

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

HARLAN KIRWAN and PANDORA’S BOX, LLC d/b/a GUNSLINGER SALOON,

Appellants,

v.

CITY OF DEADWOOD, a Municipal Corporation, and DEADWOOD HISTORIC
PRESERVATION COMMISSION, and DEADWOOD HISTORIC DISTRICT
COMMISSION,

Appellees.

Appeal No. 29836

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

THE HONORABLE MICHELLE K. COMER, CIRCUIT COURT JUDGE

APPELLANTS’ BRIEF

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PRELIMINARY STATEMENT

Appellants Harlan Kirwan and Pandora’s Box, LLC d/b/a Gunslinger Saloon will be collectively referred to as “Appellants.” Appellees City of Deadwood, Deadwood Historic Preservation Commission, and Deadwood Historic District Commission collectively will be referred to as “Appellees.” References to the record in this case will be “CR” followed by the applicable page number. References to the transcript of the Historic Preservation Commission and Historic District Commission meeting held March 10, 2021, will be “HT” followed by the appropriate page(s) and line number(s). The Oral Argument Transcript from the hearing before the Circuit Court, held on October 12, 2021, will be “OAT” followed by the appropriate page(s) and line number(s). Citations to the Appendix of this brief will be “App.” followed by the appropriate page number.

JURISDICTIONAL STATEMENT

This is an appeal from a decision of the Fourth Judicial Circuit, the Honorable Michelle K. Comer, affirming the decision of the Deadwood Historic Preservation Commission and Deadwood Historic District Commission. An *Order*, which affirmed the decision of the Deadwood Historic District Commission, was signed by Judge Comer and filed November 29, 2021; *Notice of Entry of Order* was also filed and served on November 29, 2021. Appellants timely filed their *Notice of Appeal* on December 3, 2021. Appellants appeal from the Circuit Court’s *Order*. This Court has jurisdiction pursuant to SDCL 15-26A-3(1) and (4) and SDCL 15-26A-7.

STATEMENT OF LEGAL ISSUES

I. DID THE CIRCUIT COURT ERR BY DETERMINING SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE DECISION OF THE DEADWOOD HISTORIC DISTRICT COMMISSION?

The Circuit Court found that “a mere scintilla” of evidence was the definition of “substantial evidence” and found Appellees met that standard. OAT 19¹⁸⁻²².

Apposite Authority:

Olson v. Deadwood, 480 N.W.2d 770 (S.D. 1992)

M.G. Oil Co. v. City of Rapid City, 2011 S.D. 3, 793 N.W.2d 816

In re Sdds, Inc., 472 N.W.2d 502 (S.D. 1991)

II. DID THE CIRCUIT COURT ERR BY FINDING THE DEADWOOD HISTORIC DISTRICT COMMISSION CONSIDERED AND FOLLOWED THE CRITERIA IN DEADWOOD CITY ORDINANCE (DCO) 17.68.050?

The Circuit Court found “the criteria was considered and followed” by the Historic District Commission. OAT 19¹²⁻¹³.

Apposite Authority:

Reck v. S.D. Bd. of Pardons & Paroles, 2019 S.D. 42, 932 N.W.2d 135

Duffy v. Circuit Court for the 7th Judicial Circuit, 2004 S.D. 19, 676 N.W.2d 126

DCO 17.68.050

III. DID THE CIRCUIT COURT ERR BY FAILING TO ADDRESS WHETHER THE DEADWOOD HISTORIC DISTRICT COMMISSION COMPLIED WITH SDCL 1-19B-49?

This issue was raised by Appellants, but the Circuit Court did not rule on the issue. CR 3; CR 1303-1445; OAT 7⁸⁻⁹; OAT 19; CR 1796-97.

Apposite Authority:

Hall v. State, 2006 S.D. 24, 712 N.W.2d 22

SDCL 1-19B-49

IV. DID THE CIRCUIT COURT ERR BY NOT MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT ITS ORDER?

The Circuit Court provided a brief oral decision at the hearing, but did not separately enter Findings of Fact, Conclusions of Law, or a Memorandum Decision. OAT 19; CR 1796; App. 001-2.

Apposite Authority:

Toft v. Toft, 2006 S.D. 91, 723 N.W.2d 546
SDCL 1-26-36

V. DID THE CIRCUIT COURT ERR BY ACCEPTING THE AFFIDAVIT OF KEVIN KUCHENBECKER?

Appellants objected to the Affidavit. CR 1784. The Circuit Court accepted it into the record. OAT 5₂₀₋₂₅; App. 001.

Apposite Authority:

South Dakota Commission on Gaming v. Johnson, 2018 S.D. 49, 914
N.W.2d 583
SDCL 1-26-36

STATEMENT OF THE CASE

Appellants appealed to the Circuit Court from a decision of the Deadwood Historic District Commission, which denied Appellants' application for a Certificate of Appropriateness to change the façade on the storefront of Gunslinger Saloon. CR 1-2. At the Circuit Court level, the parties submitted briefs, and oral argument was held on October 12, 2021. CR 1303, 1765, 1780; OAT 1-20. At the oral argument hearing, the Court ruled from the bench and made limited findings which affirmed the decision of the Historic District Commission denying Appellants' application for Certificate of Appropriateness. OAT 19₂₋₂₂; App. 007. Following the hearing, Appellees submitted an Order for the Court's signature, which was signed and filed on November 29, 2021. CR 1796, 1798; App. 001-2.

STATEMENT OF THE FACTS

In May of 2020, Appellants placed a wood façade on the storefront of Gunslinger Saloon. CR 48, 64-65.¹ The façade was made of rough hewn wood and was placed on top of the existing storefront wood. CR 48, 64-65. Appellants did not apply for a Certificate of Appropriateness with the Historic Preservation Commission prior to placing the façade. HT 22₂₋₂₅. Appellants applied for a Certificate of Appropriateness after placing the façade, and the Deadwood Historic Preservation/District Commission²

¹ The administrative record was submitted by Appellees with documents out of order. For an organized version of the Administrative Record, see pages 004-030 of the Appendix to Appellants' Brief submitted to the Circuit Court. CR 1348-1374.

² It appears that the Deadwood Historic District Commission, consisting of the same members as the Historic Preservation Commission, is a subset of the Historic Preservation Commission. Although city ordinances and state statutes differentiate between the two, no differentiation between the two is noted during Historic Preservation Commission meetings, and the meeting flows from one topic to another, but the agenda/minutes place these types of applications for certificate of appropriateness under

denied the request on May 27, 2020. CR 55, 57. Following that decision, Appellants removed the façade. CR 48.

Appellants desire the rough hewn wood façade on Gunslinger Saloon because it looks nice, is historic, and should draw more customers into the store. CR 56; HT 9₁₋₄. Therefore, Appellants applied again for a Certificate of Appropriateness on February 25, 2021, providing more details about the project and why the façade should be approved. CR 40-43, 61-65. At the regularly scheduled Historic Preservation Commission meeting held on March 10, 2021, the Deadwood Historic District Commission heard Appellants' application for Certificate of Appropriateness. CR 40, 60; HT 2₁₋₃. The Historic Preservation Officer, Kevin Kuchenbecker, read a report to the Commission and recommended the application be denied. HT 3₂₋₆₁₈. His *Staff Report* listed criteria related to the Department of Interior standards. CR 44-46. Appellants, through counsel, also presented argument to the Commission as to why the application should be granted. HT 7₁₉₋₁₀₂₀. Very brief discussions were held, and the Commission refused to ask questions of Appellants, despite being invited to do so. HT 10₂₂₋₁₇₃.³ A motion was made, reciting the exact wording the Historic Preservation Officer dictated, with no analysis, to deny the application for Certificate of Appropriateness. HT 17₇₋₁₄. The wording of the motion was "Option B. Based upon the guidance found in DCO 17.68.050, I find that the exterior alteration proposed is incongruous with the historical,

the heading "Historic District Commission." Confusion between the two commissions is further demonstrated by the letter denying Appellants' application. CR 60. The heading of the letter indicates the Historic Preservation Commission denied the Certificate of Appropriateness, but the body of the letter indicates the Certificate of Appropriateness was reviewed and denied by the Historic District Commission.

³ The transcript of the meeting does not always identify the members of the Commission who spoke, making the record submitted by Appellees incomplete.

architectural, archeological, or cultural aspects of the district and move to deny Certification of Appropriateness.” HT 17₉₋₁₄; App. 005. The motion passed. HT 17₂₁. A letter notifying Appellants of the decision was sent after the meeting. CR 60; App. 003. No discussion of the criteria in DCO 17.68.050 occurred. HT 11-17.

Appellants appealed to the Circuit Court and presented a number of issues for appeal.⁴ CR 1; CR 3. The Circuit Court ruled from the bench and upheld the Historic District Commission’s decision, making a few brief remarks about its decision. OAT 19; App. 007. No formal findings of fact and conclusions of law were entered by the court, nor was a memorandum decision entered. *See* CR generally. An *Order* was signed and filed on November 29, 2021. CR 1796; App. 001-2.

⁴ More specifically, the Circuit Court was asked to consider the following assignments of error: 1) Did the Deadwood Historic District Commission fail to follow procedures required by Deadwood City Ordinances, South Dakota Codified Laws, and South Dakota Administrative Rules in denying the Certificate of Appropriateness? 2) Did the Deadwood Historic District Commission fail to apply the necessary criteria outlined in Deadwood City Ordinances and South Dakota Codified Laws prior to denying Appellants’ Certificate of Appropriateness? 3) Was the Historic District Commission’s determination that Appellants’ application for Certificate of Appropriateness was “incongruous with the historical, architectural, archeological or cultural aspects of the district” supported by substantial evidence? and 4) Did the Deadwood Historic District Commission act in an arbitrary and capricious manner when it denied Appellants’ application for Certificate of Appropriateness, given the past conduct and precedent of the Deadwood Historic District Commission? CR 1303-1445.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY DETERMINING SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE DECISION OF THE DEADWOOD HISTORIC DISTRICT COMMISSION.

A. Standard of Review

Because the Circuit Court sat in an appellate posture when it reviewed the Historic District Commission's decision, the Supreme Court should review the agency's decision the same as the circuit court did, "unaided by any presumptions of the correctness of the circuit court's determination." *Korzan v. City of Mitchell*, 2006 S.D. 4, ¶12, 708 N.W.2d 683, 686 (quoting *In re B.Y. Development, Inc.*, 2000 S.D. 102, ¶6, 615 N.W.2d 604, 607). This Court's review is confined to the record. *Id.* (citing SDCL 1-26-35). Questions of law and statutory construction are fully reviewable. *Id.* This Court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. *Id.* (citing SDCL 1-26-36). The court may reverse or modify the decision if the administrative findings, inference, conclusions, or decisions are clearly erroneous considering the entire evidence in the record, or arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

B. The Circuit Court clearly erred by finding that substantial evidence is defined as "a mere scintilla" of evidence.

During the Circuit Court's brief oral decision, it stated, "The Court finds, as Mr. Riggins alluded to, that substantial evidence under the Olson case was defined as a mere scintilla, which I – I don't understand, but it's clear that it does say a mere scintilla, so the Court finds that certainly that was – that standard was met." OAT 19¹⁸⁻²²; App. 007. The *Olson* case to which the Circuit Court was referring was *Olson v. Deadwood*, 480 N.W.2d 770 (S.D. 1992) and was the only case relied on by Appellees. In that case, the

Supreme Court did define “substantial evidence.” However, the Supreme Court did not define substantial evidence as “a mere scintilla” of evidence; rather, this Court noted that substantial evidence is “more than a mere scintilla of evidence.” *Id.* at 775 (emphasis added). Specifically, that case, in quoting a number of other decisions, laid out the test for reviewing a decision by a board of adjustment. *Id.* at 774-775. The Court said that the question on review is whether an order of the board is supported by substantial evidence and is reasonable and not arbitrary. *Id.* at 774.

Reasonableness is measured by examining whether standards set out in the local ordinance have been satisfied. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...or evidence which...[affords] a substantial basis of fact from which the fact in issue can be reasonably inferred....It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. The phrase does not mean a large or considerable amount of evidence..., but means ‘more than a mere scintilla’ of evidence.

Id. at 774-775 (internal citations omitted). Instead of using the entire definition of “substantial evidence” described in *Olson*, the Circuit Court misapplied the standard and clearly erred by concluding that *Olson* requires only “a mere scintilla” of evidence to satisfy the “substantial evidence” standard. Because the Circuit Court made an erroneous legal conclusion, this Court is not bound by that conclusion and this Court should review the evidence without giving deference to the Circuit Court’s conclusions.

C. The Historic District Commission’s denial of the Certificate of Appropriateness is not supported by substantial evidence.

Substantial evidence does not support the Historic District Commission’s decision to deny Appellants’ application for Certificate of Appropriateness. The Historic District Commission’s stated basis for denying Appellants’ application for Certificate of Appropriateness was because the proposal was “incongruous with the historical,

architectural, archeological or cultural aspects of the district.” HT 17 9-14; CR 60. In *M.G. Oil Co. v. City of Rapid City*, this Court noted that the correct standard is to examine the record to determine: (i) “whether there was substantial evidence supporting” the decision, and (ii) whether the decision was reasonable and not arbitrary. 2011 S.D. 3, ¶15, 793 N.W.2d 816, 822. As noted above, “Substantial evidence is defined as such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion.” *In re Montana-Dakota Utils. Co.*, 278 N.W.2d 289, 190 (S.D. 1979).

This Court is not the only court to have weighed in on this issue. When reviewing the record to determine whether substantial evidence existed to support such a reason and ultimate conclusion, the Connecticut Supreme Court determined the Historic District Commission fell short in *Gibbons v. Historic District Comm’n*, 941 A.2d 917, 925 (Conn. 2008). In *Gibbons*, the Connecticut Supreme Court found that the Historic District Commission’s stated reason for denying the application for certificate of appropriateness was within its authority, and that the commission articulated, “albeit summarily” a proper consideration of the historic value and significance of the building, as well as other criteria. *Id.* at 924. However, that Court went on to determine that the Historic District Commission’s denial of the certificate of appropriateness was arbitrary. *Id.*

To be capable of meaningful review on appeal, the Connecticut Court explained that determinations of Historic District Commissions must be based on “actual knowledge and factual evidence, not solely on personal beliefs or aesthetic preferences.” *Id.* at 926. More specifically, the Court held:

A commission is assumed to be sufficiently knowledgeable in its field to determine what are the historic and architectural aspects or character of an

historic district or historic property, and to recognize what would be incongruous. A commission's judgment must be based on sound knowledge of the architectural characteristics of an historic district or historic property. Denial of an application 'because I don't like it' is not persuasive legally and will not withstand an appeal.

Id.

The *Gibbons* decision is instructive. This Court should properly confine its focus to determining whether substantial evidence exists for the reason stated, not whether the Historic District Commission could have denied the Certificate of Appropriateness for another reason. The stated reason for which substantial evidence must exist in this case is that Appellants' proposal to place rough hewn wood on the building's façade is incongruous with the historical, architectural, archeological, or cultural aspects of the district. Examining these four reasons for denial reveals the following:

- 1) Historical: The use of the building as a store and saloon, is historically accurate, and will not change. CR 45 (#1). Yet the Historic District Commission found the historical aspect would be incongruous. CR 60; HT 17. Because this finding contradicts the record, it should be overturned.
- 2) Architectural: The *Staff Report* states that this particular building historically featured store front windows and a recessed entry. CR 44 (staff opinion). This will not change. Staff then goes on to say, "these structures *typically* included recessed painted panels at the base of the store front as well." *Id.* Here, however, there is no evidence this particular building historically had recessed painted panels, nor does the *Staff Report* identify when recessed panels were the architectural style. The report emphasized that the building

was made of wood. CR 45. The proposal is wood; that will not change. CR 43.

Even though the Appellants' proposal reiterates that the architecture of the building will not change, the Historic District Commission found that the architecture would be incongruous. CR 43; CR 60; HT 17. This finding is therefore erroneous.

- 3) Archeological: The *Staff Report* and comments of Mr. Kuchenbecker indicate that archeological resources are inapplicable. HT 6₃₋₄; CR 46 (#8). There are no archeological changes. CR 46 (#8). Yet, the Historic District Commission found the Certificate of Appropriateness application incongruous with archeological resources. CR 60; HT 17. Once again, because this finding contradicts the record, it is erroneous.
- 4) Cultural: Cultural aspects are never discussed. *See generally* CR 44-46 and HT 1-17. Again, despite cultural aspects of the district never being discussed, the Historic District Commission found the proposed Certificate of Appropriateness incongruous with the cultural aspects of the district. CR 60; HT 17. Because this finding is not supported by the record, it should be overturned.

Most comments of commission members related to how the building has looked over the years and the size of the windows, which would not change with the proposal. *See generally* HT 11-16. The only real comments that expressed an opinion from a member of the commission were:

Ms. Posey: In fact, there are no other buildings in town that look like that.
(HT 11₁₀₋₁₁.)

...

Ms. Weber: I think we have to be really careful because this [sic] are our oldest buildings. These are some of the few buildings that are actually left. I think changing it is a really big deal, and I don't – I think we have to be real careful. (HT 15₁₂₋₁₆.)

...

Ms. Weber: I think that if any changes were to be made that it should be taken back to its more original look, not add something that's new that was never there. I don't think that's the purpose of a historic district. (HT 16₁₈₋₂₂.)

...

Ms. Posey: ...as far as I'm concerned, this is completely inappropriate. (HT 17₂₋₃.)

These comments do not provide substantial evidence for the stated decision of the Historic District Commission. Instead, they are more akin to vague reservations.

As mentioned, in *M.G. Oil Co. v. City of Rapid City*, this Court has noted the correct standard is to examine the record to determine “whether there was substantial evidence supporting” the decision and whether the decision was reasonable and not arbitrary. 2011 S.D. 3, ¶ 15, 793 N.W.2d 816, 822. The use of the “substantial evidence” review does not supplant the necessary determination that an entity's actions were arbitrary and capricious. *Id.* ¶ 2, n. 8. In *M.G. Oil*, “there was virtually no discussion by the City Council regarding the actual ordinance.” *Id.* ¶ 17.

The opinions presented through public comment to the City Council do not satisfy the language in subsection C of the ordinance. The discussion leading up to the vote indicates that the decision by the City Council was not made based upon the criteria specified in the ordinance. The action by the City Council was factually unsupported. Vague reservations expressed by Council members and nearby landowners are not sufficient to provide factual support for a Board decision. We have also stated that predictions and prophecies by neighboring property owners that a building when completed will likely become a nuisance and annoyance...cannot serve as a legal reason for local governments to deny a permit to persons otherwise entitled thereto.

Id. (internal citations omitted). This Court determined, “The City Council only considered the ordinance’s stated criteria at the very end of its discussion and it amounted to little more than repeating the ordinance’s language as part of a motion.” *Id.* ¶ 19. This Court found there was a “want of the evidentiary basis the City Council is required to make” to deny the permit. *Id.* The same is true here.

Here, the conclusion reached by the Historic District Commission was that the Certificate of Appropriateness was “incongruous with the historical, architectural, archeological or cultural aspects of the district.” SR 25; HT 17⁹⁻²¹. Even assuming that the commission applied the correct meaning of the word “incongruous,” there is no substantial evidence in the record to support this conclusion, nor were those four elements specifically discussed by the Historic District Commission.

This Court in *Olson* noted that “vague reservations expressed by Commission members and nearby landowners are not sufficient to provide factual support for a Board decision.” 480 N.W.2d 770, 775 (S.D. 1992). While the Court noted that the ordinance did not require the Board to make findings of fact, a municipal body must have reasons for its decision recorded in more than just a conclusory fashion. *Id.* at 776 (citing *Honn v. Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981)).

In the Connecticut case of *Gibbons v. Historic District Comm’n*, , the statutory scheme governing hearings on applications for Certificates for Appropriateness provided that “when a certificate of appropriateness is denied, the commission shall place upon its records and in the notice to the applicant the reasons for its determination.” 941 A.2d 917, 924, 926 (Conn. 2008). And, in that case, the Historic District Commission stated one reason for its denial. *Id.* The court found that, on appeal, the Historic District

Commission could not argue other reasons for the denial that had not been previously stated, and that a review of the record is to determine if substantial evidence exists for the reason stated, not whether evidence exists to support any reason for the denial. *Id.* at 927.

“The court should not go behind that official collective statement and attempt to search out and speculate on other reasons which might have influenced some or all of the members of the commission to reach the commission’s final collective decision.” *Id.*

The reason for this rule is compelling.

[W]hen a reason is given, we should not search beyond it. We reaffirm that this is the appropriate scope of review for municipal land use appeals and appeals from decisions of historic district commissions. When an administrative agency specifically states its reasons, the court should go no further because it could reasonably be inferred that this was the extent of its findings. To go beyond those stated reasons invades the factfinding mission of the agency by allowing the court to cull out reasons that the agency may not have found to be credible or proven....[T]he commission’s stated reason for denial is not supported by substantial evidence in the record, and, thus, its denial of the plaintiff’s application was arbitrary and capricious.

Id. at 928. The court went on to find that the denial was based on aesthetic preferences rather than “on an evidence based determination of the impact that the proposed changes would have on the historic aspects” of the area. *Id.* at 931.

In *In re Sdds, Inc.*, this Court in reviewing an agency decision of the Board of Minerals and Environment, stated, “Our task, however, is not to review the hearing transcript and exhibits *de novo* to discern whether such an ultimate finding *could* be supported.” 472 N.W.2d 502, 513 (S.D. 1991) (emphasis added). To do so would “require the ability to look into the minds of the six Board members to determine what part of the evidence persuaded them.” *Id.*

Here, the only stated reason for denial was that the proposal was “incongruous with the historical, architectural, archeological or cultural aspects of the district.” HT 179-14. Appellees cannot now argue another reason for denial.⁵ Notably, the Commission did not adopt the report of the Historic Preservation Officer or otherwise incorporate those opinions into its decision. The reason given for denial was conclusory and not based on substantial evidence.⁶ This Court should reverse the decision of the Circuit Court.

Even if this Court finds that substantial evidence exists for the stated decision of the Historic District Commission, the decision is arbitrary and not reasonable because it was not based upon the criteria of DCO 17.68.050, as Appellees claim it was in the motion to deny the Certificate of Appropriateness. HT 179-14; CR 60.

II. THE CIRCUIT COURT ERRED BY FINDING THE DEADWOOD HISTORIC DISTRICT COMMISSION CONSIDERED AND FOLLOWED THE CRITERIA IN DEADWOOD CITY ORDINANCE (DCO) 17.68.050.

A. Standard of Review

The interpretation of an ordinance presents a question of law which is reviewed *de novo*. *Dunham v. Lake County Comm’n*, 2020 S.D. 23, ¶ 11, 943 N.W.2d 330, 334. Reviewing a question of law subjects the review to the *de novo* standard of review. *Clark County v. Sioux Equip. Corp.*, 2008 S.D. 60, ¶ 10, 753 N.W.2d 406, 410. When an application of a legal test to the historical facts of a case requires the court to consider

⁵ At the Circuit Court level, Appellees alluded to the denial being based on Department of Interior standards. CR 1775. Critically, however, the Commissioners did not adopt the *Staff Report* or any findings related to Department of Interior standards.

⁶ The decision may have been based on language found in SDCL 1-19B-44, but that statute is never referenced by Appellees, nor are any state statutes, so Appellees did not give the criteria in that statute as a reason for the denial.

legal concepts and “exercise judgment about the values that animate legal principles,” the Court reviews the mixed question of law and fact *de novo*. *Id.*

Statutory construction is a question of law to be reviewed under the *de novo* standard of review. *Apland v. Bd. of Equalization of Butte County*, 2013 S.D. 33, ¶ 7, 830 N.W.2d 93, 97 (quoting *Cable v. Union Cnty. Bd. of Cnty. Comm’rs*, 2009 S.D. 59, ¶19, 769 N.W.2d 817, 825).

In a case appealing from the decision of a school board, this Court has said, “Although the circuit court determined the Board acted correctly in denying the petition [to change district boundaries], our review proceeds unfettered by any presumption that the circuit court correctly decided the matter in its review.” *Kirby v. Hoven Sch. Dist. No. 53-2*, 2004 S.D. 100, ¶ 5, 686 N.W.2d 905, 906.

B. The Commission did not consider all the required criteria in DCO 17.68.050.

The Circuit Court stated, “The criteria to be considered in Mr. Kirwan’s case under 17.68.050, the Court finds that the criteria was considered and followed....” OAT 19₁₁₋₁₄. This finding is erroneous because the Appellees’ admitted⁷ to not applying all the criteria in reaching the decision to deny the Certificate of Appropriateness. OAT 15₂₅₋₁₆₂. Appellees’ claim at the Circuit Court level was that it was not required to consider all the criteria before reaching a decision. OAT 15₂₀₋₁₆₂.⁸

⁷ At OAT 15₂₅₋₁₆₂, Appellees’ counsel stated in reference to DCO 17.68.050, “It simply lists a number of criteria to be considered, almost all of which was considered by the City Commission [sic] prior to its decision to deny Mr. Kirwan’s request.” (emphasis added)

⁸ It is unclear whether the Circuit Court agreed with Appellees that all the criteria did not have to be considered, or if the Court’s finding was that all criteria were considered.

Deadwood City Ordinance 17.68.050 outlines the criteria for issuance of certificates of appropriateness or project approvals. That ordinance states,

The historic district and historic preservation commissions **shall** use the following criteria and established design review guidelines in granting or denying certificates of appropriateness and project approvals:

A. General Factors.

1. Architectural design of the resource and proposed alteration;
2. Historical significance of the resource;
3. General appearance of the resource;
4. Condition of the resource;
5. Materials composing the resource;
6. Size of the resource;
7. The relationship of the above factors to, and their effect upon the immediate surroundings and upon the district as a whole and its architectural and historical character and integrity; **and**
8. The location and visibility of the alteration and resource.

DCO 17.68.050 (emphasis added.) When exterior alteration is proposed, subpart C of

DCO 17.68.050 further describes considerations for the Historic District Commission as:

C. Exterior Alteration.

1. All exterior alterations to a building, structure, object, site or landscape feature shall be compatible with the resource itself and other resources with which it is related. The original design of a building, structure, object or landscape feature shall be considered in applying these standards.
2. Exterior alterations shall not affect the architectural character or historic quality of a resource and shall not destroy the significance of resource sites.

The Ordinance states that the Historic District Commission **shall** use the above-described criteria.⁹ It is well established in South Dakota that “shall” means a mandatory requirement. “As a rule of statutory construction, when ‘shall’ is the operative verb in a statute, it is given obligatory or mandatory meaning.” *Reck v. S.D. Bd. of Pardons &*

⁹ Notably, DCO 17.68.050 references architectural and historical characteristics, but not archeological or cultural aspects, as areas of consideration.

Paroles, 2019 S.D. 42, ¶ 12, 932 N.W.2d 135, 139 (citing *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 21, 757 N.W.2d 756, 762; *In re J.H.*, 1999 S.D. 36, ¶ 31, 590 N.W.2d 473, 479). Additionally, the list is linked by the use of “and,” which means that all criteria must be considered. “Typically the use of the word ‘and’ links a conjunctive list, which communicates all the elements listed in the connected clauses are required.” *State v. Buffalo Chip*, 2020 S.D. 63, ¶ 48, 951 N.W.2d 387, 401 (J. Kern, concurring); *see also In re Alcohol Bev. License Suspension of Cork’n Bottle*, 2002 S.D. 139, ¶13, 654 N.W.2d 432, 435 (licensee must satisfy all five requirements because they are listed in the conjunctive). Therefore, in this case, all criteria must be considered before granting or denying a Certificate of Appropriateness.

At the outset, the criteria from DCO 17.68.050 were never formally discussed or considered by either the Historic District Commission or in the *Staff Report*. Even reviewing the comments of the members of the Historic District Commission in their best light, the Historic District Commission did not come close to considering all of the criteria. Failure to consider the eight criteria in DCO 17.68.050(A) and the additional two “exterior alterations” criteria in DCO 17.68.050(C) demonstrates a failure on the part of the Historic District Commission to follow their mandate and requires reversal of the Circuit Court’s decision finding that the Historic District Commission considered and followed the criteria of DCO 17.68.050.

The Historic Preservation Officer outlined some criteria he claimed was guidance from the Department of the Interior, but the criteria in DCO 17.68.050 was never discussed. CR 45-46. The architectural character was not going to change (specifically the lay-out with the alcove/recessed entry and the size and configuration of the windows

would not change). HT 8₃₋₇. The only proposed change is in the wooden look of the entrance to the building. As counsel noted at the Historic District Commission meeting, this boiled down to texture. HT 9₁₄₋₁₆. But the Historic District Commission never made any findings regarding the “materials of the resource.” See DCO 17.68.050(A)(5). And the Historic District Commission is required to make findings insofar as the reasons for denial must be stated on the record and recorded in the notice of denial to the applicant. See SDCL 1-19B-49.

South Dakota has not developed case law in applying criteria to applications for certificates of appropriateness, but other states have. These decisions provide persuasive authority for this Court. In Alabama, for example, the Court of Civil Appeals provides excellent guidance in reversing a denial of an application for a certificate of appropriateness in an historic district. See *Shoal Creek Land & Cattle, LLC v. City of Arab*, 250 So.3d 602 (Ala. 2017). In that case, the court noted, “the power to deny an owner of private property the right to modify the appearance of that property must be circumscribed by uniform standards applicable to all citizens.” *Id.* at 605.

Municipal ordinances, placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct of business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply.

Id. at 605-606. The legislature in Alabama, much like the legislature in South Dakota, intended that historic preservation commissions should formulate design standards by which the commissions would adjudge whether a proposed change should be permitted to

the exterior appearance of a building within an historic district. *Id.* at 606; *see* SDCL 1-19B-1 *et seq.*

In discussing another case, the court in *Shoal Creek* stated, “Our supreme court held, however, that the planning commission was bound by its ordinance and that it could not ‘ignore the specific criteria...and exercise discretion...which is unguided by uniform standards, and capable of arbitrary application.’” *Id.* at 609. The court went on to say, “a historic preservation commission cannot deny a proposed change solely on the basis of its opinion that the proposed change conflicts with the general character of the historic district, which is too vague a standard.” *Id.* Here, the Historic District Commission ignored their directive to consider specific criteria outlined in DCO 17.68.050, and instead denied the Certificate of Appropriateness for other, unrelated reasons.¹⁰

Appellees claimed at the Circuit Court level that the Historic District Commission considered DCO 17.68.050(A) subparts 1, 2, 3, 5, 7, and 8. Of note, Appellees made no mention of any consideration of subparts 4 and 6, which are also required considerations due to the use of “shall” and “and” in the ordinance. Appellees therefore concede that the Historic District Commission failed to consider all the criteria outlined by DCO 17.68.050(A) and (C), thus, the decision of the Historic District Commission must be

¹⁰ This case demonstrates a fundamental problem with Deadwood’s Historic District Commission and applications for Certificate of Appropriateness. An applicant does not know what criteria will be applied to an application when the *Staff Report* lists Department of Interior standards, city ordinance 17.68.050 lists different standards, and the denial is based on language found in state statute. This is not ordinarily a concern for applicants, because as argued in Appellants’ argument 4 at the circuit court level (CR 1337-1339), these Certificates of Appropriateness are routinely rubber-stamped for approval.

reversed. Appellees told the Circuit Court they were not required to consider all the criteria, thereby admitting they failed to do so. *See fn. 7, supra*.

In *Duffy v. Circuit Court for the 7th Judicial Circuit*, this Court explained that the Circuit Court’s explanation regarding the reduction in legal fees did not address the factors to be used in determining whether the fees were reasonable or how those factors entered into its decision to reduce Duffy’s fees. 2004 S.D. 19, 676 N.W.2d 126. In determining whether a trial court has “regularly pursued its authority,” this Court “examines if the court applied an incorrect legal standard or whether the court abused its discretion to the extent that it acted illegally....” *Id.* at ¶ 19. The judge who presides over the case and determines that an attorney’s fees are unreasonable has an obligation to apply the correct legal standard when making that decision. *Id.* at ¶ 26. The judge is also required to explain the reasons for reducing the fees based upon that standard. *Id.* “Although the panel attempted generally to address some of the reasonableness factors in *Tappe*, it did not address all of the factors or require the judges assigned to the cases to do so either.” *Id.* at ¶30. Therefore, the decision was reversed. *Id.*

Here, the Historic District Commission may have stumbled into addressing some of the required factors through individual comments and questions, but the Historic District Commission, like the circuit court in *Duffy*, did not address all the factors required to be addressed under DCO 17.68.050. Nor did it make any explicit findings supporting its decision. Because Appellees admitted to not applying all the criteria in DCO 17.68.050, the Circuit Court erred by finding “the criteria under 17.68.050 was considered and followed.” Additionally, the Historic District Commission did not specifically address any of the criteria and this Court should not be left to read into the

individual comments of Commission members to possibly pigeonhole comments, after-the-fact, to match the criteria. As noted in *Olson*, “reasonableness is measured by examining whether standards set out in the local ordinance have been satisfied.” *Olson*, 480 N.W.2d at 774. They have not; the denial was not reasonable; it was arbitrary. The decision of the Circuit Court must be reversed.

III. THE CIRCUIT COURT ERRED BY FAILING TO ADDRESS WHETHER THE DEADWOOD HISTORIC DISTRICT COMMISSION COMPLIED WITH SDCL 1-19B-49.

A. Standard of Review

This Court reviews a circuit court’s application of a statute *de novo*. *Trask v. Meade Cty. Comm’n*, 2020 S.D. 25, ¶8, 943 N.W.2d 493, 496; *Coester v. Waubay Twp.*, 2018 S.D. 24, ¶7, 909 N.W.2d 709, 711.

B. The Circuit Court failed to address the requirements of SDCL 1-19B-49.

SDCL 1-19B-49 provides as follows:

If the Historic District Commission determines that a certificate of appropriateness should not be issued, the commission **shall** place upon its records the reasons for such determination and shall forthwith notify the applicant of such determination, furnishing the applicant an attested copy of its reasons therefor and its recommendations, if any, as appearing in the records of the commission.

(emphasis added).

The Historic District Commission decision did not “place upon its records the reasons for such determination” to deny Appellants’ Certificate of Appropriateness. Nor did the Historic District Commission “furnish[] the applicant an attested copy of its reasons.” The form letter from Mr. Kuchenbecker does not satisfy these requirements. CR 60. Appellees never contradicted this assertion at the Circuit Court level. *See* CR 1765-1779 and OAT 14₁₃-18₆.

In *In re B.Y. Dev., Inc.*, the South Dakota Supreme Court remanded a case to Lawrence County Circuit Court in order for the court to examine *both statutes and Deadwood City Ordinances* to determine whether the Historic Preservation Commission properly denied an application to expand a building. 2010 S.D. 57, 785 N.W.2d 296 (emphasis added).¹¹

Failing to consider necessary legal or procedural standards prior to making a decision can establish reversible error. See *S.D. Pub. Assur. Alliance v. McGuire*, 2018 S.D. 75, 919 N.W.2d 745 (failure of the circuit court to consider the interests of justice and adequately address excusable neglect prior to dismissing a case was reversible error).

In *In re Sdds, Inc.*, 472 N.W.2d 502 (S.D. 1991), this Court determined that the agency failed to meet the statutory requirements and make findings to support the general conclusion that “granting the permit was in the public interest.” The argument in that case was that the ultimate finding by the board was not detailed enough to enable a reviewing court to determine the ground on which the decision was made. *Id.* at 512. The board’s finding was “merely a statement of the statutory requirement...” *Id.* In *Sdds*, the Court also noted that in *Lemke*, “the failure of the agency’s findings to reveal the underlying facts effectively forecloses judicial review.” *Id.* (citing *Lemke v. Rabenberg’s, Inc.*, 89 S.D. 386, 233 N.W.2d 336, 339).

In *Hall v. State*, because of the inadequate development of the record, the failure to properly recognize the issues presented, and the lack of a thorough consideration of the applicable law, the Supreme Court’s review was hindered, and the Supreme Court could

¹¹ Although a portion of the *In re B.Y. Dev., Inc.* decision has since been superseded by statute, the legal principles remain the same.

not determine whether, as a matter of law, the closing of the Interstate exit at Box Elder, South Dakota constituted a compensable taking. 2006 S.D. 24, 712 N.W.2d 22. The circuit court did not address whether the State’s action was arbitrary or unreasonable. *Id.* As demonstrated by this precedent, failure to address important, required issues, or make factual findings and legal conclusions is reversible error; the applicable law must be considered.

SDCL 1-19B-49 is clearly applicable to the denial of the application for Certificate of Appropriateness in this case. Chapter 1-19B’s purpose is to authorize local governing bodies in South Dakota to engage in a comprehensive program of historic preservation. SDCL 1-19B-1. SDCL 1-19B-2 authorizes the governing body of any city to establish an historic preservation commission to preserve, promote, and develop the historic resources of the city in accordance with the provisions of Chapter 1-19B. The only reason that the Deadwood Historic Preservation Commission, and subsequently the Historic District Commission pursuant to SDCL 1-19B-38, can make determinations on historic properties is because the legislature gave such authority in Chapter 1-19B. The honor and power of such authority comes with responsibilities. Therefore, the statutory provisions of Chapter 1-19B, including 1-19B-49, must be followed by the Deadwood Historic District Commission in determining whether to grant or deny a Certificate of Appropriateness.

Here, reviewing the record demonstrates the Historic District Commission failed to follow SDCL 1-19B-49; it did not “place upon its records the reasons for such determination” in more than a conclusory fashion and did not “furnish[] the applicant an attested copy of its reasons therefor....” Appellees ignored this statute and claimed “you

don't need to have findings of fact and conclusions of law.” OAT 17²²⁻²³. The Circuit Court failed to address this statute entirely in its decision affirming the denial of the Certificate of Appropriateness. Failure to follow these mandatory procedures warrants reversal of the decision to affirm the denial of Appellants' application for Certificate of Appropriateness.

IV. THE CIRCUIT COURT ERRED BY NOT MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT ITS ORDER.

South Dakota Codified Law 1-26-36 provides, “A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.”

Generally, the failure to file findings of fact and conclusions of law constitutes reversible error. *Toft v. Toft*, 2006 S.D. 91, 723 N.W.2d 546. However, an appellate court may decide the appeal without further findings if it feels it is able to do so. *Id.*

It is helpful to review the purpose of findings and conclusions to determine if an appellate court is able to review a ruling that is not supported by findings and conclusions. *Id.* The purpose of findings of fact is threefold: 1) to aid the appellate court in reviewing the basis for the trial court's decision; 2) to make clear what the court decided should estoppel or res judicata be raised in later cases; and 3) to help insure that the trial judge's process of adjudication is done carefully. *Id.* at ¶ 12. The appellate court may decide the appeal without further findings if: 1) the record itself sufficiently informs the court of the basis for the trial court's decision on the material issue, or 2) the contentions raised on appeal do not turn on findings of fact. *Id.* The court has also considered a third requirement: if a court issues a lengthy memorandum decision,

explaining in detail the testimony, circumstances, and inferences upon which the judge relied in reaching the decision – and incorporates that opinion by reference. *Id.* at ¶ 13.

Here, no findings or conclusions were entered by the Court. The Court made brief comments at the hearing regarding its decision, and an order was drafted and submitted to the Court for signature. The entire basis for the Court’s decision was stated as:

The Court, while it can appreciate the argument of Mr. Kirwan -- and I've been to the building actually -- the Commission differentiated the exterior of a new building compared to his building because new buildings don't have the historical value and it's a completely separate statute or ordinance.

The criteria to be considered in Mr. Kirwan's case under 17.68.050, the Court finds that the criteria was considered and followed and the Court finds that the Commission did rule appropriately in this case and the Court's going to uphold the decision of the City of Deadwood Historic Preservation and deny the request of the Petitioners in this case.

The Court finds, as Mr. Riggins alluded to, that substantial evidence under the Olson case was defined as a mere scintilla, which I -- I don't understand that, but it's clear that it does say a mere scintilla, so the Court finds that certainly that was -- that standard was met.

OAT 19:5-22.

Unless this Court determines it is sufficiently informed based upon the record, these statements do not allow this Court to adequately review the Circuit Court’s decision. Nor do these brief oral statements equate to compliance with SDCL 1-26-36. It was error for the Circuit Court to fail to enter Findings of Fact and Conclusions of Law or a Memorandum Decision that would allow for meaningful review. The decision of the Circuit Court must be reversed.

V. THE CIRCUIT COURT ERRED BY ACCEPTING THE AFFIDAVIT OF KEVIN KUCHENBECKER.

The circuit court's review is usually confined to the administrative record. *South Dakota Commission on Gaming v. Johnson*, 2018 S.D. 49, 914 N.W.2d 583; SDCL 1-26-35. However, in cases of alleged irregularities in procedure before an agency, not shown in the record, proof thereon may be taken in the court. *Id.* at fn.4 (citing SDCL 1-26-37). A circuit court's factual findings and legal conclusions regarding such proof of irregularities would be entitled to the usual deference afforded a circuit court. *Id.*

Appellees submitted an Affidavit of Kevin Kuchenbecker with their brief to the Circuit Court. Appellees cited no rule which allowed for such a submission of an Affidavit to add "facts" to the record on appeal. The Affidavit of Kevin Kuchenbecker was not submitted as part of a motion to add to the record pursuant to SDCL 1-26-33.¹² It was not properly submitted to be included as part of the record on appeal in this case and the Circuit Court erred in accepting the Affidavit into the record.

Appellees submitted the "administrative record" to the circuit court and chose what documents to include. In doing so, Appellees did not follow any procedure to request the court permit the addition to the record. Instead, Appellees submitted an Affidavit with their brief. The Affidavit did not include the attachments referenced in the Affidavit, and those attachments were never provided to the Court or counsel as part of Mr. Kuchenbecker's testimony.

More important than Appellees' failure to follow any procedure to add information to the record, is that the "facts" described by Mr. Kuchenbecker in his

¹² Appellees also did not comply with this statute regarding transmission of the record to the Circuit Court. The Notice of Appeal was filed on April 9, 2021, but the record was not transmitted to the court until June 22, 2021, after Appellants made a motion regarding transmission of the record. CR 13, 36.

Affidavit were not known or considered by the Historic District Commission at the time it voted on the application for Certificate of Appropriateness. Such information appears nowhere in any official records of the Historic District Commission or Historic Preservation Commission. *See* HT 1-17; CR 36-65. The meeting is not mentioned in the *Staff Report* to the commission and no commissioner mentioned it at the March 10, 2021, meeting. It was error for the Court to accept and consider information that was not known to, or considered by, the Historic District Commission at the time it rendered its decision to deny the Certificate of Appropriateness.

This Court should reverse the decision of the Circuit Court and exclude Kevin Kuchenbecker's *Affidavit* from the record. *See, e.g., In re Estate of French*, 2021 S.D. 20, ¶12 n.3, 956 N.W.2d 809 n.3.

CONCLUSION

A complete review of the record creates a definite and firm conviction that the Circuit Court erred by affirming the decision of the Historic District Commission denying the Certificate of Appropriateness. Appellants respectfully request this Court reverse the decision of the Circuit Court affirming the decision of the Deadwood Historic District Commission denying Appellants' Certificate of Appropriateness for the reasons argued in this brief. The Historic District Commission has responsibilities that must not be disregarded. Appellants request this Court grant Appellants' Certificate of Appropriateness because a) the denial was not based upon substantial evidence, b) the denial was not reasonable – the Historic District Commission concedes Deadwood City Ordinance 17.68.050 criteria was not applied to the application, and c) SDCL 1-19B-49

was not considered or addressed. The decision arbitrarily denied Appellants property rights.

REQUEST FOR ORAL ARGUMENT

Oral Argument is hereby requested by Appellants.

Dated: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL 1-26-33.3 and 15-26A-66(4). The font is Times New Roman size 12, which includes serifs. The brief is 25 pages long and the word count is 7,525, exclusive of the Cover, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, and certificates of counsel. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below, true and correct copies of APPELLANTS' BRIEF and APPENDIX were served through email and hand-delivered on:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

HARLAN KIRWAN and PANDORA’S BOX, LLC d/b/a GUNSLINGER SALOON,

Appellants,

v.

CITY OF DEADWOOD, a Municipal Corporation, and DEADWOOD HISTORIC
PRESERVATION COMMISSION, and DEADWOOD HISTORIC DISTRICT
COMMISSION,

Appellees.

Appeal No. 29836

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

THE HONORABLE MICHELLE K. COMER, CIRCUIT COURT JUDGE

APPELLANTS’ APPENDIX

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NOTICE OF APPEAL FILED
December 3, 2021

APPENDIX

Order (November 29, 2021)	001
Letter Denying Certificate of Appropriateness	003
Excerpts from Historic District Commission transcript (March 10, 2021)	004
Excerpts from Oral Argument transcript (October 12, 2021)	006
Deadwood City Ordinance 17.68.050	008
SDCL 1-19B-49	010

STATE OF SOUTH DAKOTA)
)
)SS.
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

HARLAN KIRWAN and PANDORA'S)
BOX, LLC d/b/a GUNSLINGER SALOON,)

Case No. 40CIV21-75

Appellants,)
vs.)

ORDER

CITY OF DEADWOOD, DEADWOOD)
HISTORIC PRESERVATION)
COMMISSION, DEADWOOD)
HISTORIC DISTRICT COMMISSION)

Appellees.)

This matter came before this Court on October 12, 2021, on two matters. Kimberly Pehrson, attorney for Appellants, appeared on behalf of Appellants, and Harlan Kirwan also appeared personally. Quentin L. Riggins, attorney for Appellees, appeared on behalf of Appellees, and Kevin Kuchenbecker, Historic Preservation Officer, also appeared in person.

The first matter before the Court was Appellants' *Motion to Add to the Record*. Appellees did not oppose the motion. The Court GRANTED Appellants' *Motion* in its entirety. The Court also accepted the Affidavit of Kevin Kuchenbecker into the record, over Appellants' objection.

Oral Argument on the Appeal before the Court was then presented by the parties. The Court, after having reviewed all briefs and following argument by counsel, NOW THEREFORE, it is hereby

ORDERED, ADJUDGED, AND DECREED that the decision of the Deadwood Historic District Commission denying Appellants' request for Certificate of Appropriateness is

AFFIRMED for the following reasons:

1. **Substantial evidence as defined in *Olson v. City of Deadwood*, 480 N.W.2d 770 (SD 1992) exists to support the Deadwood Historic District Commission's decision to deny Appellant Kirwan a Certificate of Appropriateness; and**
2. **The Deadwood Historic District Commission did not act in an arbitrary and capricious manner in denying Appellant Kirwan a Certificate of Appropriateness.**

11/29/2021 10:23:09 AM

BY THE COURT:



Honorable Michelle Comer
Circuit Court Judge

ATTEST: CAROL LATUSECK, CLERK

BY: KRISTIE GIBBENS, DEPUTY



OFFICE OF
PLANNING, ZONING AND
HISTORIC PRESERVATION
108 Sherman Street
Telephone (605) 578-2082
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Kevin Kuchenbecker
Historic Preservation Officer
Telephone (605) 578-2082
kevin@cityofdeadwood.com

**DEADWOOD HISTORIC PRESERVATION COMMISSION
NOTICE OF DENIAL FOR
CERTIFICATE OF APPROPRIATENESS**

March 11, 2021

Harlan Kirwan
637 Main Street
Deadwood, SD 57732

Dear Mr. Kirwan:

The Historic District Commission has reviewed your request for Certificate of Appropriateness for replacing the façade with pine wood as submitted at 669 Main Street a contributing structure in the Deadwood City Planning Unit in the City of Deadwood. This Certificate of Appropriateness was denied at the Deadwood Historic District Commission meeting on March 10, 2021.

The Commission unanimously denied the Application for Certificate of Appropriateness based upon the guidance found in DCO 17.68.050, the exterior alteration proposed is incongruous with the historical, architectural, archaeological or cultural aspects of the district and moved to deny Certification of Appropriateness. Furthermore, the Historic Preservation Commission previously required the removal of the inappropriate material from the doors and balance of the storefront to be repaired from last alteration without approval.

Should you desire to appeal the decision by the Historic Preservation District you may do so according to City of Deadwood Ordinance Code 17.68.080 within thirty (30) days following the receipt of this letter. If you have any questions or need further information, please do not hesitate to contact our office at your convenience.

Sincerely,

Kevin Kuchenbecker
Historic Preservation Officer

cc: Quentin Riggins, City Attorney
file

1	STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
2	COUNTY OF LAWRENCE	FOURTH JUDICIAL CIRCUIT
3		
4	-----	
5	HARLAN KIRWAN and PANDORA'S BOX,) Civ No. 21-
6	LLC, d/b/a GUNSLINGER SALOON,)
7	Appellants,) Excerpt of Historic
8	vs.) Preservation Commission
9	CITY OF DEADWOOD, a Municipal) Meeting
10	Corporation, and DEADWOOD HISTORIC)
11	PRESERVATION COMMISSION, and)
12	DEADWOOD HISTORIC DISTRICT)
13	COMMISSION,)
14	Appellees.)
15	-----	
16		
17	DATE: March 10, 2021	
18		
19	PLACE: Deadwood City Hall	
20	102 Sherman Street	
21	Deadwood, SD 57732	
22		
23	Transcribed by: Veronica Fish	
24	Court Reporter	
25	Black Hills Reporting	
	1601 Mt. Rushmore Rd., Ste. 3280	
	Rapid City, SD 57701	

1 MR. BERG: Okay.

2 MS. POSEY: I agree. After this -- as far as I'm
3 concerned, this is completely inappropriate.

4 MR. BERG: So you need to make a motion.

5 MS. POSEY: Okay.

6 MS. WEBER: Motion to deny, is that what it is?

7 MR. KUCKENBECKER: It would be -- If -- If you're doing
8 that, it would be the motion on B.

9 MS. POSEY: Option B. Based upon the guidance found in
10 DCO 17.68.050, I find that the exterior alteration
11 proposed is incongruous with the historical,
12 architectural, archaeological, or cultural aspects of
13 the district and move to deny Certification of
14 Appropriateness.

15 MS. WEBER: Second.

16 MR. BERG: We have a motion and a second. All those in
17 favor say aye.

18 (Various Ayes.)

19 MR. BERG: Opposed, same sign.

20 (No verbal response.)

21 MR. BERG: Motion carries.
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STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

**HARLAN KIRWAN and PANDORA'S
BOX, LLC, d/b/a GUNSLINGER
SALOON,**

Appellants,

vs.

**CITY OF DEADWOOD, a
Municipal Corporation, and
DEADWOOD HISTORIC
PRESERVATION COMMISSION, and
DEADWOOD HISTORIC DISTRICT
COMMISSION,**

Appellees.

Motion Hearing and
Oral Argument

40CIV21-75

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
October 12, 2021, at 10:00 a.m.

APPEARANCES:

For the Appellants: **MS. KIMBERLY PEHRSON**
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Rapid City, SD 57702

For the Appellees: **MR. QUENTIN RIGGINS**
Gunderson Palmer Nelson & Ashmore
P.O. Box 8045
Rapid City, SD 57709

1 **THE COURT:** Thank you.

2 The Court normally would take it under advisement, but
3 I've had some trials fall so I've had some extra time to
4 review the submittals.

5 The Court, while it can appreciate the argument of
6 Mr. Kirwan -- and I've been to the building actually -- the
7 Commission differentiated the exterior of a new building
8 compared to his building because new buildings don't have
9 the historical value and it's a completely separate statute
10 or ordinance.

11 The criteria to be considered in Mr. Kirwan's case
12 under 17.68.050, the Court finds that the criteria was
13 considered and followed and the Court finds that the
14 Commission did rule appropriately in this case and the
15 Court's going to uphold the decision of the City of
16 Deadwood Historic Preservation and deny the request of the
17 Petitioners in this case.

18 The Court finds, as Mr. Riggins alluded to, that
19 substantial evidence under the Olson case was defined as a
20 mere scintilla, which I -- I don't understand that, but
21 it's clear that it does say a mere scintilla, so the Court
22 finds that certainly that was -- that standard was met.

23 So, Mr. Riggins, if you would prepare an appropriate
24 order for the Court's signature and submit it, I would sign
25 it. If you'd submit it to Ms. Pehrson first for approval

17.68.050 Criteria for issuance of certificates of appropriateness or project approvals.

The historic district and historic preservation commissions shall use the following criteria and established design review guidelines in granting or denying certificates of appropriateness and project approvals:

A. General Factors.

1. Architectural design of the resource and proposed alteration;
2. Historical significance of the resource;
3. General appearance of the resource;
4. Condition of the resource;
5. Materials composing the resource;
6. Size of the resource;
7. The relationship of the above factors to, and their effect upon the immediate surroundings and upon the district as a whole and its architectural and historical character and integrity; and
8. The location and visibility of the alteration and resource.

B. New Construction.

1. In advance of new construction, steps shall be taken to insure evaluation of possible archaeological resources, as set forth in SDCL 1-20.
2. The following aspects of new construction shall be visually compatible with the buildings and environment with which the new construction is visually related, including but not limited to: the height, the gross volume, the proportion between width and height of the facade(s), the proportions and relationship between doors and windows, the rhythm of solids to voids created by openings in the facade, the materials, the textures, the colors, the patterns, the trims and the design of the roof.
3. Existing rhythm created by existing building masses and spaces between them shall be preserved.
4. The landscape plan shall be compatible with the resource, and it shall be visually compatible with the environment with which it is visually related. Landscaping shall also not prove detrimental to the fabric of a resource, or adjacent public or private improvements like sidewalks and walls.
5. No specific architectural style shall be required.
6. With respect to these new construction criteria, the commission shall also consider the zoning classification and historic integrity of visually related buildings.

C. Exterior Alteration.

1. All exterior alterations to a building, structure, object, site or landscape feature shall be compatible with the resource itself and other resources with which it is related. The original design of a building, structure, object or landscape feature shall be considered in applying these standards.
2. Exterior alterations shall not affect the architectural character or historic quality of a resource and shall not destroy the significance of resource sites.

D. Demolition.

1. The individual architectural, cultural and/or historical significance of the resource.

2. The importance or contribution of the resource to the architectural character of the district and, where appropriate, the damaging impact of the resource on the architectural character of the district.

3. The importance or contribution of the resource to neighboring property values and, where appropriate, the damaging impact of the resource on neighboring property values.

4. The commission shall consider the difficulty or impossibility of reproducing such a resource because of its texture, design, material or detail.

5. An applicant for demolition must receive a certificate of appropriateness or project approval for demolition before receiving a demolition permit, which must be received prior to demolition. In order to receive such certificate of appropriateness or project approval, the applicant must submit plans for the property. In planning unit number 4, such plans must include or contemplate new construction, and the applicant shall provide the historic district commission with plans for this purpose which shall include, but shall not be restricted to, project concept, primary elevations, site plans, completed working drawings for at least the foundation plan which will enable the applicant to receive a permit for foundation construction and a construction or project schedule including satisfactory assurances of compliance with such construction or project schedule. Other than in planning unit number 4, such plans do not have to include new construction.

6. Applicants that have received a certificate of appropriateness or project approval for demolition shall be permitted to receive such demolition permit without additional commission action, provided that such certificate of appropriateness includes approval of construction plans if the demolition is located within planning unit number 4. Permits for demolition and construction shall be issued simultaneously if the requirements of this section are met, and the applicant has provided financial proof of his or her ability to complete the project.

7. When the commission recommends approval of demolition of a resource, a permit shall not be issued until all plans for the site have received approval from all appropriate city boards, commissions, departments and agencies.

(Ord. 952 (part), 1999; Ord. 926 (part), 1997; Ord. 831 § 7.5, 1992)

1-19B-49. Denial of certificate--Reasons recorded--Notice to applicant.

If the Historic District Commission determines that a certificate of appropriateness should not be issued, the commission shall place upon its records the reasons for such determination and shall forthwith notify the applicant of such determination, furnishing the applicant an attested copy of its reasons therefor and its recommendations, if any, as appearing in the records of the commission.

Source: SL 1974, ch 21, § 11; SL 2009, ch 1, § 94.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29836

**HARLAN KIRWAN and PANDORA’S BOX, LLC d/b/a GUNSLINGER
SALOON,**

Plaintiffs-Appellants,

v.

**CITY OF DEADWOOD, a Municipal Corporation, and DEADWOOD HISTORIC
PRESERVATION COMMISSION, and DEADWOOD HISTORIC DISTRICT
COMMISSION,**

Defendants-Appellees.

**APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA**

The Honorable Michelle K. Comer, Circuit Court Judge

Notice of Appeal filed December 3, 2021

APPELLEES’ BRIEF

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PRELIMINARY STATEMENT

Appellants Harlan Kirwan and Pandora’s Box, LLC, d/b/a Gunslinger Saloon will be collectively referred to as “Kirwan.” Appellees City of Deadwood, Deadwood Historic Preservation Commission and Deadwood Historic District Commission collectively will be referred to as “Deadwood.” Citations to the record will appear as “(CR ___)” with the appropriate page number in the Clerk’s Appeal Index. Citations to the City of Deadwood Municipal Ordinances will appear as “(DMO ___)” with the ordinance cited. Citations to the Circuit Court oral argument transcript will appear as “(OAT ___)” with the appropriate page and line number.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment dated November 29, 2021 in the Fourth Judicial Circuit, the Honorable Michelle K. Comer affirming the decision of the Deadwood Historic Preservation Commission. CR 1796. Notice of Appeal was filed on December 3, 2021. CR 1880. This Court has jurisdiction of this appeal pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

I. DID THE CIRCUIT COURT ERR BY DETERMINING SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE DECISION OF THE DEADWOOD HISTORIC DISTRICT COMMISSION?

The Circuit Court correctly determined there was substantial evidence to support the Deadwood Historic District Commission’s decision.

- DMO 17.68.050
- 36 CFR 67.7
- *Olson v. Deadwood*, 480 N.W.2d 770 (S.D. 1992)

II. DID THE CIRCUIT COURT ERR BY FINDING THE DEADWOOD HISTORIC DISTRICT COMMISSION CONSIDERED AND

**FOLLOWED THE CRITERIA IN DEADWOOD CITY
ORDINANCE (DMO) 17.68.050?**

The Circuit Court correctly determined that the criteria set forth in DMO 17.68.050 was considered by the Deadwood Historic District Commission and followed.

- DMO 17.68.050
- *Olson v. Deadwood*, 480 N.W.2d 770 (S.D. 1992)

**III. DID THE CIRCUIT COURT ERR BY FAILING TO ADDRESS
WHETHER THE DEADWOOD HISTORIC DISTRICT
COMMISSION COMPLIED WITH SDCL 1-19B-49?**

The Circuit Court did not expressly discuss SDCL § 1-19B-49 in its oral ruling, but expressly stated it had “review[ed] the submittals” and Kirwan’s Circuit Court brief discussed SDCL § 1-19B-49.

- DMO 17.68.050
- *Olson v. Deadwood*, 480 N.W.2d 770 (S.D. 1992)

**IV. WHETHER THE CIRCUIT COURT WAS REQUIRED TO MAKE
FINDINGS OF FACT AND CONCLUSIONS OF LAW IN
SUPPORT OF ITS ORDER?**

The Circuit Court considered this issue based upon oral argument from the parties and correctly determined findings of fact and conclusions of law were unnecessary.

- *Olson v. Deadwood*, 480 N.W.2d 770 (S.D. 1992)

**V. WHETHER THE CIRCUIT COURT ERRED BY ACCEPTING
THE AFFIDAVIT OF KEVIN KUCHENBECKER?**

The Circuit Court considered this issue directly on oral argument and correctly admitted the affidavit.

- *Sorensen v. Harbor Bar, LLC*, 871 N.W.2d 851, 857–58 (S.D. 2015)
- *State v. Williams*, 748 N.W.2d 435, 442 (S.D. 2008)

STATEMENT OF THE CASE

The Deadwood Historic Preservation Commission denied Harlan Kirwan’s application for a certificate of appropriateness. Kirwan then appealed the denial to Circuit

Court, alleging the City of Deadwood, the Deadwood Historic Preservation Commission, and the Deadwood Historic District Commission improperly denied Kirwan's application. The Circuit Court affirmed the Commission's decision and Kirwan now appeals to this Court.

STATEMENT OF THE FACTS

Kirwan owns a building located in the Historic District of Deadwood, South Dakota, at 669 Main Street. This case arises from the replacement of the façade of this building with rough sawn pine boards with a burnt finish. CR 36–38 (initial application); CR 1762–64 at ¶ 3 (Affidavit of Kevin Kuchenbecker) (hereinafter “Aff.”). Kirwan did so without first applying for or receiving the required “certificate of appropriateness” from the Deadwood Historic Preservation Commission¹ as required by DMO 17.68.010. CR 1762–64 at ¶ 4 (Aff.); CR 696–702; DMO 17.68.010. This Ordinance states, in pertinent part: “Within planning unit 4, no exterior portion of any building or other structure (including walls, fences, light fixtures, steps and pavement or other appurtenant features) nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, moved or demolished until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the historic district commission.” *Id.*

After the work was completed, in early May 2020, the City of Deadwood received an application for a certificate of appropriateness from Kirwan, seeking to change the façade of 669 Main Street by installing rough sawn pine boards with burnt finish. CR 55; CR 36–38; 1762–65 at ¶ 4. The Deadwood Historic Preservation Commission heard the

¹ The Deadwood HPC and the Historic District Commission are comprised of the same members. Thus the terms are used interchangeably.

request for a certificate of appropriateness on May 27, 2020. CR 36–38. In a letter dated May 28, 2020, sent by Kevin Kuchenbecker, the Historic Preservation Officer for the City of Deadwood, the Deadwood Historic Preservation Commission ultimately denied Kirwan’s application and required Kirwan to remove the rough sawn pine boards previously installed in violation of DMO 17.68.010. CR 55.

Following the denial of Kirwan’s application for certificate of appropriateness, Kuchenbecker reached out to Kirwan and offered to meet with him to discuss the façade of 669 Main St. CR 1763, ¶ 7. On June 8, 2020, a meeting was held with Kirwan, Scott Odenbach (Kirwan’s attorney at the time), Jeramy Russell (Deadwood Planning and Zoning Director), Quentin L. Riggins (Deadwood City Attorney), and Kuchenbecker to discuss Kirwan’s desire to change the façade of his existing building. *Id.* at ¶ 8. At this meeting, Kirwan was provided with the earliest known photographs of his building, which showed its condition in the early 1900s. *Id.* at ¶ 9.

After providing Kirwan with the photographs of his building, Kirwan was informed that there were concerns with the use of rough sawn pine boards because the use of these boards was inconsistent with the original construction of the building. *Id.* at ¶ 10. Kirwan was also informed during this meeting that while rough sawn pine boards may have been consistent with building structures from 1876 to 1879 in Deadwood, his building was constructed after these buildings had burned and there was no evidence Kirwan’s building ever had a rough sawn pine board façade. As such, the addition of rough sawn unpainted pine boards would alter the original historic appearance of the building which was constructed during a later period of significance. *Id.* at ¶ 11. Kirwan was also instructed that there were various ways that he would likely find approval from

the Historic Preservation Commission, including changes to the paint scheme and windows of Kirwan's building. *Id.* at ¶ 12.

Roughly eight months after the June 8, 2020 meeting, on February 25, 2021, Kirwan resubmitted the application for certificate of appropriateness seeking again to use rough sawn pine boards for the façade of 669 Main St., despite the fact that he was told the use of this product was not consistent with the original design of the building and despite the fact this same request was previously denied by the Commission. *Id.* at ¶ 13; CR 40–43 (Kirwan's Second Application). Following receipt of the second application, Kuchenbecher prepared a staff report. CR 44–52. Kirwan's second application was discussed at the Historic Preservation Commission meeting on March 10, 2021. CR 18–35 (Transcript of Commission's Mar. 10, 2021 meeting). This discussion included many of the same concerns by commissioners that had previously been articulated to Kirwan following the first application, including the fact that the use of rough sawn pine boards as a façade would result in changes to the exterior of the building inconsistent with the building's original design. *Id.* Following these discussions, a motion was made that a certificate of appropriateness should be denied because the "exterior alteration proposed is incongruous with historical, architectural, archaeological or cultural aspects of the district." *Id.* at 34. The motion passed unanimously. *Id.* After the Historic Preservation meeting, Kuchenbecker sent Kirwan a letter notifying him of the decision. CR 60.

Kirwan appealed the Historic Preservation Commission's decision denying the application for certificate of appropriateness to the Circuit Court on the grounds that (1) the Historic Preservation Commission did not follow the statutory procedure upon receipt of Kirwan's application for certificate of appropriateness; (2) the Historic Preservation Commission did not apply the required criteria prior to denying Kirwan's application for

certificate of appropriateness; (3) the basis for denial of certificate of appropriateness by the Historic Preservation Commission is not supported by substantial evidence and; (4) the denial of the certificate of appropriateness was arbitrary based on past conduct and precedent of the Historic Preservation Commission. CR 1303 *et seq.*

After briefing and oral argument, the Circuit Court affirmed the Historic District Commission’s decision. CR 1796. Kirwan filed his notice of appeal with the Supreme Court on December 3, 2021. CR 1800.

STANDARD OF REVIEW

The interpretation of a city ordinance presents a question of law which is reviewed de novo. *Dunham v. Lake County Commission*, 220 SD 23 at ¶ 11. In *Olson v. City of Deadwood*, the South Dakota Supreme Court articulated the standard of review for decisions made by municipal boards: “As to a decision by a board of adjustment made pursuant to [SDCL 11-4-25 through 29], the question on . . . review is whether an order of the board is supported by substantial evidence and is reasonable and not arbitrary.” 480 NW 2d 774 (S.D. 1992) (*citing Graves v. Johnson*, 63 N.W.2d 341, 344 (S.D. 1954)).

ARGUMENT

I. SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE DECISION OF THE DEADWOOD HISTORIC DISTRICT COMMISSION

a. Substantial Evidence Standard

Kirwan claims that the Circuit Court applied the incorrect standard for establishing whether substantial evidence exists to support Deadwood’s decision. However, Kirwan’s definition strays from this Court’s previously-established definition of the term “substantial evidence.”

As indicated *supra*, in *Olson*, this Court articulated the standard of review for decisions made by municipal boards to be “whether an order of the board is supported by substantial evidence and is reasonable and not arbitrary.” *Id.* at 774 (citing *Graves*, 63 N.W.2d at 344). “[R]easonableness is measured by examining whether standards set out in the local ordinance have been satisfied.” *Id.*

Substantial evidence is defined as ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’ or ‘evidence which . . . [affords] a substantial basis of fact from which the fact in issue can be reasonably inferred . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id. (internal citations omitted); *In re Montana-Dakota Utilities Co.*, 278 N.W.2d 189, 190 (S.D. 1979). The term “substantial evidence” “does not mean a larger or considerable amount of evidence, but means more than a mere scintilla of evidence.” *Id.* (internal citations and quotations omitted). Deadwood outlined this standard in both its brief and oral argument to the Circuit Court. CR 1765–66 (Response to Kirwan’s Appeal Brief in Circuit Court); OAT 14–15.

In response to the parties’ arguments, the Circuit Court stated:

The Court finds, as Mr. Riggins alluded to, that substantial evidence under the *Olson* case was defined as a mere scintilla, which I – I don’t understand that, but it’s clear that it does say a mere scintilla, so the Court finds that certainly that was – that standard was met.

OAT, 19:11–22. The Circuit Court explained that in coming to this standard, it relied upon Deadwood’s brief. CR 1766; OAT 19–20. The Circuit Court’s statement that substantial evidence is defined as a mere scintilla (rather than more than a mere scintilla) was a slip of the tongue and not “an erroneous legal conclusion” as argued by Kirwan. *See* Appellants’ Brief, p. 5.

In Kirwan’s attempt to avoid the clearly-stated definition of “substantial evidence” set forth by this Court in *Olson*, he relies upon a Connecticut Supreme Court case, *Gibbons v. Historic District Commission*, 941 A.2d 917 (Conn. 2008); Appellants’ Brief, p. 6–12. However, *Gibbons* is not even persuasive (much less precedential) as the *Olson* case from this Court is directly on point. Because Kirwan cites to no authority in South Dakota to support his argument, the Circuit Court correctly applied the *Olson* standard.

b. Evidence Considered by the Commission

As it relates to alterations to existing buildings located within the historic district of Deadwood, DMO 17.68.050 provides the considerations to be followed by the Deadwood Historic District Commission in determining whether a certificate of appropriateness necessary to alter the building should be granted. DMO 17.68.050 provides in relevant part:

The historic district and historic preservation commissions shall use the following criteria and established design review guidelines in granting or denying certificates of appropriateness and project approvals:

A. General Factors.

1. Architectural design of the resource and proposed alteration;
2. Historical significance of the resource;
3. General appearance of the resource;
4. Condition of the resource;
5. Materials composing the resource;
6. Size of the resource;
7. The relationship of the above factors to, and their effect upon the immediate surroundings and upon the district as a whole and its architectural and historical character and integrity; and
8. The location and visibility of the alteration and resource.

...

C. Exterior Alternation.

1. All exterior alterations to a building, structure, object, site or landscape feature shall be compatible with the resource itself and other resources with which it is related. The original design of a building, structure, object or landscape feature shall be considered in applying these standards.
2. Exterior alterations shall not affect the architectural character or historic quality of a resource and shall not destroy the significance of resource sites.

In addition to DMO requirements, the U.S. Department of Interior regulations,² 36

CFR 67.7 require:

- (1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
- (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
- (3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
- (4) Most properties change over times; those changes that have acquired historic significance in their own right shall be retained and preserved.
- (5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.
- (6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.
- (7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.
- (8) Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.

² In April 2014, the US Department of the Interior wrote a letter to the Deadwood Mayor and City Council expressing concern with the neglect of some historic resources and properties in the community. CR 53. This letter outlined the Department's concerns moving forward with protecting historic resources in Deadwood.

- (9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.
- (10) New additions and adjacent or related new construction shall be undertaken in such a manner that it removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

Kirwan attempts to minimize the Commission's discussion of the above factors by dismissing Kuchenbecker's Staff Report and characterizing select comments by the Commissioners as "vague reservations." Appellants' Brief, p. 8–9, 12 n.5. However, the full record shows that all *relevant* factors were discussed and analyzed.

It should be noted, the Commission did,³ and was permitted to, rely upon Kuchenbecker's Report in its analysis. In *Olson* the Supreme Court noted, when addressing on appeal the weight given to testimony from a planning director, that "[i]n small towns, city officials have the experience and competence to assess impact on property values and to weigh and assess similar values without relying on experts to determine whether or not a use is in harmony with the zoning ordinance and master plan." *Olson*, 480 N.W.2d at 776 (citing *White Bear Docking & Storage v. City of White Bear Lake*, 324 N.W.2d 174, 177 (Minn. 1982)). As Historic Preservation Officer for the City of Deadwood, Kuchenbecker possesses the same experience and competence identified in *Olson* to act as an authority on preservation matters. *Id.*

The Staff Report (the "Report") prepared by Kuchenbecker for the Deadwood Historic District Commission clearly outlined the Department of the Interior factors. It

³ Members of the Commission read part of the report aloud at the meeting and actively referred to it during discussions. CR 18–35.

explains that while Kirwan’s proposed alteration meets the first factor, it fails to meet any of the remaining factors necessary to permit an alteration to an existing building.

Factor one looks at the historical and current use of the building. The building was previously used as a clothing store and saloon and it operates as a clothing store and saloon today, meeting the first Department of the Interior standard. CR 44–46. However, Kirwan’s proposed alteration does not satisfy the rest of the Department of Interior factors.

Factor two focuses on retaining the historic character of the property. The Report notes that “[t]he proposed alteration appears to characterize buildings which were destroyed by fire in 1879,” but the building was built after the fire. *Id.* Therefore, the proposed alteration (adding rough sawn pine boards) does not retain the historic character of the property. *Id.*

Factor three prohibits “[c]hanges that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings.” *Id.* Here, “the proposed alteration creates a false senses of history” because the alteration would add features that were never part of the current building. *Id.*

Factor four seeks to retain and preserve changes to a building over time “that have acquired historic significance in their own right.” *Id.* The Report again notes that the current façade of the property best matches the historical nature of the building, without any alterations. *Id.*

Factor five seeks to preserve “distinctive features, finishes and construction techniques.” *Id.* The Report explains that “the current configuration and materials are the most appropriate characterizing features of the historic property.” *Id.*

Factor six focuses on repairing rather than replacing deteriorating features and notes the importance of matching design, color, texture, and materials. *Id.* The Report explains, “[t]he proposed alteration does not reflect nor follow this standard.” *Id.*

The Report finally notes that factors seven, eight, nine, and ten are not applicable to Kirwan’s application for a certificate of appropriateness, but notes the applicant initially completed the work without proper review and approval and was later asked to remove the boards. *Id.* The Department of the Interior factors outlined in the Report and considered by the Commission support the denial of the certificate of appropriateness.

As for the factors of DMO 17.68.050.A and C, the Commission discussed or referenced all *relevant* factors. The Historic Preservation Commission spent the majority of its discussion talking about the architectural design of the resource and the proposed alteration, the appearance of the resource, and materials composing the resource. DMO 17.68.050 (1), (3) and (5). These discussions included a review of historical photographs of Kirwan’s building. The Commission also considered and discussed that the appropriate architectural period begins in 1879 when Kirwan’s building was constructed, rather than 1875 when rough sawn lumber storefronts were commonly used in construction.

The Architectural design of the resource and proposed alteration, as well as the general appearance of the resource, were discussed at length with Kuchenbecker’s Report noting that the “proposed alteration creates a false sense of history to this specific building.” CR 20 (lines 20-25) DMO 17.68.050(A)(1) and (3). This false sense of history is created because the use of rough sawn pine boards alters the historic façade consistent with the original construction of the building by adding the features of an earlier structure, which no longer existed following the 1879 fire. *Id.* at 44–45. The report also contained photographs from a 1993 architectural survey, historic photographs which

depicted Kirwan's building over a number of years, and photographs taken of the building in 2020 after the pine boards had been attached to its façade in order to give the Historic Preservation Commission an understanding of Kirwan's request. *Id.* at 47–52.

Commissioner Diede noted that a 1913 photograph of the building depicted “pretty much how it looked like before the carousel took it over” and that the current facade of Kirwan's building was “the way the building looked in the early 1960s.” *Id.* at 28 (lines 23–24). One unidentified commissioner stated, when viewing the historic photographs of Kirwan's building that the current look without the rough sawn pine boards “looks a lot like it does now.” *Id.* at 29 (line 17). Kuchenbecker and the Commission also discussed photographs of the façade of Kirwan's building noting that the 1913 photographs depicted similar horizontal lap siding to the siding Kirwan sought to replace with rough sawn pine boards. *Id.* at 30 (lines 8–9).

Additionally, Kuchenbecker explained that the period of significance in 1875 when pine facades were commonplace was inappropriate because Kirwan's building did not exist until 1879 and that the requested pine façade would require the Commission to approve construction materials used during two different periods of significance. *Id.* at 30 (lines 16–17). Kuchenbecker noted Kirwan's building was built in 1879 after a great fire had destroyed much of downtown Deadwood. *Id.* at 30. Following this fire, “the boomtown architecture, the rough sawn lumber storefronts and the log cabins and canvas tents disappeared.” *Id.* Because the storefronts following the great fire ceased to use rough sawn lumber, similar to the pine boards proposed by Kirwan, the Commission discussed the construction methods used in 1879, following the fire, when Kirwan's building was constructed.

The Commission also viewed the oldest photograph depicting the condition of Kirwan's building, which was taken in 1913. *Id.* This photograph shows a storefront virtually identical to Kirwan's building prior to the application for certificate of appropriateness. *Id.* Kirwan cites no authority to support the contention that reliance upon this period of significance is inappropriate and it remains to be seen how a Historic Preservation Commission could consider architectural methods used prior to a building's construction.

The historical significance of the building was also considered. DMO 17.68.050(A)(2). Kuchenbecker stated Kirwan's building, along with other neighboring properties in the same area, were "some of the oldest buildings remaining in the historic district." *Id.* at 31. Commissioner Weber said: "I think we have to be really careful because this is [sic] our oldest buildings. These are some of the few buildings that are actually left. I think changing is a really big deal and I don't . . . I think we have to be real careful." *Id.* at 32. Commissioner Weber stated that if changes were to be made to Kirwan's building, she felt that "it should be taken back to its more original look, not add something that is new that was never there." *Id.* at 33.

In addition to the hearing transcript itself, Kuchenbecker's Report describes the historic significance of the resource, discussing both the fact that Kirwan's building is a historic feature of Deadwood which was built after the 1879 fire and that the current look of the building "is a reconstruction of the original." Aff. at ¶ 15. The Report states the architectural design and proposed alteration "does encroach upon, damage, or destroy a historic resource" in the Deadwood National Historic Landmark district because it is important to "maintain the traditional design and materials of this historic resource." CR

46 (Report); Aff. at ¶ 15. The Report further notes Kirwan’s request alters the “traditional elements by introducing non-painted materials and stylistic elements.” Aff. at ¶ 15.

Finally, the commissioners discussed DMO 17.68.050(A)(7) and (8) – the relationship of the factors to and effect upon the immediate surroundings and the location and visibility of the alteration and resource. During the March 10, 2021 hearing, Kuchenbecker discussed, and the Commission considered, the appearance of the area in which Kirwan’s building sits, known as the “Phoenix Block” which was constructed immediately following the catastrophic fire in Deadwood in 1879. CR 30. Kuchenbecker noted Kirwan’s building is among “the oldest buildings remaining in the historic district.” *Id.*

There are no explicit references by the Commission to the building’s condition (DMO 17.68.050(4)) or size (DMO 17.68.050(6)). That said, Kirwan has provided no authority demonstrating why non-relevant factors must be considered. The addition of a pine façade would not change the condition of the building nor the size or height of the building. It simply defies common sense that the Commission would be required to consider factors that are not applicable or relevant to the application for issuance of a certificate of appropriateness. Kirwan argues the use of the word “shall” in DMO 17.68.050 means the Commission must consider “all” factors—including irrelevant ones—such as factors set forth in DMO 17.68.050(4) and (6), which clearly do not apply to Kirwan’s request. However, a common sense reading of DMO 17.68.050 would dictate that the Commission must consider the listed factors of 17.68.050, not that it must consider all factors even those that are irrelevant to the application.

The Historic Preservation Commission also considered the factors of DMO 17.68.050(C), which outlines considerations for exterior alterations to historic buildings.

As discussed, the Commission considered at length whether the proposed exterior alterations consisting of a pine façade were compatible with the original construction of Kirwan’s building and whether it would affect the architectural character and historic quality of the building of its historical significance.

The Commission summarized its discussions and unanimously voted to deny the application as being “incongruous with the historical, architectural, archaeological or cultural aspects of the district.” CR 60. However, that one sentence does not fully encapsulate Kuchenbecker’s Report compiled and relied upon by the Commissioners, the public debate by the Commission (at which Mr. Kirwan was present, CR 24), or the June 8, 2020 meeting between Mr. Kirwan and members of the Commission staff regarding the Commission’s concerns with the proposal and other potential changes that would be permitted. The record clearly demonstrates that there is substantial evidence to affirm the Commission’s denial for Kirwan’s application for a certificate of appropriateness.

II. THE DEADWOOD HISTORIC DISTRICT COMMISSION CONSIDERED AND FOLLOWED THE CRITERIA IN DEADWOOD MUNICIPAL ORDINANCE 17.68.050

As explained at length in response to Issue I, the Commission considered six of the eight general factors for alterations to existing buildings (DMO 17.68.050(A)), considered the two exterior alteration factors (DMO 17.68.050(C)), and six of the ten Department of the Interior factors. The two DMO factors not considered were DMO 17.68.050(A)(4), the condition of the resource and DMO 17.68.050(A)(6), the size of the resource. However, these factors simply have no bearing on whether adding roughhewn boards to the façade of the building is historically appropriate.

Kirwan notes that these factors were not discussed, but does not explain how their express consideration would have assisted the Commission in concluding that his

certificate of appropriateness should be approved. The boards did not change the condition and structure of the building, as the boards were simply an aesthetic change. Therefore, the condition of the building pre or post pine boards is not relevant to the question of whether the boards are appropriate for the historic building. Second, Kirwan did not propose expanding or changing the size of the building. Therefore, the size of the building is not relevant to whether the boards are an appropriate façade for an existing building in the historical district. The Commission was not required to consider factors that were not relevant to the building at issue. *See Marie v. American Red Cross*, 771 F3d 344, 352–59 (6th Cir. 2014) (finding it is only necessary to consider relevant factors to determine if an individual is an employee for Title VII purposes).

Kirwan argues that “the Historic District Commission did not specifically address any of the [DMO] criteria and this Court should not be left to read into the individual comments of Commission members to possibly pigeonhole comments, after-the-fact, to match the criteria.” Appellants’ Brief, p. 18. However, one does not have to pigeonhole comments in order to fit the different topics discussed by the Commissioners into each relevant factor of DMO 17.68.050(A) and (C). Reading the transcript as a whole, and as outlined factor by factor in Section I, the Commissioners discussed the six relevant factors. Simply because each Commissioner did not state “In reference to factor 1” as a preface to each comment, does not mean the factor was not discussed. Nor has Kirwan shared any case law to support that view. Kirwan’s cases simply highlight the importance of considering all DMO factors – something Deadwood does not dispute. However, it is simply a futile exercise to consider and discuss factors that are not relevant to the question at hand.

Therefore, this Court should affirm the Circuit Court's ruling and find the Deadwood Historic District Commission properly considered and followed the criteria in DMO 17.68.050.

III. THE COMMISSION COMPLIED WITH SDCL § 1-19B-49

To the extent SDCL § 1-19B-49 requires reasons for a denial to be provided to the applicant, Kirwan was provided a denial letter summarizing the reason for the denial on March 11, 2021. CR 60. He was also present at the March 10, 2021 Commission meeting where this was discussed and at the prior June 8, 2020 meeting with Commission staff where the Commission's concerns were discussed and alternatives were proposed. Kirwan was fully informed and aware of the concerns about adding the roughly hewn boards to the façade of his building.

The South Dakota cases cited by Kirwan in support of his argument are distinguishable. Kirwan cites three cases highlighting the importance of providing a rationale for an agency's or board's decision and considering the required factors, *In re B.Y. Development, Inc.*, 785 N.W.2d 296 (S.D. 2010) (superseded by statute on other grounds as stated in *McDowell v. Sapienza*, 906 N.W.2d 399 (S.D. 2018)); *Matter of Sdds, Inc.*, 472 N.W.2d 502 (S.D. 1991); and *Hall v. State*, 712 N.W.2d 22 (S.D. 2006). However, unlike the cases cited, Deadwood did discuss all relevant factors found in both Deadwood ordinances and Department of Interior requirements. Discussions were held with Kirwan both in public during the March 10, 2021 meeting and in private at the June 8, 2020 meeting with Commission staff. Kirwan's cases do not support the position that the rationale for the Commission's decision was not set forth.

While Kirwan's cases are distinguishable for the above reasons, *Olson v. Deadwood* is on point and supports affirming the Circuit Court. In *Olson*, this Court addressed whether the Deadwood Planning and Zoning Commission's denial of a use-on-review permit was supported by substantial evidence. During the Planning and Zoning meeting, various board members stated their concerns, with the primary concern being the location of a motel in a predominately residential neighborhood. *Id.* at 777. Planning and Zoning ultimately denied the "use-on-review" but did not state any reasons for the denial. *Id.* The Circuit Court remanded the decision back to Planning and Zoning to articulate reasons for the denial. *Id.* On remand, the reasons given by Planning and Zoning were as follows:

- (1) That the use would be injurious to the use and enjoyment of the other property in the immediate [area] which has been residential in character.
- (2) That the use would impede the normal and orderly development of the surrounding property for the residential uses predominate in the area and proposed public uses by the City of Deadwood.
- (3) That there is inadequate access for a commercial venture of the size proposed by [the Olsons] for many reasons, including, but not limited to, the size, the legal issues of who would be responsible for the construction, maintenance, and liability and the confusion which would be created for the traveling public of [sic] a street going through an existing parking lot.

Id.

The Olsons appealed the Circuit Court decision to remand the case on the basis "it was an abuse of the trial court's discretion to remand to the Board to allow it to 'rationalize' its decision after-the-fact." *Id.* However, this Court noted that "the city ordinance does not require the Board to record its reasons in the record or to make findings of fact in support of its conclusion. For that reason, the Board's failure to enter on the record its reasons for denial did not render its decision arbitrary or capricious per

se.” *Id.* at 777–78. Nothing in the Deadwood Ordinances regarding the issuance of certificates of appropriateness requires the Commission to record its specific reasons in the record or to make written findings of fact.

In the present case, as noted *supra*, significant consideration was given to Kirwan’s request for certificate of appropriateness. The Historic Preservation Commission considered the historic appearance of Kirwan’s building at the time of its construction, the period of significance, 1879, when the existing structure was built, the conditions of surrounding buildings which were constructed during the same time frame as Kirwan’s building, and the need to maintain the historical context of the historical district. While each Commissioner may not have specifically stated these reasons in the exact form set forth in DMO 17.68.050, they certainly discussed each of the criteria required to be considered.

Under *Olson*, the lack of findings of fact or specific references to the criteria considered under Ordinance 17.68.050 is not fatal. Instead, a consideration of the evidence considered by the Historic Preservation Commission is necessary. Substantial evidence exists showing the criteria of Ordinance 17.68.050 was considered by the Commission as noted above. Therefore, if this Court believes the specific factors relied upon by the Commission should be articulated in the same manner as set forth in 17.68.050, precedent exists to remand the case to the Historic Preservation Commission to list the specific factors considered and not to overturn the Circuit Court. *Id.* at 777–78.

IV. THE CIRCUIT COURT WAS NOT REQUIRED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ITS ORDER

Relying upon SDCL § 1-26-36, Kirwan suggests the Circuit Court committed reversible error by not entering findings and of fact and conclusions of law. Appellants’

Brief, p. 22–23. Kirwan disregards this Court’s contrary decision in *Olson*. 480 N.W.2d 770. In *Olson*, this Court stated,

Unlike the situations presented in many of the cases cited by the Olsons, the city ordinance in question here does not require the Board to make findings of fact. We note a board of adjustment is not a state agency and, there, is not subject to the state administrative procedure and rules statutes. SDCL 1-26-1(1) (1991 Supp.). ‘In the absence of [an ordinance requiring such], a board of adjustment is not required to include findings of fact or a statement of reasons for its decision.’

Olson, p. 776–77.

Because the Board itself was not required to include findings of fact, the court reviewing its decision is also not subject to the requirements of the SDCL § 1-26-36. Likewise, nothing in DMO 17.68.050 requires the Deadwood Historic Preservation Commission to issue findings of fact and conclusions of law. Further, the sole case cited by Kirwan, *Toft v. Toft*, analyzes the required findings of fact and conclusions of law when “ruling on a request for attorney’s fees.” *Toft v. Toft*, 723 N.W.2d 546, 550 (S.D. 2006). Attorney’s fees are not at issue here and neither is the administrative procedures act.

Therefore, the Circuit Court did not err by following *Olson v. City of Deadwood* and declining to make findings of fact and conclusions of law.

V. THE CIRCUIT COURT CORRECTLY ACCEPTED THE AFFIDAVIT OF KEVIN KUCHENBECKER

Kirwan contends the Circuit Court erred when it accepted the affidavit of Kevin Kuchenbecker. First, it claims Deadwood “cited no rule which allowed for such a submission of an Affidavit to add ‘facts’ to the record on appeal.” Appellants’ Brief, p. 23–24. Second, Kirwan claims “the ‘facts’ described by Mr. Kuchenbecker in his affidavit were not known or considered by the Historic District Commission at the time it

voted on the application for Certificate of Appropriateness. . . . The [June 8, 2020] meeting is not mentioned in the Staff Report to the commission and no commissioner mentioned it at the March 10, 2021 meeting.” *Id.* at 24–25. However, Kirwan has only shared one side of the story with this Court.

Kirwan’s initial brief to the Circuit Court indicated that, in violation of DMO 17.68.060(D), no meeting occurred between the applicant and members of the Commission or Commission staff “for the purpose of learning whether changes or adjustments to the applicant could make it more consistent with the commission’s standards.” CR 1312. However, the record clearly shows that a meeting did occur on June 8, 2020 between Kirwan, Kuchenbecker, Russell, Kirwan’s attorney at the time Scott Odenbach, and City Attorney Quentin L. Riggins for that exact purpose. CR 1763; OAT, p. 4. At the meeting, “Mr. Kirwan was provided with [the] earliest known photographs of his building,” “was told that there were concerns with utilization of rough sawn pine boards because the use of these boards was inconsistent with the original condition of the building.” He was also informed “that while pine boards were consistent with building structures from 1875-1879 in Deadwood, this particular building was constructed after these buildings had burned and so the addition of rough sawn pine boards altered the original form of the building, making it inconsistent with its original form,” and he was “instructed that there were various ways he would likely find approval from the Historic Preservation Commission.” CR 1763.

Kuchenbecker’s affidavit was thus submitted to the Circuit Court “to clarify a misstatement of the facts in the original appellate brief.” OAT, p. 4. The Circuit Court accepted the affidavit “to clarify the record regardless of what [Mr. Kirwan’s current counsel] w[as] or w[as] not aware of.” *Id.* at 5. Had the Circuit Court not admitted the

affidavit, Deadwood could not have responded to Kirwan’s false accusation that no meeting occurred under DMO 17.68.060(D). Kirwan should not be permitted to benefit from his misstatement of facts to the Circuit Court, which the Circuit Court noted. OAT 4:4–6:1.

Kuchenbecker’s affidavit is limited to the June 8, 2020 meeting – the meeting Kirwan contended in his brief that did not occur. The Circuit Court is permitted to consider new evidence to rebut false statements on the record. *See e.g., Sorensen v. Harbor Bar, LLC*, 871 N.W.2d 851, 857–58 (S.D. 2015) (undisclosed rebuttal witness permitted to testify to “explain[], contradict[], or refute[] evidence of the defendant.”); *State v. Williams*, 748 N.W.2d 435, 442 (S.D. 2008) (“Trial court judges have wide discretion in permitting the State to introduce additional evidence after it has closed its case. This also applies when the testimony admitted is rebuttal evidence to contradict the defendant’s version of the facts.”).

Therefore, the Circuit Court correctly accepted the affidavit into the record in order to ensure Kirwan could not benefit from a misstatement of fact he made to the Court on the record.

CONCLUSION

Deadwood’s decision to deny Kirwan’s second application for a certificate of appropriateness was supported by an analysis of DMO 17.68.050 and the Department of Interior requirements. The Circuit Court properly applied the definition of substantial evidence in reaching its decision and correctly accepted Kuchenbecker’s affidavit to correct factual inaccuracies in Kirwan’s Circuit Court brief. Therefore, Deadwood respectfully requests this Court affirm the Circuit Court’s decision.

REQUEST FOR ORAL ARGUMENT

Deadwood respectfully requests oral argument on these issues.

Dated this 1st day of April 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Quentin L. Riggins

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellees' Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellees' Brief, including footnotes, contains 6,297 words. I have relied upon the word count of our word processing system as used to prepare this Appellees' Brief. The original Appellees Brief and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Quentin L. Riggins

Quentin Riggins

CERTIFICATE OF SERVICE

I hereby certify on April 1, 2022, I emailed a true and correct copy of the foregoing **APPELLEES' BRIEF** to the following at his last known e-mail addresses:

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I further certify that on April 1, 2022, I emailed the foregoing **APPELLEES' BRIEF** and sent the original and two copies of both by U.S. Mail, first-class postage prepaid, to:

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By: /s/ Quentin L. Riggins
Quentin Riggins

APPENDIX

Affidavit of Kevin Kuchenbecker..... App. 1 - 3

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF LAWRENCE)

IN MAGISTRATE COURT
FOURTH JUDICIAL CIRCUIT

HARLAN KIRWAN and PANDORA'S)
BOX, LLC d/b/a GUNSLINGER SALOON,))
Appellants,)
vs.)
CITY OF DEADWOOD,)
Appellee.)

Case No. 40CIV21-75

AFFIDAVIT

AFFIDAVIT OF KEVIN KUCHENBECKER

Kevin Kuchenbecker, being first duly sworn on oath, deposes and states:

1. I am the Historic Preservation Officer for the City of Deadwood.
2. As part of my duties as Historic Preservation Officer, my job is to prepare reports for the Historic Preservation Commission whenever an application for project approval or certificate of appropriateness is sought.
3. In April of 2020, it came to my attention that Gunslingers, a business owned by Harlan Kirwan, located at 669 Main St., altered the façade of his building to replace the existing storefront with rough sawn pine boards with a burnt finish.
4. Prior to making these alterations in April of 2020, Mr. Kirwan had not obtained a certificate of appropriateness which is required for his building nor a building permit also required by the City of Deadwood.
5. Mr. Kirwan filled out an application for a certificate of appropriateness following completion of this unauthorized work on May 3rd, 2020.

6. On May 27th, 2020, the Historic Preservation Commission denied Mr. Kirwan's request for a certificate of appropriateness.

7. Following the denial of the certificate of appropriateness, which was communicated to Mr. Kirwan via letter dated May 28th, 2020, the City of Deadwood offered to meet with Mr. Kirwan to discuss the façade of his building at 669 Main St. Attached as Exhibit A is a true and correct copy of the letter denying the application for certificate of appropriateness.

8. On June 8th, 2020, Mr. Kirwan, along with his attorney Scott Odenbach, Planning and Zoning Administrator, Jeramy Russell and city attorney, Quentin L. Riggins and myself met to discuss Mr. Kirwan's request to change the façade of his building.

9. At this meeting, Mr. Kirwan was provided with our earliest known photographs of his building which depicted its condition in the early 1900s.

10. After providing Mr. Kirwan with photographs of his building in its original condition, Mr. Kirwan was told that there were concerns with utilization of rough sawn pine boards because the use of these boards was inconsistent with the original condition of the building.

11. Mr. Kirwan was also told during this meeting that while pine boards were consistent with building structures from 1875-1879 in Deadwood, this particular building was constructed after these buildings had burned and so the addition of rough sawn pine boards altered the original form of the building, making it inconsistent with its original form.


12. At the June 8th, 2020 meeting, Mr. Kirwan was also instructed that there were various ways that he would likely find approval from the Historic Preservation Commission. Significant discussions occurred regarding potential paint schemes and windows as well as other possible modifications to Mr. Kirwan's plan.

13. After the June 8th, 2020 meeting with Mr. Kirwan and his attorney, Scott Odenbach, Mr. Kirwan resubmitted an application using rough sawn pine boards for the façade of 669 Main St., despite the fact that he was told the use of this product was not consistent with the original design and materials.

14. Attached is a true and correct copy of a letter sent by myself to Mr. Kirwan informing him of the Historic Preservation Commissions denial of his request for a certificate of appropriateness at the March 10, 2021 meeting. Exhibit B.

15. Attached is a true and correct copy of a report prepared by myself discussing Mr. Kirwan's request for a certificate of appropriateness which was provided to the Historic Preservation Commission prior to the March 10, 2021 meeting. Exhibit C.


Dated August 31, 2021.


Kevin Kuchenbecker

Subscribed and sworn to before me on August 31, 2021.

(SEAL)




Notary Public – South Dakota
My Commission Expires:

MY COMMISSION EXPIRES
SEPTEMBER 28, 2024

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

HARLAN KIRWAN and PANDORA’S BOX, LLC d/b/a GUNSLINGER SALOON,

Appellants,

v.

CITY OF DEADWOOD, a Municipal Corporation, and DEADWOOD HISTORIC
PRESERVATION COMMISSION, and DEADWOOD HISTORIC DISTRICT
COMMISSION,

Appellees.

Appeal No. 29836

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

THE HONORABLE MICHELLE K. COMER, CIRCUIT COURT JUDGE

APPELLANTS’ REPLY BRIEF

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December 3, 2021

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ARGUMENT

I. THE CIRCUIT COURT ERRED BY DETERMINING SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT THE DECISION OF THE DEADWOOD HISTORIC DISTRICT COMMISSION.

A. The Circuit Court clearly erred by finding that substantial evidence is defined as “a mere scintilla” of evidence.

Appellees claim that the Circuit Court’s statement that *Olson* described “substantial evidence” as “a mere scintilla” was simply a “slip of the tongue.” Appellees’ Brief p. 7. However, a proper review of the Court’s statements demonstrates a misunderstanding of the “substantial evidence” standard. The Circuit Court not once, but twice, stated that the requirement was “a mere scintilla” rather than “more than a mere scintilla” of evidence. OAT 19_{19-20, 21}. The Circuit Court, in between those two statements, also expressed confusion over that standard. OAT 19₂₀₋₂₁. Further, the Court referenced that was the standard that “Mr. Riggins alluded to.” OAT 19₁₈. Although Mr. Riggins initially correctly stated the standard, he later misstated the standard. OAT 14_{20, 22-23}. That misstatement was the standard that the Court found applied in this case.¹

Appellees also perplexingly claim that Appellants’ definition of the substantial evidence standard “strays” from this Court’s prior decisions. Appellees’ Brief p. 6. This is not true. Appellants quoted the same language from *Olson* that Appellees quote, and Appellants applied that language to the facts of this case. Simply because Appellants

¹ Perhaps if the Court had stated what substantial evidence it found existed or made specific findings the statements could be determined to be a “slip of the tongue”, but one assumes that a Court means what it says. *Cf. Reck v. S.D. Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 14, 932 N.W.2d 135, 140 (“This court assumes that statutes mean what they say and that legislators have said what they meant.”); *In re State Sales & Use Tax Liab. of Pam Oil*, 459 N.W.2d 251 (S.D. 1990) (the circuit court’s construction of a statute implied that a “mere acceptance” of a resale certificate was sufficient burden of proof was found to be an erroneous burden of proof).

also cited relevant out-of-state cases which also used a “substantial evidence” standard and applied that standard in the context of appeals from Historic District Commissions – persuasive authority that this Court may find helpful – does not “avoid” the standard or “stray” from the standard that was quoted exactly from the *Olson* case.

Finally, Appellees claim that the “Circuit Court explained that in coming to this standard, it relied upon Deadwood’s brief.” Appellees’ Brief p. 7 (emphasis added). The transcript of the oral argument hearing belies this claim. Relying on boilerplate, standard language of the Court’s Order (cited by Appellees) does not strengthen Appellees’ argument.²

Because the Circuit Court made an erroneous legal conclusion, by specifically finding that “substantial evidence” requires only a mere scintilla of evidence, this Court is not bound by that conclusion and this Court should review the evidence without giving deference to the Circuit Court’s conclusions.

B. *Olson* is not “directly on point.”

Appellees heavily rely on *Olson v. Deadwood*, 480 N.W.2d 770 (S.D. 1992) in their brief and claim that this thirty-year-old decision is “directly on point.” Appellees’ Brief p. 8. However, *Olson*, while helpful, is not “directly on point.” First, *Olson* involves decisions by a board of adjustment and planning and zoning commission, rather than an Historic District Commission. *Id.* Further, *Olson* did not address whether the board and commission correctly applied the criteria found in statute. *Id.* The facts of

² In other contexts, this Court has held that “mere recitation” of standard language is insufficient when entering findings. *Cf. Knecht v. Evridge*, 2020 S.D. 9, ¶¶ 44-45, 940 N.W.2d 318, 331 (holding that a bare statement was insufficient to satisfy the standard for certification of a final order).

Olson are unique and distinguishable from this case. *Olson* involved three Board of Adjustment meetings, Planning and Zoning Commission meetings, and at least two petitions or appeals to the Circuit Court. *Id.* In that case, the board actually restated the language of the ordinance in its first decision to deny Olson’s request. *Id.* at 776. Here, the Historic District Commission was seemingly unaware that a city ordinance even applied to the request for Certificate of Appropriateness, as no mention of any City Ordinance ever occurred. HT 1-17. In *Olson*, “the city ordinance in question...does not require the Board to make findings of fact.” *Id.* at 777. Here, while the City Ordinance does not require findings of fact, State Statute does require reasons to be stated. *See* SDCL 1-19B-49. In *Olson*, the court found, related to the first denial, that because the city ordinance did not require specific findings or a statement of reasons, the reasons provided by the Board were sufficient. *Olson*, at 777. This is not the case here.

Olson is distinguishable for a second reason. In that case, a second Board decision was made, after a re-hearing based upon new evidence. *Id.* After that hearing, the Board and Commission simply denied Olson’s request, without stating any reasons. *Id.* On appeal, the Circuit Court remanded to the Board to make specific findings, which it did. *Id.* at 777-78. On appeal to the Supreme Court, the Court found that two of the three reasons stated by the Board were supported by substantial evidence. *Id.* at 778. Here, the reason stated by the Historic District Commission does not even parrot the City Ordinance; it is unrelated to the criteria the Historic District Commission must apply and is not supported by substantial evidence.³ This alone merits reversal.

³ The reason for denial stated on the record was “the exterior alteration proposed is incongruous with the historical, architectural, archeological, or cultural aspects of the

While *Olson* provides a definition of “substantial evidence” and one of the parties (Deadwood) is the same as in this case, the similarities essentially stop there; the case is not “directly on point.” Of note in *Olson* is also Justice Henderson’s concurrence. Justice Henderson warned the City of Deadwood that it should make explicit findings, not simply parrot a statute, and that boards should not be “empty gestures, nor...a rubber stamp...” *Id.* at 778-79 (Henderson, J. concurring). Justice Henderson also stated, “in the future[,] the city of Deadwood should isolate its thinking into findings of fact in a more explicit manner.” *Id.* (Henderson, J. concurring). This directive was apparently not taken to heart by the Appellees because the Historic District Commission’s decision here does little more than rubber-stamp the *Staff Report* recommendation.

C. The Historic District Commission’s denial of the Certificate of Appropriateness is not supported by substantial evidence.

Appellees argue that the Historic District Commission⁴ considered appropriate criteria from the Department of Interior regulations. Appellees’ Brief p. 9-12. However, these are not the factors that the city ordinance requires to be considered. *See* DCO 17.68.050. This lengthy argument by Appellees is a red herring. For the first time on appeal, Appellees cite 36 CFR 67.7 and claim these Department of Interior regulations

district.” HT 17₁₀₋₁₃. Substantial evidence does not exist to support this conclusion. *See Appellants’ Brief p. 7-12.*

⁴ Footnote 1 in Appellees’ Brief states, “The Deadwood Historic Preservation Commission and the Historic District Commission are comprised of the same members. Thus the terms are used interchangeably.” This is problematic. Historic Preservation Commissions and Historic District Commissions are both authorized, separately, by state statute. Each Commission has different duties and responsibilities and oversees different requests from the public. The two different commissions are not “interchangeable.” *See* SDCL 1-19B-2 through 31 (Historic Preservation) and SDCL 1-19B-38 through 51 (Historic District).

must be applied. Appellees' Brief p. 9. While the *Staff Report*⁵ outlined these criteria, the city ordinances never reference these criteria nor adopt them as criteria to be considered by the Historic District Commission. See DCO 17.68.050. It is well established that it is inappropriate to raise issues for the first time on appeal – especially here, when the appeal requires review of a Commission's findings. See, e.g. *Gantvoort v. Ranschau*, 2022 S.D. 22, n.1, -- N.W.2d --, --; *People ex rel D.S.*, 2022 S.D. 11, n.5, -- N.W.2d --, --.

Appellees claim, “the Commission did...rely upon Kuchenbecker’s Report in its analysis” and “[m]embers of the Commission read part of the report aloud at the meeting and actively referred to it during discussions.” Appellees' Brief p. 10. This is not accurate. Mr. Kuchenbecker, who is not a member of the Commission, read the report to the Commission; members of the Commission did not read it aloud. See generally HT 1-17. Members of the Commission discussed photos. HT 11-12, 14. Appellees rely on the *Staff Report* to try to bolster the decision of the Historic District Commission, rather than relying on the comments and stated decision of the Historic District Commission. Further, Commission members did not say they were adopting the report or otherwise relying on it in making their collective decision to deny Mr. Kirwan’s application. HT 17.

Appellees' claim that “while Kirwan’s proposed alteration meets the first factor, it fails to meet any of the remaining factors...” is also incorrect. Appellees' Brief p. 11. The *Staff Report* actually determined that factors 7, 8, 9, and 10 were not applicable, not

⁵ Appellees refer to the *Staff Report* as “Kuchenbecker’s Report” throughout its brief. However, the claim on page 10 that Kuchenbecker prepared the report contains no citation to the record. The *Staff Report* does not list an author. CR 44-52.

that Mr. Kirwan's application failed to meet those factors. Interestingly, the *Staff Report* addressed all Department of Interior factors, even those "not relevant" or "applicable."

First, as noted previously, these factors from the Department of the Interior are inapplicable to this Appeal. This appeal concerns the Historic District Commission's failure to abide by its own city ordinance and follow the directives of state statute, as well as a lack of substantial evidence to support the stated reason for denial. The federal guidelines are not incorporated by city ordinance or state statute. Appellees rely heavily on an analysis of these Department of Interior factors in their brief, but virtually ignore the DCO 17.68.050 factors which are a main issue in this appeal. Even if the Historic District Commission did consider the Department of Interior standards in its decision, such is of no import. The Deadwood City Ordinance requires its own factors to be used and makes no mention of the CFR or Department of Interior standards.

Moreover, as this Court noted in *M.G. Oil Co. v. City of Rapid City*,

[W]e want to be clear that a review for substantial evidence does not supplant the necessary determination that an entity's actions were arbitrary and capricious. The substantial evidence examination, discussed in detail in *Olson*, 480 N.W.2d at 774-75, looks at whether substantial evidence supports an entity's factual findings, not whether there is substantial evidence to support the action of the entity.

2011 S.D. 3, 793 N.W.2d 816 n. 8. Contrary to this precedent, Appellees ask this Court to review the Commission's decision for any reason to support denial, rather than looking at the reason given. Appellees' Brief p. 12 (argument that the Department of Interior factors support denial). Appellees' Brief fails to address: (i) the actual stated reason for denial; that (ii) the reason was not supported by the evidence; and (iii) it, ultimately, was not reasonable and was arbitrary.

II. THE CIRCUIT COURT ERRED BY FINDING THE DEADWOOD

HISTORIC DISTRICT COMMISSION CONSIDERED AND FOLLOWED THE CRITERIA IN DEADWOOD CITY ORDINANCE (DCO) 17.68.050.

A. The Commission did not consider all the required criteria in DCO 17.68.050.

Appellees, while admitting they did not consider all DCO 17.68.050.A and C factors, claim they “discussed or referenced all *relevant* factors.” Appellees’ Brief p. 12. Again, this is the first time Appellees have made the argument that the Commission did not need to apply all factors from its own city ordinance. Interestingly, the only case Appellees cite to support this claim (while ignoring the plain ordinance language of “shall” and “and”) is a Sixth Circuit case which, upon review, does not support their position. Appellees’ Brief p. 17 (citing *Marie v. American Red Cross*, 771 F.3d 344, 352-59 (6th Cir. 2014)).

In *Marie v. American Red Cross*, the Sixth Circuit was tasked with determining whether Red Cross volunteers were “employees” pursuant to Title VII. *Id.* No criteria had previously been established to make that determination, and the court used the criteria that is normally used to determine if a person is an “employee” or “independent contractor.” *Id.* The criteria did not neatly fit the situation, and the court noted that not all of those factors (known as *Darden* factors) were applicable to the situation. *Id.* However, the court still mentioned each factor and determined that some were not instructive; thus, the court considered each factor outlined in the test. *Id.* at 359. That case is distinguishable from the current situation where an Historic District Commission is tasked with determining whether to grant or deny a Certificate of Appropriateness by applying the criteria it created for that exact situation. The Historic District Commission did not even consider the DCO 17.68.050 factors. As outlined on pages 9-12 of

Appellees' Response Brief, Mr. Kuchenbecker outlined and advised the Historic District Commission to rely on Department of Interior factors.

Next, Appellees claim "Kirwan cites no authority to support the contention that reliance upon this period of significance [1879] is inappropriate...." Appellees' Brief p. 14. However, it should be noted that the period of significance begins in 1875, not 1879. HT 8₁₈₋₂₀; 10₁₀; 13₁₃₋₁₄. Further, the Historic District Commission relied on a 1913 photo, which may not depict the original look of the building from more than 30 years earlier. Certainly architecture, style, and design today is different than it was in the late 1980s; it is reasonable to believe that the 1913 photograph, an arbitrary date during the period of significance, does not depict the original look of the building. Appellees dismiss any other possible look yet cite no authority to support their claims regarding architecture of the time. *See* Appellees' Brief p. 14.

Appellees claim that the Historic District Commission's stated decision,⁶ copied verbatim from the dictates of the *Staff Report*, "does not fully encapsulate Kuchenbecker's Report compiled and relied upon by the Commissioners, the public debate by the Commission..., or the June 8, 2020 meeting between Mr. Kirwan and members of the Commission staff...." Appellees' Brief p. 16. As noted in Appellants' opening brief, there is no evidence that any member of the Historic District Commission, much less the Commission as a whole, had any knowledge of the June 8, 2020 meeting.⁷

⁶ Appellees appear to concede that the Historic District Commission did not enter reasons for its denial. Appellees' Brief p. 19-20.

⁷ As will be discussed *infra*, it is apparent from the repeated references to Mr. Kuchenbecker's Affidavit that the purpose of the Affidavit was to significantly supplement the record previously created by Appellees, rather than to simply provide some basic factual information that such a meeting occurred after Mr. Kirwan's first application was denied – an application which is not the subject of this appeal.

However, the Commission did not state on the record that it was relying on the *Staff Report* or any information outside of the discussion which occurred at the March 10, 2021 meeting. Contrast this with the specific findings and adoption of a staff report the Deadwood Historic Preservation Commission made in *In re B.Y. Dev., Inc.*, 2010 S.D. 57, n.1, 785 N.W.2d 296, n. 1.

Appellees claim that the two Deadwood City Ordinance factors they concede it did not consider, 17.68.050.A (4) and (6), are not relevant factors and did not need to be considered by the Historic District Commission. Appellees' Brief p. 16. However, (4), "condition of the resource," is relevant. The condition of the resource would have a bearing on whether a new façade should be granted to cover up a potentially deteriorating resource or whether the resource is in excellent condition and whether a new façade should not be allowed. Additionally, (6), the "size of the resource," has bearing on the impact of the change and how noticeable the change would be (i.e. whether it is a small unnoticeable storefront or most of a city block, as some Deadwood buildings are).

Appellees concede that it is important to consider all DCO factors but try to claim that some are not relevant, so it does not matter that those criteria were ignored. Appellees' Brief p. 17. In reality, the Historic District Commission did not consider the DCO criteria; if anything, it relied on the Department of Interior factors outlined in the *Staff Report*, which are different criteria than those outlined in DCO 17.68.050. If the Historic District Commission does not follow its own criteria outlined in its own city ordinances, how can an applicant have fair warning of what criteria must be met to obtain a Certificate of Appropriateness? If the Historic District Commission does not follow its own criteria, its decisions are arbitrary. When the stated reason for denial bears no

relationship to the criteria it must consider, the decision is arbitrary.

III. THE CIRCUIT COURT ERRED BY FAILING TO ADDRESS WHETHER THE DEADWOOD HISTORIC DISTRICT COMMISSION COMPLIED WITH SDCL 1-19B-49.

Appellees do not seem to grasp the application of SDCL 1-19B-49 to the issues at hand. *See* Appellees' Brief p. 18 ("To the extent SDCL 1-19B-49 requires..."). That single sentence is the only reference Appellees make to SDCL 1-19B-49; no further discussion of the statute occurred by Appellees in their brief. Instead, Appellees changed the subject and continued arguing about Deadwood ordinances and Department of Interior requirements. *Id.* While arguing that "Nothing in the Deadwood Ordinances regarding the issuance of certificates of appropriateness requires the Commission to record its specific reasons in the record or to make written findings of fact" this ignores the statutory requirements of SDCL 1-19B-49 which is the basis for Appellants' Argument III.⁸

The Historic District Commission decision did not "place upon its records the reasons for such determination" to deny Appellants' Certificate of Appropriateness. *See* SDCL 1-19B-49. Nor did the Historic District Commission "furnish[] the applicant an attested copy of its reasons." *Id.* The form letter from Mr. Kuchenbecker does not

⁸ Appellees are correct that the Deadwood City Ordinances do not require findings or a statement of reasons; which should explain why Appellants' Argument III was not related to city ordinance, but rather state statute. The Historic District Commission is required to follow both its own ordinances as well as state statute. *See* Appellants' Brief p. 19-22.

satisfy these requirements. CR 60. Appellees never contradicted this assertion at the Circuit Court level. *See* CR 1765-1779 and OAT 14₁₃₋₁₈. Appellees do not contradict this assertion before this Court; rather Appellees ignore that SDCL 1-19B-49 even exists. Appellees do not address the lack of attested copy being provided to Mr. Kirwan.

Appellees next claim that the Historic “Preservation” Commission considered the appearance of Appellants’ building at the time of construction, in 1879. Appellees’ Brief p. 20. However, as the discussion at the meeting reveals, the Historic District Commission based its decision on the 1913 look of the building, not the 1879 look. HT 11₁₄₋₂₄; 14₁₀₋₁₆; Appellees’ Brief p. 14.

Appellees claim that, “Under *Olson*, the lack of findings of fact or specific references to the criteria considered under Ordinance 17.68.050 is not fatal.” Appellees’ Brief p. 20. However, *Olson* is distinguishable because it did not have a state statute requiring “reasons for denial.” Additionally, the Board in *Olson* did state reasons for its denial on the record, and when it did not, the Circuit Court remanded the second decision to the Board to state its reasons for denial. *See Olson*, 480 N.W.2d at 776-77.

IV. THE CIRCUIT COURT ERRED BY NOT MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT ITS ORDER.

Appellees’ argument that, “Because the Board itself was not required to include findings of fact, the court reviewing its decision is also not subject to the requirements of SDCL 1-26-36” provides no authority in support of this position. Appellees’ Brief p. 21. Again, this argument ignores the dictates of SDCL 1-19B-49. Moreover, what a governmental entity is required to do at a public meeting does not equate to a court’s requirements or best practices. When a court provides a short (less than one transcript page) oral decision, with nothing more, review of said decision is hampered.

Appellees claim “the Circuit Court did not err by following *Olson v. City of Deadwood* and declining to make findings of fact and conclusions of law.”⁹ Appellees’ Brief p. 21. However, the Court did not follow *Olson* on this issue. Moreover, *Olson* does not mention whether the Circuit Court made findings and conclusions, but focuses on the actions of the municipal body. 480 N.W.2d 770.¹⁰

V. THE CIRCUIT COURT ERRED BY ACCEPTING THE AFFIDAVIT OF KEVIN KUCHENBECKER.

Despite their claims that “Kuchenbecker’s affidavit was thus submitted to the Circuit Court ‘to clarify a misstatement of the facts in the original appellate brief,’” Appellees heavily rely on the statements contained therein throughout their Response Brief to this Court, even though the issue in which the clarification was related below was not raised as an issue on appeal to this Court. Further, the Affidavit goes far beyond simply clarifying a misstatement of fact; it introduces a number of additional facts which are not entirely relevant to this Appeal but which nonetheless Appellees rely on throughout their Brief.

Appellees cite to Mr. Kuchenbecker’s Affidavit in their current responsive brief at pages 3 (facts), 4 (facts), 5 (facts), 14 (argument I), 15 (argument I), 16 (argument I), and 18 (argument III). Given that whether a meeting occurred on June 8, 2020, is of no

⁹ The Circuit Court did make three oral findings at the hearing: 1) that the criteria was considered and followed, 2) the Commission did rule appropriately, and 3) that a mere scintilla of evidence existed. OAT 19 12-14, 18-22. This implies that the Court recognized the need to enter findings but did so erroneously.

¹⁰ In *Olson*, the Circuit Court did draft a memorandum opinion on its decision to deny the Olson’s motion for new trial following the first Board decision. The posture of *Olson* came about first by a petition for review; it is unclear if this was treated like an appeal or if there was a trial, but since a motion for new trial was made, it would seem to be in a different procedural posture from the case at bar.

import to the issues on appeal to this Court, it is curious why the statements in Mr. Kuchenbecker's Affidavit are repeatedly discussed. As suspected, it appears that the statements were made to add additional information to the record, which Appellees could have provided at a time when it created, compiled, and submitted the "record on appeal" to the Circuit Court. (Appeal record filed by Appellees on June 22, 2021; CR 36-65.) Importantly, the June 2020 meeting was related to Mr. Kirwan's earlier request for certificate of appropriateness, which is not at issue in this appeal. Moreover, at no time do Appellees contradict the assertion, based upon the record, that the June 8, 2020 meeting was not mentioned in the *Staff Report* to the commission, no one mentioned it at the March 10, 2021 meeting, and there is no evidence any commissioners knew such meeting occurred.¹¹ The content of the June 8, 2020 meeting had no bearing on the decision of the Historic District Commission and is not relevant to the issues now on appeal. Further, because it had no bearing on the decision of the Historic District Commission, it was improper for the Circuit Court to admit it into the record, for Appellees to now repeatedly cite in their Brief to this Court.

If Appellees needed to add to the record, as mentioned in Appellees' Brief p. 23, a specific procedure exists to allow for such. Pursuant to SDCL 1-26-33, Appellees could have made a motion to add to the record, just as Appellants did. Instead of doing that, Appellees simply filed an Affidavit along with its Appellee Brief to the Circuit Court; such is not appropriate.

CONCLUSION

¹¹ If the Historic District Commission knew of the prior June 8, 2020, meeting and recommendations Mr. Kuchenbecker claims were provided, those recommendations likely would have been mentioned at the March 10, 2021, meeting and could have been provided pursuant to SDCL 1-19B-49.

A complete review of the record creates a definite and firm conviction that the Circuit Court erred by affirming the decision of the Historic District Commission denying the Certificate of Appropriateness. Appellants respectfully request this Court reverse the decision of the Circuit Court affirming the decision of the Deadwood Historic District Commission denying Appellants' Certificate of Appropriateness for the reasons argued in this brief and Appellants' initial brief.

Dated: May 2, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL 1-26-33.3 and 15-26A-66(4).

The font is Times New Roman size 12, which includes serifs. The brief is 14 pages long and the word count is 4,138, exclusive of the Cover, Table of Contents, Table of Authorities, and certificates of counsel. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below, true and correct copies of APPELLANTS' REPLY BRIEF were served through email and hand-delivered on:

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