IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30277

LOVE'S TRAVEL STOPS & COUNTRY STORES, INC. and ONE SHOT, L.L.C.

Plaintiffs and Appellees,

VS.

CITY OF WALL, SOUTH DAKOTA; CITY COUNCIL FOR WALL, SOUTH DAKOTA; and PLANNING AND ZONING COMMISSION FOR WALL, SOUTH DAKOTA,

Defendants and Appellants.

APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI L. LINNGREN
CIRCUIT COURT JUDGE

BRIEF OF APPELLANTS

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Notice of Appeal filed on February 21, 2023

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PRELIMINARY STATEMENT

Citations to the settled record as reflected by the Clerk's Index are designated with "R." and the page number. This includes citations to the hearing transcripts, which are paginated within the settled record. Citations to the Appendix are designated as "App." and the page number.

JURISDICTIONAL STATEMENT

This is an appeal from a contempt proceeding. This Court has jurisdiction under SDCL 15-26A-3(1), (2) and (4).

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. Did the circuit court commit legal or factual error in finding the Wall City Council in civil contempt of a final order where it followed the express terms of the order and did not disobey any term of the order?

Love's previously had brought a petition seeking a writ of mandamus directing the city council to issue a commercial building permit for a truck stop adjacent to residential neighborhoods because of Love's assertion that two council members participating in the unanimous vote to deny Love's permit application allegedly had conflicts of interest.

The court entered a final order resolving Love's petition denying the relief sought by Love's, holding that it had no legal authority to order issuance of the permit, and instead ordering the City to apply the statutory conflict-of-interest analysis prescribed by SDCL 6-1-17 and hold a second vote on Love's application.

As directed by the final order resolving Love's petition, the City applied the statutory conflict-of-interest analysis prescribed by SDCL 6-1-17 and held a second vote on Love's building permit application, resulting in a second denial.

Love's then brought the present action against the City alleging civil contempt by filing a motion for order to show cause.

Following an evidentiary hearing, the circuit court held that the City had willfully and contumaciously disobeyed its final mandamus order and held it to be in civil contempt.

- *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019)
- *Karras v. Gannon*, 345 N.W.2d 854 (S.D. 1984)
- *Alto Township v. Mendenhall*, 2011 S.D. 54, 803 N.W.2d 839
- *Holborn v. Deuel County Board of Adjustment*, 2021 S.D. 6, 955 N.W.2d 363

II. Did the circuit court abuse its discretion in ordering issuance of a building permit as a remedy for civil contempt where the final order the City was found to have disobeyed held that the court had no legal authority to order issuance of the permit?

The circuit court previously entered a final order denying Love's request for an order requiring the City to issue a building permit. Instead, the court held that it had no legal authority to do so. After finding that the City disobeyed its final mandamus order despite compliance with its express terms, the court then contradicted its order and required the City to issue the permit as its remedy for civil contempt.

- *Maggio v. Zeitz*, 333 U.S. 56 (1948)
- *Fienup v. Rentto*, 52 N.W.2d 486 (S.D. 1952)
- *Otten v. Otten*, 245 N.W.2d 506 (S.D. 1976)
- *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 2003 S.D. 45, 661 N.W.2d 719 (per curiam)

STATEMENT OF THE CASE

This is an appeal from a civil contempt action against the City of Wall and Wall City Council ("City") by Love's Travel Stops & Country Stores, Inc. ("Love's") and One Stop, L.L.C. ("One Stop") commenced when they filed a motion under SDCL 15-20-19 for an order to show cause why the City should not be held in civil contempt of a final order resolving Love's previous Verified Petition for Writ of Mandamus and for Writ of Certiorari and Complaint for Declaratory Relief ("mandamus petition") entered by the Pennington County Circuit Court.

The underlying order resolving the mandamus petition

In 2021, the Wall City Council denied Love's rezoning and commercial building permit applications to construct a 24-hour illuminated interstate truck stop on land within the city limits adjacent to premier residential neighborhoods. Love's filed a petition for writ of mandamus asking the circuit court to require the City to issue the building permit because of Love's assertion that two council members participating in the unanimous votes to deny the applications had conflicts of interest.

On August 12, 2021, the court issued a decision and final order granting in part, but mostly denying, Love's mandamus petition. (App. 14). The court held that the City's zoning ordinance did not apply to the property because it had not yet been administratively designated in one of the four zoning districts set forth in the ordinance. (R. 915-16).

Next, the court held it could not require the City to issue the building permit and declined to order that relief:

> While the Court may issue a writ of mandamus requiring the City Council to perform, such as hear and consider Love's building permit application, mandamus is inappropriate in dictating how the Council must vote, as this is a purely discretionary function. **Therefore, the Court has no authority to require approval of the building permit.**

(R. 903) (emphasis supplied). The court further held it could not dictate the outcome of a conflict-of-interest analysis under SDCL 6-1-17, but it could order the City to apply that statute:

> While determining whether SDCL § 6-1-17 actually disqualifies any member of the City Council is discretionary in nature, and mandamus is not appropriate, mandamus is appropriate to require the City to review and apply the statute.

(R. 905-06). Love's petition was resolved—on the merits and in its entirety—with the following order:

ORDER

Based on the reasons set forth above, it is hereby:

DECLARED the City of Wall Zoning Ordinance as found under the city of Wall Municipal Code Title 17 does not apply to the subject property as noted in the Verified Petition for Writ of Mandamus and for Writ of Certiorari and Complaint for Declaratory Relief. It is further

ORDERED that the Court hereby issues a Writ of Mandamus requiring the City Council of Wall, South Dakota to discuss and vote upon Petitioner's commercial building permit application. The Writ of Mandamus also requires that prior to the discussion and vote on Petitioner's commercial building permit application, the City Council is required to review and determine whether any member of the City Council is disqualified, as provided under SDCL § 6-1-17, from discussing and voting on Petitioner's commercial building permit application.

(R. 922; App. 26). By its plain terms, the order required the City to consider and apply SDCL 6-1-17 and hold a new vote on Love's building permit application. Nothing else was required under its express terms. Notice of entry of this final order was served on August 13, 2021. (R. 908). Thirty days then passed. No one appealed from the order.

In consultation with its attorneys, the city council first considered whether any member was disqualified under SDCL 6-1-17 from discussing and voting on Love's building permit application. The City's application of that statute did not result in any disqualifications. At its next meeting, the City heard and voted on the application, resulting in a second denial.

This civil contempt action

Displeased with the outcome again, Love's set upon a new legal strategy and brought the present contempt action. On November 12, 2021, Love's filed what it styled as a "Motion for Order to Show Cause and Issue Building Permit" under the same civil number as the mandamus petition. (R. 923). The action was brought under SDCL 15-20-19 ("Disobedience of order of judge or referee as contempt") asking the court:

> [T]o issue an Order requiring Defendant City Council for Wall, South Dakota ("City") to appear before this Court to show cause, if any there be, why it should not be held in contempt for its failure to comply with this Court's August 12, 2021, Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory Relief[.]

(R. 923). Love's motion neglected to specify how the final order resolving the mandamus petition had been disobeyed. Love's purpose in invoking the

severe judicial remedy of contempt was to get the court to "enter a *remedial* Order requiring the City to issue" the very permit that the court's mandamus order held it had no legal authority to require. (R. 924).

Love's brief set forth the following theory on how the City's actions in following the mandamus order could be construed as disobeying it:

> In issuing its Order, this Court required the City to exercise authority it has been delegated by the South Dakota Legislature pursuant to SDCL Ch. 11-10. It is axiomatic that in complying with this Court's directive, the City had the concomitant duty to regularly pursue its authority, and within the present context, that means the City was required to act within the parameters of the Legislature's express delegation of authority under SDCL Ch. 11-10 and within the parameters of any such powers necessarily implied therefrom.
>
> The City failed to accomplish either task on October 18, 2021, and as such, it should be held in contempt for its willful disobedience of the Court's Order. In addition, given the continued abuse of the limited authority the City has been given in this area, the Court should enter an Order requiring the City to issue a commercial building permit to Plaintiffs relative to their Application.

(R. 1039-40). However, neither of those previously unmentioned "tasks"—apparently arising from "axiomatic inferences" and "concomitant duties" gleaned from an entire chapter of the South Dakota Code—were set forth in the actual language of the actual order of which Love's actually was seeking to have the City held in contempt.

A hearing on Love's contempt motion was held on January 19-20, 2002. (R. 1126, 1273). The court took judicial notice of its final order resolving the mandamus petition. (R. 1133-34). Only three of the six council members who

voted on the application were called to testify: Rick Hustead, Kelly Walsh, and Jerry Morgan. Hustead and Walsh had voted to deny it and Morgan voted to approve. (R. 1204, 1230, 1302).

On August 16, 2022, the court granted Love's motion for an order to show cause. (R. 1404; App. 27). It held the City had willfully and contumaciously disobeyed its final order resolving Love's mandamus petition because "the conflict of interest analysis was woefully ill-prepared and in no way comprehensive enough." (R. 1410).

Specifically, the court said that when the City applied SDCL 6-1-17, a statute addressing "direct pecuniary interest," it did not *also* adequately consider this Court's 2005 decision in *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202, which did *not* address or involve SDCL 6-1-17, but rather the concept of "*indirect* pecuniary interest," under an interpretation of the due process clause from which this Court has largely receded, if not abandoned entirely. (R. 1410-11). The court also accepted Love's argument that it was "extreme" and "egregious" that (1) the court's public order and the City's public meeting were publicized to the public; and (2) that the second vote was "slow walked." (R. 1411-12).

Finally, the court suggested that the *outcome* of the 4-2 vote meant the City considered the wrong things in denying the permit application:

> The Court cannot ignore the fact that the city council's decision, upon advice of legal counsel, was not based upon any law or rule. This Court directed the council to act under the law that was before it. The Court did not order them to grant the permit,

> the Court ordered them to follow the law, something that was clearly disregarded here.

(R. 1412). As summarized by the court:

> Defendants are in a position of power and can affirm or deny permits such like Plaintiff seeks here. Before such a step can be taken, the Council itself must ensure that no Conflict of Interest exists. That was not done and as such the Defendants willfully and contumaciously disobeyed this Court's order. First, in the process by which the meeting was "slow walked" and the manner in which the council voted was contrary to the powers for which they held by statute and its own ordinances. Their reasons for the denial of the permit, under their own rules, was [sic] improper and the councils' actions rise to the level of contempt, with Plaintiff having met the burden on every element of the same. This court gave the council the opportunity in its Memorandum Opinion of August 12, 2021, to follow the law with the discretion allowed therein. The willful disregard of the same is evident.

(R. 1413). The court set another hearing "to determine the remedy" for its finding of civil contempt. (R. 1413). On November 28, 2022, the court heard argument on the issue. (R. 1461).

On January 9, 2023, the court issued its "remedy" decision. (R. 1489; App. 1). The court acknowledged that in its final order resolving Love's petition, "this Court determined that it had no authority to require approval of the building permit." (R. 1491). Although the City clearly complied with the terms of that order, however, the court tethered its rationale to speculation about the collective "*motivation*" of the City in the 4-2 vote denying the permit, finding that the City had been "driven primarily" by "a fear that current businesses in the City of Wall would be adversely affected by the building of Love's Truck Stop." (R. 1492-93). The court added:

> Based upon the entire record before this Court, this Court has little faith that the City is going to carry through in good faith to apply their own standards through the process of this building permit process. This Court acknowledges the same as it did in it's [sic] Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory relief is an extraordinary remedy **and must not be used to dictate details when there is discretion on how the duty should be performed, as is the case here.**
>
> However, the egregiousness of the actions of the Plaintiffs [sic] suggest that the discretionary function in this set of facts was compromised and motivated by something very different than acting on behalf of the constituents that elected them. And because they did not follow the Order of this Court, **there is no way of knowing**.

(R. 1494) (emphasis supplied). The court thus did what its final order held it had no authority to do and required the City to issue the building permit as its judicial remedy for civil contempt. (R. 1495).

On January 24, 2023, the court entered findings of fact and conclusions of law that contradicted its mandamus order, stating that "there is no discretion left for the City Council to exercise relative to consideration of Love's Application, and as such, there is no lawful reason for the City Council to refrain from issuing a commercial building permit to Love's for its development project." (R. 1530-32; App. 38). That same day, the court entered its "Order Directing Issuance of Building Permit." (R. 1533; App. 45).

This appeal followed.

STATEMENT OF THE FACTS

The prairie hamlet of Wall in western South Dakota has fewer than 900 residents. (R. 2). Named for the natural wall of rock formations in Badlands National Park, it is also the home of Wall Drug, an iconic South Dakota destination. (R. 2, 1310). Wall is governed by a six-member elected city council that meets twice per month. (R. 1199). Any tie votes are decided by the mayor. (R. 1173).

Love's Travel Stops & Country Stores, Inc. is one of the largest and most successful operators of large, 24-hour interstate truck stops in the United States. (R. 1). One Shot, L.LC. is a South Dakota limited liability company. (R. 1135). In 2019, One Shot purchased 85 acres of unplatted land south of Interstate 90 in the southwest part of Wall adjacent to its premier residential neighborhoods (Stone Drive, Echo Valley, and Kelly subdivisions) and at least forty family homes. (R. 2, 298, 1135, 1186, 1302, 1305).

As set forth in its Comprehensive Plan and Zoning Ordinance, the City's sole land use goal is "[t]o establish a land use pattern through planning which enhances the value of residential living while promoting the expansion of a well balanced economic community." (R. 543). Under that plan, residential development is to be "directed to the southwest of the existing city limits" where the property at issue here is located. (R. 560, 581).

In recent years, the property was annexed by the City and was not platted. (R. 1186, 1222). It also had not yet been administratively

designated for one of the four zoning districts, which the City deemed a necessary precondition for any new construction. (R. 2-3, 119, 1230-31) (Wall City Ordinance 17.04.060: "No building shall be erected ... except in conformity with the use regulations prescribed for the district in which the building is located"). The only district in which gas stations (or truck stops) are allowed is the Commercial District where they are "permitted upon review by the governing body on a conditional basis." (R. 124 – Wall City Ordinance 17.16.030). The city ordinance also has a city-wide restriction on all new construction within city limits: "The following structures shall not be allowed within the city ... B. New or remodeled structures that is not consistent with the general Main Street ambience and atmosphere." (R. 125, Wall City Ordinance 17.16.035 - Prohibited Structures).

Love's had entered into a conditional purchase agreement to buy part of One Shot LLC's property "for the development and construction of a Travel Stop" to operate at least twelve gas pumps, five diesel bays, 92 auto parking spaces, 70 truck parking spaces, one or more restaurants, a scale, and laundry and shower facilities. (R. 3, 33, 1222). The sale is contingent and has not been completed. (R. 1222).

According to Love's, the truck stop "would, in part, compete with Wall Drug." (R. 3). One of the city council members, Rick Hustead, owns Wall Drug, which owns a gas station called Wall Auto Livery. (R. 1289). Another council member owns a Dairy Queen in Wall. (R. 1291).

It was a surprise to no one that Love's plan to build an interstate truck stop adjacent to Wall's residential neighborhoods generated substantial public attention among its 800 plus residents. (R. 18-19, 96-97, 104-05). Much of the reaction was negative, regarding how the large truck stop might impact the neighborhoods and the entire community in terms of crime, safety, noise, light and air pollution, traffic congestion, drainage issues, and property values. (R. 18-19, 96-97, 104-05, 425-30, 433-36, 1200-01) ("There should be no truck stops in residential areas"; "The people out in the public, they were generally against it. I mean, their homes were out there").

On October 15, 2019, Love's requested to get on the agenda for the Wall Planning and Zoning Commission to rezone the property from its "Agricultural Lands" designation on the City's zoning map to "Commercial District." On November 5, 2019, the commission deadlocked and so provided no majority recommendation to the council. (R. 427). On January 30, 2020, Love's applied for a building permit to construct the truck stop and surrounding concrete plaza. (R. 8, 39, 143).

On February 20, 2020, the city council took up Love's rezoning and building permit applications. The council first unanimously (6-0) denied the application to rezone the property to "Commercial District." As indicated in the minutes: "A decision for the best interest of the health, safety and welfare of this community is not possible at this time with the lack of a completed [traffic] study and update to the Master Comprehensive Plan." (R. 108-09,

446-47, 490-91). The council then unanimously (6-0) denied the building permit application, as the minutes state, "due to the land is not zoned for a commercial business." (R. 9, 447, 494-96).

On March 26, 2020, Love's filed its petition for writ of mandamus and other relief ostensibly seeking to declare Wall's entire comprehensive plan and zoning ordinance void *ab initio*, but really seeking to force the City to issue the building permit on the grounds that two of the six council members voting to deny had "conflicts of interest." (R. 1, 721-23, 878-88).

On August 12, 2021, the court denied the mandamus petition with the limited exception of: (1) declaring that the municipal zoning ordinance "does not apply to the subject property"; and (2) ordering the city council "to discuss and vote upon Petitioner's commercial building permit application" after it first reviewed and determined "whether any member of the City Council is disqualified, as provided under SDCL § 6-1-17, from discussing and voting on Petitioner's commercial building permit application." (R. 907). Notice of entry of the court's final order was served on August 13, 2021. (R. 908).

Before the 30-day appeal deadline passed, the City consulted with its attorneys and deliberated on whether to appeal. (R. 939). On the one hand, the City disagreed with the implications of the lower court's declaration that its zoning ordinance "does not apply to the subject property" and unarticulated premise that the land existed in some sort of unregulated nebulous limbo—outside of any consideration for the health, safety, welfare,

and best interests of the city and its residents—where "anything goes" in terms of new construction and use of the land.

On the other hand, the City was already in the process of completing an update of its comprehensive plan and ordinance that would eliminate the perceived loophole sought to be exploited by Love's. (R. 994-95). It further agreed with the court's clear and unequivocal legal conclusion that:

> While the Court may issue a writ of mandamus requiring the City Council to perform, such as hear and consider Love's building permit application, mandamus is inappropriate in dictating how the Council must vote, as this is a purely discretionary function. **Therefore, the Court has no authority to require approval of the building permit.**

(R. 903) (emphasis supplied). That holding, of course, was consistent with the plain language of the City's governing ordinance requiring the council to "[r]eview all applications for building permits" but expressly reserving discretion to either "approve *or* disapprove applications for building permits." (R. 137) (emphasis supplied).

Ultimately, the City agreed to forego appeal of the final order. On September 2, 2021, before the 30-day appeal deadline expired on September 13, the council voted unanimously "to accept and not to appeal, all or in part, the Memorandum Opinion and Order" entered by the court. (R. 945, 1159, 1229, 1278).

The conflict-of-interest analysis under SDCL 6-1-17 was placed on the agenda for the next council meeting on September 20, 2021. (R. 948, 1159, 1278). The minutes reflect extended discussion of the requirements of SDCL

6-1-17 with counsel present, after which no council member identified as having a conflict of interest or "direct pecuniary interest" and no determination was made by anyone, let alone a two-thirds majority, that anyone should be disqualified. Rather, the council unanimously concluded that no member had a conflict under SDCL 6-1-17. (R. 950-51, 1176-77, 1195, 1202-03, 1229-30, 1278-79).

Through its lawyers, Love's demanded that the building permit application be reheard before the appeal deadline passed and threatened to hit the City with claims for lost profits, attorney fees, and sanctions. (R. 957, 1157). Love's also objected to the City inviting public comment and to copies of the court's mandamus order being made available to city residents, even though it was all public information. (R. 1142, 1145).

The City informed Love's that it would be hearing its permit application at its regularly scheduled October 21 meeting. (R. 958, 965). As the City Finance Officer testified regarding the sequence of events:

> [W]e had it on the agenda to determine whether they were going to appeal the Order; then it appeared on the agenda to determine whether the Council – or – I'm not sure I'm going to say this right – whether there was going to be any conflict of interest determined by – with the council; and then the building permit was on the next agenda.

(R. 1164). In fact, the regular council meeting was held three days *earlier* than scheduled on October 18, with public notice duly given, because of a conflict with the state high school football playoffs involving Wall's undefeated team. (R. 968-69, 1082-83, 1156, 1160, 1168-69, 1178, 1191, 1239,

1280-81, 1286).[1]

At the hearing, Love's attorneys made a presentation and their corporate representative appeared remotely to answer questions. (R. 972, 1004-05, 1011-12). As true for any agenda item, the public had the opportunity to comment. (R. 1144, 1146, 1156-57, 1277). Obviously, this was not the run-of-the-mill building permit for a fence or shed about which members of the public rarely exercise their right to comment. (R. 1145-46, 1156). As Love's attorney observed, "I think it's obvious just by the crowd here tonight that this is a controversial matter." (R. 975).

Some residents asked questions or made observations. Some expressed opposition and concern regarding the truck stop's intended location and its effect on the community in terms of health, safety, and welfare—including one resident who lamented that the truck stop would be located only a few hundred feet from his backyard. Some expressed support for the project. (R. 977-1014, 1178-79, 1189-90, 1200-01, 1230, 1281-83).

After public comment and a discussion with legal counsel in executive session, Council Member Anderson said: "I'm going to make a motion for the health, safety, well-being of the residents of the City of Wall are at stake, I'll make a motion to deny the building permit for the One Shot LLC/Love's

[1] On October 21, 2021, the undefeated Wall Eagles advanced to the state quarterfinals with a convincing 56-6 win over North Central. Later, the Eagles lost a 21-17 nailbiter in the semifinals to the eventual Class 9A state champion Howard Tigers.

Truck Stop," which was seconded by Council Member Walsh. (R. 1020). The council then denied the application by a vote of 4-2. (R. 1021-22).

Mayor Marty Huether supported Love's project and presided over the meeting but did not have a vote. (R. 1187). He testified at the contempt hearing that looking into the hearts of the six council members to try to determine why each decided to vote the way he or she did would be "in all honesty, speculation and opinion[.]" (R. 1183).

STANDARD OF REVIEW

In reviewing contempt findings on appeal, this Court reviews a trial court's findings of fact as to contempt under a clearly erroneous standard. *See Metzger v. Metzger*, 2021 S.D. 23, ¶ 13, 958 N.W.2d 715, 719; *Alto Township v. Mendenhall*, 2011 S.D. 54, ¶9, 803 N.W.2d 839, 842. This Court reviews conclusions of law de novo. *See id.*; *Mundlein v. Mundlein*, 2004 S.D. 25, ¶5, 676 N.W.2d 819, 821 ("We review the application of law to the facts de novo, however, with no deference to the circuit court's decision"). This Court reviews the remedy imposed for civil contempt for abuse of discretion. *See Farmer v. Farmer*, 2020 S.D. 46, ¶19, 948 N.W.2d 29, 35.

ARGUMENT

I. THE CIVIL CONTEMPT FINDING SHOULD BE REVERSED AND RESULTING REMEDIAL ORDER VACATED WITH INSTRUCTIONS TO DISMISS WITH PREJUDICE.

This is not an appeal about 24-hour truck stops, quiet neighborhoods, or representative municipal government, although they all are part of the background. This is an appeal from a civil contempt finding based on the City's purported *disobedience* of a circuit court's final order. The plain language of that order required the City to: (1) consider and apply SDCL 6-1-17 and (2) hold a second vote on Love's commercial building permit application. The City did those things.

Because the City complied with the express terms of the final order resolving the mandamus petition, it appears—rather alarmingly—that the City actually was held in contempt for disobeying the order because the *outcome* of the City's consideration and application of SDCL 6-1-17 and *outcome* of the second vote on Love's permit application was not in its favor or apparently in line with the court's unspoken expectations.

And because the sole permissible use of civil contempt is to secure compliance with the clear, express, and unambiguous terms of a prior court order and it is impermissible to utilize contempt proceedings to *change* and relitigate the express terms of a previous order with which a party has already complied, the contempt findings and resulting orders here should be vacated with instructions to dismiss with prejudice.

A. The judicial power of contempt

For a thousand years under English common law, "a refusal to obey an order of the king or of his officer, formally and expressly directed to a subject, has been regarded as a contempt," as when Henry I (reign: 1100-1135), third son of William the Conqueror, declared *contemptus brevium* "an offense subjecting a person guilty of it to amercement." Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. Law. Rev. 161, 164 (1908).

This essential and truly formidable power to enforce judgments under threat of contempt resides on equal terms in the courts of the United States. *See Thomerson v. Thomerson*, 387 N.W.2d 509, 512 (S.D. 1986).[2] As this Court recognized from its earliest decisions on judicial authority: "The power to punish for contempt is one of the highest prerogatives of a court of justice, and is inherent in it. ... The mandates of a court must in all cases be obeyed." *State v. Knight*, 54 N.W. 412, 413 (S.D. 1893); *see also Johnson v. United Parcel Service, Inc.*, 2020 S.D. 39, 946 N.W.2d 1, 10 ("This idea of giving effect to valid orders is the premise underlying our law of civil contempt").

At the same time, this Court recognized from its beginning that "[i]f wrong be done a citizen by error of facts or judgment in the exercise of this power, there must be some channel of redress provided by law to rectify the

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[2] Abrogated on other grounds by *Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶¶ 11-18, 729 N.W.2d 335, 341-43 (holding that technical defects in affidavit supporting show cause order in contempt proceeding did not deprive courts of subject matter jurisdiction).

wrong." *Knight*, 54 N.W. at 413. That proper channel of redress is the substance of this appeal.

Under the common law, contempt is classified either as civil or criminal in nature. *See Metzger*, 2021 S.D. 23, ¶ 13, 958 N.W.2d at 718; *Hiller v. Hiller*, 2018 S.D. 74, ¶ 20, 919 N.W.2d 548, 554. "If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order." *Knight*, 54 N.W. at 413; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911); *State v. American-News Co.*, 253 N.W. 492, 493 (S.D. 1934); *Fienup v. Rentto*, 52 N.W.2d 486, 488 (S.D. 1952); *Karras v. Gannon*, 345 N.W.2d 854, 856 & n.1 (S.D. 1984); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 2003 S.D. 45, ¶ 14, 661 N.W.2d 719, 723 (per curiam).[3]

The inherent power of the Judicial Department to enforce compliance with its mandates has been ratified by the Legislature, which has provided that "[i]f any person, party, or witness disobey an order of the judge or referee duly served, such person party, or witness may be punished by the judge as for a contempt." SDCL 15-20-19; *see also* SDCL 16-15-6 (Disobedience of judicial process as misdemeanor).

We are concerned here with alleged civil contempt, which "must find its basis in the willful or contumacious refusal to comply with an order of the

[3] *See* footnote two.

court." *Acker v. Adamson*, 293 N.W. 83, 85 (S.D. 1940). Four elements must be proved to sustain a finding of contempt: (1) existence of an order; (2) knowledge of the order by defendant; (3) ability to comply with the order; and (4) willful or contumacious disobedience. *See Amiotte v. Amiotte*, 358 N.W.2d 803, 804 (S.D. 1984); *Metzger*, 2021 S.D. 23, ¶ 13, 958 N.W.2d at 718.

B. Contempt procedure under South Dakota law

As this Court has explained, "[a] contempt proceeding is sui generis." *Simmons v. Simmons*, 278 N.W. 537, 538 (S.D. 1938).[4] A civil contempt action for alleged refusal to obey a court order is initiated by filing a motion for order to show cause "and may properly be entitled within a civil action; it need not be separate proceeding." *Thomerson*, 387 N.W.2d at 512; *see also Gompers*, 221 U.S. at 446; *Freeman v. City of Huron*, 66 N.W. 928, 929 (S.D. 1896);[5] *State v. Bullis*, 315 N.W.2d 485, 487 (S.D. 1982); *Brummer v. Stokebrand*, 1999 S.D. 137, ¶ 15, 601 N.W.2d 619, 623; *Wold Family Farms*, 2003 S.D. 45, ¶ 15, 661 N.W.2d at 724.

This procedure was ordained in this Court's first published decision involving the contempt power:

> The theory of an ordinary order to show cause is that the party in whose favor it is granted has made a *prima facie* case, entitling him to certain relief, and upon the strength of such *prima facie* case the adverse party is called upon to show cause to the court, if any he have, why such relief should not be granted, in accordance with the *prima facie* case made, and this theory and practice prevail equally in proceedings for contempt.

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[4] *See* footnote two.

[5] *See* footnote two.

State v. Mitchell, 52 N.W. 1052, 1053 (S.D. 1892).

As later summarized by Justice Wollman, "[u]nder South Dakota practice the affidavit upon which an order to show cause is issued in a contempt action is treated as the complaint and the affidavit of the defendant as the answer, this in contrast to the usual rule that affidavits are not pleadings." *Otten v. Otten*, 245 N.W.2d 506, 508 n.* (S.D. 1976); *see also Sazama*, 2007 S.D. 17, ¶ 16, 729 N.W.2d at 343.

Significantly, "the burden of proving the allegations necessary to sustain the contempt as charged fall[s] upon the person bringing the proceedings." *Thomerson*, 387 N.W.2d at 513. Thereafter, "the final adjudication results in a judgment as distinguished from an order, and in this respect the procedure itself is sui generis, at least so far as the practice of this state is concerned." *Simmons*, 278 N.W. at 538.

C. The fundamental requirement of a clear, specific, and unambiguous order and corresponding prohibition against basing contempt on unspoken expectations.

Perhaps nothing is more essential to a valid finding of civil contempt than that the obligations imposed by an order must have been set forth with precision in clear, specific, and unambiguous terms before a party can be held to have willfully or contumaciously disobeyed it. As explained in the leading English treatise on contempt:

> The necessity of determining whether there has been a factual breach of an order or undertaking on the part of the body or

> person brought before the court demands that the terms of the order itself be expressed in clear and unambiguous language. In so far as possible that person should know *with complete precision* what it is they are required to do or to abstain from doing.

Miller on Contempt of Court, § 12.38 (Oxford University Press 4th ed. 2017).

The logical basis for this mandate is that:

> The rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest upon implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby.

Ex Parte Slavin, 412 S.W.2d 43, 44 (Tex. 1967). As recently explained by the Supreme Court:

> [W]e have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885) (emphasis added). This standard reflects that civil contempt is a "severe remedy" and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam).

Taggart v. Lorenzen, 139 S.Ct. 1795, 1801-02 (2019) (citing *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) (civil contempt not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid")).

This requirement is universal and absolute:

> A finding of contempt for disobeying, disregarding, or violating a court judgment, order, or mandate requires that the order violated is clear and explicit and that the act complained of is

> clearly prescribed thereby. The judgment or order must be clear, precise, definite, specific, unambiguous, unequivocal, and certain.
>
> In order to form the basis for a subsequent finding of contempt, an order must state the details of compliance in such terms that the person to whom it is directed will know exactly what duties or obligations are imposed, leaving no question regarding whether the order is violated nor any uncertainty or doubt in the mind of the person to whom it is addressed as to the conduct prohibited. A party must be able to discern from the language of a court's order the actions necessary to comply the court's directive in order for a court to exercise the contempt power.
>
> One cannot be placed in contempt for the failure to read the court's mind; the order must be sufficient to put a reasonable person on notice of what is required for compliance. The terms must be express, rather than implied.

17 C.J.S. Contempt § 24 (citing *Alto Township*, 2011 S.D. 54, 803 N.W.2d 839).

This Court always has understood the gravity of this judicial power and enforced this bedrock principle, holding in no uncertain terms:

> To form the basis for a subsequent finding of contempt, an order must state the details of compliance in such clear, specific, and unambiguous terms that the person to whom it is directed will know *exactly* what duties or obligations are imposed upon him.

Karras, 345 N.W.2d at 859 (emphasis supplied); *see also Harksen v. Peska*, 2001 S.D. 75, ¶17, 630 N.W.2d 98, 102; *Keller v. Keller*, 2003 S.D. 36, ¶10, 660 N.W.2d 619, 622; *Wold Family Farms,* 2003 S.D. 45, ¶16, 661 N.W.2d at 724; *Evens v. Evens*, 2020 S.D. 62, ¶47, 951 N.W.2d 268, 283.

As this Court held in reversing a judgment of contempt based on an ambiguous order:

> One could interpret this directive either as requiring twelve hours' notice before each separate movement in the field or as

> merely requiring twelve hours' notice of Gannon's intention to renew harvesting operations, subject to such weather-caused interruptions as occurred on November 23, 1981. Although in the light of provisions of the October 15, 1981, temporary restraining order, the former interpretation might appear to be the more logical, we are not disposed to interpret the latent ambiguity in the October 30 order in favor of a finding of contempt.

Karras, 345 N.W.2d at 859; *see also Revell v. Revell*, 241 N.W. 746 (S.D. 1932) (holding that because "[t]he provision of the decree which is the basis of the alleged contempt is ambiguous" there "is no basis for the alleged contempt"); *Amiotte*, 358 N.W.2d at 805 ("As it is, however, the language of that portion of the decree in question is sufficiently ambiguous as to not mandate a finding appellee had contumaciously disobeyed it").

D. The lower court's findings and determination that the City willfully or contumaciously disobeyed the mandamus order are clearly erroneous and legally insufficient.

Here, the circuit court's findings are clearly erroneous and its reasoning legally insufficient to support holding the City in civil contempt.

1. The city complied with the express terms of the order and cannot be held in civil contempt for failing to meet unarticulated expectations.

Fundamentally, this is a simple case. In its mandamus order, the circuit court held it had no authority to dictate the outcome of the City's conflict-of-interest analysis under SDCL 6-1-17 and no authority to require the City to issue the building permit. Instead, the court ordered the City to consider and apply SDCL 6-1-17 and hold another vote. As ordered, the City

considered and applied SDCL 6-1-17, with assistance from legal counsel, and then held another vote. The court then inexplicably held the City in contempt for *disobeying* the order and required it to issue the permit.

As the authorities above make clear, the judicial remedy of civil contempt was entirely unsuitable here and the court's findings are insufficient as a matter of law. "To form the basis for a subsequent finding of contempt, an order must state the details of compliance in such clear, specific, and unambiguous terms that the person to whom it is directed will know *exactly* what duties or obligations are imposed upon him." *Karras*, 345 N.W.2d at 859. Here, the City did what the circuit court's order directed. As a matter of law, that should have ended any consideration of contempt.

This case shares similarities with *Alto Township*, in which the lower court enjoined the Mendenhalls from erecting cattle guards across section lines unless they met certain criteria established by a township resolution. *See id.*, 2011 S.D. 54, ¶13, 803 N.W.2d at 843. The resolution was unclear regarding the required dimensions of the guards. The township brought an action to hold the Mendenhalls in civil contempt for violating the injunction. Granting it, the lower court held that the resolution, at least inferentially, required guards sixteen feet wide, whereas the guards installed were only ten feet wide. *Id.* ¶8.

On appeal, this Court reversed because the resolution's ambiguity violated the imperative that an underlying order forming the basis for

contempt "must state the details of compliance in such clear, specific, and unambiguous terms that the person to whom it is direct will know exactly what duties or obligations were imposed[.]" *Id.* ¶13. As this Court explained:

> In light of this ambiguity, a reasonable person could conclude that the Mendenhalls complied with the trial court's order by installing two cattle guards that measured sixteen feet in total width.
>
> . . . Had it been the intent of the Roberts County Board of Commissioners to require the Mendenhalls to install cattle guards that measure sixteen feet where vehicles pass over, Resolution 09–41 could have expressly so provided.
>
> *In the absence of such a clear expression of intent, the trial court's order cannot serve as the basis for a finding of contempt. Accordingly, we hold that the trial court's finding of contempt was clearly erroneous.*

Id. at ¶¶ 13-15 (emphasis supplied). Here, the same conclusion holds true but the circumstances are even a step beyond. In this case, the order was not ambiguous; rather, the court held the City in contempt for disobeying unarticulated inferences it thought the City should have gleaned from the order to arrive at Love's preferred outcome. The circuit court's finding of contempt was clearly erroneous and should be reversed.

2. The alternative rationales for finding that the City disobeyed the order despite complying with its express terms are legally insufficient, based on clearly erroneous findings, and premised on errors of law.

a. The Hanig rationale

In sharp contrast to the mandamus order, which only required application of SDCL 6-1-17, the contempt order relied on *Hanig v. City of*

Winner, a 2005 decision that did not involve SDCL 6-1-17 (which did not even exist at that time) but rather a constitutional due process claim, and did not involve a direct but rather an *indirect* pecuniary interest:

> This Court will not allow the Defendants to feign ignorance of the standard before them. Hustead's [sic] assured this Court, in his testimony, that he had read the South Dakota Supreme Court's rationale in *Holburn*, and "under[stood] the decision in conjunction with what this Court ordered the Council to do. ... Taking that as true, in the times that Hustead would have read *Holburn*, he surely would have seen the Court's reference to *Hanig v. City of Winner* where indirect pecuniary interests disqualify council person from voting. There, a councilwoman worked as a waitress in a competing bar in Winner and conceded that if there was another bar in town her income based on tips may be impacted." ... The Court held that because of the indirect pecuniary interest she should have been disqualified from participating in the decision.
>
> Hustead made it very clear that he and the other members of the Council had been advised by legal counsel regarding this Court's order. ... Any council member could have asked the legal counsel to explain what impact *Hanig* had on its impending conflict of interest analysis. They did not. Instead, they willfully went about their analysis as they saw fit to conduct it, in the light most favorable to how it would benefit them, as business owners and not as council members.

(R. 1410-11) (emphasis supplied). These findings and conclusions are clearly erroneous and legally incorrect. The order for which the City was found to be in contempt made no mention of *Hanig* and was limited on its face to SDCL 6-1-17. *Hanig* has no controlling bearing on whether SDCL 6-1-17 was followed by the council members.

SDCL 6-1-17 implicates only *direct* pecuniary interests. Otherwise, the determination of whether disqualification is required is left to the

individual judgment of each official or else a two-thirds majority vote of the governing body. *See Holborn v. Deuel County Board of Adjustment*, 2021 S.D. 6, ¶ 32, 955 N.W.2d 363, 377. In *Holborn*, this Court further held that "a direct pecuniary interest requires a showing that the property of the official will be benefitted, or that he or she will receive direct financial *gain* from a decision on the matter before the board." *Id.* (emphasis in original).

By the time of these mandamus proceedings, moreover, the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), had long since changed the legal landscape on procedural due process. Since *Caperton*, this Court appears to have properly retreated from *Hanig* in several decisions including *Holborn*.

Even before *Caperton*, *Hanig* was considered an outlier decision embodying an unworkable constitutional standard, particularly for locally elected officials. Indeed, Senator Schoenbeck specifically drafted SDCL 6-1-17, unanimously enacted by the Legislature soon after *Hanig*, out of concern its standard was far too broad.[6] A 2019 law review article persuasively summarized its flaws:

> *Hanig* presents an unreasonable standard in almost any community—but certainly in South Dakota, where 86% of incorporated municipalities have fewer than 1500 residents.
>
> But this strict standard is not limited to South Dakota's 311

[6] *See Senate Bill 171*, S.D. LEGIS. RES. COUNCIL (2005), http://sdlegislature.gov/sessions/2005/171.htm (select "audio" from date: 02/05/2005, action: Local Government Do Pass Amended Passed, YEAS 5, NAYS 0. S.J. 354).

> municipalities. The analysis presumably required by *Hanig* applies to township boards, counties, special districts, and school boards as well.
>
> In the next case, the South Dakota Supreme Court should follow the Legislature's lead and scale back *Hanig* to reduce the threshold for finding a conflict that requires disqualification.
>
> Nothing short of clear and convincing evidence that an elected official may have strayed from her oath to faithfully perform the duties of her office should be sufficient to preclude her from voting on the issues her constituents elected her to determine.
>
> If those voters feel betrayed, they have a remedy in the next municipal election.

E. Davis and B. Hoffman, *Evaluating the Potential Conflicts of Municipal Elected Officials: A Statutory and Constitutional Analysis*, 63 S.D. L. Rev. 521, 532-33 (2019).

As the result of *Caperton*, this Court's thoughtful withdrawal from *Hanig* was already well underway before this article arrived. In 2022, this Court then crystallized its position:

> [I]n *Holborn*, we applied the *Caperton* due process principles to clarify that in the absence of actual bias or a direct pecuniary interest, the standard for disqualification for an unacceptable risk of actual bias is 'extremely high and should only be applied in extraordinary situations where the Constitution requires recusal."

Miles v. Spink County Board of Adjustment, 2022 S.D. 15, ¶37, 972 N.W.2d 136, 149 n.15 (emphasis supplied); *see also Powers v. Turner County Board of Adjustment*, 2022 S.D. 77, ¶¶ 22-23, 983 N.W.2d 594, 602-03 (same).

It certainly appears, then, that the *Hanig* standard requiring disqualification for *indirect* pecuniary interests (even those as modest as the

possibility that tips collected by a restaurant server might be reduced in the future by the presence of a competing restaurant) is no longer good law.

The circuit court noted in its mandamus order that "the record in front of the Court is *insufficient* to show that Council member Hustead has a direct pecuniary interest which would disqualify him under SDCL § 6-1-17." (R. 905). The record on that point never changed. At most, Hustead had the potential for an *indirect* pecuniary loss because Love's proposed truck stop, if built, would sell gas and snack items that Wall Auto Livery also sells, which might reduce its future revenue like the steakhouse in *Hanig*. The same is true for a council member owning a Dairy Queen that might sell fewer Dilly bars and ice cream cones. SDCL 6-1-17 does not apply to require disqualification based on potential indirect pecuniary interests.

b. Conjecture about motivation

The circuit court utilized *Hanig* and the supposed "failure" of the council members to require their attorneys "to explain what impact *Hanig* had on its impending conflict of interest analysis" to speculate on their collective motivation and infer that the City's actions were "driven primarily" by "a fear that current businesses in the City of Wall would be adversely affected by the building of Love's Truck Stop." (R. 1492-93). The court also suggested that the six council members had covertly applied the zoning ordinance in denying the building permit. (R. 1538-39).

These findings and conclusions are clearly erroneous and based on

errors of law. No evidence supports that conjecture and the court's own decision admitted it was pure supposition:

> However, the egregiousness of the actions of the Plaintiffs [sic] suggest that the discretionary function in this set of facts was compromised and motivated by something very different than acting on behalf of the constituents that elected them. And because they did not follow the Order of this Court, **there is no way of knowing**.

(R. 1494) (emphasis supplied). Conjecture and supposition, of course, are not evidence and certainly provide no basis for holding a party in contempt for willfully or contumaciously disobeying an order. *See Taggart*, 139 S. Ct. at 1801-02 (holding that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct").

As Mayor Huether testified, trying to suppose why various council members ultimately decided to cast a particular vote would be "in all honesty, speculation and opinion[.]" (R. 1183). The mayor further agreed "it was explicitly stated that the – the zoning did not apply." (R. 1197). Indeed, only three council members were even called as witnesses: two who voted against the application and one who voted in favor. They testified, without contradiction, to having sought to faithfully apply the law in considering SDCL 6-1-17. (R. 1232, 1279, 1203). They further testified, without contradiction, that their legal counsel instructed them not to apply the zoning ordinance and they had not done so in voting on the application. (R. 1231, 1245, 1303-04, 1206, 1208-09). The remaining three members were never even called.

There simply is no sound evidentiary basis for finding the City guilty of contempt based on conjecture that the six council members—three of whom never testified—were not applying the circuit court's mandamus order with pure hearts even as they were following its express requirements. Certainly, the court's final order did not require council members to vote a certain way nor did it instruct they were forbidden from considering the will of their constituents or welfare and best interests of the community. As this Court held in *Holborn*:

> Simply put, the standard in SDCL 6-1-17 does not support disqualification of any of the Board members in this instance. At the start of the hearing, each Board member stated his subjective belief that he could act fairly in the consideration of the SEPs, and there was no determination by the Board that any individual Board member had a conflict of interest. Further, as discussed above, there was no showing that any member of the Board had a direct pecuniary interest in the Deuel Harvest SEP applications.

2021 S.D. 6, ¶36, 955 N.W.2d at 378. Here, the same circumstances apply and the court's contrary findings are clearly erroneous. More fundamentally, to the extent the court relied on *Hanig* and speculation about what was considered—rather than SDCL 6-1-17 and the express terms of its mandamus order—in pronouncing contempt, it erred as a matter of law.

c. The "slow walk" rationale

The circuit court also appears to have taken issue with the fact that the City addressed the conflict-of-interest issue at its first scheduled meeting after the appeal deadline passed, and then held the revote on the permit

application at the next meeting. The court adopted Love's characterization that this meant the order was "slow walked" and therefore meant the order had been disobeyed:

> This court acknowledges that there was not a specific time or deadline set for holding the meeting/hearing on the application for the building permit; however, the record stands for itself and even the testimony of the council members made it abundantly clear that the council acted with disregard to the Court's Order.

(R. 1411-12). The August 12, 2021 final order resolved the issues raised by Love's petition. Notice of entry was served the next day. After determining it would not appeal, the City reviewed and applied SDCL 6-1-17 as ordered, concluded that the statute did not require disqualifications, and held a new vote on Love's permit application as ordered.

Certainly, the City was entitled to take thirty days as prescribed by the rules to consider whether to appeal. After the appeal deadline expired, the city council conducted its conflict-of-interest analysis at its next meeting. It voted on the building permit application at the meeting after that. It is objectively apparent that the City did exactly what was ordered within a reasonable time (about one month after the time to appeal expired) particularly in light of the fact that the court's order set no timeline and the council meets twice per month.

d. The publicity rationale

The circuit court also seemed troubled that the council meeting was held three days *earlier* than originally scheduled because of a conflict with

the high school football playoffs and offended that copies of its mandamus decision were made publicly available. (R. 1245-47). In the court's view, these mundane activities constituted "extreme measures" justifying imposition of the extreme judicial remedy of civil contempt where the express terms of the order were not disobeyed:

> The extreme measures of rescheduling a city council meeting because it was in conflict with a Wall High School football game so that more city members could attend, the copying and producing of this Court's Memorandum and decision and setting copies of the same on the counter of a business, the Auto Livery owned by Mr. Huste[a]d, the Mayor of Wall and voting member of the City council at the time of the issue before this court. These are just to name a few instances that were so far in excess of what had previously been done, it is quite clear that this issue was treated differently than other important issues of the City.

(R. 1491). These findings and conclusions also are clearly erroneous and legally incorrect. There is nothing contemptuous or even remotely inappropriate about accommodating or encouraging civic participation at public city council meetings or notifying the public about the circuit court's mandamus order involving a matter of intense public interest among residents of Wall and the City's process for compliance.

This was not some routine building permit to add a third stall to a residential garage. This involved a matter that might well change life for many people living in this small town. Making copies of the court decision publicly available and allowing members of the public to express their views on the subject is hardly inappropriate and certainly did not violate any express order by the court that could support a finding of civil contempt.

II. THE LOWER COURT ABUSED ITS DISCRETION IN ORDERING ISSUANCE OF THE BUILDING PERMIT AS A REMEDY FOR CIVIL CONTEMPT.

Although this Court obviously need not consider this issue should it vacate the finding of contempt, the circuit court further abused its discretion in ordering the City to issue the building permit as a civil contempt remedy. The sole permissible use of civil contempt is to bring the party who disobeyed a specific order of the court into compliance with that same order. *See Knight*, 54 N.W. at 413; *Gompers*, 221 U.S. at 443; *American-News Co.*, 253 N.W. at 493; *Wold Family Farms*, 2003 S.D. 45, ¶ 14, 661 N.W.2d at 723; *Sazama*, 2007 S.D. 17, ¶ 23, 729 N.W.2d at 344. Here, contempt was not used to enforce the mandamus order; it was used to grant a *new* legal remedy that the order denied.

The mandamus order denied Love's petition seeking to require the City to issue the building permit. The court held it had no legal authority to do so and ordered only that the City must apply SDCL 6-1-17 and then hold another vote. That judgment resolved all the issues raised in Love's petition and became final when it failed to appeal. It thus was the law of the case and foreclosed relitigating those issues under principles of res judicata. *See Healy Ranch, Inc. v. Healy*, 2022 S.D. 40, ¶¶ 40-45, 978 N.W.2d 786, 798-99; *In re Pooled Advocate Trust*, 2012 S.D. 24, ¶¶ 24-26, 813 N.W.2d 130, 139.

Although it may be filed using the same civil number as the original action, a civil contempt action is sui generis. *See Freeman*, 66 N.W. at 929;

Simmons, 278 N.W.at 538; *Bullis*, 315 N.W.2d at 487; *Karras*, 345 N.W.2d at 856; *Thomerson*, 387 N.W.2d at 512; *Brummer*, 1999 S.D. 137, ¶ 15, 601 N.W.2d at 623. Thus, "the affidavit upon which an order to show cause is issued in a contempt action is treated as the complaint and the affidavit of the defendant as the answer[.]" *Otten*, 245 N.W.2d at 508 n.*; *see also Wold Family Farms*, 2003 S.D. 45, ¶15, 661 N.W.2d at 724.

A contempt action brought by a party disappointed with a final order does not provide a fresh opportunity to relitigate what has been determined. The opposite is true: contempt is permissible only to enforce the express terms of a prior order a party willfully or contumaciously disobeyed. Judicial contempt powers may not be commandeered by an unsuccessful litigant and used as some sort of proxy motion to reconsider and reargue its case after a party has foregone its right to appeal from a final order.

That is what happened here. As emphasized by Justice Robert Jackson in the context of contempt proceedings arising from a bankruptcy trustee's alleged failure to obey an order to turn over property:

> The question now arises as to whether, in this contempt proceeding, the Court may inquire into the justification for the turnover order itself. It is clear however that the turnover order proceeding is a separate one and, when completed and terminated in a final order, it becomes res judicata and not subject to collateral attack in the contempt proceedings. This we long ago settled in *Oriel v. Russell*, 278 U.S. 358, and, we think, settled rightly.
>
> The court order is increasingly resorted to, especially by statute, to coerce performance of duties under sanction of contempt. *It would be a disservice to the law if we were to depart from the*

> *long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.*

Maggio v. Zeitz, 333 U.S. 56, 68-69 (1948) (emphasis supplied). If anything, it is Love's attempt to utilize civil contempt to relitigate the court's final mandamus order that should be deemed willful and contumacious. As this Court has sagely explained:

> The act constituting the contempt charged as we have indicated was the attempt contumaciously to relitigate questions determined by the court. The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or other tribunal. The doctrine of res judicata rests on reasons of public policy and private right. *Relitigation of questions previously determined by a court of competent jurisdiction will not be permitted and a party proceeding willfully to relitigate matters adjudicated against him is doubtless guilty of contempt.*

Fienup, 52 N.W.2d at 488 (emphasis supplied).

The underlying mandamus petition raised some interesting questions. Is a city council just a "rubber stamp" when considering a permit application with a potentially devastating impact on quiet residential neighborhoods or life in the town as a whole? Or in exercising the express discretion to approve or deny such an application granted by ordinance, are elected council members permitted to consider the will of their constituents and how it will affect the community? Is it a decision at all—or just a preordained outcome in which the views of the council members, their constituents, and affected homeowners are irrelevant as a matter of law?

Those questions are not before this Court. For purposes of this contempt action, they were resolved by a final order—for which notice of entry was served almost two years ago—that Love's did not appeal.

CONCLUSION

The inherent judicial authority to impose the severe remedy of civil contempt is essential to our system of justice. It is equally vital that courts ensure this truly impressive power is wielded with measure and limited to its true purpose. The City did not disobey any provision of the order it was erroneously found to have violated. Failure to comply with what the circuit court now appears to have thought, but did not require, is insufficient as a matter of law to support a finding of civil contempt.

WHEREFORE, Appellants respectfully request that this Honorable Court reverse and vacate the contempt decisions, findings of fact, conclusions of law, and remedial order directing issuance of commercial building permit and remand with instructions to dismiss with prejudice.

Respectfully submitted this 2nd day of June, 2023.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,785 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS and the APPENDIX were served via email upon the following:

Michael F. Nadolski
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on this 2nd day of June, 2023.

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

APPENDIX

Page

Seventh Judicial Circuit Court
P.O. Box 230
Rapid City, SD 57709-0230
(605) 394-2571

January 9, 2023

Michael Nadolski
110 N. Minnesota Ave. STE 400
PO Box 160
Sioux Falls, SD 57104

Douglas Abraham
503 S. Pierre Street
Pierre, SD 57501

Kent R. Hagg
601 West Boulevard
PO Box 8008
Rapid City, SD 57709

RE: Love's Travel Stops and Country Stores Inc., One Shot LLL vs. City of Wall South Dakota, City Council for Wall South Dakota, Planning and Zoning Commission for Wall South Dakota; 51CIV20-463

Counsel:

This matter came on for hearing before the Court on January 19 and 20, 2022, on a Motion and Order to Show Cause filed by Plaintiffs. Michael Nadolski appeared for the Plaintiffs and Douglas Abraham and Kent Hagg appeared for the Defendants. The parties requested transcripts and a briefing schedule regarding the same. The Court considered the record, briefs and arguments of counsel and GRANTED the Motion and Order to Show Cause, thereby finding the City of Wall, South Dakota, City Council for Wall, South Dakota and the Planning and Zoning Commission for Wall, South Dakota, in Contempt of a valid court order. The matter came before the Court again for a hearing on November 28, 2022,

wherein the Court reviewed the written submission and the oral arguments of counsel as to the possible remedies sought and litigated by the parties for the Contempt finding. The Court having considered the record, briefs, and arguments of counsel, finds for the reasons set forth below, Love's Travel Stops and Country Stores Inc., One Shot LLL is entitled to the issuance of the building permit as sought.

HISTORICAL BACKGROUND

This case was initiated on or about March 25, 2020 by way of the filing of a Petition for Writ of Mandamus by the Plaintiffs. On or about May 1, 2020, Defendant filed a Motion to Dismiss or in the Alternative Motion to Sever. A hearing on that Motion was held on December 9, 2020, and the Court issued a Memorandum Decision (See attached reference #1) that was filed on January 1, 2021, denying the same.

The Court issued a Memorandum Opinion and Order Regarding Petition for Writ of Mandamus Writ of Certiori and Declaratory Relief on or about August 12, 2021, establishing an Order of direction to the City of Wall and Denying the Plaintiffs requests specifically, the Writ of Mandamus to issue the Building Permit to Plaintiffs. (See attached reference #2). A Notice of Entry of that Order was filed on August 13, 2021.

On or about November 11, 2021, Plaintiffs filed a Motion for Order to Show Cause and Issue Building permit. A hearing was held on that Motion on January 19, 2022, and January 20, 2022. After a briefing schedule, the Court issued a Memorandum Decision filed on August 16, 2022, finding the Defendants in contempt of the Court's order dated August 12, 2021. (See attached reference #3). A subsequent hearing was held on November 28, 2022, inviting the parties to set forth their respective positions on remedies available to the Court, in a situation such as this, as there is little to no guidance by way of precedent in the State of South Dakota.

REMEDY DECISION OF THE COURT REGARDING THE FINDING OF CONTEMPT

The record speaks for itself and the attached historical memorandums and orders do the same. The concern of this Court is the extent that the City of Wall went to avoid following the law and its own rules and procedures. Those concerns are set forth in the transcripts from the January 19 and 20, 2022 hearing. The extreme measures of rescheduling a city council meeting because it was in conflict with a Wall High School football game so that more city members could attend, the copying and producing of this Court's Memorandum and decision and setting copies of the same on the counter of a business, the Auto Livery owned by Mr. Husted, the Mayor of Wall and voting member of the City council at the time of the issue before this court. These are just to name a few instances that were so far in excess of what had previously been done, it is quite clear that this issue was treated differently than other important issues of the City.

In the Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory Relief (#2) this Court determined that it had no authority to require approval of the building permit. This Court did, however, exert its authority in granting a writ of mandamus requiring the Wall City Council to conduct a new hearing and vote regarding the Plantiffs building permit application on the subject property, subsequent to a review and consideration of whether SDCL§ 6-1-17 applies to any members of the City Council.

The statute specifically states:

> No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
>
> (1) The official has a direct pecuniary interest in the matter before the governing body; or
> (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.
>
> If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

Defendants claim that they complied with the statute and the Court's order when they held that discussion and found that none of the members had a conflict.

During the hearing that was held on January 19 and 20, 2022, the Court now relies on the testimony of Kelly Welsh, a witness, Council member and business owner, called by the defense. Welsh confirmed that she was counseled by Defendant's legal counsel as to the definition of conflict of interest. Based upon that, she testified that she did not believe she had a conflict of interest, nor did any other member of the City Council. Plaintiffs, during cross-examination asked "[s]o you were instructed by counsel that pecuniary interest in regards to your conflict of interest analysis meant only if their vote would financially profit them in some manner[]" (Transcript January 20, 2022, pg. 20 lines 15-19) and her answer was "[r]ight. Well that---yeah. And I looked up the word, and that's what it said is if you profit from it." (Transcript January 20, 2022, pg. 20 lines 20-21). There is additional back and forth discussion regarding other members, namely Rick Hustead and Stan Anderson, also business owners. At the conclusion of the questioning by counsel for Defendants of Welsh, the Court inquired of her. The transcript of that hearing is available for review, but the Court had the benefit of seeing the demeanor of the witness and candor to the Court. Based on those answers, Welsh's demeanor, one of extreme nervousness and clear intent to want to tell the truth, it is clear that the council members did not take into consideration the full intent of SDCL §6-1-17. The indication and the manner in which these proceedings were conducted, in a manner that was contrary to any other process followed by this Council for previous building permits, was clearly driven by a fear that current businesses in the City of Wall would be adversely affected by the building of Love's Truck Stop. Those

fears may very well be reasonable. This record is clear that the actions of the Council were driven primarily by that fear. Other issues such as light and noise were addressed in the building permit application that clearly complied with the City's ordinance regarding those issues. The fact that business owners who are also council members (not including Welsh based on her testimony) were printing Court decisions and handing them out and putting them in their businesses, shows how different this situation was handled from all other building permit requests in the history of the City. While nothing prohibits those folks from doing the same, as these are proceedings that are open to the public and one certainly enjoys the freedom to do the same, when coupled with the idea that the result of the same would have a direct impact, perhaps negatively or perhaps positively, creates a record that suggests a different motivation. It was clear by Walsh's testimony that she had not even considered whether she would or could benefit positively from Love's Truck stop. The focus for the business owners on the council was always on the negative impact, one that they were advised by counsel for Defendants would not count for consideration of a pecuniary interest thereby creating a conflict of interest. This Court maintains that the direction of the Court regarding the Conflict of Interest determination was not followed and that the conduct of the Defendants throughout the entire process following the Court's order was capricious and arbitrary.

Argument was made Abraham that there needed to be specific times and details that would better guide Defendants to comply. SDCL §6-1-17 is very specific and the City of Wall's Ordinances are very specific. They had legal counsel that was rehearsed in the law advising them. They were aware of the Court's order, had the ability to comply. Based on the

evidence and testimony presented to the Court, they willfully and contumaciously refused to do so.

Abraham also argues at the November 28, 2022 hearing that it's "been our position that the appropriate course of action here would have been through mandamus if they're going to argue that the City's actions were arbitrary and capricious." (Transcript November 28, 2022 pg 16, lines 5-8). The original filing of these proceedings was through a Writ of Mandamus, this Court ruled on that and gave an Order to Defendants through the same. They failed to comply with that Order and because of that failure to comply, the case reverts back to that Writ of Mandamus. This is has always been a Mandamus case, and with the series of events that have occurred since the Court's ruling on the same, the principles set forth in *Black Hills Central Railroad vs. Hill City* very much apply. 274 N.W.2d 31 (2003).

Based upon the entire record before this Court, this Court has little faith that the City is going to carry through in good faith to apply their own standards through the process of this building permit process. This Court acknowledges the same as it did in it's Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory relief is an extraordinary remedy and must not be used to dictate details when there is discretion on how the duty should be performed, as is the case here. However, the egregiousness of the actions of the Plaintiffs suggest that the discretionary function in this set of facts was compromised and motivated by something very different than acting on behalf of the constituents that elected them. And because they did not follow the Order of the Court, there is no way of knowing. This Court does not take

lightly the totality of the circumstances surrounding this case. Abraham argues that monetary damages are not appropriate because they would be too subjective and premature, as a building permit had not been issued. He is correct. In this case, monetary damages are not appropriate under the law.

The Court hereby requires, as a remedy to the contempt, that the building permit shall be issued to Love's Travel Stop and Country Stores, Inc. forthwith. Plaintiff will prepare the appropriate order.

Sincerely,

Heidi L. Linngren
Circuit Court Judge
Seventh Judicial Circuit

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN 9 2023
Ranae Truman, Clerk of Courts
By _____ Deputy

Seventh Judicial Circuit Court
P.O. Box 230
Rapid City SD 57709-0230
(605) 394-2571

January 12, 2021

Michael Nadolski
110 N. Minnesota Ave. STE 400
Sioux Falls, SD 57104

Douglas Abraham
503 S. Pierre Street PO Box 160
Pierre, SD 57501

RE: Love's Travel Stops and Country Stores Inc., One Shot LLL vs. City of Wall South Dakota, City Council for Wall South Dakota, Planning and Zoning Commission for Wall South Dakota; 51CIV20-463

Counsel:

This matter came on for hearing before the Court on December 9, 2020. Michael Nadolski appeared for the Plaintiffs, Douglas Abraham and Kent Hagg (not by way of notice of appearance, just as an observer) appeared for the Defendants. The Court having considered the record, briefs, and arguments of counsel, finds for the reasons set forth below, that the Defendants' motion to dismiss the Writ of Mandamus and Writ of Certiorari are DENIED. The Defendants' request to sever the actions is hereby DENIED.

Background

Love's Travel Stops and Country Stores (hereinafter Love's) entered into a purchase agreement with One Shot, LLC (hereinafter One Shot) for a 13-acre parcel of land. Love's intention in the purchase of the land was to develop and construct a travel stop. In approximately December 2018, Love's began discussions with leaders from the City of Wall (hereinafter the City). The leaders present were Mayor Marty Huether, City Finance Officer Carolynn Anderson, and City Council member Rick Hustead. Love's provided materials regarding the planned travel stop to the

1.

leaders of the City. Following this meeting, Hustead communicated to members of the community his concerns regarding Love's planned travel stop.

On or about August 22, 2019, representatives for Love's attended the City Council meeting and presented their plan for the travel stop. Again, Hustead voiced his opposition to the planned travel stop, at one point indicating that his own business, Wall Drug, would suffer as a result and fewer people would be coming to the city of Wall.

On or about October 16, 2019, Love's submitted a verbal request to rezone the property from agricultural district to general commercial. Love's later learned that the property they acquired from One Shot was not assigned to any of the four zoning districts set forth in the City's Zoning Ordinance. On October 23, 2019, the City published a Notice of Hearing on the Application for rezoning where a hearing would be held by the Planning Commission. Between October 23, 2019, and the date of the hearing, November 5, 2019, Stan Anderson (Anderson) and Hustead, both members of the City Council as well as the planning commission, expressed their disapproval for Love's proposed Travel Stop. Love's allege that this disapproval stems from bias and concern for personal financial interests.

On November 5, 2019, the planning commission met regarding the rezoning. After deliberation, the commission reached a tie vote of three to three. Anderson and Hustead represented two of the three "no" votes. After the Commission meeting, attorneys for Love's expressed their concerns to the Mayor regarding Anderson and Hustead's dual roles as elected officials and commission members. Love's requested that members Anderson and Hustead be recused and a proper 5-seat member consider the application to re-zone. On or about December 12, 2019, the City's attorney informed Love's that no conflicts of interests existed regarding the rezoning application.

On or about January 30, 2020, Love's applied for a building permit for the property to the City's zoning administrator. The City Council held a meeting on February 20, 2020, where a vote on the rezoning of Love's land from agricultural to commercial, as well as Love's building permit appeared on the agenda. Both requests were denied.

Love's initiated their action, seeking the Court's intervention on their application for the building permit which was denied. Love's further seeks declaration that that the City acted contrary

to its own ordinance and state law, exceeding its jurisdiction in denying the building permit. In response, the City filed a motion to dismiss or alternatively to sever.

Analysis

A. Motion to Dismiss

The City makes its motion to dismiss pursuant to SDCL § 15-6-12(b). A motion to dismiss only tests the legal sufficiency of the pleadings, not the facts which support it. The Court must treat as true all facts properly pleaded in the complaint and resolve all doubts in favor of the pleader. *Yankton Ethanol, Inc. v. Vironment, Inc.*, 1999 S.D. 42 ¶ 6, 592 N.W.2d 596, 597-98. Neither will the Court consider documents outside the pleadings when ruling on a motion to dismiss for failure to state a claim. Pleadings should not be dismissed merely because the Court entertains doubts as to whether the pleader will prevail in the case. *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390.

B. Writ of Mandamus

Pursuant to SDCL § 21-29-1, a Writ of Mandamus may be issued by a circuit court upon any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy. *Bailey v. Lawrence County*, 51 N.W. 331, 332 (1892).

The City contends that based upon the Wall City Zoning Ordinance 17.56.030(E), that Love's is not entitled to a Writ of Mandamus. The Ordinance states that "[t]he governing body may vote to approve or deny the amendment, or it may refer it back to the Planning Commission for further study, or hold an additional public hearing, or other action as it may deem necessary." The City argues that based upon this broad discretion, mandamus is inappropriate as there is not a clear legal right of any petitioner to the granting of a petition to rezone.

Love's does not dispute that Ordinance No. 17.56.030 gives the City Council discretion in its decision making, nor does its pleading seek to argue this point. Love's pleadings ask this Court whether its zoning request can be made both fairly and impartially without bias or personal interest. For purposes of the motion to dismiss, this Court does rely upon the South Dakota Supreme Court's decision in *Hanig v. City of Winner*. In *Hanig*, the Supreme Court held that the city council must

conduct a new hearing without disqualified members where allegations of impartiality, conflicts of interest, pecuniary interests and other circumstantial evidence of an unfair hearing exist. *Hanig*, 2005 S.D. 10 ¶ 26, 692 N.W.2d 202, 211. A "Writ of Mandamus is appropriate if there is a 'clear legal right to performance of the specific duty sought to be compelled and the respondent must have a definite legal obligation to perform that duty.'" *Id.* ¶ 9, N.W.2d at 205 (citing *Baker v. Atkinson*, 2001 S.D. 49 ¶ 16, 625 N.W.2d 265, 271). Further, "[a]n individual's constitutional right to due process includes fair and impartial consideration' by a local governing board." *Riter v. Woonsocket Sch. Dist.*, 504 N.W.2d 572, 574 (S.D. 1993).

Here, Love's seeks a Writ of Mandamus upon allegations that the City's consideration of both the rezoning application and building permit were biased and possessed a conflict of interest. Based solely on the pleadings provided by Love's and the South Dakota Supreme Court's holding in *Hanig*, the Court does find that there is legal sufficiency to deny the motion to dismiss the Writ of Mandamus but makes no finding on the merit for the request.

The City further argues that the Writ of Mandamus should be dismissed as Love's fails to state a claim upon which relief can be granted because the building permit cannot be granted until after the property is rezoned. The Court does not find this argument persuasive, as the time for this argument is not ripe. Therefore, the court makes no specific findings on the merit for the request. For these reasons, the Motion to Dismiss the Writ of Mandamus is denied.

C. Writ of Certiorari

A Writ of Certiorari may be appropriate when "inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal nor, in the judgment of the court, any other plain speedy, and adequate remedy." SDCL § 21-31-1. A circuit court's use of certiorari will not "review technical lack of compliance with law or be granted to correct insubstantial errors which are not shown to have resulted in prejudice or to have caused substantial injustice." *Adolph v. Grant county Board of Adjustment*, 2017 S.D. 5 ¶ 7, N.W.2d 377, 381 (quoting *State ex rel. Johnson v. Pub. Utils. Comm'n of S.D.*, 381 N.W.2d 226, 230 (S.D. 1986)).

The City contends that this Court may only determine whether the Planning and Zoning Commission performed an act prohibited under the law or failed to take an action required by law when the City did not provide a recommendation concerning the rezoning application of Love's.

However, similar to its Writ of Mandamus, Love's Writ of Certiorari is based upon the City's alleged bias, pecuniary interest and conflicts of interest. Love's allege that it has a clear right to have the zoning request properly heard by Planning Commissioners who are non-biased and who do not possess a conflict of interest, and whose positions as Commissioners are not contrary to the City's Ordnance. Love's disputes that the City acts in excess of its jurisdiction and not in conformity with law, creating a risk of impartiality in violation of Love's due process rights.

For purposes of the pleading, this Court must treat as true all facts properly pleaded in the complaint and resolve all doubts in favor of the pleader. *Yankton Ethanol Inc,* ¶ 6, N.W.2d at 597-98. This Court finds that Love's pleadings are sufficient. The Motion to Dismiss the Writ of Certiorari is denied.

D. Severance of Actions

The City maintains that in the alternative of dismissing Love's writs, it is entitled to a severance of the actions. The City, in neither its initial motion nor its reply brief, provided this Court with even so much as a citation or caselaw favoring this position. Opposing the request, Love's points to SDCL § 15-6-42(b). In order to grant a severance, the Court, may either for convenience or to avoid prejudice, order separate proceedings. Such a step may be taken for the sake of expedition and economy. The City has not provided any argument to suggest how it would be prejudiced.

This Court relies on at least four different occasions where the South Dakota Supreme Court has addressed cases wherein one of the parties petitioned for both a Writ of Mandamus and a Writ of Certiorari. Not in any of these cases, was any reference made about the impossibility of a court ruling on both in the same proceeding. *See Centennial Valley Ass'n, Inc. v. Schultz,* 284 N.W.2d 452 (S.D. 1979); *Lamar Outdoor Advertising of South Dakota, Inc., v. City of Rapid City,* 2007 S.D. 35, 731 N.W.2d 199 (2007); *Jundt v. Fuller,* 2007 S, D., 62, 736 N.W.2d 508; & *Parris v. City of Rapid City,* 2013 S.D. 51, 834 N.W.2d 850.

Finally, the Court agrees with Love's position that this proceeding is only in the pleadings stage and that it is too early to determine which avenue it must pursue. Finally, the City has not submitted any authority to support its request for a severance of the action. For these reasons, the request to sever the action is denied.

Conclusion

Based upon the aforementioned, the Motion to Dismiss the Writ of Mandamus and Certiorari is hereby DENIED. Alternatively, the motion to sever the actions is also hereby DENIED.

Very truly yours,

Heidi L. Linngren
Circuit Court Judge

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN 12 2021
Renee Juman, Clerk of Courts
By: _____ Deputy

STATE OF SOUTH DAKOTA)SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., and ONE SHOT, LLC, Petitioners/Plaintiffs, vs. CITY OF WALL, SOUTH DAKOTA, CITY COUNCIL FOR WALL, SOUTH DAKOTA, and PLANNING AND ZONING COMMISSION FOR WALL, SOUTH DAKOTA, Respondents/Defendants.	)	51CIV20-463 **MEMORANDUM OPINION AND ORDER REGARDING PETITION FOR WRIT OF MANDAMUS, WRIT OF CERTIORARI, AND DECLARATORY RELIEF**

This matter came before the Court through Petitioner's Verified Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory relief. On July 28, 2021, the Court held a hearing to address the matter. The Petitioners appeared through Counsel, Michael Nadolski; the Respondents appearing through Counsel, Douglas Abraham. The Court being familiar with the entire file and having considered the affidavits, exhibits, briefs, and arguments of both parties; the Court hereby **DECLARES** that the subject property is outside of the districts as detailed in the City of Wall's Zoning Ordinance, therefore any regulations as outlined in the Zoning Ordinance do not apply to the subject property; it is also hereby **ORDERED**, that the Petitioner's Writ of Mandamus is **GRANTED** requiring the Wall City Council to reconsider Petitioner's building permit application regarding the subject property, however, prior to consideration of the building permit application, the Wall City Counsel must review and determine

whether SDCL § 6-1-17 applies to any of the Council Members prior to discussion and voting on the Petitioner's building permit application.

BACKGROUND

Petitioner, Love's Travel Stops and Country Stores (hereinafter Love's), entered into a purchase agreement with One Shot, LLC (hereinafter One Shot) for a 13-acre parcel of land. Love's intention in the purchase of the land was to develop and construct a travel stop. In December 2018, Love's began discussions with leaders from the City of Wall (hereinafter the City). The leaders present were Mayor Marty Huether, City Finance Officer Carolynn Anderson, and City Council member Rick Hustead. Love's provided materials regarding the planned travel stop to the leaders of the City. Following this meeting, Hustead communicated to members of the community his concerns regarding Love's planned travel stop.

On August 22, 2019, representatives for Love's attended the City Council meeting and presented their plan for the travel stop. Again, Hustead voiced his opposition to the planned travel stop, at one point indicating that his own business, Wall Drug, would suffer as a result and fewer people would be coming to the City of Wall. Hustead is a majority shareholder of Wall Drug Store, Inc., which owns Wall Auto Livery, a service or gas station located in Wall.

On October 16, 2019, Love's submitted a verbal request to rezone the property from agricultural district to general commercial. Love's later learned that the property they acquired from Once Shot was not assigned to any of the four zoning districts set forth in the City's Zoning Ordinance. On October 23,

2019, the City published a Notice of Hearing on the Application for rezoning where a hearing would be held by the Planning Commission. Between October 23, 2019, and the date of the hearing, November 5, 2019, Stan Anderson (Anderson) and Hustead, both members of the City Council as well as the planning commission, expressed their disapproval for Love's proposed Travel Stop. Love's allege that this disapproval stems from bias and concern for personal financial interests.

On November 5, 2019, the planning commission met regarding the rezoning. After deliberation, the commission reached a tie vote of three to three. Anderson and Hustead represented two of the three "no" votes. After the Commission meeting, attorneys for Love's expressed their concerns to the Mayor regarding Anderson and Hustead's dual roles as elected officials and commission members. Love's requested that members Anderson and Hustead be recused and a proper 5-seat member consider the application to re-zone. On December 12, 2019, the City's attorney informed Love's that no conflicts of interests existed regarding the rezoning application.

On January 30, 2020, Love's applied for a building permit for the property to the City's zoning administrator. The City council held a meeting on February 20, 2020, where a vote on the rezoning of Love's land from agricultural to commercial, as well as Love's building permit appeared on the Agenda. Both requests were denied. The Wall City Attorney recommended to the City Council to deny Love's building permit application because it was premature. Soon after the City Council denied the building permit application.

Love's initiated their action, seeking the Court's intervention on their denied building permit application. Love's further seeks declaration that the City acted contrary to its own ordinance and state law. Love's argues the City failed to properly adopt its Zoning Ordinance and the ordinance should be set aside. Alternatively, Love's argues that the Zoning Ordinance does not contain an agricultural district, therefore the Zoning Ordinance does not apply to the subject property. The City argues that the Zoning Ordinance applies and regulates service stations, and that no conflicts of interest existed in the decision making bodies.

The City concedes that the prior Planning and Zoning Commission decision is invalid because the commission included six members, rather than five, and also included three elected members of the City Council, which was in contravention of a City Ordinance in effect at the time of the decision. The City suggests the proper remedy is for Love's to receive a new hearing in front of a Planning and Zoning Commission which complies with City Ordinances.

ANALYSIS

1. The Petitioner's subject property is not regulated by the City of Wall's Zoning Ordinance, therefore rezoning is unnecessary and zoning regulations are not applicable.

"A significant function of local government is to provide for orderly development by enacting and enforcing zoning ordinances." *Parris v. City of Rapid City*, 2013 S.D. 51, ¶ 17, 834 N.W.2d 850, 855 (quoting *Schafer v. Deuel County Bd. Of Com'rs*, 2006 S.D. 106, ¶ 17, 725 N.W.2d 241, 245); *see also* SDCL § 9-19-3; SDCL Chapter 11-4. "The ultimate purpose of zoning ordinances is to

confine certain classes of uses and structure to designated areas, and thus bring about the physical development of the community." *Schafer*, 2006 S.D. 106, ¶ 12, 725 N.W.2d at 245-46 (quoting CJS *Zoning and Land Planning* § 3 (2005)). "The object of zoning is also to adopt measures to regulate property use in conformance with a comprehensive plan," which at its essence "is to provide a balanced and well-ordered scheme for all activity deemed essential . . . ." *Id.* at 246.

In order to regulate property under a zoning ordinance, a city must divide the city into zoning districts, or "zones" which then specific regulations may be developed for each specific district. SDCL § 11-4-2; *see also Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926). These regulations may "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structure, or land." SDCL § 11-4-2. Also, any regulations developed for a specific zoning district "shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts." *Id.*

"[R]egulations shall be made in accordance with a comprehensive plan . . . to promote health and the general welfare[.]" SDCL § 11-4-3. "Such regulations shall be made with reasonable consideration, among other things, to the character of the district, and is peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." *Id.*

The City of Wall's Zoning Ordinance divides the city into four districts: (1) General Residential District; (2) General Commercial District; (3) General Industrial District; and (4) Planned Unit Development. *City of Wall Municipal Code* (WMC) § 17.08.010. Nowhere in the City's Zoning Ordinance is a district termed "Agricultural." The subject property is located outside of the four designated districts regulated by the Zoning Ordinance. The City argues that the Zoning Ordinance only allows service or gas stations to be located within the General Commercial District. While it is true that if Love's attempted to place a service or gas station within any of the other districts as outlined in the Zoning Ordinance, these regulations would apply, this is not true when the proposed location is within non-zoned property. Ultimately, the purpose of the zoning ordinance is to implement the comprehensive plan. If an area of land is not within a district, or "zone" as outlined by the Zoning Ordinance, then this area is not regulated by the Zoning Ordinance.

This is the case with Love's property. Love's property is not within any of the district boundaries as provided in the Zoning Ordinance. The scope of the Zoning Ordinance cannot encompass a new and distinct "zone" without properly pursing an amendment to the Zoning Ordinance. As evidenced by the current state of the Zoning Ordinance, the City never amended the ordinance to include an "Agricultural" district. Therefore, the Zoning Ordinance does not regulate or apply to Love's property. As such, no zoning regulations prevent Love's from placing a service or gas station on the subject property. As the Zoning Ordinance

does not apply to the subject property, the Court finds it unnecessary to determine whether the City validly adopted the Zoning Ordinance.

2. The Petitioner is entitled to a fair and impartial hearing and vote to determine whether their building permit application is approved or denied.

Love's requests the Court issue a writ of mandamus requiring the City Council to approve a building permit for the project on the subject property. The City Council, at its February 20, 2020 meeting, summarily denied Love's building permit application based on the City Attorney's recommendation that consideration of the building permit is premature until zoning issues have been resolved. Love's also requests as part of the writ of mandamus that members of the City Council be disqualified to consider the building permit application because of conflicts of interest.

A. The City has a ministerial duty to consider and vote upon Love's building permit application.

Generally, "[a] writ of mandamus is an extraordinary remedy that will issue only when the duty to act is clear." *Krsnak v. South Dakota Dept. of Environment and Natural Resources*, 2012 S.D. 89, ¶ 9, 824 N.W.2d 429, 434 (quoting *Woodruff v. Bd. Of Comm'rs for Hand Cnty.*, 2007 S.D. 113, ¶ 3, 741 N.W.2d 746, 747). "A writ of mandamus 'commands the fulfillment of an existing legal duty, but creates no duty itself . . . ." *Id.* "Mandamus may only be used to compel ministerial duties, not discretionary duties." *Id.* ¶ 10 (quoting *Sorensen v. Sommervold*, 2005 S.D. 33, ¶ 9, 694 N.W.2d 266, 269). "'[W]hen public officials

have a mandatory duty to perform . . . mandamus may require performance' but mandamus may not dictate details when there is discretion in how the duty is to be performed." *Id.*

The City of Wall regulates commercial building permits under Chapter 15.09 of the City Code. WMC § 15.09.050 expressly requires that a commercial building permit is required with any new construction, and "shall be approved by the council." This places a duty on the City Council to hear the building permit as long as the other criteria have been met. Based on the record, Love's complied with the necessary requirements to place their building permit application in front of the City Council for consideration. Thus, the City Council has a clear and unequivocal duty to at minimum, hear and consider Love's building application.

While the City Council did not provide a specific reason for denying Love's building permit, based on the City Attorney's recommendation, it is apparent that the denial was based solely on the permit consideration being premature until the other zoning issues were settled. As noted above, the City's Zoning Ordinance does not regulate the subject property, thereby settling all previous zoning issues and clearing the way for the City Council to properly consider Love's building permit.

WMC § 15.09.050 essentially requires the City Council to hear and consider all commercial building permits, as long as other prerequisites are met. As this removes all discretion from the City Council on whether to hear and review the permit, then this duty is ministerial in nature. However, whether to

approve or deny the building permit is purely a discretionary function of the City Council. While the Court may issue a writ of mandamus requiring the City Council to perform, such as hear and consider Love's building permit application, mandamus is inappropriate in dictating how the Council must vote, as this is a purely discretionary function. Therefore, the Court has no authority to require approval of the building permit. However, the Court does have authority to issue a writ of mandamus requiring the City Council to consider and vote regarding Love's building permit application. Therefore, the Court hereby grants a writ of mandamus requiring the Wall City Council to conduct a new hearing and vote regarding the Petitioner's building permit application on the subject property.

B. Prior to the discussion and vote on Love's building permit application, the City Council must review and consider whether SDCL § 6-1-17 applies to any members of the City Council.

Love's argues that Council member Hustead possesses a disqualifying conflict of interest because of Hustead's stake in Wall Drug Store, Inc., which owns Wall Auto Livery, a potential competitor to Love's. Love's also referenced Hustead's comments at the August 22, 2019, City Council meeting where Hustead made statements regarding: (1) "[a] fast food business would have devasting impact on town;" (2) "Wall Drug would not be able to maintain advertising which will bring fewer people to town;" (3) "[e]mployment problems will get worse;" and (4) this is not economic development it is economic destruction."[1] *August 22, 2019 City Council Meeting Minutes*, City of Wall

[1] The record is unclear if these statements are direct quotes from Hustead or were paraphrased.

Certiorari Return Volume V, 292 (filed May 11, 2020). In the same minutes, Hustead also raises concerns that: (1) "Kelly addition will suffer from noise and lighting pollution;" (2) "Kelly addition is Wall's premier residential area and it would lower property values;" (3) We will lose our wholesome safe living; this is not economic development it is economic destruction." *Id.*

Generally, SDCL § 6-1-17 directs that no county, municipal, or school official "may participate or vote on any issue which the official has a conflict of interest, but vests the official with discretion to make a subjective determination whether he or she has 'any potential conflict of interest requir[ing] such official to be disqualified . . . .'" *Holborn v. Deuel County Board of Adjustment*, 2021 S.D. 6, ¶ 31, 955 N.W.2d 363, 376-77 (quoting SDCL § 6-1-17). SDCL § 6-1-17 requires disqualification when: (1) "'[t]he official has a direct pecuniary interest in the matter before the governing body;' or (2) if '[a]t least two-thirds of the governing body votes that an official has identifiable conflict of interest' prohibiting the official from voting on a matter." *Id.* ¶ 31, 955 N.W.2d at 377 (quoting SDCL § 6-1-17). "Absent these two mandatory grounds for disqualification, SDCL § 6-1-17 leaves the decision of whether an elected or appointed public official can be fair and unbiased to the conscience and anticipated good judgment of each official in carrying out his or her duties." *Id.*

When determining whether a "direct pecuniary interest" exists, there must be a "showing that the property of the official will be benefited, or that he or she will receive direct financial *gain* from a decision on the matter before the board. *Id.* ¶ 32 (emphasis in original). Without a direct pecuniary interest, the decision

to disqualify because of a conflict of interest rests "exclusively to the official's judgment, or the collective vote of at least two-thirds of the governing body when any other potential conflict is disclosed or identified." *Id.*

In the case with Council member Hustead, while there is no question he has a significant stake in Wall Drug, the record in front of the Court is insufficient to show that Council member Hustead has a direct pecuniary interest which would disqualify him under SDCL § 6-1-17. Love's relies heavily on Hustead's statements at the August 22, 2019 meeting to support that a conflict of interest exists. When viewing the rest of Hustead's statements at the same meeting, the record is unclear whether Hustead is protecting his own interests, or acting on behalf of his constituents.

Hustead's statements appear to go beyond merely protecting his interest in Wall Drug, but raises community wide concerns, such as noise and light pollution, residential property values, and overall effect on the wholesome safe living within the community. These statements show Hustead's community concerns rather than his own personal interests. Based on this record, it is unclear whether Hustead has a direct pecuniary interest as stated under SDCL § 6-1-17. While the record is inadequate for the Court to issue a writ of mandamus disqualifying Council member Hustead, this does not mean Council member Hustead, or any other City Council member, is free and clear of the requirements under SDCL § 6-1-17.

Ultimately, the City Council has a duty to provide Love's a fair and impartial hearing in regards to their building permit application. As part of

fulfilling this duty, the City Council is obligated to consider whether SDCL § 6-1-17 applies to any of its members prior to discussion and voting on the building permit application. While determining whether SDCL § 6-1-17 actually disqualifies any member of the City Council is discretionary in nature, and mandamus is not appropriate, mandamus is appropriate to require the City Council to review and apply the statute. Therefore, the Court grants a writ of mandamus requiring the City Council to apply SDCL § 6-1-17, and determine whether any member of the City Council is disqualified from discussing and voting on Love's commercial building permit application related to the subject property.

As the Court has addressed the substantive matters raised in the Petition through a declaration and a writ of mandamus, the Court finds it unnecessary to address a writ of certiorari.

CONCLUSION

Based on the above-mentioned reasons, the Court hereby **DECLARES** that the City of Wall Zoning Ordinance as provided under WMC Title 17, does not apply to Love's property as noted in the filed Petition. The Court also hereby **GRANTS** a writ of mandamus requiring the City Council to conduct a new hearing and vote regarding the Petitioner's building permit application on the subject property. However, prior to discussion and vote, the City Council is required to review and determine whether any of its members are disqualified from discussing and voting as required under SDCL § 6-1-17.

ORDER

Based on the reasons set forth above, it is hereby:

DECLARED the City of Wall Zoning Ordinance as found under the city of Wall Municipal Code Title 17 does not apply to the subject property as noted in the Verified Petition for Writ of Mandamus and for Writ of Certiorari and Complaint for Declaratory Relief. It is further

ORDERED that the Court hereby issues a Writ of Mandamus requiring the City Council of Wall, South Dakota to discuss and vote upon Petitioner's commercial building permit application. The Writ of Mandamus also requires that prior to the discussion and vote on Petitioner's commercial building permit application, the City Council is required to review and determine whether any member of the City Council is disqualified, as provided under SDCL § 6-1-17, from discussing and voting on Petitioner's commercial building permit application.

Dated this 12 day of August, 2021.

BY THE COURT:

THE HONORABLE HEIDI L. LINNGREN
CIRCUIT COURT JUDGE

ATTEST:
RANAE TRUMAN
CLERK OF COURTS
By:
Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT
AUG 12 2021
Ranae Truman, Clerk of Courts
By Deputy

Seventh Judicial Circuit Court
P.O. Box 230
Rapid City, SD 57709-0230
(605) 394-2571

August 15, 2022

Michael Nadolski
110 N. Minnesota Ave. STE 400
Sioux Falls, SD 57104

Douglas Abraham
503 S. Pierre Street PO Box 160
Pierre, SD 57501

Kent R. Hagg
601 West Boulevard
PO Box 8008
Rapid City, SD 57709

RE: Love's Travel Stops and Country Stores Inc., One Shot LLL vs. City of Wall South Dakota, City Council for Wall South Dakota, Planning and Zoning Commission for Wall South Dakota; 51CIV20-463

Counsel:

This matter came on for hearing before the Court on January 19 and 20, 2022 on a Motion and Order to Show Cause filed by Plaintiffs. Michael Nadolski appeared for the Plaintiffs, Douglas Abraham and Kent Hagg appeared for the Defendants. The parties requested transcripts and a briefing schedule regarding the same. The Court having considered the record, briefs, and arguments of counsel, finds for the reasons set forth below, that Motion and Order to Show Cause is hereby GRANTED.

3

Facts

Love's Travel Stops (hereinafter Plaintiff) brought suit against the city of Wall (Defendants) in regard to several issues, all stemming from Plaintiff's attempt at purchasing land and building a travel stop within Wall city limits. On August 12, 2021, as part of the ongoing litigation, this Court issued a Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory Relief.

Specifically, this Court ordered:

> **DECLARED** the City of Wall zoning ordinance as found under the City of Wall Municipal code title 17 does not apply to the subject property as noted in the Verified Petition for Writ of Mandamus and for Writ of Certiorari and Complaint for Declaratory Relief. It is further
>
> **ORDERED** that the Court hereby issues a Writ of Mandamus requiring the City Council of Wall, South Dakota to discuss and vote upon Petitioner's commercial building permit application. The Writ of Mandamus also requires that prior to the discussion and vote on Petitioner's commercial building permit application, the City Council is required to review and determine whether any member of the City council is disqualified, as provided under SDCL § 6-1-17, from discussing and voting on Petitioner's commercial permit application.

Memorandum and Order, p. 13.

On August 16, 2021, Plaintiff asked that their Application be placed on the City's next agenda. Defendants did so, yet nothing of substantive action occurred at the hearing on August 23, 2021. At the following meeting, September 2, 2021, the City did not list any action on Plaintiff's Application but conversation was had about this Court's decision from the previous month.

Finally, on September 20, 2021 Defendants testified that they believe they held a hearing which comported with this Court's previous order to determine whether conflicts of interests existed. "That portion of the Court's order was complied with...The City Council provided public notice and the opportunity for public input concerning Love's

application for a building permit." *Defendant's Brief*, p. 5. The process the council members utilized, per the advice given to them by legal counsel, Kent Haag, was to evaluate whether they had a conflict of interest based solely upon whether any decision maker would receive a direct financial benefit from approving the Application. Based upon that process, the council members determined that none of them had a conflict of interest.

Subsequently, on October 1, 2021, Defendants provided a timeline in which it would render a decision on Plaintiff's application, adopt new rules and procedures relative to its deliberations and take public comment regarding the Application. On October 7, 2021, October 12, 2021, and again on October 14, 2021, Defendants published notice in its legal newspaper requesting "Public Input" at the October 18, 2021, meeting. The evidence suggested that Defendants spent $166 in publishing their notices, more money and more often than usual.

At the council meeting on October 18, 2021, Plaintiff was provided 20 minutes to make its presentation which was to be followed by a 10-minute question and answer period. Defendants subsequently went into executive strategy session and denied Plaintiff's Application for a second time. Council person Stan Anderson made the denial official, stating "[t]he health, safety, well-being of the residents of the City of Wall are at stake, I'll make a motion to deny the building permit." The motion carried and although not a unanimous decision, it was a majority decision, nonetheless and the Application was denied. Plaintiff then brought the Motion and Order to Show Cause before this Court arguing that Defendants did not comply with the Court's order of August 12, 2021.

Analysis

"The four elements of contempt are (1) existence of an order; (2) knowledge of the order; (3) ability to comply with the order; (4) willful or contumacious disobedience of the order." *Alto Tp. v. Mendenhall*, 2011 S.D. 54, ¶ 12, 803 N.W.2d 839, 842. Counsel for Defendants have already stipulated that the first two elements of contempt are met in their entirety. This Court will solely focus upon elements three and four.

A. Ability to Comply with the Order

In this Court's decision of August 12, 2021, the Defendants were ordered to do two things: 1) discuss and vote upon Plaintiff's commercial permit application; and 2) prior to the discussion and vote, review and determine whether any member of the city council is disqualified, as provided under SDCL § 6-1-17, from discussing and voting on Petitioner's commercial permit application.

The evidence and testimony presented at the hearing on the Order to Show Cause was very clear that Defendants had the ability to comply with this Court's order. Defendants placed on their agenda for the September 20, 2021 hearing "Love's Litigation Against the City of Wall – Conflict of Interest Analysis." Based upon its own admissions, it had ample ability to comply with the order.

Defendant's brief further concedes that it had the ability to comply, "the Wall City council conducted a public health hearing to review whether any member was disqualified pursuant to SDCL § 6-1-17 in compliance with the Court's Order. Further, the council also discussed and voted on Petitioner's commercial building permit application as directed by the Court." *Defendant's Brief*, p. 2-3

There is no question that Defendants had the ability to comply with the Order, Element three is met.

B. Willful or Contumacious Disobedience of the Order

To form the basis for a subsequent finding of contempt, an order must state the details of compliance in such clear, specific and unambiguous terms that the person to whom it is directed will know exactly what duties or obligations are imposed upon [him or her]." *Alto Tp.* 2011 SD. 54, ¶ 13, 803 N.W.2d at 843.

Defendants argument rests upon the contention that "[t]here can be no contempt finding where the express terms of the Court's Order are complied with." Defendants further argue that they held a hearing to determine whether a conflict existed, gave Plaintiff time to present its case, and voted upon the application again. Defendants rest its entire defense on the argument that the underlying Writ of Mandamus is "inappropriate in dictating how the Council must vote, as this is a purely discretionary function."

Defendants are correct, this Court does not have the authority to tell the council how to vote. However, this Court finds that Defendants did not even reach the portion where they could utilize their discretion when it willfully disobeyed this Court's order to adequately conduct a conflict of interest analysis. To reiterate, SDCL § 6-1-17 directs that no county, municipal, or school official "may participate or vote on any issue which the official has a conflict of interest, but vests the official with discretion to make a subjective determination whether he or she has 'any potential conflict of interest requir[ing] such official to be disqualified [.]'" *Holborn v. Deuel County Board of Adjustment*, 2021 S.D. 6, ¶ 31, 955 N.W.2d 363, 376-77 (quoting SDCL § 6-1-17).

When determining whether a "direct pecuniary interest" exists, there must be a "**showing that the property of the official will be benefited**, or that he or she will receive direct financial gain from a decision on the matter before the board." *Id.* ¶ 32 (emphasis in original). Without a direct pecuniary interest, the decision to disqualify because of a conflict of interest rests "exclusively to the official's judgment, or the collective vote of at least two-thirds of the governing body when any other potential conflict is disclosed or identified." *Id.*

At the evidentiary hearing before this court on January 19-20, 2022, it became abundantly clear that as Plaintiff alleges, it does appear as if Defendants merely went through the motions of having the conflict of interest hearing. Most significantly to this point is the testimony of Rick Hustead and Kelly Walsh.

During cross examination Hustead, the owner of the Auto Livery in Wall, and council member, was asked whether he believed he had a pecuniary interest in the outcome of this case. His response was that in order to have a conflict of interest he would need to "have a direct profit." *TR*-1 108: 13-14. Hustead followed this up by stating he did not believe that a conflict of interest arose where "there was a competitor, and, in approving the permit then you would lose business." *TR*-1 108-109: 25, 1-2. It is obvious that less competition, i.e. denying a building permit to a competing business, in his capacity as a councilman, would be a pecuniary interest, in and of itself.

A similar conversation occurred during the testimony of council member Kelly Welsh whom owns a motel in Wall. It was the belief of Welsh that neither her nor any other member of the Wall city council had a conflict of interest. *TR*-2 7: 11-13. During cross-examination Welsh could not provide the criteria used by the council to determine whether

a conflict existed, other than that "if they have a financial gain directly from this." Plaintiff then inquired "[i]f Wall Drug would be negatively impacted by a truck stop going there, a vote against allowing it to come there would be a financial gain because they would not be negatively impacted?" *TR*-2 18: 1-4. Welsh indicated she "wouldn't have a clue." *Id.* at 11.

The actions and subsequent testimony of the city council concern the Court. Even giving Defendants the benefit of the doubt that it did not have a reasonable definition of 'pecuniary' at hand, the conflict of interest analysis was woefully ill-prepared and in no way comprehensive enough. This is evident by the testimony of the witnesses but most specifically Welsh. It is clear from her testimony that little to no consideration was given into what financial gains her hotel would likely receive with the addition of Plaintiff's Travel-Stop. Black's Law Dictionary defines willful as "voluntary and intentional, but not necessarily malicious." The Court finds that even in the light most favorable to the Defendant, its actions were willfully disobedient to the Court's order. The record is clear based on the testimony presented and the arguments of Plaintiff that this portion of the Court's order was disregarded in a willful manner by not addressing the same.

This Court will not allow the Defendants to feign ignorance of the standard before them. Hustead's assured this Court, in his testimony, that he had read the South Dakota Supreme Court's rationale in *Holborn* and "under[stood] the decision in conjunction with what this Court ordered the Council to do. *TR*-107: 6. Taking that as true, in the times that Hustead would have read *Holborn*, he surely would have seen the Court's reference to *Hanig v. City of Winner* where indirect pecuniary interests disqualify council persons from voting. There, a councilwoman worked as a waitress in a competing bar in Winner and conceded that if there was another bar in town her income based on tips may be impacted."

Hanig, 2005 S.D. 10, ¶ 20, 692 N.W.2d 202, 209. The Court held that because of the indirect pecuniary interest she should have been disqualified from participating in the decision. *Id.*

Husted made it very clear that he and the other members of the Council had been advised by legal counsel regarding this Court's order. *TR*-103: 12-14. Any council member could have asked the legal counsel to explain what impact *Hanig* had on its impending conflict of interest analysis. They did not. Instead, they willfully went about their analysis as they saw fit to conduct it, in the light most favorable to how it would benefit them, as business owners and not as council members.

In addressing the issue regarding the denial of the building permit, after the "conflict of interest" analysis that Defendants claim occurred, it is important to refer back to the court's original Memorandum Opinion on the Writ of Mandamus (which is attached hereto for reference). Defendants rely heavily on the courts Memorandum Opinion that it gives the city council some unfettered discretion that is not carved out in its responsibilities under South Dakota Codified Law. Defendants changed its own rules which did not comport with the responsibilities that it holds under South Dakota Codified Law. This record is abundantly clear that the Defendants had made up its mind and then created rules that would fall in line with their decision to deny the Building Permit, despite the implementations of its own rules. Plaintiff is correct in its analysis contained in its post hearing submissions that this record is riddled with inconsistencies of any intention of Defendants to follow its own rules when it began to pick and choose which rules would apply, regardless of whether or not they were proper. This is not a zoning issue. They treated it as such to justify denying the building permit. They ignored the fact that the

Plaintiff's building plans were complied with at every level. Each witness testified to the same. There may be a dispute as to why it took so long to get this matter addressed by the city council, but the facts of the timeline and the manner in which this was continued for a variety of reasons, including continuing based on a Wall High School football game, and in spite of the court's order, Defendants did indeed "slow walk" this process, deliberately.

This record is also full of areas where this council acted differently in this case than it had in any other instance of granting a building permit, from multiple publications to actually placing a stack of this court's original Memorandum Opinion in the business of one of the council members, something that Husted testified that he had never done before.

The record is also very clear, as set forth in the written submissions of Plaintiff, that the council denied the building permit based upon zoning criteria. This court acknowledges that there was not a specific time or deadline set for holding the meeting/hearing on the application for the building permit; however, the record stands for itself and even the testimony of the council members made it abundantly clear that the council acted with disregard to the Court's Order. The Court cannot ignore the fact that the city council's decision, upon advice of legal counsel, was not based upon any law or rule. This Court directed the council to act under the law that was before it. The Court did not order them to grant the permit, the Court ordered them to follow the law, something that was clearly disregarded here. This arbitrary decision, which was not based in rules or law, allowed the application of Love's, as Plaintiff quotes "to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines[.]" *Goos RV Ctr v. Minnehaha County Commission*, 2009 S.D. 24, ¶ 12, 764 N.W.2d 704,709.

Conclusion

The Court understands that civil contempt is a severe remedy and principles of basic fairness require that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt. *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1802 204 L. Ed. 2d 129 (2019) (internal citations omitted). However, in this Court's order, it made clear that the Defendants needed to comport with the requirements of SDCL § 6-1-17. The city of Wall is a creature of statute and has "only such powers as are expressly delegated by the state or as are necessarily implied from expressly delegated powers." *Custer City v. Robinson*, 108 N.W.2d 211, 213 (S.D. 1961). It is for that reason this Court finds civil contempt to be appropriate. Defendants are in a position of power and can affirm or deny permits such like Plaintiff seeks here. Before such a step can be taken, the Council itself must ensure that no Conflict of Interest exists. That was not done and as such the Defendants willfully and contumaciously disobeyed this Court's order. Further, in the process by which the meeting was "slow walked" and the manner in which the council voted was contrary to the powers for which they held by statute and its own ordinances. Their reasons for the denial of the permit, under their own rules, was improper and the councils' actions rise to the level of contempt, with Plaintiff having met the burden on every element of the same. This court gave the council the opportunity in its Memorandum Opinion of August 12, 2021, to follow the law with the discretion allowed therein. The willful disregard of the same is evident. This Court hereby GRANTS Plaintiff's Motion for Order to Show Cause and finds Defendants are in contempt.

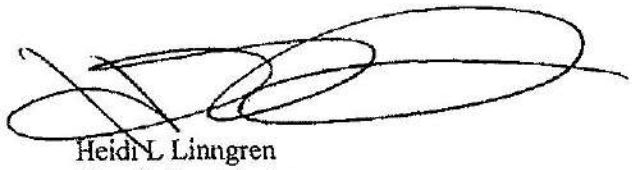
The Court hereby orders that a hearing be held to determine the remedy. The Court directs Plaintiff to submit the legal authority for which they believe the Court can act on

the issuance of the permit, as a result of this finding of contempt. The Court directs the Plaintiff to submit an affidavit of attorney's fees for consideration prior to the hearing with notice to Defendant to respond to the same. The Court also directs Plaintiff to submit, if able, a daily loss of pecuniary benefit to Plaintiff since the issuance of the August 12, 2021 Memorandum Opinion issued by this Court, also in advance of the hearing so Defendant can respond to the same. The Court will consider any remedy allowed under the law.

Plaintiff will do the appropriate Order regarding this Memorandum decision, with appropriate findings regarding the same.

Counsel can advise how quickly they can be ready for such hearing via email.

Very truly yours,



Heidi L. Linngren
Circuit Court Judge
Seventh Judicial Circuit

Pennington County, SD
FILED
IN CIRCUIT COURT
AUG 16 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., and ONE SHOT, LLC, Petitioners/Plaintiffs, vs. CITY OF WALL, SOUTH DAKOTA, CITY COUNCIL FOR WALL, SOUTH DAKOTA, and PLANNING AND ZONING COMMISSION FOR WALL, SOUTH DAKOTA, Respondents/Defendants.	51CIV. 20-000463 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above-entitled matter came on for hearing before this Court on Plaintiffs' Motion for Order to Show Cause and Motion for Contempt on January 19 and 20, 2022, and November 28, 2022. Plaintiffs Love's Travel Stops & Country Stores, Inc. ("Love's"), and One Shot, LLC ("One Shot"), appeared through their counsel Jeffery Collins and Michael Nadolski, and Defendants City of Wall ("City") and City Council for Wall, South Dakota ("City Council") appeared through their counsel Kent Hagg, Douglas Abraham, and Stephanie Trask.

The Court, having received the testimony and evidence of the parties, having considered the record, briefs, and arguments of counsel, and being fully advised, hereby enters the following:

FINDINGS OF FACT

1. That on August 12, 2021, the Court signed and filed a Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory Relief, (hereafter "Memorandum Opinion and Order").

2. That in that Memorandum Opinion and Order, the Court granted Petitioner/Plaintiffs' Writ of Mandamus ordering the City Council to reconsider Love's commercial building permit application filed with the City on January 30, 2020 ("Application") regarding the subject property without consideration of the City's Zoning Ordinance, as the Court had determined such zoning regulations were inapplicable to the subject property under the facts of the case.

3. It was further ordered that prior to the Defendants City's and City Council's reconsideration of the Application, the City Council was directed to review and determine if any members of the City Council were disqualified under SDCL § 6-1-17 from discussing and voting on the Application.

4. The evidence presented at the hearing held on January 19 and 20, 2022, demonstrates that the City Council failed to properly comply with the Court's Order directing it to review participation of its members pursuant to SDCL § 6-1-17 to determine if any member had a conflict of interest requiring that official to be disqualified from consideration of the Application.

5. That the testimony elicited from members of the City Council made it clear that the City Council was aware of the contents of the law, was aware of the contents of

this Court's Memorandum Opinion and Order regarding the review to be undertaken under SDCL § 6-1-17, and that the Defendant City, through Defendant City Council wholly failed to properly apply the standards of SDCL § 6-1-17 and properly review potential conflicts of interest which may have required an official to be disqualified from voting on the Application.

6. That evidence solicited and presented through briefing and testimony of City Council members confirms that the Application complies with the City's regulations relative to commercial building permits in all respects.

7. That evidence solicited through testimony and submissions to the Court further show that the Defendants City's and City Council's denial of the Application was based entirely on factors that are part and parcel of the City's Zoning Ordinance, such as compatibility with surrounding areas and concern for negative secondary effects of the proposed use.

8. That although certain members of the City Council denied that consideration was given to the City's Zoning Ordinance when deciding the issue of the Application, such councilmember testimony revealed that the various justifications for the denial of the Application were all anchored in considerations relative to the proposed use of the subject property, considerations which fall within the purview of the City's Zoning Ordinance and had been deemed impermissible by the Court.

9. That the failure of the Defendant City, through the City Council, to properly review for potential conflicts of interest of its members pursuant to SDCL §6-1-

17 was a direct violation of this Court's Memorandum Opinion and Order of August 12, 2021.

10. That the Defendants City's and City Council's failure to apply the applicable regulatory standards to the review the Application, and instead, to use considerations that were in effect regulatory elements of the City's Zoning Ordinance as a basis to deny the Application constitute a direct violation of the Memorandum Opinion and Order.

11. That through the testimony and submissions of the parties, it is clear that the Defendants City and City Council had knowledge of this Court's Memorandum Opinion and Order.

12. That the Defendants City and City Council had the ability to comply with the Memorandum Opinion and Order.

13. That the Defendants City and City Council, by its actions, willfully and contumaciously disobeyed the Memorandum Opinion and Order by failing to properly review and address potential conflicts of interest pursuant to SDCL § 6-1-17, and further failed to apply the correct standard to the Application set forth in Title 15, Chapters 15.05 and 15.09 of the City's municipal code.

14. That the Defendants City and City Council further willfully and contumaciously disobeyed the Court's Order through its *de facto* application of certain zoning considerations as the basis for its denial of the Application, the nature and function of which are fundamental to its Zoning Ordinance and are distinctly different from those codified in Title 15, Chapters 15.05 and 15.09 of the City's municipal code.

15. That the Court finds, based upon the City Council's previous actions and testimony in this matter, that the Court is not confident that the City Council will abide by further Orders of this Court to properly evaluate and apply the appropriate standards of review to Love's Application.

16. That based upon the testimony from the City Council members that the Love's Application complies with all applicable building code regulations and criteria, that sending the issue back to the City Council for reconsideration would only delay the inevitable issuance of the Building Permit and cause additional damages to the Plaintiffs as there exists no basis to deny the Application.

17. That any Findings of Fact contained in the August 15, 2022, letter opinion from this Court are incorporated herein by this reference pursuant to SDCL § 15-6-52(a).

18. That any Findings of Fact contained in the January 9, 2023, letter opinion from this Court are also incorporated herein by this reference pursuant to SDCL § 15-6-52(a).

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following:

CONCLUSIONS OF LAW

1. Any Conclusions of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law.

2. That following the Court's issuance of its August 12, 2021, Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and

Declaratory Relief, the City Council did not follow the Court's direction regarding the "Conflict of Interest" determination prior to considering Love's Application.

3. That following the Court's issuance of its August 12, 2021, Memorandum Opinion and Order Regarding Petition for Writ of Mandamus, Writ of Certiorari, and Declaratory Relief, the City Council's conduct relative to its consideration of Love's Application was arbitrary and capricious.

4. That through testimony, submissions, and evidence, Love's and One Shot have shown by clear and convincing evidence the contempt factors set forth in *Keller v. Keller*, 2003 S.D. 36, ¶ 9, 660 N.W.2d 619, 622, in that:

a. There was a sufficiently clear order to inform the City, through the City Council, of the City Council's duty to perform an analysis for potential conflicts of interest of its members and consider the Application without resort to the Zoning Ordinance.

b. The Defendants City and City Council knew about the Order.

c. The Defendants City and City Council had the ability to comply with the Order.

d. The Defendants City and City Council willfully and contumaciously disobeyed the Court's Order.

5. That based upon the testimony, submissions, and evidence submitted by both parties, the record is clear that Love's Application complied with all applicable regulatory requirements promulgated by the City of Wall.

6. That based upon the record before this Court, there is no discretion left for the City Council to exercise relative to consideration of Love's Application, and as such, there is no lawful reason for the City Council to refrain from issuing a commercial building permit to Love's for its development project.

7. That any Conclusions of Law contained in the August 15, 2022, letter opinion from this Court are incorporated herein by this reference pursuant to SDCL § 15-6-52(a).

8. That any Conclusions of Law contained in the January 9, 2023, letter opinion from this Court are also incorporated herein by this reference pursuant to SDCL § 15-6-52(a).

9. Love's and One Shot's Motion and Order to Show Cause is hereby GRANTED and the Court further finds that the Defendants are in CONTEMPT;

10. The Court hereby requires, as a remedy to the contempt, that a commercial building permit shall be issued to Love's forthwith. An Order consistent with these Findings of Fact and Conclusions of Law shall be entered.

1/24/2023 7:54:52 AM

BY THE COURT:

Honorable Heidi L. Linngren
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., and ONE SHOT, LLC, Petitioners/Plaintiffs, vs. CITY OF WALL, SOUTH DAKOTA, CITY COUNCIL FOR WALL, SOUTH DAKOTA, and PLANNING AND ZONING COMMISSION FOR WALL, SOUTH DAKOTA, Respondents/Defendants.	51CIV. 20-000463 **ORDER DIRECTING ISSUANCE OF COMMERCIAL BUILDING PERMIT**

The Court having the same day entered its Findings of Fact and Conclusions of Law, which are incorporated herein by this reference, now, therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED that the City of Wall, through the City Council, shall issue forthwith a commercial building permit to Love's Travel Stops & Country Stores, Inc., relative to the building permit application submitted by Love's Travel Stops & Country Stores, Inc., on January 30, 2020 ("Application"), and filed with the City of Wall on January 30, 2020.

1/25/2023 8:37:05 AM

BY THE COURT:

Honorable Heidi L. Linngren
Circuit Court Judge

Attest:
Watkins, Amber
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30277

LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., and ONE SHOT, LLC,

Plaintiffs and Appellees,

v.

CITY OF WALL, SOUTH DAKOTA, CITY COUNCIL FOR WALL, SOUTH DAKOTA, and PLANNING AND ZONING COMMISSION FOR WALL, SOUTH DAKOTA,

Defendants and Appellants.

Appeal from the Circuit Court,
Seventh Judicial Circuit
Pennington County, South Dakota
The Honorable Heidi L. Linngren, Presiding

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Filed: 7/17/2023 10:46 AM CST Supreme Court, State of South Dakota #30277

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NOTICE OF APPEAL FILED ON FEBRUARY 21, 2023

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JURISDICTIONAL STATEMENT

Appellants, City of Wall, South Dakota; City Council for Wall, South Dakota; and Planning and Zoning Commission for Wall, South Dakota (collectively "the City"), appeal from the circuit court's January 9, 2023 Memorandum Decision finding the City in contempt of court and granting the Motion and Order to Show Cause; the circuit court's Findings of Fact and Conclusions of Law related thereto; the circuit court's Order Directing Issuance of Commercial Building Permit; and the Memorandum Decision dated August 15, 2022. Notice of Entry of the Decision and Order dated January 9, 2023, was filed on January 25, 2023, and the City filed Notice of Appeal on February 21, 2023. This Court has jurisdiction pursuant to SDCL § 15-26A-3.

STATEMENT OF THE ISSUES

I. Whether the court correctly found the City was in contempt of its Mandamus Order for failing to reconsider whether any of the City's councilmembers had a conflict of interest and whether the building permit should be issued?

The circuit court correctly determined the City willfully or contumaciously failed or refused to comply with the circuit court's Order,[1] after having the knowledge and ability to do so.

Most apposite authorities:

Metzger v. Metzger, 2021 S.D. 23, 958 N.W.2d 715
Hanig v. City of Winner, 2005 S.D. 10, 692 N.W.2d 202
Miles v. Spink Ctnty., 2022 S.D. 15, 972 N.W.2d 136
SDCL § 6-1-17

[1] "Order" refers to the circuit court's August 12, 2023 Memorandum Opinion and Order, unless otherwise specified.

II. Whether the court's remedy of directing issuance of the building permit as a remedy for the City's contempt was proper?

The circuit court correctly ordered that the City issue a building permit after finding that all requisites for the issuance of a building permit had been satisfied.

Most apposite authorities:

Harksen v. Peska, 2001 S.D. 75, 630 N.W.2d 98
Healy Ranch, Inc. v. Healy, 2022 S.D. 43, 978 N.W.2d 786
Link v. L.S.I., Inc., 2010 S.D. 103, 793 N.W.2d 44
Lippold v. Meade Cnty., 2018 S.D. 7, 906 N.W.2d 917

STATEMENT OF THE CASE

Love's planned to purchase from One Shot real property located along Interstate 90, within the city limits of Wall, South Dakota (the "Property"), for the construction of a gas station/convenience store ("Travel Stop"). The Property did not fall within any of the zoning districts established by Wall's Zoning Ordinance ("Ordinance"). As such, the Property is not subject to any zoning regulations, a determination made by the circuit court,[2] which has not been appealed or otherwise challenged by the City. Therefore, Love's need only to obtain a building permit to construct the Travel Stop. Although typically a very straightforward, brief process, Love's attempts were met with opposition from the City. Almost immediately after Love's intentions to build the Travel Stop were made public, City councilmember Rick Hustead publicly voiced opposition to the

[2] Use of "court" (lower case "c") means the circuit court unless otherwise noted.

Travel Stop, notwithstanding his ownership of two competing businesses, Wall Drug and the Auto Livery.

From the initial submission of Love's Building Permit Application on January 30, 2020 ("Love's Application"), the City imposed unprecedented procedural hurdles upon Love's, including several meetings, hearings, rules and other procedural hurdles that are rooted in bias and fall outside the legal scope required of a building permit application process. The City Council ultimately voted to deny Love's Application, with participation of Hustead and two other members having conflicts of interest. Love's sought certiorari and mandamus relief from the court, which ordered that the City reconsider both the conflict-of-interest issue and Love's Application.

Those three councilmembers had indirect pecuniary interests, which should have disqualified them from voting on Love's Application. The City failed to properly consider the conflict-of-interest issue and failed to properly consider Love's Application, as the City applied irrelevant considerations while ignoring legally required considerations as to both issues, contrary to what the court ordered. As a result, the court found the City in contempt and ordered that the building permit be issued, since all requisites for issuance were satisfied. The City appeals.

STATEMENT OF THE FACTS[3]

A. The Parties and Property

At all times relevant, Marty Huether was Mayor of Wall. R.2. Members of Wall's City Council included Hustead, Dar Haerer, Jerry Morgan, Stan Anderson, Dan Hauk, Mike Anderson ("Anderson"), and later Kelly Welsh. *Id.* The members of the Planning and Zoning Commission ("Commission") were Anderson, Hustead, Rick Sutter, Gary Keyser, and Dave Olson. *Id.*

Hustead is the owner of Wall Drug Store, Inc., commonly known as "Wall Drug" and the Auto Livery (a gas station), both located in Wall. *Id.* Wall Drug has a restaurant, gift and souvenir shop, and visitor information. *Id.* Love's operates Travel Stops throughout the United States. R.1. One Shot currently owns the Property on which Love's plans to construct the Travel Stop, which would have multiple gas and diesel pumps, auto and truck parking spaces, restaurant(s), scale, and laundry and shower facilities. R.3.

B. Application to Rezone the Property and Application for Building Permit

In December 2018, Love's began communicating with the City about the Travel Stop. *Id.* Sometime thereafter, Love's representatives and City officials, Huether, Carolynn Anderson (City finance officer), and Hustead, participated in a meeting, where Love's provided materials to the City. R.3-4. Thereafter, in an effort to gain opposition to the Travel Stop, Hustead began communicating with

[3] Factual citations are to the certified record prepared by the clerk, indicated by the abbreviation "R." followed by the page number assigned by the clerk.

members of the public regarding the Travel Stop, even showing members of the public materials that Love's provided to the City. R.4.

On or about August 22, 2019, Love's representatives attended the City Council meeting and presented the plan for the Travel Stop. *Id.* Pat Trask, father of the City's attorney, Stephanie Trask, voiced opposition to the planned Travel Stop, stating he feels "it is a nightmare idea for this Goliath company to come in." R.4, 18. Hustead also publicly opposed the Travel Stop, stating, his own business, "Wall Drug would not be able to maintain advertising which will bring fewer people to town." *Id.*

In October 2019, Love's submitted a "verbal" request to the Commission to rezone the Property, which was in accordance with the direction Love's received from the City. R.4. At the time it requested the rezoning, Love's believed the Property was within an agricultural district, as the City so informed Love's. *Id.* Love's applied to have the Property rezoned as general commercial (GC), a zoning district consistent with the City's Comprehensive Plan. R.4-5.

Only later did Love's learn that the designation for the Property, "Agricultural Lands", is not a zoning district recognized or established by the Ordinance. The Ordinance is limited to four (4) zoning districts: general residential district (GR), general commercial district (GC), general industrial district (GI), and planned unit development (PUD). R.5, 29-30. The City's Ordinance does not list a zoning district commonly known as an agricultural district or agriculture. *Id.*

Prior to the November Commission meeting, Love's submitted the fact sheet setting forth its plans for the Travel Stop and additional relevant information for the Commission's consideration. R.6, 33-37. Prior to that Commission meeting, Anderson and Hustead, both members of the City Council *and* the Commission, publicly exhibited and communicated disapproval of Love's Travel Stop. R.6.

The Commission met on November 5, 2019, and six individuals were seated as Commission members, three of whom were at the time, elected officials, including Huether, Anderson and Hustead, in violation of Ordinance Section 2.20.010, which states, "[t]he members of this planning commission . . . *shall not hold any elective office in the municipal government.*" R.7, 38 (emphasis added). The Commission reached a tie vote of 3 to 3, resulting in no recommendation to the City Council. R.7. Anderson and Hustead were two of the three members who voted "no" on Love's Rezoning Application. *Id.*

Following the Commission meeting, Love's communicated with Huether, expressing concerns over the participation of councilmembers Anderson and Hustead, in light of their status as elected officials, their comments within the community, and their personal interests. Love's requested that the City properly seat a five-member Commission to promptly consider Love's Rezoning Application, and that members Anderson and Hustead be recused. *Id.* In response, City Attorney, Stephanie Trask, indicated the South Dakota Public

Assurance Alliance did not identify any conflicts of interest with regard to the Rezoning Application. R.7-8.

On or about January 30, 2020, Love's submitted its Application to the City's zoning administrator. R.8, 39. All the legal requirements for obtaining a building permit were satisfied. R.8. The Ordinance does not prohibit Love's proposed use of the Property. *Id.*

The City Council held a meeting on February 20, 2020. R.8. Immediately following executive session of that meeting, Haerer moved to deny the Rezoning Application and the motion carried by a unanimous vote. *Id.* Love's was not given an opportunity to comment, and no public comments or public discussion was had regarding Love's request. R.9. Such action was taken contrary to the applicable provisions of the Ordinance and SDCL Ch. 11-4 ("Any interested person shall be given a full, fair, and complete opportunity to be heard at the hearing. . . .").

In that same City Council meeting, the issue of allowing councilmembers to also serve on the planning and zoning commission was raised, and an inquiry about Love's Application was made. R.9. Attorney Trask indicated the Application was premature. *Id.* Nevertheless, Anderson moved to deny the Application and the motion carried by a unanimous vote. *Id.* Love's was again denied the opportunity to comment, no other public comments or discussion was had regarding Love's Application, and the City Council summarily denied Love's Application. *Id.*

C. The Circuit Court Proceedings

Love's and One Shot[4] filed their Verified Petition seeking certiorari, mandamus, and declaratory relief. R.1-40. As to the writ of certiorari, Love's alleged that the City exceeded its jurisdiction based on the illegal membership of the City's elected officials on the Commission (Anderson, Huether, and Hustead) and on Anderson's and Hustead's bias and personal conflicts of interest when considering both the Rezoning Application and Building Permit Application. R.10. Love's alleged the Commission failed to properly consider Love's Rezoning Application, and the City Council failed to properly consider Love's Application and Rezoning Application. *Id.* Through the writ of mandamus, Love's requested that the court order the City Council to issue a building permit, as there was no zoning prohibition, and the Application met all legal requirements. R.12.

The court decided the mandamus relief, set forth in the August 12, 2021 Memorandum Opinion and Order, stating:

> DECLARES that the subject property is outside of the districts as detailed in the City of Wall's Zoning Ordinance, therefore any regulations as outlined in the Zoning Ordinance do not apply to the subject property; it is also hereby ORDERED, that the Petitioner's Writ of Mandamus is GRANTED requiring the Wall City Council to reconsider Petitioner's building permit application regarding the subject property, however, prior to consideration of the building permit application, the Wall City [Council] must review and determine whether SDCL § 6-1-17 applies to any of the Council

[4] For the proceedings in circuit court and this Court, Love's and One Shot will be collectively referred to as "Love's" unless otherwise noted.

Members prior to discussion and voting on the Petitioner's building permit application.

R.895-907.

The court held the Property was not within any of the districts or zones outlined by the Ordinance, and was not regulated by the Ordinance.[5] R.898-901. As to the City's duty to consider and vote on Love's Application, the court held:

> *Based on the record, Love's complied with the necessary requirements to place their building permit application in front of the City Council for consideration. Thus, the City Council has a clear and unequivocal duty to at [a] minimum, hear and consider Love's building application.*
>
> While the City Council did not provide a specific reason for denying Love's building permit, based on the City Attorney's recommendation, it is apparent that the denial was based solely on the permit consideration being premature until the other zoning issues were settled. As noted above, *the City's Zoning Ordinance does not regulate the subject property, thereby settling all previous zoning issues and clearing the way for the City Council to properly consider Love's building permit.*
>
> WMC § 15.09.050 essentially requires the City Council to hear and consider all commercial building permits, as long as other prerequisites are met. As this removes all discretion from the City Council on whether to hear and review the permit, then *this duty is ministerial in nature*.

R.901-02 (emphasis added).

Regarding the conflict-of- interest issue, the court noted Hustead's competing business interests (Wall Drug and Wall Auto Livery), and highlighted Hustead's statements:

---

[5] Because of this conclusion, the circuit court held it was unnecessary to consider Love's argument that the Ordinance was not validly adopted. R.901.

> (1) "[a] fast food business would have devasting impact on town;" (2) "Wall Drug would not be able to maintain advertising which will bring fewer people to town;" (3) "[e]mployment problems will get worse;" and (4) "this is not economic development it is economic destruction."

R.903. Additionally, Hustead stated:

> (1) "Kelly addition will suffer from noise and lighting pollution;" (2) "Kelly addition is Wall's premier residential area and it would lower property values;" (3) "We will lose our wholesome safe living; this is not economic development it is economic destruction."

R.904. Hustead's statements remain undisputed.

The court noted that an official is prohibited from voting on any issue on which the official has a "*conflict of interest*." *Id.* (citing SDCL 6-1-17 and *Holborn v. Deuel County Bd. of Adjustment*, 2021 S.D. 6, ¶ 31, 955 N.W.2d 363, 376-77) (emphasis added). The court explained that a direct pecuniary interest is one type of conflict of interest, mandating disqualification. R.904. Even without a direct pecuniary interest, a conflict of interest could still exist, requiring disqualification. R.904-05. The court found the record was unclear as to whether Hustead has a *direct* pecuniary interest, and as to whether he had *any other type of conflict of interest*. R.905. The court concluded:

> While the record is inadequate for the Court to issue a writ of mandamus disqualifying Council member Hustead, this does not mean Council member Hustead, or any other City Council member, is free and clear of the requirements under SDCL § 6-1-17.
>
> Ultimately, the City Council has a duty to provide Love's a fair and impartial hearing in regard[] to their building permit application. As part of fulfilling this duty, the City Council is obligated to consider whether SDCL § 6- 1-17 applies to any of its members prior to discussion and voting on the building permit application. While

> determining whether SDCL § 6-1-1 7 actually disqualifies any member of the City Council is discretionary in nature, and mandamus is not appropriate, mandamus is appropriate to require the City Council to review and apply the statute. Therefore, the Court grants a writ of mandamus requiring the City Council to apply SDCL § 6-1-1 7, and determine whether any member of the City Council is disqualified from discussing and voting on Love's commercial building permit application related to the subject property.

R.905-06.

Following that decision, Love's again provided the City with its Application for consideration at the City's meeting on August 23, 2021. R.932-33. Neither Love's Application nor the conflict-of-interest issue were considered by the City at its subsequent August and September meetings, despite appearing on those agendas. R.936-54; 955-57.

At the August 23rd City council meeting, the City approved three non-Love's building permit applications *without public hearing or the solicitation of public input*. R.938. In sharp contrast, the minutes from the August meeting reflect that the City refrained from deliberating upon Love's building permit so as to obtain an "informed legal decision" and to purportedly provide Love's time to provide more information. R.939.

Although "building permits" was an item on the September 2nd agenda, the City council again took no action on Love's Application. R.942-46. On September 20, 2021, the City's agenda listed: "Love's Litigation Against the City of Wall – Conflict of Interest Analysis – Pursuant to SDCL 6-1-17." R.948. The agenda also listed "Permits" and two non-Love's applications for building permits.

Id. After engaging in what was labeled as "self-analysis," the City's attorneys concluded (incorrectly) that the "Court defines conflict of interest as 'direct pecuniary gain'" and City Attorney Trask reiterated (incorrectly) that "a 'direct pecuniary gain' would need to be identified to show conflict of interest." R.951. The minutes reflect "[n]o council member self-analyzed as having a conflict of interest, and, by lack of a motion for assertion of a council member, no action was taken." *Id.* However, a different building permit application was approved. *Id.* Tellingly, both actions on non-Love's building permit applications were taken *without public hearing or the solicitation of public comment*. *See id.* Underscoring Husted's bias and conflict of interest, Hustead made packets of information related to Love's Application available at his gas station prior to the August and September council meetings, an unprecedented action for other building permit applications. R.1058-61.

After Love's inquiry of the City's delay in considering the issues ordered by the court, City Attorney Trask provided a timeline for consideration of the issues. Trask set forth a number of various dates for action, including the date the City intended to notify the public of its intent to render a decision on the Love's application, adopt new rules and procedures relative to its deliberations, and take public comment regarding such Application; the date the City would "pursue information" for the council members' ultimate review; and the date the council would take public comment pursuant to its new rules. R.958. Love's voiced

concern with the City's new rule-making regarding the Application and the continued delay in complying with the court's Order. R.959-61.

Another City council meeting was held on October 4, 2021. R.962. The agenda for that meeting listed three non-Love's building permit applications, and also, "Love's Truck Stop data collection." *Id.* Without public hearing or solicitation of public comment, the City approved all three non-Love's building permits. R.964-65. While the City again did not decide Love's Application, it stated the City's intent to take public input and to implement public input rules relative to Love's Application. R.965. Counsel for Love's objected, noting that public comment on building permit applications is not the normal practice and contradicts the legal standard under the City's code. *Id.*

Finally, the City thrice published notice of its intent to (1) consider Love's Application on October 18, 2021, and (2) take public input. R.968. The City posted notice of its intent on its website and Facebook page. R.1060.

The October 18th city council meeting, when Love's Application was finally considered was transcribed by a court reporter. R.971. The councilmembers failed to ask a single question of Love's representatives regarding its Application. R.977. Instead, the City solicited public input, hearing comments from approximately 12 citizens, none of whom offered comment or evidence relative to Love's Application's compliance with the City's building code. R.977-1014. Those who spoke out in opposition were concerned with the perceived negative secondary effects of the project – zoning issues, not issues related to a

building permit application. *Id.* None of the councilmembers asked for information pertaining to the project's compliance with the building code. *Id.*

Upon prompting by Attorney Trask, and a motion from Hustead, the council entered into executive session "to hear from its legal counsel," after which Huether called for a motion. R.1018-20. Councilmember Anderson made a motion stating, "The health, safety, well-being of the residents of the City of Wall are at stake, I'll make a motion to deny the building permit." R.1020. The motion passed with a vote of 4 to 2. R.1021-22. There was no further explanation regarding the denial of the building permit application, how the purported issues related to "health, safety, [and] well-being" (improper zoning considerations) had any bearing on compliance with the requirements of the building code, nor any explanation as to whether any councilmembers had a conflict of interest. R.1019-22.

Because the City failed to comply with the court's Order, Love's filed a Motion for Order to Show Cause. At the January 19 and 20, 2022 Show Cause hearing, testimony was taken from Huether; councilmembers, Morgan, Hustead, and Welsh; Eric Hansen, One Shot owner and former councilmember; the City's finance officer; and Love's representative, Steve Walters. R.1127-1331.

The testimony overwhelmingly demonstrates that Love's Application was subjected to a standard not warranted under existing law. Hansen's testimony reflects that Love's Application was treated differently than any other building permit application Hansen could recall. R.1138-41. City finance officer Anderson

confirmed that no building permit application other than Love's had been separately noticed or advertised for hearing. R.1164, 1167. Huether testified that Love's building permit application was treated differently than all other such applications in terms of advertising and soliciting public input. R.1177-78.

Huether confirmed that Love's plan satisfied all requirements for a building permit listed in the Ordinance, including the site plan, drainage, parking lot, handicap accessible parking, landscaping, and special equipment. R.1180-81. Love's also satisfied the requirement of architect certification and confirmed it would follow any other applicable ordinances. R.1181-82. Counsel for the City elicited testimony from Huether regarding issues unrelated to building permit requirements, but related to zoning concerns, including proximity to residential areas, overnight parking, noise, light, traffic, and crime. R.1189-90. Huether acknowledged that at the time the City was considering the building permit application, the Ordinance did not apply to the Property. R.1192, 1197.

At the Show Cause hearing, councilmember Morgan was asked about the city council meeting on October 18, 2021: "Do you recall any of your colleagues asking questions of the Love's representative regarding the specifics of their building plans and specifications?" R.1201. Morgan responded, "At that meeting, I don't think we were discussing the building permit. . . . I don't believe we discussed the building itself at that meeting." *Id.*

Councilmember Welsh testified she owns a motel in Wall, located near Hustead's gas station. R.1289. Welsh testified that councilmember Anderson owned the Dairy Queen restaurant in Wall. R.1291.

Welsh also testified that a number of citizens were opposed to Love's Travel Stop, based on concerns of noise and the "proximity to their homes and the devaluation of their property," none of which, even if true, have any bearing on compliance with the building code. R.1281. She testified the crux of the concerns was they "just didn't think that that was the best place for it." R. 1282.

Welsh testified that as to the conflict-of-interest issue, the City council considered only whether anyone had a "*direct* pecuniary" interest. R.1288. Her understanding of "direct pecuniary interest" is that the person would "have a financial gain directly from this." R.1288. In determining whether any of the councilmembers had a conflict of interest, the councilmembers only looked at whether any of them had a "financial gain directly from this." *Id.* They did *not* take into account whether any councilmembers' business or financial position would be *negatively* impacted by Love's travel stop. R.1291-92. The councilmembers "were instructed by counsel that pecuniary interest in regard [] to your conflict of interest analysis meant only if their vote would financially profit them in some manner?" R.1292.

As with the other councilmembers, Welsh testified that Love's plans and specifications complied with each of the requirements for a commercial building permit as set forth in the Ordinance. R.1293-95. Welsh found Love's site plan,

parking, handicap parking, and landscaping were compliant with the Ordinance. *Id.* In short, Love's submission complied with all parts of the Ordinance, and nothing in Love's Application was in violation of the Ordinance. R.1295-96; 1298.

Welsh confirmed that none of the reasons that were a basis for denying the building permit actually appear in the Ordinance relating to commercial building permits. R.1298-99. Welsh acknowledged the concerns and reasons the building permit was denied – the health, safety, well-being – are not criteria in the City's building code but are considerations relevant only to zoning decisions. R.1300-02.

Welsh also admitted no reason was given for the City's denial of Love's Application. R.1302. She testified she voted to deny the building permit "because of the location of where it's at and the proximity to the Stone Drive Neighborhood," but acknowledging such a reason is not found anywhere in the criteria set forth in the Ordinance. *Id.* Welsh further testified that Love's Application met the building permit criteria, she had no problem with the proposed building itself, and the issue was with its proximity to homes. R.1304-05.

Love's representative, Steve Walters, confirmed that after Love's Application was fully submitted, the City never notified Love's about any questions or concerns regarding the plans and specifications. R.1214. Similarly, the councilmembers had no questions or concerns regarding the plans and specifications during the October 18th council meeting. *Id.* None of the questions

or concerns from the public at that meeting related to Love's Application; rather, all such concerns related to light, pollution, drainage – questions relevant only to zoning matters. R.1215. When the City denied Love's Application, no reason was given for the denial. R.1216. At no point between the time Love's Application was filed and the time the City denied it, did the City ever provide any feedback on Love's Application. R.1221.

Hustead testified he voted to deny Love's Application because "I didn't feel that putting a truck stop at that location was in the best interests of Wall and its citizens. . . . People were really concerned -- well, there's a lot of things, but they were really concerned with the truck stop going right in the backyard of our nicest residential area. I mean, really concerned." R.1230. Regarding his conflict of interest, Hustead testified that he did not have a "pecuniary interest," which he understood to mean he had to have a "direct profit." R.1233. Hustead testified that if a competitor caused his business to suffer a "loss," such a loss did not amount to a "pecuniary interest." R.1233-34.

Hustead testified that in considering the building permit application, the councilmembers could consider "the health, safety, and well-being of the community." R.1236. He acknowledged "light, noise, crime, traffic" were factors considered on a conditional use permit application (which has never been at issue). R.1236-38. Hustead testified he did not ask Love's any questions about the building plans and specifications because "I didn't have -- have any questions. . . . I think the plan, from our engineer's estimate, *was that it was fine*." R. 1238

(emphasis added). Hustead testified he knew the City's building code "applied to the building permit" and he knew what was required of the building plans and specifications "to a certain degree." *Id.* He admitted, however, he never indicated that Love's plans and specifications did not comply with the building code. *Id.* Hustead could not provide any examples in which considerations such as crime and impact on the neighborhood were considered for a building permit application. R.1240. *Hustead acknowledged that the City's building code is adopted to promote the health, safety, and welfare of the public and agreed that "if you're in – in compliance with the building code, then you're satisfied of health, safety, and welfare concerns regarding how the structure is built."* R.1241 (emphasis added).

The court also asked several questions of Hustead, confirming that Hustead has a "pecuniary interest in Wall Auto Livery." R.1245-47. Hustead admitted that the only business in which copies of the court's previous opinion were left was his own competing business, and that prior to the October 18th meeting, Hustead made his opinion about Love's Application known to the public. R.1246-49.

By Memorandum Decision dated August 15, 2022, the court found the City in contempt of its August 2021 Order. R.1404-14. The court found the City "willfully disobeyed this Court's order to adequately conduct a conflict of interest analysis" and it was "abundantly clear" that the City merely "went through the motion of having the conflict of interest hearing." R.1409. The court held it "is obvious that less competition, i.e., denying a building permit to a competing business, in [Hustead's] capacity as a councilman, would be a pecuniary interest,

in and of itself." *Id.* The court found it was "clear from [Welsh's] testimony that little to no consideration was given into what financial gains her hotel would likely receive." R.1410. The court concluded the City's conflict-of-interest analysis was "woefully ill-prepared and in no way comprehensive enough." *Id.*

In concluding the City was also willfully disobedient to its Order regarding consideration of the building permit, the court found the City believed it had some "unfettered discretion" and "changed its own rules which did not comport with the responsibilities" under South Dakota law. R.1411. The court found the "record is abundantly clear that the [City] had made up its mind and then created rules that would fall in line with their decision to deny the Building Permit." *Id.* The court found specifically, this "is not a zoning issue," yet the City "treated it as such to justify denying the building permit. They ignored the fact that [Love's] building plans were complied with at every level. Each witness testified to the same." R.1411-12. The court held: "This record is also full of areas where this council acted differently in this case than it had in any other instance of granting a building permit, from multiple publications to actually placing a stack of this court's original Memorandum Opinion in the business of one of the council members, something that Husted testified that he had never done before." R.1412.

The court concluded:

> The Court cannot ignore the fact that the city council's decision, upon advice of legal counsel, was not based upon any law or rule. This Court directed the council to act under the law that was before it. The Court did not order them to grant the permit, the Court ordered them to follow the law, something that was clearly

> disregarded here. This arbitrary decision, which was not based in rules or law, allowed the application of Loves, as Plaintiff quotes "to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines[.]" *Goos RV Ctr v. Minnehaha County Commission*, 2009 S.D. 24, ¶ 12, 764 N.W.2d 704,709.

R.1412. The court found the City in contempt as to both its responsibilities under the Order and requested additional briefing regarding available remedies for the City's contempt. R.1413-14. On January 9, 2023, the court ordered that the City issue the building permit to Love's, issuing a Memorandum Opinion and Findings of Fact and Conclusions of Law. R.1489-1525; 1526-1540.

As to the conflict-of-interest analysis, the court found:

> the testimony elicited from members of the City Council made it clear that the City Council was aware of the contents of the law, was aware of the contents of this Court's Memorandum Opinion and Order regarding the review to be undertaken under SDCL § 6-1-17, and that the Defendant City, through Defendant City Council wholly failed to properly apply the standards of SDCL § 6-1-17 and properly review potential conflicts of interest which may have required an official to be disqualified from voting on the Application.
>
> * * *
>
> That the failure of the Defendant City, through the City Council, to properly review for potential conflicts of interest of its members pursuant to SDCL §6-1-17 was a direct violation of this Court's Memorandum Opinion and Order of August 12, 2021.

R.1527-28.

As to the building permit, the court found the "evidence solicited and presented through briefing and testimony of City Council members confirms that

the Application [for building permit] complies with the City's regulations relative to commercial building permits in all respects." R.1528. The court found:

> [E]vidence solicited through testimony and submissions to the Court further show that the Defendants City's and City Council's denial of the Application was based entirely on factors that are part and parcel of the City's Zoning Ordinance, such as compatibility with surrounding areas and concern for negative secondary effects of the proposed use.
>
> [A]lthough certain members of the City Council denied that consideration was given to the City's Zoning Ordinance when deciding the issue of the Application, such councilmember testimony revealed that the various justifications for the denial of the Application were all anchored in considerations relative to the proposed use of the subject property, considerations which fall within the purview of the City's Zoning Ordinance and had been deemed impermissible by the Court.

R.1528.

The City appeals the court's finding that the City was in contempt of the Order on three bases: (1) the Order was not clear and unambiguous; (2) the City did not violate the Order; and (2) the court erred in granting the building permit application. The City has not appealed the court's conclusion that the Ordinance is inapplicable or that the City incorrectly applied zoning considerations to the building permit application.

As explained below, the Order was clear and unambiguous and the councilmembers' sole consideration of whether any of them had a "direct financial interest" rather than whether any of them had a "conflict of interest" was in violation of and failed to satisfy that Order. The councilmembers' sole consideration of issues related to zoning, instead of issues related to a building

permit was also in violation of and failed to satisfy the court's Order. The court's order to issue the building permit as a remedy for the City's contempt was within the court's discretion and supported by its findings of fact and conclusions of law.

ARGUMENT AND AUTHORITIES

Standards of Review

The Court will not set aside the circuit court's findings of fact regarding whether the City was in contempt unless those findings are clearly erroneous. *See Harksen v. Peska*, 2001 S.D. 75, ¶¶ 8-10, 630 N.W.2d 98, 101. This requires the Court to "defer to the circuit court's findings of fact" and the Court "will only reverse when 'after a review of all the evidence, "we are left with a definite and firm conviction that a mistake has been made."'" *Mundlein v. Mundlein*, 2004 S.D. 25, ¶ 5, 676 N.W.2d 819, 821 (other citations omitted). This standard of review "'reflects both the primacy of the court's fact-finding role and our inclination to reverse only those findings that are clearly erroneous.'" *Evens v. Evens*, 2020 S.D. 62, ¶ 24, 951 N.W.2d 268, 277 (other citations omitted). "Indeed, '[t]he credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the circuit court and we give due regard to the circuit court's opportunity to observe the witnesses and the evidence.'" *Id.* (other citations omitted).

The Court reviews the conclusions of law regarding whether the City was in contempt *de novo*. *See Harksen*, 2001 S.D. 75, ¶¶ 8-10, 630 N.W.2d at 101. However, the "remedy or punishment for contempt of court . . . lies within the

sound discretion of the trial court." *Id.* "'Abuse of discretion' is discretion not justified by, and clearly against, reason and evidence. The test is whether a judicial mind, in view of the law and circumstances, could reasonably have reached the conclusion." *Id.* (quoting *Nelson v. Nelson Cattle Co.*, 513 N.W.2d 900, 906 (S.D. 1994)).

I. THE COURT PROPERLY FOUND THE CITY WAS IN CONTEMPT

In *Metzger v. Metzger*, 2021 S.D. 23, ¶ 13, 958 N.W.2d 715, 718, the Court explained civil contempt:

> "The purpose of the civil contempt power is to force a party to comply with orders and decrees issued by a court in a civil action ...." . . . The proceeding here was a civil contempt proceeding, requiring the following elements to be established: "(1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order."

(internal citations omitted). The City offers argument only regarding the fourth element,[6] claiming the Order was not sufficiently clear, specific, or unambiguous, and that it complied with the Order.

A. The Order Was Clear, Specific, and Unambiguous

Although the City provides several authorities regarding the requirement that the order be clear, specific and unambiguous, it offers no explanation of how

[6] The City cannot offer argument on any of the other elements in its reply brief. *Ellingson v. Ammann*, 2013 S.D. 32, ¶ 10, 830 N.W.2d 99, 102 (holding a party may not raise an issue for the first time in a reply brief).

the Order failed in any of those respects. *See* City's Brief, pp. 22-25. The Order was *unambiguous*, as later acknowledged by the City. *See id.*, p. 27 ("In this case, the order was not ambiguous.").

"'To form the basis for a subsequent finding of contempt, an order must state the details of compliance in such clear, specific, and unambiguous terms that the person to whom it is directed will know exactly what duties or obligations are imposed upon him.'" *Harksen*, 2001 S.D. 75, ¶ 17, 630 N.W.2d at 102 (other citations omitted). As here, the defendant in *Harksen* did "not explain how he believes the injunction is ambiguous." *Id.* The reason for the required specificity is "'so that the parties may not be misled thereby.'" *Karras v. Gannon*, 345 N.W.2d 854, 859 (S.D. 1984) (other citations omitted).

The Order required the City to (1) "reconsider" Love's building permit application, and (2) prior to such reconsideration, to "review and determine whether SDCL 6-1-17 applies to any of the Council Members." *Id.* The City never asked the court, formally or otherwise, for further explanation of the Order that it now claims was unclear. Even now, the City never elucidates what part of this Order is in any way unclear, unspecific or ambiguous. It is none of those, particularly when the Order is read in conjunction with the Opinion. In short, the City knew "exactly what duties or obligations were being imposed on [it]." *Harksen*, 2001 S.D. 75 ¶ 18, 630 N.W.2d at 102. The City could not have been and was not "misled" by the terms of the Order and it does not claim that it was. *See Karras*, 345 N.W.2d at 859.

Rather, the City simply disagrees with the court's specific findings and determination that it failed to comply with those requirements. As explained below, none of the court's findings in this regard are erroneous.

B. The City Failed to Comply with the Order

The City argues it complied with the express terms of the Order, claiming it both considered and applied SDCL § 6-1-17 and held a second vote on Love's Application. The City's mere perfunctory consideration of the issues, while applying the incorrect conflict-of-interest analysis and considering irrelevant factors applicable only to zoning issues, does not fulfil its obligations. The court's findings that the City failed to comply with the Order are fully supported by the facts and the law.

1. The City Did Not Comply with the Express Terms of the Order

The City argues it complied with the Order, relying in part on *Alto Township v. Mendenhall*, 2011 S.D. 54, ¶ 13, 803 N.W.2d 839, 843. That case is wholly distinguishable.

In *Alto Township*, the order at issue prohibited defendants from erecting cattle guards across sections lines unless defendants met criteria set forth in the township's resolution. *Id.* at ¶ 4, 803 N.W.2d at 841. Following the court's order, the defendants erected cattle guards only "ten feet wide in the area where traffic passes over." *Id.* at ¶ 6. The court found defendants in contempt, noting the guards were only ten feet wide. *Id.* at ¶ 8, 803 N.W.2d at 842.

On appeal, the Court concluded the finding of contempt was erroneous because the order was ambiguous:

> The resolution did not define whether the total width of the cattle guards was to measure sixteen feet or whether the area of the cattle guards that vehicles could pass over was to measure sixteen feet. In light of this ambiguity, a reasonable person could conclude that the Mendenhalls complied with the trial court's order by installing two cattle guards that measured sixteen feet in total width.

Id. at ¶ 13, 803 N.W.2d at 843. For that reason, the Court reversed, holding, "[i]n the absence of such a clear expression of intent, the trial court's order cannot serve as the basis for a finding of contempt." *Id.* at ¶ 15, 803 N.W.2d at 843.

The difference between *Alto Township* and the current case is that here "the order was *not* ambiguous," as the City unequivocally admits. *See* City's Brief, p. 27 (emphasis added). The City claims, however, the court imposed "unarticulated inferences," requiring reversal. There were no unarticulated inferences, and notably, the City cites to none. *See id.*

Rather, the court required the City to follow both the letter and spirit of the Order, which implicitly required the City to apply the applicable law and standards. *See e.g.* 24A AM. JUR. 2D *Divorce and Separation* § 775 (in a contempt proceeding "a trial court has broad discretion to enforce the letter and spirit of the decree."). The court should not have had to specify that the City do more than go through the motions of a reconsideration, instead considering inapplicable factors on zoning, while ignoring factors applicable to building permit applications. Building permit applications are a common function of the City, which is legally

required to be well-versed in the process and was represented and advised by its legal counsel on several occasions. The above-cited facts relied upon by the court in finding the City in contempt demonstrate that the City's reconsideration was a sham and the City failed to properly consider the conflict-of-interest issue and Love's Application. Importantly, the City has not pointed to any of the court's factual findings that the City believes are clearly erroneous.

2. The City Failed to Apply the Law in Considering the Conflict-of-Interest Issue

a.* Hanig *Remains Good Law on the Issue of Indirect Pecuniary Interest

The court's decision focused in part on the City's failure to apply the legally required conflict-of-interest analysis, including whether any councilmember had an indirect pecuniary interest, as defined in *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202. The City mistakenly argues *Hanig* has "no controlling bearing" on whether the City followed SDCL § 6-1-17. *See* City's Brief, p. 28. The City not only misstates the court's decision, but also this Court's and the legislature's edicts on what amounts to a conflict of interest.

The court held that an official is prohibited from voting on any issue on which the official has a "conflict of interest." The court explained that a direct pecuniary interest is only one type of conflict of interest mandating disqualification, and that even without a direct pecuniary interest, a conflict of interest could still exist, requiring disqualification under statute. The court's ruling is correct.

A direct pecuniary interest disqualifies a councilmember from voting on an issue. *See* SDCL § 6-1-17. However, that is only *one* of several types of conflicts of interest that disqualifies a councilmember. *See id.* As the Court in *Holborn* explained, a member can make a subjective determination as to a potential conflict of interest; however, disqualification is mandatory and not subject to that subjective determination under two circumstances: (1) if a member has a direct pecuniary interest and (2) if 2/3 of the members determine a member has a conflict of interest. *Holborn*, 2021 S.D. 6, ¶ 31, 955 N.W.2d at 377. Therefore, a member is disqualified from voting on an issue such a building permit application on at least three bases: (1) if the member has a *direct pecuniary interest*; (2) if 2/3 of the members determine the member has *another type of conflict of interest* (such as indirect pecuniary interest) or (3) if the member makes a subjective determination he/she has *another type of conflict of interest*. *See id.*; SDCL § 6-1-17; *Hanig*, 2005 S.D. 10, ¶ 19, 692 N.W.2d at 209.

The City's claim that "*Hanig* has no controlling bearing on whether SDCL 6-1-17 was followed by the council members" is incorrect. To the contrary, *Hanig* continues to provide the framework to analyze whether any councilmembers had an *indirect pecuniary interest*. *See id.*, ¶ 20, 692 N.W.2d at 209. *See also Miles v. Spink Ctnty.*, 2022 S.D. 15, ¶ 44, 972 N.W.2d 136, 151 (applying *Hanig* factors to determine whether member had an indirect pecuniary interest). The differentiating factor between *Holborn, Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, (2009), and the present case is that in *Holborn* and *Caperton*, the issue was

whether there was an *unconstitutional bias*, whereas here, the issue is whether there was a disqualifying conflict of interest. Accordingly, the court correctly instructed the City to utilize the *Hanig* factors to determine whether any member had an indirect pecuniary interest that would constitute a disqualifying conflict of interest.

b. Failure to Consider Financial Loss

Application of the factors relied upon by the Court in *Hanig* and *Miles* supports the court's conclusion that three councilmembers had indirect pecuniary interests (Hustead, Anderson and Welsh). *See Miles,* 2022 S.D. 15, ¶¶ 44, 45, 972 N.W.2d at 150-51. In *Miles*, the Court concluded the plaintiff failed to demonstrate bias, noting the board member received letters in opposition from the general public, not from her employer, and the plaintiff "presented no evidence that [the board member] would *lose* business income" by her vote. *Id.* (emphasis added). In so concluding, the Court cited to *Hanig*, distinguishing it on the facts, but still applying its reasoning. *See id.*

The testimony from the Show Cause hearing, demonstrates the existence of three councilmembers' conflicts of interests, had the proper analysis occurred. Specifically, (1) Hustead owns two businesses that would compete with the Travel Stop – Wall Drug and Auto Livery, the impact of which is obvious; (2) Anderson owns one competing business, the Dairy Queen, which would be adversely impacted by the Travel Stop's sale of food; and (3) Welsh owns the local motel, which could also be impacted by the Travel Stop. The impact on these

councilmembers is obvious, and their failure to acknowledge their interest in not having the Travel Stop constructed is in plain derogation of their duty to consider whether a conflict of interest existed.

The councilmembers' reasoning for not considering these as conflicts of interest or pecuniary interests does not hold water. Those members testified they had been advised by counsel that because the Travel Stop would not result in a financial *gain* to them, but a financial *loss*, it was not a disqualifying interest. This is incorrect and contrary to the Court's holdings. *See Hanig*, 2005 S.D. 10, ¶ 12, 692 N.W.2d at 209 (noting *loss* of tips if she were to vote in favor of the application as a basis for the official's disqualifying interest); *Miles*, 2022 S.D. 15, ¶ 45, 972 N.W.2d at 151 (finding no bias, in part because there was no evidence the official would lose income). In both cases the Court looked at the voting officials' potential *loss* of income resulting from their vote.

Regardless of *Hanig's* application, the court unquestionably ordered the City to determine whether SDCL § 6-1-17 applied and that determination required the City to consider whether any member had a direct *or* indirect pecuniary interest. It was clear to the court that the City did not undertake that determination, as the evidence showed that the City impermissibly restricted the scope of the conflict-of-interest inquiry to only whether there was a "direct pecuniary interest." The evidence showed that Hustead, Welsh, and Anderson had indirect pecuniary interests in whether the Travel Stop was constructed, which the City impermissibly failed to consider at all.

Additionally, the councilmembers ignored whether any councilmember's business or financial position would be *negatively* impacted by the Travel Stop. Instead, the City councilmembers "were instructed by counsel that pecuniary interest in regard[] to your conflict-of-interest analysis meant only if their vote would financially profit them in some manner?"

For example, Hustead testified that he did not have a "pecuniary interest," which he understood to mean he had to have a "direct profit." Hustead testified that if a competitor caused his business to suffer a "loss," such a loss did not amount to a pecuniary interest." The City's reliance on the court's conclusion that "the record is *insufficient* to show that Council member Hustead has a direct pecuniary interest which would disqualify him under SDCL § 6-1-17" is misleading. *See* City's Brief, p. 31. First, the court was considering whether Hustead had a *direct* not an *indirect* pecuniary interest. Second, that conclusion was reached at an earlier hearing on the mandamus action, not after the Show Cause hearing, where substantial testimony establishing Hustead's financial interest was presented.

In short, the record fully supports the court's findings that that City's reconsideration of the conflict-of-interest issue was woefully inadequate, particularly in light of the undisputed facts that three councilmembers owned businesses that would likely be impacted by those members' vote on Love's Application. Those members' interests in competing businesses reflect their indirect pecuniary interests that should have disqualified them from voting on the

building permit application. The City has not and cannot establish that any of the court's relevant findings were "clearly erroneous" or that any of its legal conclusions were incorrect, and the contempt finding should be affirmed.

II. THE COURT PROPERLY ORDERED ISSUANCE OF THE BUILDING PERMIT

A. The City Inappropriately Applied Zoning Considerations

The City's application of zoning considerations to the Application was a basis for the court's conclusion that the City failed to properly consider Application and accordingly, was in contempt of the Order.[7] *See* R.1527-29. As to the zoning considerations, the City points to the court's suggestion "that the six council members had covertly applied the Ordinance in denying the building permit." City's Brief, p. 31. The members did not *covertly* apply zoning considerations, they *overtly* did so, which was improper, as the court determined.

The councilmembers who testified at the Show Cause hearing confirmed that considerations relevant to zoning issues, not a building permit application, were the basis for their denial of Love's Application. This is despite Huether's recognition that when considering the Application, the Ordinance did not apply to the Property, and the court's uncontested holding regarding the same.

[7] The City also takes issue with several of the court's other findings relative to the City's failure to properly consider the conflict-of-interest issue. *See* City's Brief, pp. 31-35. While these findings were not the basis of the court's finding that the City failed to conduct a proper conflict-of-interest analysis, the findings reflect the erroneous manner Love's Application was considered by the City. The court's findings on these other procedural abnormalities are fully supported in the record.

For example, Welsh testified the reason she voted to deny the Application was "because of the location of where it's at and the proximity to the Stone Drive Neighborhood." She acknowledged her reason for the denial is entirely unsupported under the criteria set forth in the Ordinance on commercial building permits.

Hustead testified that he voted to deny Love's Application because "I didn't feel that putting a truck stop at that location was in the best interests of Wall and its citizens. . . . People were really concerned -- well, there's a lot of things, but they were really concerned with the truck stop going right in the backyard of our nicest residential area. I mean, really concerned." Hustead's testimony also reflects that zoning considerations were the entire basis for his vote to deny Love's Application, as he testified they considered "the health, safety, and well-being of the community" along with "light, noise, crime, traffic" All zoning considerations. At the same time, Hustead admitted that if Love's were in compliance with the building code, then Love's also satisfied "health, safety, and welfare concerns regarding how the structure is built."

Not only does the record reflect the improper application of zoning considerations on multiple occasions, it also reflects the City's failure to apply the relevant building permit criteria. All those who testified on the issue confirmed the City's requirements for issuing a building permit were satisfied, including Love's proposed site plan, drainage, parking lot, handicap accessible parking, landscaping, and special equipment.

Hustead testified he knew the City's building code "applied to the building permit" and what was required of the building plans and specifications. He admitted Love's Application appeared to comply with the building code. Hustead lacked any examples in which factors such as crime and/or impact on the neighborhood were considered during the building permit application process.

Welsh testified that Love's Application complied with all legal requirements for a commercial building permit. Welsh acknowledged there were no issues with Love's site plan, no issues with the parking, handicap parking, or landscaping requirements, and no concerns that it violated the City's ordinance on a building plan or special equipment needs. Welsh confirmed that none of her reasons for denial of Love's Application actually appear in the Ordinance. She acknowledged that the reasons Love's Application was denied – health, safety, well-being – are not criteria in the City's building code, but rather, are considerations relevant to zoning issues. Welsh admitted that Love's Application met all criteria for a building permit.

In short, the record unequivocally shows that in denying Love's Application, the City impermissibly applied criteria applicable only to zoning considerations *and* failed to apply criteria relevant to a building permit application. The court's conclusion that the City violated its Order, which plainly stated that "any regulations as outlined in the Zoning Ordinance do not apply" to the Property and that unambiguously required reconsideration of Love's Application is also

fully supported. As explained below, the court's remedy for the City's violations was supported, justified, and well within the court's discretion.

B. The Remedy for the City's Contempt was Not Barred by Res Judicata or Law of the Case

The City argues the court abused its discretion in ordering issuance of the building permit, based on the doctrines of res judicata and/or the law of the case. As explained below, neither applies.

"The doctrine of the law of the case is a discretionary policy practiced by the courts in which they will generally refuse to reconsider a matter which has already been decided in earlier stages of the litigation." *In re Estate of Jetter*, 1999 S.D. 33, ¶ 20, 590 N.W.2d 254, 258. "'The law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense." *Id.* (other citations omitted). "Generally, the rule is applied to issues litigated in the same case by the same parties." *Id.* Where, as here, additional evidence is adduced on the issue previously considered, the law of the case does not apply and the court may reconsider the issues. *See id.*, ¶ 27, 590 N.W.2d at 259-60.

In *Healy Ranch*, the Court reiterated the four elements that must exists for application of res judicata:

> (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Healy Ranch, Inc. v. Healy, 2022 S.D. 43, ¶ 42, 978 N.W.2d 786, 799. Three of the requisite elements are missing here, with only the identity of the parties being satisfied.

First, the City misstates the court's holding – the court did not, as suggested, conclude that it had did not have the ability to order issuance of the building permit. Rather, in considering the mandamus petition, the court held, "*mandamus* is inappropriate *in dictating how the Council must vote*" and that it did not have the authority to "*require approval* of the building permit." R.903 (emphasis added). This distinction between mandamus and contempt is critical. Specifically, the court never dictated how the council should vote or require approval of Love's Application. Rather, the court ordered issuance of the building permit after concluding the evidence showed that all requirements for issuance of the permit had been met and contempt of its Order had occurred – evidence that was not before the court when it considered the mandamus Petition.

As noted, the issue in the mandamus proceedings is different than the issued in the contempt proceedings. In the former proceedings, the court was not considering a remedy for contempt, but whether it could compel the City council to vote a certain way. In the latter proceedings for contempt, the issue was how to remedy the City's violation of the court's order to properly consider Love's Application. The issues in the two proceedings, while similar, are not "identical." *See id.* (requiring the issues to be identical).

Second, there was no "final judgment," nor was the mandamus decision as to that issue "on the merits." *See id.* The Court has "recognized the United States Supreme Court's standard that generally a final decision is 'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Link v. L.S.I., Inc.*, 2010 S.D. 103, ¶ 43, 793 N.W.2d 44, 57 (other citations omitted). Here, the very nature of the Order demonstrates that Order was not final, as the court ordered the City to reconsider the conflict of interest and building permit issues.

Further, as the case has borne out, additional proceedings – the motion for contempt and Show Cause hearing – have transpired, demonstrating the Order was not a final judgment. While the Court has not had occasion to determine whether a subsequent contempt action in the same case prevents the violated order from being final, other courts have concluded the ongoing contempt proceedings prevent the order from being final. *See e.g. Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 134 Fed. Appx. 445 (Fed. Cir. 2005) ("However, regarding the pending contempt motion, it appears that because the matter has not been adjudicated, there is no final judgment. . . . Here, litigation on the merits is not complete because of the pending motion [for contempt]."

In addition, the Order was not "on the merits." The Court in *Lippold v. Meade Ctnty.*, 2018 S.D. 7, ¶ 29, 906 N.W.2d 917, 925, acknowledged "extraordinary writs may be denied for numerous and a variety of reasons, some of which may not be based upon the merits of the petition." *See also Hiley v. United*

States, 807 F.2d 623, 625–26 (7th Cir. 1986) ("Where, as here, the denial of the petition is based not on the merits of the dispute, but rather on the limitations inherent in the extraordinary nature of the writ, such a denial does not preclude examination of the merits of the questions presented in the mandamus petition under the doctrines of res judicata or law of the case."); 50 C.J.S. *Judgments* § 927 ("given the extraordinary nature of the writ of mandamus, the denial of a petition for mandamus does not operate as a binding decision on the merits and cannot have res judicata effect on subsequent proceedings. Preclusive effect is also lacking when the grounds on which mandamus relief were denied are unclear.").

Finally, in the mandamus proceedings, the parties lacked the opportunity to fully and fairly litigate the issue of whether the court could order issuance of the building permit. In the mandamus proceeding, there was no testimony from the councilmembers who were called to testify at the Show Cause hearing. It was not until the Show Cause hearing that evidence was adduced, demonstrating that all requisites for issuing a building permit were satisfied, the basis for the court's contempt order. Such evidence did not exist at the time of the mandamus proceedings, allowing the court to consider issuance of the building permit in the contempt proceedings. *See J. Clancy, Inc. v. Khan Comfort, LLC*, 2022 S.D. 68, ¶ 14, 982 N.W.2d 35, 41 (noting in the context of the law of the case doctrine that "while there is no South Dakota opinion on point, North Dakota has held that 'the general rule is a trial court has the power to reverse its findings of fact without receiving new evidence.'" (quoting *Johnson Farms v. McEnroe*, 656 N.W.2d 1, 4

(N.D. 2002)). *See also In re Ga. Granite Co.*, 86 B.R. 733, 739 (Bankr. N.D. Ga. 1988) ("Newly discovered evidence may preclude application of the collateral estoppel doctrine if the party against whom collateral estoppel is asserted was deprived of crucial evidence in the prior litigation without fault of his own."); *Miller v. Miller*, 956 P.2d 887, 898 (Okla. 1998) (noting "the availability of new evidence can be considered in determining whether a litigant has had a full and fair opportunity to litigate an issue in a prior action for purposes of applying preclusion doctrine"). *Cf. Payne v. State of Neb., Dep't of Corr. Servs.*, 45 F.3d 433 (8th Cir. 1994) (finding plaintiff had a "full and fair opportunity to litigate" noting he had the opportunity in a previous proceeding "to conduct discovery, subpoena and present witnesses and evidence, rebut testimony, and submit briefs.").

In sum, the Order in the Mandamus proceeding clearly differs from what was later ordered by the court in the contempt proceedings. Even if it were the same, which is denied, the Order was not final or on the merits. Additional, new evidence after the Order was entered allowed the court to change course and conclude that the building permit should be issued. The remedy for the City's contempt – ordering issuance of the building permit – was well within the court's discretion and should be affirmed by this Court.

CONCLUSION

For all these reasons, Love's and One Shot respectfully request that the Court affirm the circuit court's Findings of Fact, Conclusions of Law and Order in their entirety.

Dated this 17th day of July, 2023.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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REQUEST FOR ORAL ARGUMENT

Appellees, Love's Travel Stops & Country Stores, Inc. ("Loves"), and One Shot, LLC ("One Shot"), respectfully request oral argument on this matter.

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellees' Brief contains 9,991 words as counted by Microsoft Word.

/s/ Michael F. Nadolski

Michael F. Nadolski

CERTIFICATE OF SERVICE

Michael F. Nadolski, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 17th day of July, 2023, he electronically filed the foregoing document with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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The undersigned further certifies that the original Brief of Appellees in the above-entitled action was mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Michael F. Nadolski
Michael F. Nadolski

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30277

LOVE'S TRAVEL STOPS & COUNTRY STORES, INC. and ONE SHOT, L.L.C.

Plaintiffs and Appellees,

VS.

CITY OF WALL, SOUTH DAKOTA; CITY COUNCIL FOR WALL, SOUTH DAKOTA; and PLANNING AND ZONING COMMISSION FOR WALL, SOUTH DAKOTA,

Defendants and Appellants.

APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI L. LINNGREN
CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

1. "Burying the lede" in its final paragraph, the Appellee Brief concedes that the civil contempt proceeding was not used to *enforce* the terms of the circuit court's previous mandamus order. Rather, the contempt proceeding was employed to contradict and replace the mandamus order and require something entirely different. As Love's has summarized it:

> In sum, **the Order in the Mandamus proceeding clearly differs from what was later ordered by the court in the contempt proceedings**. Even if it were the same, which is denied, the Order was not final or on the merits. Additional, new evidence after the Order was entered **allowed the court to change course and conclude that the building permit should be issued.**

(Brief at 40) (emphasis supplied). Love's brief further admits that the only permissible use of civil contempt is to bring the party who disobeyed a specific order of the court into compliance with that same order. (Brief at 24, quoting *Metzger v. Metzger*, 2021 S.D. 23, ¶ 13, 958 N.W.2d 715, 718); *see State v. Knight*, 54 N.W. 412, 413 (S.D. 1893); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911); *State v. American-News Co.*, 253 N.W. 492, 493 (S.D. 1934); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 2003 S.D. 45, ¶ 14, 661 N.W.2d 719, 723 (per curiam); *Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶ 23, 729 N.W.2d 335, 344.

When assessing whether a party disobeyed a court order in a contempt proceeding, "changing course" and ordering something "clearly different" are not authorized. *See Maggio v. Zeitz*, 333 U.S. 56, 68-69 (1948) ("It would be a

disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy"). This Court should reverse on that basis alone.

2. Moving to the front of the argument section, Love's asserts that: "[a]lthough the City provides several authorities regarding the requirement that the order be clear, specific and unambiguous, it offers no explanation of how the Order failed in any of those respects." (Brief at 25). But the City, of course, has not argued that the mandamus order was not clear. It has argued the opposite: that the City followed the clear, specific, and unambiguous terms of the mandamus order and was held in contempt for disobeying the mandamus order *despite* complying with its terms. The opposition brief's strategy of reframing things in order to knock down assertions no one has made is unhelpful. *See, e.g., Keller v. City of Fremont*, 719 F.3d 931, 944 (8th Cir. 2013) ("Having woven this straw man, it is of course easy to blow him down").

3. The main thrust of Love's opposition is its contention that the City should have been held in contempt due to Love's assessment that the mandamus order "implicitly" required the City to "apply the applicable law and standards" and Love's belief that the City violated the "spirit" of the mandamus order. (Brief at 27-36). On this point, Love's has provided little in response to settled law that "[o]ne cannot be placed in contempt for the

failure to read the court's mind; the order must be sufficient to put a reasonable person on notice of what is required for compliance. The terms must be express, rather than implied." 17 C.J.S. Contempt § 24 (citing *Alto Township v. Mendenhall*, 2011 S.D. 54, 803 N.W.2d 839).

Basically, Love's position is that the City violated the mandamus order because: (1) even though the City applied SDCL 6-1-17 as ordered, Love's disagrees with the City's assessment of the significance of this Court's pre-*Holborn* decision in *Hanig v. City of Winner* (2005) on its application of SDCL 6-1-17; and (2) even though the City held a second vote as ordered, Love's believes the City should not be allowed to consider anything other than the truck stop building plans, that consideration of anything else automatically meant the zoning ordinance somehow was applied, and that this Court should infer on appeal that the votes of individual council members were the product of what Love's thinks were improper "zoning considerations." Both contentions are rooted in the legally erroneous notion that when a party does exactly what is ordered, it nonetheless may be held in civil contempt because of speculation and assertions that it did not do those things "properly" or in the way the opposing party would have liked.

a. The first of these positions (regarding SDCL 6-1-17) is incorrect as a matter of law for the reasons set forth in the opening brief. *See Holborn v. Deuel County Board of Adjustment*, 2021 S.D. 6, ¶¶ 32-36, 955 N.W.2d 363, 377-78; *Miles v. Spink County Board of Adjustment*, 2022 S.D.

15, ¶37, 972 N.W.2d 136, 149 n.15; *Powers v. Turner County Board of Adjustment*, 2022 S.D. 77, ¶¶ 22-23, 983 N.W.2d 594, 602-03. The council members called at the hearing testified, without contradiction, to having sought to faithfully apply the law in considering SDCL 6-1-17. (R. 1232, 1279, 1203). With the assistance of its City Attorney and outside counsel retained by the South Dakota Public Assurance Alliance, the council unanimously concluded that no member had a conflict under SDCL 6-1-17. (R. 950-51, 1176-77, 1195, 1202-03, 1229-30, 1278-79). They did exactly what they were supposed to do under the mandamus order, which specifically held that the circuit court could *not* dictate the outcome of the City's application of the statute: "While determining whether SDCL § 6-1-17 actually disqualifies any member of the City Council is discretionary in nature, and mandamus is not appropriate, mandamus is appropriate to require the City to review and apply the statute." (R. 905-06).

b. The second position (regarding the zoning ordinance) has no support in the facts, law, or the mandamus order itself, and as the circuit court explained, "there is no way of knowing." (R. 1494; App. 6). The sole declaratory relief in the order was that Title 17 of the Wall Municipal Code "does not apply to the subject property," (R. 922; App. 26), and the record is undisputed that City did not apply the zoning ordinance in denying the permit. (R. 1197, 1231, 1245, 1303-04, 1206-09). Tellingly, Love's cannot even explain what part of the zoning ordinance supposedly was applied—it

just repeats the refrain of amorphous "considerations."

Inferences regarding why individual council members voted the way they did, moreover, do not provide a basis for finding the City in contempt of an order that expressly held that "the Court has no authority to require approval of the building permit." (R. 903). As this Court explained in a similar context:

> This is a practical legislative determination which has been entrusted to the discretion of the Board, not to the courts. The wisdom of its decision is not our concern, since we are not at liberty to substitute our judgment for that of the [township] board on a matter inherently legislative. If the rule were otherwise[,] the circuit courts would become administrative boards . . . deciding matters that are nonjudicial.
>
> . . .
>
> These conclusory claims amount to little more than another invitation to infer wrongdoing. Moreover, the Department's argument overlooks the fact that the Townships' board members are necessarily residents of their respective townships; have first-hand knowledge of the highways and conditions at issue; and as the Department itself points out, are fully aware of the competing interests.

S.D. Dep't of Game, Fish & Parks v. Troy Township, 2017 S.D. 50, ¶¶ 26, 40, 900 N.W.2d 840, 851, 855. Indeed, this Court has questioned the propriety of hauling elected local officials into court and putting them under oath to grill them on the rationales behind their votes in representing constituents. *See Powers*, 2022 S.D. 77, ¶ 24, 983 N.W.2d at 603 n.3; *Miles*, 2022 S.D. 15, ¶ 24, 972 N.W.2d at 145 n.12; *Adolph v. Grant County Board of Adjustment*, 2017 S.D. 5, ¶ 14, 891 N.W.2d 377, 382 n.3.

In any event, the circuit court relied on *Hanig* and speculation about what was considered—rather than SDCL 6-1-17 and the express terms of its mandamus order—in pronouncing contempt. In so doing, it erred as a matter of law. The City did not violate the clear, specific, and unambiguous terms of the mandamus order and there was no valid basis for finding that it did.

4. Returning to the final section of the opposition brief, Love's seeks to portray the final order resolving its petition as "non-final" in an effort to sidestep the implications of its decision not to appeal. (Brief at 38). The attempt is unpersuasive. A final order is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *See Knecht v. Evridge*, 2020 S.D. 9, ¶ 12, 940 N.W.2d 318, 330-31. That was the case here. Love's claims were resolved by the mandamus order, most of them unfavorably to its petition, and neither side appealed. A civil contempt action may not be utilized as a motion to reconsider, relitigate, and replace the underlying order that was supposedly disobeyed.

5. Finally, the opposition brief asserts that "the City has not pointed to any of the court's factual findings that the City believes are clearly erroneous." (Brief at 28). That inaccurate assertion is contradicted elsewhere in Love's own brief. (Brief at 33 n.7). The City's opening brief references numerous findings demonstrated to be clearly erroneous. (City's Brief at 25, 27, 28, 31, 32, 33, 35).

The opposition brief also is sprinkled with conclusory accusations not

supported by the record and contains some inaccurate factual assertions, though most ultimately are immaterial. One of the more glaring is its attempt to portray council member Stan Anderson as owning the Dairy Queen in Wall. (R. 16). Stan Anderson is a retiree and does not own any businesses in Wall. The Dairy Queen is owned by council member Mike Anderson (no relation). Another inaccuracy is the repeated assertion that Love's was not given an opportunity to comment or make its case to the city council. (Brief at 7, 11, 12, 13). Love's and its attorneys were provided every opportunity to do so, at every stage, and took full advantage of those opportunities or knowingly declined to do so.

Members of the council asked questions of Love's representatives throughout the various proceedings as well. And the City allows and invites public comment on all of the items noticed on its public agendas. Typically, few take advantage of that opportunity, but this situation was different for obvious reasons. Love's had already sued the City once and its attorneys were threatening additional lawsuits. In any event, Love's characterization of these events provide nothing to contradict the record that demonstrates conclusively that the City did not disobey the mandamus order.

CONCLUSION

In its mandamus order, the circuit court held it had no authority to dictate the outcome of the City's conflict-of-interest analysis under SDCL 6-1-17 and no authority to require the City to issue the building permit. Instead,

the court ordered the City to consider and apply SDCL 6-1-17 and hold another vote. As ordered, the City and its legal counsel considered and applied SDCL 6-1-17 and then held another vote. The court then held the City in contempt for *disobeying* the order—without identifying any specific terms contained in the order that were disobeyed—and required it to issue the permit that the order expressly held it had no authority to require. This was fundamental legal error, the definition of an abuse of discretion, and should be reversed.

WHEREFORE, Appellants very respectfully request that this Honorable Court reverse and vacate the contempt decisions, findings of fact, conclusions of law, and remedial order directing issuance of commercial building permit and remand with instructions to dismiss with prejudice.

Respectfully submitted this 14th day of August, 2023.

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In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1,996 words, excluding the table of contents, table of cases, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

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