2017, by means of a Personal Representative's Deed. The Losh property is further described as:

Reinke Tract of HES #323 located in the SE1/4 SW1/4 of Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on plat recorded in Book 6, page 12. (DOE #4312).

(CR 13-17; APP12-16). As described above, the Losh property was granted a 66° private access Easement by the filing of the Case Subdivision Plat. Traditionally, the Loshs' property was accessed off of Medicine Mountain Road, by means of the existing public highways known as Eggers Lane and Freeland Drive.

By a letter dated December 12, 2021, Losh informed Shaw that Losh intended to open and improve the Easement across Shaw's land. (CR 18-19; APP 17-18). This access had not been previously opened or developed and no track or trail existed over the Easement area. *Id.* On or about May 22, 2022, without coming to any agreement with Shaw regarding the extent and use of the Easement, Losh cut a path through Shaw's land along the Easement, installed culverts, and graveled the same. (CR 5; APP 4 at ¶ 21). In response to Losh's opening and graveling of a road within the Easement area, Shaw, by and through the undersigned, sent a letter to the Losh dated August 5, 2022, requesting that Shaw and Losh enter into a mutually acceptable agreement outlining the extent and use of the Easement. (CR 20-21; APP 19-20).

The Losh responded to Shaw's letter of August 5, 2022, by letter dated August 10, 2022. (CR 23-24; APP 22-23) In their tersely written letter, Losh, among other things, stated that they will not allow Shaw to use the Easement to access Shaw's own building site, without the expressed permission of Losh, refused to allow any fence or gate on the Easement, and refused to discuss any agreement to set out the nature and extent of the use of the Easement. *Id.*

After the August 10, 2022, letter, Losh recognized that state law would allow

Shaw to use the Easement but stated additional disagreements with the installation of a
culvert by Shaw on Shaw's newly installed access from Medicine Mountain Road. (CR
67). This acknowledgment was also included in the Answer and Motion to Dismiss filed
by Losh, but Losh continued to dispute the matter. (CR 57-58). Shaw, nonetheless,
provided Losh with a detailed written agreement to govern the use of the Easement.

Despite Losh's eventual understanding that Shaw could use their own land in the
Easement area, Losh remained unwilling to agree to the other terms and conditions
proposed by Shaw, including fencing and gating, and has been unwilling to sign any
written agreement memorializing the use by Shaw or the proposed terms and conditions.

(CR 252; HT 15:5-6). A ripe and justiciable controversy existed.

STANDARD OF REVIEW

Declaratory judgments are reviewed in the same manner as "any other order, judgment, or decree." Luze v. New FB Co., 2020 S.D. 70, ¶ 14, 952 N.W.2d 264, 269 (citation omitted); SDCL 21-24-13.

A ruling granting a motion for judgment on the pleadings is reviewed de novo. Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings. It is only an appropriate remedy to resolve issues of law when there are no disputed facts.

Slota v. Imhoff & Assocs., P.C., 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873 (cleaned up).

"Statutory and contract interpretation are questions of law reviewed de novo." Bozied v.

City of Brookings, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268 (citing State Farm Mut.

Auto. Ins. Co. v. Vostad, 520 N.W.2d 273, 275 (S.D.1994). The existence of a legal duty

is also a question of law. Id. (citing Poelstra v. Basin Elec. Power Coop., 1996 SD 36, ¶
9, 545 N.W.2d 823, 825).

ARGUMENT AND AUTHORITIES

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING DECLARATORY JUDGMENT TO SHAW.

The Circuit Court correctly granted Shaw's Declaratory Judgment. The Court's ruling was limited to a legal interpretation of the Easement created by 12 PLAT 626.

While Shaw takes issue with many of Losh's factual statements, Losh's recitation of the facts, as Losh sees them, is irrelevant to the decision in this matter. No facts are at issue. The Court's ruling was informed by public documents embraced by the pleadings, statutory provisions, and settled case law. See Findings of Fact and Conclusions of Law (CR 172-179; APP 28-35). There are no other issues preserved for appeal.

The Circuit Court was free to consider the deeds and 12 PLAT 626. These documents are public records and embraced by the pleadings. See Complaint and attachments. (CR 2-24; APP 1-23). When considering a motion for judgment on the pleadings, a court may generally only consider the facts asserted in the pleadings, but "it may [also] consider 'some materials that are part of the public record or do not contradict the [pleadings]', as well as materials that are 'necessarily embraced by the pleadings."

Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999) (cleaned up)(citing See also 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357, at 299 (1990) (court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"); see also Nooney v. StubHub, Inc., 2015 S.D. 102, ¶ 8, 873 N.W.2d 497, 499 (discussing incorporation of documents on a motion to dismiss). The Circuit Court's review of the

public documents attached to the Complaint, and State law, was proper when deciding a motion for judgment on the pleadings.

Shaw does not dispute that 12 PLAT 626, filed with the Custer County Register of Deeds, created a "66' wide private access Easement dedicated with this plat for the owners of Tract Reinke" across the Shaw property. The Court correctly applied State law when it entered a Declaratory Judgment to Shaw. That ruling merely outlined the rights and obligations of both Shaw and Losh under the Easement.

A. The Declaratory Judgment was Venued in the Proper Court, was Justiciable and Ripe for Review

South Dakota Circuit Courts possess original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. S.D. Const. art. V, § 5. The Circuit Court had original civil jurisdiction over this action pursuant to SDCL § 16-6-9 (2) and (3). (actions in law equity, and cases regarding real property). The Circuit Court has jurisdiction over subject matter of this action pursuant to SDCL chapter 21-24 for declaratory relief, and SDCL 21-24-1, which provides that "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Venue was appropriate in the Seventh Judicial Circuit, Custer County, pursuant to SDCL 15-5-1 (1) (venue for a determination of an interest in real property).

The Declaratory Judgment Act (SDCL ch. 21-24) is intended to allow the Court to provide guidance to parties before the parties have been unnecessarily damaged by an impending conflict.

The philosophy of the Declaratory Judgment Act establishes that through it the courts seek to enable parties to authoritatively settle their rights in advance of any invasion thereof. Within the bounds of the remedial act's command of a liberal construction and liberal administration is found its ultimate goal of allowing the courts (to be) more serviceable to the people. The achievement of peace through the avoidance of predictable conflict permeates as the Act's main function.

Benson v. State, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141 (citations and internal quotations omitted). The Declaratory Judgment Act is particularly suited to resolve disputes regarding written instruments such as easements. SDCL 21-24-3 (declaratory judgment available to establish legal status under a written easement); Hofmeister v. Sparks, 2003 S.D. 35, ¶ 1, 660 N.W.2d 637, 638 (declaratory judgment action to ascertain the legal status of an easement). "We have said that in order for a court to have jurisdiction over a declaratory judgment action, there must be 'a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it." Benson, 2006 S.D. 8, ¶ 16, 710 N.W.2d at 140 (citations omitted). "Landowners, as property owners, have a claim of right to their property." Id.

As applied to this case, Losh cut a road through the Shaw property to access his own property. (CR 5). Losh denied Shaw various rights to utilize their own land, based on Losh's own interpretation of easement law. (CR 23-24; APP 22-23). And Losh continued to resist an out-of-court agreement between the parties even through the hearing on this matter. (CR 252; HT 15:5-6). Losh's authority for such action depends on the interpretation of 12 PLAT 626, and the Easement created thereby. Because 12 PLAT 626 did not further outline the nature and extent of that Easement, it was necessary to obtain a declaration of those rights under State law. That review relied on the interpretation of written instruments, state statute, and case law interpreting the same. No disputed facts were involved in this analysis. The Declaratory Judgment Act is particularly suited to this type of action. There is no doubt Shaw, as the landowner

affected by Losh's actions, has standing. There exists a ripe and justiciable controversary between Losh and Shaw.

B. Losh's Arguments Regarding Custer County Ordinances and Exhaustion are Misplaced.

1. Losh Failed to Preserve His Argument on Appeal.

Losh argues that the Court should not have granted Declaratory Judgment in favor of Shaw for various reasons. See Appellant's Brief at pp. 16-22. These arguments were not raised below prior to the hearing on this matter. SDCL 15-6-6(d) requires opposing briefs to be filed "not later than five days before the hearing, unless the court permits them to be served at some other time." Losh filed Defendants' Response to Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings and Motion for Permanent Injunction, on September 13, 2024, which complied with SDCL 15-6-6(d), but that filing did not contain the arguments now made on appeal. Compare Appellant's Brief at pp. 16-22 to Defendants' Response to Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings and Motion for Permanent Injunction. (CR 88-105). Nor were those arguments presented at the hearing on the matter held on September 18, 2024, at which time the Court orally granted Shaw's Motion for Declaratory Judgment. See Motions Hearing Transcript (CR 238-308; APP 38-108).

It was not until after the hearing on this matter that Losh first raised the argument regarding Custer County Ordinances. See Defendants' Brief in Opposition to Motion for Judgment on the Pleadings (filed on October 10, 2024)(CR128-132)(noting at CR 128, ¶ 20, that on September 20, 2024, after the hearing on this matter, Losh received a copy of Custer County Ordinance No. 2). It does not appear that Losh's exhaustion argument was raised below at all. These arguments, therefore, are untimely and were not properly

before the Court below. They should not, therefore, be considered on appeal. Hall v. State ex rel. S. Dakota Dep't of Transp., 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27; Claimants, LLC v. S. Dakota Dep't of Tourism & State Dev., 2020 S.D. 38, ¶ 24, 945 N.W.2d 911, 918 (argument not raised at motions hearing). Notwithstanding the fact Losh did not raise these issues with the Court below in a timely fashion, or at all, Losh's arguments are not applicable here.

The Custer County Ordinances are not Applicable to the Declaratory Judgment.

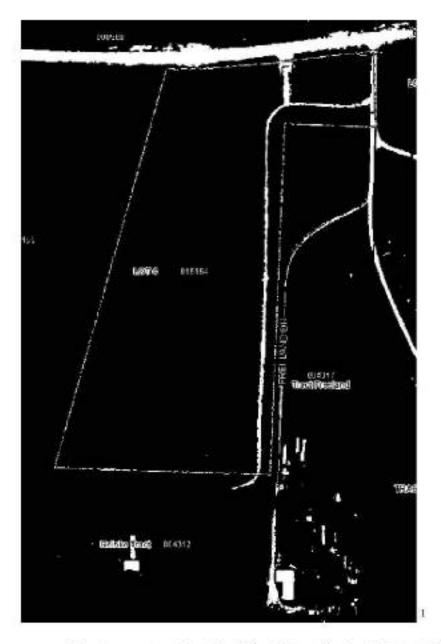
The Declaratory Judgment only determined the legal rights under the Easement created by 12 Plat 626. See generally, Findings of Fact and Conclusions of Law and Order on Motion for Declaratory Judgment (CR 172-179; APP 28-35). Shaw does not challenge Custer County's adoption of 12 Plat 626 or the Easement created thereunder. Simply put, Shaw is not aggrieved by the County's adoption of 12 Plat 626. SDCL 7-8-27 (persons aggrieved of a decision of a board of county commissioners are entitled to appeal that decision). Nor does the Court's decision on this matter, in any way, call into question the County's authority to adopt the Plat. Rather, accepting 12 Plat 626 as a valid exercise of the County's authority, the Court's decision simply states the relative rights of the parties, under State law, related to the Easement created by 12 Plat 626.

Declaratory Judmgent actions, such as this, do not act as appeals from a governing body. Abata v. Pennington Cnty. Bd. of Commissioners, 2019 S.D. 39, ¶ 11, 931 N.W.2d 714, 719 (declaratory judgment is controlled by chapter 21-24).

Additionally, the Administrative Procedures Act does not apply to appeals from a County Commission. Vitek v. Bon Homme Cnty. Bd. of Comm'rs, 2002 S.D. 100, ¶ 11, 650 N.W.2d 513, 517. Losh's citations to, and reliance on, SDCL Chapter 1-26 has no

application to this matter. See Appellants' Brief at pp. 19-20. The use of a declaratory judgment to define the rights granted by a platted easement is the proper method of resolving the dispute. Selway Homeowners Ass'n v. Cummings, 2003 S.D. 11, ¶ 19, 657 N.W.2d 307, 313; Hofmeister v. Sparks, 2003 S.D. 35, ¶ 1, 660 N.W.2d 637, 638; Knight v. Madison, 2001 S.D. 120, ¶ 2, 634 N.W.2d 540, 541; Pluimer v. City of Belle Fourche, 1996 S.D. 65, ¶ 18, 549 N.W.2d 202, 206. The Court applies the rules of civil procedure in declaratory judgment actions. State Highway Comm'n v. Sweetman Const. Co., 83 S.D. 27, 32, 153 N.W.2d 682, 685 (1967)(noting the adoption of the South Dakota Rules of Civil Procedure in a declaratory judgment action).

Moreover, Losh's argument that the Custer County ordinances apply in this matter is misguided. Losh argues various Custer County ordinances restrict access by Private Access Easement to either one residence or one parcel. *Appellants' Brief* at pp. 17-22. Losh fails to recognize, however, that Tract Reinke – the Losh's property – is the only parcel or residence that has been granted an Easement by 12 Plat 626. The Plat specifically designates a "66" wide private access Easement dedicated with this plat for the owners of Tract Reinke." *See* 12 Plat 626 (CR 22; APP 21). The Easement runs from north to south over Lot 4 (the Shaw property) to Tract Reinke (the Losh property) to provide access to Medicine Mountain Road on the northern edge of Lot 4.



Shaw's property abuts Medicine Mountain Road. See 12 Plat 626 (Lot 4). The Shaw property is accessed directly from Medicine Mountain Road.² Shaw, as the owner of the servient tenement retains "all the incidents of ownership in the Easement." *Picardi* v. Zimmiond, 2005 S.D. 24, ¶ 25, 693 N.W.2d 656, 663. Shaw does not need an

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¹ This figure is inserted for demonstrative purposes only and not as evidence.

Alternatively, Shaw could access their property, at the northeast corner of Lot 4, from Eggers Ln / Freeland Dr., shown on 12 PLAT 626 as a "Previously Dedicated 66' ROW."

easement, nor does Shaw utilize an easement, for access.³ Shaw is the owner, in fee simple, of the Lot upon which the Easement crosses. (CR 10-11; APP 9-10). Shaw has the "right to use the property in any manner or for any purpose, so long as [Shaw] does not interfere with the use or enjoyment of the Easement." *Knight v. Madison*, 2001 S.D. 120, ¶ 7, 634 N.W.2d 540, 543. This includes Shaw's use of the Shaw property encumbered by the Easement. *Knight*, 2001 S.D. 120, ¶ 6-8, 634 N.W.2d at 542-543. The Custer County Ordinances cited by Losh are not relevant to the Circuit Court's decision or this appeal. Instead, the only relevant discussion is the nature and extent of the Easement across the Shaw property. The Circuit Court properly decided that matter.

C. Losh Does not Challenge the Substance of Court's Findings, Conclusions, or Order.

On appeal, Losh challenges the legal authority for the issuance of the Declaratory

Judgment. The Findings and Conclusions themselves are not subject to any reasonable

challenge. Losh's arguments on appeal are summarized as follows: 1) the trial court

erred in issuing an Order and Judgment allowing for a violation of Custer County

Ordinance; 2) there was lack of jurisdiction, improper venue, failure to state a ripe or

justiciable claim or controversy; and 3) the court erred when it failed to consider Custer

County Ordinance No. 2 as a question of fact. As described above, none of those are

arguments are relevant to a decision on this appeal.

Aside from Losh's arguments stated in the paragraph above, the Findings of Fact and Conclusions of Law and Order are not in dispute on appeal. Losh's contentions, described supra, relate only to the Conclusions of Law paragraphs 12-26. See Findings

13

³ Although untenable, Losh's argument would more likely invalidate Losh's access as it is the second parcel / residence along the easement.

of Fact and Conclusions of Law ¶¶ 12-26 (CR 172-179; APP 28-35)(addressing jurisdiction, venue, and the use of judgment on the pleadings for a declaratory judgment action). The Findings of Fact issued by the Circuit Court are not subject to any reasonable dispute as they are derived directly from the documents embraced by the pleadings. See Findings of Fact and Conclusions of Law ¶¶ 1-11 (CR 172-179; APP 28-35). The remainder of the Findings of Fact and Conclusions of Law (paragraphs 27-40) and the Order have not been challenged by Losh. Those Conclusions of Law and the Order accurately set forth the law provided by the Legislature and this Court.

Furthermore, Losh cites no authority on appeal to call into question the legal declarations recited in paragraphs 27-40 of the Findings of Fact and Conclusions of Law, or the Order issued by the Circuit Court, incorporating those findings and conclusions.

The failure to cite authority waives the issue on appeal. State v. Pellegrino, 1998 S.D. 39, ¶ 22, 577 N.W.2d 590, 599 (citations omitted). Moreover, Losh specifically agreed with the legal conclusions in paragraphs 27-40 when Losh filed Defendant's Response to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Order on Motions for Judgment on the Pleadings and for Permanent Injunction ("Defendants Response to Findings of Fact and Conclusions of Law"). See (CR159-160). Losh stated:

In paragraphs 27 through 40 Plaintiff cites State statutory and case law regarding easements. Defendants do not dispute any of these cites and have recognized their authority in their Defendants' Response to Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings and Motion for Permanent Injunction submitted to this Court on September 10, 2024. Moreover, Defendants would note that paragraph 37 has been moot for some time as Plaintiffs installed their fencing and gates quite a while ago without any objection or interference from Defendants.

Defendants' Response to Findings of Fact and Conclusions of Law. (CR 159-160 at ¶

9). The Circuit Court's conclusions of law in this regard, were accepted by Losh below

and are not challenged on appeal. Losh cannot now take an inconsistent position.

Watertown Concrete Prods., Inc. v. Foster ex rel. Est. of Foster, 2001 S.D. 79, ¶ 11, 630

N.W.2d 108, 112 (discussing judicial estoppel for inconsistent positions). As described

above, Losh's arguments, and any relationship between those arguments and the Findings

of Fact and Conclusions of Law on appeal, are unfounded. The remaining Findings of

Fact and Conclusions of Law and Order are without challenge.

CONCLUSION

Losh's arguments on appeal are without merit. Losh has waived any argument to

the remaining Findings of Fact and Conclusions of Law and Order. The decision by the

Circuit Court was correct and supported by State law and this Court's rulings setting forth

the rights of the dominant and servient tenement under the Easement. Shaw respectfully

requests this Court uphold the Circuit Court's decision in all respects.

REQUEST FOR ORAL ARGUMENT

Appellee does not request oral argument.

Dated: April 9, 2025.

GUNDERSON, PALMER, NELSON

& ASHMORE, LLP

By: /s/ Richard M. Williams

Richard M. Williams

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15

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies

with the type volume limitation provided for in South Dakota Codified Laws. This Brief

for Appellee, excluding the table of contents, table of cases, jurisdictional statement,

statement of legal issues, any addendum materials, and any certificates contains 3,891

words. I have relied upon the word count of our word processing system as used to

prepare this Brief for Appellee. The original Brief for Appellee and all copies are in

compliance with this rule.

GUNDERSON, PALMER, NELSON

& ASHMORE, LLP

By: /s/ Richard M. Williams

Richard M. Williams

16

CERTIFICATE OF SERVICE

Thereby certify on April 9, 2025, the BRIEF OF APPELLEE SHAW FAMILY

TRUST was filed through EFile SD File and Serve Portal and the original plus one
copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk South Dakota Supreme Court 500 E. Capitol Avenue Pierre, SD 57501-5070

and the BRIEF OF APPELLEE SHAW FAMILY TRUST was served by electronic

mail and mailed by U.S. Mail to the following:

Richard Losh Carol Kay Biewick Losh 1679 S. Kearney Street Denver, CO 80224

Telephone: (303) 320-6821

E-mail: richardlosh@comcast.net

Appellants Pro Se

By: /s/ Richard M. Williams

Richard M. Williams

APPENDIX

1.	ComplaintApp. 001
Pl	Order on Motion for Declaratory Judgment Regarding the Easement Located on the at of Case Subdivision #4 Recorded as 12 Plat 626 Over Lot 4 and for the Benefit
of	Tract ReinkeApp. 024
3.	Findings of Fact and Conclusions of Law and Order on Motion for Judgment
or	the Pleadings and Motion for Permanent Injunction
4.	JudgmentApp. 036
5.	Hearing Transcript, Motions Hearing September 18, 2024App. 038

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS.		
COUNTY OF CUSTER)		SEVENTH JUDICIAL CIRCUIT
140			CIV NO. 16CIV23-000020
SHAW FAMILY TRUST,)	76.27.10.00.00
by and through its trustees, Ronald I	D. Shaw)	
and Jill D. Shaw,)	50 000 V 000 U 000 V 000 U 00
)	COMPLAINT
Plaintiffs,)	
)	
v.		3	
RICHARD LOSH and CAROL KA	Y	3	
BIEWICK LOSH,)	
and an article of the second)	
Defendants.)	

PARTIES

- Ronald D. Shaw and Jill D. Shaw ("Plaintiffs") are residents of Custer County,
 South Dakota.
 - 2. Ronald D. Shaw and Jill D. Shaw are trustees of the Shaw Family Trust.
 - The Shaw Family Trust holds land in Custer County, South Dakota.
- Based on information and belief, Richard Losh and Carol Kay Beiwick Losh
 ("Defendants") are residents of Denver County, Colorado.
 - Carol Kay Beiwick Losh owns land in Custer County.
- Based on information and belief, Richard Losh and Carol Kay Beiwick Losh are husband and wife.

VENUE AND JURISDICTION

Plaintiffs restate and incorporate by reference all the allegations in Paragraphs 1-

б.

- South Dakota Circuit Courts possess original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. S.D. CONST. Art. V, § 5.
- This Court has original civil jurisdiction over the parties and subject matter of this action pursuant to SDCL § 16-6-9.
- 10. This Court has jurisdiction over the parties and the subject matter of this action pursuant to SDCL Chapter 21-24 for declaratory relief, and SDCL § 21-24-1, which provides that "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."
- This Court has jurisdiction over the parties and the subject matter of this action pursuant to SDCL Chapter 21-8 for injunctive relief.
- Venue is appropriate in the Seventh Judicial Circuit, Custer County, pursuant to
 SDCL § 15-5-1 (venue for a determination of an interest in real property).

FACTS

- Plaintiffs restate and incorporate by reference all the allegations in Paragraphs 1-
- The Shaw Family Trust received property, by Warranty Deed, in Custer County,
 South Dakota, on September 18, 2020, which is further described as:

Lot 4 of Case Subdivision #4, located in the SW1/4 and H.E.S. 323 in Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on Plat filed in Book 12 of Plats, Page 626.

See attached Exhibit A (Warranty Deed).

- 15. The Shaw Family Trust holds Lot 4 of Case Subdivision #4 ("Case Subdivision"), which was created by the filing of 12 PLAT 626, with the Custer County Register of Deeds, on September 19, 2015. See attached Exhibit B (Case Subdivision Plat).
- 16. The Case Subdivision Plat creates a "66" wide private access easement ("Easement") dedicated with this plat for the owners of Tract Reinke" which generally runs down the eastern property line of Plaintiffs Lot 4 and connects to a public road known as Eggers Lane.
- 17. Other than providing for the width and location of the Easement across Lot 4, the Easement created by the Case Subdivision Plat did not otherwise provide any terms or conditions related to the nature or extent of the Easement.
- Defendants received property in Custer County, South Dakota, on May 2, 2017,
 by means of a Personal Representative's Deed. The property is further described as:

Reinke Tract of HES #323 located in the SE1/4 SW1/4 of Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on plat recorded in Book 6, page 12. (DOE #4312).

See attached Exhibit C (Personal Representatives Deed).

- 19. As described above, Defendants are the owners of Tract Reinke which was granted a 66' private access easement by the filing of the Case Subdivision Plat described in paragraph 12.
- Traditionally, Defendants' property, Tract Reinke, was accessed by means of the existing public highways known as Eggers Lane and Freeland Drive.
- By a letter dated December 12, 2021, Defendants informed Plaintiffs that
 Defendants intended to open and improve the Easement across Plaintiffs land. See Attached

Exhibit D (Defendants' letter of December 12, 2021). This access had not been previously opened or developed and no track or trail existed over the Easement area.

- 22. On or about May 22, 2022, without coming to any agreement with Plaintiffs regarding the extent and use of the Easement, Defendants cut a path through Plaintiffs' land along the Easement, installed culverts, and graveled the same.
- 23. In response to Defendants' opening and graveling of a road within the Easement area, Plaintiffs, by and through the undersigned, sent a letter to Defendants dated August 5, 2022, requesting that Plaintiffs and Defendants enter into a mutually acceptable agreement outlining the extent and use of the Easement. See Exhibit E (Williams letter of August 5, 2022).
 - 24. Plaintiffs intend to use the Easement to access their proposed home site on Lot 4.
- Plaintiffs also intend to keep animals, including horses, on their property and will,
 therefore, need to fence their property to keep the animal on Plaintiffs' property.
- 26. As outlined in Exhibit E, Plaintiffs desire an agreement that covers such things as, mutual use of the Easement by both parties, insurance and liability, maintenance, width of the access road and ditches to ensure proper drainage, the extent and use of any improvements, allocation of cost, and gating of Lot 4 to ensure the safety of the animals and motorists.
- 27. Defendants responded to Plaintiffs' letter of August 5, 2022, by letter dated August 10, 2022. See Exhibit F (Defendants' letter Dated August 10, 2022). In their letter, Defendants, among other things, state that they will not allow Plaintiffs to use the Easement to access their own building site, without the expressed permission of Defendants, and refused to discuss any agreement to set out the nature and extent of the use of the Easement.

COUNT ONE DECLARATORY JUDGMENT

Plaintiffs reassert and reallege the above paragraphs as if fully set forth herein.

- Pursuant to SDCL Ch. 21-24 et seq. of the South Dakota Statutes and Rule 57 of
 the South Dakota Rules of Civil Procedure, the Defendants, in good faith, request that the Court
 determine the nature, extent, and use of the Easement in accordance with South Dakota Law.
- The Easement creates a servitude. Defendants are owners of the dominant tenement and Plaintiffs are owners of the servient tenement.
- The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. SDCL § 43-13-5.
- 5. The following principle is implicit in SDCL 43-13-5: "[t]he holder of a private easement has the right to limited use or enjoyment of the property only if it is consistent with the general use of the property by the owner, and "neither the physical size nor the purpose or use to which an easement may be put can be expanded or enlarged beyond the terms of the grant of the easement." Vander Heide v. Boke Ranch, Inc., 2007 S.D. 69, ¶ 45, 736 N.W.2d 824, 837 (emphasis added).
- 6. By the terms of the Plat, Defendants are granted only a "66' wide private access easement dedicated with this plat for the owners of Tract Reinke." No other terms or conditions are expressed. Accordingly, other than specifically stated, State law controls the extent and use of the Easement.
- Contrary to Defendants' assertions in Exhibit F, Defendants do not "own the
 rights to the surface of the easement." Instead, Plaintiffs, as the owners of the servient tenement
 retain "all the incidents of ownership in the easement." Picardi v. Zimmiond, 2005 S.D. 24, ¶ 25,
 693 N.W.2d 656, 663.

- Plaintiffs have the "right to use the property in any manner or for any purpose, so long as the owner does not interfere with the use or enjoyment of the easement." Knight v. Madison, 2001 S.D. 120, ¶ 7, 634 N.W.2d 540, 543.
- 9. By the terms of the Easement, access is limited to the "owners" of Tract Reinke. Defendants, as owners of Tract Reinke, are the only persons authorized to use the easement area. Plaintiffs have the authority to exclude others from the Easement area. Plaintiffs retain the right to "regulate access by third parties to a non-exclusive private roadway easement." Picardi v. Zimmiond, 2005 S.D. 24, ¶ 21, 693 N.W.2d 656, 663.
- 10. Plaintiffs retain the right to otherwise use the Fasement area. "In the absence of contrary language in the easement, a servient owner may reasonably use that portion of its real property subject to an egress, ingress, and roadway easement for its own purposes up to the point where such uses substantially interfere with the dominant owner's reasonable use of the easement." DeHaven v. Hall, 2008 S.D. 57, ¶ 31, 753 N.W.2d 429, 439.
- 11. Plaintiffs may fence and gate the Easement area provided that such fencing and gating does not infringe on the rights of the Easement holder to gain reasonable access. "The fee owner of a road has the right to erect a gate to limit public or third-party access to the road, as long as this does not interfere with the ingress and egress rights of the easement holder." Knight v. Madison, 2001 S.D. 120, ¶ 8, 634 N.W.2d 540, 543.
- 12. Plaintiffs may otherwise use the Easement in a manner that does not encumber the reasonable use of the Easement. "This includes the right to use the ditches of the current roadway, and the ditches of any future roadway, for parking, signage, fences, fence posts, curbing, planting or removal of trees, sod, or other vegetation." Picardi v. Zimmiond, 2005 S.D. 24, ¶34, 693 N.W.2d 656, 665-66.

- A ripe and justiciable controversary exists between Plaintiffs and Defendants.
- Plaintiffs respectfully request the Court declare the rights of the Parties under the
 Fasement created by 12 PLAT 626 and State law.

COUNT TWO INJUNCTIVE RELIEF

- Plaintiffs reassert and reallege the above paragraphs as if fully set forth herein.
- Plaintiffs have suffered and will continue to suffer irreparable harm as a result of the actions taken by Defendants.
- Plaintiffs have the right to use the Easement, to the extent it does not interfere with
 Defendants right of access, including, but not limited to, Plaintiffs use of the Easement to access their own building site.
- Defendants' exclusion of Plaintiffs from the Easement was not an innocent mistake; it
 was an undertaking specifically devised to eliminate Plaintiffs' use of the same.
- By refusing to allow Plaintiffs to use the Easement area, Defendants are unlawfully preventing Plaintiffs enjoyment and use of Plaintiffs' property.
- Any potential harm to Defendants is substantially outweighed by the foreseeable and actual harm to Plaintiffs.
- 7. Any harm to Defendants, as a result of the entry of an injunction, would not be disproportionate to the benefit received by Plaintiffs. Plaintiffs have the right to lawful use and enjoyment of their property.
 - 8. Plaintiffs are likely to succeed on the merits of the action.
- Granting injunctive relief in favor of Plaintiffs is in the best interest of the public because it results in the lawful use of property as defined by South Dakota law.

- 10. Pursuant to SDCL Ch. 15-6 and SDCL Ch. 21-8, Plaintiffs are entitled to a permanent injunction preventing Defendants from excluding Plaintiffs from the Easement area across Lot 4.
- 11. Plaintiffs are also entitled to a permanent injunction requiring Defendants to abide by, and to act in accordance with, any declaratory relief determined by this Court.

WHEREFORE, Plaintiffs request and pray that the Court:

- A. Enter an order and declaratory judgment, consistent with Count One above.
- B. Enter a permanent injunction, preventing Defendants from Excluding Plaintiffs from the Easement area across Lot 4.
- C. Enter a permanent injunction, requiring Defendants to abide by, and to act in accordance with, any declaratory relief issued by this Court.
- D. Ener a judgment for the recovery of Plaintiffs costs and disbursements associated with this action, including attorney fees as allowed by law.
- E. Order such additional relief as is just and equitable under the circumstances.

Dated: March _____, 2023.

GUNDERSON, PALMER, NELSON

& ASHMORE, LLP

By

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Attorneys for Plaintiffs



Doc #80202 Recording Fee \$30.00
CUSTER COUNTY REGISTER OF DEEDS
Recorded 9/21/2020 at 4:03 PM, Book 55 DEED 220
Teri L Morgan, Register of Deeds

Mary

Prepared By: Gerald M. Baldwin Attorney at Law Box 31 Custer, SD 57730 605-673-3331 C20-1165

WARRANTY DEED

CHARLES CARLSON, JR. and JOELLA CARLSON, husband and wife, of 24655 Modicine Mountain Rd, Custer, SD 57730, GRANTORS, for and in consideration of One Dollar and other valuable consideration GRANT, CONVEY, and WARRANT to RONALD D. SHAW and JILL D. SHAW, as Trustees of the SHAW FAMILY TRUST established May 22, 1991, of 1401 Outrigger Dr, Corona Del Mar, CA 92625, GRANTEES, the following described real estate in the County of Custer and the State of South Dakota:

Lot 4 of Case Subdivision #4, located in the SW1/4 and H.E.S. 323 in Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on Plat filed in Book 12 of Plats, Page 626.

INCLUDING:

- A. All oil, gas and mineral estate hold by Grantor.
- Any interest in rights-of-way or easements reserved or established on other properties, providing access to the demised premises.

SUBJECT TO THE FOLLOWING:

- Exceptions and reservations contained in the United States Patent and all prior valid exceptions and reservations of oil, gas and minerals.
- Highway and public utility rights-of-way and easements as described, platted, or established by prescription.
- C. Covenants, restrictions and reservations of record, if any, providing that the same are not violated by the existing improvements or the use thereof.
- Any zoning, building or land use regulations, of whatever nature or kind, of any governmental body, law or statute, or violations thereof,

EXHIBIT

that may be applicable to or affecting the real premises herein being sold.

E. Current taxes not delinquent.

Transfer Fee \$ 190.00 TRANSFER FEE PAID S 1900

Dated this 18 day of Sophember 2020.

GRANTORS:

ARLES CARLSON, J

JOELLA CARLSO

STATE OF SOUTH DOUGH

On this the ______ day of _______ 2020, before me, the undersigned officer, personally appeared CHARLES CARLSON, JR. and JOELLA CARLSON, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

My commission expires:

(SEAL)

Notary Public

NOTARY PUBLIC State of South Dayon

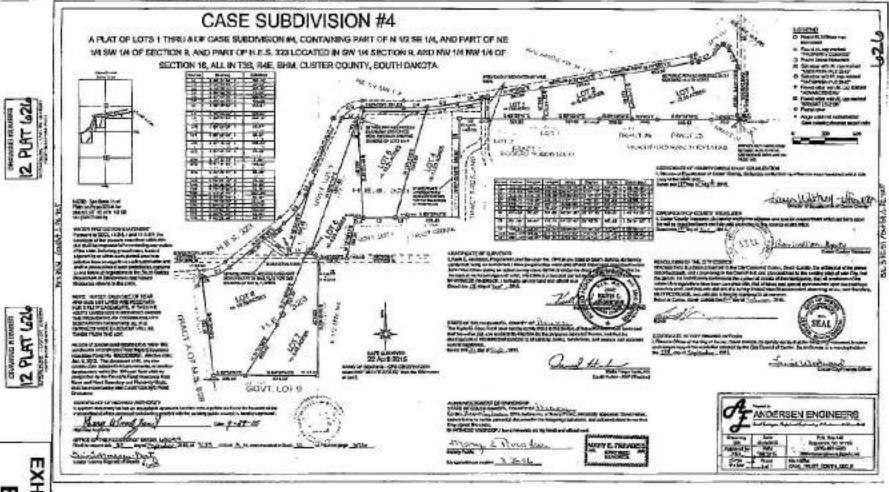
Filed: 3/7/2023 9:10 AM CST Custer County, South Dakota 16CIV23-000020

APP 010

X

PER

APP 011





ADDOUGLA CONTRACTOR OF THE STATE OF THE

Doc #71930 Recording Fee \$30.00 CUSTER COUNTY REGISTER OF DEEDS Recorded 5/25/2017 at 2:13 PM, Book 53 DEED 152 Teri L Morgan, Register of Deeds

PREPARED BY: Garland Lee Goff, Attorney at Law LLC 428 Mt. Rushmore Road Custer, SD 57730 (605) 673-3529



CUSTER COUNTY SOUTH DAKOTA

DATE
DEBBIE SALZSIEDER CLERKOF COURT
DEPUTY

LORI BIENICK a/k/a L. BIENICK by, MARCIE R. MCMINIMEE of 3773

Cherry Creek N. Drive, Suite 775, Denver, CO 80209, as PERSONAL REPRESENTATIVE (special administrator), and CAROL RAY BIENICK

LOSE of 1679 S. Kearney, Denver, CO 80224, Grantors, for and in consideration of \$1.00 receipt whereof being hereby acknowledged, does hereby GRANT, CONVEY, AND WARRANT to CAROL KAY BIENICK LOSE of 1679 S. Kearney, Denver, CO 80224, GRANTEE, all of Grantors' right, title and interest, including that as may be hereinafter acquired in and to the following described real estate in the County of Custer and the State of South Dakote to wit:

Reinke Tract of HES #323 located in the SE1/45W1/4 of Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on plat recorded in Book 6, page 12. (DOE #4312)

INCLUDING:

- A. All oil, gas and mineral estate held by Grantor.
- B. Any interest in rights-of-way or easements reserved or established on other properties, providing access to the demised premises.

SUBJECT TO THE FOLLOWING:

Page 1 of 3

EXHIBIT

- A. Exceptions and reservations contained in the United States Patent and all prior valid exceptions and reservations of oil, gas and minerals.
- B. Highway and public utility rights-of-way and easements as described, platted, or established by prescription.
- C. Covenants, restrictions, and reservations of record, if any, providing that the same are not violated by the existing improvements or the use thereof.
- D. Any zoning, building or land use regulations, of whatever nature or kind, of any governmental body, law or statute, or violations thereof, that may be applicable to or affecting the real premises herein being sold.
- E. Current taxes not delinquent.

Transfer Fee EXEMPT 43-4-22 (10)

EXEMPT FROM TRANSFER FEE

Dated this 2" day of May , 2017.

GRANTOR: ESTATE OF LORI L. BIEWICK a/k/a LORI LINDSEY BIEWICK a/k/a LORI

BIEWICK a/k/a L. BIEWICK

MARCIE R. MIMINIMEE,

Personal Representative (special administrator)

STATE OF COLORADO

)SS

COUNTY OF DENVER

On this the day of flay, 2017, before me personally appeared MARCIE R. MCMINIMEE, known to me or satisfactorily proven to be the person described in the Personal Representative's Deed, and acknowledged that she executed the foregoing Deed as the Personal Representative of the ESTATE OF

Page 2 of 3

LORI L. BIEWICK a/k/a LORI LINDSEY BIEWICK a/k/a LORI BIEWICK
a/k/a L. BIEWICK and for the purposes therein contained.
IN WITNESS WHEREOF I hereunto pet my hand and official
SEAL) WALER NOTATION NOTATION NOTATION Public - Colorado My Commission Expires: 06/09/19
Dated this //m day of May , 2017.
GRANTOR: CAROL KAY BIEWICK LOSH
CAROL RAY BILLION LOSH, GRANTOR
STATE OF COLORADO)
) SS
COUNTY OF DENVER)
On this the 1/9 day of May , 2017, before
me the undersigned officer, personally appeared CAROL KAY
BIEWICK LOSH, known to me or satisfactorily proven to be the
person whose name is subscribed to the within instrument and
acknowledged that she executed the same for the purposes therein
contained.
IN WITNESS WHEREOF, I hereunto set my hand and official
seal. (Samarda a 1 Quit, o.
(SEAL) ASSANDA C. RUBIO NOTARY PUBLIC STATE OF COLORADO NOTARY NO 20094019318 NY COMMISSION EXPRES JUNE 18, 2017

Page 3 of 3

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

SS SEVENTH JUDICIAL CIRCUIT

Pro.

ESTATE OF)

LORI L. BIEWICK,) LETTERS OF DOMICILIARY

Poreign Personal Representative

On day of 4/26/2017, 2017, Margie R. McMinimee was

On _____day of ___426/2017, 2017, Marcie R. McMinimee was appointed by this Court and qualified as Domiciliary Foreign Personal Representative of the Estate of LORI L. BIEWICK, to serve without bond, pursuant to SDCL 29A-4-204;

These Letters are issued as evidence of the appointment, qualification, and authority of Marcie R. McMinimee to do and perform all acts authorized by SDCL 29A-4-205.

Dated this ____ day of 4/26/2017 ___, 2017.



BY THE COURT: /s/ Kris Bierwith CLERK OF COURTS

Prepared by: Garland Lee Goff, Attorney at Law, LLC 428 Mt. Rushmore Rd. Custer, SD 57730 (605) 673-3529

Page 1 of 1

State of South Dokata Seventh Judicial
County of Custer Circuit Court
Liberaby Certify that the foregoing instrument
is a true and correct copy of the original as the
come appears on record in my office this Court
day of 20

DEBNIE SALVSHOER, Clark of Court
By Deputy

Filed: 4/26/2017 1:42:32 PM CST Custer County, South Dakota 15PRO17-000010

STATE OF SOUTH DAKOTA)

STATE OF SOUTH DAKOTA)

SS SEVENTH JUDICIAL CIRCUIT

COUNTY OF CUSTER)

ESTATE OF)

LORI L. BIEWICK,)

Deceased. ORDER ACKNOWLEDGING

PERSONAL REPRESENTATIVE DEED

DUSTY, COOKERTY, SOUTH LANGUTA

This Court having reviewed the Letters of Domiciliary Foreign Personal Representative and finding Marcie R. McMinimee was appointed by this Court and qualified as Domiciliary Foreign Personal Representative of the Estate of LORI L. BIEWICK, pursuant to SDCL 29A-4-204; and

Pursuant to her authority as a Personal Representative, as authorized by SDCL 29A-4-205, a Personal Representative's Deed was executed for the following described real estate in the County of Custer and the State of South Dakota to wit:

Reinke Tract of HES #323 located in the SE1/4SW1/4 of Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on plat recorded in Book 6, page 12. (DOE #4312)

IT IS HEREBY ORDERED that this Court acknowledges the validity of the Personal Representative Deed executed by Marcie R. McMinimes for the above described real property.

Dated this 25 day of

1 /1:

BY THE

Honorable Jeff Davis Circuit Court Judge

Page 1 of 1

Documber 12, 2021

Jill and Romald Staw 1401 Outrigger Drive Correa del Mar, California 92625

Re: Private Access Ensement

Dear Mr. and Mrs. Shaw,

We understand you are the new owners of Lot 4 of the Case subdivision North of Custer, South Dakets and that you recently filed an application with Custer County for Vacation of a Private Access Essement slong the border of your property. Our property, labeled Tract Reinke, adjoins the Southern border of Lot 4. The easiment connects our property with Eggers Lane allowing access to Medicine Moumain Road.

Our property has been in the family for 48 years. The property was accessed originally via Freeland Drive. At the time the Freeland trust was open, emopospied, and unobstructed. However, in 2005 the property was sold, and the new owner brought in various machinery including old semi-tractor trucks and stations, buildowers, tractors and agricultural equipment play access didapidated mobile frames to store on the property. The owner also brought in horses and other saturals, playing frames, gains and cattle guards along the access touter at several points. The gates, feering and cattle guards have since fallen into disrepair.

We have had figures in the past with access to our property through the Freeland route. As such, we worked with David Commit of Wells Fargo, who administered the sale and distribution of the Case subdivision, so obtain the current easencest for private access to our property. Mr. Cammid was very femiliar with the various properties in the arth sum unding the subdivision and be recognized and underground our conserve with the existing situation. As such, he incorporated the Private Access Easencest connecting our property with Eggers Lease into the plan for Lot 4 before it went to the markon in 2015.

We do not wish our private access easument to interfere in any way with your intended unago and enjoyment of your new property, which is why we chose the access path along the borders of Lot 4. All we want to do is create a driveway for private access allowing for heavy equipment such as a large track with or without trailer to remove the mobile house currently on our property and for bringing in new materials for constructing a new home via a straight shot along the fines line.

Such is cut possible through the Freeland property, as has been demonstrated in the past with the twists and turns and puliway through gates as narrow as 13 feet and buildings less than 30 feet from the fence line. Instead, the new driveway will be build to code, properly compacted and alevated with proper drainage allowing for use all year.

As we have not spoken to each other, yet, we have no knowledge of what your plans might be for developing Lot 4. It would seem reasonable to talk to each other directly about the

> EXHIBIT D

mainer before going forward with our plans - yours and ours - before we construct the driveway private access. We prefer to have a confial and respectful relationship with neighbors before going forward with such a project. However, please understand that we would not have obtained the executed unless we needed it.

Additionally, it is our understanding their South Dahous law, both standary and case law history, support our position. In order to soldieve and further a mutual understanding of any issues in this matter, please contact us by US mail or telephone via any of the following:

Carol and Rinhard Losh 1679 S. Kenney Street Deaver, Colorado, 80224

9

Telephone land lines: Carol Losh 303-759-3945 Richard Losh 303-320-6821

We hope to hear from you at some point soon.

Sincerely

Carol and Richard Losb



GUNDERSON | PALMER | NELSON | ASHMORE UP

506 Sixth Street Post Office Box 8045 Rapid City, South Dakota 57709 Main: (605) 342-1078 Fax: (605) 342-9503

www.gpna.com

August 5, 2022

Richard M. Williams Email: rwlillams@gpna.com Direct Dial: (605) 719-3430

Carol and Richard Losh 1679 S. Kearney Street Denver, CO 80224

Re: Private Access Easement – Custer County GPNA File No. 16088.0002

Dear Carol and Richard:

I represent Ron and Jill Shaw. We are hoping to establish a mutual agreement regarding the use and maintenance of a private easement (the "easement") across Lot 4 that provides secondary access to your land which is platted as "Track Reinke." See attached plat, Case Subdivision Lot #4. Currently, Freeland Drive operates as the Primary access to your land.

I read your letter to Ron and Jill Shaw dated December 12, 2021. In that letter, you expressed your intention to use the easement for purposes of constructing a new home, and to provide private access to your lot. We appreciate your statement that you do not wish to interfere with the Shaws' intended use of Lot 4. However, you installed a roadway across Lot 4 without receiving any input from the Shaws. As it is currently exists, the Shaws do not believe that the roadway is adequately constructed. As part of the proposed agreement, the Shaws wish to address the safety and construction standards of this access.

Much like you in relationship to your property, the Shaws intend to build a new home on Lot 4. To that end, the Shaws have obtained an approach permit from Custer County enabling them to access Medicine Mountain Road directly from Lot 4. The Shaws, however, do not wish to disturb more ground than necessary to access the proposed building site. Accordingly, to access their new home, the Shaws will be using the easement area.

Additionally, the Shaws also plan to keep animals, including horses, on their property. In order to secure these animals, the Shaws will be constructing a fence around the entire perimeter of Lot 4.

Because Lot 4 will be entirely enclosed, gates will need to be placed in order to allow access and provide safety.

While the plat indicates that a private easement exists across Lot 4, it does not otherwise describe the nature or the extent of that easement. In order to ensure a mutual understanding of the acceptable use and maintenance of the easement across Lot 4, we need to enter into a written agreement. That agreement would then be filed with the Register of Deeds. The agreement would run with the land and bind future owners of your land, Tract Reinke, and Lot 4.

Offices in Rapid City and Pierre, South Dakota

Attorneys licensed to practice in South Dakota, North Dakota, Nebraska, Wyoming, and Montana

The agreement needs to cover, among other things, the following:

- 1. Insurance and liability.
- 2. Type of control of maintenance bi-yearly, and as needed.
- 3. Width of improved roads and ditches within the easement area over Lot 4.
- 4. Extent of use and improvements.
- 5. Allocation of future cost.
- 6. Responsibility of gates and safety of animals on Lot 4.

If the above is acceptable in concept, I will prepare a draft agreement for your review. Please feel free to have your attorney contact me if you have any questions.

Sincerely,

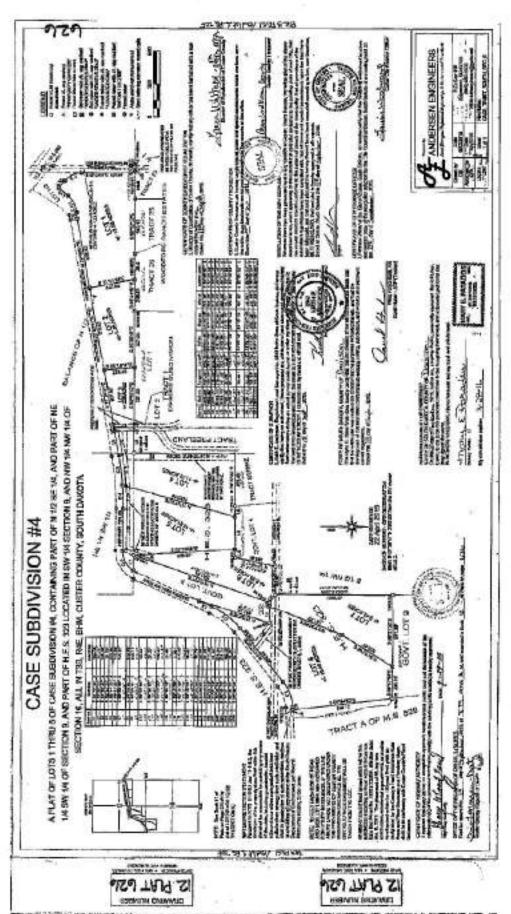
/s/ Richard M. Williams

Richard M. Williams

RMWamw Enclosure

ce: Ron and Jill Shaw

Filed: 3/7/2023 9:10 AM CST Custer County, South Dakota 16CIV23-000020



Filed: 3/7/2023 9:10 AM CST Custer County, South Dakota 16CIV23-000020

RECEIVED

AUG 1 5 2022

GUNDERSON, PALMER
NELSON & ASHMORE LLP

August 10, 2022

Dear Mr. Williams.

Carol and I have received your letter and read it with some degree of surprise at some of its brazen, outrageous and apparent misinformed contents.

First off, you refer to our easement across Lot 4 as a "secondary" easement while you refer to the former access route though the Freeland property as the "primary" access to our land. That is incorrect sir. The private access easement across Lot 4 is now our only access route to our property.

Have you visited the site of the former Freeland property access route used by the family for many years? If so, your may have observed how it fails to meet even the basic requirements of the County Code. As such, having recently constructed a new driveway along the Lot 4 easement, this will be our only access route to our property.

We have informed the owners of the Freeland property, John and Gail Ertl, that we will no longer need to use the route through their property for access to our property. As such, your use of the descriptors "primary" and "secondary" is meaningless and serves only to confuse the reader when you state that Freeland Drive currently operates as the primary access to our property. Nothing is further from the truth here than that statement.

Secondly, what is it about a private access easement that your clients do not understand? Use of the private access driveway is reserved for us and our invited guests. It is not to be traveled upon or otherwise used in any way by your clients or anyone else associated with them without our express permission.

Additionally, you state that we installed a "roadway" without receiving any input from the Shaws. Did your clients bother to tell you that while we left a telephone message to them early on, which your clients have acknowledged, offering to talk about any issues and then wrote the letter to them you cite, we have received no response directly from them at all? Rather, it has been only one lawyer after another contacting us to convey your clients' discontent.

Did your clients tell you they tried to have our easement vacated before the county commissioners early on? The fact of the matter is that they knew or should have known about the easement when they bought their property.

Thirdly, you appear to sow confusion again when you say the nature and extent of the easement are not described. Again, what is it about a private access easement that your clients don't understand or won't accept? As your clients should know, the nature and extent of the easement are described quite specifically in the plat as well as in the recent survey performed prior to construction of our driveway as a private access easement.

F

EXHIBIT

Filed: 3/7/2023 9:10 AM CST Custer County, South Dakota 16CIV23-000020

Perhaps your time communicating with the Shaws might be more productive if you explain the law of easements to them either in layman's terms, legal terms or both. We own the rights to the surface of the easement while they continue to own the land beneath it. I think your law in South Dakota would refer to our private access easement as a dominant tenement and your clients' ownership of the ground beneath it as a servient tenement. Maybe that would be a good place for you to start in educating your clients about the nature and extent of our easement; i.e., a 66 foot wide strip of land running North from tract Reinke along the eastern border of Lot 4 all the way to Eggers Lane to be used only for private access.

As such, please advise your clients to create their own model driveway for access to their proposed building site and to not even think of using our driveway to access their property without our express permission. It is and shall remain our private access route. Also, please advise them they are not permitted to construct any fence or gate anywhere on the 66foot wide strip without our express permission.

Sincerely.

Richard Loh

Richard Losh

Filed: 3/7/2023 9:10 AM CST Custer County, South Dakota 16CIV23-000020

STATE OF SOUTH DAKOTA) SS.			IN CIRCUIT COURT
COUNTY OF CUSTER	ś		SEVENTH JUDICIAL CIRCUIT
SHAW FAMILY TRUST ESTABL	ISHED)	
MAY 22, 1991, AS RESTATED ON JULY)	Case No. 16CIV23-000020
18, 2019, by and through its acting Trustee,)	
JILL D. SHAW)	ORDER ON MOTION FOR
)	DECLARATORY JUDGMENT
Plaintiffs,		1	REGARDING THE EASEMENT
327701202003083		1	LOCATED ON THE PLAT OF CASE
V.)	SUBDIVISION #4 RECORDED AS 12
)	PLAT 626 OVER LOT 4 AND FOR THE
RICHARD LOSH and CAROL KAY	Y)	BENEFIT OF TRACT REINKE
BIEWICK LOSH,)	

Defendants.

This matter came before the Court on Plaintiff's Motion for Judgment on the Pleadings and Motion for Permanent Injunction on September 18, 2024. Plaintiff, the Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019, by and through its successor trustee Jill D. Shaw, was represented by its counsel, Richard M. Williams of Gunderson, Palmer, Nelson and Ashmore, LLP; and Defendants Richard Losh and Carol Kay Biewick Losh appeared pro se.

BACKGROUND

The Shaw Family Trust holds Lot 4 of Case Subdivision #4 ("Case Subdivision"), which was created by the filing of 12 PLAT 626, with the Custer County Register of Deeds, on September 19, 2015. The Case Subdivision Plat creates a "66" wide private access easement [("Easement" or "Easement Area")] dedicated with this plat for the owners of Tract Reinke" which generally runs down the eastern property line of Plaintiffs' Lot 4 and connects to a public road known as Eggers Lane. Other than providing for the width and location of the Easement across Lot 4, the Easement created by the Case Subdivision Plat did not otherwise provide any

terms or conditions related to the nature or extent of the Easement. The owners of Tract Reinke constructed a roadway ("Roadway") within the Easement Area across Lot 4. The Court further defines the nature and use of the Easement as described and declared in the Order below.

ORDER

The Court having reviewed all of the briefing, having considered evidence subject to judicial notice, and having heard and considered the arguments presented at the hearing, and being fully advised in the premises, it is hereby **ORDERED**:

- The Court's Findings of Fact and Conclusions of Law entered in the above-captioned matter upon the same date as the execution of this Order are hereby incorporated herein by this reference.
- Tract Reinke is the dominant tenement and Lot 4 is the servient tenement.
- 3. The Roadway is for ingress and egress purposes and shall be maintained, by the owners of Tract Reinke, over and across the Easement Area. To the extent it does not interfere with the reasonable use of the Easement, the areas on either side of the Roadway, within the Easement Area, may be graded to a consistent level, kept free of weeds, and maybe landscaped as desired by the owners of Lot 4.
- 4. The Easement shall be for the purpose of permitting the owners of Tract Reinke, their social guests, or business invitees, access for ingress and egress across the established Roadway. The Easement may not be used for commercial purposes. The Easement may only serve Tract Reinke.
- 5. The Easement shall not be deemed to be an easement to or for the general public or for any public purpose whatsoever, the Easement being strictly limited to a private access easement for the benefit of the residential property owners of Tract Reinke, their successors, and assigns, to the exclusion of all other properties.
- 6. The owners of Tract Reinke must indemnify and hold the owners of Lot 4 harmless from and against any and all actions, suits, damages, liability or other proceedings which may arise as the result of the use of the Easement by the owners of Tract Reinke, their social guests, or business invitees. This section does not require the owners of Tract Reinke to be responsible for or defend against claims or damages arising solely from the errors or omissions of the owners of Lot 4, their social guess, or business invitees. Nothing in this paragraph is intended to impair the insurance coverage or any subrogation rights of either party.

- 7. The owners of Track Reinke must maintain the Roadway within the Easement Area. The owners of Lot 4 have the concurrent right to maintain the Easement Area and Roadway, provided that such maintenance does not interfere with the reasonable use of the Easement by the owners of Tract Reinke. However, in the event that either party, their social guests, or business invitees, damages the Easement or Roadway through negligence or extraordinary use of the Easement or Roadway, that party will repair the damage at their own expense.
- Any rocks or boulders unearthed during maintenance or construction within the Easement Area shall remain the property of Lot 4.
- No chemical herbicides or insecticides may be used in the Easement Area unless agreed to by the owners of Lot 4.
- 10. The owners of Lot 4 have the right to use and maintain the Easement Area and Roadway in any manner which will not interfere with Tract Reinke's use of the Easement or Roadway as described in this Order. The owners of Lot 4 specifically have the right to fine grade the road surface as needed and to remove snow as necessary.
- This Easement shall include the right of either party to enter upon the
 Easement Area in order to do those things such as maintenance, repair,
 grading, and snow removal which are reasonably necessary to effectuate
 the purpose of this Order.
- Other than the landscaping and maintenance of the Easement Area
 otherwise described in this Order, the Easement Area shall be kept free of
 all trash, rubbish, and obstructions including, but not limited to, vehicles
 and equipment, buildings, and sheds.
- 13. As long as the Easement remains accessible to Tract Reinke, the Easement Area may be fenced and gated by the owners of Lot 4. The owners of Lot 4 must maintain, in working order, any gates placed across the Easement Area. When the Easement is used by Tract Reinke, their social guests, or business invitees, the owners of Tract Reinke must use their best efforts to ensure the gates along the Easement Area are closed and secure.
- The terms of this Order shall run with the land and shall be binding upon and shall inure to the benefit of the parties hereto, their heirs, successors or assigns.
- A copy of this Order shall be filed with the Custer County Register of Deeds and indexed against the affected properties.

BY THE COURT:

11/7/2024 1:14:25 PM

Attest: Barrera, Ellen Clerk/Deputy

By:

Honorable Heidi Linngren Circuit Court Jiudge

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)ss	
COUNTY OF CUSTER)	SEVENTH JUDICIAL CIRCUIT
SHAW FAMILY TRUST ESTABLISHED	1	
MAY 22, 1991, AS RESTATE ON JULY	1	CASE NO: 16CIV23-20
18, 2019, BY AND THROUGH ITS	3	
- 2의 (THE COLUMN TO BE USED BY SOUTH AND SOUTH AND SOUTH SO	3	FINDINGS OF FACT AND
ACTING TRUSTEE, JILL D. SHAW	,	
)	CONCLUSIONS OF LAW AND ORDER
Plaintiff,)	ON MOTION FOR JUDGMENT ON THE
	1	PLEADINGS
v.	1	AND MOTION FOR PERMANENT
**	1	INJUNCTION
BIGHARD LOSH AND CAROL KAN	4	INJUNCTION
RICHARD LOSH AND CAROL KAY	,	
BIEWICK LOSH,)	
)	
Defendants.)	

This matter came before the Court on Plaintiff's Motion for Judgment on the Pleadings and Motion for Permanent Injunction on September 18, 2024. Plaintiff, the Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019, by and through its successor trustee Jill D. Shaw, was represented by its counsel, Richard M. Williams of Gunderson, Palmer, Nelson and Ashmore, LLP; and Defendants Richard Losh and Carol Kay Biewick Losh appeared pro se. The Court having reviewed all of the briefing, having considered evidence subject to judicial notice, and having heard and considered the arguments presented at the hearing, and being fully advised in the premises, the Court does hereby make and enter the following:

FINDINGS OF FACT

 All findings of fact have been established by a preponderance of the evidence introduced or stipulated to at hearing and are supported by substantial evidence. To the extent any of the following findings of fact may be determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated by reference as a conclusion of law as if set forth in detail.

A. PARTIES

- Jill D. Shaw is acting Trustee for The Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019 ("Shaw Family Trust").
- The Shaw Family Trust holds land in Custer County, South Dakota.
- Richard Losh and Carol Kay Biewick Losh ("Defendants") are residents of Denver County, Colorado.
- 4. Carol Kay Biewick Losh owns land in Custer County.
- 5. Richard Losh and Carol Kay Biewick Losh are husband and wife.

B. FACTUAL BACKGROUND

 The Shaw Family Trust received property, by Warranty Deed, in Custer County, South Dakota, on September 18, 2020, which is further described as:

Lot 4 of Case Subdivision #4, located in the SW1/4 and H.E.S. 323 in Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on Plat filed in Book 12 of Plats, Page 626. See attached Exhibit A (Warranty Deed).

- 7. The Shaw Family Trust holds Lot 4 of Case Subdivision #4 ("Case Subdivision"), which was created by the filing of 12 PLAT 626, with the Custer County Register of Deeds, on September 19, 2015. See attached Exhibit B (Case Subdivision Plat).
- 8. The Case Subdivision Plat creates a "66' wide private access easement ("Easement") dedicated with this plat for the owners of Tract Reinke" which generally runs down the eastern property line of Plaintiffs Lot 4 and connects to a public road known as Eggers Lane.
- Other than providing for the width and location of the Easement across Lot 4, the Easement created by the Case Subdivision Plat did not otherwise provide any terms or conditions related to the nature or extent of the Easement.

10. Defendants received property in Custer County, South Dakota, on May 2, 2017, by means of a Personal Representative's Deed. The property is further described as:

Reinke Tract of HES #323 located in the SE1/4 SW1/4 of Section 9, Township 3 South, Range 4 East of the Black Hills Meridian, Custer County, South Dakota, as shown on plat recorded in Book 6, page 12. (DOE #4312). See attached Exhibit C (Personal Representatives Deed).

11. As described above, Defendants are the owners of Tract Reinke which was granted a 66' private access easement by the filing of the Case Subdivision Plat as set forth in Exhibit B.

CONCLUSIONS OF LAW

- 12. To the extent that any of the following conclusions of law may be determined to be findings of fact or mixed findings of fact and conclusions of law, the same are incorporated by this reference as a finding of fact as if set forth in detail.
- 13. The burden of proof as to an issue on which a party bears the burden is by a preponderance of the evidence.
- 14. South Dakota Circuit Courts possess original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. S.D. CONST. Art. V, § 5. This Court has civil jurisdiction over the parties and subject matter of this action pursuant to SDCL § 16-6-9.
- 15. This Court has jurisdiction over the parties and the subject matter of this action pursuant to SDCL. Chapter 21-24 for declaratory relief, and SDCL § 21-24-1, which provides that "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."
- 16. Venue is appropriate in the Seventh Judicial Circuit, Custer County, pursuant to SDCL § 15-5-1 (venue for a determination of an interest in real property).
- 17. Pursuant to SDCL Ch. 21-24 et seq. of the South Dakota Statutes and Rule 57 of the South Dakota Rules of Civil Procedure, the Court may determine the nature, extent, and use of the Easement in accordance with South Dakota Law.
- 18. Per Rule 12(c) of the South Dakota Rules of Civil Procedure, a party may move for judgment on the pleadings:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56. SDCL 15-6-12(c).

- 19. A motion for judgment on the pleadings "is a remedy to test the legal sufficiency, substance, and form of pleadings." Linda S. Sorensen Revocable Tr. v. Sommervold, 2005 S.D. 33, ¶ 4, 694 N.W.2d 266, 268 (citation omitted). "However, it is only an appropriate remedy to resolve issues of law when there are no remaining issues of fact." Korstad-Tebben, Inc. v. Pope Architects, Inc., 459 N.W.2d 565, 567 (S.D. 1990).
- 20. While generally a court may only consider the facts asserted in the pleadings, it may [also] consider "some materials that are part of the public record or do not contradict the [pleadings]," Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir.), cert. denied, 527 U.S. 1039, 119 S. Ct. 2400, 144 L.Ed.2d 799 (1999), as well as materials that are "necessarily embraced by the pleadings." Piper Jaffray Cos. v. National Union Fire Ins. Co., 967 F.Supp. 1148, 1152 (D. Minn. 1997). See also 5Λ Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357, at 299 (1990) (court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint"). Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999).
- 21. 12 PLAT 626 and the deeds of the respective parties are embraced by the pleadings, constitute public records, and are subject to judicial notice.
- 22. The Declaratory Judgment Act (SDCL ch. 21-24) is intended to allow the Court to provide guidance to parties before the parties have been unnecessarily damaged by an impending conflict.
- 23. The philosophy of the Declaratory Judgment Act establishes that through it the courts seek to enable parties to authoritatively settle their rights in advance of any invasion thereof. Within the bounds of the remedial act's command of a liberal construction and liberal administration is found its ultimate goal of allowing the courts (to be) more serviceable to the people. The achievement of peace through the avoidance of predictable conflict permeates as the Act's main function.

Benson v. State, 2006 S.D. 8, ¶ 21, 710 N.W.2d 131, 141 (citations and internal quotations omitted).

- 24. The Declaratory Judgment Act is particularly suited to resolve disputes regarding written instruments such as easements. SDCL 21-24-3 (declaratory judgment available to establish legal status under a written easement); Hofmeister v. Sparks, 2003 S.D. 35, ¶ 1, 660 N.W.2d 637, 638 (declaratory judgment action to ascertain the legal status of an easement).
- 25. A ripe and justiciable controversary exists between Plaintiffs and Defendants.
- 26. Plaintiffs request the Court declare the rights of the Parties under the Easement created by 12 PLAT 626 and State law.
- 27. The Easement creates a servitude. Defendants are owners of the dominant tenement and Plaintiffs are owners of the servient tenement.
- The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. SDCL § 43-13-5.
- 29. The following principle is implicit in SDCL 43-13-5: "[t]he holder of a private easement has the right to limited use or enjoyment of the property only if it is consistent with the general use of the property by the owner, and "neither the physical size nor the purpose or use to which an easement may be put can be expanded or enlarged beyond the terms of the grant of the easement." Vander Heide v. Boke Ranch, Inc., 2007 S.D. 69, ¶ 45, 736 N.W.2d 824, 837 (emphasis added).
- 30. By the terms of the Plat, Defendants are granted only a "66' wide private access easement dedicated with this plat for the owners of Tract Reinke." No other terms or conditions are expressed. Accordingly, other than specifically stated, State law controls the extent and use of the Easement.
- 31. Plaintiffs, as the owners of the servient tenement retain "all the incidents of ownership in the easement." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 25, 693 N.W.2d 656, 663.
- 32. Plaintiffs have the "right to use the property in any manner or for any purpose, so long as the owner does not interfere with the use or enjoyment of the easement." Knight v. Madison, 2001 S.D. 120, ¶ 7, 634 N.W.2d 540, 543.
- 33. By the terms of the Easement, access is limited to the "owners" of Tract Reinke. Defendants, as owners of Tract Reinke, are the only persons authorized to

use the easement area. Plaintiffs have the authority to exclude others from the Easement area. Plaintiffs retain the right to "regulate access by third parties to a non-exclusive private roadway easement." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 21, 693 N.W.2d 656, 663.

- 34. "The owner of the servient tenement retains the exclusive legal authority to regulate access by third parties to a non-exclusive private roadway easement." Picardi, 2005 S.D. 24, ¶ 21, 693 N.W.2d 656, 663, (citing Picardi I, 2004 SD 125, ¶ 22, 689 N.W.2d at 892 and Knight, 2001 SD 120, ¶ 8, 634 N.W.2d at 543).
- 35. Plaintiffs retain the right to otherwise use the Easement area. "In the absence of contrary language in the easement, a servient owner may reasonably use that portion of its real property subject to an egress, ingress, and roadway easement for its own purposes up to the point where such uses substantially interfere with the dominant owner's reasonable use of the easement." *DeHaven v. Hall*, 2008 S.D. 57, ¶ 31, 753 N.W.2d 429, 439.
- 36. Private access easements cannot be expanded to include commercial uses unless otherwise allowed by the grant of the easement. *Picardi*, 2005 S.D. 24, ¶¶ 29-30, 693 N.W.2d at 664-65.
- 37. Plaintiffs may fence and gate the Easement area provided that such fencing and gating does not infringe on the rights of the Easement holder to gain reasonable access. "The fee owner of a road has the right to erect a gate to limit public or third-party access to the road, as long as this does not interfere with the ingress and egress rights of the easement holder." Knight v. Madison, 2001 S.D. 120, ¶ 8, 634 N.W.2d 540, 543.
- 38. Plaintiffs may otherwise use the Easement in a manner that does not encumber the reasonable use of the Easement. "This includes the right to use the ditches of the current roadway, and the ditches of any future roadway, for parking, signage, fences, fence posts, curbing, planting or removal of trees, sod, or other vegetation." Picardi v. Zimmiond, 2005 S.D. 24, ¶ 34, 693 N.W.2d 656, 665–66.
- 39. In DeHaven v. Hall, the South Dakota Supreme Court described the dominant estate's obligation for maintenance of an easement:

An easement holder (the dominant estate, in this case Halls) owes a limited duty to the landowner (the servient estate, DeHavens) to repair, and maintain

the easement. The Restatement (Third) of Property (Servitudes) § 4.13 (2000) defines this duty:

Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:

- (1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
- (a) prevent unreasonable interference with the enjoyment of the servient estate, or
- (b) avoid liability of the servient-estate owner to third parties. DeHaven, 2008 S.D. 57, ¶ 23, 753 N.W.2d 429, 437. The Court further quoted the Idaho Supreme Court on this issue:

The duty of maintaining the easement rests with the easement owner (i.e. dominant estate), even when the servient owner landowner uses the easement. That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate. This duty to maintain does not mean that the easement owner is required to maintain and repair the easement for the benefit of the servient estate. DeHaven, 2008 S.D. 57, ¶ 24, 753 N.W.2d at 437 (citing Walker v. Boozer, 95 P.3d 69, 73-74 (2004)).

40. As noted above, the maintenance obligation, in part, is required to "avoid liability of the servient-estate owner to third parties."

Based on the above Findings of Fact and Conclusions of Law, it is therefor, ORDERED as follows:

- The Motion to Dismiss filed by Richard Losh and Carol Kay Biewick Losh as part of their Answer is DENIED.
- The Shaw Family Trust's Motion for Permanent injunction is DENIED.

- 3. The Shaw Family Trust's Motion for Declaratory Judgment is GRANTED. The Shaw Family Trust is directed to submit an Order consistent with, and incorporating by reference, the above Findings of Fact and Conclusions of Law above that shall be filed with the Custer County Register of Deeds and indexed against the affected properties described herein.
- Each Party to the above-captioned matter will be responsible for their own costs and attorney's fees.
- This is a final Order as it disposes of all claims and counterclaims in the abovecaptioned matter.

Dated this 7th day of November, 2024.

Attest: Barrera, Ellen Clerk/Deputy

Heidi L. Linngren

Circuit Court Judge

Seventh Judicial Circuit

STATE OF SOUTH DAKOTA)) SS.		IN CIRCUIT COURT
COUNTY OF CUSTER	j		SEVENTH JUDICIAL CIRCUIT
SHAW FAMILY TRUST ESTABL	ISHED)	Case No. 16CIV23-000020
MAY 22, 1991, AS RESTATED OF	NJULY)	
18, 2019 by and through its acting T	rustee,)	
JILL D. SHAW,)	JUDGMENT
)	
Plaintiffs,)	
)	
V.)	
)	
RICHARD LOSH and CAROL KA	Y)	
BIEWICK LOSH,)	
)	
Defendants.)	

The Court having heard argument on September 18, 2024, and thereafter having entered its Order on Motion for Declaratory Judgment on November 7, 2024, granting judgment on the pleadings in favor of the Plaintiff, the Shaw Family Trust Established May 22, 1991, as Restated on July 18, 2019, and having entered its Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleadings and Motion for Permanent Injunction, copies of both of which are incorporated into this Judgment by reference, it is now therefore,

HEREBY ADJUDGED, and DECREED as follows:

In accordance with the above-incorporated orders, the Shaw Family Trust's Motion for Declaratory Judgment is GRANTED.

11/15/2024 8:07:27 AM

Attest: Barrera, Ellen Clerk/Deputy



The Honorable Heidi L. Linngren Circuit Court Judge

Seventh Judicial Circuit

CERTIFICATE OF SERVICE

I hereby certify on November 14, 2024, a true and correct copy of JUDGMENT was electronically filed through South Dakota's Odyssey File and Serve Portal and served by U.S. Mail, first class, postage prepaid, and by email upon the following individuals:

Richard Losh
Carol Kay Biewick Losh
1679 S. Kearney Street
Denver, Colorado 80224
Email: richardlosh@comeast.net

By: /s/Richard M. Williams Richard M. Williams

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT 2 COUNTY OF CUSTER) SEVENTH JUDICIAL CIRCUIT 3 ***********************************				
Shaw Family Trust, by and through its trustees, Ronald D. Shaw and Sits trustees, Ronald D. Shaw and September 18, 2024 Richard Losh and September 18, 2024 Richard Losh Appearing Office of trust Court Seventh Judge of the Circuit Seve	1	STATE OF SOUTH DAKO	N1000 #0	IN CIRCUIT COURT
Shaw Family Trust, by and through its trustees, Ronald D. Shaw and Jill D. Shaw, Plaintiffs, MOTIONS HEARING Plaintiffs, September 18, 2024 Richard Losh and September 18, 2024 BEFORE: The Honorable Heidi L. Linngren Judge of the Circuit Court Seventh Judicial Circuit Rapid City, South Dakota APPEARANCES: Mr. Richard M. Williams Gunderson, Palmer, Nelson & Ashmore, LLP Rapid City, South Dakota Appearing on behalf of the Plaintiffs. Mr. Richard Losh Ms. Carol Kay Biewick-Losh Denver, Colorado Appearing Pro Se. PROCEEDINGS: The above-entitled matter came on for a Motions Hearing on the 18th day of September, 2024, commencing at the hour of 3:27 p.m. in the Courtroom of the Custer County Courthouse, Custer, South Dakota.	2	COUNTY OF CUSTER)	SEVENTH JUDICIAL CIRCUIT
its trustees, Ronald D. Shaw and Jill D. Shaw, Plaintiffs, * MOTIONS HEARING Plaintiffs, * September 18, 2024 Richard Losh and * September 18, 2024 Richard Losh and * September 18, 2024 Richard Losh and * September 18, 2024 BEFORE: The Honorable Heidi L. Linngren Judge of the Circuit Court Seventh Judicial Circuit Rapid City, South Dakota APPEARANCES: Mr. Richard M. Williams Gunderson, Palmer, Nelson & Ashmore, LLP Rapid City, South Dakota APPEARANCES: Mr. Richard M. Williams Gunderson, Palmer, Nelson & Ashmore, LLP Rapid City, South Dakota Appearing on behalf of the Plaintiffs. Mr. Richard Losh Ms. Carol Kay Biewick-Losh Denver, Colorado Appearing Pro Se. PROCEEDINGS: The above-entitled matter came on for a Motions Hearing on the 18th day of September, 2024, commencing at the hour of 3:27 p.m. in the Courtroom of the Custer County Courthouse, Custer, South Dakota.	3	* * * * * * * * * *	* * * * * * * *	* * * * * * * * * * * * *
Jill D. Shaw, Plaintiffs, * MOTIONS HEARING -vs- * September 18, 2024 Richard Losh and carol Kay Biewick-Losh, * Defendants. * The Honorable Heidi L. Linngren Judge of the Circuit Court Seventh Judicial Circuit Rapid City, South Dakota APPEARANCES: Mr. Richard M. Williams Gunderson, Palmer, Nelson & Ashmore, LLP Rapid City, South Dakota Appearing on behalf of the Plaintiffs. Mr. Richard Losh Ms. Carol Kay Biewick-Losh Denver, Colorado Appearing Pro Se. PROCEEDINGS: The above-entitled matter came on for a Motions Hearing on the 18th day of September, 2024, commencing at the hour of 3:27 p.m. in the Courtroom of the Custer County Courthouse, Custer, South Dakota.	4	Shaw Family Trust,	by and through	* 16CIV23-000020
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* September 18, 2024 * Richard Losh and Carol Kay Biewick-Losh, * Defendants. * * * * * * * * * * * * * * * * * * *	5	Jill D. Shaw,		*
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1	INDEX OF	EXHIBITS			
2	NUMBER DESCRIPTION	MARKED	OFFERED	RECE	(VED
3	Plaintiff 1	3			
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5	INDE	×			
6	Argument by Mr. Williams:			Page	5
7	Argument by Mr. Losh:			Page	14
8	Comments by the Court:			Page	18
9	Discussion on Proposed Terms	Items 1 - 15:		Page	24
0	Court's Ruling:			Page	58
1					
2					
3					
4					
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.7					
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1 (Plaintiffs' Exhibit Number 1 marked for 2 identification.) 3 THE COURT: All right. This is the time set for a motions 4 hearing in the matter of Shaw Family Trust versus Richard 5 and Carol Losh -- is it Losh or Losh? 6 MR. RICHARD LOSH: Losh. MS. CAROL KAY BIEWICK-LOSH: Losh. 7 8 THE COURT: Losh. Mr. Williams is here on behalf of the 9 trust. The Loshes are here personally present as -- just 10 for the record, I note that Mr. Williams had objected to 11 the continuance to today. In fairness to the Loshes, 12 obviously, you traveled as well. When the date was set 13 back in August, you weren't part of that scheduling, so 14 that's why we're here today. 15 Certainly, Mr. Williams represents the trust; 16 however, he proceeds without Ms. Shaw present, because I 17 think the dynamic of the trust has changed somewhat as 18 Mr. Shaw has passed away, and I don't think that the 19 formal caption has been changed, at least what I have. 20 And just for the benefit of the Loshes to explain why 21 they're not here and you are, because you're representing 22 yourselves. I also note for the record, perhaps, apologetically, although I don't have to apologize on 23 24 behalf of Mr. Goff, but it does seem throughout these

proceedings you kind of got left with an attorney that

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moved as they had representation, and now we're kind of here for a substantive hearing.

So, I can't at any point give you legal advice. If
there comes a point where you would ask or wish to seek
legal counsel, you can just go ahead and mention that and
ask. Obviously, it involves coming back again, which we
may very well end up doing anyway, but I just wanted to at
least let you know and have that afforded to you.

Mr. Williams, you filed a motion, which is the purpose of today's hearing. I know there have been some responsive documents and such that have been filed. I guess I'm going to have you, Mr. Williams, start by way of any — just for record purposes and any responses that you may have to what has been filed as recently as I believe September 13th.

MR. WILLIAMS: Sure, Your Honor. I don't know if the Court prefers if I stand or sit or --

THE COURT: It's however the court reporter can hear. I know people are used to standing, but I really am fine with you sitting since I know you're referring to notes and things like that, as long as you're talking into the microphone. And that would go for both of you folks too. You can remain seated. It's not disrespectful. My goal is just to make sure the court reporter hears everything so she can get everything down. Mr. Williams.

MR. WILLIAMS: Thank you, Your Honor. So, as the Court noted in its earlier statements, Ron Shaw, one of the trustees of the family trust, passed away as a result of a car accident on October 25th of 2023. Jill Shaw, obviously, the other trustee — I don't know how to put this — has not had a — it's not — they were together since I think the age of about 16. This has been extremely difficult for her.

THE COURT: Well, and I can tell you and the Loshes as

well — it's certainly not a secret; it was a public hearing — I presided over the sentencing or disposition of the traffic citation. And Ms. Shaw was present, and I did get quite a history of them, and obviously it was a very tragic accident that happened, and it is very apparent that it's difficult. And throughout those proceedings, essentially, she and her children informed the Court and court staff that, quite frankly, they hope they never have to come back to South Dakota.

So I understand that because you're here as a representative, Mr. Williams, I just wanted by way of explanation to those folks why Ms. Shaw is not required to be here, but they are. So, if that helps.

MR. WILLIAMS: Thank you, Your Honor. That was much of what I was going to explain, but the Court is obviously familiar with that.

So what we will probably need to do for a procedural matter is I'm not sure what the status of that trust is currently. What I would suggest is that I would file a motion to substitute, and it may be just, in that motion, it probably might just be renaming the trustees of that trust. That might be all it needs. I just don't know the status of the probate and ancillary trust issues, Your Honor.

THE COURT: Sure. And just for your benefit, folks, in the event that the motion is filed to substitute, that's not anything that affects necessarily the pleadings or changes the dynamic of what's at issue between your properties and why we're here today. It's just to basically make the record right as to who the parties are, because it's sadly very clear that Ronald Shaw is no longer a party or a trustee.

And honestly, I know, Mr. Williams, that there was some work or some discussion. Ms. Shaw, when she appeared during that proceeding for the individual that received the citation for that accident, there were lawyers in the courtroom, and I know that there was some work that was done by way of some filings and things like that with the trust, but I can't answer the question as to where they are by way of the estate, I guess.

So I think that the record is maybe not clear, but

clear at the same time that it's kind of a work in progress by way of the substitution. At the end of the day it doesn't change the dispute between landholders, even though a landholder in Mr. Williams' case is a trust, and you folks are obviously the owners of the other piece of land.

So, if that helps by way of background, Mr. Williams, I'll let you proceed.

MR. WILLIAMS: Thank you, Your Honor. I would proceed with the motion for judgment on the pleadings. I would tell the Court that I don't have any witnesses to call today. We believe this to be a legal matter basically for declaratory judgment based on the documents that we have attached as exhibits to our complaint. And more specifically, just the deeds to the properties, the Shaw Family Trust and the Losh deed, in addition to the Case Subdivision plat, which provides for the creation of Lot 4, which the Shaws own, and the easement that is at issue today.

So with that in mind, Your Honor, do you mind if I approach? I would like to provide a larger copy of that plat so that it would be easier to see the easements.

THE COURT: Sure.

MR. WILLIAMS: Thank you. I will provide a copy to the Loshes.

THE COURT: Thank you.

MR. WILLIAMS: So this is — basically what I've handed
the Court we've marked for today as Exhibit 1. This is
actually Exhibit B to the complaint. This was filed with
the Custer County Register of Deeds, and it's Case
Subdivision Number 4, which platted the lots owned by the
Shaws plus additional lots. The Shaws purchased Lot 4,
which is basically in the center of that plat.

The easement that we're talking about is along, if you're looking at it, along the right-hand side that traverses basically the entire length north from south on that property line.

And the reason I think this is a legal issue is that we don't dispute that this plat, as written right on there, creates a 60-foot wide private access easement dedicated on this plat for the owners of Tract Reinke.

Tract Reinke is now owned by the Loshes. So that is the access that is at issue today.

Prior -- let me go back to when my clients purchased this property on September 18th of 2020. In my discussions with them, I don't think they recognized that there was an easement on there. We're not disputing that, the existence, however, because it's clearly platted; it's clearly a legal easement; and it's as described on this plat.

Sometime after they purchased that, I believe the

Loshes tried to contact them about putting this road in. I

don't think that attempt went anywhere, and at some point

the road was cut through.

What we're here today to talk about is just what legally does this mean. The plat does not have any other descriptions of the nature and extent of that easement. So, from our viewpoint, what we're left with is basically South Dakota case law, you know, defining the nature and use of an easement in pretty general terms, and that would be the extent of access, the type of access, obligations for maintenance and fencing.

It's our position -- and, you know, we've laid this out in our brief at Page 10 -- and what we have at Page 10 is basically an excerpt of a access agreement that we've been kicking back and forth over the course of, well, since the filing of this complaint. And it's just some considerations that we thought might be informative for the Court. I did read Mr. Losh's response, and I'm not entirely sure that we're really fighting about much today at this point.

So, you know, what we want to do -- and I'm looking at those on Page 10 right now -- based on the response, you know, we'd be willing to essentially strike Paragraph 2 that dealt with the construction of the road based on,

you know, the composition of granite and properly
engineered, that type of thing. I mean, obviously, I think
that there would still be a requirement that it be safe
for travel, so proper engineering might be there, but the
remainder of that probably is something that we could not
need — we wouldn't need to include it.

The other thing that sort of was raised I think was that Paragraph 6 with regard to maintenance. I think the Loshes recognize that as the dominant tenement that there's a obligation placed on them by state law to maintain that easement area. At the same time, that my clients would be able to use and maintain it, you know, to the extent that it didn't unnecessarily interfere with the Loshes' access to their property.

In general, the cases that we've cited indicate that because it's simply an easement, my clients would have the opportunity to travel over that easement area, gated, provided that the gates provide reasonable access to the Loshes, and otherwise maintain that easement to the extent that the Loshes would continue to have reasonable access to their Tract Reinke.

Along those lines, it appears from a reading from the plat that the dominant tenement is Tract Reinke; the servient tenement would be Lot 4. And what does that mean?

Of course, it means the dominant tenement can obviously

use the easement area, but that the servient tenement retains all the incidents of ownership otherwise to that land.

We also think that the easement is constrained by
what we see here as the use, and that would be for the
owners of Tract Reinke. So that wouldn't extend to any
subdivisions of the land past that, nor would it include
commercial traffic as a private access easement, and
certainly it doesn't appear to create a public access
easement.

So along those lines, Your Honor, we would suggest, you know, those items that we see that are on Paragraph 10 -- or on Page 10 to 11. The other thing too would be I know that there was an objection by the Loshes to Paragraph 14 with the extinguishment. I think we can for the purposes of today cross that out too. I think that this -- I don't know that, without an agreement, that that would be an appropriate clause to place in there, Your Honor.

And 15, of course, would be more proper for an agreement rather than an order that would be issued by the Court. It would be my suggestion — or if we were to — if the Court would rule in our favor today, what I would propose doing is changing these into conclusions of law and basically findings of fact based mostly off our

complaint was laid out in a way to basically structure
those conclusions of law and the exhibits in order to make
this more capable of a judgment for judgment on the
pleadings, because we are just talking about the legal
ramifications of the filing of this plat and the
application of state law.

In this case it's different than some of the other easement cases I've had where there's basically a history of prior use and all of that, that goes along with that, and how was it used in the past, who used it. All those types of things we don't really have here because this is a really new development, a new road. And so I think we can just basically look at these documents and this plat and decide as a matter of law and do a declaratory ruling on the legal ramifications of this legal document.

I also understand that Mr. Losh was objecting to, you know, any sort of injunction to that effect. You know, I don't know that it's necessary, Your Honor. If this Court should rule in our favor, I think the declaratory ruling would be satisfactory, and the injunction wouldn't be necessary provided that we'd be given the opportunity to place those conditions in an order that would be filed and recorded with the register of deeds that would further modify the conditions or the nature and extent of the easement that was platted on that Case Subdivision 4,

which is seen in Exhibit 1.

With that in mind, Your Honor, I know there was some other conversations about, you know, back and forth between the parties, about access and all this stuff. I'm not going to get into that because I don't think it's necessary for this pure legal argument. And then unless the Court wants to hear more about those, I am not going to speak to those issues, Your Honor. Thank you.

THE COURT: Thank you. So, I've read all of your submissions, and I understand probably some of those things in the back-and-forth you provided as a historical note, because at the end of the day we're here on a purely legal one. Sometimes that's hard when there's a lot of history and personal stuff that goes along with things, but one thing that Mr. Williams is absolutely right about is I am here to rule on a legal issue.

So, you've heard him indicate a couple of basic things, in my opinion, that certainly they don't disagree or dispute that there's an easement that you have a right to and that you're the dominant party and that they are the secondary party, essentially. The question is: What is it that we do as a matter of law to get this solidified?

There is case law certainly in favor of what

Mr. Williams is talking about for his argument. The other

part of it that I would say before I hear from you on the

legal issues of the easement itself and maybe the proposals that have been made, to include striking some of the things that you objected to, is that if we get to that point, I don't see any legal need for an injunction. So, I kind of want to skip that part so we don't get held up on the things that we probably all or that everybody agrees about and just the things that aren't agreed to, if that makes sense.

So, this would be your opportunity, either one of you, to make any argument that you wish based on what Mr. Williams has said here today. Perhaps, the things that he's said have satisfied some of your objections, and we're to the point where we just need to get this, like he says, legally in writing so that nobody has any question, nobody has to go back and forth any more, that it is what it is by way of a legal easement.

So, to either one of you, this would be your opportunity to respond to what Mr. Williams has said.

MR. RICHARD LOSH: Well, first, Your Honor, I have a question as to whether any legal agreement in terms of our easement use and maintenance is necessary when it all — when we've installed the driveway legally, and as far as I can tell, it's in good shape. The Shaws have complained about it to their attorney, and perhaps others, as being unsafe. And when asked, you know, to specify what about it

is unsafe, have not heard any response to that.

We believe in good relationships with neighbors. We respect the land. We respect the property of others and treat it as though we would want ours treated.

So, just right off the bat we don't see a need for an agreement. If there's some condition that we —— some instance where we might interfere with their access somehow, some way, or offend them in terms of how we may not respect the property, then please just let us know directly. I don't think we need legal action to adjust to each other's preferences, and if there's any complaints, just to hear directly from the other property owner first. Say, hello, this is your neighbor. I've got this concern about how you use the easement, what do you have to say about that, instead of going through this legal process, which takes a long time. There's no personal contact to better the understanding between parties.

A lot of times you can meet with somebody and understand more of where they're coming from and adjust our perspectives and how we listen to the other person as opposed to being, right off the bat, being defiance, being against each other if we're not in total agreement. As Mr. Williams seemed to suggest, you know, there's really not a whole lot of disagreement in terms of our use of the easement.

Since February 28th, which was before the complaint was filed — and I believe they knew about it before the complaint was filed, but I don't know, I can't prove it — basically the complaint, it did not state a case or controversy worthy of the deliberation and intervention by the Court. We concede that certainly we have no right to limit your access and use of your property.

And the letter I think I wrote right after receiving the complaint from Mr. Williams was, fine, you can fill in the ditches all you want. You can do whatever you want. We have no ownership to that. That was my misunderstanding as to the surface, somehow the dominant tenement being responsible for. I cleared that up before they filed the complaint, and I mentioned that in the letter.

My concern was why if they say, I believe in

Mr. Williams' -- one of his -- I think Paragraph 26 of his

complaint was the intent of the Shaws was to allow for

proper ditches for drainage of the water away from the

roadway, the driveway. And the reason we wrote the letter

to the Shaws seemed to -- that occurred before the

complaint -- was why would they not put a culvert and

preserve the function of the -- no response. The response

was basically a complaint.

But there is no real controversy in my mind, in either of our minds. My wife and I treat the property of

others as though it were our own, and we respect the rights of others. So, to ask the Court to order us in somehow, some way, to do something that we're already doing, it seems unnecessary. And quite frankly, Your Honor, I have to say this, it seems like harassment. And I mentioned that to Mr. Williams a couple times and the fact that, you know, it causes anxiety. And no response. No response.

And then this owner -- and we feel sorry for her in the loss of her husband, certainly, about that, but she's had opportunity to meet with us. I've notified

Mr. Williams when we came up and asked that -- was it six months ago or a year ago -- and offered to meet with

Ms. Shaw. And, no, she preferred not to.

So, you know, to have this agreement, supposedly agreement, has got to have two sides. And how can we agree to something when, number one, we don't feel like we're getting any benefit from this so-called agreement. It's supposed to be some sort of a contract over the use of land. There's got to be a benefit to each side to have consideration, in my mind.

But, you know, when we respect the land, and there's no specific complaints about the road -- this is a general sort of accusation that it's unsafe -- leaves me to wonder what would happen if such an agreement were -- if these

terms and conditions were agreed to by us, what would they do next.

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I mean, if there's any of those conditions that we might violate, without an agreement, they have full access to the courts to complain; a legal complaint that so-and-so left trash or a vehicle parked on the driveway, something like that. That's a simple legal -- if first they would ask: Well, did you contact the other party to tell them that your car was parked illegally, or they don't like you throwing items on the driveway? No. Well, this is all we're asking for is basic communication between us and the Shaws. THE COURT: One of the things -- and I guess I'm going to best describe what I see as happening here is I appreciate your willingness, and I certainly have no reason to question either of your intentions about the land or otherwise. My concern, in all candor, and it's no disrespect, Mr. Williams, to your client, but clearly just in your own words she has made it clear that she doesn't necessarily want to work with you even though that is the best, most logical way that people should handle things. I don't disagree with you on that. I certainly don't disagree that Ms. Shaw has the right to contact an

attorney and talk about the land from a legal perspective.

One of the things, quite frankly, that I see in

having things more in writing as opposed to what you suggest which would — you know, oftentimes people see the law, and I respect that, as, hey, why can't we just use common sense. Why do we have to complicate everything with words and something that's signed.

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One concern -- and I'm saying this to Mr. Williams, and I understand his client is not here, and I respect the fact that she has chosen not to come, and that is her prerogative, she has representation -- is even with what you're talking about, sir, I foresee a problem without something that's more detailed in writing that actually at the end of the day protects you as well. MR. RICHARD LOSH: Could you be more specific, please. THE COURT: Well, even in your example of, well, if there's a problem with the car on the road, or if there's a problem with the road not being safe, they can just come to me. Clearly, the history here which, you know, I've indicated isn't important, but some of it is with what you're asking the Court to not order and that there's no reason to have court intervention. If I take your responsive pleadings to their face, and I have no reason to suggest, or nor has Mr. Williams suggested that you're lying to the Court or misrepresenting anything to the Court factually or otherwise, the bottom line is Ms. Shaw doesn't want to have that relationship it appears. And

Mr. Williams is nodding.

And so it comes down to a protection even for you to have certain things laid out in writing so that -- you know, you've just used the word "harassment" now, that you believe that some of this has risen to the level of harassment.

MR. RICHARD LOSH: It feels that way.

THE COURT: Okay. And you get to feel that way if you wish. I mean, that is -- I'm not going to be here to tell you how you should or shouldn't feel. Neither should Mr. Williams be able to tell you that.

But the simple answer is a legal document that sets out criteria — and I agree, I mean, I agree with your objections, and Mr. Williams honestly cleared up some of the questions that I had, because some of the paragraphs that he suggested need to be stricken I would have stricken regardless, because they're not applicable. And I don't believe that there's anybody that could be the person that subjectively or objectively, for that matter, could make a determination as to whether or not those criteria were met, and it would be putting people in a place where you would not even be able to adhere to the things that would be in writing.

So, you objected to some of the things. He addressed those. I had notes before I came in here that I think, for

example, Paragraph 2, Paragraph 6, Paragraph 14 and

Paragraph 15 should never be considered under these

circumstances because you don't have two people that are

trying to get along with each other.

I understand your efforts. Ms. Shaw has made it
perfectly clear that that's not what she wants. She
doesn't want to talk to you folks. She doesn't want to sit
down and have a conversation with you folks. I don't blame
you folks for that. I think sometimes people just have
different ways of life.

I also think that Ms. Shaw, in all candor, moving forward in the future — I don't want to speak to her — I just know that I saw her that day, and what has happened in the last year has been something that I don't know that Ms. Shaw will probably ever want to have a conversation with you about what's the best for the road, and I think that she will probably always take an approach that she will go through an attorney, and that's her right.

So what Mr. Williams is asking here is that the Court make a declaration, essentially, for what you're both saying; what you would want to sit down and have a conversation about; what she doesn't want to sit down and have a conversation about, but that both of you leave with, in writing, of what's required under the law for you to maintain and have this easement.

1 MR. RICHARD LOSH: I'm sorry, Your Honor. It's required by 2 law to have an agreement? 3 THE COURT: Well, we're mincing words here, because you 4 guys clearly don't have an agreement --5 MR. RICHARD LOSH: I'm sorry, I misunderstood. 6 THE COURT: -- or we wouldn't be here. 7 MR. RICHARD LOSH: Okay. 8 THE COURT: I mean a declaration that it is in writing as 9 to what the criteria is that both parties would have to 10 meet under the law in maintaining the easement. I 11 apologize for using the word "agreement." Clearly --12 clearly, you don't have an agreement or we wouldn't be 13 sitting here. 14 MR. RICHARD LOSH: Well, no, my question was: Does the law 15 require that we have an agreement as to the use and 16 maintenance of the easement? 17 THE COURT: No, and I'm telling you that's not what is 18 suggested here. Mr. Williams is asking that a declaration 19 be made under the law for the criteria of the law, that 20 there's something in writing that's recorded at the 21 register of deeds so that no one has any question about 22 what the obligation is. It isn't about an agreement. 23 MR. RICHARD LOSH: Would it be fair to ask that we 24 negotiate the agreement? 25 THE COURT: I think Mr. Williams has, you know, perhaps,

offered that, but he's asking today as a matter of law that it be set forth.

You know, the only other thing that -- I'm here. I came down here. If you guys want to have a conversation -- you know, part of me, quite frankly, I'll say this to both of you -- I think you're actually closer to an agreement than either one of you think, because I think what has happened is you really want to kind of do it by way of a gentlemen's agreement, handshake, we all need to be respectful of each other's property. And you don't have a willing party to do that on the other side; therefore, that can never exist.

But the criteria, I mean, I'm certainly willing to give you a few minutes to visit, because if we reduce it — if it's reduced to writing regardless, and the declaration is made by law that this is what it is, and these are the responsibilities, I don't have a problem with two people sitting down and visiting about that.

Now, Mr. Williams, if you're unwilling to do that because you don't have your client's say about it, that's a difficult spot for you to be in.

MR. WILLIAMS: Your Honor, I do have my client's say in this regard. We did try to come to an agreement on several occasions. I spoke with her, and she said, I just want this declared by the Court, and I'll live by whatever the

1 Court decides. 2 THE COURT: So, can you tell me -- let's just, perhaps, do 3 it this way. The example on that Page 10 and 11 that Mr. Williams has set forth. 4 5 MR. RICHARD LOSH: Okay. 6 THE COURT: I guess I'm choosing your words. You said 7 "example." Is that accurate? 8 MR. RICHARD LOSH: I'm sorry. What are the conditions that 9 Mr. Williams is suggesting be eliminated or reconsidered? 10 THE COURT: Do you have that in front of you? 11 MR. RICHARD LOSH: I've got the list of the terms. 12 THE COURT: Mr. Williams, and correct me if I'm wrong, but 13 he's suggested that Number 2 be stricken. 14 Could you reiterate what you suggested with Paragraph 15 Number 6? 16 MR. WILLIAMS: Probably just amend Paragraph 6 to state 17 that the Losh property, Tract Reinke, has the duty to 18 maintain the easement area as the dominant tenement; and 19 that, essentially, that the Tract 4 in this instance, the 20 Shaw property, would also have the ability to maintain and 21 repair the easement area as it follows over and across Lot 22 4. 23 I believe in one of the cases we cited indicated that 24 to the extent that either party has some extraordinary use

of that property by which there was damage; for instance,

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1 if he might have construction vehicles or other heavy 2 equipment on it, that whoever was responsible for that 3 would be liable to repair that damage, Your Honor. 4 THE COURT: All right. I'll get back to that in a second. 5 You suggested that 14 and 15 be eliminated 6 altogether? 7 MR. WILLIAMS: That's correct, Your Honor. 8 THE COURT: Yes, sir. 9 MR. RICHARD LOSH: I'd respectfully request the 10 opportunity to negotiate be resumed. We had a negotiation 11 going, and it lasted for several weeks. We had an attorney 12 get to a certain point. And a lot of it is buried in the 13 language, Your Honor, in my humble opinion; that no 14 contract or agreement can perfectly predict what the 15 future as to past. 16 And we don't know what the conditions are like. 17 Mr. Williams has misrepresented certain things about

And we don't know what the conditions are like.

Mr. Williams has misrepresented certain things about

Ms. Shaw in his briefs; the fact that she's apparently not
a resident, and yet he stated so, and the fact that the
house is under construction, which it's not. We were just
there. It's vacant land still. You know, some
mischaracterizations that can be persuasive.

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And the language in the agreement that we're either going to sign or is apparently going to be ordered by Your Honor I think is very important, and I think we need an

1 opportunity to review it and then consent to it, if it's 2 deemed fair by Your Honor. I don't think we should decide 3 this right now. 4 THE COURT: Well --5 MR. RICHARD LOSH: I mean, if we're going to be forced to 6 accept an order from the Court on maintenance, I 7 respectfully request the opportunity to participate and 8 follow the provisions of the sections of the Restatement 9 of the Law of Property Third Edition that very concisely 10 put it out, and that is not reflected in these conditions. 11 THE COURT: Well, that's for you to argue today then, 12 because the purpose of today was to be heard on this 13 motion. And Mr. Williams has now indicated, even at my 14 prompting, that his client does not wish to negotiate, and 15 I'm not going to order negotiations when she's not a 16 willing participant. It seems to be a futile effort if she 17 doesn't want to negotiate. So we're here to make a Court 18 order. 19 MR. RICHARD LOSH: Okay. So, in other words, my 20 understanding is then you want to keep --21 THE COURT: Well, let's do it this way. 22 MR. RICHARD LOSH: -- Section 1. 23 Let's just talk about -- let's just talk 24 about each of these sections. 25 MR. RICHARD LOSH: Right. Good idea.

1 THE COURT: So, Number 1. What, if any, objection do you 2 have to Number 1? 3 MR. RICHARD LOSH: Well, first off the driveway is already 4 installed, and its location is not according to this 5 specification. And then with all that, dimensions are not 6 accurate; basically, the fact that it doesn't - it's 7 not -- it doesn't accurately describe the location. 8 THE COURT: So you don't disagree with the spirit of what 9 it says, but the location is not accurate? 10 MR. RICHARD LOSH: Right. I mean, we would have to measure 11 to see how far it is from the fenceline, from the property 12 line. 13 THE COURT: Do you disagree, Mr. Williams, that perhaps --14 just a second -- that, perhaps, the measurements need to 15 be -- if I'm ordering this, if I'm going to grant your 16 motion regarding a declaratory action here, which I'm not 17 granting an injunction if I do this -- he is saying that 18 that's not accurate. So what -- I'm not signing something 19 or adopting something that doesn't have the right 20 measurements or recitation of what it indicates. 21 So fixing that, Mr. Williams, do you have any 22 objection that that should be an accurate depiction of 23 what the actual easement and driveway is as it exists 24 today? 25 MR. WILLIAMS: No objection to that, Your Honor. What I

1 would say is for the purposes of getting this done and 2 accomplished that we would simply strike the second 3 sentence that reads: "The road surface itself shall be 10 4 feet from the property line of Lot 4 and may not be less 5 than 12 feet in width." Strike that entirely out of that 6 paragraph, leaving the remainder the same. 7 THE COURT: All right. So he's getting rid of any 8 dimensions at all. 9 MR. RICHARD LOSH: That helps. 10 THE COURT: Okay. So if you cross out -- if you cross out the word: "The road surface itself," and cross it all the 11 12 way out to "width period," are you satisfied that that is 13 what is occurring or has occurred as you sit here today? 14 MR. RICHARD LOSH: That's -- that sounds better to me, 15 Your Honor. My question to you is also: Is this proposed 16 order going to be effective against Ms. Shaw or the Shaw 17 property as well as us? It shall be maintained. "... shall 18 be along a maintained road ... "Okay. I'm sorry. I'll withdraw any objection. 19 20 THE COURT: Okay. And just so you understand, the 21 declaration that the Shaw Trust is asking the Court to 22 make -- Mr. Williams, you can correct me if I'm putting 23 words in your mouth as far as the legal argument and the 24 case authority in the State of South Dakota -- would 25 essentially lay out, but by way of order, what is required

- under the law of the State of South Dakota for both the
 dominant and subserv --
- 3 MR. RICHARD LOSH: Subservient.
- 4 THE COURT: Thank you. No, I -- it's late in the day, and
- 5 I had a big hearing this morning too, so I'm on two
- 6 different tracks here. Lays out what the obligations are
- 7 in writing. That's basically all Mr. Williams is asking
- 8 for is that I reduce to an order what is required under
- 9 the law.
- 10 MR. RICHARD LOSH: By both parties.
- 11 THE COURT: By both parties.
- 12 MR. RICHARD LOSH: Very good.
- 13 THE COURT: Yes. So are you satisfied, if the sentence is
- 14 stricken, that Number 1 is appropriate?
- MR. RICHARD LOSH: Yes, ma'am. Yes, Your Honor.
- 16 THE COURT: All right. Number 2 has been requested by
- 17 Mr. Williams to be stricken.
- 18 MR. RICHARD LOSH: That's fine by us.
- 19 THE COURT: Okay. So Number 3, I'll let you kind of peruse
- 20 over that quick.
- 21 MR. RICHARD LOSH: We have no problems with the first
- 22 sentence. The other language in here is unnecessary. It
- 23 depends on the definitions of commercial, for example. And
- 24 what business is it whether or not we choose to subdivide?
- 25 That is none of the business of -- that's our property.

1 MR. WILLIAMS: Your Honor, I think the easement itself 2 limits it to the -- it's for the owners of Tract Reinke. 3 To the extent that that lot is subdivided, it would have 4 to be replatted. There would no longer be the Tract Reinke 5 as it exists today on this plat. And so the easement use 6 would be expanded past what we see here for Tract Reinke 7 to Tract A and B or however it should be subdivided. The 8 language on this seems to limit it to Tract Reinke as 9 currently platted. 10 THE COURT: Well, you could limit it to Tract Reinke as 11 it's currently platted, because if these folks decide to 12 subdivide they to have to deal with the consequences by 13 way of the register of deeds and notice to your client 14 regardless. I think the concern here is that you're 15 prohibiting use of this property that -- that he's saying 16 I'll deal with the ramifications if I deal with the 17 ramifications, but you don't get to tell me what I can do 18 with my property. I mean, those ramifications speak for 19 themselves. 20 MR. WILLIAMS: Right. I agree, Your Honor. I think one is, 21 from a purely legal perspective, if we're going to 22 construe this document, the four corners, the easement 23 provides, you know, private access to Tract Reinke, and I 24 think that's all we're trying to say. 25 THE COURT: And --

- 1 MR. WILLIAMS: And we --
- 2 THE COURT: Go ahead.
- 3 MR. WILLIAMS: I'm sorry, Your Honor, go ahead.
- 4 THE COURT: I was just going to say I agree. I mean, you
- 5 can't, quite frankly, eliminate all of that, because the
- 6 easement is specifically as it is platted for Tract
- 7 Reinke.
- 8 MR. RICHARD LOSH: Understood.
- 9 THE COURT: So what I -- and I think that satisfies your
- 10 concern, Mr. Williams, if the period goes at Tract Reinke,
- 11 period, without the prohibition of subdividing.
- 12 MR. WILLIAMS: So, Your Honor, I guess in light of that,
- 13 what if we just strike the -- amend the last sentence:
- 14 "The easement may only serve" --
- 15 THE COURT: To Tract Reinke as it is platted as of today's
- 16 date.
- 17 MR. RICHARD LOSH: I have a suggestion.
- 18 MR. WILLIAMS: Yes, Your Honor.
- 19 THE COURT: Let him finish, and then I'll take your
- 20 suggestion.
- 21 MR. WILLIAMS: I wouldn't have any objection to that. We
- 22 can strike the subdivision language.
- 23 THE COURT: Mr. Losh.
- 24 MR. RICHARD LOSH: I'm sorry. He didn't object to what you
- 25 said, which was?

1 THE COURT: Essentially, that it would read: "The easement 2 may only serve" --3 MR. RICHARD LOSH: What we could do is put Tract Reinke at 4 the end of the first sentence instead of that other stuff. 5 We could say, Number 3, our thought is: "This easement 6 shall be for the purpose of permitting grantees, their 7 social guests, or business invitees, access for ingress 8 and egress across the established roadway to Tract 9 Reinke." 10 In other words, at the end of the first sentence we 11 tack on: "Across the established roadway to Tract Reinke." 12 Then we wouldn't need any of the other stuff. 13 THE COURT: Well, I guess I'd view that a little bit 14 differently, but Mr. Williams. 15 MR. WILLIAMS: I think it's kind of mixing two concepts. 16 One of them is the legal concept that the easement is only 17 for access to Tract Reinke, and the other one is who can use Tract Reinke. 18 19 So, I would go back to just saying that final 20 sentence in that Paragraph 3 would read: "The easement may 21 only serve Tract Reinke, " period, and then strike: "which, 22 for the purposes of this agreement, may not be 23 subdivided." 24 THE COURT: All right. I do think we need a separate 25 sentence. I don't think you can just add Tract Reinke onto

1 it, because you have to specify the easement. And so if 2 the easement says it may only serve Tract Reinke, then 3 that satisfies their concern, which quite frankly under 4 the law you would not be able to subdivide unless you go 5 through the proper channels to subdivide, which could 6 affect, quite frankly, how -- it could in the long run 7 affect how that easement is used legally. 8 MR. RICHARD LOSH: Okay. 9 THE COURT: That's not for today. What I'm hearing you say 10 is you don't want the Shaws to tell you what you can do 11 with your property. You recognize that legally if you 12 decided to do that, there may be some ramifications to 13 this easement, and you could possibly be exposed to a 14 lawsuit because of this easement, whether I sign an order 15 or not, if it's misused in any way -- or if it's misused 16 in any way. 17 MR. RICHARD LOSH: Okay. 18 THE COURT: But it would take the language out that has 19 them telling you what you can do with your property. 20 MR. RICHARD LOSH: Okay. Then the other part is -- I'm 21 sorry, you had something. 22 MS. CAROL BIEWICK-LOSH: I do. I would like to have the 23 term "commercial" better defined as far as -- first of 24 all, we don't have any intention of subdividing that 25 property. It's not a large enough lot that -- so,

futuristically, that's not something that's in our plan.

But for commercial, I don't know what that all entails. What if I wanted to build another structure, a second structure on the property without subdividing it, and use it as a guesthouse or B&B or something of that nature. And then — and then sometimes my husband does some work from home. And I'm still a — I still have a license to practice as a RN in a pretty high degree, and so I might want to do some consulting services or whatever.

THE COURT: Well, I guess my question to you,

Mr. Williams, would be how does that not be included, or

what is the concern by way of the commercial use language

that would not include their examples here that would fall

under invitees?

MR. WILLIAMS: Your Honor, I think the only concern is, you know, the nature of I think real commercial use in terms of like an industrial thing where you have truck traffic or something on that road traveling through Lot 4. I don't, you know, consider an Airbnb to be commercial. I think the Supreme Court has determined that to be residential in nature.

And I think for -- and I can't speak for Custer,
because I'm not sure what their -- I don't actually think
they have zoning ordinances in Custer, but nonetheless,

1 maybe some type of home businesses and all that stuff 2 aren't actually considered commercial-type uses when you 3 have them in a residential area. And what we have here is 4 obviously platted lots that appear to be intended for 5 residential use. 6 MR. RICHARD LOSH: So why do we need the language then? 7 THE COURT: Well, in the event somebody decided they 8 wanted to build a hotel. I mean --9 MS. CAROL BIEWICK-LOSH: You know, there's an idea. 10 THE COURT: Well, I mean, you folks also have to 11 understand that when we're talking about not being able to 12 anticipate the realm of possibilities, if, you know, if 13 what's represented here today, which Mr. Williams said, 14 you know, all of those things would fall under residential 15 use like an Airbnb and the nursing situation. I'm not 16 suggesting you folks are nefarious. I don't want you to 17 take this wrong when I say this, but oftentimes the 18 language has to be included because if you were to decide, 19 well, you know what, Custer doesn't do this, Custer 20 doesn't do that. I think we're going to take our chances 21 and put a sixplex on there and see if somebody catches us 22 for that. 23 I think the goal on the commercial use is that you 24 don't have big trucks driving up and down the road; that,

you know, decide maybe you want to build a distillery

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there, for example. I'm not saying that that -- I know as 1 2 you sit here today those aren't your intentions, but I 3 would be out of a job if everybody followed exactly what 4 their intentions were today as opposed to what 10 years 5 down the road looks like. 6 MS. CAROL BIEWICK-LOSH: Well, if I may. I understand that 7 futuristically we don't always know. I mean, obviously, 8 just in the case of Mr. Shaw's demise. I'm sure that 9 wasn't anything that they had anticipated at that time. 10 If we sell the property, then these guidelines or 11 whatever you call them, restrictions --12 MR. RICHARD LOSH: Covenants. 13 MS. CAROL BIEWICK-LOSH: -- covenants would apply to new 14 homeowners. And so I think that's just something that --15 THE COURT: Well, I understand your concern. I'm going to 16 leave the "commercial" language in there. 17 MR. RICHARD LOSH: Could we qualify the "commercial," Your 18 Honor, just qualify it a bit, commercial with large 19 vehicles. THE COURT: No, because a commercial -- a hotel or an 20 21 eightplex is not big, large vehicles. That's a lot of 22 traffic is what -- it isn't just about big vehicles. I'm 23 giving you a lot of hypotheticals here, and I understand 24 that. 25 And I take you to your word, but if you sell the

property, and somebody does something different, that's not protected under here. And I think some of this stuff that you might be -- and I understand you want to be a good neighbor -- taking this personally to you. This is also looking forward in the future. So I'm leaving the "commercial" language in there.

Mr. Williams is here on record. You can order the transcript if you want. The South Dakota Supreme Court has spoken about Airbnbs and other type of residential -- MS. CAROL BIEWICK-LOSH: Use.

THE COURT: -- use that your suggestions here would not be in violation of this easement.

MR. RICHARD LOSH: Okay.

THE COURT: So 3 would read: "This easement shall be for the purposes of permitting grantees, their social guests, or business invitees, access for ingress and egress across the established roadway. The easement may not be used for commercial purposes. The easement may only serve Tract Reinke."

Mr. Williams, are you good with that?

MR. WILLIAMS: I'm good with that. I would also just notice, and I didn't pick this up earlier, it also includes "business invitees," so that may alleviate some of those concerns.

THE COURT: Well, that's why I asked, but I also think

1 when you're looking towards the future if somebody decides 2 to do something different. 3 MR. WILLIAMS: And that's why I'm happy to have 4 "commercial" remain in that language also, Your Honor. 5 THE COURT: All right. So -- and certainly your objections 6 are noted on this record about the "commercial" part. That 7 stays preserved. 8 MS. CAROL BIEWICK-LOSH: If I may just add one other thing 9 on that is throughout the years -- and that land has been 10 in my family since the '70s -- during that time, you know, 11 there's a lot of seasonal workers that come here, work in 12 the State Park or whatever, and so if -- I would feel that 13 we would be at liberty to rent that property as well too. 14 THE COURT: Well, if you're renting, like, an Airbnb type 15 of thing. You couldn't rent it as a campground. 16 MS. CAROL BIEWICK-LOSH: No, I'm not suggesting that. But 17 do you understand, I mean --18 THE COURT: Well, "business invitees," I think you need to 19 listen to the words. If you have invited someone that's 20 going to rent a room in your house, that is covered on 21 this. 22 MS. CAROL BIEWICK-LOSH: Okay. 23 THE COURT: Where you might end up with some problems is 24 if you have 45 people coming and going on that road, 25 because you've decided you'd like to welcome the whole

1 group of people that came from Ecuador to your home, I'm 2 going to tell you, you might have a problem, because 3 that's unnecessary use of that road. 4 MS. CAROL BIEWICK-LOSH: No, I understand. 5 THE COURT: All right. 6 MR. RICHARD LOSH: Thank you. 7 THE COURT: All right. Number 4, if you could take a look 8 at that. And that encompasses all of the things that we 9 talked about, you know, an easement is not for public use. 10 MR. RICHARD LOSH: We understand that. 11 THE COURT: So that's pretty general language, but I'll 12 give you a second to read it all. 13 MS. CAROL BIEWICK-LOSH: When you use -- when the term "public use" is used or "general public," who is the 14 15 general public? 16 THE COURT: Anybody who is not invited to your home. 17 MS. CAROL BIEWICK-LOSH: That -- pardon me? 18 THE COURT: Anybody who doesn't fall into the category of 19 Number 3. 20 MS. CAROL BIEWICK-LOSH: Okay. So if -- having a garage 21 sale, that sort of thing, I'd be at liberty to do that? 22 THE COURT: You could do that, but probably not 365 days 23 straight, that might be excessive; but if you're going to 24 do that twice a year or three times a year, I don't see

that that is prohibited.

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1 This is more from the standpoint that, for example, 2 if you decided you wanted to set up a lemonade stand and 3 have fireworks at your home, and you're going to open up 4 the road to 400 people to bring their lawn chairs to your 5 house. I don't know if Ms. Shaw would ever find that out, 6 but if the road was damaged after a period of time, and 7 there was all kinds of debris or something on it, and she 8 happened to be home on the 4th of July or she happened to 9 be there on the 4th of July, that might be the general 10 public that you have invited to say, everybody bring their 11 lawn chairs to my home and watch the fireworks. 12 MS. CAROL BIEWICK-LOSH: And just my last point on this is 13 our property does require some additional work right now, 14 some tree clearing, that sort of thing, and that may 15 involve --16 THE COURT: Those would be business invitees in Paragraph 17 because you've hired them, you've invited them to your 18 property. That is not in dispute. 19 MS. CAROL BIEWICK-LOSH: Okay. I just want to make sure. 20 THE COURT: Yeah. 21 MR. RICHARD LOSH: Thank you, Your Honor. 22 THE COURT: So Number 4 is valid under the law. 23 Number 5. Any questions, concerns or comments there? 24 MR. RICHARD LOSH: In my response, I don't know if that 25 made sense to you, but we had concerns that the Shaws may

1 decide to reconstruct the driveway in their own fashion, 2 in their own way, with their own materials. They have that 3 right as far as I can tell, in which case there may be 4 possible negligence that happens on their part. And if 5 there is an accident that results from that, I don't know 6 who should defend that claim. 7 THE COURT: Mr. Williams, any clarification to that end? I 8 don't -- I mean, if Ms. Shaw or any family member of the 9 Shaw Trust were to exercise their rights under the legal 10 easement as the secondary easement holder, the same would 11 ring true for them and anyone they would bring into the 12 property in the same manner. 13 MR. WILLIAMS: Right. Your Honor, if it would make 14 everybody feel better, I think we can -- the provision 15 that: "Grantees shall not be responsible for any injuries 16 or damages suffered by grantees' social guests and 17 business invitees based solely on the negligence of grantor." 18 19 So that would mean then if the grantor was negligent, 20 the grantees wouldn't be held responsible for that 21 negligence. 22 THE COURT: So you're basically making the conditions 23 reciprocal? 24 MR. WILLIAMS: Essentially, saying that basically it's a 25 -- other than the indemnification, the hold harmless

clause, it just would say that if the Shaws in this instance, based on their sole negligence, there was harm to the Loshes or their invitees, that the Loshes would not be responsible for that.

THE COURT: So that answers your question about in the event that — I mean, one question that you had, if I'm understanding it correctly, is what happens, though, under the circumstance that the Shaws exercise their right to fix or maintain something, and there's something wrong with that, let's say, a culvert or a gate or something like that, that they chose to exercise as the secondary easement holder. Then they, the Loshes, should not be responsible for any construction or maintenance and any of the negligence or deficiencies that could possibly be assumed to that work by the Shaws.

Is that part of what I'm hearing?

MR. RICHARD LOSH: I — I agree with what you just said,

Your Honor. I just have trouble following it. I think it's

got so many words. It can be tricky to people like me to

understanding correctly, and I think if we could simplify

it and say that the Shaws agree to indemnify the Loshes

for any harm resulting from — the same language would

apply to them as applies to us.

But in their case -- in our case the driveway is already there. So anything that happens now that somebody

complains about, they can't -- we would agree to indemnify 1 2 the Shaws, no problem with that. We've got homeowners' 3 insurance that would cover it, all that sort of thing. But 4 we just have questions as to if and when, and I believe 5 they will, make changes to the driveway, and then that 6 becomes somewhat their burden to indemnify us. 7 THE COURT: And Mr. Williams just agreed to that; for work 8 that the Shaws would do in exercising their rights. 9 MR. RICHARD LOSH: If we could simplify that somehow, it 10 would be a lot -- it would be very helpful. 11 MR. WILLIAMS: Your Honor, I think in a way -- I think the 12 writing that I could -- one way to do this would be to 13 submit it in proposed findings where it's more clear. Some 14 of the indemnification clauses that I've used for the 15 State has the language, you know, the State is held 16 harmless and whatever for these accidents, except for if 17 the injury or damage is the result of the, solely, of the 18 negligence of the State. So it's -- that's what I'm trying 19 to incorporate into this is basically this hold harmless 20 and indemnification provision wouldn't apply if the 21 negligence was on the part of the Shaws. 22 MR. RICHARD LOSH: We don't see any -- that's why --23 THE COURT: Well, and here's ultimately what's going to 24 happen, sir. By the time we're done here, Mr. Williams is 25 going to put this reduced to a proposed finding and order

for my signature, which then you have the ability to look through and say, wait a minute, that's not what we talked about. These are the objections I have to this. This is how we change it.

When we leave here today we're going to have a set, a working set, of the generalities that everybody has essentially gotten their objections noted; I've made my findings. For example, about the commercial language, that will be in there. Your objection is preserved.

Mr. Williams is going to put together that language that you're talking about so that you can study it and kind of digest it, because the reason that he and I are being a little careful with our words here is because holding somebody harmless of indemnity is a pretty broad legal term, and I don't want to make it more complicated than it needs to be. And he's acknowledging your objection and your concern, and he's going to incorporate that by way of example into that finding.

MR. RICHARD LOSH: Thank you, Your Honor.

THE COURT: And if it's not what you think it is -- once
he proposes that order when we're done here, you have five
days to respond in writing of, you know, I agree that this
order looks good to me. You know, my objections that I had
at the hearing, they're preserved, but as to the form that
we left here for, I agree that this is what it was; or,

1 no, Number 5 is not at all what I agreed to, this is my 2 objection. Then ultimately I decide what the language is 3 before I sign it. 4 MR. RICHARD LOSH: Okay. I understand. The five days is a 5 little tricky for us because not sure about the mail 6 service. 7 THE COURT: Well, you guys can get together and, perhaps, 8 email it to you by way of the proposed findings so that he 9 has it, and we can expedite this. 10 MR. WILLIAMS: I'd be happy to email it, Your Honor. 11 MR. RICHARD LOSH: I think that should work. 12 THE COURT: Okay. So with those changes that you'll see in 13 the proposed, we'll move on. 14 Number 6, if you could, Mr. Williams, reiterate what 15 your suggestion is by way of the reading with the changes. 16 MR. WILLIAMS: Your Honor, I think what we would do --17 and, you know, my client's life has changed. I don't know 18 what her plans are for this land any more. So part of the 19 purpose of this declaratory judgment is just to get this 20 on record so that if there was something to come up in the 21 future that the parties would know what they were getting 22 into right off the bat. 23 So, I don't -- I don't think that the law requires 24 shared upkeep of the maintenance of the easement. So I

would strike that first sentence. In my reading of the

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case law it requires the dominant tenement to maintain that easement, and so without an agreement it would just be stating what the law is. We would cross off that first sentence.

The second sentence --

THE COURT: Well, I think under the circumstances it's just an appropriate statement of the law is that the dominant holder of the easement is responsible for general maintenance.

MR. WILLIAMS: Yes, I think that's right. So what I think maybe we should do is strike everything then -- you know, start with that, what the Court just said, the dominant tenement is responsible for the maintenance and then skip down to -- cross everything out down to, "However," that, you know, if there's an extraordinary use, damages the easement through negligence or extraordinary use, that party will repair the damage at their own expense.

I think that that -- you know, it reads: "However, in the event that any party, its successors, invitees, or assigns damages the easement through negligence or extraordinary use of the easement, that party will repair the damage at their own expense."

I think that goes both ways, basically saying if you damage the easement, it seems only fair that whoever damages it fixes it. So I would start with that, and then

I think we can strike the last sentence and just leave it at that.

Basically, the beginning of that then would be: "The dominant tenement" -- or I can rephrase that in the findings -- "The dominant tenement is responsible for the maintenance of the easement area," and then start with, "However," that sentence that I just read into the record. THE COURT: So it will just be two sentences.

Yes, ma'am.

MS. CAROL BIEWICK-LOSH: I don't know if it's in here further down, and I'm just not seeing it yet, but the maintenance work that's done on the easement, whether it be done by the Shaws or by us, one, I think we have to ensure that there is access to their property and to our property in the event that there needs to be an emergency vehicle brought to the property or whatever.

THE COURT: Well, there's language that says there can be no interference at any time with the other person's enjoyment of the easement.

MS. CAROL BIEWICK-LOSH: So, in that event, say a portion of the road had to be sectioned off for whatever reason, would there be an alternate route to get around that?

THE COURT: The language says that no one can interfere with somebody else's enjoyment. So if they were going to

do something like that, the answer would be, yes. The same

thing with you. If you were to do something that would interfere with theirs, even if it's by way of maintenance, that language speaks for itself that no one can interfere otherwise.

So if there is some type of construction, then, yes, they will have to build some temporary road so an emergency vehicle can get back there, or you can enjoy your driveway. That's implied. We're not going to start saying: In the event that the roads are broken up there has to be — it says down the way, if I recall correctly, that neither party can interfere with the other person's enjoyment of the easement.

MR. WILLIAMS: Your Honor, I think that's just a correct statement of the law in general too, and I believe it also is shown in Paragraph 9.

THE COURT: Yes, that would answer your question.

MS. CAROL BIEWICK-LOSH: Okay. Thank you for that. I just -- I just know that we did have a past experience where a fire vehicle was not able to get up to our property --

MR. RICHARD LOSH: That was a different situation.

MS. CAROL BIEWICK-LOSH: -- in a reasonable amount of time.

MR. RICHARD LOSH: That was a different situation.

MS. CAROL BIEWICK-LOSH: Well, I know it's a different

1 situation. 2 THE COURT: I can't get every single situation. 3 MS. CAROL BIEWICK-LOSH: No, I understand. That's one that 4 comes to my mind. 5 THE COURT: Okay. Hang on. I'd like to get back to 6, 6 because they're going to close the courthouse here in 7 about 25 minutes. 8 MS. CAROL BIEWICK-LOSH: Oh. 9 THE COURT: So I'd like to get back to 6. 6 reads that: 10 "The dominant tenement is responsible for the general 11 maintenance." That will be the first sentence. 12 The second sentence will start where it says: 13 "However, in the event that any party, its successors, 14 invitees, or assigns damages the easement through 15 negligence or extraordinary use of the easement, that 16 party will repair the damage at their own expense." That's 17 reciprocal language that goes both ways. 18 And then everything else will go away in that 19 paragraph. 20 MR. RICHARD LOSH: Thank you. 21 THE COURT: Are you good with that, Mr. Williams? 22 MR. WILLIAMS: Yes, Your Honor. 23 THE COURT: Number 7. Is there any issue with that? 24 MR. RICHARD LOSH: Well, not a legal issue, I suppose. 25 It's certainly, I guess, the law as it would seem anyway,

1 and it's kind of insulting to somehow --2 THE COURT: I know that a lot of this stuff is probably 3 personally insulting to you. 4 MR. RICHARD LOSH: If it's necessary, we could move on, 5 and we'll be happy to abide by that. THE COURT: Quite frankly, the language is kind of what I 6 7 refer to as the one-guy rule. Somebody did it, and that's 8 why we have to put it in to protect everybody. It's not a 9 personal indictment against you and whether or not you 10 would do that. It may, quite frankly, be more applicable 11 to somebody who bought the property; or if the Shaws sold 12 the property, you might be very grateful that that 13 language is in there. 14 So, Number 8. 15 MR. RICHARD LOSH: No objection here. 16 THE COURT: 8 is good. 17 Number 9. We just talked about that. 18 MR. RICHARD LOSH: I think we also have that right for 19 other maintenance. Wouldn't that be included? 20 THE COURT: Number 9? 21 MR. RICHARD LOSH: Where it says: "Grantors further 22 specifically reserve the right to fine-grade the road 23 surface as needed and to remove snow as necessary." 24 I think we also have that right as easement holders. 25 Is that not --

- MR. WILLIAMS: That's correct, Your Honor. That's probably covered in the maintenance of the easement.

 MR. RICHARD LOSH: So if we could just add: "Grantors and grantees further specifically ..." Put "Grantors and grantees."
- 6 THE COURT: Sure. Will you add that, Mr. Williams.
- 7 MR. WILLIAMS: Yes. Then, Your Honor, may I add one word
- 8 to that?
- 9 THE COURT: Yes.
- 10 MR. WILLIAMS: "Grantors and grantees reserve the right to
- 11 use and maintain the easement area."
- 12 THE COURT: Yes.
- 13 MR. WILLIAMS: Thank you.
- 14 THE COURT: If we're going to put it in one place, we
- 15 should put it in both.
- 16 MR. RICHARD LOSH: Very good.
- 17 THE COURT: Number 10. I believe that covers pretty much
- 18 everyone. The easement itself speaks for itself.
- 19 MR. RICHARD LOSH: So when it says: "This easement shall
- 20 include the right ... " That would be the right for both of
- 21 us?
- 22 THE COURT: That's a general statement. Yes, that's the
- 23 right for both of you, because you'll see that it doesn't
- 24 specify one way or the other. It's the easement and the
- 25 language of the law itself by the nature of the actual

easement.

MR. RICHARD LOSH: So we don't need to clarify it and say both parties. Okay. Very good. Thank you.

THE COURT: Number 11. That's another suggestion that it just talks about "the easement," so it applies to both parties.

MR. RICHARD LOSH: We have no objection.

THE COURT: 12.

MR. RICHARD LOSH: It's obviously moot right now. It is fenced and gated. I think we can probably eliminate it.

MR. WILLIAMS: May I — the hope of this is that these things run with the land and so that future owners, if this land is sold, will see these things in the file with the register of deeds, and we think that's important. It is a statement of the law as it is.

Some of the things that we're arguing about today, we're arguing about because they weren't known to one party or the other originally. So I think it's important to keep that in there. It's just an accurate statement of the law.

THE COURT: It is -- I mean, that's how the law is stated.

MR. RICHARD LOSH: I'm sorry. The law is stated that it

has to be fenced, that's fine -- or it can be fenced.

That's fine. It is fenced and gated, so we certainly can't object to it.

1 THE COURT: True. But if, let's say, for example, the 2 Shaws, before they sell it, take it down. Somebody 10 3 years from now may want to know that they can fence or 4 gate it. This is preplanning too. 5 MR. RICHARD LOSH: I do object to the last sentence, to 6 include: "Grantees will be responsible to ensure the gates 7 along the easement are closed ... " We're not responsible 8 to ensure when we're not here and not using the gates. So 9 I think we can -- we would object to the sentence. 10 THE COURT: Well --11 MR. RICHARD LOSH: We can include a sentence which would 12 say: "We'll make every reasonable effort." 13 THE COURT: I think what he's concerned about is if 14 something happens, and they're gone for three months in 15 the winter, for example, and the gate gets opened through 16 no fault of their own when both parties are not primarily 17 living here. I think the language then should just read 18 that you would ensure to the best of your ability. 19 MR. RICHARD LOSH: "We will make every reasonable effort 20 to ensure that the gates are kept closed and secure." 21 THE COURT: "Every reasonable effort to ensure." 22 MS. CAROL BIEWICK-LOSH: If I may add, the gates are 23 already there, and the way that -- they put in the gates 24 they want, and so I think it's up to them to ensure that 25 those gates remain functional and not prone to -- you know

1 what I'm -- to any circumstance that would make the gates 2 inclined to not function properly. 3 THE COURT: Okay. Work with me for a second, because 4 there's language in there that says any improvements or 5 any maintenance that they make, that I would consider the 6 gate to fall under that, they have to maintain. 7 MR. WILLIAMS: Yeah. Your Honor, I also think that the law 8 says that they can put gates on it, but they have to 9 ensure that it remains accessible to the Loshes. 10 So they'll be required to, you know, not padlock it or, 11 you know, not jimmy rig it in a way that would prevent 12 access. 13 THE COURT: But that they also make them working gates. So 14 if the gate falls apart, for example, and it's got three 15 pieces hanging out of it that could scratch their car, it 16 would be the Shaws' responsibility since they chose to put 17 the gate there, to the best of their ability, make certain 18 that that gate's maintenance remains. 19 MR. WILLIAMS: I agree, Your Honor, and I think that might be covered in that first paragraph or the first sentence 20 21 of Paragraph 12: "As long as the easement remains 22 accessible to grantees, the easement area may be fenced by 23 grantors." So I think it implies that the gate is 24 operational to the effect that it still allows access to the Loshes. 25

- 1 THE COURT: I think because the gate was put up already
- 2 that you're going to put one more sentence that says
- 3 they'll maintain the operation of the gate.
- 4 MR. WILLIAMS: Your Honor, I'll add that.
- 5 THE COURT: Thank you. 13.
- 6 MR. RICHARD LOSH: I'm sorry, who maintains the operation
- 7 of the gate?
- 8 THE COURT: The Shaws.
- 9 MR. RICHARD LOSH: And that's in there, okay.
- 10 THE COURT: That will be when he does his proposed order,
- 11 because I'm making him put it in there.
- 12 MR. RICHARD LOSH: Okay. We did change the language as to
- "ensuring" to be "every effort" to ---
- 14 THE COURT: Already did.
- 15 MR. RICHARD LOSH: Okay. Thank you.
- 16 THE COURT: 13. That's what we've been talking about, that
- 17 this is binding on the land and that if you sell, the
- 18 people who buy your land would be obligated to follow the
- 19 easement. The same way that if the Shaws sell, then you're
- 20 assured that that follows with any new owners.
- 21 MR. RICHARD LOSH: No objection.
- 22 THE COURT: And that's the law. And then 14 and 15, he's
- 23 already suggested are stricken.
- 24 MR. RICHARD LOSH: Okay.
- 25 THE COURT: So, to that end I would grant the motion as a

matter of law that this easement under these conditions would be solidified in writing by way of an order, by findings of fact and conclusions of law that then could be filed with the register of deeds that goes with the land.

I'm denying the request for an injunction.

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MS. CAROL BIEWICK-LOSH: Thank you.

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THE COURT: And in fairness to Mr. Williams, he asked essentially that — or made the statement that in the event that the Court grants the declaratory judgment that we have just now put together, which will be reduced to an order, that there is no need for an injunction, so that will be denied.

- MR. WILLIAMS: Thank you, Your Honor.
- 14 THE COURT: Anything further, Mr. Williams?
- 15 MR. WILLIAMS: No, Your Honor. I'll prepare the findings
- 16 and conclusions and send them to everyone for review.
- 17 MS. CAROL BIEWICK-LOSH: So that part under 15, Part B. —
- 18 THE COURT: There's no 14 or 15. 15 and 14 are gone.
- 19 MS. CAROL BIEWICK-LOSH: Okay. Well, there's this whole
- 20 thing that says "Permanent Injunction."
- 21 THE COURT: They're all gone, and I've just denied that.
- 22 MS. CAROL BIEWICK-LOSH: Oh, okay.
- 23 THE COURT: The only thing that he's going to reduce to
- 24 writing is the 13 things we just talked about here today
- 25 by way of the declaratory judgment under the law.

MS. CAROL BIEWICK-LOSH: Okay. Thank you.

THE COURT: And he'll email that to you. Then you have five days. That would be the only time I would allow you to email me, as long as he's on it. You can say what your objections are. I don't litigate back and forth.

Mr. Williams then would be able to say — in response to your objections, I'll allow you to do that in an email, Mr. Williams, that I will then file so that we can get this done expeditiously. I will take both of your objections into consideration. If it's not the way that you thought that it was written, understanding that I know there are some things that you objected to, and I said we're going to put in there; and Mr. Williams objected to, and I just ordered him to put some other things in. Those objections are preserved.

The only purpose that you have when he gives you the proposed order is to say, you know, if the first sentence says that the grantors are supposed to buy a dozen doughnuts for the grantees every Tuesday, you get to say, wait a minute, that wasn't said. So it would be to the form or whether or not the language is correct, because your objections are preserved. If I find in any of that response what my understanding or interpretation of this order will read, I will then sign my final order accordingly. Yes.

1 MR. RICHARD LOSH: So we're going to do all this by email? 2 THE COURT: Yes. 3 MR. RICHARD LOSH: And we're going to be able to email you 4 any objections? 5 THE COURT: Yes. 6 MR. RICHARD LOSH: And we'll copy Mr. Williams at the same 7 time. 8 THE COURT: Yes. 9 MS. CAROL BIEWICK-LOSH: So Mr. Williams has five days to redraft this? 10 11 THE COURT: No. Mr. Williams is going to work now on this 12 order that I have just ordered. 13 MS. CAROL BIEWICK-LOSH: Okay. 14 THE COURT: We've gone back and forth on. The order will 15 also include that the injunction -- there will be language 16 in there that the injunction is denied; that I've granted 17 the declaratory judgment as a matter of law that then will adopt these 13 things that we just went over and the 18 19 language that we talked about including different language 20 than what he has in there, so it reads what we just talked 21 about here on the record. 22 Once you receive that order or his -- what will read 23 a Proposed Findings of Fact and Conclusions of Law, then 24 you'll read through those to make sure that your notes 25 match up with what we talked about here. We're not going

1 to rehash things like, well, we didn't want the 2 "commercial" language in there. That's not the purpose of 3 that, because your record is preserved for that. The 4 purpose is if he changed that language and said you get 5 four bananas on Wednesdays instead of the commercial 6 language, then you can say, you didn't say anything about 7 bananas, Judge. You were talking about commercial traffic. 8 That's where -- the objections are really kind of to the 9 form. 10 MS. CAROL BIEWICK-LOSH: But you did say something about 11 doughnuts. 12 THE COURT: Yes, I did. I did. So to that end I think that 13 would --14 MS. CAROL BIEWICK-LOSH: I will bring doughnuts. 15 THE COURT: -- would put this to rest, and then the Shaw 16 Trust can -- you know, some of this is the protection to 17 the Shaws as well in selling the property, if that's what 18 they choose to do. Yes. 19 MR. RICHARD LOSH: When will we get the list, and when does the clock start on the five days? 20 21 THE COURT: As soon as you receive his email, the clock 22 starts on five days. He's not under a five-day -- I'm 23 assuming he'll probably get it done within a week. 24 MR. WILLIAMS: I hope to, Your Honor. 25 THE COURT: Yeah.

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- 1 MR. RICHARD LOSH: And then I'll have five days after
 2 that?
 3 THE COURT: Then once you receive it in that email, you
- 4 have five days after that. If I don't hear from anybody,
- 5 then I'm just going to assume that you don't have any
- 6 objections, and that's okay too. Because the practice that
- 7 I have, which is what's required under the Civil Rules of
- 8 Procedure, is if nobody objects in the five days, I'm
- 9 going to sign the order.
- 10 MR. RICHARD LOSH: Okay. Well, we haven't even seen the
- 11 order yet so ...
- 12 THE COURT: I'm telling you what happens by way of
- 13 process.
- 14 MR. RICHARD LOSH: I'm sorry.
- 15 THE COURT: Yes. If you see the order, and you don't have
- 16 any objections, and you don't want to email me, I'm going
- 17 to sign the order. Okay. You're not under any obligation
- 18 to respond to an email.
- 19 MR. RICHARD LOSH: I see.
- 20 THE COURT: Only if you have an objection.
- 21 MR. RICHARD LOSH: Okay.
- 22 THE COURT: All right? All right. Thank you.
- 23 MR. WILLIAMS: Thank you, Your Honor.
- 24 MR. RICHARD LOSH: Thank you for your patience.
- 25 THE COURT: Thank you.

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            (Proceedings adjourned at 4:50 p.m.)
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 3
   STATE OF SOUTH DAKOTA
                                               CERTIFICATE
 4
    COUNTY OF CUSTER
 5
 6
         THIS IS TO CERTIFY that I, Carol Johnson, Registered
 7
   Professional Court Reporter, Notary Public in and for the
   State of South Dakota, hereby certify that I was present for
 8
 9
   and reported the proceedings as described on Page 1 herein,
10
   and that this transcript contains a true and correct record
11
   of the proceedings so had.
12
         To all of which I have hereunto set my hand this
13
   14th day of January, 2025.
14
15
16
    /s/Carol Johnson
    Carol Johnson, Court Reporter, RPR
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	2	54/22	Airbnbs [1] 37/9	anything [6] 6/11
	2020 [1] 8/20	accident [4] 5/4 5/14		19/23 36/9 42/25
	2023 [1] 5/4	6/20 41/5	12/9 12/10 13/4 13/9	56/14 59/6
MR. WILLIAMS: [41]		accidents [1] 43/16	14/6 14/21 16/10	anyway [2] 4/7 49/25
4/16 5/1 5/23 7/9 7/24		accomplished [1]	18/11 18/17 21/11	anywhere [1] 9/3
	24 [1] 2/9	28/2	23/9 25/4 27/5 28/7	apart [1] 54/14
27/25 30/1 30/20 31/1		according [1] 27/4	28/8 28/11 29/7 29/16	
	25th [1] 5/4	accordingly [1] 57/25	30/24 31/5 32/24	3/23
	26 [1] 16/16	accurate [6] 24/7 27/6 27/9 27/18 27/22	33/24 34/2 35/1 35/14	22/11
	28th [1] 16/1	52/19	38/5 39/5 39/7 39/8 39/12 40/7 43/3 45/1	J-0.00.10 (C)
41/24 43/11 45/10	3	accurately [1] 27/7	56/21 58/1 60/22	apparent [1] 5/15 apparently [2] 25/18
40/10 46/10 46/13		accusation [1] 17/24	60/22 61/12	25/24
	365 [1] 39/22	acknowledging [1]	alleviate [1] 37/23	appear [2] 11/9 35/4
	3:27 [1] 1/23	44/16	allow [3] 16/17 57/3	APPEARANCES [1]
54/19 55/4 56/13	4	across [4] 24/21 32/8		1/14
00/10 09/24 00/23	400 [1] 40/4	32/11 37/16	allows [1] 54/24	appeared [1] 6/18
MS. CAROL	400 [1] 40/4 45 (41 38/24	action [2] 15/10	along [9] 8/9 8/10	Appearing [2] 1/16
BIEWICK-LOSH: [31]	4:50 p.m [1] 61/1	27/16	10/22 11/11 12/9	1/19
30 mm, 30 m, 30 m, 30 m, 30 m	4th [2] 40/8 40/9	actual [2] 27/23	13/14 21/4 28/18 53/7	appears [2] 10/22
20/40 20/20 20/4		51/25	already [7] 17/3 27/3	19/25
38/16 38/22 39/4 39/13 39/17 39/20	5	actually [5] 8/4 19/11		applicable [2] 20/17
40/12 40/19 47/10	58 [1] 2/10	23/6 34/24 35/2	55/14 55/23	50/10
ATMS ASHT ASMS		add [7] 32/25 38/8	also [18] 3/22 11/4	application [1] 12/6
48/25 49/3 49/8 53/22	6	51/3 51/6 51/7 53/22	12/16/21/11 24/20	applies [2] 42/23
56/6 56/17 56/19	60-foot [1] 8/15	55/4	28/15/35/10/37/5	52/5
56/22 57/1 58/9 58/13	ALL DESCRIPTION OF STREET	addition [1] 7/16	37/21 37/22 37/25	apply [3] 36/13 42/23
59/10 59/14	·	additional [2] 8/7	38/4 48/14 50/18	43/20
MS. CAROL KAY	:SS [1] 1/1	40/13	50/24 54/7 54/13	appreciate [1] 18/14
management to make him	A	addressed [1] 20/24	58/15	approach [2] 7/21
3/7		adhere [1] 20/22	alternate [1] 47/22	21/17
	abide [1] 50/5	adjourned [1] 61/1	although [1] 3/23	appropriate [3] 11/1
	ability [4] 24/20 44/1 53/18 54/17	adjust [2] 15/10 15/19	altogether [1] 25/6	29/14 46/7
		1/0/30/01/01		area [9] 10/11 10/17 11/1 24/18 24/21 35/3
70s [1] 38/10	able [8] 10/12 20/11 20/22 33/4 35/11	adopt [1] 58/18 adopting [1] 27/19	am [3] 4/19 13/7 13/16	47/6 51/11 54/22
	48/19 57/6 58/3	advice [1] 4/3	amend [2] 24/16	aren't [3] 14/7 35/2
	about [57] 5/7 8/9 9/2		31/13	36/2
vs [1] 1/7	9/5 9/20 12/4 13/3	affects [1] 6/11	amount [1] 48/22	argue [1] 26/11
			ancillary [1] 6/7	arguing [2] 52/16
s/Carol [1] 61/16	14/7 14/24 14/25		another [2] 34/3 52/4	52/17
a carol [1] 61/16	15/14 15/15 16/2	60/1 60/4	answer [4] 6/23	argument [6] 2/6 2/7
0	17/10 17/23 18/16	again [1] 4/6	20/12 47/25 48/16	13/6 13/24 14/10
000020 [1] 1/4	18/24 19/10 21/16	against [3] 15/22	answers [1] 42/5	28/23
14	21/22 21/23 22/21	28/16 50/9	anticipate [1] 35/12	around [1] 47/22
1	22/22 23/18 23/20	age [1] 5/7	anticipated [1] 36/9	Ashmore [1] 1/15
10 [10] 9/14 9/14 9/23	25/17 26/23 26/24	ago [2] 17/13 17/13	anxiety [1] 17/7	ask [5] 4/4 4/6 17/2
11/13 11/13 24/3 28/3	ACCOUNT OF THE RESERVE OF THE STATE OF THE S		any [48] 4/3 4/13 4/13	18/8 22/23
36/4 51/17 53/2	39/9 42/5 43/1 44/3	20/13/20/13/30/20	7/11 9/6 11/6 12/17	asked [4] 14/25 17/1
11 [3] 11/13 24/3 52/4		31/4 42/17 42/21 43/1	14/4 14/10 14/14	37/25 56/7
12 [2] 52/8 54/21	50/17 52/5 52/16	44/22 44/25 54/19	14/15 14/20 15/1	asking [7] 18/11
12 feet [1] 28/5	52/17 53/13 55/16	agreed [4] 14/7 18/1	15/11 17/18 18/3	19/19 21/19 22/18
13 [4] 55/5 55/16	56/24 58/19 58/21	43/7 45/1	22/21 27/1 27/21 28/7	23/1 28/21 29/7
56/24 58/18	58/25 59/6 59/7 59/10	agreement [25] 9/15	28/19 31/21 32/12	assigns [2] 46/20
	above [1] 1/21	11/17 11/21 14/20	33/15 33/16 33/24	49/14
1970 MD C 900 S 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	above-entitled [1]	15/6 15/22 17/15	40/23 41/7 41/8 41/15	
25/5 55/22 56/18	1/21	17/16 17/18 17/25	42/13 42/13 42/22	assumed [1] 42/15
	absolutely [1] 13/15	18/4 22/2 22/4 22/11	43/22 45/18 46/19	assuming [1] 59/23
	accept [1] 26/6	22/12 22/15 22/22	47/18 49/13 49/23	assured [1] 55/20
14th [1] 61/13	Denne tota DISC OND	26/24 20/0 20/0 20/20		attached [1] 7/14
14th [1] 61/13 15 [8] 2/9 11/20 21/2	access [21] 8/15 8/18			CACHARDON CLT L CM/25
14th [1] 61/13 15 [8] 2/9 11/20 21/2 25/5 55/22 56/17	9/11 9/11 9/15 10/14	25/14 25/23 32/22	57/22 58/4 60/5 60/16	
14th [1] 61/13 15 [8] 2/9 11/20 21/2 25/5 55/22 56/17 56/18 56/18	9/11 9/11 9/15 10/14 10/18 10/20 11/8 11/9	25/14 25/23 32/22 46/2	60/17	attorney [5] 3/25
14th [1] 61/13 15 [8] 2/9 11/20 21/2 25/5 55/22 56/17 56/18 56/18 16 [1] 5/7	9/11 9/11 9/15 10/14 10/18 10/20 11/8 11/9 13/4 15/7 16/7 18/4	25/14 25/23 32/22 46/2 agrees [1] 14/6	60/17 any circumstance [1]	attorney [5] 3/25 14/24 18/24 21/18
14th [1] 61/13 15 [8] 2/9 11/20 21/2 25/5 55/22 56/17 56/18 56/18 16 [1] 5/7 16CIV23-000020 [1]	9/11 9/11 9/15 10/14 10/18 10/20 11/8 11/9 13/4 15/7 16/7 18/4 30/23 32/7 32/17	25/14 25/23 32/22 46/2 agrees [1] 14/6 ahead [3] 4/5 31/2	60/17 any circumstance [1] 54/1	attorney [5] 3/25 14/24 18/24 21/18 25/11
14th [1] 61/13 15 [8] 2/9 11/20 21/2 25/5-55/22 56/17 56/18 56/18 16 [1] 5/7 16CIV23-000020 [1]	9/11 9/11 9/15 10/14 10/18 10/20 11/8 11/9 13/4 15/7 16/7 18/4 30/23 32/7 32/17 37/16 47/14 54/12	25/14 25/23 32/22 46/2 agrees [1] 14/6 ahead [3] 4/5 31/2 31/3	60/17 any circumstance [1] 54/1 anybody [4] 20/18	attorney [5] 3/25 14/24 18/24 21/18 25/11 August [1] 3/13
14th [1] 61/13 15 [8] 2/9 11/20 21/2 25/5-55/22 56/17 56/18 56/18 16 [1] 5/7 16CIV23-000020 [1] 1/4 18 [2] 1/7 2/8	9/11 9/11 9/15 10/14 10/18 10/20 11/8 11/9 13/4 15/7 16/7 18/4 30/23 32/7 32/17	25/14 25/23 32/22 46/2 agrees [1] 14/6 ahead [3] 4/5 31/2	60/17 any circumstance [1] 54/1	attorney [5] 3/25 14/24 18/24 21/18 25/11

big [4] 29/5 35/24 16/4 28/24 36/8 41/3 closer [1] 23/6 9/18 42/24 42/24 46/1 36/21 36/22 Colorado [1] 1/18 considered [2] 21/2 away... [2] 16/18 35/2 cases [3] 10/15 12/8 come [6] 5/18 19/8 binding [1] 55/17 49/18 bit [2] 32/13/36/18 24/23 19/16 23/23 38/11 constrained [1] 11/4 catches [1] 35/21 45/20 blame [1] 21/8 construction [5] 9/25 category [1] 39/18 25/1 25/20 42/13 48/5 both [17] 4/22 21/20 comes [3] 4/4 20/2 back [15] 3/13 4/6 21/23 22/9 23/5 29/1 49/4 causes [1] 17/7 construe [1] 30/22 5/18 8/19 9/16 13/3 coming [3] 4/6 15/19 29/10/29/11 46/23 center [1] 8/8 consulting [1] 34/9 13/11 14/15 25/4 49/17 51/15 51/20 certain [4] 20/3 25/12 38/24 contact [4] 9/2 15/16 32/19 48/7 49/5 49/9 51/23 52/3 52/5 53/16 25/17 54/17 commencing [1] 18/8 18/23 57/5 58/14 contains [1] 61/10 certainly [13] 3/15 1/22 background [1] 7/7 bottom [1] 19/24 5/10 11/9 13/18 13/23 comments [2] 2/8 continuance [1] 3/11 bananas [2] 59/5 bought [1] 50/11 16/6 17/10 18/15 40/23 continue [1] 10/20 59/7 brief [1] 9/14 18/22 23/13 38/5 commercial [21] 11/8 contract [2] 17/19 based [7] 7/13 9/23 briefs [1] 25/18 49/25 52/24 29/23 33/23 34/2 25/14 9/25 11/25 14/10 bring [4] 40/4 40/10 34/13 34/17 34/20 CERTIFICATE [1] controversy [2] 16/5 41/17 42/2 41/11 59/14 35/2 35/23 36/16 61/3 16/24 basic [2] 13/17 18/11 broad [1] 44/14 certify [2] 61/6 61/8 36/17 36/18 36/20 conversation [5] basically [20] 6/13 broken [1] 48/9 chairs [2] 40/4 40/11 37/6 37/18 38/4 38/6 21/8 21/15 21/22 7/12 8/2 8/8 8/11 9/8 brought [1] 47/16 44/8 59/2 59/5 59/7 21/23 23/4 chances [1] 35/20 9/15 11/25 12/1 12/8 change [3] 7/3 44/4 commercial-type [1] build [4] 34/3 35/8 conversations [1] 12/13 16/4 16/23 27/6 35/25 48/6 55/12 35/2 13/3 29/7 41/22 41/24 copy [3] 7/21 7/24 burden [1] 43/6 changed [4] 3/17 common [1] 19/4 43/19 46/23 47/3 buried [1] 25/12 3/19 45/17 59/4 58/6 communication [1] bat [3] 15/5 15/21 business [8] 29/24 changes [4] 6/11 18/11 corners [1] 30/22 45/22 29/25 32/7 37/16 43/5 45/12 45/15 complain [1] 18/5 correct [7] 24/12 25/7 be [138] changing [1] 11/24 37/23 38/18 40/16 complained [1] 14/23 28/22 48/13 51/1 because [40] 3/16 41/17 channels [1] 33/5 complains [1] 43/1 57/21 61/10 3/21 5/19 6/14 8/23 businesses [1] 35/1 children [1] 5/16 complaint [13] 7/14 correctly [3] 42/7 10/16 12/4 12/11 13/5 buy [2] 55/18 57/18 choose [2] 29/24 8/4 9/17 12/1 16/1 42/20 48/10 13/12 20/15 20/17 59/18 could [23] 10/5 19/13 16/3 16/4 16/9 16/14 21/3 22/3 23/7 23/14 16/17 16/21 16/23 choosing [1] 24/6 20/18 20/20 24/14 23/20 26/12 30/11 call [2] 7/11 36/11 30/10 32/3 32/5 33/5 18/5 chose [2] 42/11 31/5 33/1 33/14 34/24 called [1] 17/18 54/16 33/6 33/13 36/17 39/7 complaints [2] 1511 35/18 36/20 38/25 came [5] 1/21 17/12 chosen [1] 19/8 17/23 39/22 42/14 42/20 39/2 40/17 44/12 20/25 23/4 39/1 43/9 43/12 45/14 50/4 CIRCUIT [4] 1/1 1/2 complicate [1] 19/4 44/13 45/5 49/6 51/23 campground [1] complicated [1] 51/3 54/15 56/3 1/12 1/12 52/17 54/3 55/1 55/11 38/15 circumstance [2] couldn't [1] 38/15 44/15 57/21 59/3 60/6 can [50] 4/5 4/18 4/23 42/8 54/1 composition [1] 10/1 counsel [1] 4/5 becomes [1] 43/6 4/25 5/9 10/25 11/15 circumstances [2] concede [1] 16/6 COUNTY [4] 1/2 1/23 been [11] 3/19 4/10 12/13 14/23 15/18 21/3 46/6 concept [1] 32/16 8/5 61/4 4/11 4/14 5/7 9/16 16/9 16/10 17/16 citation [2] 5/12 6/20 couple [2] 13/17 17/6 concepts [1] 32/15 14/2 21/14 29/16 38/9 concern [11] 15/13 19/16 23/12 24/2 cited [2] 10/15 24/23 course [3] 9/16 10/25 55/16 25/14/25/22 28/22 City [2] 1/13 1/15 16/15 18/17 19/6 11/20 before [9] 1/11 13/25 30/17 31/22 32/17 court [35] 1/1 1/12 Civil [1] 60/7 30/14/31/10 33/3 16/1 16/2 16/13 16/20 32/25 33/10 33/19 34/13 34/16 36/15 2/8 4/16 4/18 4/24 5/1 claim [1] 41/6 20/25 45/3 53/2 5/17 5/17 5/24 7/11 37/7 41/3 41/14 42/19 clarification [1] 41/7 44/17 beginning [1] 47/3 44/11 45/7 45/9 47/1 clarify [1] 52/2 concerned [1] 53/13 8/3 9/19 11/22 11/23 behalf [3] 1/16 3/8 47/4 47/17 47/23 48/3 12/18 13/7 16/6 17/2 clause [2] 11/18 42/1 concerns [3] 37/24 3/24 48/7 48/7 48/11 52/10 40/23 40/25 19/19 19/20 19/23 clauses [1] 43/14 being [8] 14/24 15/21 52/23 53/3 53/9 53/11 clear [6] 6/15 6/25 19/24 21/19 23/25 concisely [1] 26/9 15/21 15/21 16/12 54/8 57/4 57/8 59/6 7/1 18/19 21/6 43/13 conclusions [5] 24/1 26/6 26/17 28/21 19/16 35/11 44/13 59/16 11/24 12/2 56/3 56/16 34/21 37/8 46/12 56/9 cleared [2] 16/13 believe [12] 4/14 7/12 can't [9] 4/3 6/23 20/14 58/23 61/7 61/17 9/1 15/2 16/2 16/15 16/3 19/3 31/5 34/23 clearing [1] 40/14 condition [1] 15/6 Court's [1] 2/10 20/5 20/18 24/23 43/4 43/1 49/2 52/24 clearly [7] 8/23 8/24 conditions [9] 12/22 courthouse [2] 1/23 48/14 51/17 candor [2] 18/17 18/18 19/17 22/4 12/24 18/1 18/3 24/8 49/6 benefit [4] 3/20 6/9 21/11 22/11/22/12 25/16/26/10/41/22 courtroom [2] 1/23 17/18 17/20 capable [1] 12/3 client [4] 18/18 19/7 6/21 best [5] 18/14 18/21 caption [1] 3/19 26/14/30/13 consent [1] 26/1 courts [1] 18/5 21/16 53/18 54/17 car [4] 5/4 18/9 19/15 client's [3] 23/20 consequences [1] covenants [2] 36/12 better [4] 15/17 28/14 23/22 45/17 30/12 36/13 33/23 41/14 careful [1] 44/13 clients [3] 8/19 10/12 consider [2] 34/20 cover [1] 43/3 between [5] 6/12 7/3 Carol [6] 1/8 1/18 3/5 10/16 54/5 covered [3] 38/20 13/4 15/17 18/12 clock [2] 59/20 59/21 61/6 61/16 61/17 consideration [2] 51/2 54/20 Biewick [2] 1/81/18 case [14] 7/4 7/16 8/5 close [1] 49/6 17/21 57/10 covers [1] 51/17 Biewick-Losh [2] 1/8 9/9 12/7 12/25 13/23 closed [2] 53/7 53/20 considerations [1] create [1] 11/9 1/18

27/19 35/19 35/20 defining [1] 9/9 13/12 19/12 32/4 46/22 49/16 32/10 38/23 41/7 39/18 51/23 experience [1] 48/18 definitions [1] 29/23 creates [1] 8/15 degree [1] 34/8 55/25 59/12 explain [2] 3/20 5/24 doing [3] 4/7 11/24 creation [1] 7/17 deliberation [1] 16/5 engineered [1] 10/2 explanation [1] 5/21 17/4 criteria [5] 20/13 dominant [13] 10/9 demise [1] 36/8 engineering [1] 10/4 exposed [1] 33/13 20/21 22/9 22/19 denied [3] 56/12 10/23 10/25 13/20 enjoy [1] 48/7 extend [1] 11/6 23/13 56/21 58/16 16/12 24/18 29/2 46/1 enjoyment [3] 47/19 extent [7] 9/7 9/11 cross [6] 11/16 28/10 Denver [1] 1/18 46/8 46/12 47/4 47/5 47/24 48/12 10/13 10/19 12/24 28/10 28/11 46/3 denying [1] 56/5 49/10 enough [1] 33/25 24/24 30/3 46/14 ensure [8] 47/14 53/6 extinguishment [1] depends [1] 29/23 don't [63] culvert [2] 16/21 done [8] 6/22 28/1 53/8 53/18 53/20 depiction [1] 27/22 11/15 42/10 describe [2] 18/14 43/24 44/21 47/12 53/21 53/24 54/9 extraordinary [5] currently [3] 6/3 30/9 27/7 47/13 57/9 59/23 ensuring [1] 55/13 24/24 46/15 46/16 30/11 described [2] 8/24 doughnuts [3] 57/19 entalls [1] 34/3 46/21 49/15 CUSTER [9] 1/2 1/23 59/11 59/14 61/9 entire [1] 8/11 extraordinary use [1] 1/23 8/5 34/23 34/25 DESCRIPTION [1] 46/16 down [14] 4/25 20/2 entirely [2] 9/20 28/5 35/19 35/19 61/4 2/2 21/8 21/21 21/22 23/4 entitled [1] 1/21 extremely [1] 5/7 cut [1] 9/4 23/18 35/24 36/5 descriptions [1] 9/7 equipment [1] 25/2 detailed [1] 19/11 48/14 48/14 47/11 essentially [10] 5/16 9/24 13/21 21/20 48/10 53/2 face [1] 19/21 determination [1] DAKOTA [11] 1/1 fact [8] 11/25 17/6 20/20 dozen [1] 57/18 24/19 28/25 32/1 1/13 1/15 1/24 5/18 determined [1] 34/21 drainage [1] 16/18 41/24 44/7 56/8 19/8 25/18 25/19 27/6 9/9 28/24 29/1 37/8 driveway [10] 14/22 56/3 58/23 development [1] established [3] 32/8 61/3/61/8 12/12 16/19 18/6 18/10 27/3 32/11 37/17 factually [1] 19/24 damage [7] 24/25 fair [3] 22/23 26/2 didn't [5] 10/13 31/24 27/23 41/1 42/24 43/5 estate [1] 6/24 25/3 43/17 46/17 46/24 37/22 59/1 59/6 48/8 even [9] 7/3 18/20 46/22 46/24 49/16 fairness [2] 3/11 56/7 different [9] 12/7 driving [1] 35/24 19/9 19/14 20/2 20/22 damaged [1] 40/6 fall [4] 34/14 35/14 21/10 29/6 37/1 38/2 during [2] 6/19 38/10 26/13 48/2 60/10 damages [5] 41/16 duty [1] 24/17 39/18 54/6 48/21 48/24 48/25 event [9] 6/10 35/7 46/15 46/20 46/25 58/19 dynamic [2] 3/17 42/6 46/19 47/15 falls [1] 54/14 47/20 48/9 49/13 56/9 familiar [1] 5/25 differently [1] 32/14 6/12 date [2] 3/12 31/16 day [8] 1/22 7/2 13/12 difficult [3] 5/8 5/15 family [6] 1/4 3/4 5/3 ever [2] 21/15 40/5 every [6] 49/2 53/12 7/16/38/10 41/8 23/21 19/12 21/13 29/4 each [6] 15/11 15/22 digest [1] 44/12 53/19 53/21 55/13 far [5] 14/22 27/11 59/22 61/13 days [10] 39/22 44/22 dimensions [2] 27/5 17/20 21/4 23/10 28/23 33/23 41/3 57/19 26/24 fashion [1] 41/1 28/8 everybody [6] 14/6 45/4 57/3 58/9 59/20 36/3 40/10 41/14 44/6 fault [1] 53/16 earlier [2] 5/2 37/22 directly [2] 15/10 59/22 60/1 60/4 60/8 15/12 easement [77] favor [3] 11/23 12/19 deal [3] 30/12 30/16 disagree [5] 13/18 easements [1] 7/22 everyone [2] 51/18 13/23 30/16 February [1] 16/1 easier [1] 7/22 18/22 18/23 27/8 56/16 dealt [1] 9/25 Ecuador [1] 39/1 February 28th [1] 27/13 everything [6] 4/24 debris [1] 40/7 Edition [1] 26/9 16/1 disagreement [1] 4/25 19/4 46/11 46/14 decide [7] 12/14 26/2 feel [6] 17/9 17/17 effect [2] 12/17 54/24 15/24 30/11 35/18 35/25 20/8 20/10 38/12 effective [1] 28/16 discussion [2] 2/9 exactly [1] 36/3 41/1 45/2 effort [5] 26/16 53/12 41/14 6/18 example [12] 19/14 decided [4] 33/12 53/19 53/21 55/13 21/1 24/3 24/7 29/23 feels [1] 20/7 discussions [1] 8/20 35/7 38/25 40/2 feet [2] 28/4 28/5 disposition [1] 5/11 efforts [1] 21/5 36/1 40/1 44/8 44/18 decides [2] 24/1 38/1 dispute [4] 7/3 8/14 fence [1] 53/3 egress [2] 32/8 37/16 53/1 53/15 54/14 declaration [5] 21/20 13/19 40/18 eightplex [1] 36/21 fenced [5] 52/10 examples [1] 34/14 22/8 22/18 23/16 either [7] 14/9 14/17 52/23 52/23 52/24 disputing [1] 8/22 except [1] 43/16 28/21 disrespect [1] 18/18 16/25 18/16 23/7 54/22 excerpt [1] 9/15 declaratory [8] 7/13 fenceline [1] 27/11 disrespectful [1] 24/24 25/23 excessive [1] 39/23 12/14 12/19 27/16 fencing [1] 9/12 eliminate [2] 31/5 exercise [3] 41/9 45/19 56/9 56/25 52/10 distillery [1] 35/25 42/8 42/11 few [1] 23/14 58/17 eliminated [2] 24/9 fighting [1] 9/20 ditches [2] 16/10 exercising [1] 43/8 declared [1] 23/25 Exhibit [4] 3/1 8/3 8/4 file [3] 6/3 52/13 57/8 16/18 25/5 dedicated [1] 8/16 else [1] 49/18 filed [10] 4/9 4/11 document [3] 12/15 13/1 deed [1] 7/16 4/14 6/10 8/4 12/22 else's [1] 47/24 20/12 30/22 exhibits [3] 2/1 7/14 deeds [7] 7/15 8/5 email [11] 45/8 45/10 16/2 16/3 16/13 56/4 documents [3] 4/11 12/2 12/23 22/21 30/13 57/2 57/4 57/7 58/1 filing [2] 9/17 12/5 7/13 12/13 exist [1] 23/12 52/14 56/4 58/3 59/21 60/3 60/16 filings [1] 6/22 does [12] 3/24 9/6 existence [1] 8/23 deemed [1] 26/2 60/18 fill [1] 16/9 9/6 10/24 22/14 26/14 exists [2] 27/23 30/5 defend [1] 41/6 final [2] 32/19 57/24 34/6 34/12 37/1 40/13 emergency [2] 47/15 expanded [1] 30/6 Defendants [1] 1/9 55/10 59/20 48/7 expedite [1] 45/9 find [2] 40/5 57/22 defiance [1] 15/21 doesn't [15] 7/3 11/9 encompasses [1] expeditiously [1] finding [2] 43/25 deficiencies [1] 44/18 18/19 19/25 21/7 21/7 39/8 42/14 21/22 26/17 27/6 27/7 end [10] 4/7 7/2 findings [8] 11/25 expense [3] 46/17 defined [1] 33/23

F	gate's [1] 54/18
findings [7] 43/13	gated [3] 10/17 52/1 52/24
44/8 45/8 47/5 56/3 56/15 58/23	gates [10] 10/18 53/
fine [6] 4/19 16/9	53/8 53/20 53/22
29/18 50/22 52/23	53/23 53/25 54/1 54/ 54/13
52/24 fine-grade [1] 50/22	general [11] 9/10
finish [1] 31/19	10/15 17/23 39/11
fire [1] 48/19	39/14/39/15/40/9/46/
fireworks [2] 40/3	48/14 49/10 51/22 generalities [1] 44/6
40/11	gentlemen's [1] 23/
first [14] 14/19 15/12	get [25] 4/25 5/13
18/7 27/3 29/21 32/4 32/10 33/23 45/25	13/5 13/22 14/3 14/5
46/3 49/11 54/20	14/13 20/8 21/4 25/4
54/20 57/17	25/12/30/17 45/7 45/19/47/22/48/7
five [10] 44/21 45/4	48/19 49/2 49/5 49/9
57/3 58/9 59/20 59/22	57/8 57/19 59/4 59/1
59/22 60/1 60/4 60/8 five-day [1] 59/22	59/23
fix [1] 42/9	gets [1] 53/15
fixes [1] 46/25	getting [4] 17/18 28
fixing [1] 27/21	28/7 45/21 give [3] 4/3 23/14
folks [10] 4/22 5/21	39/12
6/9 7/5 21/7 21/8 21/9	given [1] 12/21
30/11 35/10 35/16 follow [2] 26/8 55/18	gives [1] 57/16
followed [1] 38/3	giving [1] 36/23
following [1] 42/18	go [10] 4/5 4/22 8/19
follows [2] 24/21	14/15/21/18/31/2/31/ 32/19/33/4/49/18
55/20	goal [2] 4/23 35/23
foot [1] 8/15 forced [1] 26/5	goes [6] 12/9 13/14
foresee [1] 19/10	31/10 46/23 49/17
form [3] 44/24 57/21	56/4
59/9	Goff [1] 3/24 going [42] 4/12 5/24
formal [1] 3/19	13/5 13/7 15/15 18/1
forth [8] 9/16 13/3 13/11 14/15 23/2 24/4	20/9 25/11 25/24
57/5 58/14	25/24 26/5 26/15
forward [2] 21/12	27/15 28/16 30/21
37/5	31/4 35/20 36/15 38/20 38/24 39/2
tour [2] 30/22 59/5	39/23 40/3 43/23
frankly [9] 5/17 17/4 18/25 23/5 31/5 33/3	43/25 44/5 44/10
33/6 50/6 50/10	44/17 47/24 48/8 49/
front [1] 24/10	51/14 55/2 56/23
full [1] 18/4	57/13 58/1 58/3 58/1 58/25 60/5 60/9 60/1
function [2] 16/22 54/2	gone [4] 53/14 56/1
104/2 functional [1] 53/25	56/21 58/14
further [5] 12/23	good [12] 14/23 15/
47/11 50/21 51/4	26/25/29/12/37/4 37/20/37/21/44/23
56/14	49/21 50/16 51/16
futile [1] 26/16	52/3
future [6] 21/12 25/15 37/5 38/1 45/21 52/12	got [8] 3/25 15/13
futuristically [2] 34/1	17/16 17/20 24/11
36/7	42/19 43/2 54/14
-	gotten [1] 44/7
G	grade [1] 50/22 granite [1] 10/1
garage [1] 39/20	grant [2] 27/15 55/2
gate [10] 42/10 53/4 53/15 54/6 54/14	granted [1] 58/16
54/17 54/23 55/1 55/3	grantees [10] 32/6
55/7	37/15 41/15 41/20

51/4 51/5 51/10 53/6 /17 52/10 54/22 57/19 grantees' [1] 41/16 0/18 53/6 granting [1] 27/17 grantor [2] 41/18 54/1 54/8 41/19 grantors [6] 50/21 51/3 51/4 51/10 54/23 57/18 40/9 46/8 grants [1] 56/9 grateful [1] 50/12 group [1] 39/1 guess [8] 4/12 6/24 [1] 44/6 [1] 23/9 18/13 24/6 31/12 4/3 14/5 32/13 34/11 49/25 guesthouse [1] 34/5 1/4 25/4 guests [3] 32/7 37/15 41/16 9/5 49/9 guidelines [1] 36/10 9/4 59/19 Gunderson [1] 1/15 guy [1] 50/7 guys [3] 22/4 23/4 7/18 28/1 45/7 H had a [1] 5/6 hand [2] 8/10 61/12 handed [1] 8/2 handle [1] 18/21 4/22 8/19 handshake [1] 23/9 31/2 31/3 Hang [1] 49/5 hanging [1] 54/15 happen [2] 17/25 43/24 happened [5] 5/14 21/13 23/8 40/8 40/8 happening [1] 18/14 1/12 5/24 happens [5] 41/4 /15 18/13 42/7 42/25 53/14 60/12 happy [3] 38/3 45/10 50/5 harassment [3] 17/5 20/4 20/6 hard [1] 13/13 harm [2] 42/2 42/22 48/8 49/6 harmless [4] 41/25 43/16 43/19 44/14 8/3 58/11 have to [1] 3/23 0/9 60/16 haven't [1] 60/10 14 56/18 | having [2] 19/1 39/20 he [16] 3/16 14/13 20/16 20/24 25/1 4/23 15/2 25/19 27/17 31/24 44/12 44/21 45/8 55/10 56/7 57/16 58/20 59/4 he'll [2] 57/2 59/23 he's [12] 14/12 23/1 24/13 28/7 30/15 44/16 44/17 53/13 55/22 56/23 57/4 59/22 15 55/25 hear [5] 4/18 13/7 13/25 15/12 60/4 heard [3] 13/17 15/1

26/12

33/9 42/16 44/24 hears [1] 4/24 heavy [1] 25/1 Heidi [1] 1/11 held [3] 14/5 41/20 43/15 hello [1] 15/13 helpful [1] 43/10 helps [3] 5/22 7/7 28/9 her [10] 5/8 5/16 17/9 17/10 19/8 21/12 21/13 21/18 23/24 45/18 here [55] 3/8 3/9 3/14 3/21 4/2 5/19 5/22 6/13 9/5 11/5 12/11 13/12 13/16 14/11 18/14 19/7 19/17 20/9 20/25 21/19 22/3 22/6 22/13 22/18 23/3 23/4 however [8] 3/16 26/17 27/16 28/13 29/6 29/22 30/6 30/14 34/14 35/3 35/13 36/2 humble [1] 25/13 36/23 37/2 37/7 37/11 38/11 43/24 44/5 44/13 44/21 44/25 47/10 49/6 50/15 53/8 36/23 53/17 56/24 58/21 58/25 here's [1] 43/23 hereby [1] 61/8 herein [1] 61/9 hereunto [1] 61/12 hey [1] 19/3 high [1] 34/8 him [4] 13/17/31/19 55/11 57/14 hired [1] 40/17 his [9] 13/24 16/16 16/16 19/7 25/18 26/14 55/10 58/22 BQ/21 historical [1] 13/11 history [4] 5/13 12/8 13/14 19/17 hold [2] 41/25 43/19 holder [3] 41/10 42/12 46/8 holders [1] 50/24 holding [1] 44/14 home [7] 34/7 35/1 39/1 39/16 40/3 40/8 40/11 homeowners [1] 36/14 homeowners' [1] 43/2 honestly [2] 6/17 20/14 Honor [49] 4/16 5/1 5/23 6/8 7/9 7/20 11/11 11/19 12/18 13/2 13/8 14/19 17/5 22/1 23/22 25/3 25/7

hearing [10] 1/6 1/22

25/13 25/25 26/2 3/4 4/2 4/10 5/11 29/5 27/25 28/15 29/15 30/1 30/20 31/3 31/12 31/18 34/16 36/18 38/4 40/21 41/13 42/18 43/11 44/19 45/10 45/16 48/13 49/22 51/1 51/7 54/7 54/19 55/4 56/13 56/15 59/24 60/23 Honorable [1] 1/11 hope [3] 5/17 52/11 59/24 hotel [2] 35/8 36/20 hour [1] 1/22 house [3] 25/20 38/20 40/5 how [13] 5/5 12/10 15/8 15/14 15/20 17/16 20/10 27/11 33/6 33/7 34/12 44/4 52/21 4/18 8/23 30/7 46/14 46/18 47/7 49/13 husband [2] 17/10 34/6 hypotheticals [1]

l'd [6] 25/9 32/13 39/21 45/10 49/5 49/9 l'II [13] 7/8 23/5 23/25 25/4 28/18 29/19 30/16 31/19 39/11 55/4 56/15 57/7 60/1 I'm [55] 4/12 6/2 9/19 9/22 13/4 18/13 19/6 20/9 22/1 22/5 22/17 23/3 23/13 24/6 24/8 24/12 26/15 27/15 27/15 27/16 27/18 28/18 28/22 29/5 31/3 31/24 33/9 33/20 34/7 34/24 35/15 36/1 36/8 36/15 36/22 37/5 37/21 38/3 38/16 39/1 42/6 42/16 43/18 47/11 52/22 54/1 55/6 55/11 56/5 59/22 60/5 60/8 60/12 60/14 60/16 I've [11] 8/2 12/8 13/9 15/13 17/11 19/17 24/11 43/14 44/7 56/21 58/16 dea [2] 26/25 35/9 identification [1] 3/2 illegally [1] 18/9 implied [1] 48/8 implies [1] 54/23 important [4] 19/18 25/25 52/14 52/18 improvements [1] 54/4

1				
I	isn't [3] 19/18 22/22 36/22	18/16 18/24 25/21 38/9 45/18 52/12	53/1 letter [3] 16/8 16/14	21/5 22/19 23/16 40/25 44/7 56/8
incidents [1] 11/2	Issue [7] 6/12 7/18	52/13 55/17 55/18	16/19	mail [1] 45/5
inclined [1] 54/2	8/13 8/18 13/16 49/23		level [1] 20/5	maintain [11] 10/11
include [8] 10/6 11/7	49/24	landholder [1] 7/4	liable [1] 25/3	10/12 10/19 21/25
14/2 34/14 51/20 53/6	Issued [1] 11/21	landholders [1] 7/3	liberty [2] 38/13	24/18 24/20 42/9 46/1
53/11 58/15	Issues [3] 6/7 13/8	language [35] 25/13	39/21	51/11 54/6 55/3
Included [3] 34/12	14/1	25/23 29/22 30/8	license [1] 34/8	maintained [2] 28/17
35/18 50/19	it's [55] 4/18 4/23 5/6	31/22 33/18 34/13	life [2] 21/10 45/17	28/18
Includes [1] 37/23	5/10 5/15 6/13 6/14	35/6 35/18 36/16 37/6		maintaining [1]
Including [1] 58/19 Incorporate [2] 43/19	7/1 8/5 8/23 8/23 8/24	38/4 39/11 42/22	like [21] 4/21 6/22	22/10
44/17	9/13 9/17 10/16 12/7	43/15 44/8 44/10 45/2	7/21 14/13 17/5 17/17	maintains [1] 55/6
indemnification [3]	12/18 13/5 14/23	47/17 47/23 48/3	18/7 18/10 25/16	maintenance [17]
41/25 43/14 43/20	17/18 17/24 18/17	49/17 50/6 50/13	33/22/34/18/35/15	9/12 10/8 14/21 22/16
indemnify [3] 42/21	22/1 23/15 25/20	51/25 53/17 54/4	36/5 38/14 38/25	26/6 42/13 45/24 46/9
43/1 43/6	25/21 26/1 27/6 29/4	55/12 57/21 58/15	42/11 42/19 47/25	46/13 47/6 47/12 48/2
indemnity [1] 44/14	30/2 30/11 32/15	58/19 58/19 59/2 59/4		49/11 50/19 51/2 54/5
INDEX [2] 2/1 2/5	33/15/33/15/33/25	59/6	limit [3] 16/7 30/8	54/18
indicate [2] 10/15	41/24 42/18 43/13	large [3] 33/25 36/18	30/10	make [19] 4/24 6/13 12/2 14/10 20/20
13/17	43/18 44/20 46/6 47/10 48/2 48/25	36/21	limits [1] 30/2	
indicated [3] 19/18	49/25 50/1 50/4 50/8	larger [1] 7/21	line [4] 8/12 19/24 27/12 28/4	21/20 26/17 28/22 40/19 41/13 43/5
24/23 26/13	51/24 52/9 52/18	last [5] 21/14 31/13 40/12 47/1 53/5	lines [2] 10/22 11/11	44/15 53/12 53/19
Indicates [1] 27/20	52/19 53/24 54/14	lasted [1] 25/11	Linngren [1] 1/11	54/1 54/5 54/13 54/17
Indictment [1] 50/9	57/10	late [1] 29/4	list [2] 24/11 59/19	58/24
individual [1] 6/19	items [3] 2/9 11/12	law [40] 9/9 10/10		makes [1] 14/8
industrial [1] 34/18	18/10	11/24 12/2 12/6 12/14		making (2) 41/22
informative [1] 9/18	its [5] 1/4 5/2 27/4	13/22 13/23 19/3	little [3] 32/13 44/13	55/11
informed [1] 5/16	46/19 49/13	21/24 22/2 22/10	45/5	manner [1] 41/12
ingress [2] 32/7 37/16	itself [8] 14/1 28/3	22/14 22/19 22/19	live [1] 23/25	many [1] 42/19
injunction [9] 12/17	28/11 30/1 48/3 51/18		living [1] 53/17	marked [3] 2/2 3/1
12/20 14/4 27/17 56/5	51/18 51/25	29/9 33/4 40/22 45/23		8/3
56/11 56/20 58/15	J	46/1 46/3 46/7 48/14	location [3] 27/4 27/7	match [1] 58/25
58/16	in-	49/25 51/25 52/15	27/9	materials [1] 41/2
injuries [1] 41/15	January [1] 61/13	52/20 52/21 52/22	logical [1] 18/21	matter [10] 1/21 3/4
injury [1] 43/17	Jill [2] 1/5 5/4	54/7 55/22 56/1 56/3	long [5] 4/21 15/16	6/2 7/12 12/14 13/22
installed [2] 14/22	jimmy [1] 54/11 job [1] 36/3	56/25 58/17 58/23 lawn [2] 40/4 40/11	33/6 54/21 57/4 longer [2] 6/15/30/4	20/19 23/1 56/1 58/17 may [25] 4/7 4/14 6/4
27/4	Johnson [3] 61/6	lawsuit [1] 33/14	look [3] 12/13/39/7	15/8 28/4 31/14 32/2
instance [4] 15/7	61/16/61/17	lawyers [1] 6/20	44/1	32/20 32/22 33/2
24/19 24/25 42/2	Judge [2] 1/12 59/7	lay [1] 28/25	looking [4] 8/10 9/22	
instead [3] 15/15		Lays [1] 29/6	37/5 38/1	37/18 37/23 38/8
32/4 59/5		least [2] 3/19 4/8	looks [2] 36/5 44/23	40/14 40/25 41/3
Insulting [2] 50/1 50/3	56/9 56/25 58/17	leave [4] 21/23 36/16		50/10 51/7 52/11 53/3
insurance [1] 43/3	JUDICIAL [2] 1/2	44/5 47/1	1/17 1/18 2/7 3/5 3/5	53/22 54/22
Intended [1] 35/4	1/12	leaves [1] 17/24	3/5 3/6 3/7 3/8 7/16	maybe [5] 6/25 14/1
Intent [1] 16/17	July [2] 40/8 40/9	leaving [2] 28/6 37/5	12/16 24/17 31/23	35/1 35/25 46/11
Intention [1] 33/24	just [77]	left [4] 3/25 9/8 18/6	Losh's [1] 9/19	me [15] 8/19 17/24
intentions [3] 18/16	K	44/25	Loshes [17] 3/9 3/11	19/17 23/5 24/2 24/12
36/2 36/4	Kay [2] 1/8 1/18	legal [27] 4/3 4/5	3/20 5/9 7/25 8/17 9/2	
Interfere [6] 10/13	keep [2] 26/20 52/19	7/12 8/13 8/24 12/4	10/9 10/19 10/20	39/17 42/19 44/23
15/7 47/23 48/2 48/3	kept [1] 53/20	12/15 12/15 13/6 13/13 13/16 14/1 14/4	11/14 42/3 42/3 42/12 42/21 54/9 54/25	mean [20] 9/6 10/2
48/11	kicking [1] 9/16	14/16 14/20 15/10	Loshes' [1] 10/14	10/24 18/3 20/9 20/13
interference [1]	kind [11] 3/25 4/1 7/1	15/15 18/5 18/7 18/24		22/8 23/13 26/5 27/10
47/18	14/5 23/8 29/19 32/15	20/12 28/23 30/21	lot [17] 7/17 8/7	30/18 31/4 35/8 35/10
interpretation [1]	44/12 50/1 50/6 59/8	32/16 41/9 44/15	10/24 13/13 15/18	36/7 38/17 41/8 41/19
57/23	kinds [1] 40/7	49/24	15/24 24/21 25/12	42/6 52/21
intervention [2] 16/5 19/20	knew [1] 16/2	legally [5] 9/6 14/14		means [1] 10/25
Invited [4] 38/19	know [76]	14/22 33/7 33/11	36/21 36/23 38/11	measure [1] 27/10
39/16 40/10 40/17	known [1] 52/17	lemonade [1] 40/2	43/10 50/2	measurements [2]
invitees [10] 32/7	L	length [1] 8/11	lots (3) 8/6 8/7 35/4	27/14 27/20
34/15 37/16 37/23	Market and the second s	less [1] 28/4	lying [1] 19/23	meet [4] 15/18 17/11
· · · · · · · · · · · · · · · · · · ·	laid [3] 9/13 12/1 20/3	let [6] 4/8 7/8 8/19	М	17/13 22/10
38/18 40/16 41/17		2 6 AL 200 (4 D 2)4 (4 D	***	member [1] 41/8
38/18 40/16 41/17 42/3 46/19 49/14	S75573	15/9 29/19 31/19	mail and 501 0014 5 47 0	
	land [16] 7/6 11/3 11/7 15/3 17/20 17/22	let's [6] 24/2 26/21 26/23 26/23 42/10	ma'am [2] 29/15 47/9 made [8] 14/2 18/19	mention [1] 4/5 mentioned [2] 16/14

17/11 25/10 26/1 26/7 M 27/13 27/21 28/22 neighbors [1] 15/2 20/14/38/5/44/3/44/7 44/23 57/5 57/7 57/10 29/7 29/17 31/10 opposed [3] 15/21 neither [2] 20/10 mentioned... [1] 17/6 32/14/34/12/35/13 57/15 57/22 58/4 59/8 19/1 36/4 48/11 met [1] 20/21 37/7 37/20 41/7 43/7 Nelson [1] 1/15 order [29] 11/21 12/2 60/6 60/16 microphone [1] 4/22 never [3] 5/18 21/2 43/24 44/10 45/14 objectively [1] 20/19 12/22 17/2 19/19 26/6 might [15] 6/5 6/6 49/21 51/6 56/7 56/14 23/12 26/15 26/18 28/16 objects [1] 60/8 9/18 10/4 15/7 18/4 57/6 57/8 57/13 58/6 new [4] 12/12 12/12 28/25 29/8 33/14 37/7 obligated [1] 55/18 25/1 34/9 37/3 38/23 43/25 44/21 44/23 58/11 36/13 55/20 obligation [3] 10/10 39/2 39/23 40/9 50/12 Mr. Williams' [2] 7/4 next [1] 18/2 22/22 60/17 55/10 56/2 56/11 54/19 no [40] 6/15 15/16 57/17 57/24 57/24 16/16 obligations [2] 9/11 mincing [1] 22/3 16/6 16/11 16/22 58/12 58/14 58/22 Ms [1] 1/18 mind [6] 7/20 7/20 Ms. [14] 3/16 5/12 16/24 17/7 17/7 17/14 obviously [11] 3/12 60/9 60/11 60/15 13/2 16/24 17/21 49/4 4/6 5/5 5/13 5/24 7/5 5/21 6/18 17/14 18/23 17/23 18/10 18/15 60/17 minds [1] 16/25 10/2 10/25 35/4 36/7 19/24 21/5 21/11 18/17 19/19 19/21 ordered [3] 25/24 minute [2] 44/2 57/20 22/14 22/17 22/21 21/15 25/18 28/16 52/9 57/14 58/12 minutes [2] 23/14 25/13 27/25 29/4 40/5 41/8 occasions [1] 23/24 ordering [1] 27/15 49/7 29/21 30/4 36/20 Ms. Shaw [14] 3/16 occurred [2] 16/20 ordinances [1] 34/25 mischaracterizations 5/12 5/21 6/18 17/14 38/16 39/4 43/2 45/1 28/13 originally [1] 52/18 [1] 25/22 occurring [1] 28/13 other [32] 5/5 7/5 9/6 18/23 19/24 21/5 47/18 47/23 48/3 49/3 misrepresented [1] 21/11 21/15 25/18 50/15 52/7 53/16 October [1] 5/4 10/7 11/13 12/7 13/3 25/17 28/16 40/5 41/8 55/21 56/11 56/15 October 25th [1] 5/4 13/24 15/12 15/20 misrepresenting [1] much [3] 5/23 9/20 56/18 58/11 off [7] 11/25 15/5 15/22 18/8 21/4 23/3 19/23 15/21 27/3 45/22 46/3 23/11 25/1 26/19 51/17 nobody [3] 14/14 misunderstanding my [36] 4/23 8/19 14/15 60/8 47/21 29/22 32/4 32/10 [1] 16/11 8/20 10/11 10/16 nodding [1] 20/1 offend [1] 15/8 32/12 32/17 33/20 misunderstood [1] 11/22 13/18 16/11 none [1] 29/25 offered [3] 2/2 17/13 37/9 38/8 41/25 47/18 22/5 16/15 16/24 16/25 nonetheless [1] 23/1 48/11 50/19 51/24 misused [2] 33/15 17/21 18/17 22/14 34/25 oftentimes [2] 19/2 52/18 57/14 33/15 23/22 25/13 26/13 north [1] 8/11 other's [2] 15/11 35/17 mixing [1] 32/15 26/19 28/15 30/18 Oh [2] 49/8 56/22 23/10 not [96] modify [1] 12/24 okay [33] 20/8 22/7 others [4] 14/24 15/3 34/6 34/11 38/10 Notary [1] 61/7 months [2] 17/13 40/11 40/12 40/24 24/5 26/19 28/10 17/1 17/2 note [3] 3/10 3/22 53/14 44/1 44/7 44/23 45/1 13/12 28/18 28/20 29/19 otherwise [5] 10/19 moot [1] 52/9 45/17 45/25 49/4 noted [3] 5/2 38/6 33/8 33/17 33/20 11/2 18/17 19/24 48/4 more [15] 7/14 11/20 our [21] 7/14 9/8 9/13 57/23 57/24 61/12 44/7 37/13 38/22 39/20 12/3 13/7 14/15 15/19 notes [3] 4/20 20/25 40/19 45/4 45/12 9/14 11/23 11/25 19/1 19/11 19/13 40/1 12/19 14/20 15/20 58/24 48/17 49/5 52/3 54/3 43/13 44/15 45/18 nature [7] 9/7 9/9 notice [2] 30/13 55/9 55/12 55/15 15/24 16/25 17/1 50/10 55/2 12/24 34/6 34/17 37/22 55/24 56/19 56/22 29/25 32/5 34/1 35/20 morning [1] 29/5 34/22 51/25 40/13 42/24 44/13 notified [1] 17/11 57/1 58/13 60/6 60/10 most [1] 18/21 necessarily [2] 6/11 now [13] 4/1 8/17 60/17/60/21 47/14 48/19 mostly [1] 11/25 18/20 9/23 20/4 23/19 26/3 ours [1] 15/4 out [17] 9/14 11/16 once [3] 44/20 58/22 motion [8] 4/9 6/4 6/4 necessary [6] 12/18 26/13 40/13 42/25 60/3 6/10 7/10 26/13 27/16 12/21 13/6 14/21 50/4 12/1 20/3 20/13 26/10 52/9 53/3 56/10 58/11 one [29] 5/2 13/13 55/25 number [24] 2/2 3/1 50/23 13/15 14/9 14/17 28/5 28/10 28/10 motions [3] 1/6 1/22 need [17] 6/1 10/6 8/6 17/17 24/13 24/15 16/16 17/17 18/13 28/12 28/25 29/6 10/6 14/4 14/13 15/5 27/1 27/2 29/14 29/16 18/25 19/6 22/21 23/7 33/18 36/3 40/5 46/14 mouth [1] 28/23 15/10 20/16 23/9 29/19 32/5 39/7 39/19 24/23 30/20 32/16 54/15 move [2] 45/13 50/4 over [7] 5/11 9/16 25/25 27/14 32/12 40/22 40/23 45/1 32/17 38/8 42/6 43/12 moved [1] 4/1 32/24 35/6 38/18 52/2 45/14/49/23 50/14 47/13 47/23 48/3 49/3 10/17 17/19 24/21 moving [1] 21/11 56/11 50/17 50/20 51/17 50/7 51/7 51/14 51/24 29/20 58/18 Mr [7] 1/14 1/17 2/6 needed [1] 50/23 52/4 52/17 55/2 own [10] 7/18 17/1 2/7 3/24 31/23 58/9 needs [3] 6/6 44/16 one-guy [1] 50/7 18/19 41/1 41/2 41/2 nursing [1] 35/15 Mr. [63] 47/15 only [13] 23/3 31/14 46/17 46/22 49/16 Mr. Losh [1] 12/16 nefarious [1] 35/16 32/2 32/16 32/21 33/2 53/16 Mr. Losh's [1] 9/19 negligence [10] 41/4 object [4] 31/24 34/16 37/18 46/24 owned [2] 8/6 8/17 Mr. Shaw [1] 3/18 52/25 53/5 53/9 41/17 41/21 42/2 owner [2] 15/12 17/9 56/23 57/3 57/16 Mr. Shaw's [1] 36/8 42/14 43/18 43/21 objected [5] 3/10 owners [6] 7/5 8/16 60/20 Mr. Williams [57] 3/8 46/16 46/20 49/15 14/3 20/24 57/12 open [1] 40/3 11/6 30/2 52/12 55/20 3/10 3/15 4/9 4/12 negligent [1] 41/19 57/13 opened [1] 53/15 ownership [2] 11/2 4/25 5/20 6/17 7/7 negotiate [4] 22/24 objecting [1] 12/16 operation [2] 55/3 16/11 13/15 13/24 14/11 25/10 26/14 26/17 objection [13] 11/14 55/6 14/18 15/23 16/9 17/6 negotiation [1] 25/10 27/1 27/22 27/25 operational [1] 54/24 17/12 18/18 19/6 negotiations [1] 28/19 31/21 44/9 opinion [2] 13/18 p.m [2] 1/23 61/1 19/22 20/1 20/11 44/16 45/2 50/15 52/7 26/15 25/13 padlock [1] 54/10 20/14 21/19 22/18 55/21 60/20 Page [11] 2/6 2/7 2/8 neighbor [2] 15/13 opportunity [8] 10/17 22/25 23/19 24/4 24/9 2/9 2/10 9/14 9/14 37/4 objections [15] 14/12 12/21 14/9 14/18 24/12 25/17 26/13

placed [1] 10/10 proceeds [1] 3/16 51/14 51/15 53/23 recorded [2] 12/23 54/8 54/16 55/1 55/2 Plaintiff [1] 2/3 process [2] 15/15 22/20 Page... [4] 9/23 11/13 redraft [1] 58/10 Plaintiffs [2] 1/6 1/16 | 60/13 55/11 56/10 57/13 24/3 61/9 57/14 59/15 Plaintiffs' [1] 3/1 Professional [1] 61/7 reduce [3] 23/14 29/8 Palmer [1] 1/15 plan [1] 34/1 putting [3] 9/2 20/21 56/23 progress [1] 7/2 paragraph [18] 9/24 plans [1] 45/18 prohibited [1] 39/25 28/22 reduced [3] 23/15 10/8 11/12 11/15 plat [11] 7/17 7/22 prohibiting [1] 30/15 43/25 56/10 16/16 21/1 21/1 21/1 8/8 8/14 8/16 8/25 9/6 prohibition [1] 31/11 refer [1] 50/7 21/2 24/14 24/16 28/6 10/23 12/5 12/13 30/5 prompting [1] 26/14 qualify [2] 36/17 referring [1] 4/20 32/20 40/16 48/15 platted [8] 8/6 8/23 reflected [1] 26/10 36/18 prone [1] 53/25 49/19 54/20 54/21 question [12] 6/23 12/25 30/9 30/11 31/6 proper [4] 10/4 11/20 regard [2] 10/8 23/23 paragraphs [1] 20/15 13/21 14/14 14/20 31/15 35/4 16/18 33/5 regarding [1] 27/16 pardon [1] 39/17 18/16 22/14 22/21 pleadings [4] 6/11 properly [2] 10/1 regardless [3] 20/17 Park [1] 38/12 28/15/34/11 42/5 42/6 23/15/30/14 7/10 12/4 19/21 54/2 parked [2] 18/6 18/9 48/16 please [2] 15/9 19/13 register [6] 8/5 12/23 properties [2] 6/12 part [12] 3/13 13/25 questions [3] 20/15 plus [1] 8/7 22/21 30/13 52/14 14/5 23/5 33/20 38/6 property [36] 8/12 40/23 43/4 56/4 point [8] 4/3 4/4 9/3 41/4 42/16 43/21 quick [1] 29/20 9/21 14/4 14/13 25/12 8/20 10/14 15/3 15/9 Registered [1] 61/6 45/18 56/17 56/17 quite [10] 5/13 5/17 rehash [1] 59/1 15/12 16/7 16/25 40/12 participant [1] 26/16 23/10 24/17 24/20 17/4 18/25 23/5 31/5 Reinke [24] 8/16 8/17 portion [1] 47/20 participate [1] 26/7 33/3 33/6 50/6 50/10 position [1] 9/13 24/25 26/9 27/11 28/4 10/21 10/23 11/6 parties [10] 6/14 13/4 possibilities [1] 28/17 29/25 30/15 24/17 30/2 30/4 30/6 15/17 22/9 29/10 30/18 33/11 33/19 30/8 30/10 30/23 31/7 35/12 29/11 45/21 52/3 52/6 raised [1] 10/7 possible [1] 41/4 33/25 34/4 36/10 37/1 31/10 31/15 32/3 32/9 53/16 possibly [2] 33/13 ramifications [6] 38/13 40/13 40/18 32/11 32/17 32/18 party [13] 6/15 13/20 12/5 12/15 30/16 42/14 41/12 47/14 47/15 32/21 32/25 33/2 13/21 18/8 23/11 30/17/30/18 33/12 practice [2] 34/8 60/6 47/16 48/20 50/11 37/19 24/24 48/17 48/19 Rapid [2] 1/13 1/15 predict [1] 25/14 50/12 59/17 reiterate [2] 24/14 46/21 48/11 49/13 rather [1] 11/21 proposals [1] 14/2 45/14 preferences [1] 49/16 52/18 read [11] 9/19 13/9 propose [1] 11/24 15/11 relationship [1] passed [2] 3/18 5/3 32/1 32/20 37/14 preferred [1] 17/14 proposed [9] 2/9 19/25 past [5] 11/7 12/10 39/12 47/7 53/17 prefers [1] 4/17 28/15 43/13 43/25 relationships [1] 25/15 30/6 48/18 57/24 58/22 58/24 prepare [1] 56/15 45/8 45/13 55/10 15/2 patience [1] 60/24 reading [3] 10/22 57/17 58/23 remain [3] 4/23 38/4 preplanning [1] 53/4 people [12] 4/19 45/15 45/25 prerogative [1] 19/9 proposes [1] 44/21 53/25 18/21 19/2 20/21 21/3 reads [4] 28/3 46/18 present [4] 3/9 3/16 protect [1] 50/8 remainder [2] 10/5 21/9 23/18 38/24 39/1 49/9 58/20 5/12 61/8 protected [1] 37/2 28/6 40/4 42/19 55/18 real [2] 16/24 34/17 protection [2] 20/2 preserve [1] 16/22 remains [3] 54/9 perfectly [2] 21/6 really [7] 4/19 9/20 preserved [6] 38/7 59/16 54/18 54/21 25/14 12/11 12/12 15/23 remove [1] 50/23 44/9 44/24 57/15 protects [1] 19/12 perhaps [8] 3/22 23/8 59/8 renaming [1] 6/5 57/22 59/3 prove [1] 16/3 14/11 14/24 22/25 realm [1] 35/12 presided [1] 5/11 provide [3] 7/21 7/24 rent [3] 38/13 38/15 24/2 27/13 27/14 45/7 reason [7] 8/13 16/19 38/20 pretty [5] 9/10 34/8 10/18 period [5] 28/12 18/15 19/20 19/21 39/11 44/14 51/17 provided [3] 10/18 renting [1] 38/14 31/10 31/11 32/21 prevent [1] 54/11 44/12 47/21 repair [5] 24/21 25/3 12/21 13/11 40/6 primarily [1] 53/16 reasonable [6] 10/18 46/17 46/21 49/16 provides [2] 7/17 Permanent [1] 56/20 prior [2] 8/19 12/9 30/23 10/20 48/22 53/12 rephrase [1] 47/4 permitting [2] 32/6 53/19 53/21 private [3] 8/15 11/8 provision [2] 41/14 replatted [1] 30/4 37/15 recall [1] 48/10 reported [1] 61/9 30/23 43/20 person [2] 15/20 receive [3] 58/22 Pro [1] 1/19 provisions [1] 26/8 reporter [4] 4/18 4/24 20/19 probably [13] 6/1 6/5 public [8] 5/10 11/9 59/21 60/3 61/7 61/17 person's [2] 47/18 received [2] 2/2 6/19 10/5 13/10 14/6 21/15 39/9 39/14 39/14 representation [2] 48/11 receiving [1] 16/8 21/17 24/16 39/22 39/15 40/10 61/7 4/1 19/9 personal [3] 13/14 recently [1] 4/14 50/2 51/1 52/10 59/23 purchased [3] 8/7 representative [1] 15/16 50/9 reciprocal [2] 41/23 probate [1] 6/7 8/19 9/1 5/20 personally [3] 3/9 49/17 problem [6] 19/10 pure [1] 13/6 represented [1] 37/4.50/3 recitation [1] 27/20 19/15 19/16 23/17 purely [2] 13/12 35/13 perspective [2] 18/24 recognize [2] 10/9 39/2 43/2 30/21 representing [1] 3/21 30/21 represents [1] 3/15 purpose [7] 4/10 problems [2] 29/21 perspectives [1] recognized [1] 8/21 request [3] 25/9 26/7 38/23 26/12 32/6 45/19 15/20 reconsidered [1] 57/16 59/2 59/4 procedural [1] 6/1 56/5 persuasive [1] 25/22 24/9 purposes [6] 4/13 requested [1] 29/16 Procedure [1] 60/8 peruse [1] 29/19 11/16 28/1 32/22 reconstruct [1] 41/1 proceed [2] 7/8 7/9 require [2] 22/15 pick [1] 37/22 record [12] 3/10 3/22 proceeding [1] 6/19 37/15 37/18 40/13 piece [1] 7/5 4/13 6/14 6/25 37/7 required [7] 5/21 proceedings [6] 1/21 put [21] 5/5 16/21 pieces [1] 54/15 38/6 45/20 47/7 58/21 3/25 5/16 61/1 61/9 26/10 32/3 35/21 21/24 22/1 28/25 29/8 place [4] 11/18 12/22 59/3 61/10 61/11 43/25 44/10 50/8 51/4 54/10 60/7 20/22 51/14

15/8 17/3 17/19 19/18 R 19/16/21/16 28/3 Section [1] 26/22 28/16 28/16 28/21 28/11 28/18 34/19 40/5 41/8 41/9 59/15 20/5 20/14 20/15 sectioned [1] 47/21 requirement [1] 10/3 35/24 36/5 38/24 39/3 20/24 24/24 25/21 sections [2] 26/8 Shaw's [1] 36/8 requires [2] 45/23 33/12 34/7 34/9 35/1 40/4 40/6 47/21 48/6 26/24 Shaws [22] 7/18 8/7 46/1 37/2 37/23 38/23 50/22 secure [1] 53/20 8/7 14/23 16/17 16/20 reserve [2] 50/22 see [18] 7/22 11/5 18/12/33/10 40/25 40/13 40/14 43/13 roads [1] 48/9 51/10 roadway [4] 16/19 11/12 14/4 15/5 18/14 42/1 42/8 42/15 42/21 48/5 48/6 52/16 57/12 resident [1] 25/19 43/2 43/8 43/21 47/13 32/8 32/11 37/17 18/25 19/2 27/11 30/6 57/14 59/16 residential [5] 34/22 Ron [1] 5/2 35/21 39/24 43/22 50/11 53/2 55/8 55/19 somebody [11] 15/18 35/3 35/5 35/14 37/9 45/12 51/23 52/13 59/17 35/7 35/21 37/1 38/1 Ronald [2] 1/4 6/15 respect [7] 15/3 15/3 room [1] 38/20 60/15 60/19 Shaws' [1] 54/16 42/25 44/14 47/24 15/9 17/1 17/22 19/3 route [1] 47/22 see any [1] 43/22 50/7 50/11 53/2 she [18] 4/25 5/16 19/7 RPR [1] 61/17 seeing [1] 47/11 6/18 17/14 18/19 somehow [5] 15/8 respectful [1] 23/10 rule [4] 11/23 12/19 seek [1] 4/4 18/19 19/8 19/9 21/6 16/12 17/3 43/9 50/1 respectfully [2] 25/9 21/6 21/7 21/17 21/17 13/16 50/7 seem [2] 3/24 49/25 someone [1] 38/19 something [26] 10/5 17/3 17/17 18/7 19/5 seemed [2] 15/23 21/22 23/24 26/16 Rules [1] 60/7 respond [3] 14/18 ruling [3] 2/10 12/14 40/7 40/8 16/20 44/22 60/18 12/19 seems [5] 17/4 17/5 she's [3] 17/10 25/18 19/11 21/14 22/20 response [10] 9/19 run [2] 33/6 52/12 26/16 30/8 46/24 27/18 27/19 33/21 26/15 9/23 15/1 16/22 16/22 seen [2] 13/1 60/10 should [14] 12/19 34/1 34/5 34/19 36/14 17/7 17/8 40/24 57/6 sell [5] 36/10 36/25 18/21 20/10 20/10 37/1 38/2 40/7 42/9 53/2 55/17 55/19 sadly [1] 6/14 21/2 26/2 27/22 30/7 42/9 42/10 45/20 responses [1] 4/13 selling [1] 59/17 safe [2] 10/3 19/16 41/6 42/12 45/11 47/25 48/1 53/14 responsibilities [1] said [12] 14/11 14/12 send [1] 56/16 46/11 51/15 53/17 59/10 14/18 23/24 24/6 sense [3] 14/8 19/4 shouldn't [1] 20/10 Sometime [1] 9/1 responsibility [1] 31/25 35/13 42/17 40/25 shown [1] 48/15 sometimes [3] 13/13 54/16 46/12 57/12 57/20 sentence [21] 28/3 side [3] 8/10 17/20 21/9 34/6 responsible [12] 59/4 29/13/29/22/31/13 23/11 somewhat [2] 3/17 16/13 25/2 41/15 sale [1] 39/21 32/4 32/10 32/20 sides [1] 17/16 43/6 41/20 42/4 42/13 46/B same [9] 7/1 10/11 32/25 45/25 46/4 46/5 sign [6] 25/24 33/14 soon [1] 59/21 46/13 47/5 49/10 53/6 28/6 41/10 41/12 47/1 47/7 49/11 49/12 45/3 57/24 60/9 60/17 sorry [11] 17/9 22/1 53/7 42/22 47/25 55/19 53/5 53/9 53/11 54/20 22/5 24/8 28/18 31/3 signature [1] 44/1 responsive [2] 4/11 31/24 33/21 52/22 55/2 57/17 signed [1] 19/5 19/21 satisfactory [1] 12/20 signing [1] 27/18 55/6 60/14 sentences [1] 47/8 rest [1] 59/15 sentencing [1] 5/11 simple [2] 18/7 20/12 satisfied [3] 14/12 sort [7] 10/7 12/17 Restatement [1] 26/8 28/12 29/13 separate [1] 32/24 17/19 17/24 39/21 simplify [2] 42/20 restrictions [1] 36/11 satisfies [2] 31/9 40/14 43/3 September [4] 1/7 43/9 result [2] 5/3 43/17 33/3 1/22 4/15 8/20 simply [2] 10/16 28/2 sounds [1] 28/14 resulting [1] 42/22 saw [1] 21/13 September 13th [1] since [6] 4/20 5/7 south [12] 1/1 1/13 results [1] 41/5 say [30] 13/25 15/13 4/15 9/17 16/1 38/10 54/16 1/15 1/24 5/18 8/11 resumed [1] 25/10 15/14 16/15 17/5 23/5 September 18th [1] single [1] 49/2 9/9 28/24 29/1 37/8 retains [1] 11/2 23/20 23/22 28/1 8/20 sir [3] 19/10 25/8 61/3 61/8 review [2] 26/1 56/16 30/24 31/4 32/5 33/9 serve [5] 31/14 32/2 South Dakota [4] 43/24 Richard [4] 1/8 1/14 35/17 40/10 42/1 32/21 33/2 37/18 sit [6] 4/17 21/7 21/21 5/18 9/9 28/24 37/8 1/17 3/4 42/10 42/21 44/2 21/22 28/13 36/2 speak [4] 13/8 21/12 service [1] 45/6 rid [1] 28/7 47/20 52/2 53/1 53/12 services [1] 34/9 sitting [3] 4/20 22/13 30/18 34/23 rig [1] 54/11 57/4 57/6 57/17 57/19 servient [2] 10/24 23/18 speaks [2] 48/3 51/18 right [41] 3/3 6/14 59/6 59/6 59/10 1171 situation [5] 35/15 specific [2] 17/23 8/10 8/14 9/23 13/15 set [8] 3/3 3/12 23/2 saying [9] 19/6 21/21 48/21 48/24 49/1 49/2 19/13 13/19 15/5 15/21 16/6 27/17 30/15 32/19 24/4 40/2 44/5 44/6 six [1] 17/12 specifically [4] 7/15 16/8 18/23 21/18 25/4 36/1 41/24 46/23 48/9 61/12 sixplex [1] 35/21 31/6 50/22 51/4 26/3 26/25 27/10 skip [2] 14/5 46/13 says [14] 14/14 27/9 sets [1] 20/12 specification [1] 27/5 27/19 28/7 29/16 33/2 47/17 47/23 SEVENTH [2] 1/2 snow [1] 50/23 specify [3] 14/25 30/20 32/24 38/5 39/5 48/10 49/12 50/21 1/12 so [114] 33/1 51/24 39/7 40/13 41/3 41/13 51/19 54/4 54/8 55/2 several [2] 23/23 So they'll [1] 54/10 spirit [1] 27/8 42/8 45/22 46/10 56/20 57/18 25/11 so-called [1] 17/18 spoke [1] 23/24 50/18 50/22 50/24 scheduling [1] 3/13 shall [7] 28/3 28/17 social [3] 32/7 37/15 spoken [1] 37/9 51/10 51/20 51/20 scratch [1] 54/15 28/17 32/6 37/14 41/16 spot [1] 23/21 51/23 52/9 60/22 sold [2] 50/11 52/13 Se [1] 1/19 41/15 51/19 ss [1] 61/3 60/22 seasonal [1] 38/11 shape [1] 14/23 sole [1] 42/2 staff [1] 5/17 right-hand [1] 8/10 seated [1] 4/23 second [8] 25/4 stand [2] 4/17 40/2 shared [1] 45/24 solely [2] 41/17 43/17 rights [3] 17/2 41/9 Shaw [28] 1/4 1/4 1/5 solidified [2] 13/22 standing [1] 4/19 43/8 27/14 28/2 34/4 39/12 3/4 3/16 3/18 5/2 5/4 56/2 standpoint [1] 40/1 ring [1] 41/11 some [40] 4/10 6/18 48/5 49/12 54/3 5/12 5/21 6/15 6/18 start [7] 4/12 46/12 risen [1] 20/5 secondary [3] 13/21 7/15 17/14 18/23 6/18 6/21 6/22 9/3 46/25 47/6 48/8 49/12 RN [1] 34/8 41/10 42/11 19/24 21/5 21/11 9/17 12/7 13/2 13/10 59/20 road [21] 9/2 9/4 9/25 secret [1] 5/10 21/15 24/20 25/18 14/2 14/12 15/6 15/6 starts [1] 59/22 12/12 17/23 19/15

S suppose [1] 49/24 42/2 42/3 42/8 42/24 15/15/21/18 33/5 trying [3] 21/4 30/24 43/6 43/8 44/7 46/17 34/19 44/2 46/16 supposed [2] 17/19 43/18 state [13] 1/1 10/10 46/22 47/14 49/16 46/20 49/14 53/15 Tuesday [1] 57/19 12/6 16/4 24/16 28/24 supposedly [1] 17/15 53/16 54/15 54/17 58/24 twice [1] 39/24 29/1 38/12 43/15 Supreme [2] 34/21 theirs [1] 48/2 two [6] 17/16 21/3 throughout [3] 3/24 43/15 43/18 61/3 61/8 them [17] 5/13 8/21 23/18 29/5 32/15 47/8 37/8 5/15 38/9 stated [3] 25/19 type [7] 9/11 10/2 sure [12] 4/16 4/24 9/2 10/10 15/8 18/9 throwing [1] 18/10 52/21 52/22 6/2 6/9 7/23 9/20 35/1 35/2 37/9 38/14 32/16 33/19 35/3 time [12] 3/3 7/1 statement [6] 46/7 34/24 36/8 40/19 45/5 36/11 40/17 40/17 10/11 15/16 36/9 48/5 48/14 51/22 52/15 51/6 58/24 41/11 42/23 53/24 38/10 40/6 43/24 types [1] 12/11 52/19 56/8 surface [4] 16/12 54/13 56/16 47/18 48/23 57/3 58/7 statements [1] 5/2 28/3 28/11 50/23 themselves [1] 30/19 times [3] 15/18 17/6 stating [1] 46/3 therefore [1] 23/11 ultimately [2] 43/23 39/24 status [2] 6/2 6/7 these [16] 3/24 11/24 today [25] 3/11 3/14 stays [1] 38/7 tack [1] 32/11 under [22] 21/2 21/24 6/13 7/11 7/19 8/3 12/13 17/25 21/2 still [5] 10/3 25/21 take [10] 19/20 21/17 23/17 26/10 26/24 22/10 22/19 25/20 8/18 9/5 9/20 11/16 34/7 34/7 54/24 31/19 33/18 35/17 30/11 36/10 43/16 11/23 14/11 23/1 29/1 29/8 33/3 34/15 straight [1] 39/23 35/20 36/25 39/7 53/2 35/14 37/2 40/22 41/9 44/3 52/11 52/13 56/1 26/11 26/12 27/24 stricken [6] 20/16 42/7 46/6 54/6 56/1 58/18 28/13/30/5/33/9/35/13 20/17 24/13 29/14 takes [1] 15/16 they [44] 4/1 5/6 5/17 36/2 36/4 44/5 52/16 56/17 56/25 59/22 29/17 55/23 taking [1] 37/4 60/7 60/17 5/18 5/22 6/23 8/21 56/24 strike [9] 9/24 28/2 talk [5] 9/5 18/24 21/7 9/1 13/18 13/20 16/2 today's [2] 4/10 understand [17] 5/19 28/5 31/13 31/22 26/23 26/23 16/13 16/15 16/21 12/16 13/10 15/19 31/15 32/21 45/25 46/11 19/7 21/5 28/20 35/11 talked [7] 39/9 44/2 18/1 18/4 18/8 18/9 together [4] 5/6 50/17 56/24 58/19 36/6 36/15 36/23 37/3 19/16 30/12 34/25 44/10 45/7 56/10 striking [1] 14/2 38/17 39/4 39/10 45/4 58/20 58/25 35/7 36/9 41/2 41/11 too [8] 4/22 11/13 structure [3] 12/1 49/3 talking [9] 4/21 8/9 42/11 42/12 43/1 43/5 11/16 29/5 38/13 34/3 34/4 12/4 13/24 19/10 45/21 47/24 48/6 understanding [6] 48/14 53/4 60/6 study [1] 44/11 35/11 44/11 55/16 15/17 26/20 42/7 52/17 53/2 53/3 53/23 total [1] 15/22 stuff [7] 13/4 13/14 59/7 53/24 54/5 54/6 54/8 towards [1] 38/1 42/20 57/11 57/23 32/4 32/12 35/1 37/2 talks [1] 52/5 Understood [1] 31/8 54/8 54/13 54/16 tracks [1] 29/6 50/2 tell [11] 5/9 7/10 Tract [26] 8/16 8/17 59/18 unless [2] 13/6 33/4 subdivide [4] 29/24 14/23 18/9 20/9 20/11 they'll [2] 54/10 55/3 unnecessarily [1] 10/21 10/23 11/6 30/12 33/4 33/5 24/2 30/17 33/10 39/2 they're [7] 3/21 15/19 24/17 24/19 30/2 30/4 10/13 subdivided [3] 30/3 41/3 30/6 30/7 30/8 30/10 20/17 44/24 49/6 unnecessary [3] 17/4 30/7 32/23 telling [3] 22/17 30/23 31/6 31/10 29/22 39/3 53/14 56/21 subdividing [3] 33/19 60/12 thing [14] 10/2 10/7 31/15 32/3 32/8 32/11 unsafe [3] 14/25 15/1 31/11 33/24 34/4 temporary [1] 48/6 32/17 32/18 32/21 17/24 11/13 13/15 23/3 subdivision [4] 7/17 tenement [12] 10/9 34/18 38/8 38/15 32/25 33/2 37/18 unwilling [1] 23/19 8/6 12/25 31/22 10/23 10/24 10/25 up [16] 4/7 14/5 39/21 40/14 43/3 48/1 traffic [5] 5/12 11/8 subdivisions [1] 11/7 16/13 17/12 20/14 11/1 16/12 24/18 46/1 56/20 56/23 34/19/36/22 59/7 subjectively [1] 46/13 47/4 47/5 49/10 things [28] 4/21 6/22 35/24 37/22 38/23 tragic [1] 5/14 20/19 40/2 40/3 45/20 48/9 term [3] 33/23 39/13 12/11 13/11 13/14 transcript [2] 37/8 submissions [1] 48/19 53/24 55/1 44/15 13/18 14/3 14/6 14/7 61/10 13/10 terms [8] 2/9 9/10 58/25 14/11 18/13 18/21 trash [1] 18/6 submit [1] 43/13 14/20 15/8 15/24 18/1 18/25 19/1 20/3 20/23 travel [2] 10/4 10/17 upkeep [1] 45/24 subserv [1] 29/2 24/11 34/18 20/24 25/17 35/14 traveled [1] 3/12 us [13] 15/9 17/2 Subservient [1] 29/3 than [7] 11/21 12/7 traveling [1] 34/19 17/11 18/1 18/12 39/8 52/12 52/13 substantive [1] 4/2 23/7 28/5 41/25 44/16 traverses [1] 8/11 28/17 29/18 35/21 52/16 56/24 57/12 substitute [2] 6/4 treat [2] 15/4 16/25 58/20 42/23 43/6 45/5 47/13 57/14 58/18 59/1 6/10 Thank [24] 5/1 5/23 51/21 think [80] treated [1] 15/4 substitution [1] 7/2 use [33] 9/10 10/12 7/9 7/24 8/1 13/8 13/9 Third [1] 26/9 tree [1] 40/14 successors [2] 46/19 11/1 11/5 12/9 14/21 29/4 39/6 40/21 44/19 those [24] 5/15 5/21 tricky [2] 42/19 45/5 49/13 48/17 49/20 51/13 15/14 15/24 16/7 9/23 10/22 11/11 tried [1] 9/2 such [2] 4/11 17/25 52/3 55/5 55/15 56/6 17/19 19/3 22/15 11/12 12/2 12/10 trouble [1] 42/18 suffered [1] 41/16 56/13 57/1 60/22 24/24 30/5 30/15 12/22 13/7 13/8 13/10 truck [1] 34/18 suggest [5] 6/3 11/11 60/23 60/24 60/25 32/18 34/5 34/13 18/3 20/20 20/25 trucks [1] 35/24 15/23 19/2 19/22 that part [1] 42/16 34/17 35/5 35/15 true [3] 41/11 53/1 30/18/35/14/36/2 suggested [7] 19/22 that results [1] 41/5 37/24 40/16 45/12 35/23 37/10 37/11 61/10 20/16 22/18 24/13 39/3 39/9 39/13 39/14 That's a [1] 36/21 53/25 57/14 58/24 trust [15] 1/4 3/4 3/9 24/14 25/5 55/23 46/15 46/16 46/21 That's fine [1] 52/24 3/15 3/17 5/3 6/2 6/6 though [5] 7/4 15/4 suggesting [3] 24/9 That's one [1] 49/3 49/15 51/11 17/1 18/20 42/7 6/7 6/23 7/4 7/16 35/16 38/16 their [32] 10/14 10/21 used [8] 4/19 12/10 thought [3] 9/18 32/5 28/21 41/9 59/16 suggestion [5] 11/22 14/24 15/7 19/21 32/6 12/10 20/4 33/7 37/17 57/11 trustee [2] 5/5 6/16 31/17 31/20 45/15 33/3 34/14 34/24 36/4 three [3] 39/24 53/14 trustees [3] 1/4 5/3 39/14 43/14 37/15 40/4 40/10 41/1 uses [1] 35/2 54/14 6/5suggestions [1] 41/2 41/2 41/4 41/9 using [2] 22/11 53/8 through [12] 1/4 9/4 try [1] 23/23 37/11

47/12 50/9 57/21 we can [1] 53/9 28/11 36/25 51/7 which [25] 4/6 4/9 words [10] 18/19 we'd [2] 9/24 12/21 vacant [1] 25/21 we'll [4] 45/13 50/5 7/17 7/18 8/6 8/8 13/1 19/5 22/3 24/6 26/19 valid [1] 40/22 53/12 58/6 15/16 16/1 19/2 19/17 28/23 32/10 38/19 vehicle [4] 18/6 47/16 we're [35] 3/14 4/1 24/25 25/20 27/16 42/19 44/13 48/7 48/19 work [13] 6/18 6/21 6/13 8/9 8/22 9/5 9/8 31/25 32/21 33/3 33/5 vehicles [4] 25/1 9/20 13/12 14/13 35/13 41/3 44/1 53/11 7/1 18/20 34/7 38/11 36/19 36/21 36/22 56/10 60/7 61/12 15/22 17/3 17/17 40/13 42/15 43/7 versus [1] 3/4 18/11 22/3 25/23 26/5 who [10] 6/14 12/10 45/11 47/12 54/3 very [11] 4/7 5/14 26/17/30/21/30/24 32/17 39/14 39/16 58/11 5/14 6/15 25/25 26/9 35/11 35/20 43/24 39/18 41/6 50/11 55/6 workers [1] 38/11 29/12 43/10 50/12 44/5 44/21 48/8 51/14 55/18 working [2] 44/6 51/16 52/3 52/16 52/17 53/7 53/8 whoever [2] 25/2 54/13 view [1] 32/13 57/13 58/1 58/3 58/25 46/24 worthy [1] 16/5 viewpoint [1] 9/8 we've [8] 8/3 9/13 whole [3] 15/24 would [114] violate [1] 18/4 9/15 10/15 14/22 43/2 38/25 56/19 wouldn't [10] 10/6 violation [1] 37/12 55/16 58/14 why [13] 3/14 3/20 11/6 12/20 22/6 22/12 visit [1] 23/14 Wednesdays [1] 59/5 5/21 6/13 16/15 16/21 31/21 32/12 41/20 visiting [1] 23/18 week [1] 59/23 19/3 19/4 35/6 37/25 43/20 50/19 vs [1] 1/7 weeks [1] 25/11 38/3 43/22 50/8 writing [14] 14/14 welcome [1] 38/25 wide [1] 8/15 19/1 19/11 20/3 20/23 well [41] 3/12 4/7 5/9 width [2] 28/5 28/12 21/24 22/8 22/20 wait [2] 44/2 57/20 5/10/9/16 14/19 18/8 23/15/29/7 43/12 wife [1] 16/25 want [30] 9/22 14/5 18/10 19/12 19/14 will [32] 6/1 7/24 44/22 56/2 56/24 15/4 16/10 16/10 19/14/22/3 22/14/26/4 21/15 21/17 21/18 written [2] 8/14 57/11 18/20 19/25 21/7 21/7 26/11 26/21 27/3 43/5 44/9 46/17 46/21 wrong [3] 24/12 21/12 21/15 21/21 28/17/30/10 32/13 47/8 48/6 49/11 49/12 35/17 42/9 21/22 23/4 23/8 23/24 49/16 49/18 51/6 34/11 35/7 35/10 wrote [2] 16/8 16/19 26/17 26/20 33/10 35/19 36/6 36/15 52/13 53/6 53/19 34/9 35/16 35/25 37/3 37/25 38/13 38/14 55/10 56/10 56/12 37/8 40/19 44/15 53/3 Yeah [3] 40/20 54/7 38/18 43/23 45/7 46/6 57/8 57/9 57/24 57/24 53/24 59/1 60/16 47/17 48/25 49/24 58/14 58/15 58/17 59/25 wanted [5] 4/7 5/20 year [4] 17/13 21/14 53/10 56/19 59/1 58/22 59/14 59/19 34/3 35/8 40/2 59/17 60/10 Williams [60] 1/14 39/24 39/24 wants [2] 13/7 21/6 years [3] 36/4 38/9 were [15] 5/6 6/20 2/6 3/8 3/10 3/15 4/9 was [51] 3/12 5/10 11/22 17/1 17/25 18/1 53/3 4/12 4/25 5/20 6/17 5/12 5/13 5/23 5/24 yes [22] 25/8 29/13 20/21 25/20 35/18 7/7 13/15 13/24 14/11 6/17 6/21 6/21 8/4 36/4 41/9 45/21 47/24 14/18 15/23 16/9 17/6 29/15 29/15 31/18 8/21 9/4 10/7 10/7 46/10 47/9 47/25 48/5 48/1 59/7 17/12 18/18 19/6 11/14 12/1 12/10 48/16 49/22 51/7 51/9 19/22 20/1 20/11 weren't [2] 3/13 12/16 12/25 13/2 16/1 51/12 51/22 57/25 20/14/21/19 22/18 52/17 16/2 16/3 16/9 16/11 58/2 58/5 58/8 59/12 22/25 23/19 24/4 24/9 what [100] 16/15 16/17 16/17 what I'm [1] 54/1 59/18/60/15 24/12 25/17 26/13 16/21 16/23 17/12 27/13 27/21 28/22 yet [3] 25/19 47/11 what's [6] 6/12 21/16 18/9 22/14 24/25 25/2 21/24 35/13 43/23 29/7 29/17 31/10 60/11 26/12 31/4 31/25 40/6 60/7 32/14/34/12/35/13 you [260] 40/7 41/19 42/2 43/21 whatever [B] 16/10 37/7 37/20 41/7 43/7 you use [1] 39/13 44/25 45/20 48/19 you'd [1] 38/25 23/25 34/10 36/11 43/24 44/10 45/14 48/21 48/24 55/1 49/21 51/6 56/7 56/14 you'll [3] 45/12 51/23 38/12 43/16 47/16 57/11 61/8 57/6 57/8 57/13 58/6 58/24 wasn't [2] 36/9 57/20 when [27] 3/12 6/18 58/9 58/11 you're [22] 3/21 4/20 watch [1] 40/11 8/19 13/13 14/21 Williams' [2] 7/4 4/21 5/19 8/10 13/20 water [1] 16/18 19/10 19/19 19/22 14/22 14/25 17/12 16/16 way [38] 4/12 5/20 21/20 23/6 23/19 17/17 17/22 26/15 willing [4] 9/24 23/11 6/22 6/24 7/2 7/7 12/1 30/14 38/1 38/14 35/2 35/11 35/17 38/1 23/13 26/16 14/16 15/8 17/3 18/21 39/23 40/3 41/22 39/13 39/13 43/4 44/5 willingness [1] 18/15 20/7 20/8 23/8 24/3 44/11 55/2 55/19 44/21 51/19 53/8 winter [1] 53/15 26/21 28/12 28/25 60/17 53/16 55/10 57/16 wish [4] 4/4 14/10 30/13 33/15 33/16 59/19 59/19 20/9 26/14 you've [5] 13/17 20/4 34/13 41/2 43/11 38/25 40/17 40/17 withdraw [1] 28/19 when it [1] 14/21 43/12 44/18 45/8 where [14] 4/4 6/23 your [103] within [1] 59/23 45/15 48/2 48/10 yourselves [1] 3/22 12/8 14/13 15/7 15/19 without [7] 3/16 51/24 53/23 54/11 20/22 34/18 38/23 11/17 18/4 19/10 55/19 56/2 56/25 43/13 48/19 49/12 31/11 34/4 46/2 57/10 60/12 zoning [1] 34/25 50/21 59/8 witnesses [1] 7/11 ways [3] 21/10 46/23 whether [7] 14/20 wonder [1] 17/24 49/17 word [5] 20/4 22/11 20/20 29/24 33/14 we [128]

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IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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SHAW FAMILY TRUST ESTABLISHED)	
MAY 22, 1991 AS RESTATED ON JULY	}	
18, 2019 by and through its acting trustee	j	
JILL D. SHAW	ì	
)	APPELLANTS' REPLY BRIEF
Plaintiff and Appellee)	
)	
v.)	
)	Appeal No. 30933
RICHARD LOSH and CAROL KAY)	
BIEWICK LOSH)	
)	
Defendants and Appellants)	

Appeal from the Circuit Court, Seventh Judicial District, Custer County, South Dakota
The Honorable Heidi L. Linngren

Notice of Appeal filed December 11, 2024

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Table of Cases
Preliminary Statement
Argument
Disputed Facts
Jurisdiction and Venue4
Ordinance Argument Timely8
Conclusion9
Appendix
TABLE OF CASES Page No.
TABLE OF CASES Page No. Gottschalk v. Hegg, 228 N./W. 2d 640
Gottschalk v. Hegg, 228 N./W. 2d 640
Gottschalk v. Hegg, 228 N./W. 2d 640
Gottschalk v. Hegg, 228 N./W. 2d 640
Gottschalk v. Hegg, 228 N./W. 2d 640
Gottschalk v. Hegg, 228 N./W. 2d 640
Gottschalk v. Hegg, 228 N./W. 2d 640

TABLE OF CONTENTS

Page No.

PRELIMINARY STATEMENT

This Reply Brief is offered by Appellants and Defendants as a rebuttal to the Answer Brief submitted by Appellee and Plaintiff. Appellants and Defendants Richard and Carol Losh may be referred to as "Loshs" while Appellee and Plaintiff Shaw Family Trust established May 22, 1991 as restated on July 18, 2019 by and through its acting Trustee, Jill D. Shaw will be referred to as "Shaw". Shaw's Answer Brief filed with this Court on April 9, 2025 will be referred to as "Answer Brief". The Order on Motion for Declaratory Judgment Regarding the Easement located on the Plat of Case Subdivision #4 Recorded as 12 Plat 626 over Lot 4 and for the Benefit of Truct Reinke will be referred to as the "Order". Citations to the court record will appear as "R. p. _____": citations to the Flearing Transcript will appear as "Tr. p. _____"; and citations to the Appendix for this brief will appear as "App. ____" with page numbers to follow.

ARGUMENT

1. DISPUTED FACTS

While certain incorrect statements of facts may not be central to the legal issues in this case, Appellants wish to address and clarify the continuing factual misrepresentations made in Appellee's submissions to the Court including Appellee's recently submitted Answer Brief.

The claim that Shaw is a resident of Custer County, South Dakota (Answer Brief, p.2) has been debunked. R. pp.55-56; see also Tr. p. 5, lines 16-18 at App. 011. The factual history as narrated in Shaw's submissions to the Court has sought to describe a

ripe and justiciable controversy based on statements made in a single letter, at R. pp. 23-24, hastily written in response to an aggressive letter, at R. pp. 20-22, from Shaw's attorney even though the statements were subsequently retracted a week before Shaw filed the original *Complaint*. Rather than addressing the inaccurate statements individually, Loshs refer to Exhibits 2 and 4, at R. pp.64-71, and 74, in their *Answer and Motion to Dismiss Complaint*, at R. pp. 55-74, and will include a copy of Exhibits 2 and 4 in the Appendix to this brief at App. 033-041.

Also somewhat puzzling in the Answer Brief at p. 4, line 5 is why Shaw's attorney continues to refer to Freeland Drive as a highway even though he was corrected in Losh's Answer and Motion to Dismiss Complaint, at R. pp 56-57. Loshs also wonder at Shaw's submission of an aerial photograph at p. 12 of the Answer Brief apparently purporting to show several properties and a stretch of dirt road conspicuously labeled Freeland Drive.

This aerial photograph was not made part of the record in the Circuit Court and it does not accurately represent the conditions on the ground now or as they were at the time the easement was obtained in 2015; nor does the figure accurately represent the conditions on the ground at the time the *Complaint* was filed. While Shaw asserts in a footnote that the "figure is inserted for demonstrative purposes only and not as evidence", Shaw fails to identify what the purposes are. Indeed, Shaw's attorney has already submitted a larger copy of the plat at the Hearing, ostensibly for demonstrative purposes. Tr. p.7, lines 20-25 at App. 012: also R.p. 118. As such, Loshs respectfully object to this submission in Shaw's Answer Brief.

2. JURISDICTION and VENUE

Shaw's Answer Brief, at p.7, asserts that the Circuit Court had jurisdiction and was the proper venue for seeking a declaratory judgment with a Court Order that conflicts with a Custer County Ordinance. While the County Ordinance plainly states that private access roads may serve only one parcel and are intended to serve only one residence, the Court Order establishes a list of terms and conditions for the use and maintenance of the private access road by the owners of two adjacent parcels, Lot 4 and the Reinke Tract and allowing for the sharing of the private access easement to serve two residences. The Court Order also directs that a copy of the Order with the list of terms and conditions be filled with the Custer Register of Deeds and indexed against the affected properties. R. pp.160-170.

Appellants' Brief, at pp. 11 and 16, notes that the Court was made aware of Custer County Ordinance No. 2 in two briefs submitted to the Court, one on October 10, 2024 and the second on October 18, 2024 (R. pp. 124-136 and 155-163) well in advance of the Court's Findings of Fact and Conclusions of Law and the subsequent Order that were both issued on November 7, 2024 (R. pp. 168-179). Yet there was no mention of the Ordinance in any of the Court's findings of fact or conclusions of law. The Court plainly did not address the conflict created by the terms and conditions in the Order allowing for joint usage of the single private access road while such joint usage is expressly not allowed by the provisions of the Ordinance.

Had the Circuit Court considered Ordinance No. 2 it may have examined the provisions of Article I on p. 2 of the Ordinance acknowledging statutory authorization and jurisdiction of the Ordinance governing all unincorporated lands within the

jurisdiction of the Board of County Commissioners for Custer County, South Dakota..

App. 003-004. The Court might then have reviewed SDCL Sections 7-18A-2 and 11-2-2 which provide authority for the counties to enact, amend and repeal ordinances and resolutions and providing penalties for violation. App 027, 030. The Court might then have noted that SDCL Section 7-18A-34 provides for an appeal to the circuit court from magistrate court concerning violation of an ordinance. The Court might then have examined SDCL Chapter 1-26 stating the Administrative Procedure and Rules for resolving "contested cases", defined in SDCL Section 1-26-1(2) along with "Agency" in SDCL Section 1-26-1(1). App. 018-032. And finafly, the Court might have looked at Shaw's Complaint and request for a declaratory judgment, at R. pp. 5-8, as more properly addressed to the Custer County Board of Commissioners, the Board of Adjustment, or the County Planning Department and referring to the provisions for requesting a declaratory judgment available to Shaw according to the Administrative Procedure and Rules provided in SDCL Chapter 1-26.

In Gottschalk v. Hegg, 228 N.W. 2d 640, 643 the Court stated

We cannot ignore the fact that one of the reasons for creation of administrative agencies is the speedy resolution of issues within their expertise. Furthermore, lengthy judicial involvement may ultimately prove to be completely unnecessary as the present controversy may be disposed of at the administrative level.

In In Re Petition for Declaratory Ruling, 877 N.W. 2d 340, 342-343, the Court stated

In 1966 the Legislature enacted three jurisdictional statutes pertaining to proceedings under SDCL chapter 1-26, the Administrative Procedure Act (APA). One governs jurisdiction of agencies to issue declaratory rolings, one governs jurisdiction of the circuit courts to consider appeals of agency decisions, and one governs this Court's jurisdiction to consider appeals from the circuit courts on agency determinations.

In 1956 the Supreme Court in *United States v. Western Pacific Railroad Co. et Al*, 352 U.S. 59, 63-64 explained jurisdiction of courts when matters involving agencies are concerned by stating

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction", on the other hand, applies where a claim is originally cognizable in the courts, and comes in to play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. The Court then cited General American Tank Car Corp. v. El Dorado Terminal Co.308 U.S. 422, 433.

More recent cases have followed this formula consistently. In Reynolds v. Douglas School District #51-1, 2004 SD 129, 690 N.W. 2d 655, 657 the Court quoted Small v. State, 2003 SD 29, P16, 659 N.W. 2d 15, 18-19, while stating

"It is a settled rule of judicial administration that 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrated remedy has been exhausted." Failure to exhaust administrative remedies is a jurisdictional defect."

In the *Small* case the Court upheld the trial court's dismissal of a request for a declaratory judgment stating

"Exhaustion of administrative remedies is a well-settled component of the Administrative Procedures Act. <u>SDCL 1-26-30</u>. In comparable proceedings, exhaustion is plainly required. *Small*, at p. 18-19.

In Zuke v. Presentation Sisters, Inc. 589 N.W. 2d 925, the Court affirmed a trial court judgment in stating

"Exhaustion of administrative remedies is a fundamental principle of administrative law and jurisprudence that precludes a state court from exerting jurisdiction over a claim that has not yet reached the final stages of the administrative process. The doctrino is a well-settled component of the Administrative Procedures Act."

In South Dakota Board of Regents v. Heege. 428 N.W. 2d 535, 539 the court cited.

Gottschalk in stating

A practical reason for this requirement is that the dispute may be resolved at the administrative level, thus avoiding judicial involvement in the matter. It also conserves judicial resources and is in accord with the duty of the judiciary to seek to harmonize its relations with agencies of the executive branch of government operating under authority granted them by the legislature.

and

Failure to exhaust administrative remedies where required is a jurisdictional defect. This error requires dismissel, because at that point primary jurisdiction rests with the agency and not with the courts. Citing *Matter of a Notice and Demand to Quash*, 339 N.W. 2d 785 (S.D. 1983) and *Meyerink v. Northwestern Public Service Co.*, 391 N.W. 2d 180, 184 (S.D. 1986)

As such, the Circuit Court cried in granting the Declaratory Judgment by not recognizing that the conflict with Custer County Ordinance No.2 More specifically the Circuit Court did not recognize that jurisdiction over the matter initially was with the County Board of Commissioners and the proper venue would be provided according to the Administrative Procedures Act and SDCL Chapter 1-26.

3. THE ORDINANCE ARGUMENT WAS TIMELY

The Circuit Court allowed for a brief period of time following Shaw's submission of the proposed terms and conditions for Loshs to submit a response and counter argument. Tr. pp. 44-45, 58-60; at App. 013-017.

The Hearing was conducted on September 18, 2024. Defendants' Brief in Opposition to Motion for Judgment on the Pleadings was mailed on October 7, 2024 (R. p.135) and received by the Court on October 10, 2024. On October 10, 2024 Shaw filed the Proposed Findings of Fact and Conclusions of Law and Order on Motion for Judgment on the Pleudings and Motion for Permanent Injunction with attached Exhibits. On October 15, 2024 (R. p. 162) due to technical deficiencies Losh was unable to email a response but instead sent by U.S. mail Defendants' Response to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Order on Motions for Judgment on the Pleadings and for Permanent Injunction which was received by the Court and entered into the record on October 18, 2024. Loshs' arguments are found in the Court record at R. pp.128-131 and 157-160. On October 28, 2024 the Court issued an Order Granting Plaintiff's Motion to Amend Caption at R. pp. 166-167 and finally on November 7 the Court issued its Findings of Fact and Conclusions of Law in which there was no mention of Loshs' Ordinance 2 argument. As such, it would appear that while the Court had actual notice of the argument, it did not wish to address the matter.

CONCLUSION

Loshs respectfully submit that the Circuit Court did not have primary jurisdiction in this matter and should have dismissed the case to allow the contested issues to be brought before the appropriate Custer County agency according to the administrative procedures and rules provided in SDCL Chapter 1-26. Only after exhausting all administrative remedies available under the rules and procedures provided might Shaw

then choose to appeal the outcome of any contested matter to the Circuit Court which might then find jurisdiction over any further complaints or appeals by Shaw.

Loshs respectfully request that this honorable Court dismiss this case in a manner consistent with the case law cited above and order the removal of the Order of the Circuit Court including the terms and conditions for the use and maintenance of the private access road that have been indexed against the properties of the Loshs and the Shaw Family Trust and filed with the Custer County Register of Deeds.

Dated: May 7, 2025 Signod: Richard Losh

Richard Losh

CERTIFICATE OF SERVICE

I hereby certify on this _____day of May, 2025 that I have placed a true and correct copy of the foregoing Appellants' Reply Brief in the U.S. mail with first class postage prepaid and addressed to

> Richard M. Williams P.O. Box 8045 Rapid City, South Dakota, 57709.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellants' Reply Brief is in compliance with the page and type volume limitations specified in SDCL Section 15-26A-66.

Dated: May 7, 2025 Signed: Richard Losh

APPENDIX

1.	Custer County Ordinance No.2 excerpts	Арр. 001
2.	Hearing Transcript excerpts	App. 008
3.	South Dakota Codified Laws Sections 1-26-1, 1-26-14, 1-26-15, 1-26-16, 1-26-18.3, 1-26-30, 1-26-30.2, 7-18A-2, 11-2-1, 11-2-2 and 11-2-13	Aրր. 018
4.	Exhibits 2 and 4 from Answer and Motion to Dismiss Complaint	.App. 033

CUSTER COUNTY ORDINANCE NUMBER 2

AN ORDINANCE PROVIDING REGULATIONS FOR THE SUBDIVISION AND USE OF LAND WITHIN CUSTER COUNTY

EFFECTIVE JANUARY 30, 2007

PROVIDED BY:
CUSTER COUNTY PLANNING DEPARTMENT
420 MT. RUSHMORE ROAD
CUSTER, SD 57730
(605)-673-8174
FAX (605)-673-8150

E-MAIL: discopig@gwtc.net

TABLE OF CONTENTS

ARTICLE 1 Section 1 Section 2 Section 3 Section 4 Section 5	AUTHORITY AND JURISDICTION Stalutory Authorization Jurisdiction Amendments Statements of Policy Severability and Separability	2 2 2 2 2 2 2	
ARTICLE II	DEFINITIONS	3	₹7
ARTICLE III Section 1 Section 2 Section 3 Section 4 Section 5 Section 6	PROCEDURE FOR THE SUBDIVISION OF LAND	9 10 11 13 15 17	
ARTICLE IV	DESIGN STANDARDS FOR RESIDENTIAL SUBDIVISIONS	19	
Section 1 Section 2 Section 3 Section 4 Section 5 Section 6 Section 7 Section 8	Conformity to Custer County Ordinance #2 Low -Density Subdivisions Medium-Density Subdivisions High-Density Subdivisions Road Requirements Names Utility and Drainage Easements Drainage Plans	22 23 23 24 25 25 26 26	
ARTICLE V Section 1 Section 2	NON-RESIDENTIAL SUBDIVISIONS	27 27 28	
ARTICLE VI	SECTION-LINE HIGHWAYS	29	
ARTICLE VIII	MOBILE HOME PARKS OR COURTS	30	
ARTICLE VIII	WASTEWATER DISPOSAL SYSTEMS	31	
ARTICLE IX	BUILDING, GRADING AND WASTEWATER DISPOSAL PERMITS	32	
ARTICLE X	VARIANCES	35	
ARTICLE XI	VIOLATIONS AND PENALTIES	35	

ARTICLE ! - AUTHORITY AND JURISDICTION

SECTION 1 - STATUTORY AUTHORIZATION

Whereas Title 11-2-2, South Dakota Codified Laws (SDCL) has delegated the responsibility to the Roard of County Commissioners of each county to adopt and enforce regulations designed for the purpose of promoting health, safety, and the general welfare of the county, the Board of Commissioners of Custer County, South Dakota hereby ordern the following:

SECTION 2 - JURISDICTION

This Ordinance shall govern all unincorporated lands within the jurisdiction of the Board of County Commissioners for Custer County, South Dakota.

SECTION 3 - AMENDMENTS

The regulations, restrictions, area, and boundaries set forth in this Ordinance may from time to time be amended, supplemented, revised or repealed as provided by law. The Director of Planning for Custer County is to review this Ordinance annually and make recommendations for revisions to the Board as provided by law.

<u>SECTION 4 — STATEMENTS OF POLICY</u>

If at any time during the course of completion of subdivisions, construction or any other development authorized under the provisions of this Ordinance, the Board becomes aware of impracticable procedures, unforeseen circumstances, or other cogent situations not compatible with the intent of this Ordinance, a Statement of Policy will govern the continuance of the problem area and/or any other projects requiring the application of the same. A Statement of Policy will govern any given situation or peculiar problem area for a period of time not to exceed twelve (12) menths.

SECTION 5 — SEVERABILITY AND SEPARABILITY

Should any Article, Section, Subsection or Provision of this Ordinance be found to be or declared invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity or constitutionality of the Ordinance as a whole or any part thereof, other than the portion so declared to be invalid or unconstitutional.

- SUBDIVISION, HIGH-DENSITY: A subdivision created by division of land into one (1) or more tracts(s), of which any lot, tract, or parcel contains less than two (2), but more than one (1) acre.
- SUPPLEMENTAL MATERIALS: Those plans, reports, narratives, designs, requirements, agreements, covenants, and other materials necessary for the development of a subdivision. These include, but are not limited to, those items listed in Article III, Section 6 of this Ordinance.
- USPLSS: United States Public Land Survey System.
- VARIANCE: A specific exception, granted by the Board, to the terms of this Ordinance where such deviation will not be contrary to the public interest and will be granted due to circumstances peculiar to this property. A variance shall not be granted if such issuance violates the intent and spirit of this Ordinance.
- WASTEWATER DISPOSAL PERMIT: The Instrument used by the Planning Department to permit construction of an individual or small on-site wastewater system. All systems shall meet the provisions of SDAR 74:53 and Ordinance Number 2.
- WATER DISTRICT ASSOCIATION: An association of land owners formed to develop a community or subdivision district with the intent and purpose of developing a private water carriage system with the capacity to handle the requirements of its members or the entire subdivision. The association shall develop rules and by-laws to govern the operation of the association including election of officers, collection of fees and the authorization to develop, repair, and maintain said system. The plans for all water district associations shall be submitted to DENR for approval prior to any construction or development, as required.

ARTICLE III - PROCEDURE FOR THE SUBDIVISION OF LAND

STATEMENT OF INTENT

It is the intent of the Board that <u>all</u> subdivision of land within Custer County shall be reviewed, either by Access Map Review or by Plat Review, to ensure that the provisions of Ordinance 2, especially the regulations concerning public access and road construction to County Specifications, are uniformly applied to all lands proposed for subdivision.

SECTION 1 - GENERAL REQUIREMENTS

- 1. Plats shall be filed on any parcel that is subdivided into an aliquot or nonaliquot part of the USPLSS. However, the Board, upon completion of an Access Map Review per requirements of Section 2 of this Article, may waive the requirement to create and file a plat for subdivision by change of aliquot description. Subdivision by change of aliquot description is not allowed within previously platted parcels or within previously recorded Government Lots, Homestead Entry Surveys (H.E.S.), or Mineral Surveys (M.S.).
- 2. The subdivider is required to install or construct the improvements hereinafter described prior to review of the final plet or access map by the Board. The Board may allow the subdivider to provide a cash or surety bond in lieu of immediate construction of improvements if so recommended by the Planning Commission and the County Highway Department. improvements required under this Ordinance shall be constructed in accordance with specifications provided by, and under the inspection of, the Highway and Planning Departments.
- 3. All public roads shall be constructed to County Road Specifications. Such road construction will be subject to inspection by the Highway and Planning Departments, during construction and upon completion,
- 4. Meintenance of public roads shall be the responsibility of adjacent landowners unless said maintenance is accepted by the Board. Landowners are encouraged to form a Road District Association as specified in SDCL 31-12A but may petition the Board for acceptance of maintenance by the County as follows:
 - A. This petition shall contain a description of the exact location of the roadway to be maintained by the County.
 - B. A statement shall be included describing the requested maintenance, or improvements the petitioners desire the County to undertake. This statement is to be of sufficient detail to enable the Highway Department and the Board to reasonably determine the likely costs of the proposed action.
 - C. An explanation shall be provided detailing why a Road District Association cannot or should not be formed.
- 5. Private Access Roads are allowed and shall be indicated on plats. easement documents, or access maps within Private Access Easements. Private Access Roads are intended to serve only one (1) residence. The Board may allow a Private Access Road to be shared by two (2) adjoining residences where topography or access restrictions onto Federal, State, or County highways make such sharing necessary. Development of Private Access Roads is not required.

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utilities, and other improvements necessary to permit development within the subdivision.

SECTION 2 - LOW-DENSITY SUBDIVISIONS

- All public roads shall be constructed to County Road Specifications. Such
 construction will be subject to inspection by both the Highway and
 Planning Departments during construction and upon completion.
- Private Access Easements are allowed and may be indicated on the plat.
 Private Access Roads may serve only one (1) parcel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.
- Development of all required improvements shall be the responsibility of the subdivider.
- Central water systems are not required.
- Central sewer systems are not required. The Planning Commission may request that the subdivider provide further evidence prepared by a competent professional that the subject land is capable of accommodating any proposed wastewater disposal system without causing pollution.

<u>SECTION 3 - MEDIUM-DENSITY SUBDIVISIONS</u>

- All public roads shall be constructed to County Road Specifications. Such
 construction will be subject to inspection by both the Highway and
 Planning Departments during construction and upon completion.
- Private Access Easements are allowed and may be indicated on the plat.
 Private Access Roads may serve only one (1) parcel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.
- Development of all required improvements shall be the responsibility of the subdivider.
- 4. Medium-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, shall have an acceptable water supply and distribution plan. All plans for water supply and distribution are the responsibility of the subdivider and will conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include private wells.

5. Medium-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, shall have an acceptable plan for disposal of wastewater. All plans for wastewater disposal are the responsibility of the subdivider and shall conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include individual septic systems, however, the Planning Commission may request that the subdivider provide further evidence prepared by a competent professional that the subject land is capable of accommodating the proposed individual sewer systems(s) without causing pollution.

SECTION 4 - HIGH-DENSITY SUBDIVISIONS

- All public roads shall be constructed to County Road Specifications. Such
 construction will be subject to inspection by both the Highway and
 Planning Departments during construction and upon completion.
- Private Access Easements are allowed and may be indicated on the plat.
 Private Access Roads may serve only one (1) parcel unless otherwise approved by the Board. There is no requirement that Private Access Roads be developed.
- Development of all required improvements shall be the responsibility of the subdivider.
- 4. The water system within the subdivision shall be connected to a public water system where the sald system is within one-half (½) mile of the subdivision, except where restricted by the Municipality or limited by topography.
- 5. High-density subdivisions intended for residential dwellings, public buildings, commercial enterprises, or industrial use, and not located within one-half (½) mile of a public water system, or which cannot be connected to the public water system, shall have an acceptable water supply and distribution plan. All plans for water are the responsibility of the developer and/or subdivider and will conform to the requirements of the Planning Commission and/or the Board, and comply with all Federal, State, and County Health Department codes and regulations. These plans may include private wells.
- The sewer system within the subdivision shall be connected to a public sewer system where said system is within one-half (½) mile of the subdivision, except where restricted by the Municipality or limited by topography.

COURT REPORTERS' REPORTING FORM

SECTION I

ENDORSEMENT OF TRANSCRIPT ORDERS.

Pursuant to SDCL 15-26A-51, please be sure to endorse the following information at the tool of each order for an appellate transcript before transmitting the ORIGINAL order to the office of the Clerk of the Supreme Court:

- 1. The date on which you received the order,
 - (a) If there is a substantial discrepancy between the date of the order and date you received it, e.g., you were on vacation, or postmark is substantially later than the date of the order, please explain.
- The date on which you expect to have the trenscript completed.

SIGN THE ORDER AS SO ENDORSED.

SECTION &

:JJS 056 Rev 08/08

FILING AND TRANSMITTAL OF COMPLETED TRANSCRIPT

Complete this section and transmit it to the Clerk of the Supreme Court when you have prepared an appellate transcript, filed the original with the trial clerk, and transmitted copies to attorneys for each party to the appeal separately represented, and directly to any parties not represented pursuant to SDCL 15-26A-52.

Title of Action: 16Ctv23-000020 Shaw Family Trust et al. vs. Richard Losh, Carol Kay						
Biewick-Losh						
County File Number: 16CIV23-000020						
Supreme Court Appeal Number: 30933						
Date Transcript Completed: <u>1-14-25</u>						
Oate Transcript Filed (File & Serve to Clerk): 1-14-2025 (emailed)						
Date Transcript Transmitted to Appellant: 1-14-2025						
(by First Class mail; _Xemail; hand delivery)						
Date Transcript Transmitted to Other Parties: 1-14-25						
(by First Class mail; _X email; hand delivery)						
Number of Pages in Transcript(s): 61						
TOTAL PAGES: 61						
_						
Date: 1-14-25 Signed: /s/ Carol Johnson						

App 008

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            (Proceedings adjourned at 4:50 p.m.)
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   STATE OF SOUTH DAKOTA
                                               CERTIFICATE
                           : 85
 4
   COUNTY OF CUSTER
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 Б
        THIS IS TO CERTIFY that I, Carol Johnson, Registered
 7
   Professional Court Reporter, Notary Public in and for the
   State of South Dakota, hereby certify that I was present for
 8
   and reported the proceedings as described on Page 1 herein,
 9
   and that this transcript contains a true and correct record
IO
11
   of the proceedings so had.
12
         To all of which I have hereunto set my hand this
13
    14th day of January, 2025.
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    /s/Carol Johnson
    Carol Johnson, Court Reporter, RPR
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1	STATE OF SOUTH DAKOTA	i) :\$s	IN CIRCUIT COURT	
2	COUNTY OF CUSTER)	SEVENTE JUDICIAL CIRCUIT	
3	* * * * * * * * * * *	* * * * * * *	* * * * * * * * * * * * *	
4	Shew Femily Trust, by its trustees, Ronald	* 16CIV23-000020		
5	Jill D. Shaw,			
6	1	Plaintiffs,	* MOTIONS HEARING	
7	\range	September 15, 2024		
8	Richard Losh and Carol Kay Biswick-Los	nt.	*	
9	-		•	
10		Defendants.	*	
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12	BEFORE: The Monorable Beidi L. Linngren Judge of the Circuit Court Seventh Judicial Circuit			
13	!	Rapid City, Sout		
14	277777777777		g4 9 9 ÷	
15	APPEARANCES: Mr. Richard M. Williams Gunderson, Palmer, Nelson & Ashm Rapid City, South Dakota			
16				
17			half of the Plaintiffs.	
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20	ļ	Appearing Pro Se	•	
21	PROCEEDINGS:	Mha sharra-artis	1 ad makkey game on 5	
22	•	The above-entitled matter came on for a Motions Hearing on the 18th day of September, 2024, commencing at the hour		
23		of 3:27 p.m. in	the Courtroom of the purtpurse, Custer,	
24	I	South Dakota.	om chouse, coster,	
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MR. NILLIAMS: Thank you, Your Honor. So, as the Court noted in its earlier statements, Ron Shaw, one of the trustees of the family trust, passed away as a result of a car accident on October 25th of 2023. Jill Shaw, obviously, the other trustee — I don't know how to put this — has not had a — it's not — they were together since I think the age of about 16. This has been extremely difficult for her.

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THE COURT: Well, and I can tell you and the Loshes as well — it's certainly not a secret; it was a public hearing — I presided over the sentencing or disposition of the traffic citation. And Ms. Shew was present, and I did get quite a history of them, and obviously it was a very tragic accident that happened, and it is very apparent that it's difficult. And throughout those proceedings, essentially, she and her children informed the Court and court staff that, quite frankly, they hope they never have to come back to South Dakota.

So I understand that because you're here as a representative, Mr. Williams, I just wanted by way of explanation to those folks why Ms. Shaw is not required to be here, but they are. So, if that helps.

MR. WILLIAMS: Thank you, Your Honor. That was much of what I was going to explain, but the Court is obviously familiar with that.

clear at the same time that it's kind of a work in progress by way of the substitution. At the end of the day it doesn't change the dispute between landholders, even though a landholder in Mr. Williams' case is a trust, and you folks are obviously the owners of the other piece of land.

So, if that helps by way of background, Mr. Williams,
I'll let you proceed.

MR. WILLIAMS: Thank you, Your Honor. I would proceed with the motion for judgment on the pleadings. I would tell the Court that I don't have any witnesses to call today. We believe this to be a legal matter basically for declaratory judgment based on the documents that we have attached as exhibits to our complaint. And more specifically, just the deeds to the properties, the Shaw Family Trust and the Losh deed, in addition to the Case Subdivision plat, which provides for the creation of Lot 4, which the Shaws own, and the easement that is at issue today.

So with that in mind, Your Honor, do you mind if I approach? I would like to provide a larger copy of that plat so that it would be easier to see the essements.

THE COURT: Sure.

MR. WILLIAMS: Thank you. I will provide a copy to the Loshes.

for my signature, which then you have the ability to look through and say, wait a minute, that's not what we talked about. These are the objections I have to this. This is how we change it.

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When we leave here today we're going to have a set, a working set, of the generalities that everybody has essentially gotten their objections noted; I've made by findings. For example, about the commercial language, that will be in there. Your objection is preserved.

Mr. Williams is going to put together that language that you're talking about so that you can study it and kind of digest it, because the reason that he and I are being a little careful with our words here is because holding somehody harmless of indemnity is a pretty broad legal term, and I don't want to make it more complicated than it needs to be. And he's acknowledging your objection and your concern, and he's going to incorporate that by way of example into that finding.

MR. RICHARD LOSE: Thank you, Your Bonor.

THE COURT: And if it's not what you think it is — once he proposes that order when we're done here, you have five days to respond in writing of, you know, I agree that this order looks good to me. You know, my objections that I had at the hearing, they're preserved, but as to the form that we left here for, I agree that this is what it was; or,

Carol Johnson, Court Reporter, RPR

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1 no, Number 5 is not at all what I agreed to, this is my Z objection. Then ultimately I decide what the language is 3 before I sign it. 4 MR. RICHARD LOSH: Okay. I understand. The five days is a 5 little tricky for us because not sure about the mail 6 service. 7 THE COURT: Well, you guys can get together and, perhaps, 8 email it to you by way of the proposed findings so that he 9 has it, and we can expedite this. 10 MR. WILLIAMS: I'd be happy to email it, Your Honor. 11 MR. RICHARD LOSH: I think that should work. 12 THE COURT: Okay. So with those changes that you'll see in 13 the proposed, we'll move on. 14 Number 6, if you could, Mr. Williams, reiterate what 15 your suggestion is by way of the reading with the changes. 16 MR. WILLIAMS: Your Honor, I think what we would do --17 and, you know, my client's life has changed. I don't know 18 what her plans are for this land any more. So part of the 19 purpose of this declaratory judgment is just to get this 20 on record so that if there was something to come up in the 21 future that the parties would know what they were getting 22 into right off the bat. 23 So, I don't -- I don't think that the law requires

So, I don't -- I don't think that the law requires shared upkeep of the maintenance of the easement. So I would strike that first sentence. In my reading of the

Carel Johnson, Court Reporter, RPR

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1 MR. RICHARD LOSH: So we're going to do all this by email? 2 THE COURT: Yes. 3 MR. RICHARD LOSH: And we're going to be able to email you any objections? 5 THE COURT: Yes. 6 MR. RICHARD LOSH: And we'll copy Mr. Williams at the same 7 tima. 8 THE COURT: Yes. 9 MS. CAROL BIENICK-LOSH: So Mr. Williams has five days to 10 redraft this? 11 THE COURT: No. Mr. Williams is going to work now on this 12 order that I have just ordered. 13 MS. CAROL BIENICK-LOSE: Okay. 14 THE COURT: We've gone back and forth on. The order will 15 also include that the injunction -- there will be language in there that the injunction is denied; that I've granted 16 17 the declaratory judgment as a matter of law that then will adopt these 13 things that we just went over and the 1 B language that we talked about including different language 19 than what he has in there, so it reads what we just talked 20 21 about here on the record. Once you receive that order or his -- what will read 22 a Proposed Findings of Pact and Conclusions of Law, then 23 you'll read through those to make sure that your notes 24 match up with what we talked about here. We're not going 25

to rehash things like, well, we didn't want the "commercial" language in there. That's not the purpose of 2 3: that, because your record is preserved for that. The 4 purpose is if he changed that language and said you get 5 four bananas on Wednesdays instead of the commercial 6 language, then you can say, you didn't say anything about 7 bananas, Judge. You were talking about commercial traffic. В That's where -- the objections are really kind of to the 9 form. MS. CAROL BIEWICK-LOSE: But you did say something about 10 11 doughnuts. 12 THE COURT: Yes, I did. I did. So to that end I think that would --13 14 MS. CAROL BIENICK-LOSH: I will bring doughnute. 15 THE COURT: -- would put this to rest, and then the Shaw 16 Trust can - you know, some of this is the protection to 17 the Shaws as well in selling the property, if that's what 18 they choose to do. Yes. 19 MR. RICHARD LOSE: When will we get the list, and when 20 does the clock start on the five days? 21 THE COURT: As soon as you receive his email, the clock starts on five days. He's not under a five-day -- I'm 22 assuming he'll probably get it done within a week. 23 24 MR. WILLIAMS: I hope to, Your Honor. 25 THE COURT: Yeah.

MR. RICHARD LOSH: And then I'll have five days after 2 that? 3 THE COURT: Then once you receive it in that email, you have five days efter that. If I don't hear from anybody, 4 5 then I'm just going to assume that you don't have any 5 objections, and that's okay too. Because the practice that 7 I have, which is what's required under the Civil Rules of 8 Procedure, is if nobody objects in the five days, I'm 9 going to sign the order. IU MR. RICHARD LOSH: Okay. Well, we haven't even seen the 11 order yet so ... 12 THE COURT: I'm telling you what happens by way of 13 process. MR. RICHARD LOSH: I'm sorry. 15 THE COURT: Yes. If you see the order, and you don't have 16 any objections, and you don't want to email me, I'm going 17 to sign the order. Okay, You're not under any obligation 18 to respond to an email. 19 MR. RICHARD LOSH: I see. 20 THE COURT: Only if you have an objection. 21 MR. RICHARD LOSH: Okay. 22 THE COURT: All right? All right. Thank you. 23 MR. WILLIAMS: Thank you, Your Honor. MR. RICHARD LOSH: Thank you for your patience. 24 25 THE COURT: Thank you.

So to Previous Versions of this Section 😕

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-1 - Definition of terms.

Universal Citation:

SD Codified L § 1-26-1 (2023)

Next >

1-26-1. Definition of terms.

Terms used in this chapter mean:

(1)"Agency," each association, authority, board, commission, committee, council, department, division, office, officer, teak force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term includes a home-rule municipality that has adopted its own administrative appeals process, whose final decisions, rulings, or actions rendered by that process are subject to judicial review pursuant to this chapter. The term does not include the Legislature, the Unified Judicial System, any unit of local government, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute;

(2)"Contested case," a proceeding, including rate-making and licensing in which the legal rights, duties, or privileges of a party are required by law to be dete

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- after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in §1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents;
- (3)"Emergency rule," a temporary rule that is adopted without a hearing or which becomes effective less than twenty days after filing with the secretary of state, or both;
- (4)"License," the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;
- (5)"Licensing," the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;
- (6)"Party," each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;
- (7)"Person," all political subdivisions and agencies of the state;
- (8)"Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:
 - (a)Statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public;
 - (b)Declaratory rules issued pursuant to \$1-26-15;
 - (c)Official opinions issued by the attorney general pursuant to \$1-11-1;
 - (d)Executive orders issued by the Governor,
 - (e)Student matters under the jurisdiction of the Board of Regents;
 - (f)Actions of the railroad board pursuant to §1-44-28;
 - (g)Inmate disciplinary matters as defined in §1-15-20;
 - (h)Internal control procedures adopted by the Gaming Commission pursuant to §42-78-25-1;

- (i)Policies governing specific state fair premiums, awards, entry, and exhibit requirements adopted by the State Fair Commission pursuant to §1-21-10;
- (j)Lending procedures and programs of the South Dakota Housing Development Authority; and
- (8A)"Small business," a business entity that employs twenty- five or fewer full-time employees.
- (9)"Substantial evidence," such relevant and competent evidence as a reasonable mindmight accept as being sufficiently adequate to support a conclusion.

Source: SDC 1939, §65.0106; SL 1966, ch 159, §1; SL 1968, ch 210; SL 1972, ch 8, §3; SL 1973, ch 264, §1; SL 1974, ch 16, §§1, 2; SL 1975, ch 16, §§7, 8; SL 1976, ch 14, §§1, 2; SL 1977, ch 13, §1; SL 1977, ch 14; SL 1980, ch 17; SL 1982, ch 20, §2; SL 1983, ch 199, §1; SL 1989, ch 20, §42; SL 1990, ch 343, §9A; SL 1992, ch 8, §3; SL 1995, ch 3, §2; SL 1996, ch 10, §1; SL 1996, ch 130, §15A; SL 1999, ch 6, §1; SL 2004, ch 20, §1; SL 2012, ch 7, §1; SL 2014, ch 73, §1.

Next >

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Go to Frenious Versions of this Section 🗡

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-14 - Declaratory judgment on rules.

Universal Citation:

SD Codified L § 1-26-14 (2023)

\[
\text{Previous}
\]
 Next >

1-26-14. Declaratory judgment on rules.

The validity or applicability of a rule may be determined in an action for declaratory judgment in the circuit court for the county of the plaintiff's residence, if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

Source: SL 1966, ch 159, §7.

< Previous Next >

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Go to Previous Versions of this Section 🐣

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-15 - Declaratory rulings by agencies.

Universal Citation:

SD Codified L § 1-26-15 (2023)

< Previous Next >

1-26-15. Declaratory rulings by agencies.

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. No inmate as defined in §1-15-20.1 may petition an agency for a declaratory ruling on the applicability of statutory provisions, rules, or orders of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases. A copy of all such rulings shall be filed with the director for publication in the Administrative Rules of South Dakota.

Source: SL 1966, ch 159, §8; SL 1979, ch 8, §3; SL 1989, ch 16, §12; SL 1990, ch 20, §3; SL 1993, ch 19, §8; SL 1995, ch 8, §13; SL 1999, ch 6, §3.

< Previous

PackageFinder A

App 022



Go to Prentons Versions of this Section 🔗

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-16 - Notice and hearing required in contested cases.

Universal Citation:

SD Codified L § 1-26-16 (2023)

(Previous Next >

1-26-16. Notice and hearing required in contested cases.

in a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

Source: SL 1966, ch 159, §9 (1).

< Previous Next >

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Apr 023

To to Previous Versions of this Section 🗡

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules

Section 1-26-18.3 - Request to use Office of Hearing Examiners in certain contested cases.

Universal Citation:

SD Codified L § 1-26-18.3 (2023)

< Previous

Next >

1-26-18.3. Request to use Office of Hearing Examiners in certain contested cases.

In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to \$1-26-17. This section does not apply to any contested case before the Public Utilities Commission.

Source: SL 1995, ch 8, §18; SL 2003, ch 18, §1; SL 2007, ch 7, §2.

C Previous

Next >

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Go to Previous Versions of this Section . v

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-30 - Right to judicial review of contested cases--Preliminary

Universal Citation:

SD Codified L § 1-26-30 (2023)

agency actions.

< Previous Next >

1-26-30. Right to judicial review of contested cases—Preliminary agency actions.

A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

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Go to Fravious Versions of this Section 🤒

2023 South Dakota Codified Laws Title 1 - State Affairs and Government Chapter 26 - Administrative Procedure And Rules Section 1-26-30.2 - Appeal from final action in contested case.

Universal Citation:

SD Codified L § 1-26-30-2 (2023)

< Previous Next >

1-26-30.2. Appeal from final action in contested case.

An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency.

Source: SL 1975, ch 17, §1.

< Previous Next >

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2023 South Dakota Codified Laws Title 7 - Counties Chapter 18A - Ordinances And Resolutions

Section 7-18A-2 - Authority to enact, amend, and repeal ordinances and resolutions--Penalties for violation.

Universal Citation:

SD Codified L § 7-18A-2 (2023)

< Previous Next >

7-18A-2. Authority to enact, amend, and repeal ordinances and resolutions—Penalties for violation.

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers granted to it by law and provide for the enforcement of each violation of any ordinance by means of any or all of the following:

(1)A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to exceed thirty days for each violation, or by both the fine and imprisonment; or

(2)An action for civil injunctive relief, pursuant to chapter 21-8.

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Co to Previous Versions of this Section 💌

2023 South Dakota Codified Laws Title 11 - Planning, Zoning and Housing Programs

Chapter 02 - County Planning And Zoning

Section 11-2-1 - Definition of terms.

Universal Citation:

SD Codified L § 11-2-1 (2023)

Next >

11-2-1. Definition of terms.

Terms used in this chapter mean:

- (1)"Board," the board of county commissioners;
- (2)"Commission," "planning and zoning commission," "zoning commission," or "planning commission," any county planning and zoning commission created under the terms of this chapter,
- (3)"Comprehensive plan," a document which describes in words, and may illustrate by maps, plats, charts, and other descriptive matter, the goals, policies, and objectives of the board to interrelate all functional and natural systems and activities relating to the development of the territory under its jurisdiction;

PackageFinder __

- (4)"Governing body," the board of county commissioners, the city council or city commission;
- (5)"Municipality," a city or town however organized;
- (6)"Temporary zoning or subdivision ordinance," an ordinance adopted as an emergency measure for a limited duration;
- (7)"Subdivision ordinance," any ordinance adopted by the board to regulate the subdivision of land so as to provide coordination of streets with other subdivisions and the major street plan, adequate areas set aside for public uses, water and sanitation facilities, drainage and flood control, and conformity with the comprehensive plan;
- (8)"Subdivision," the division of any tract or parcel of land into two or more lots, sites, or other division for the purpose, whether immediate or future, of sale or building development. The term includes resubdivision. This definition does not apply to the conveyance of a portion of any previously platted tract, parcel, lot, or site if the conveyance does not cause the tract, parcel, lot, or site from which the portion is severed to be in violation of any existing zoning ordinance or subdivision ordinance applying to the tract, parcel, lot, or site;
- (9)"Zoning map," the map that delineates the extent of each district or zone established in the zoning ordinance;
- (10)"Zoning ordinance," any ordinance adopted by the board to implement the comprehensive plan by regulating the location and use of buildings and uses of land.

Source: SL 1967, ch 20, §1; SL 1975, ch 113, §1; SL 1987, ch 29, §55; SL 1992, ch 60, §2; SL 2000, ch 69, §1.

Next >

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Go to Previous Versions of this Seption 🔻

2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-2 - Appointment of county
planning commission--Number of
members--Acting as zoning
commission.

Universal Citation:

SD Codified L § 11-2-2 (2023)

< Previous Next >

11-2-2. Appointment of county planning commission—Number of members—Acting as zoning commission.

The board of county commissioners of each county in the state may appoint a commission of five or more members to be known as the county planning commission. If a county proposes to enact or implement any purpose set forth in this chapter then the board of county commissioners shall appoint a county planning commission. The total membership of the county planning commission shall always be an uneven number and at least one

PackageFinder A

member shall be a member of the board of county commissioners. The county planning commission is also the county zoning commission.

Source: SL 1941, ch 216, §4; SDC Supp 1960, §12.20A04; SL 1966, ch 27; SL 1967, ch 20, §2; SL 1968, ch 23; SL 1997, ch 72, §2; SL 1999, ch 64, §1.

< Previous Next >

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2023 South Dakota Codified Laws
Title 11 - Planning, Zoning and Housing
Programs
Chapter 02 - County Planning And
Zoning
Section 11-2-13 - Adoption of zoning
ordinance.

Universal Citation:

SD Codified L § 11-2-13 (2023)

← Previous

Next >

11-2-13. Adoption of zoning ordinance.

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

Source: SL 1941, ch 216, §2; SDC Supp 1960, §12.20A02; SL 1967, ch 20, §3 (1); SL 🕬 ...

App 032

Richard M. Williams P.O. Box 8045 Rapid City, SD 57709 Telephone: (605) 342-1078 Telefax: (605) 342-9503

E-mail: politique à pausantaire Attorneys for Plaintiffs

Re: Summons and Complaint from the Shaw Family Trust

Dear Mr. Williams:

We received a summons and complaint from your office yesterday demanding an answer to your complaint. This letter is not an answer to your complaint but rather an attempt to communicate with you about the substance of your complaint before we respond with an answer.

We were surprised not only to receive the complaint but also in reading the allegations you put forth. This is because we sent a certified letter to the Shaws on February 28, 2023 indicating that we understood that they have the right to travel upon the driveway we constructed and which is the central subject of your complaint. Please see the attached letter with a copy of the US Postal Service certified mail receipt dated February 28, 2023.

We did not understand your allegations because we stated clearly before ever receiving your complaint that we understood your clients have the legal right to use the driveway we constructed. That matter was not an issue in dispute on February 28th and we do not dispute it now. The statement you refer to in our last letter to you in response to your letter was made in ignorance. Since that time we have become a bit more educated as to what South Dakota law provides in this respect.

If you read our letter of February 28th you will see that it was written solely to request that the Shaws act to remediate a problem created by their newly installed entry onto our driveway from Medicine Mountain Road as their entry drive has obstructed one of the gutters running alongside our driveway. As the letter points out the obstructed gutter will potentially pool the drainage and redirect it onto the driveway rather than allowing it to follow its intended course. To repeat, our letter was a request and not a demand that the Shaws use what we consider to be common sense and courtesy to remedy an obstruction which can only lead to premature erosion of the driveway surface.

We were curious as to why your complaint made no reference to our February 28th letter so we called the US Postal Service tracking number and were surprised to find out that there is no record of the letter having been delivered to your clients after it reached the distribution center in Santa Ana on March 3, 2023. Did your clients refuse to

Apr 033

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accept the letter? Or did they receive the letter and not sign for it? We don't know. So the Postal Service is currently investigating as to its whereabouts and will let us know more after several business days. In the meantime perhaps you will be kind enough to share a copy of the February 28th letter with your clients since it appears there has been a problem with its delivery directly from us. Please feel free to access the current status of the Postal Service's investigation of the matter via their 800 number or Website using the service request number 49195164.

With regard to your characterization of statements in our letter to the Shaws dated August 10, 2022 (your exhibit F) we would make a couple of points. First and foremost, it has appeared to us ever since November of 2021 that the Shaws have wanted to extinguish our easement. Initially they tried to vacate our easement through a hearing with the county commissioners without ever trying to contact us and with very short notice to us. When that failed they ignored our offer in a letter dated December 12, 2021 (your exhibit D) to discuss any issues with them. Instead they had their California attorney send us an e-mail stating they believed the depiction of our easement was improper and that they were employing the services of your law firm (see attached copy of e-mail from Michael Genovese dated January 6, 2022). The e-mail stated that they did not want their property to be "burdened by such depiction of an access casement". Apparently the fact that the easement was properly in place for approximately 5 years prior to their acquisition of Lot 4 meant nothing to them.

Then we received your letter dated August 5, 2022 with its erroneous description of our easement as "secondary" along with a list of stipulated demands for an agreement to be filed with the registry of deeds. All of this simply because we installed a driveway to our property according to the specifications of a legal private access easement that your clients knew about when they bought their property? Seriously?

Second, and equally important, is the fact that your clients have given us no reason to trust them or their words when their actions and behavior toward as from the outset can rightly be interpreted as hostile. Neither I nor my wife have ever had a neighbor who refused to speak with us in person or, more importantly, communicated with us only through attorneys. And, like most people who have lived in multiple locations around the country, we've had our share of experiences with cranky and irascible neighbors in the past. But we've always managed to live as neighbors extending good faith, courtesy and respect for each other in our relationships as much as possible. And we've never had a disagreement with any neighbor or landlord in which the neighbor resorted to using an attorney against us for any reason.

So perhaps you can understand as to how we might perceive your August 5^{th} letter as something akin to a threat from someone we've never met and about whom we know little or nothing of substance.

As you can plainly see in our February 28th letter, after educating ourselves as to South Dakota easement law and prior to receiving your complaint, we have recognized the rights of your clients to use the driveway we constructed. It might have been a bit

App 034

easier if you had tried to educate us in your August 5th letter instead of simply stating that the Shaws were just going to use the driveway for their own purposes. And, by the way, that statement struck us as quite odd when considering your statement in the August 5th letter that the Shaws did not believe the "roadway" was adequately constructed and that they wanted to address "the safety and construction standards" of the access. It seemed to us at that point that the Shaws might use our driveway in a manner such as to create some sort of "accidental injury" and then turn around and blame us for a purportedly unsafe or hazardous construction. Stranger things have happened as you may know.

By the way, you never did identify any particular aspect or portion of the driveway that the Shaws consider to be unsafe. Please feel free to do so if your clients are inclined to speak honestly.

Accordingly, as we have acknowledged in our February 28th letter prior to receiving your complaint that the Shaws have the right to use the driveway we constructed, it appears there is no significant issue between the Shaws and us that is addressed in your complaint. Please contact me if this is not the case.

However, we do have a question for you as to whether your complaint has been submitted to the Court, as we see no indication in your complaint specifically to that effect. If it has not yet been submitted to the Court perhaps it is yet possible to have a reasonable discussion of any serious concerns the Shaws may harbor without trying to force their desired outcome through the Court.

We are sending this letter to you via US Postal Service first class mail as well as via your e-mail address, not as an official answer to your claims for relief, but rather as an attempt to resolve any issues reasonably and without threats of litigation. We will attempt to speak with you by telephone in a few days if we have not heard back from you in the meantime.

Sincerely,

Richard and Carol Losh

Attachments: Letter to Shaws with US Postal certified mail receipt (4 pages) and Copy of e-mail from attorney Mike Genovese (1 page)

App 035 6

Dear Mr. and Mrs. Shaw,

We are writing this letter to you to request that you act at your earliest opportunity to remediate the problem created by your driveway entry from Medicine Mountain Road onto our driveway. As you are no doubt aware, our driveway was constructed with gutters, or trenches, on both sides and the driveway itself sloped toward the gutters in order to facilitate drainage of water away from the surface of the driveway. These gutters then allow water to flow away from the driveway surface according to gravity and were designed and created for that purpose.

Apparently your short entry driveway section from Medicine Mountain Road to our driveway was constructed simply by dumping a few loads of dirt and gravel on the ground and then compacting it. However, in connecting your new driveway entry with our driveway you also filled and compacted your dirt and gravel into one of the drainage gutters serving alongside our driveway. This act effectively blocks our drainage gutter such that any runoff water from Eggers Lane uphili will pool at the point of your obstruction until rising to the surface of our driveway and then flowing across the surface of our driveway. If this happens it will create a muddy driveway surface and along with vehicle traffic back and forth will serve only to erode the driveway surface prematurely.

Why would you create this situation when all that is required is a simple culvert in the trench allowing the gutter to function according to its purpose?

We understand that you, as new owners of Lot 4, have the right to use the driveway we have constructed. However, we don't believe you are justified in creating an obstruction that, if left in place, will block gravitational drainage of water runoff causing it to pool and eventually flow onto the surface of the driveway and muddy it up, eventually croding the surface with vehicles travelling back and forth.

Despite our past attempts via US mail and telephone messaging to communicate with you directly in the past, you have chosen to communicate with us only through your lawyers. The last message we received in the mail from one of your lawyers stated, among other things, that you wanted to be good neighbors. If that is indeed the case please unblock the drainage gutter that your new entry drive path has obstructed and install a culvert at the point where your driveway joins with ours to allow the gutter to serve the purpose for which it was created.

We will look forward to receiving a meaningful response from you soon.

Sincerely,

Richard and Carol Losh

enclosures: pictures of the point of obstruction

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Clerk: 09

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Michael J. Genovese <mig@ggb-lavr.com>

1/26/2022 10:24 PM



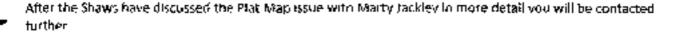
Lot 4 Case Subdivision #4 / Jill and Ron Shaw

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Ron Shaw <rshaw@shawconstruction.com> • sodreaming <sddreaming@protonmail.com> •
Marty J. Jackley <mjackley@gons.com> • Kadi Brandet <knb@ggb-law.com>

Carol and Richard Losh.

As a follow up to my conversations with Richard Losh I have met with my client Jill and Ron Shaw to discuss the Plat map depiction of a Physics easement on the Shaws Lot 4 property. The Shaws do not believe the depiction of the easement was proper and wants to better understand the content of all conversations with Wells Fargo, Andersen Engineering and the County planners at Custer regarding the depiction on the Plat map. The Shaws do not want Lot 4 hurdened by such depiction of an access easement and have retained the Law first of Gunderson, Palmer, Nelson & Ashmore, LLP in Rapid City to advise them of their rights re this matter. At this point my understanding is that you will be contacted by Marty Jackley or someone on his behalf re efforts to desolve this matter.

The Shaws intentions are to be good neighbors and as such are willing to discuss providing you with a limited license for a limited time to access Lot 4 to remove your mobile home and have material delivery for new home construction. The Shaws are also very interested in joining you in an effort to get the County of Custer to provide more maintenance for Freeland Drive.



After all of my research and understanding of the property issues ham confident that there is a reasonable resolution.

Michael J. Genovese, Esq. Grant, Genovese & Baratta, LLP 2030 Maio Street, Ste. 1600

trvine, CA 92614 Phone: 949/660-1600 FAX: 949/660-6051 Smail: mig@ggb-law.com

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