IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26897

SHAWN TIBBS, VIRGIL STEMBAUGH, GENE GULLICKSON and JANET GULLICKSON,

Petitioners/Appellants,

vs.

MOODY COUNTY BOARD OF COMMISSIONERS, sitting as THE BOARD OF ADJUSTMENT, and MUSTANG PASS, LLC,

Respondents/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Moody County, South Dakota

The Honorable Gregory J. Stoltenburg, Presiding Judge

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

ARGUMENT 7

I. The Writ of Certiorari Standard of Review Applicable to Board of Adjustment Appeals to Circuit Court Is Unconstitutional in Violation of the Equal Protection Clause. 7

A. SDCL Chapter 11-2 Creates Classifications. 9

B. The Classifications Created by SDCL Chapter 11-2 Are Arbitrary and Lack a Determining Principle. 11

C. Local Flexibility Does Not Make the Classifications Non-arbitrary. 12

D. Fundamental Rights Are Involved and the Legislature's Differing Standards of Review Cannot Pass Strict Scrutiny. 15

E. There Is No Rational Relationship between Unequal Standards of Review and Any Legitimate Legislative Purpose. 17

II. The Board Exercised Original Jurisdiction over Mustang's Application, which Is Beyond the Board's Jurisdiction under South Dakota Law. 18

A. The Board Exercised Original Jurisdiction over Mustang's Application. 18

B. The Board's Exercise of Power Must Comply with State Law. 19

C. When the Legislature Created Boards of Adjustment, It Granted Only Appellate Jurisdiction. 20

D. The Legislative Changes in 2003 and 2004 Make Clear That Boards of Adjustment Do Not Have Original Jurisdiction. 23

E. SDCL 11-2-17.3 Provides No Additional Authority to Boards of Adjustment. 26

III. The Board Exceeded Its Jurisdiction, because Moody County Has No Valid Board of Adjustment Due to the Timing of the Enactment of the Ordinances. 28

IV. The Board's Decision Should Be Reversed, because the Board Exceeded Its Jurisdiction, Failed to Pursue Its Authority in a Regular Manner, and Failed to Perform Acts Required by Law. 30

A. The Board Failed to Adopt Rules as Required by SDCL 11-2-54. 30

B. Moody County's Creation of the Board Failed to Comply with the Procedural Requirements of SDCL Chapter 11-2, therefore, the Board's Action Exceeded Its Jurisdiction. 31

C. One of the Board Members Was Not Qualified, because He No Longer Resided in Moody County at the Time of the Board's Vote. 32

CONCLUSION 34

REQUEST FOR ORAL ARGUMENT 34

CERTIFICATE OF COMPLIANCE 36

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

Cases

Accounts Mgmt., Inc. v. Williams,
484 N.W.2d 297 (S.D. 1992) 7-8

Aman v. Edmunds Cent. Sch. Dist. No. 22-5,
494 N.W.2d 198 (S.D. 1992) 26

Armco Steel v. City of Kansas City,
883 S.W2d 3 (Mo. 1994) 3, 28

Armstrong v. Turner County Bd. of Adjustment,
2009 SD 81, 772 N.W.2d 643 2,4,9-12,30-34

Bounds v. Smith,
430 U.S. 817 (1977) 16

Budahl v. Gordon and David Associates,
287 N.W.2d 489 (S.D. 1980) 15

Cary v. City of Rapid City,
1997 SD 18, 559 N.W.2d 891 19

Chambers v. Baltimore & O.R. Co.,
207 U.S. 142 (1907) 16

City of Aberdeen v. Meidinger,
233 N.W.2d 331 (S.D. 1975) 2, 7-8, 13-14

City of Santa Fe v. Armijo,
634 P.2d 685 (N.M. 1981) 3, 29

City of Sioux Falls v. Peterson,
25 N.W.2d 556 (S.D. 1946) 26

Corfield v. Coryell,
6 F. Cas. 546 (E.D. Pa. 1823) 16

Elliot v. Board of Cnty. Comm'rs,
2007 SD 6, 727 N.W.2d 288 ..... 9, 10, 30

First Nat. Bank of Minneapolis v. Kehn Ranch, Inc.,
394 N.W.2d 709 (S.D. 1986) 26

Goos RV Center v. Minnehaha Cnty. Comm'n,
2009 SD 24, 764 N.W.2d 704 9-11

Grutter v. Bollinger,
539 U.S. 306 (2003) 15-16

Hines v. Board of Adjustment of City of Miller,
2004 SD 13, 675 N.W.2d 231 10

In re Davis,
2004 SD 70, 681 N.W.2d 452 ..... 7, 9, 11, 15, 17

In re Yankton Cnty. Comm'n,
2003 SD 109, 670 N.W.2d 34 ..... 3, 19-20, 23

Jensen v. Turner Cnty. Bd. of Adjustment,
2007 SD 28, 730 N.W.2d 411 ..... 10, 30

Law v. City of Sioux Falls,
2011 SD 63, 804 N.W.2d 428 19

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 16

Metropolitan Assoc. v. City of Milwaukee,
796 N.W.2d 717 (Wis. 2011) 2, 14-15, 17-18

Nankin v. Village of Shorewood,
630 N.W.2d 141 (Wis. 2001) 14-15

North Liberty Land Co. v. Incorporated City of North Liberty,
311 N.W.2d 101 (Iowa 1981) 3, 29

Ohlwine v. Bushnell,
143 N.W. 362 (S.D. 1913) 16

Pennington County v. Moore,
525 N.W.2d 257 (S.D. 1994) 4, 31-32

People in Interest of Z.B.,
2008 SD 108, 757 N.W.2d 595 7

Singleton v. Cecil,
176 F.3d 419 (8th Cir. 1999) 15

State ex rel. Jackley v. City of Colman,
2010 SD 81, 790 N.W.2d 491 19

State v. Geise,
2002 SD 161, 656 N.W.2d 30 15-16

State v. Hansen,
68 N.W.2d 480 (S.D. 1955) 31

State v. King,
149 N.W.2d 509 (S.D. 1979) 7

Truax v. Corrigan,
257 U.S. 312 (1921) 15

Washington v. Glucksberg,
521 U.S. 702 (1997) 15

Wright v. Sherman,
52 N.W. 1093 (S.D. 1892) 15

Statutes

SDCL 3-4-1 ..... 4, 33-34

SDCL 7-8-30 11-12

SDCL 11-2-17.3 ..... 2, 26-27

SDCL 11-2-18 ..... 3-4, 31-32

SDCL 11-2-19 ..... 3-4, 31-32

SDCL 11-2-20 ..... 3-4, 31-32

SDCL 11-2-53 ..... 2, 3, 6, 20-21, 23-25, 27-28

SDCL 11-2-54 ..... 3-5, 30

SDCL 11-2-55 ..... 2, 5, 11

SDCL 11-2-57 ..... 2, 21

SDCL 11-2-58 ..... 2, 21, 24-25

SDCL 11-2-59 ..... 2, 22

SDCL 11-2-60 ..... 2, 22

SDCL 11-2-61 ..... 2, 8, 19

SDCL 11-2-62 ..... 2, 4, 8, 18-19

Other Authorities

S.D. CONST. Art. VI, § 18 .....2, 7

S.D. CONST. Art. VI, § 20 16

Moody County Zoning Ordinances § 3.02.02.10.b 6, 18

Moody County Zoning Ordinances § 3.03 .....5, 32

PRELIMINARY STATEMENT

In this brief, Appellants Shawn Tibbs, Virgil Stembaugh, Gene Gullickson, and Janet Gullickson will be referred to as "the Citizens." Appellee Moody County Board of Commissioners sitting as the Board of Adjustment will be referred to as "the Board." Appellant Mustang Pass L.L.C. will be referred to as "Mustang."

The record includes 241 numbered pages (primarily pleadings and similar filings with the circuit court), two deposition transcripts (which were not separately numbered by the circuit court clerk), and 41 exhibits (which were not separately numbered by the circuit court clerk). The numbered pages will be referenced by "R." followed by the page number. The deposition transcripts will be referenced using the deponent's last name (*e.g.*, "Peper Dep."), followed by the page number of the applicable transcript. The deposition exhibits will be referenced as "Dep. Ex." followed by the exhibit number and, in the case of multi-page exhibits, the page number in the exhibit (*e.g.*, Dep. Ex. 1 p. 3).

JURISDICTIONAL STATEMENT

The Citizens timely presented their petition for writ of certiorari to the circuit court challenging the Board's decision to grant a conditional use permit for the construction of a concentrated animal feeding operation to Mustang. (R. 1.) On October 11, 2013, the circuit court issued its memorandum decision denying all relief to the Citizens and finding in favor of the Board and Mustang. (R. 147.) Thereafter, on October 31, 2013, the circuit court signed its Judgment of Dismissal dismissing the appeal, and judgment was entered by the clerk on November 4, 2013. (R. 174.) Also on October 31, 2013, the circuit court entered Findings of Fact and Conclusions of Law. (R.

173.) On November 7, 2013, the Board served written notice of entry of the Judgment of Dismissal, Findings of Fact, and Conclusions of Law. (R. 203.) The Citizens served their Notice of Appeal on December 5, 2013. (R. 205.)

STATEMENT OF THE ISSUES

I. WHETHER THE EQUAL PROTECTION CLAUSE REQUIRES ALL CITIZENS TO HAVE THE PROTECTION OF THE SAME STANDARD OF REVIEW WHEN APPEALING COUNTY DECISIONS GRANTING CONDITIONAL USE PERMITS TO CIRCUIT COURTS.

Residents of certain counties in South Dakota are able to obtain a *de novo* review of county zoning decisions at the circuit court level, while residents in other counties have less protection afforded by a highly deferential writ of certiorari standard of review. The issue before this Court is whether this unequal treatment violates the Equal Protection Clause. The circuit court found no Equal Protection violation.

- Relevant constitutional provision: South Dakota Constitution Article VI, § 18.
- Relevant statutes: SDCL 11-2-61, 11-2-62.
- Relevant cases: *Metropolitan Associates v. City of Milwaukee*, 796 N.W. 2d 717 (Wis. 2011); *Armstrong v. Turner County Bd. of Adjustment,* 2009 SD 81, 772 N.W.2d 643; *City of Aberdeen v. Meidinger,* 233 N.W.2d 331 (S.D. 1975).

II. WHETHER THE BOARD EXCEEDED ITS JURISDICTION WHEN IT EXERCISED ORIGINAL JURISDICTION OVER MUSTANG'S CONDITIONAL USE PERMIT.

The issue before this Court is whether the Board's granting of Mustang's CUP application, as a matter of original jurisdiction, was within the Board's jurisdiction and authority under SDCL chapter 11-2. The circuit court found that the Board did not exceed its jurisdiction.

- Relevant statutes: SDCL chapter 11-2, §§ 17.3, 53, 55, 57, 58, 59, and 60.

- Relevant case: *In re Yankton Cnty. Comm'n*, 2003 SD 109, 670 N.W.2d 34.

III. WHETHER MOODY COUNTY'S CREATION OF THE BOARD THROUGH PREMATURELY ENACTED ORDINANCES IS VOID *AB INITIO*, RESULTING IN THE BOARD EXCEEDING ITS JURISDICTION AS A MATTER OF LAW.

The issue before this Court is whether the Moody County Zoning Ordinances ("the Ordinances") vesting original jurisdiction over CUPs in the Board were unlawful at the time the Ordinances were enacted and, if so, whether the Ordinances are void *ab initio* resulting in the Board exceeding its jurisdiction. The circuit court found that the Board did not exceed its jurisdiction.

- Relevant statute: SDCL 11-2-53.
- Relevant cases: *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. 1994); *North Liberty Land Co. v. Incorporated City of North Liberty*, 311 N.W.2d 101 (Iowa 1981); *City of Santa Fe v. Armijo*, 634 P.2d 685 (N.M. 1981).

IV. WHETHER THE BOARD OTHERWISE EXCEEDED ITS JURISDICTION, FAILED TO REGULARLY PURSUE ITS AUTHORITY, OR FAILED TO PERFORM ANY ACT REQUIRED BY LAW.

Before this Court are the following issues related to whether the Board exceeded its jurisdiction, failed to regularly pursue its authority, or failed to perform any act required by law: (1) whether the Board's failure to adopt rules as required by SDCL 11-2-54 warrants reversal of its decision; (2) whether Moody County properly enacted the Ordinances establishing the Board in compliance with SDCL chapter 11-2, specifically §§ 18, 19, and 20; and (3) whether one Board member was ineligible to serve on the Board due to his residency. The circuit court rejected all of the Citizens' arguments and affirmed the Board's decision.

- Relevant statutes: SDCL chapter 11-2, §§ 18, 19, 20, and 54; SDCL 3-4-1.
- Relevant cases: *Armstrong*, 2009 SD 81; *Pennington County v. Moore*, 525 N.W.2d 257 (S.D. 1994).

STATEMENT OF THE CASE

The Board granted Mustang's conditional use permit ("CUP") application for construction of a concentrated animal feeding operation ("CAFO") in Moody County. The Citizens appealed the Board's decision to the Third Judicial Circuit Court, the Honorable Gregory J. Stoltenburg presiding. The Citizens asserted that they were entitled to a *de novo* review of the Board's decision, notwithstanding that SDCL 11-2-62 provides for a deferential writ of certiorari review at the circuit court level. Counties that approve CUPs through county commissions, as opposed to boards of adjustment, have their decisions reviewed under a *de novo* standard at the circuit court level, while board of adjustment counties are subject to a writ of certiorari standard of review. The Citizens asserted that the Equal Protection Clause does not permit such unequal treatment.

The Citizens also asserted that under the writ of certiorari standard of review, the Board's decision must be reversed, because the Board exceeded its jurisdiction, failed to regularly pursue its authority, or failed to perform any act required by law. The bases for their argument included the following: (1) the Board unlawfully exercised original jurisdiction, when SDCL chapter 11-2 grants only appellate jurisdiction to boards of adjustment; (2) Moody County vested the Board with original jurisdiction over CUPs several months before the legislature delegated such authority (which remained lawful only for another year, at which point the legislature abrogated that power), and Moody County failed to re-enact the Ordinances which were void *ab initio*; (3) the Board failed

to adopt procedural rules as required by SDCL 11-2-54; (4) Moody County failed to adopt the Ordinances establishing the Board in compliance with the two-step process required by SDCL chapter 11-2; and (5) one member of the Board was not a resident of Moody County at the time the Board took action, rendering the Board's decision unlawful.[1] The circuit court rejected the Citizens' arguments, affirmed the Board's decision, denied the requested writ of certiorari, and dismissed the Citizens' appeal.

STATEMENT OF FACTS

Moody County created the Board, a board of adjustment, through § 3.03 of the Ordinances. (Dep. Exs. 9 (at Exs. A & B), 10, & 11.) On January 21, 2003, the Moody County planning commission and board of commissioners held a joint hearing on the Ordinances, the planning commission recommended adoption of the Ordinances, and the board of commissioners adopted the Ordinances, all at the same hearing. (*Id.*) The Board has never adopted procedural rules governing its proceedings. (Dep. Ex. 3 p. 1.)

On January 16, 2013, Mustang presented its CUP application to the county zoning officer. (R. 173 at Findings of Fact 11-12.) The officer did not make any decision on Mustang's application, but rather sent the application to the Board with a recommendation to approve it. (R. 173 at Findings of Fact 13.) Mustang did not file a notice of appeal specifying the grounds of the appeal to the Board, as contemplated by SDCL 11-2-55. (R. 173 at Findings of Fact 12-19.) Rather than exercising appellate jurisdiction, the Board exercised original jurisdiction when it granted Mustang's CUP application. (R. 173 at Findings of Fact 12.)

[1] To avoid duplication, the facts related to the residency of the Board member in question are set forth in the Argument section with references to the record.

The process that was employed for Mustang's application is the same process described in the Ordinances. Ordinance § 3.02.02.10.b. provides as follows: "For Conditional Uses and Variances, the Administrative Official shall review the application, and shall make a recommendation to the Board of Adjustment to either approve or deny said application." Under the Ordinances, the zoning officer (or "Administrative Official") does not make an actual decision on CUP applications.

Moody County established the Board with the power to hear CUP applications as a matter of original jurisdiction. (R. 173 at Findings of Fact 8-10.) The Ordinances became effective on February 25, 2003. (R. 173 at Findings of Fact 7.) However, the South Dakota legislature did not delegate the power for boards of adjustment to hear CUPs until July 1, 2003, several months after Moody County enacted its ordinances. *See* SDCL 11-2-53 (legislative history, H.B. 1281 (2003 legislative session)). On July 1, 2004, the legislature abrogated the power of boards of adjustment to hear CUPs as a matter of original jurisdiction. *See* SDCL 11-2-53 (legislative history, S.B. 164 (2004 legislative session)). Moody County did not reenact the Ordinances after July 1, 2003, nor did Moody County modify the Ordinances once the legislature removed original jurisdiction from the menu of available powers for boards of adjustment in 2004.

Ultimately, the circuit court found "that the Moody County BOA had original jurisdiction to consider Mustang Pass' application for a conditional use permit." (R. 173 at Conclusion of Law 52.) Applying the writ of certiorari standard (and refusing to conduct a *de novo* review), the circuit court found in favor of the Board and Mustang, and dismissed the Citizens' appeal. (R. 174.)

ARGUMENT

I. The Writ of Certiorari Standard of Review Applicable to Board of Adjustment Appeals to Circuit Court Is Unconstitutional in Violation of the Equal Protection Clause.

This appeal presents a question about the constitutionality of a statutory scheme. This Court's primary duty is to the Constitution, and laws violating the Constitution cannot stand. *In re Davis*, 2004 SD 70 ¶ 4, 681 N.W. 2d 452. This Court determines the constitutionality of statutes *de novo*. *People in Interest of Z.B.,* 2008 SD 108 ¶ 5, 757 N.W.2d 595. This Court presumes that statutes are constitutional unless shown otherwise beyond a reasonable doubt. *Davis*, 2004 SD 70 ¶ 4 (citing *Accounts Mgmt., Inc. v. Williams,* 484 N.W.2d 297 (S.D. 1992)). If possible, this Court will interpret statutes reasonably to find them constitutional and valid, and the party asserting the unconstitutionality of a statute bears the burden of persuasion. *Id.*

South Dakota's Equal Protection Clause provides "[n]o law shall be passed granting to any citizen, class of citizens or corporations, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. CONST. Art. VI, §18. "Equal protection of the law requires that the rights of every person must be governed by the same rule of law under similar circumstances." *City of Aberdeen v. Meidinger*, 233 N.W. 2d 331, 333 (S.D. 1975) (quoting *State v. King*, 149 N.W. 2d 509 (S.D. 1979)).

This Court applies a two prong test to laws challenged on equal protection grounds. *Davis,* 2004 SD 70 ¶ 5. The first prong requires the court to determine "whether the statute creates arbitrary classifications among citizens." *Id*. (citing *Meidinger,* 233 N.W.2d at 333). Under the second prong, "if the classification does not

involve a fundamental right or suspect group, [the Court] determine[s] whether a rational relationship exists between a legitimate legislative purpose and the classifications created." *Id*. (citing *Accounts Mgmt.,* 484 N.W.2d at 300).

The circuit court found that the standard of review imposed by the statutory scheme in SDCL chapter 11-2 does not violate the Equal Protection Clause. The statutes at issue in this appeal are SDCL 11-2-61 and 11-2-62, which together require CUP appeals from county boards of adjustment to proceed to circuit court by writ of certiorari. SDCL 11-2-61 provides the following:

> [a]ny person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the county, may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality. The petition shall be presented to the court within thirty days after the filing of the decision in the office of the board of adjustment.

The next statute, SDCL 11-2-62, establishes the standard of review by setting forth that:

> [u]pon the presentation of the petition, the court may allow a writ of certiorari directed to the board of adjustment to review the decision of the board of adjustment and shall prescribe the time within which a return must be made and served upon the relator's attorney, which may not be less than ten days and may be extended by the court. The allowance of the writ does not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board of adjustment and on due cause shown, grant a restraining order.

For the following reasons, this Court should find that the writ of certiorari standard of review established by SDCL chapter 11-2 for appeal of board of adjustment decisions to circuit court is unconstitutional in violation of the Equal Protection Clause.

A. SDCL Chapter 11-2 Creates Classifications.

The first prong of *Davis* requires the Court to determine if a statutory scheme creates arbitrary classifications. 2004 SD 70 ¶ 5. This requires two inquiries: first, the statutory scheme must create classifications; then, such classifications established by the scheme must be arbitrary. *Id.*

The current methods of appealing CUP decisions from the county level to circuit court in South Dakota create two classifications of citizens: (1) those in "county commission" counties subject to *de novo* review; and (2) those in "board of adjustment" counties subject to the deferential writ of certiorari standard of review. "The legislature prescribes the procedure for reviewing the actions of the county." *Goos RV Center v. Minnehaha County Commission,* 2009 SD 24 ¶ 8, 764 N.W.2d 704 (citing *Elliot v. Board of County Commissioners*, 2007 SD 6 ¶ 17, 727 N.W. 2d 288). "Review may be had only by complying with the conditions the legislature imposes." *Id.*

The South Dakota legislature imposed the condition that appeals from county boards of adjustment proceed to circuit court by writ of certiorari. *See Armstrong v. Turner County Bd. of Adjustment,* 2009 SD 81 ¶ 11, 772 N.W.2d 643. Recent decisions from this Court indicate this appeal mechanism varies from county to county. *Id.*

In *Armstrong*, this Court noted that the party appealing a CUP decision from a county commission has the right to *de novo* review by the circuit court. *Id; see also Goos,* 2009 SD 24 ¶ 8 (indicating the proper standard of review for appeals of CUP decisions made by a county commission is *de novo* under SDCL 7-8-30). The Court then described the inconsistency which currently exists in how such appeals are handled in other counties, specifically those falling under the SDCL chapter 11-2 board of

adjustment statutory scheme. *Armstrong,* 2009 SD 81 ¶ 11. An appeal from a county board of adjustment is properly made to the circuit court by writ of certiorari, and as a consequence, the circuit court would apply a highly deferential standard of review consistent with writ of certiorari actions. *Id*.; *see also Jensen v. Turner County Board of Adjustment,* 2007 SD 28, 730 N.W.2d 411; *Elliot,* 2007 SD 6.

When compared to the appeal mechanism under SDCL chapter 11-2, the benefit provided to those appealing from a county commission is significant. For example, in appeals under the *de novo* standard

> the circuit court should determine anew the question ... independent of the county commissioner's decision. In addition, the trial court should determine the issues before it on appeal as if they had been brought originally. The court must review the evidence, make findings of fact and conclusions of law, and render judgment independent of the agency proceedings.

Goos, 2009 SD 24 ¶ 8 (internal citations omitted). In stark contrast, an appeal to the circuit court via writ of certiorari is limited only to the following inquiry:

> whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it. A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law. Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding....

Elliott, 2005 SD 92 ¶ 14 (citing *Hines v. Board of Adjustment of City of Miller,* 2004 SD 13 ¶ 10, 675 N.W. 2d 231). Further, this Court acknowledged the writ of certiorari "appellate procedure departs significantly from the trial de novo." *Id*.

These significant differences created under the parallel methods of appealing county zoning decisions provide citizens with dramatically different opportunities to pursue and challenge such decisions, and with dramatically different legal protections

from the courts. The enhanced rights provided in some counties are substantial, because these counties provide access to *de novo* review in circuit court. This provides these counties' citizens with the right to pursue ordinary civil actions under the ordinary rules of civil practice and procedure, and importantly, the formal rules of evidence. This unequal access to *de novo* review, as created by the SDCL chapter 11-2 statutory scheme, establishes two distinct classifications of citizens.

B. The Classifications Created by SDCL Chapter 11-2 Are Arbitrary and Lack a Determining Principle.

Once the Court finds there are classifications, the Court will then determine if the classifications are arbitrary. The Court considers a classification arbitrary when it was made without an adequate "determining principle." *Davis,* 2004 SD 70 ¶ 7. *Armstrong* observed that the legislature omitted "any reference to an appeal procedure if the county-designated entity was not a board of adjustment." 2009 SD 81 ¶ 10.

The legislature's 2004 revisions to SDCL chapter 11-2 attempt to provide greater flexibility to the counties by allowing each to designate the county authority that would approve CUPs. As clearly stated by this Court in *Armstrong*, the statutory scheme is silent on the matter of appeals from non-board of adjustment county entities. This Court bridged this gap by pointing to the only other available method of appeal under SDCL 7-8-30, which provides *de novo* review from county commission decisions. *Id.*; *see also Goos*, 2009 SD 24 ¶ 8.

The conspicuous absence of any justification in the legislative history to support the restricted rights created by the 2004 amendments to SDCL chapter 11-2, or alternatively, the lack of any support for expansive rights available only to some citizens

under SDCL 7-8-30, strongly suggest these classifications occurred by chance, rather than by some adequate determining principle. The two classifications created by the legislature's omission are arbitrary.

C. Local Flexibility Does Not Make the Classifications Non-arbitrary.

The differing levels of protection afforded by the law occur when county zoning decisions reach the circuit court level. There may be good policy reasons to afford flexibility to counties in their procedures (boards of adjustment versus county commission appeals) as well as substantive ordinances governing land uses. However, there is no reason for (or any thought given to) the dramatically different levels of protection afforded to citizens of different counties once a zoning decision proceeds to circuit court. Since the disparate standards of review are applied at the circuit court level, the county flexibility justification is unrelated to the standard of review applied by the circuit court, and therefore, cannot be said to be the adequate determining principle underlying the class creation.

As discussed in *Armstrong*, the confusing method of appealing CUPs developed from an omission in the 2004 amendments to SDCL chapter 11-2, when the legislature failed to address the proper appeal method for CUP decisions if the approving body was something other than a board of adjustment. The resulting confusion brought this Court to the only legislatively created alternative available, SDCL 7-8-30, which provides *de novo* review. *See Armstrong,* 2009 SD 81 ¶ 11. Again, the two methods of appeal were created by the legislature without a determining principle, making the classifications arbitrary.

This Court has previously determined that classifications are arbitrary even when the legislature has provided local governments with discretion to create such

classifications. *See Meidinger,* 233 N.W.2d at 333 (determining unequal statutory maximum sentences for misdemeanors created arbitrary classifications, even though cities meeting population requirements in effect had been legislatively granted the discretion to impose such maximum sentences).

In *Meidinger*, cities meeting certain population requirements were provided legislative discretion to establish municipal courts. *Id.* If the city established a municipal court, the maximum sentence allowed by state law for violating any city ordinance, resolution or regulation could be increased.[2] *Id.* The Court found that this resulted in arbitrary classifications, because it resulted in unequal punishment for like offenses when one locality makes a decision to create a municipal court, and the other does not. *Id*.

Meidenger provides an example of arbitrary classification arising from a legislative grant of discretion to a local government. Moody County, like the City of Aberdeen in *Meidenger,* has in effect been granted discretion to limit the standard of review for CUP appeals. By providing this discretion, the legislature has arbitrarily created classes of citizens.

Two decisions from the Wisconsin Supreme Court extend the *Meidenger* analysis to standards of review. The Wisconsin Supreme Court determined that statutes providing *de novo* review to some, but not all, citizens of Wisconsin created classifications which ultimately violate the Equal Protection Clause. Each case presented the Wisconsin Supreme Court with laws that restricted access to *de novo* review for property tax

[2] Cities without a municipal court were allowed only a $100 maximum fine and up to thirty days in jail, while cities with municipal courts were allowed up to a $500 fine and six months in jail.

assessment decisions. *See Nankin v. Village Of Shorewood,* 630 N.W.2d 141 (Wis. 2001); *Metropolitan Associates v. City of Milwaukee*, 796 N.W. 2d 717 (Wis. 2011).

In *Nankin,* a Wisconsin statute allowed property owners residing in counties with populations of greater than 500,000 to appeal only by writ of certiorari to a circuit court, while the residents in all other counties were provided an opportunity for *de novo* review by a circuit court. 630 N.W. 2d at 144-45. The Wisconsin Supreme Court made a finding that this law created separate classes (dependent upon the population of the county of one's residence) in violation of the Equal Protection Clause. *Id*. at 108.

Several years later, in *Metropolitan Associates*, the Wisconsin Supreme Court reviewed a statute, "Act 86," that provided county governments discretion to "opt out" of *de novo* review for appeals of county tax assessment decisions. 796 N.W. 2d at 720. The court concluded Act 86, like the statute in *Nankin*, created two classes of citizens: those in "opt out" jurisdictions and everyone else. *Id.* at 99. The court provided no deference to the county, even where the decision to choose the appeal method was expressly granted by the state legislature to counties to provide local flexibility. *See id.*

Both *Nankin* and *Metropolitan Associates* provide examples of an appellate scheme providing *de novo* review only to some citizens (denying *de novo* review legislatively in *Nankin* and via county "opt outs" in *Metropolitan Associates*), thereby creating two classes of citizens with substantially different rights.

Meidenger, Nankin and *Metropolitan Associates* provide illustrative examples of arbitrary classifications. *Meidenger* demonstrates that in South Dakota, a grant of power to local government of discretion to manage local affairs can create classifications which

are arbitrary. *Nankin* and *Metropolitan Associates* extend this logic to matters concerning standards of review.

D. Fundamental Rights Are Involved and the Legislature's Differing Standards of Review Cannot Pass Strict Scrutiny.

Under *Davis*, the next step in the analysis is to determine whether a "fundamental right" exists and, if not, then "whether a rational relationship exists between a legitimate legislative purpose and the classifications created." *Davis,* 2004 SD 70 ¶ 5.

In the constitutional context, "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' " are considered fundamental rights. *Singleton v. Cecil*, 176 F.3d 419, 425 (8th Cir. 1999) (quoting *Washington v. Glucksberg,* 521 U.S. 702 (1997)). "[T]he strict scrutiny test applies only to fundamental rights or suspect classes." *State v. Geise*, 2002 SD 161 n. 4, 656 N.W.2d 30, 40 n. 4 (citing *Budahl v. Gordon and David Associates,* 287 N.W.2d 489 (S.D. 1980)). The strict scrutiny test under the Equal Protection clause requires a compelling local interest and use of the least restrictive alternative. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Citizens' rights are fundamental for two reasons. First, property rights are at stake, and property rights are one of the most deeply rooted set of rights in both the state and federal constitutions. *Cf. Wright v. Sherman*, 52 N.W. 1093, 1096 (S.D. 1892) (property rights are described as fundamental rights); *Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (property rights are described as fundamental rights).

Second, the Citizens' right to access the courts of this state on an equal basis with citizens in other counties is a fundamental right. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("fundamental constitutional right of access to the courts" found in context of prisoner access to court system); *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 155 (1907) (fundamental rights include the right to institute and maintain actions in the courts); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3067 (2010) (fundamental rights include "the right of access to 'the courts of the state' ") (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (E.D. Pa. 1823)); *see also Ohlwine v. Bushnell*, 143 N.W. 362, 364 (S.D. 1913) (fundamental rights of tax payer to procedural protections in enforcement actions). The "open courts" provision of South Dakota's constitution further supports the notion that fundamental rights are involved in this appeal. *See* S.D. CONST. Art. VI, § 20 ("All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay").

When fundamental rights, such as property rights and access to the courts, are at issue in an Equal Protection challenge, the state is required to satisfy the strict scrutiny standard by demonstrating a compelling local interest and use of the least restrictive alternative. *See Geise*, 2002 SD 161 n.4; *Grutter*, 539 U.S. 306. The Citizens cannot imagine what compelling interest justifies unequal standards of review when circuit courts review county zoning decisions. While counties certainly need flexibility for substantive zoning ordinances (setbacks, acceptable land use, etc.), and perhaps some flexibility in procedures at the county level, there is simply no justification for differing standards of review at the circuit court level. To the extent local flexibility was the goal

of the legislature in crafting the revisions to SDCL chapter 11-2 in 2000, 2003, and 2004, a less restrictive alternative would be simply to provide equal *de novo* review to all appeals from county zoning decisions to circuit court. The writ of certiorari standard of review in SDCL chapter 11-2 cannot pass strict scrutiny.

E. There Is No Rational Relationship between Unequal Standards of Review and Any Legitimate Legislative Purpose.

If this Court determines that fundamental rights are not involved, then the Court next examines "whether a rational relationship exists between a legitimate legislative purpose and the classifications created." *Davis,* 2004 SD 70 ¶ 5.

The effect of the statutory scheme in SDCL chapter 11-2 limits the standard of review applied by the circuit court for appeals of CUP decisions only when the decision originates from a county board of adjustment. The Citizens are unable to identify a legitimate legislative purpose for providing an absolute right to *de novo* review of CUP decisions to some citizens, while simultaneously restricting the review for other similarly situated citizens located in other counties. Accordingly, the statutory scheme appears to have no rational relationship to any legitimate legislative interest.

The Wisconsin Supreme Court decision *Metropolitan Associates* again provides support for the Citizens' argument. 796 N.W. 2d at 717. As indicated previously, the Wisconsin Supreme Court reviewed Act 86 in *Metropolitan Associates.* Act 86 had the effect of providing counties the discretion to "opt out" of providing *de novo* review of tax assessment decisions, much like the effect of board of adjustment review in South Dakota. After the Wisconsin Supreme Court concluded the law created classes of citizens, the Court applied Wisconsin's five-part test to determine if any rational basis

existed to support the distinctions. *Id.* at 117-18. The Wisconsin Supreme Court concluded that Act 86 had no rational basis, in part, because no substantial differences between classes could justify restricting access to *de novo* review in "opt out" counties; also, the characteristics of the class were not so different from the other class as to reasonably support substantially different legislation. *Id.* at 119-22. The Wisconsin Supreme Court determined that the statute violated equal protection provided under both the Wisconsin Constitution and the United States Constitution. *Id*. at 122.

As in *Metropolitan Associates*, there is nothing to suggest substantial differences exist between property owners in Moody County and property owners in counties providing access to *de novo* review. Further, no characteristics of property owners in Moody County can reasonably support substantially different legislation. Therefore, there can be no rational basis between the presumable legislative goal of local flexibility and unequal standards of review at the circuit court level depending on the county of one's residence. Accordingly, SDCL 11-2-62 and the Ordinances result in denying the Citizens equal protection, therefore, the Court should reverse the circuit court and remand for a *de novo* review of the Board's decision.

II. The Board Exercised Original Jurisdiction over Mustang's Application, which Is Beyond the Board's Jurisdiction under South Dakota Law.

A. The Board Exercised Original Jurisdiction over Mustang's Application.

Mustang presented its CUP application to the county zoning officer, who forwarded the application to the Board to take action; but, the officer did not make any actual decisions or grant the permit application. The process utilized for Mustang's application is the same process described in Ordinance § 3.02.02.10.b. The circuit court

found that the Board, in reality, exercised original jurisdiction over Mustang's permit application. The circuit court incorrectly concluded that such an exercise of original jurisdiction was within the lawful scope of the Board's jurisdiction.

B. The Board's Exercise of Power Must Comply with State Law.

The power to regulate zoning is a police power that counties derive from delegation of such power by the state. *See Cary v. City of Rapid City*, 1997 SD 18, ¶¶ 19-20, 559 N.W.2d 891, 895. Necessarily, a county's exercise of its zoning or police power must be in compliance with the statutes legislatively delegating such power to the county. *See In re Yankton Cnty. Comm'n*, 2003 SD 109, ¶ 21, 670 N.W.2d 34 (through 2000 legislative enactments, legislature intended to fully occupy the field of appeals of county zoning decisions, leaving no room for local deviations); *see also State ex rel. Jackley v. City of Colman*, 2010 SD 81, 790 N.W.2d 491 (state law preempts city law with respect to state trunk highway system); *Law v. City of Sioux Falls*, 2011 SD 63, 804 N.W.2d 428 (state gaming law preempts local regulation of gaming).

In *Yankton County Commission*, this Court made clear that "the Legislature intended to occupy the field [of appeals from county zoning decisions] and leave no room for supplementary county regulation." 2003 SD 109 ¶ 21. Yankton County passed an ordinance allowing intermediate appeals from board of adjustment decisions to the county commission. The ordinance conflicted with SDCL 11-2-61 and 11-2-62, which require board of adjustment decisions to be appealed through a writ of certiorari to circuit court. This Court held that the Yankton County ordinance allowing the intermediate appeals was invalid, as the legislature intended to completely occupy this field, and such an intermediate appeal conflicted with state law. 2003 SD 109 ¶ 21.

Whether Moody County's Ordinances permit the Board to exercise original jurisdiction over CUPs is simply not relevant. The critical inquiry is whether anything in SDCL chapter 11-2 authorizes boards of adjustment to exercise original jurisdiction over CUP applications. If nothing in SDCL chapter 11-2 authorizes the Board to have original jurisdiction over CUP applications, then the Board necessarily exceeded its jurisdiction in granting Mustang's permit application, and such decision must be reversed.

C. When the Legislature Created Boards of Adjustment, It Granted Only Appellate Jurisdiction.

An exhaustive and complete review of the powers delegated by the state to counties in the form of boards of adjustment makes clear that boards of adjustment are strictly appellate bodies of government. Stated plainly, nothing in SDCL chapter 11-2 authorizes boards of adjustment to exercise original jurisdiction. When the legislature authorized the creation of boards of adjustment, the governmental creature it created was an appellate body of county government, and not one that exercises original jurisdiction.

SDCL 11-2-53(1) provides that a board of adjustment may: "[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant to this chapter[.]" The use of the word "may" indicates that a board of adjustment may hear such appeals from county administrative official actions, but would not be required to do so. Notably, this statute contemplates that the county administrative official is the person making orders, decisions, and determinations, which may then be appealed to a board of adjustment.

SDCL 11-2-53(2) provides that a board of adjustment may: "[a]uthorize upon appeal in specific cases such variance from terms of the ordinance [under certain conditions]." This statute specifically states that variances granted by a board of adjustment are "upon appeal[.]" A variance is not at issue in this appeal.

SDCL 11-2-55 provides that "[a]ppeals to the board of adjustment may be taken by any person aggrieved or … [specified county officials] affected by any decision of the administrative officer." Again, the statute contemplates a decision being made by an "administrative officer," which is then appealed by persons aggrieved or by specified county officials. SDCL 11-2-55 continues with the procedural steps for initiating an appeal to a board of adjustment: "[t]he appeal shall be taken … by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds of the appeal." The statute makes clear that a board of adjustment is acting as an appellate body reviewing decisions of administrative officers. SDCL 11-2-55 concludes by requiring the administrative officer to transmit certain materials to a board of adjustment when an appeal is commenced.

SDCL 11-2-57 requires that a "board of adjustment shall hold at least one public hearing of the appeal" and further provides the details of how such notice must be given. SDCL 11-2-57 further requires that "[t]he board of adjustment shall decide the appeal within a reasonable time."

SDCL 11-2-58 describes the actions a board of adjustment is authorized to make when hearing appeals set forth in SDCL 11-2-53. SDCL 11-2-58 provides that a "board of adjustment may, in conformity with the provisions of this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination

appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end has all the powers of the officer from whom the appeal is taken." SDCL 11-2-58 further supports the notion that a board of adjustment is an appellate body of county government.

SDCL 11-2-59 requires a two-thirds majority vote by a board of adjustment to reverse an administrative official's decision. SDCL 11-2-59 requires a two-third's majority vote to decide in favor of an applicant upon "any matter upon which it is required to pass under any such ordinance[.]" This language is a bit clumsy, but the only fair reading is that a two-thirds majority vote is required to find that an applicant has met its burden of demonstrating compliance with applicable ordinances. Finally, SDCL 11-2-59 requires a two-thirds majority vote to effect a variation in an ordinance, which is not at issue in this appeal. SDCL 11-2-59 simply sets forth the super majority voting requirements when a board of adjustment exercises appellate jurisdiction.

SDCL 11-2-60 is applicable when a county commission acts as a board of adjustment, in lieu of appointing a separate board of adjustment. SDCL 11-2-60 provides that the county commission "may act as and perform all the duties and exercise the powers of the board of adjustment." That statue further provides that the chair of the county commission board acts as the chair of the board of adjustment. Finally, the same two-thirds vote requirements set forth in SDCL 11-2-59 are applicable to a county commission acting as a board of adjustment.

The foregoing is an exhaustive and complete review of what powers the state has delegated to counties in the form of boards of adjustment. SDCL chapter 11-2 makes clear that boards of adjustment are strictly appellate bodies of government. Nothing in

SDCL chapter 11-2 delegates original jurisdiction to boards of adjustment. Yet, in this case specifically, and in Moody County generally, the Board exercised original jurisdiction when it granted Mustang's permit application. The administrative officer did not make a decision to grant or to deny Mustang's application. Rather, the officer simply received Mustang's permit application and forwarded it with a recommendation to the Board, after which the Board granted the permit as a matter of original jurisdiction. While the Board's approach may be expedient, it is beyond the Board's jurisdiction as defined by SDCL chapter 11-2.

Whether Moody County's procedural approach is efficient and sensible is not relevant. Nevertheless, it is not permitted by SDCL chapter 11-2. While local flexibility is a legitimate goal, this Court in *Yankton County Commission* made clear that local flexibility in zoning appeals must comply with state law. 2003 SD 109 ¶ 21 (invalidating ordinance permitting intermediate appeal from board of adjustment to county commission). Likewise, Moody County's vesting of original jurisdiction with the Board is unlawful and not in compliance with the statutes creating boards of adjustment in SDCL chapter 11-2. Accordingly, the Court should reverse the circuit court and find that the Board exceeded its lawful jurisdiction.

D. The Legislative Changes in 2003 and 2004 Make Clear That Boards of Adjustment Do Not Have Original Jurisdiction.

The applicable Moody County Ordinances became effective on February 5, 2003. Five months later, on July 1, 2003, the 2003 legislative changes in South Dakota became effective. In particular, SDCL 11-2-53 was changed. SDCL 11-2-53 is the primary statute defining the power of boards of adjustment. In its current state, SDCL 11-2-53 authorizes boards of adjustment: (1) to handle appeals from administrative officer

decisions; and (2) handle appeals with respect to variances. On July 1, 2003, however, our legislature added the following power to boards of adjustment:

> Approve certain conditional uses upon a showing by an applicant that standards and criteria stated in a relevant ordinance enacted pursuant to section 7 of this Act will be met.

As of July 1, 2003, boards of adjustment were permitted to approve conditional uses directly, and not just in the form of an appeal from an administrative officer's decision. In 2004, however, the legislature reverted to the pre-2003 version of SDCL 11-2-53 and removed the above block-quoted language related to direct action on CUPs. The 2004 version of SDCL 11-2-53 is the current version in effect.

Likewise, on July 1, 2003, SDCL 11-2-58 provided the following:

> In exercising the powers mentioned in § 11–2–53, all decisions of the board of adjustment to grant variances or conditional uses or in hearing appeals from any administrative order, requirement, decision, or determination may be appealed to the board of county commissioners in accordance with the county ordinance, and any final decision of the board of adjustment or county commission shall be deemed a final administrative decision not subject to referendum or review. However, any aggrieved person or legal entity has the right to appeal as allowed in § 11–2–61.

Under the 2003 version of SDCL 11-2-58, the legislature made clear that boards of adjustment may make decisions on CUP applications, and that boards of adjustment hear appeals from administrative officials.

In 2004, the legislature amended SDCL 11-2-58 to state the following:

> In exercising the powers mentioned in § 11-2-53, the board of adjustment may, in conformity with the provisions of this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end has all the powers of the officer from whom the appeal is taken.

The 2004 version (which is the current version) removed the language referencing direct decisions by boards of adjustment as to conditional uses. The 2004 version of SDCL 11-2-58 is the current version in effect.

In sum, from July 1, 2003, until July 1, 2004, boards of adjustment could lawfully have original jurisdiction over conditional uses. However, prior to July 1, 2003, and from July 1, 2004, through the present date, boards of adjustment did not have original jurisdiction to decide CUP applications. Moody County's Ordinances permitting the Board to hear CUP applications as a matter of original jurisdiction became effective in February 2003, nearly five months before the legislature permitted such jurisdiction. Basically, Moody County jumped the gun and adopted the Ordinances before it had the power to do so. Moreover, even if the July 1, 2003, change to SDCL 11-2-53 retroactively blessed the Ordinances enacted five months prior, the Ordinances authorizing the Board to exercise original jurisdiction for conditional uses became unlawful on July 1, 2004, and remain unlawful today.

At best, Moody County's practice of having the Board exercise original jurisdiction over CUP applications was lawful from July 1, 2003, through July 1, 2004, the one-year window of time within which the legislature authorized such jurisdiction. The Board in this case, however, exercised original jurisdiction over Mustang's CUP application in 2013, which is years after our legislature amended SDCL chapter 11-2 removing such jurisdiction from boards of adjustment. The Board exceeded the scope of jurisdiction delegated to it by the legislature when it exercised original jurisdiction granting Mustang's CUP application. Therefore, its decision must be reversed.

E. SDCL 11-2-17.3 Provides No Additional Authority to Boards of Adjustment.

The discussion above (Argument § II.C) establishes that boards of adjustment have appellate jurisdiction only, and no original jurisdiction. The Board has argued that when the legislature added SDCL 11-2-17.3 in 2004, additional authority was bestowed upon boards of adjustment. The Board is incorrect for two reasons.

First, SDCL 11-2-17.3 simply provides that, when an ordinance allows conditional uses of property, the county must: (1) specify the authority approving CUP applications; and (2) specify the rules for evaluating conditional uses. The phrase "board of adjustment" appears nowhere in SDCL 11-2-17.3. The language of SDCL 11-2-17.3 does not create any additional authority for boards of adjustment, which remain appellate bodies of county government. This Court has repeatedly held that when the legislature delegates authority, that delegation will be strictly construed. *See City of Sioux Falls v. Peterson*, 25 N.W.2d 556, 557 (S.D. 1946) ("acts of the state legislature granting the police power to municipal corporations … will be strictly construed"); *Aman v. Edmunds Cent. Sch. Dis. No. 22-5*, 494 N.W.2d 198, 200 (S.D. 1992) (delegation of power to school districts is strictly construed); *First Nat. Bank of Minneapolis v. Kehn Ranch, Inc.*, 394 N.W.2d 709, 718 (S.D. 1986) (delegation to agency must be clear and express).

Second, even if SDCL 11-2-17.3 in fact results in original jurisdiction being delegated to boards of adjustment, the Ordinances' vesting of original jurisdiction in the Board remains void *ab initio* (as set forth in more detail below in Argument § III). Moody County established the Board with the power of original jurisdiction over CUPs in February of 2003. However, the legislature did not permit boards of adjustment to have original jurisdiction over CUPs until July 1, 2003, several months after Moody

County prematurely created the Board. *See* SDCL 11-2-53 (legislative history, H.B. 1281 (2003 legislative session)). On July 1, 2004, the legislature abrogated the power of boards of adjustment to hear CUPs as a matter of original jurisdiction, but also adopted SDCL 11-2-17.3. *See* SDCL 11-2-53 (legislative history, S.B. 164 (2004 legislative session)). Following the enactment of SDCL 11-2-17.3, Moody County did not re-adopt the Ordinances establishing the Board with original jurisdiction over CUPs.

In sum, on July 1, 2003, the legislature permitted boards of adjustment to have original jurisdiction over CUPs. On July 1, 2004, the legislature removed that original jurisdiction, but adopted SDCL 11-2-17.3. Both statutory sources became law after Moody County adopted the Ordinances creating the Board and vesting in the Board original jurisdiction over CUPs. At the time Moody County created the Board with such original jurisdiction, there was no statutory authority for the Board to have this power. As set forth in more detail below (Argument § III), the Ordinances were void *ab initio*. Even if the change in law on July 1, 2003, or July 1, 2004, would permit boards of adjustment to have original jurisdiction over CUPs, those statutory changes cannot revive the Ordinances that were void *ab initio*. Moody County was required to go through the procedures set forth in SDCL 11-2 (notice, hearing, a new vote, and the referendum process if invoked) in order to re-enact the Ordinances. While this may seem inefficient, case law makes clear that ordinances enacted without statutory authority are void *ab initio* and are not resuscitated by later statutory enactments. Accordingly, SDCL 11-2-17.3, for several reasons, affords no relief to the Board.

III. The Board Exceeded Its Jurisdiction, because Moody County Has No Valid Board of Adjustment Due to the Timing of the Enactment of the Ordinances.

Moody County established the Board with the power to hear CUP applications as a matter of original jurisdiction, which became effective on February 25, 2003. However, the South Dakota legislature did not delegate the power for boards of adjustment to hear CUPs until July 1, 2003, several months after Moody County enacted its ordinances. *See* SDCL 11-2-53 (legislative history, H.B. 1281 (2003 legislative session)). At best, Moody County's ordinances permitting the Board to hear CUP applications was effective from July 1, 2003, through July 1, 2004, at which point the legislature abrogated the power of boards of adjustment to hear CUPs as a matter of original jurisdiction. *See* SDCL 11-2-53 (legislative history, S.B. 164 (2004 legislative session)). Moody County did not reenact the Ordinances after July 1, 2003, nor did Moody County modify the Ordinances once the legislature removed original jurisdiction from the menu of available powers for boards of adjustment in 2004.

While an apparent matter of first impression in South Dakota, other courts have time and again found that premature action on power not yet delegated renders such action void *ab initio*. In *Armco Steel v. City of Kansas City*, the Missouri Supreme Court invalidated a city ordinance related to a natural gas licensing fees, because it was not valid at the time it was enacted, notwithstanding later legislative action extending additional authority. 883 S.W.2d 3, 7 (Mo. 1994). In so holding, the court reasoned as follows:

> [T]he ordinances were void and unenforceable *ab initio*—at the time of enactment. Nor were the ordinances validated or ratified by the 1992 amendment of *§ 92.045.* In an analogous context, this Court has stated that an unconstitutional statute "is not validated by a subsequent constitutional amendment, except, possibly, where

> the latter ratifies and confirms it ..." Without express ratification and confirmation, the statute must be reenacted. This rule is equally applicable to an ordinance that was prohibited by a statutory provision at the time of its enactment.

Id. (internal citations omitted).

Similarly, in *North Liberty Land Co. v. Incorporated City of North Liberty*, the Iowa Supreme Court found that an ordinance related to sewer connection charges was invalid as beyond the scope of delegated powers, and a later general expansion of municipal powers did not retroactively validate the ordinance. 311 N.W.2d 101, 102-03 (Iowa 1981) ("ordinance was adopted prior to the municipal home rule amendment … [u]nless the ordinance was previously valid it was not made so by the home rule amendment"); *see also City of Santa Fe v. Armijo*, 634 P.2d 685, 687-88 (N.M. 1981) ("there must have been some previously existing state statute which authorized the enactment of the particular municipal ordinance … a curative statute cannot ratify a void municipal ordinance nor validate an application of an ordinance where there was no power to enact the ordinance in the first instance").

If this Court concludes that Moody County's premature enactment of the Ordinances vesting original jurisdiction in the Board renders the Ordinances void *ab initio*, then the Ordinances creating the Board are void from day one, and Moody County effectively has no valid and lawful board of adjustment. The Citizens would suggest that such a finding would result in: (1) reversal of the circuit court's decision; (2) voiding Mustang's permit; (3) requiring Mustang to proceed with its prior application (or a new application) before the Moody County Board of Commissions; and (4) as set forth in the Equal Protection section above, any appeal from the Board of Commissioners would be *de novo* to the circuit court.

IV. The Board's Decision Should Be Reversed, because the Board Exceeded Its Jurisdiction, Failed to Pursue Its Authority in a Regular Manner, and Failed to Perform Acts Required by Law.

In *Armstrong*, this Court summarized the standard of review applicable to writs of certiorari from boards of adjustment:

> Our consideration of a matter presented on certiorari is limited to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it. A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law.

2009 SD 81¶ 12 (citing *Jensen*, 2007 SD 28 ¶ 4 (quoting *Elliott*, 2005 SD 92 ¶ 14)). Three bases should result in reversal of the Board's decision: (1) the Board exceeded its jurisdiction; (2) the Board failed to pursue its authority in a regular manner; or (3) the Board failed to do some act required by law.

A. The Board Failed to Adopt Rules as Required by SDCL 11-2-54.

SDCL 11-2-54 provides the following: "The board of adjustment shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this chapter." The Board failed to adopt rules for proceedings before the Board. (Dep. Ex. 3 p. 1 (Moody County state's attorney's letter acknowledging no rules were adopted by the Board).) The Board's failure to adopt rules is a violation of SDCL 11-2-54, rendering all proceedings before it invalid. *Armstrong* and other cases addressing the writ of certiorari standard have made clear that a decision will be reversed if a board of adjustment fails "to do some act required by law." 2009 SD 81 ¶ 12. Additionally, failure to adopt rules necessarily means that the Board failed to regularly pursue its authority, further justifying reversal of its decision.

B. Moody County's Creation of the Board Failed to Comply with the Procedural Requirements of SDCL Chapter 11-2, therefore, the Board's Action Exceeded Its Jurisdiction.

In *Pennington County v. Moore*, this Court held that county zoning ordinances are invalid and unenforceable if statutory procedural requirements are not met, regardless of how long the ordinances purportedly have been effective. 525 N.W.2d 257, 258-59 (S.D. 1994). In so holding, *Moore* noted that "[a] county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *Id.* (quoting *State v. Hansen,* 68 N.W.2d 480, 481 (S.D. 1955)). *Moore* ultimately held that the county could not enforce improperly enacted ordinances, due to the county's failure to follow the "express procedural requirements" of SDCL chapter 11-2. *Id.*

SDCL 11-2-18 requires a county planning commission to hold a public hearing (at least ten days after public notice) for new ordinances, after which hearing the planning commission shall submit a recommendation to the board of commissioners. SDCL 11-2-19 provides that "[a]fter receiving the recommendation of the planning commission the board shall hold at least one public hearing on the … zoning ordinance" at least ten days after public notice is given. Finally, SDCL 11-2-20 requires the board of commissioners to take action by majority vote following the SDCL 11-2-19 hearing.

The legislature created an intentional, deliberative two-step process to enact ordinances. First, the planning commission holds a hearing on new ordinances, with proper notice, and then makes a recommendation to the board of commissioners. The board of commissioners sets a hearing after receiving the planning commission recommendations, reviews the recommendations at the second hearing, and finally takes action based on the recommendations. This two-step process forces deliberation, careful

planning, and maximum opportunity for public awareness and participation, before ordinances become law.

Moody County did not following the procedures set forth in SDCL 11-2-18 through 11-2-20 when it created the Board. The Board was created by ordinance as set forth in § 3.03 of the Ordinances. On January 21, 2003, the Moody County planning commission and board of commissioners held a joint hearing on the Ordinances, the planning commission recommended adoption of the Ordinances, and the board of commissioners adopted the Ordinances, all at the same hearing. Moody County failed to follow the two-step process required by SDCL 11-2-18 through 11-2-20. Just as the ordinances in *Moore* were invalid due to Pennington County's failure to follow the "express procedural requirements" of SDCL 11-2, the Ordinances creating the Board are likewise invalid. 525 N.W.2d at 258-59.

As the Board was not lawfully created due to procedural shortcuts taken by Moody County, the decision of the Board approving Mustang's permit necessarily exceeded the Board's jurisdiction. *Armstrong*, 2009 SD 81 ¶ 12. The Court should reverse the Board's decision. To the extent a remand of any nature is required, the matter should be remanded for further proceedings before the board of commissioners, with a *de novo* review to follow thereafter if an appeal to circuit court is pursued, because there is no valid board of adjustment in Moody County.

C. One of the Board Members Was Not Qualified, because He No Longer Resided in Moody County at the Time of the Board's Vote.

"Every office shall become vacant on the happening of any one of the following events before the expiration of the term of such office … (5) His ceasing to be a resident of the state, district, county, township, or precinct in which the duties of his office are to

be exercised or for which he may have been elected[.]" SDCL 3-4-1. Commissioner Peper was one of the five members of the Board that voted to grant Mustang's permit. Peper, however, was not a resident of Moody County at the time, meaning he was not eligible to serve on the Board. Whether Peper was eligible to serve on the Board is directly relevant to whether the Board regularly pursued its authority and whether the Board acted unlawfully, either of which is a basis to invalidate the Board's decision to grant Mustang's permit. *Armstrong*, 2009 SD 81 ¶ 12.

Peper claims to reside in the basement of a Flandreau, Moody County, home occupied by a young couple (last name unknown to Peper) living on the main floor of the home. (Peper Dep. 5, 13-14.) The house does not have a separate entrance for the basement, which includes neither a kitchen nor laundry facilities. (*Id*. at 20-21.)

Peper purchased a home outside Moody County in Sioux Falls by warranty deed dated November 6, 2012. (Dep. Ex. 13.) When Peper purchased the Sioux Falls home, he checked the "owner-occupied" box on the certificate of value accompanying the deed. (Peper Dep. 29., Dep. Ex. 14.) By checking the "owner-occupied" box as part of purchasing the Sioux Falls home, Peper represented that as of November 6, 2012, he would be the owner of the Sioux Falls property, that he would occupy the property, and that the property would be his principal residence. (Dep. Ex. 14.) In addition to individually checking each of the above items, Peper signed directly under those representations and filed the certificate of value with Minnehaha County. (Dep. Ex. 14.) The certificate of value lists Peper's then current mailing address as the home in Flandreau, but indicated that his new mailing address would be the Sioux Falls home. (Dep. Ex. 14.) Peper was unable to testify how often he stays overnight in Flandreau,

compared to his Sioux Falls home where his female friend lives rent free. (Peper Dep. 9-10, 23-24, 34.)

On April 4, 2013, the day after the Citizens filed their petition for writ of certiorari, and well after the Board voted to grant Mustang's permit, Peper had the Minnehaha County Director of Equalization remove the "owner-occupied" status associated with the Sioux Falls home. (Dep. Ex. 17 &18.) Peper was unable to offer any explanation for the timing of the "owner-occupied" status change. (Peper Dep. 34.)

Peper ceased to be a resident of Moody County on or shortly after November 6, 2012, therefore his office became vacant under SDCL 3-4-1(5). As a result, the Board's action was unlawful and the result of irregularly exercised authority. *See Armstrong*, 2009 SD 81 ¶ 12. This Court should reverse the circuit court's decision and rule that the Board's decision granting Mustang's permit was unlawful.

CONCLUSION

The Citizens respectfully request that this Court reverse the circuit court's decision and the Board's decision, and, if appropriate, remand this matter for further proceedings with a *de novo* review of any county-level decision.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

Dated at Sioux Falls, South Dakota, this 17th day of January, 2014.

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The undersigned hereby certifies that this Appellant's Brief complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,018 words and 48,111 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 17th day of January, 2014.

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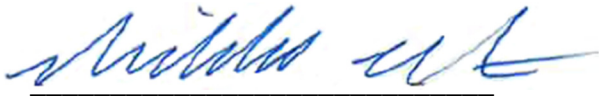

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CERTIFICATE OF SERVICE

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHAWN TIBBS, VIRGIL STEMBAUGH,
GENE GULLICKSON and JANET GULLICKSON

Petitioners/Appellants

-vs-
MOODY COUNTY BOARD OF COMMISSIONERS,
sitting as THE BOARD OF ADJUSTMENT,
and MUSTANG PASS, LLC,

Respondents/Appellees

Appeal No. 26897

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MOODY COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
CIRCUIT COURT JUDGE

APPELLEE MOODY COUNTY BOARD OF COMMISSIONERS' BRIEF

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TABLE OF CONTENTS

	Page(s)
Preliminary Statement	1
Jurisdictional Statement.	1
Legal Issues.	2
Statement of the Case	3
Statement of Facts.	5
Argument.	6
A. THE STATUTORY SCHEME SET FORTH IN SDCL CHAPTER 11-2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE	6
1. Standard of Review and elements considered in Equal Protection challenge.	6
2. SDCL Chapter 11-2 is facially valid, as it does not create classifications that violate Equal Protection	7
3. The classifications created by the application of SDCL Chapter 11-2 are not arbitrary .	9
4. The lack of legislative history is completely irrelevant to whether the application of SDCL Chapter 11-2 creates arbitrary classifications . . .	14
5. Strict scrutiny review is inappropriate because, to the extent the application of SDCL Chapter 11-2 creates classifications, neither a suspect class nor a fundamental right is involved	15

6. A rational relationship exists between a legitimate legislative purpose and the classifications created by SDCL Chapter 11-2. . 18

B. THE BOARD HAD THE AUTHORITY TO CONSIDER MUSTANG PASS'S CONDITIONAL USE PERMIT 21

1. SDCL 11-2-53 does not limit the Board to appellate jurisdiction. 21

2. The Board was granted the authority to consider conditional use permits when the changes were made to the statutes in 2000. 25

3. SDCL 11-2-53 authorizes the Board to consider the administrative official's decisions 26

C. MOODY COUNTY'S DELEGATION OF THE AUTHORITY TO HEAR CONDITIONAL USE APPLICATIONS TO THE BOARD DOES NOT CONFLICT WITH STATE LAW. 27

D. THE BOARD HAD JURISDICTION OVER MUSTANG PASS'S CONDITIONAL USE PERMIT AND PURSUED IN A REGULAR MANNER THE AUTHORITY CONFERRED UPON IT. 30

1. The Board's lack of procedural rules is irrelevant to this zoning appeal 31

2. Moody County's adoption of the Comprehensive Land Use Plan and Ordinance complied with South Dakota law. 32

3. Commissioner Peper's residence is irrelevant 34

Conclusion 35

Certificate of Compliance. 36

Certificate of Service 37

TABLE OF AUTHORITIES

Page(s)

Statutes:

SDCL 2-14-2.1. 22

SDCL Chapter 7-8 8

SDCL 7-8-18. 12

SDCL 7-18A-2 29

SDCL 9-19-3. . . . . 10, 11

SDCL 9-19-4. . . . . 10, 11

SDCL Chapter 11-2. . . . . 2-28 passim

SDCL 11-2-17.3 . . . . . 2-30 passim

SDCL 11-2-17.4 26

SDCL 11-2-18 . . . . . 3, 33, 34

SDCL 11-2-19 . . . . . 33, 34

SDCL 11-2-53 . . . . . 2-29 passim

SDCL 11-2-53(1). 27

SDCL 11-2-54 32

SDCL 11-2-58 29

SDCL 11-2-59 . . . . . 9, 24

SDCL 11-2-60 . . . . . 3, 26, 28, 34

SDCL 11-2-61 . . . . . .2, 8, 30

SDCL 11-2-62 . . . . . 2, 8

SDCL 11-9-19 3

SDCL 12-1-4. . . . . 3, 34

SDCL 15-26A-3. 1

SDCL 15-26A-6. 2

SDCL 15-26A-66(4). 36

Cases:

Aberdeen v. Meidinger, 89 S.D. 412,
233 N.W.2d 331 (1975). 10

Armstrong v. Turner County Board of Adjustment,
2009 SD 81, 772 N.W.2d 643 . . . . . 2, 8, 23, 30

Bechen v. Moody County Bd. of Commissioners,
2005 S.D. 93, 703 N.W.2d 662 . . . . . 2, 25

Buchholz v. Storsve, 2007 SD 101, 740 N.W.2d 107. 6

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985). 17

Clajon Prod. Corp. v. Petera, 70 F.3d 1566
(10th Cir. 1995). 17

Coalition for Equal Rights, Inc. v. Owens,
458 F. Supp. 2d 1251 (D. Colo. 2006) 17

Custer County Board of Educ. v. State Comm'n
on Elementary & Secondary Educ., 86 S.D. 215,
193 N.W.2d 586 (1972). 31

Goos RV Center v. Minnehaha Co. Comm'n,
2009 SD 24, 764 N.W.2d 704 . . . . . .8, 11, 12

Gulch Gaming, Inc. v. South Dakota,
781 F. Supp. 621 (D.S.D. 1991) 16

Heinemeyer v. Heartland Consumers Power Dist.,
2008 SD 110, 757 N.W.2d 772. 34

Heller v. Doe, 509 U.S. 312, 320 (1993)) 14

In re Appeal from Decision of Yankton
County Comm'n, 2003 SD 109, 670 N.W.2d 34
(S.D. 2003). 30

In re Davis, 2004 SD 70, 681 N.W.2d 452. . . . . 2, 7

In re Dupont, 142 S.W.3d 528 (Tex. App. Fort Worth 2004) 3, 32

In re Z.B., 2008 SD 108, 757 N.W.2d 595. . . . . 14, 19

Jensen v. Turner County Bd. of Adjustment, 2007 SD 28, 730 N.W.2d 411 . . . . . 2, 23, 24, 28-29

Johnson v. John Deere Co., 306 N.W.2d 231 (S.D. 1981). 31

Kraft v. Meade County, 2006 SD 113, 726 N.W.2d 237 13

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) 14

Meinders v. Weber, 2000 SD 2, 604 N.W.2d 248 . . 6

Metro. Assocs. v. City of Milwaukee, 2011 WI 20, 332 Wis.2d 85, 796 N.W.2d 717. . . . . 19, 21

Pennington County v. Moore, 525 N.W.2d 257 (S.D. 1994). 3, 32-33

Person v. Peterson, 296 N.W.2d 537 (S.D. 1980) . 22

Rantapaa v. Black Hills Chairlift Co., 2001 SD 111, 633 N.W.2d 196. . . . . 3, 29

Reform Party of U.S. v. Gargan, 89 F.Supp.2d 751 (W.D. Va. 2000). 32

State v. Allison, 2000 SD 21, 607 N.W.2d 1 . . . 7

State v. Laible, 1999 SD 58, 594 N.W.2d 328. . . 6

Truax v. Corrington, 257 U.S. 312 (1921) 16

United States v. 16.92 Acres of Land, 670 F.2d 1369 (7th Cir. 1982) 17

United States v. Salerno, 481 U.S. 739, 745 (1987) 9

Weems v. Little Rock Police Dep't.,
453 F.3d 1010 (8th Cir. 2006) 17

Woods v. Holy Cross Hospital, 591 F.2d 1164,
1173 n.16 (5th Cir. 1979) 18

Wright v. Sherman, 52 N.W. 1093 (S.D. 1892). . . 16

Other Authority:

S.D. Const. art. VI, § 18. . . . . 2, 7

Wis. Stat. § 64.01 20

Wis. Stat. § 64.25 20

Wis. Stat. § 64.39 20

Wis. Stat. § 66.0405 20

Wis. Stat. § 66.0615 20

PRELIMINARY STATEMENT

In this brief, Appellants will be referred to as "Petitioners." Appellee Moody County Board of Commissioners sitting as the Board of Adjustment will be referred to as "Board." Appellee Mustang Pass, LLC, will be referred to as "Mustang Pass." The Moody County Clerk of Courts' record will be referenced by "CR" followed by the page number. The exhibits to the "Return to Writ of Certiorari," which were not numbered by the clerk, will be identified by the pleading to which they were attached and their corresponding exhibit letter (e.g., CR 69, Ex. A). The deposition transcripts made a part of the record will be referenced using the deponent's last name, followed by the page number of the applicable transcript. The deposition exhibits will be referenced as "Dep. Ex." followed by the exhibit number and, in the case of multi-page exhibits, the page number in the exhibit (e.g., Dep. Ex. 1, p. 2).

JURISDICTIONAL STATEMENT

On November 7, 2013, the Board served notice of entry of the circuit court's Judgment of Dismissal and Findings of Fact, and Conclusions of Law. (CR 203) Pursuant to SDCL 15-26A-3, an appeal to the Supreme Court from the circuit court may be taken from a judgment. Petitioners served their Notice of Appeal and Docketing

Statement on December 5, 2013, which was within 30 days of notice entry of the Judgment of Dismissal in accordance with SDCL 15-26A-6. (CR 205; CR 241)

LEGAL ISSUES

I. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT THE PROVISIONS OF SDCL CHAPTER 11-2 DO NOT VIOLATE PETITIONERS' RIGHT TO EQUAL PROTECTION.

The trial court concluded that the classifications created by the statutory scheme of SDCL Chapter 11-2 were not arbitrary; and that there is a legitimate legislative purpose for the law in that it allows flexibility in how each county handles its respective zoning issues.

In re Davis, 2004 SD 70, 681 N.W.2d 452.

Armstrong v. Turner County Board of Adjustment, 2009 SD 81, 772 N.W.2d 643.

S.D. Const. art. VI, § 18.

SDCL 11-2-17.3, 11-2-61, and 11-2-62.

II. WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT THE BOARD HAD JURISDICTION TO CONSIDER MUSTANG PASS'S CONDITIONAL USE PERMIT.

The trial court concluded that the Board had original jurisdiction to consider Mustang Pass' application for a conditional use permit.

Armstrong v. Turner County Bd. of Adjustment, 2009 SD 81, 772 N.W.2d 643.

Bechen v. Moody County Bd. of Commissioners, 2005 S.D. 93, 703 N.W.2d 662.

Jensen v. Turner County Bd. of Adjustment, 2007 SD 28, 730 N.W.2d 411.

SDCL 11-2-17.3, 11-2-53.

III. WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT THE MOODY COUNTY ZONING ORDINANCE'S DELEGATION OF AUTHORITY TO THE BOARD TO HEAR AND DECIDE CONDITIONAL USE PERMITS WAS LAWFUL UNDER STATE LAW.

The trial court concluded that Section 3.04.01 of the Moody County Zoning Ordinance, delegating authority to hear and decide conditional uses to the Board, was valid.

Rantapaa v. Black Hills Chairlift Co., 2001 SD 111, 633 N.W.2d 196.

SDCL 11-2-17.3.

IV. WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT THE BOARD DID NOT EXCEED ITS JURISDICTION AND REGULARLY PURSUED ITS AUTHORITY.

The trial court found that the Moody County Zoning Ordinance was validly enacted, and that Petitioners' counsel conceded that, if the zoning ordinance is valid, there were no procedural or substantive due process violations as they pertain to the Board's proceedings.

In re Dupont, 142 S.W.3d 528 (Tex. App. Fort Worth 2004)

Pennington County v. Moore, 525 N.W.2d 257 (S.D. 1994).

SDCL 11-2-18, 11-9-19, 11-2-60, 12-1-4.

STATEMENT OF THE CASE

At a hearing held on March 5, 2013, the Board approved Mustang Pass's application for a conditional use permit to construct and operate a Class A concentrated animal feeding operation ("CAFO"). (CR 69, Ex. R) On or about March 27, 2013, Petitioners filed a Petition for Writ of Certiorari, with accompanying verifications, challenging the Board's decision. (CR 1; CR 38-40) The trial court

signed the Writ of Certiorari on April 2, 2013, and it was filed April 3, 2013. (CR 43) On April 6, 2013, the Petition, the accompanying verifications, and the Writ were personally served on Commissioner Rick Veldkamp. (CR 49-50) On April 15, 2013, Mustang Pass filed a motion to intervene or be joined in this action. (CR 54) That motion was granted on May 13, 2013. (CR 70)

In accordance with the Writ of Certiorari, the Board filed a Return to Writ of Certiorari on May 7, 2013, and furnished Petitioners and Mustang Pass with the materials presented to and considered by the Board in making the decision. (CR 69, Exs. A-T) On or about July 29, 2013, the parties signed a Stipulation Regarding Petitioners' Motion to Settle and Supplement the Record. (CR 116) The trial court entered an Order on Stipulation Regarding Petitioners' Motion to Settle and Supplement the Record, which was filed on July 31, 2013. (CR 112) Petitioners and the Board thereafter filed supplemental materials. (CR 119; CR 129)

Because Petitioners raised an issue concerning the constitutionality of SDCL Ch. 11-2, Petitioners also provided notice to the South Dakota Attorney General. (CR 109) The Attorney General elected not to participate. (CR 131)

The trial court held a hearing on September 23, 2013. On October 11, 2013, the trial court issued a

memorandum decision denying all relief to Petitioners and finding in favor of the Board and Mustang Pass. (CR 147)

STATEMENT OF FACTS

On or about January 16, 2013, Mustang Pass, through the engineering firm Eisenbraun & Associates, Inc., submitted to the Moody County zoning officer a written application for a conditional use permit. (CR 69, Ex. B) Upon reviewing the application, the zoning officer, Brenda Duncan, made the determination that the conditional use permit could be granted, provided that certain conditions were met. (CR 126-27)

Upon receiving the determination of the zoning officer, the Board caused a "Notice of Public Hearing by the Board of Adjustment on a Proposed Conditional Use Permit" to be published in the Moody County Enterprise on January 23, 2013, which was at least 10 days prior to the hearing that was noticed for February 5, 2013. (CR 69, Ex. C) Mustang Pass also mailed out notices to landowners in the vicinity of the proposed CAFO. (CR 69, Ex. D) The conditional use permit came on for hearing on February 5, 2013. (CR 69, Exs. G, H) The Board heard testimony from principals of Mustang Pass, engineers from Eisenbraun & Associates, and the public at large. (Id.) Several written materials were submitted for the Board's consideration. (CR 69, Exs. I-O)

The Board reconvened on March 5, 2013. (CR 69, Exs. P, Q) Written findings were prepared which documented Mustang Pass' compliance with the rules governing conditional uses and CAFOs. (CR 69, Ex. R) The Board also included numerous requirements designed to curb or eliminate negative impacts typically associated with CAFOs. (Id.) The Board imposed 13 special conditions and safeguards upon Mustang Pass. (Id.) On March 5, 2013, the Board voted unanimously to grant the permit. (CR 69, Ex. P)

ARGUMENT

A. THE STATUTORY SCHEME SET FORTH IN SDCL CHAPTER 11-2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

1. Standard of Review and elements considered in Equal Protection challenge.

Petitioners challenge the zoning appeal scheme set forth in SDCL Ch. 11-2 on equal protection grounds. This raises questions of statutory interpretation and the constitutionality of statutes. Both questions are reviewed by this Court *de novo*. Buchholz v. Storsve, 2007 SD 101, ¶7, 740 N.W.2d 107, 110 (additional citation omitted). There is a strong presumption that a statute is constitutional. Meinders v. Weber, 2000 SD 2, ¶28, 604 N.W.2d 248, 260 (citing State v. Laible, 1999 SD 58, ¶10, 594 N.W.2d 328, 331 (other citation omitted)). Only when a statute plainly and unmistakably violates a constitutional provision will

this Court declare it unconstitutional. Id. When deciding the constitutionality of a statute this Court does not determine whether the "legislative act is unwise, unsound, or unnecessary," but only if it is constitutional. State v. Allison, 2000 SD 21, ¶5, 607 N.W.2d 1, 2.

The South Dakota Constitution commands that "[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. Const. art. VI §18. This Court has instructed that, to prevail on an equal protection claim, Petitioners must satisfy a two-part test. First, they must show that a statute creates an arbitrary classification. In re Davis, 2004 SD 70, ¶5, 681 N.W.2d 452, 454 (additional citation omitted). "Second, if the classification does not involve a fundamental right or suspect [or intermediate] group, we determine whether a rational relationship exists between a legitimate legislative purpose and the classifications created." Id.

2. SDCL Chapter 11-2 is facially valid, as it does not create classifications that violate Equal Protection.

The starting point for the Court's analysis of zoning appeals under SDCL Chapter 11-2 is SDCL 11-2-17.3,

which provides, in pertinent part: "A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify the approving authority . . ." SDCL 11-2-17.3 treats all counties the same, but gives the counties the prerogative to decide who hears and decides conditional use permits. If a county selects a Board of Adjustment as the entity to decide conditional use permits, SDCL 11-2-61 and 11-2-62 provide that appeals from such decisions are via a writ of certiorari.[1]

Significantly, SDCL 11-2-17.3, SDCL 11-2-61 and SDCL 11-2-62, read together, are uniformly applicable across the State of South Dakota and contain no classifications. Cf. Nankin v. Shorewood, 630 N.W.2d 141 (Wis. 2001) (considering Wis. Stat. § 74.37(6), which allowed owners of property located in counties with a population of less than 500,000 to challenge a property assessment with a full trial in the circuit court, while those with a population of

[1] This Court discussed the differing standards of review in Goos RV Center v. Minnehaha Co. Comm'n, 2009 SD 24, 764 N.W.2d 704, and Armstrong v. Turner County Bd. of Adjustment, 2009 SD 81, 772 N.W.2d 643. The Goos and Armstrong decisions confirmed that, after the legislation in 2004 created the present form of SDCL 11-2-17.3, the appeal of decisions relating to conditional use permits could be made: (1) to the circuit court in the form of a writ of certiorari, if the county chose a board of adjustment to make the underlying decision on the conditional use permit (Armstrong); or (2) to the circuit court via SDCL Ch. 7-8, if the county chose its county commission to make the underlying decision on the conditional use permit (Goos RV Centr.).

500,000 or more were not allowed a full trial "de novo" in the circuit court).

In this respect, the relevant statutes in SDCL Chapter 11-2 are facially valid. "A facial challenge to a statute is the most difficult challenge to mount successfully, because the challenger must demonstrate that no set of circumstances exists under which the statute would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Petitioners cannot succeed with a facial challenge to the language of the statutes in SDCL Chapter 11-2.

3. The classifications created by the application of SDCL Chapter 11-2 are not arbitrary.

SDCL Chapter 11-2 evinces the South Dakota legislature's recognition of the significant hurdle that an applicant has to overcome to obtain a conditional use permit in a county utilizing a board of adjustment. A more deferential certiorari review is warranted in the context of appeals from board of adjustment decisions. In order for an applicant like Mustang Pass to secure the type of conditional use permit needed to construct a CAFO, Section 3.04.01 of the Zoning Ordinance for Moody County and SDCL 11-2-59 require four votes in favor of the permit. (CR 69, Ex. A) In other words, a super-majority of the Board has to be satisfied that the applicable conditions of the zoning

ordinance are met and, generally speaking, the proposed CAFO is in the best interests of Moody County and its citizens.[2] The heightened hurdle for an applicant at the board of adjustment level certainly accounts for the more deferential standard of review when the matter is appealed to the circuit court.

By the same token, Petitioners also had a clear advantage at the board of adjustment level. They only needed to convince two members of the Board, instead of three, in order to defeat Mustang Pass's permit. Petitioners now ask the Court to reverse the circuit court's decision, and give them an even greater advantage with a *de novo* review on appeal.

Petitioners rely upon a completely inapposite decision, Aberdeen v. Meidinger, 89 S.D. 412, 233 N.W.2d 331 (1975), in support of their argument that SDCL Ch. 11-2 is arbitrary. The crucial point in Meidinger was that two statutes, SDCL 9-19-3 and 9-19-4, covering the exact same offense provided for different penalties, depending upon whether the particular defendant was in a municipality with

[2] As more particularly stated in SDCL 11-2-17.3: "The approving authority shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and its relevant zoning districts when making a decision to approve or disapprove a conditional use request."

a municipal court. Under SDCL 9-19-4, Meidinger was placed in jeopardy of a fine of five hundred dollars and/or six months in jail, instead of $100 under SDCL 9-19-3. The Court found that the inequality simply did not square with the concept of equal protection under the law.

Petitioners attempt to extend Meidinger to this case fails, because the differing standards of review cannot be viewed in a vacuum. As the circuit court pointed out, there exists the possibility of a great disparity between counties in this state. It makes sense to allow individual counties the flexibility to determine the mechanism by which zoning issues are considered and appealed.

For example, Minnehaha County, where the Goos RV Centr. permit was decided, has the time, staff, and resources that other counties do not. It has a Planning Department that provides research and technical support to its Planning Commission. Per the official Minnehaha County website:

> The Planning Commission consists of one County Commissioner and six citizen members appointed by the Board to five year terms. The Planning Commission meets once a month to consider land use matters such as rezonings and conditional use requests. The Planning Department staff provides research and technical support to the Commission and Board to assist in the decision making process.[3]

[3] This information was obtained from the following URL: http://www.minnehahacounty.org/dept/pl/pl.aspx.

Ultimately, this Court concluded that the decision on appeal in Goos RV Centr. was "a decision concerning a conditional use permit, which, according the zoning ordinances, is the prerogative of the Planning Commission." Id. at ¶21, 764 N.W.2d at 711. The Minnehaha County ordinances state that a conditional use permit is applied for in the first instance with the Planning Commission. Id. at ¶18, 764 N.W.2d at 710. An appeal of the Planning Commission's decision is heard by the County Commissioners. Id. The County Commissioners may uphold, overrule or amend the decision of the Planning Commission. Id. Decisions made at the County Commission level can be made with a simple majority. SDCL 7-8-18.

Understandably, a rural county like Moody County has fewer resources to devote to the adjudication of zoning matters. It employs a more streamlined process. Instead of a full Planning Board providing support, Section 3.02.01 calls for an Administrative Official who makes the initial determination on zoning matters and enforces the provisions of the Ordinance. (CR 69, Ex. A) Pursuant to Section 3.03.01 of the Ordinance, Moody County's Board of Adjustment consists of the members of the County Commission. (Id.) Instead of creating layers of appeals for decisions on conditional uses like Minnehaha County, Moody County opted

to give its Board of Adjustment the power to hear the evidence and decide whether to allow conditional uses such as Mustang Pass's CAFO.

The classifications made by the application of SDCL 11-2-17.3 are not created arbitrarily. They are created because the South Dakota Legislature recognized that counties in this state are not amenable to a "one size fits all" adjudication process for zoning matters. See e.g. Kraft v. Meade County, 2006 SD 113, ¶11 726 N.W.2d 237 (equal protection clause does not exact uniformity of procedure and the legislature may classify litigation and adopt one type of procedure for one class and a different type for another). Obtaining a permit in a county that utilizes a board of adjustment like Moody County entails a greater burden than an applicant would face in a county like Minnehaha County, where a simple majority is all that is needed. Opponents of permits have a concomitant advantage in board of adjustment counties, because they only need to persuade a minority of the board's members in order to defeat the permit. The legislature crafted an appellate scheme that accounts for the difference. Deference to the Board under the writ of certiorari review is not arbitrary; it is appropriate.

4. The lack of legislative history is completely irrelevant to whether the application of SDCL Chapter 11-2 creates arbitrary classifications.

Petitioners argue that there is no justification in the legislative history to support the reasons for the differing standards of reviews, which suggests the classifications occurred by chance, rather than by some adequate determining principle. Brief of Appellants, pages 11-12. Petitioners' invitation to the Court to consider the legislature's motivation behind the statutes is a misstatement of what the Court is tasked with reviewing:

> [A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." [] Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

In re Z.B., 2008 SD 108, ¶9, 757 N.W.2d 595, 600 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

Petitioners would undoubtedly prefer to shift the burden to the Board to explain the reasons behind SDCL Chapter 11-2, but the burden to prove it is unconstitutional stays with Petitioners. "In an equal protection challenge, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" In re Z.B., at ¶5, 757 N.W.2d at 598 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356,

364 (1973) (citations omitted)). There is a clear basis for the differing standards of review, namely, the need to account for the heightened burden on the applicant at the board of adjustment level. Petitioners cannot meet their burden.

5. Strict scrutiny review is inappropriate because, to the extent the application of SDCL Chapter 11-2 creates classifications, neither a suspect class nor a fundamental right is involved.

In an attempt to persuade the Court that it should subject the statutes at issue to a strict scrutiny review, Petitioners associate their claimed right to a *de novo* standard of review in this zoning appeal with supposed fundamental rights relating to property and access to the courts. Petitioners' misguided argument fails because the regulation of zoning appeals does not involve a fundamental right or a suspect class.[4]

There are no suspect classes involved here, and Petitioners do not argue otherwise. Petitioners cite no authority for the proposition that a right to a particular standard of review for an appeal of a zoning decision falls within the ambit of a judicially-recognized fundamental

[4] The circuit court did not analyze Petitioners' Equal Protection claim under strict scrutiny review, because it found that "[t]here are no fundamental rights at stake in the delegation of authority of conditional use requests." (CR 134-35)

right. See Gulch Gaming, Inc. v. South Dakota, 781 F. Supp. 621, 631 (D.S.D. 1991) (discussing fundamental right to travel, vote, procreate and make other personal decisions).

Instead, Petitioners advance a nondescript argument that "property rights are at stake."[5] Brief of Appellants, page 15. Petitioners' only cited authority for the notion that property rights are "fundamental rights" comes from dicta in two cases of considerable age which are severely lacking in context. Wright v. Sherman, 52 N.W. 1093 (S.D. 1892) (a case concerning lien priority); Truax v. Corrington, 257 U.S. 312 (1921) (tangentially mentions "fundamental rights of liberty and property," but does not utilize a strict scrutiny standard of review for the statute in question).

Whether the Court classifies Petitioners' rights as "standard of review rights" or "property rights," they are not among the type of rights that the United States Supreme Court has classified as fundamental rights which would subject the challenged laws to strict scrutiny. Zoning regulations and the administration of zoning challenges and appeals concern economic activity on private property.

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[5] This is a peculiar argument for the Petitioners to make, considering that Mustang Pass is the party saddled with the obligation to obtain a conditional use permit to use its property as it wishes. Petitioners make no attempt at explaining how *their* property rights are at stake.

Economic regulations – i.e., those burdening one's property rights – have traditionally been afforded only rational relation scrutiny under the Equal Protection Clause. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.").

Petitioners do no cite any cases which have concluded that statutes affecting property rights should be subjected to strict scrutiny. Numerous federal courts have reached the opposite conclusion in determining that regulations affecting property rights are not reviewed under strict scrutiny. See e.g. Weems v. Little Rock Police Dep't., 453 F.3d 1010, 1015-16 (8th Cir. 2006); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1580 (10th Cir. 1995); United States v. 16.92 Acres of Land, 670 F.2d 1369, 1373 (7th Cir. 1982); Coalition for Equal Rights, Inc. v. Owens, 458 F. Supp. 2d 1251, 1263 (D. Colo. 2006).

Petitioners also argue that SDCL Chapter 11-2 infringes upon their fundamental right of access to the Courts. Once again, Petitioners' cited authority concerning the "fundamental right of access to the Courts," bears no

semblance to the situation here. At the risk of pointing out the obvious, the Petitioners have accessed the Courts to challenge the Board's zoning decision. Petitioners also do not explain, much less cite authority that explains, how the legislature's selection of a particular standard of review can constitute a denial of access to the Courts. On this basis alone, this Court should reject Petitioners' argument.

Moreover, as noted, no fundamental rights are at stake in this litigation. "Access to the courts is not an independent right; it is accorded special protection only when the right a claimant wishes to assert through such access is given a preferred status and thus entitled to special protection and if there is no alternative forum in which that specially protected right may be enforced." Woods v. Holy Cross Hospital, 591 F.2d 1164, 1173 n.16 (5th Cir. 1979).

Put simply, the right to a certain standard of review in an appeal of a zoning decision does not fall within the category of rights that has been afforded special protection by the Courts.

6. A rational relationship exists between a legitimate legislative purpose and the classifications created by SDCL Chapter 11-2.

For a number of reasons, the circuit court found that there were plausible policy reasons that favor allowing

counties to determine the mechanism by which zoning decisions are made and appealed. In re Z.B., 2008 SD at ¶9, 757 N.W.2d at 599-600) ("A state's classification scheme will be upheld under rational basis review with a 'plausible' or 'conceivable' reason for the distinction."). The circuit court's conclusion that SDCL Chapter 11-2 was rationally related to a legitimate legislative purpose was largely based on the fact that locally elected officials and officers are best equipped to understand the needs of the county, and to draft ordinances which meet those needs. The South Dakota Legislature gave recognition to the need for local flexibility by crafting SDCL 11-2-17.3 in the manner it did. The legislature's act of vesting control with local counties and municipalities is not unique to the area of zoning. The state legislature provides options to local governments in a number of areas.

Petitioners rely upon the Wisconsin Supreme Court's 4-3 decision in Metro. Assocs. v. City of Milwaukee, 2011 WI 20, 332 Wis.2d 85, 796 N.W.2d 717, in support of their argument that there is no rational basis for SDCL 11-2-17.3. Metro Assoc. is not binding authority, and the Board disagrees wholeheartedly with the majority's conclusions concerning the lack of a rational basis for the Wisconsin legislature's actions.

As is the case here, Wisconsin recognizes a presumption of constitutionality, and the Court was charged with examining the statute to determine whether a plausible policy reason existed for the legislature's classifications. In this regard, the dissenting justices wrote: "Providing municipalities with the option to determine which of two procedures will most efficiently resolve tax assessment challenges based on various local factors (like the number of residential and commercial properties) bears a rational relationship to the government interest in creating an efficient system before the Board of Review and the courts for tax assessment challenges." Id. at ¶103. The dissenting justices also refused to find legislation "arbitrary" because "it leaves for the taxation district the choice of how a taxpayer should proceed to challenge an assessment." Id. at ¶106. "The state legislature provides options to local government in a number of areas." Id. Cited as examples were the organizational structure of local government, Wis. Stat. §§ 64.01 & 64.25, the number of alders, Wis. Stat. § 64.39, and more specific issues that affect residents and businesses within a municipality. See e.g., Wis. Stat. § 66.0615 (establishment of room tax); Wis. Stat. § 66.0405 (system for removal of rubbish).

The point missed by the majority in Metro Assocs., but recognized by the dissenting justices and the circuit court, is simple: what works for one county may not work for another. Just as it has done in other areas, the South Dakota Legislature has given each county a choice of how to delegate decision making on conditional use permits. Petitioners' grievance lies with choices made by their own elected representatives, not with the state legislature. To the extent citizens disagree with the manner in which their representatives delegated the conditional use authority, they have remedies. As with all policy decisions vested in the representative branches of government, the recourse for taxpayers unhappy with the policy decisions of their local representatives rests primarily in the ballot box.

There is no fault to be found with the South Dakota Legislature in giving counties the right to decide how to best handle conditional uses, rather than making it one size fits all. Nor is there any fault in creating a more deferential standard of review when the appeal follows the decision of a super-majority of board of adjustment members.

B. THE BOARD HAD THE AUTHORITY TO CONSIDER MUSTANG PASS'S CONDITIONAL USE PERMIT.

1. SDCL 11-2-53 does not limit the Board to appellate jurisdiction.

Petitioners urge that nothing in SDCL Chapter 11-2 authorizes the Board to exercise original jurisdiction. They rely primarily on SDCL 11-2-53, which states that a BOA may, (1) hear and decide appeals, and (2) authorize, upon appeal, specific variances.

The circuit court correctly analyzed the statutory language chosen for SDCL 11-2-17.3 and SDCL 11-2-53. By using the term "may" in SDCL 11-2-53, the legislative intent was to "permit" or "allow" the Board to hear appeals. See Person v. Peterson, 296 N.W.2d 537, 538 (S.D. 1980) ("[W]e have held that the word "may" in a statute should be construed in a permissive sense unless the context and subject matter indicate a different legislative intent.") SDCL 11-2-17.3, by contrast, clearly states "The county zoning *shall* specify the approving authority. . . ." and "The approving authority *shall* consider . . . when making a decision to approve or disapprove a conditional use request." In SDCL 11-2-17.3, the legislative intent was to "require" counties to specify an authority for deciding conditional use permits and consider the stated criteria. See SDCL 2-14-2.1 ("As used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.").

When read together, the legislature gave the counties the directive to choose an entity to approve conditional use permits. If the county chooses to use a board of adjustment, then the board may be authorized to hear appeals. Petitioners' interpretation of SDCL 11-2-53 writes additional language into the statute - the Board "may ***only***". . . consider appeals. See Jensen, supra ("To violate the rule against supplying omitted language would be to add voluntarily unlimited hazard to the already inexact and uncertain business of searching legislative intent.").

This Court has reviewed the various statutes in SDCL Chapter 11-2 and has tacitly approved of the designation of the Board of Adjustment as the approving authority for conditional use permits. Armstrong is a perfect example. In spite of Petitioners' argument in Section II.E. of their brief, SDCL 11-2-17.3 and Armstrong make clear that the County has the prerogative to designate the Board of Adjustment as the entity responsible for approving conditional use permits:

> In 2004, the legislature removed the provision in the law that gave a county board of adjustment the authority to approve conditional use permits. In its place, the legislature passed a new law giving the power to the county to designate the entity responsible for approving conditional use permits. SDCL 11-2-17.3.

Id. at ¶10 (emphasis added). The Court also recognized that "[t]he Turner County zoning ordinances allow for conditional use of property and designate the county board of adjustment as the approving authority for conditional use permits." Id. at ¶16. This Court then proceeded to review the permit that was granted under the certiorari standard, without questioning the Board's authority to consider conditional use permits. Likewise, Moody County's decision to designate the Board as the approving entity was entirely appropriate.

In Jensen v. Turner County Bd. of Adjustment, 2007 SD 28, 730 N.W.2d 411, the Court considered whether SDCL 11-2-59 applies to the approval of conditional use permits by a board of adjustment. In examining SDCL 11-2-59, the Court focused on the two-thirds majority requirement "on any matter upon which [the Board] is required to pass under any such ordinance." Even though it was argued that the phrase "conditional use permit" was removed from SDCL 11-2-59 in 2004, the Court found that the Board's approval of conditional use permits still came within SDCL 11-2-59: "In this case, Turner County Ordinance 3.01.11 required the Board to approve or deny applications for conditional use permits. Because ET Farms, Ltd.'s application was a matter upon which the Board was required to pass, SDCL 11-2-59 applied, and it

required a two-thirds concurring vote for approval." Id. at ¶6, 730 N.W.2d at 413-14.

Likewise, the decision in Bechen v. Moody County Bd. of Comm'rs, 2005 SD 93, 703 N.W.2d 662, originated from the Board of Adjustment's decision granting a conditional use permit. In Bechen, this Court evaluated and examined the adoption of Moody County's comprehensive land use plan, its ordinances, and, implicitly, the authority of the county commission, sitting as a board of adjustment, to consider conditional use permits. Although the issue was whether decisions of a board of adjustment could be referred to a public vote, the Court did not question whether the Moody County Board of Adjustment could consider the conditional use permit at issue.

This Court has had numerous cases come before it since 2004 which were in the style of appeals of Board of Adjustment decisions on conditional use permits. It has not once taken issue with the Board's authority to pass upon such matters. The circuit court correctly concluded that SDCL 11-2-53 does not limit the Board to hearing appeals.

2. The Board was granted the authority to consider conditional use permits when the changes were made to the statutes in 2000.

Petitioners go through a number of statutes discussing the Board's consideration of appeals, but gloss over

statutory language that gives the Board much broader authority vis-a-vis county zoning decisions. The last clause of SDCL 11-2-60 gives the county commission, sitting as the board of adjustment, the power to "effect any *variation* in the ordinance."

The term "variation" is synonymous with an alteration, a divergence, or a change. It is not the same thing as a "variance," which is a zoning term of art. Under SDCL 11-2-17.4, a conditional use is defined as "any use that, owing to certain special characteristics attendant to its operation, may be permitted in a zoning district subject to the evaluation and approval by the approving authority specified in § 11-2-17.3. A conditional use is subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district."

A conditional use, therefore, is a use that is different, or a "variation," from what is otherwise allowed by the terms of the ordinance. Permitting a conditional use fits within the Board's power under SDCL 11-2-60 to effect any variation in the ordinance.

3. SDCL 11-2-53 authorizes the Board to consider the administrative official's decisions.

In Moody County, conditional use permit applications invariably start with the zoning officer. Ordinance

§3.02.01(10) specifically provides that the Administrative Official shall receive applications for Conditional Uses, and §3.02.01(10)(b) requires that, "[f]or Conditional Uses and Variances, the Administrative Official shall review the application, and shall make a recommendation to the Board of Adjustment to either approve or deny said application." (CR 69, Ex. A) In this case, the zoning officer, Brenda Duncan, made the determination that the conditional use permit could be granted, provided that certain conditions were met. (CR 127)

SDCL 11-2-53(1) provides the Board with the broad authority to "[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant to this chapter." Section 3.03.03 of the Ordinance gives the Board the same authority. Even if the 2000 version and the present version of SDCL 11-2-53 do not specifically mention consideration of conditional use permits among the Board's powers, the Board clearly has the authority to consider decisions and determinations made by the administrative official.

C. MOODY COUNTY'S DELEGATION OF THE AUTHORITY TO HEAR CONDITIONAL USE APPLICATIONS TO THE BOARD DOES NOT CONFLICT WITH STATE LAW.

Petitioners' argument that the Board lacked jurisdiction also has to do with the timing of the passage of the Ordinance (February 2003) versus the timing of the provision in SDCL 11-2-53 that, for one year, expressly authorized boards of adjustment to decide conditional use permits (effective July 1, 2003). Petitioners' argument is that Moody County's enactment of the Ordinance in February 2003, which gave the Board power to decide conditional use permit applications, exceeded the zoning authority delegated to Moody County by state law. Petitioners are wrong, for two reasons.

First, as argued above, at the time Moody County passed its zoning ordinance, the Board was statutorily authorized to "effect any variation in the ordinance" under SDCL 11-2-60. The Board was also statutorily authorized to review decisions and determinations of the Administrative Official under SDCL 11-2-53. Consequently, as early as 2000 when the legislature overhauled SDCL Chapter 11-2, the Board was authorized by statute to consider conditional use permits.

Second, the Ordinance provision allowing the Board to decide conditional use permits does not conflict with state law in any way. "The Legislature, with restrictions, has delegated zoning authority to counties." Jensen v.

Lincoln County Bd. of Comm'rs, 2006 SD 61, ¶11, 718 N.W.2d 606, 611. SDCL 7-18A-2 specifically authorizes a county to adopt ordinances "as may be proper and necessary to carry into effect the powers granted to it by law . . . ." Aside from this statutory grant of legislative power, a county may not pass an ordinance which conflicts with state law. SD Const art IX § 2.

Petitioners base their arguments on the language of SDCL 11-2-53 and 11-2-58, before and after 2003, which expressly spoke of the board of adjustment's ability to consider conditional use permits. But the pertinent question is not whether the legislature expressly authorized Moody County to delegate conditional use authority to the Board; it is whether Moody County's Ordinance *conflicts* with state law. As this Court noted in Rantapaa v. Black Hills Chairlift Co., there are three ways in which a local ordinance may conflict with state law:

> First, an ordinance may prohibit an act which is forbidden by state law and, in that event, the ordinance is void to the extent it duplicates state law. Second, a conflict may exist between state law and an ordinance because one prohibits what the other allows. And, third, state law may occupy a particular field to the exclusion of all local regulation.

2001 SD 111, ¶23, 633 N.W.2d 196, 203. There has never been a prohibition in state law against the Board's consideration of conditional use permits. As such, neither of the first

two scenarios apply. Under the third, the Court must determine whether the Legislature intended to completely occupy the field. See e.g. In re Appeal from Decision of Yankton County Comm'n, 2003 SD 109, ¶15, 670 N.W.2d 34 (S.D. 2003) (Legislature intended to occupy the field of zoning decision appeals to the exclusion of local ordinances when it enacted SDCL 11-2-61).

The legislative actions of 2003 and 2004 suggest that the Legislature actually intended to allow the County to decide who should consider conditional use requests, rather than completely occupying the field. See SDCL 11-2-17.3 ("A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify the approving authority. . ."); Armstrong, 2009 SD at ¶10, 772 N.W.2d at 647 (in place of provision that gave a county board of adjustment authority to approve conditional use permits, "the legislature passed a new law giving the power to the county to designate the entity responsible for approving conditional use permits").

The Ordinance's designation of the Board as the approving authority was a proper exercise of the County's power in 2003 and remains proper today. As such, the Board had jurisdiction over Mustang Pass's conditional use permit.

D. THE BOARD HAD JURISDICTION OVER MUSTANG PASS'S CONDITIONAL USE PERMIT AND PURSUED IN A REGULAR MANNER THE AUTHORITY CONFERRED UPON IT.

In the circuit court's Findings of Fact and Conclusions of Law, the court stated: "At the oral hearing in front of this Court, counsel for Petitioners conceded that, assuming *arguendo*, the zoning ordinance is valid, there were no procedural or substantive due process violations as they pertain to the BOA proceedings." (CR 169)

If the circuit court was incorrect about this concession, Petitioners did not do anything to make it known in the record. Petitioners did not file any objections to the Findings of Fact and Conclusions of Law. "Objections must be made to the trial court to allow it to correct its mistakes." Johnson v. John Deere Co., 306 N.W.2d 231, 239 (S.D. 1981). "The rulings, decisions and judgments of a trial court are presumptively correct, and it is not the duty of an appellate court to seek reasons to reverse. The burden is on the party alleging error to show it affirmatively by the record." Custer County Board of Educ. v. State Comm'n on Elementary & Secondary Educ., 86 S.D. 215, 220, 193 N.W.2d 586, 589 (1972). Even if not waived, Petitioners' arguments concerning procedural shortcomings are without merit for the reasons that follow.

1. The Board's lack of procedural rules is irrelevant to this zoning appeal.

Without explaining how it calls for a reversal of the Board's decision on the Mustang Pass conditional use

permit, the Petitioners complain that the Board failed to adopt procedural rules under SDCL 11-2-54. "Ordinarily, 'courts do not concern themselves with whether parliamentary rules are followed; instead, courts are concerned with whether the law of the land is followed.'" In re Dupont, 142 S.W.3d 528, 532 (Tex. App. Fort Worth 2004) (quoting Reform Party of U.S. v. Gargan, 89 F. Supp. 2d 751, 757-58 (W.D. Va. 2000)). The Court's concern is whether the Board followed the terms of the Ordinance and state law in the consideration of the Mustang Pass permit, not whether it has adopted and followed procedural rules.

2. Moody County's adoption of the Comprehensive Land Use Plan and Ordinance complied with South Dakota law.

The Board is perplexed by the Petitioners' continuing reliance on this argument, particularly after the circuit court pointed out its downfall during oral argument, in the Memorandum Decision, and in the Findings of Fact and Conclusions of Law. (CR 141; CR 163, ¶27) If, as Petitioners contend, Moody County does not have a validly enacted Ordinance, what would stand in the way of Mustang Pass erecting its CAFO immediately?

In the Board's mind, this is just an academic discussion. Unlike the situation in Pennington County v.

Moore, 525 N.W.2d 257 (S.D. 1994), where the county stipulated to procedural errors including failure to provide notice or to conduct a public hearing on the comprehensive plan, Moody County complied with all requirements in the statutes. Consistent with SDCL 11-2-18, Notice of the planning commission's public hearing was published on December 11, 2002, the public hearing was held on December 23, 2002, and the planning commission gave its recommendation to the County Commission at that time. (Dep. Ex. 1A, page 2)

SDCL 11-2-19 requires the County board of commissioners to also hold a public hearing on the CLUP. Rather than needlessly extending the process, the County Commission, consisting of the same five members of the planning commission, noticed its public hearing on December 11, 2002, and the public hearing was held on December 23, 2002. (Id.) The County Commission adopted a resolution approving the CLUP on January 1, 2003, and published a summary of the CLUP the same date. (Id.) The CLUP became effective on January 21, 2003. (Id.)

On January 21, 2003, with the CLUP in place, the County Commission held another public hearing and adopted the Moody County Zoning Ordinance. (CR 69, Ex. A, page 2) Notice of its adoption was published on January 25, 2003,

and February 5, 2003, and it became effective on February 25, 2003. (Id.) A careful reading of the language in both SDCL 11-2-18 and 11-2-19 does not reveal any requirement of separate and distinct hearings.

3. Commissioner Peper's residence is irrelevant.

While the Board disagrees with the petitioners' conclusion on Commissioner Peper's residency, perhaps the better question is: why does it make any difference? For the Board to approve a conditional use permit, SDCL 11-2-60 requires "the concurring vote of at least two-thirds of the members of the board as so composed." Since there are five members, "at least two-thirds" means four or more. Take Commissioner Peper's vote and *throw it away* - Mustang Pass still has four concurring votes.

Wholly lacking from the petitioners' discussion of Commissioner Peper's residence is any evidence that he intended to permanently leave Moody County. See SDCL 12-1-4 (" . . .the term, residence, means the place in which a person has fixed his or her habitation and to which the person, whenever absent, intends to return."); Heinemeyer v. Heartland Consumers Power Dist., 2008 SD 110, ¶12, 757 N.W.2d 772, 776 ("In other words, a voting residence is the place in which a person has 'fixed his or her habitation' and 'whenever absent, intends to return.'").

Commissioner Peper has been a lifelong resident of Moody County, and, in his mind, he continues to reside at 706 West Park Avenue in Flandreau. (Peper 5; 8; 44) He continues to farm in Moody County. (Peper 4-5; 45) He votes in Flandreau and his vehicles are registered in Flandreau. (Peper 44) Commissioner Peper spends many nights in Flandreau. At best, Petitioners were able to establish that Commissioner Peper spends some time at a residence he owns at 3701 South Florence in Sioux Falls, visiting his friend Rosemary Van Buren, and some time at his residence in Flandreau. (Peper 23-24) He spends enough nights in Flandreau that he couldn't say for sure whether he spent more time there or in Sioux Falls. (Id.) The petitioners' argument concerning Commissioner Peper's claimed relocation, even though immaterial in the Board's mind, is also without merit.

CONCLUSION

For these reasons, the Board respectfully urges the Court to affirm the circuit court's decision in all respects.

Respectfully submitted this 5th day of March, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 35 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 7,417 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 5th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellee Moody County Board of Commissioners, hereby certifies that on the 5th day of March, 2014, a true and correct copy of **APPELLEE MOODY COUNTY BOARD OF COMMISSIONERS' BRIEF** was electronically transmitted to:

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

Dated at Aberdeen, South Dakota, this 5th day of March, 2014.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SHAWN TIBBS, VIRGIL STEMBAUGH, GENE GULLICKSON and JANET GULLICKSON, Petitioners and Appellants, v. MOODY COUNTY BOARD OF COMMISSIONERS, sitting as THE BOARD OF ADJUSTMENT, and MUSTANG PASS, LLC., Respondents and Appellees.	) Appeal No. 26897)))) RESPONDENT/APPELLEE) MUSTANG PASS, LLC'S) JOINDER IN APPELLEES) MOODY COUNTY BOARD OF) COMMISSIONERS' BRIEF) PURSUANT TO SDCL 15-26A-) 67

Pursuant to SDCL 15-26A-67, Respondent/Appellee Mustang Pass, LLC hereby joins in the Appellee Moody County Board of Commissioners' Brief dated March 5, 2014.

Dated this 5th day of March, 2014.

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The undersigned attorney hereby certifies that on the 5th day of March, 2014, a true and correct copy of Respondent/Appellee Mustang Pass, LLC's Joinder in Appellee Moody County Board of Commissioners' Brief pursuant to SDCL 15-26A-67 was electronically transmitted to:

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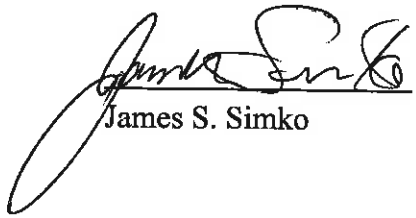

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 26897

SHAWN TIBBS, VIRGIL STEMBAUGH, GENE GULLICKSON and JANET GULLICKSON,

Petitioners and Appellants,

vs.

MOODY COUNTY BOARD OF COMMISSIONERS, sitting as THE BOARD OF ADJUSTMENT, and MUSTANG PASS, LLC,

Respondents and Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Moody County, South Dakota

The Honorable Gregory J. Stoltenburg, Circuit Court Judge

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Notice of Appeal filed December 5, 2013

TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

Jurisdictional Statement 1

Statement of the Issue 1

Nature of the Amicus Organization 2

Statement of the Case 2

Statement of the Facts 3

Argument

A. Standard of Review …….. 5

B. Rules of Determining Statutory Constitutionality 5

C. The Court Has Implicitly Approved the Statutory Scheme of SDCL Ch. 11-2 6

D. SDCL Ch. 11-2 Does Not Violate the Equal Protection Clause 10

1. The Statutory Scheme Does Not Create "Arbitrary" Classifications Among Citizens 11

2. The Statutes Do Not Implicate a Fundamental Right 15

3. The Classifications in the Statutes Bear a Rational Relationship to a Legitimate Legislative Purpose 16

4. The Petitioners' Reliance on the Wisconsin Case is Misplaced 17

Conclusion 20

Certificate of Compliance 21

Certificate of Service 22

Appendix

TABLE OF AUTHORITIES

Cases

Apland v. Board of Equalization for Butte County,
2013 SD 33, 830 N.W.2d 93 5

Armstrong v. Turner County Bd. of Adjust.,
2009 SD 81, 772 N.W.2d 643 ..... 1, 6, 8, 9

Bayer v. Johnson,
349 N.W.2d 447 (S.D. 1984) 1, 7

Bechen v. Moody County Board of Commissioners,
2005 SD 93, 703 N.W.2d 662 13

Buchholz v. Storsve,
2007 SD 101, 740 N.W.2d 107 5

City of Aberdeen v. Meidinger,
233 N.W.2d 331 (S.D. 1975) 10, 16

County of Tripp v. State of South Dakota,
264 N.W.2d 213 (S.D. 1978) 10

Department of Social Services v. Byer,
2004 SD 41, 678 N.W.2d 586 7

Dohany v. Rogers,
281 U.S. 362 (1930) 12, 13

Elliott v. Board of County Commissioners,
2005 SD 92, 703 N.W.2d 361 ..... 6, 7

Goos RV Center v. Minnehaha County Commission,
2009 SD 24, 764 N.W.2d 704 ..... 8, 9

Green v. Siegel, Barnett & Schutz,
1996 SD 146, 557 N.W.2d 396 ..... 1, 5, 15

Heikes v. Clay County,
526 N.W.2d 253 (S.D. 1995) 6

Hofer v. Board of County Commissioners,
334 N.W.2d 507 (S.D. 1983) 14

In re Davis,
2004 SD 70, 681 N.W.2d 452 ..... 11, 14

Jensen v. Turner County Board of Adjustment,
2007 SD 28, 730 N.W.2d 411 ..... 6, 7, 14

Kraft v. Meade County,
2006 SD 113, 726 N.W.2d 237 ..... 2, 11, 12, 13, 18, 19

Metropolitan Associates v. City of Milwaukee,
796 N.W.2d 717 (Wis. 2011) 17, 18, 19, 20

Metropolitan Life Ins. Co. v. Kinsman,
2008 SD 24, 747 N.W.2d 658 ..... 6, 10, 11

Nankin v. Village of Shorewood,
630 N.W.2d 141 (Wis. 2001) 19

Norfolk Redevelopment & Housing Auth. v. Stevenson, No. CL03-520,
2004 WL 137525 (Vir. Cir. Ct. 2004) 12

People in Interest of Z.B.,
2008 S.D. 108, 757 N.W.2d 595 11

State v. Bonrud,
393 N.W.2d 785 (S.D. 1986) 7

State v. Jones,
406 N.W.2d 366 (S.D. 1987) 7

Truax v. Corrigan,
257 U.S. 312 (1921) 15

Wright v. Sherman,
52 N.W.1093 (S.D. 1892) 15

Statutes

SDCL § 7-8-27 ..... 7, 8, 9
SDCL § 7-8-30 7
SDCL 7-18A-15 14
SDCL § 11-2-61 3
SDCL § 11-2-62 3
SDCL Chapter 11-2 ..... passim

Other Authorities

16B AM.JUR.2D *Constitutional Law* § 859 16

PRELIMINARY STATEMENT

Pursuant to SDCL § 15-26A-63, the designations used by the circuit court will be used in this Brief. Thus, Appellants/Petitioners, Shawn Tibbs, Virgil Stembaugh, Gene Gullickson and Janet Gullickson, will be referred to as "Petitioners"; Appellees/Respondents, Moody County Board of Commissioners, sitting as the Board of Adjustment, will be referred to as the "BOA"; Amicus Curiae, Agriculture United for South Dakota, will be referred to as "Amicus" or "Ag United"; and Mustang Pass, LLC, will be referred to as "Mustang Pass." References to the certified record are made by the designation "CR-."

JURISDICTIONAL STATEMENT

Amicus agrees with the jurisdictional statement set forth in the Petitioners' brief. In addition, Amicus states that the Court granted its Motion to file Brief as Amicus Curiae on February 28, 2014. Amicus will address only one of the issues on appeal – whether the statutory scheme set forth in SDCL Ch. 11-2 violates the Equal Protection Clause.

STATEMENT OF THE ISSUE

WHETHER THE STATUTORY SCHEME SET FORTH IN SDCL CHAPTER 11-2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE SOUTH DAKOTA CONSTITUTION?

Most Apposite Authorities:

Green v. Siegel, Barnett & Schutz, 1996 SD 146, 557 N.W.2d 396

Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984)

Armstrong v. Turner County Bd. of Adjust., 2009 SD 81, 772 N.W.2d 643

Kraft v. Meade County, 2006 SD 113, 726 N.W.2d 237

NATURE OF THE AMICUS ORGANIZATION

Amicus Curiae, Agriculture United for South Dakota, is a non-profit corporation incorporated under the laws of the State of South Dakota, and was developed as a collaboration of South Dakota farm organizations that have a common goal – the continued growth of family farms and ranches in South Dakota. The coalition members of Ag United include the South Dakota Cattleman's Association, the South Dakota Corn Growers Association, South Dakota Farm Bureau, South Dakota Pork Producers Council, the South Dakota Soybean Association, South Dakota Dairy Producers and the South Dakota Poultry Industries Association.

The coalitions that make up Ag United include individual and multi-family farms and ranches, totaling over 16,000 families from South Dakota, who produce nearly every agricultural commodity in South Dakota. Ag United represents agricultural interests throughout the State of South Dakota, and the Court's ruling on the constitutionality of SDCL Ch. 11-2 will have a direct impact on agricultural interests in this State.

STATEMENT OF THE CASE

This case began with Mustang Pass, LLC's application for a conditional use permit ("CUP") filed with Moody County. The BOA unanimously voted to approve the CUP. The Petitioners challenged the Board's decision granting the

CUP by filing a Petition for Writ of Certiorari with the circuit court, pursuant to SDCL § 11-2-61. The Board filed its Return to Writ of Certiorari, pursuant to SDCL § 11-2-62.

A hearing on the Petitioners' Petition for Writ of Certiorari was held on September 23, 2013. The circuit court issued its Findings of Fact and Conclusions of Law, and its Judgment of Dismissal, both filed November 4, 2013. Notice of Entry of the circuit court's Findings of Fact and Conclusions of Law and Judgment of Dismissal was filed on or about November 13, 2013. The Petitioners timely filed their Notice of Appeal on or about December 6, 2013. Amicus filed its Motion to File Amicus Brief with this Court on or about February 4, 2014, and the Court granted the Motion to File Amicus Brief on February 28, 2014.

STATEMENT OF THE FACTS

On or about January 16, 2013, Mustang Pass, LLC ("Mustang Pass"), submitted a Conditional Use Permit Application. CR-68-69, Exhibit B; CR-171. The CUP application was first reviewed by the county zoning officer. CR-171. The county zoning officer forwarded the application to the BOA, with the recommendation that the CUP be granted. CR-171. The BOA voted unanimously to approve the CUP application. CR-170.

On or about March 27, 2013, Petitioners filed a Petition for Writ of Certiorari, alleging that a "certain determination or decision ('Action') taken or made" by the BOA "is illegal, made upon improper procedure and in excess of the jurisdiction conferred by law, and in violation also of the South Dakota

Constitution." CR-1-37. The BOA filed its Return to Writ of Certiorari, along with copies of certain documents attached as exhibits. CR-68-69. A hearing was held on the Petition for Writ of Certiorari on September 23, 2013, and the circuit court issued its Findings of Fact and Conclusions of Law, and its Judgment of Dismissal on October 31, 2013. The circuit court held the statutory scheme set forth in SDCL Ch. 11-2, "which allows the counties to delegate the authority to hear conditional use requests to any entity within the county, does not violate Petitioners' right to equal protection." CR-149.

The circuit court held the statutory scheme of SDCL Ch. 11-2 did not create "distinct classifications of citizens" and that any "classifications" were the result of the choice of the respective counties, not some arbitrary classification. CR-152. The circuit court further held that a legitimate purpose of the statutory scheme, providing for different standards of review, is to "allow the individual counties the flexibility to determine the mechanism by which zoning issues are considered and appealed." CR-151. The circuit court noted that "[a]s with all policy decisions vested in the representative branches of government, the recourse for taxpayers unhappy with the policy decision of their local representatives rests primarily in the ballot box. The Petitioners' grievance lies with the choices made by their own elected representatives, not with the state legislature." CR-150-51.

The circuit court determined that no fundamental right was involved and the rational basis level of scrutiny was, therefore, appropriate. CR-150. The circuit court found a rational basis for the legitimate legislative purpose for the law

"in that it allows for flexibility in how each county handles its respective zoning issues." CR-149. Accordingly, the circuit court found the Petitioner's constitutional challenge to SDCL Ch. 11-2 was without merit.

ARGUMENT AND AUTHORITIES

A. Standard of Review

Amicus will address only one of the issues in this appeal: whether the statutory scheme set forth in SDCL Ch. 11-2 violates the Equal Protection Clause of the South Dakota Constitution, and accordingly, whether that statutory scheme is unconstitutional. The circuit court's determination is reviewed by this Court de novo. *See Apland v. Board of Equalization for Butte County*, 2013 SD 33, ¶ 7, 830 N.W.2d 93, 97.

B. Rules of Determining Statutory Constitutionality

"There is a strong presumption that the laws enacted by the legislature are constitutional and the presumption is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution." *Green v. Siegel, Barnett & Schutz*, 1996 SD 146, ¶ 7, 557 N.W.2d 396, 398. "When this Court reviews the constitutionality of a law, it will be upheld unless it is clearly and unmistakably unconstitutional. That law is presumed to be constitutional. Any challenge must rebut the presumption and prove beyond a reasonable doubt that the law is unconstitutional." *Buchholz v. Storsve*, 2007 SD 101, ¶ 7, 740 N.W.2d 107, 110 (other citations omitted).

The Court "must adopt any reasonable, legitimate construction of the statute which permits [it] to uphold the legislature's enactments" and therefore, "[e]very presumption is indulged in favor of the statutes' constitutionality." *Heikes v. Clay County*, 526 N.W.2d 253, 255 (S.D. 1995). The Court's function is "not to decide if a legislative act is unwise, unsound, or unnecessary, but rather, to decide only whether it is constitutional." *Metropolitan Life Ins. Co. v. Kinsman*, 2008 SD 24, ¶ 18, 747 N.W.2d 658, 661 (other citations omitted). The Petitioners bear this heavy burden of overcoming the presumption of constitutionality and proving beyond a reasonable doubt, that it is unconstitutional. *See Heikes* 526 N.W.2d at 255.

C. The Court Has Implicitly Approved the Statutory Scheme of SDCL Ch. 11-2

Since the legislature amended the relevant statutory provisions in 2004, the Court has considered appeals involving that statutory scheme on at least four occasions: *Elliott v. Board of County Commissioners*, 2005 SD 92, 703 N.W.2d 361; *Jensen v. Turner County Board of Adjustment*, 2007 SD 28, 730 N.W.2d 411; *Goos RV Center v. Minnehaha County Commission*, 2009 SD 24, 764 N.W.2d 704; and *Armstrong v. Turner County Board of Adjustment*, 2009 SD 81, 772 N.W.2d 643. Despite having four opportunities to do so, the Court has never found the provisions at issue in this case to be unconstitutional.

The fact that the parties may not have raised or argued the unconstitutionality of the statutes is of no consequence, as this Court can raise the

constitutionality of a statute *sua sponte*. *See Bayer v. Johnson*, 349 N.W.2d 447, 449-50 (S.D. 1984) ("where the appellate court has jurisdiction on other grounds it may decide a constitutional question on its own motion" and explaining, "supreme court justices, are by constitutional mandate required to take an oath or affirmation to support the constitution of this state. . . . Courts, above all, must jealously protect the integrity of the constitution."); *Department of Social Services v. Byer*, 2004 SD 41, ¶ 15, 678 N.W.2d 586, 590 ("This Court may address constitutional issues sua sponte."); *State v. Jones*, 406 N.W.2d 366, 367-68 (S.D. 1987); *State v. Bonrud*, 393 N.W.2d 785, 787 (S.D. 1986).

In *Elliott* the Court considered an appeal from the circuit court's review of the county commission's denial of an application for a building permit. *Elliott*, 2005 SD 92, ¶ 8, 703 N.W.2d at 361-63. Although the denial of the building permit was made by the county commission, and not a board of adjustment, the circuit court proceeded under SDCL §§ 7-8-27 and 7-8-30, and conducted a de novo review, rather than the review under a writ of certiorari. *See id.*, ¶ 6, 703 N.W.2d at 364. Thus, the Court had before it, a scenario in which the more deferential de novo standard of review was applied, although it appeared the standard of review under a writ of certiorari should have been utilized. *See id.* There was, however, no finding that these differing standards of review were unconstitutional, although the Court had the ability to raise that issue *sua sponte*. *See id. See also Jensen*, 2007 SD 28, ¶ 2-3, 730 N.W.2d at 412 (the court

considered an appeal from the circuit court's writ of certiorari review of the board of adjustment's grant of a conditional use permit).

In *Goos RV Center*, the Court again considered an appeal from the circuit court's de novo review of the county commission's grant of a conditional use permit. An argument was made that the challenge in circuit court should have been pursuant to SDCL Ch. 11-2 rather than SDCL 7-8-27, and the Court discussed at length, the two different appeal procedures. It did not, however, mention any perceived unconstitutionality.

Armstrong is the Court's most recent and most involved discussion of the statutory scheme at issue. The Court engaged in a lengthy explanation of the differing appellate procedure and standards of review, including the following:

> The standard of review in many of the recent appeals from a county's decision on a conditional use permit has been limited in scope because the appeals reached the Court through a writ of certiorari. However, a recent case, *Goos RV Center v. Minnehaha County Comm'n*, approved of a de novo review pursuant to SDCL 7-8-27. . . . Although *Goos RV Center* appears on the surface to contradict some of our prior decisions on proper appellate procedure and standard of review, the source of the different procedures derives from the legislature. Prior to 2004, the law provided that a county board of adjustment had the authority to approve conditional use permits and variances. The law also specified that appeals from a board of adjustment went directly to circuit court by way of a writ of certiorari. . . . In 2004, the legislature removed the provision in the law that gave a county board of adjustment the authority to approve conditional use permits. In its place, the legislature passed a new law giving the power to the county to designate the entity responsible for approving conditional use permits. . . . Although the legislature left intact the appeal procedure from a board of adjustment, the legislature omitted any reference to an appeal procedure if the county-designated entity was not a board of adjustment.

> *The effect of the omission has created inconsistencies in the appeal process depending on which entity a county designates as the approving authority*. Thus, the same action of approving or denying a conditional use permit may have a different appeal procedure depending on which entity approves the permit. In this case, the county board of adjustment approved the permit, and the statute requires that an appeal from a decision of a county board of adjustment proceed directly into circuit court in the form of a writ of certiorari. . . . In *Goos RV Center*, the Minnehaha County ordinances designated the planning and zoning board as the approving authority and apparently allowed an appeal to the county commission before proceeding to circuit court. . . . Generally, an appeal into circuit court from a county commission decision is a de novo review under SDCL 7-8-27. *Whether intentional or inadvertent, the current law allows for inconsistent procedures among counties and a confusing system of approving and appealing conditional use permits.*

Armstrong, 2009 SD 81, ¶¶ 10-11, 772 N.W.2d at 647-48 (italics added) (internal citations omitted).

Thus, the Court in *Armstrong* recognized the "inconsistencies" between the two procedures and the standards of review applicable to each, even going so far as to label them "confusing." What the Court in *Armstrong* did not label them, however, was unconstitutional. As the Court has recognized on many occasions, it has the ability to raise constitutional issues on its own, and could have done so in any or all of the recent cases addressing the statutory scheme at issue here. The constitutionality of the statutory scheme was not questioned by the Court, although it had the opportunity and power to do so.

In short, on four recent occasions, the Court had before it the very standards of review that the Petitioners are challenging as unconstitutional here. The Court was within its power to consider the constitutionality of those standards, but did

not. Instead, it left the differing standards of review in tact. The constitutionality of these statutes and the varying standards of review is beyond reproach.

D. SDCL Ch. 11-2 Does Not Violate the Equal Protection Clause

"Equal protection of the law requires that the rights of every person must be governed by the same rule of law under similar circumstances." *City of Aberdeen v. Meidinger*, 233 N.W.2d 331, 333-34 (S.D. 1975). "Equal protection demands that there be a rational basis for differing treatment of people by state statute." *County of Tripp v. State of South Dakota*, 264 N.W.2d 213, 218 (S.D. 1978). Equal protection does not "require that all persons be treated identically," but rather that the "distinctions have some relevance to the purpose for which classifications are made." *Metropolitan Life Ins. Co. v. Kinsman*, 2008 SD 24, ¶ 13, 747 N.W.2d at 659.

In determining whether SDCL Ch. 11-2 is unconstitutional and violative of the Equal Protection Clause, the Court utilizes a "two-part test." *City of Aberdeen*, 233 N.W.2d at 333. The first part is whether the statute sets up "arbitrary classifications among various persons subject to it. The second part is whether there is a rational relationship between the classification and some legitimate legislative power." *Id. See also Metropolitan*, 2008 SD 24, ¶ 13, 747 N.W.2d at 659 ("To prevail on an equal protection challenge, [the Petitioners] must first establish that the statutory scheme 'creates arbitrary classifications among citizens.'") (other citations omitted).

1. The Statutory Scheme Does Not Create "Arbitrary" Classifications Among Citizens

The Court has recognized that "'classification is primarily for the Legislature and we will not interfere "unless the classification is clearly arbitrary and unreasonable."'" *Metropolitan Life Ins. Co.*, 2008 SD 24, ¶ 13, 747 N.W.2d at 659 (other citations omitted). The Court considers "classifications arbitrary only if they were made '[w]ithout adequate determining principle.'" *In re Davis*, 2004 SD 70, ¶ 7, 681 N.W.2d 452, 455.

A state's classification scheme will be upheld under rational basis review if there is any a "plausible" or "conceivable" reason for the distinction. *See People in Interest of Z.B.*, 2008 S.D. 108, ¶ 9, 757 N.W.2d 595, 599-600. Further, the "legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' [ ] Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (other citation omitted).

In *Kraft v. Meade County*, 2006 SD 113, ¶ 11, 726 N.W.2d 237, 242, the plaintiff argued he was denied equal protection because the municipal incorporation statutes did not provide notice equal to the notice provided in the municipal annexation statutes. *Id.* at ¶ 10. The Court rejected this argument, concluding the plaintiff failed to show the statutory scheme created "arbitrary classifications among citizens." *Id.*

The Court held the "differing notice requirement for annexation and incorporation *are not dependent upon any classification of the citizenry*. Rather, the required notice is dependent on whether the government action is one of incorporation or annexation." *Id.* at ¶ 11 (italics added). The Court explained that annexation and incorporation are "two distinct actions with separate and discrete procedures set forth by the legislature. *These different procedures alone do not constitute a violation of equal protection.*" *Id.* (italics added). The Court cited to *Dohany v. Rogers*, 281 U.S. 362, 369 (1930), where the Supreme Court stated, "'the equal protection clause [does not] exact uniformity of procedure. The Legislature may classify litigation and adopt one type of procedure for one class and a different type for another.'" *Kraft*, 2006 SD 113, ¶ 11, 726 N.W.2d at 242 (quoting *Dohany*, 281 U.S. at 369).

In *Norfolk Redevelopment & Housing Auth. v. Stevenson*, No. CL03-520, 2004 WL 137525 at *2-3 (Vir. Cir. Ct. 2004), the defendant argued the statutory scheme for publication before condemnation was different than publication required in other circumstances, in violation of the Equal Protection Clause. *Id.* at *2. The defendant asserted, it is "'elementary the Constitution will not permit the granting to some individuals the rights and benefits of certain modes of procedure, while denying the same rights and procedures to others similarly situated.'" *Id.* at *3. The court held, "defendant's argument is too broad a statement. The Equal Protection Clause is violated in two instances: when people of a suspect class are discriminated against without a compelling state justification, . . . and when those

of a nonsuspect class are subject to laws that create a classification that has no rational relationship to a legitimate state interest." *Id.* In concluding the defendant could not establish either type of violation, the court noted there was "no *class* of property owners *targeted* by the statute." *Id.* Relying on *Dohany*, the court held the "Equal Protection Clause has never been interpreted as prohibiting a state from adopting different procedures for different circumstances, as long as the procedures apply equally in individual cases and have some rational basis." *Id.* (citing *Dohany*, 281 U.S. at 369).

In the present case, as in *Kraft* and *Dohany*, there is simply no arbitrary classification made by the statutory scheme set forth in SDCL Ch. 11-2, because the differing standards of review "are not dependent upon any classification *of the citizenry*." *Kraft*, 2006 SD 113, ¶ 11, 726 N.W.2d at 242 (italics added). Rather, the distinction lies in the source of the decision-making body and not in the citizen bringing the appeal. *See id.*

Indeed there are other distinctions made by the legislature regarding relief from zoning decisions. For instance, state law gives the public the right and ability to refer a vote of the county commission, but not a board of adjustment. *See Bechen v. Moody County Board of Commissioners*, 2005 SD 93, ¶¶ 14, 18, 703 N.W.2d 662, 665-66 (holding the referendum provisions cover only the actions of county commissions and not other county boards such as the county board of adjustment, noting, "[i]n 1975 the South Dakota Legislature extended the right of referendum to ordinances or resolutions adopted by a board of county

commissioners. . . . This Court upheld the constitutionality of SDCL 7-18A-15 in *Hofer v. Board of County Commissioners,* 334 N.W.2d 507 (S.D. 1983) (internal citations omitted)). Distinctions regarding relief from zoning decisions are not uncommon and have been found by this Court to be constitutional.

The Petitioners claim the absence of any justification in the legislative history suggests the classifications occurred by chance, and are therefore, arbitrary. Petitioners' Appeal Brief, pp. 11-12. Of course, the Court need not resort to legislative history in making its determination, as legislative history becomes pertinent only when the statute at issue is "ambiguous, or its literal meaning is absurd or unreasonable." *Jensen,* 2007 SD 28, ¶ 5, 730 N.W.2d at 413 ("Resorting to legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable."). The statutes at issue here are not ambiguous, nor have the Petitioners argued them to be so. Further, for a classification to be arbitrary, the Petitioners must do more than offer a guess; they must show it is "without adequate determining principle." *See In re Davis*, 2004 SD 70, ¶ 7, 681 N.W.2d at 455.

Because the Petitioners cannot establish this first element to an equal protection claim, their claim is without merit and the circuit court erred in finding an equal protection violation. On this basis alone, the decision of the circuit court should be affirmed. However, even if the Court were to find the SDCL Ch. 11-2 statutory scheme creates an arbitrary classification, the rational relationship test

applies here and there is a "reasonably conceivable state of facts" that provides a rational basis for the differing standards of review.

2. The Statutes Do Not Implicate a Fundamental Right

The Petitioners argue that fundamental rights are involved, requiring application of the strict scrutiny standard. Petitioners' Appeal Brief, p. 15-16. This argument merits little discussion, as neither of the two cases relied upon by the Petitioners in support their argument that their property rights in this context – application of a certain standard of review to decisions involving zoning – are fundamental. *See Wright v. Sherman*, 52 N.W.1093, 1096 (S.D. 1892) and *Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (the courts merely referenced fundamental property rights but in contexts wholly unrelated to this case.).

Nor have the Petitioners been denied access to the courts. *See Green*, 1996 SD 146, ¶ 13, 557 N.W.2d at 399-400. In *Green,* the Court stated the open courts provision is a "'guarantee that "for such wrong as are recognized by the laws of the land the courts shall be open and afford a remedy."'" *Id.* (other citations omitted). Where a "cause of action is implied or exists at common law without statutory abrogation, a plaintiff has a right to litigate and the courts will fashion a remedy. . . . We have held that *reasonable conditions on a cause of action are not unconstitutional*." *Id.* (internal and other citations omitted) (italics added). Indeed, the Petitioners' ability to file their Petition and this appeal plainly demonstrate they have not been denied access to the courts and the deferential standard of review that applies is a "reasonable condition" that is not

unconstitutional. *See id.* Accordingly, there is no fundamental right at issue in this case, and the Court applies the "rational relationship" test to this constitutional question. *See City of Aberdeen*, 233 N.W.2d at 333.

3. The Classifications in the Statutes Bear a Rational Relationship to a Legitimate Legislative Purpose

If the Court reaches this prong of the test, there are several considerations to take into account:

> The rational basis review requires only that the classification be rational *but does not require that it be the fairest* or best means that could have been used.
>
> * * *
>
> In a rational basis equal protection review, the state need not articulate its reasoning at the moment a particular decision is made; rather, the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . On a rational basis review, *the legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data*. . . .

16B AM.JUR.2D *Constitutional Law* § 859 (italics added).

One conceivable reason for the legislature's standard of review distinction between challenges from a board of adjustment and from a county commission is the legislature's retention of local control. Under the challenged statutory scheme, each county is allowed the discretion to make its own determination of whether to appoint a board of adjustment or its county commission to make decisions on such things as conditional use permits. Local control over local decisions certainly serves a legitimate legislature purpose.

Further, allowing each county to choose the decision-making body and the resultant standard of review applicable to a challenge of that body's decisions, gives recognition to the counties' familiarity with and understanding of its own officials and officers. A county with officials and officers who may not possess as much experience and/or expertise on zoning matters or with a smaller pool of such applicants, for instance, may elect to have its county commission make these zoning decisions, knowing that a challenger will be afforded additional evaluation of the decision through a de novo standard of review. Conversely, a county with officials and officers who possess more expertise and/or experience can afford their board of adjustment more deference, making their decisions subject to the standard of review under a writ of certiorari.

The circuit court noted this purpose by explaining the statutory scheme gives "each county a choice. Quite simply, what works for one county may not work for another. As mentioned above, there is a legitimate legislative purpose for the law in that it allows for flexibility in how each county handles its respective zoning decisions." CR-149. Thus, as the circuit court found and as explained above, legitimate legislative purposes clearly exist to explain the classifications, and the Petitioners cannot sustain their burden of establishing the statutory scheme violates the Equal Protection Clause.

4. The Petitioners' Reliance on the Wisconsin Case is Misplaced

The Petitioners' reliance on a Wisconsin case, *Metropolitan Associates v. City of Milwaukee* in support of their argument of unconstitutionality is misplaced,

as the statutory scheme in that case was vastly different, making the finding of whether the classification was arbitrary and whether there was a rational basis for the classifications distinguishable from the present case. In *Metropolitan*, the Wisconsin legislature amended its statute regarding appeals from a tax assessment, which allowed municipalities the choice of two standards of review: the de novo standard of review, or if the municipality opted out of that review, it could provide an enhanced writ of certiorari review. *Metropolitan*, 796 N.W.2d 717, 720 (Wis. 2011). Thus, the statutory scheme at issue in that case dealt specifically with the *standard of review* being afforded to its citizens and the standard of review was the focus of the amended statute. *See id.*

In contrast, in the present case, the standard of review is not the focus of or primary purpose behind the statutory scheme at issue here; rather, the standard of review is only incidental to the primary purpose of allowing each county the ability to choose between a board of adjustment and the county commission. This distinction is significant because the parties in *Metropolitan* all *agreed* that the statute created a "distinct class of citizens," and the court confirmed that agreement. *See id.* at 724. The distinct class of citizens was "taxpayers living in opt out municipalities." *See id.* In the present case, however, as explained above, the classification does not relate to *citizens*. *Kraft* 2006 SD 113, ¶ 11, 726 N.W.2d at 242. The classifications in the statutory scheme at issue in this case are not dependent upon any classification of the citizenry; rather, the required standard of

review is dependent on the decision-making body – a board of adjustment or a county commission. *See id.*

The fact that the standard of review in *Metropolitan* was the entire purpose behind the statute at issue rather than merely incidental, as in this case, is also significant to the determination of whether the classification bears a rational relationship to a legitimate legislature purpose. In *Metropolitan*, the court, relying on its previous decision in *Nankin v. Village of Shorewood*, 630 N.W.2d 141 (Wis. 2001), concluded there was "nothing inherently different about taxpayers in opt out municipalities that would justify restricting the manner in which taxpayers located in those municipalities may challenge their assessments." *Metropolitan*, 796 N.W.2d at 733-34. Because the classification in this case is not citizen-based or taxpayer-based, the conclusion that there was no justification for those classifications does not apply here. As explained above, the classification is based on the decision-making body, not the citizens, and the probable rationale for the classification is rationally related to legitimate legislative purposes – retention of local control and recognition of the counties' familiarity with and understanding of its own officials and officers.

Further, in concluding there was no rational relationship, the court in *Metropolitan* applied five criteria that a statute must meet to have a rational basis. *See id.* at 733. It does not appear that this Court has ever mandated that a statute meet such criteria or even applied such criteria in making an equal protection violation determination. Because the failure to meet criteria that do not exist

under South Dakota law was a basis for the court's finding in *Metropolitan*, that case is clearly distinguishable and does not provide any basis for concluding that the statutory scheme in this case violates the equal protection clause of the South Dakota Constitution.

In sum, this Court recognizes the legislature's constitutional ability to draw distinctions between relief from a board of adjustment's decision and relief from a county commissions' decision. The resultant standard of review that is attendant to the choice between decision-making bodies does not violate the Equal Protection Clause, but is a constitutional "reasonable condition" that bears a rational relationship to legitimate legislative purposes. The Petitioners have not sustained their very heavy burden of proving, *beyond a reasonable doubt*, that the statutory scheme of SDCL Ch. 11-2 violates the Equal Protection Clause.

CONCLUSION

For all these reasons, as well as those set forth by the BOA, Amicus Curiae, Ag United, respectfully suggests that the Court should affirm the decision of the circuit court and conclude that the statutory scheme set forth in SDCL Ch. 11-2 is constitutional.

Respectfully submitted this 10th day of March, 2014.

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

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Amicus Curiae's Brief contains 4,914 words as counted by Microsoft Word.

/s/ Dana Van Beek Palmer
Dana Van Beek Palmer

CERTIFICATE OF SERVICE

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The undersigned further certifies that the original and two (2) copies of the Brief of Amicus Curiae in the above-entitled action were 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/ Dana Van Beek Palmer
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26897

SHAWN TIBBS, VIRGIL STEMBAUGH, GENE GULLICKSON and JANET GULLICKSON,

Petitioners/Appellants,

vs.

MOODY COUNTY BOARD OF COMMISSIONERS, sitting as THE BOARD OF ADJUSTMENT, and MUSTANG PASS, LLC,

Respondents/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Moody County, South Dakota

The Honorable Gregory J. Stoltenburg, Presiding Judge

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TABLE OF CONTENTS

REPLY ARGUMENT 1

I. Equal Protection.....1

A. SDCL Chapter 11-2 Creates Classifications.....1

B. The Classifications Created by SDCL Chapter 11-2 Are Arbitrary.....3

C. SDCL Chapter 11-2 Cannot Withstand Strict Scrutiny.....5

D. SDCL Chapter 11-2 Cannot Withstand a Rational Basis Review.....6

II. The Board Exceeded Its Jurisdiction by Exercising Original Jurisdiction.....7

III. The Premature Creation of the Board Is Void Ab Initio, Therefore, the Board Necessarily Exceeded Its Jurisdiction 12

IV. The Board's Decision Should Be Reversed, because the Board Exceeded Its Jurisdiction, Failed to Pursue Its Authority in a Regular Manner, and Failed to Perform Acts Required by Law 13

CONCLUSION.....15

CERTIFICATE OF COMPLIANCE.....16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

Accounts Management Inc. v. Williams,
484 N.W.2d 297 (S.D.1992) 4

Aman v. Edmunds Cent. Sch. Dis. No. 22-5,
494 N.W.2d 198 (S.D. 1992) 9-11

Armco Steel v. City of Kansas City,
883 S.W.2d 3 (Mo. 1994) 12

Armstrong v. Turner County Board of Adjustment,
2009 SD 81, 772 N.W.2d 643 13-14

Cary v. City of Rapid City,
1997 SD 18, 559 N.W.2d 891 8

City of Aberdeen v. Meidinger,
233 N.W. 2d 331 (S.D. 1975) 1-2

City of Santa Fe v. Armijo,
634 P.2d 685 (N.M. 1981) 12

City of Sioux Falls v. Peterson,
25 N.W.2d 556 (S.D. 1946) 9-11

First Nat. Bank of Minneapolis v. Kehn Ranch, Inc.,
394 N.W.2d 709 (S.D. 1986) 9, 11

Hart v. Miller,
2000 SD 53, 609 N.W.2d 138 ..... 10, 12

In re Davis,
2004 SD 70, 681 N.W.2d 452 ..... 4, 6

In re Depont,
142 S.W.3d 528 (Tex. App. 2004) 13

In re Yankton Cnty. Comm'n,
2003 SD 109, 670 N.W.2d 34 ..... 8, 10

Jensen v. Turner Cty. Bd. of Adjustment,
2007 SD 28, 730 N.W.2d 411 13

Johnson v. Radle,
2008 SD 23, 747 N.W.2d 644 8

Kraft v. Meade County,
2006 SD 113, 726 N.W.2d 237 ..... 3, 4

Metropolitan Associates v. City of Milwaukee,
796 N.W. 2d 717 (Wis. 2011) 2, 7

Nankin v. Village Of Shorewood,
630 N.W.2d 141 (Wis. 2001) 2

North Liberty Land Co. v. Incorporated City of North Liberty,
311 N.W.2d 101 (Iowa 1981) 12

Ohlwine v. Bushnell,
143 N.W. 362 (S.D. 1913) 6

State v. Krahwinkel,
2002 SD 160, 656 N.W.2d 451 4

Wright v. Sherman,
52 N.W. 1093 (S.D. 1892) 5

Statutes

SDCL 11-2-17.3 ..... 8-9, 12

SDCL 11-2-17.4 10

SDCL 11-2-18 13-14

SDCL 11-2-19 13-14

SDCL 11-2-20 ..... `

SDCL 11-2-53 9-10

SDCL 11-2-54 13

SDCL 11-2-60 10

SDCL 11-2-61 6

SDCL 11-2-62 6

Other Authorities

S.D. Const. Art. VI, § 18 1

REPLY ARGUMENT

I. Equal Protection.

A. SDCL Chapter 11-2 Creates Classifications.

The Board argues that SDCL chapter 11-2 "treats all counties the same[.]" (Board Brief at 8.) The Equal Protection Clause provides protection to citizens, not to counties or government entities. See S.D. CONST. Art. VI, §18; *City of Aberdeen v. Meidinger*, 233 N.W. 2d 331, 333 (S.D. 1975). SDCL chapter 11-2 creates two classes: (1) citizens living in counties using the board of adjustment procedure with a writ of certiorari standard of review; and (2) citizens living in counties using the county commission procedure with a *de novo* standard of review. Whether each *county* has an equal opportunity to choose the class in which its citizens will reside does not mean *citizens* are being treated equally under the law.

This is the type of situation this Court found unconstitutional in *Meidinger*. The Board argues that "[t]he crucial point in *Meidinger* was that two statutes … covering the exact same offense provided for different penalties, depending upon whether the particular defendant was in a municipality with a municipal court." (Board Brief at 10-11.) The crucial point the Board misses is that qualifying municipalities were required to have established a municipal court in order to impose enhanced penalties. The legislature did not itself choose where enhanced penalties would be imposed. Rather, the legislature created a generally applicable statute that allowed municipalities that had municipal courts to impose harsher punishments than municipalities which did not have municipal courts. *See Meidinger*, 233 N.W.2d at 333.

While the legislature did not expressly create classifications in the statutes under review in *Meidinger*, this Court found that the legislative effect was the creation of arbitrary classifications.

> There can be no doubt that the statute did set up classifications among persons in the state. It allowed municipalities with municipal courts to impose greater penalties for municipal ordinance violation than those municipalities which did not have municipal courts because they could not meet the population requirement imposed by SDCL 16-11-2, 16-11-2.1 and SDCL 16-9-31, or did not find it necessary to have a municipal court.

233 N.W.2d at 333. As argued by the Board, persons charged with the "the exact same offense" were treated differently, therefore, *Meidinger* found an equal protection violation. (Board Brief at 10.) Here, the exact same thing, appeal of a conditional use permit ("CUP"), is handled differently at the circuit court level, depending on one's county of residence. The effect of SDCL chapter 11-2 is to create arbitrary classifications defined by whether counties use a board of adjustment or county commission.

In its argument about whether SDCL chapter 11-2 creates classifications, the Board attempts to distinguish *Nankin v. Village Of Shorewood,* 630 N.W.2d 141 (Wis. 2001), by emphasizing that the Wisconsin legislature created express classes (counties with greater than 500,000 people and counties with fewer than 500,000 people) with different standards of review. (Board Brief at 8.) The Board ignores *Metropolitan Associates v. City of Milwaukee*, 796 N.W. 2d 717 (Wis. 2011), in which the Wisconsin legislature allowed counties to opt out of *de novo* review of tax assessment appeals. 796 N.W.2d 717, 720 (Wis. 2011). The South Dakota legislature has allowed counties to opt out of *de novo* review of CUP appeals by creating boards of adjustment from which appeals are reviewed under a writ of certiorari. That the South Dakota legislature did not

itself pick and choose which counties would use writ of certiorari and *de novo* review does not make the classification any less apparent.

B. The Classifications Created by SDCL Chapter 11-2 Are Arbitrary.

The Board argues that local flexibility justifies denying equal protection to citizens in Moody County. The Board argues that counties with more resources have planning commissions that can devote more time, money, and expertise to analyzing CUP applications before they are reviewed by county commissions. This begs the question: if counties with these additional resources are equipped to make more informed decisions, then why is there a less deferential standard of review in circuit court? One would think that after a CUP application has been vetted through such an informed, deliberative process, that it would be less likely to be wrought with errors, making a writ of certiorari standard of review more sensible. The supermajority requirement for board of adjustment votes makes sense, because counties with boards of adjustment do not have resources (or choose not to spend resources) for the more rigorous county planning commission process and the additional deliberation that is inherent in such a process.

While local flexibility certainly makes sense at the county level, the same is not true when examining the level of legal protection afforded to citizens and applicants at the circuit court level when courts review the propriety and legality of county zoning decisions. SDCL chapter 11-2 lacks a determining principle that is stated, apparent, or implicit with respect to the unequal standard of review at the circuit court level.

The Board relies on *Kraft v. Meade County*, 2006 SD 113, 726 N.W.2d 237, for the proposition that "the legislature may classify litigation and adopt one type of procedure for one class and a different type for another[.]" (Board Brief at 13, *not* quoting *Kraft*.) In *Kraft*, this Court held that different legal procedures for municipal

incorporation and annexation are permissible, because incorporation and annexation are different government actions.

In *Kraft*, this Court held that the petitioner was required to "show that [the statute] creates arbitrary classifications *among citizens*." *Id.* ¶ 10 (citing *In re Davis*, 2004 SD 70, ¶ 5, 681 N.W.2d 452) (emphasis added). This Court further explained, "[i]n other words, [the petitioner] must demonstrate that the statute does not apply equally to all *people*." *Id.* (citing *State v. Krahwinkel,* 2002 SD 160, ¶ 23, 656 N.W.2d 451; *Accounts Management Inc. v. Williams,* 484 N.W.2d 297, 300 (S.D.1992)) (emphasis added). Notably, this Court did not hold that counties, municipalities, or government actions need to be classified arbitrarily to establish an equal protection violation. Rather, what is required for the first prong of equal protection analysis is whether *citizens* are in different, arbitrary classifications. After analyzing this focused issue, this Court found no equal protection violation, reasoning as follows:

> Kraft fails to satisfy the first prong because the differing notice requirements for annexation and incorporation are not dependent upon any classification of the citizenry. Rather, the required notice is dependent on whether the government action is one of incorporation or annexation.

Id. ¶ 11.

When a citizen's land is incorporated by a municipality, there is a set of procedures that must be followed, regardless of where the citizen lives. If that same citizen's land is annexed by a municipality, there is a different set of procedures that must be followed, regardless of where the citizen lives. When a citizen desires to appeal the grant of a CUP, it matters where the citizen lives. If he lives in Moody County, then the granting of the CUP will be reviewed by the circuit court under a limited writ of certiorari

standard of review; if he lives in Minnehaha County (or any county not utilizing a board of adjustment), then the CUP will be reviewed *de novo*. The same governmental action, the granting of a CUP, has different standards of review depending on where a citizen lives. The arbitrary classifications and denial of equal protection are plainly apparent.

C. SDCL Chapter 11-2 Cannot Withstand Strict Scrutiny.

Property rights are at stake in all CUP appeals. The CUP applicant, the owner of the site of the proposed conditional use, and the surrounding landowners all have important property rights. While it is the surrounding landowners in this case challenging the writ of certiorari procedure on equal protection grounds, a future appeal may involve an applicant whose CUP application was denied. Regardless of the disposition below, the property rights of Mustang and the Citizens are implicated in this appeal.

The Board relies on United States Supreme Court cases and other federal cases interpreting the Equal Protection Clause of the United States Constitution. The issue before this Court is whether the South Dakota Constitution's Equal Protection Clause permits the inequality associated with the standard of review applied to board of adjustment appeals to circuit court. Accordingly, the cases interpreting the *United States* Constitution do not limit this Court from deciding whether property rights are fundamental under the *South Dakota* Constitution. The only South Dakota case on this topic cited by any party in this litigation is *Wright v. Sherman*, 52 N.W. 1093, 1096 (S.D. 1892), which describes property rights as fundamental, albeit not in the context of a constitutional challenge. To the extent this Court finds *Wright* inapplicable, then whether property rights are fundamental and subject to a strict scrutiny analysis would be a matter of first impression in South Dakota.

The Board contests that the Citizens' access to the courts is a fundamental right. The Board argues that the Citizens' pursuit of this litigation and appeal is proof that they have access to the Court. At the risk of pointing out the obvious, there is a reason the Board and Mustang have vehemently contested the applicable standard of review. A writ of certiorari review is more than a rubber stamp process, but not by much. A *de novo* review allows a fuller vetting of all issues associated with the Board's granting of the CUP. Due to SDCL 11-2-61 and 11-2-62, the Citizens are denied access to *de novo* review, while citizens in other counties are allowed access to *de novo* review. Again, the Board relies on federal cases that do not involve the South Dakota Constitution or what rights are considered fundamental in South Dakota. The only South Dakota case on this topic that was cited by any party is *Ohlwine v. Bushnell*, 143 N.W. 362 (S.D. 1913), which describes a citizen's rights with respect to procedures for enforcement and collection of taxes as fundamental. To the extent this Court finds *Ohlwine* inapplicable, then whether equal access to the courts is fundamental and subject to a strict scrutiny analysis would be a matter of first impression in South Dakota.

D. <u>SDCL Chapter 11-2 Cannot Withstand a Rational Basis Review.</u>

If this Court determines that fundamental rights are not involved, then the Court next examines "whether a rational relationship exists between a legitimate legislative purpose and the classifications created." *Davis,* 2004 SD 70 ¶ 5.

The Board argues that local officials "are best equipped to understand the needs of the county, and to draft ordinances which meet those needs" (Board Brief at 19) and that such local officials need the "choice of how to delegate decision making on conditional use permits" (Board Brief at 21). Rural or predominantly agricultural counties have different land use needs than more populous, urban counties. Accordingly, allowing

local officials to draft ordinances governing permissible and conditionally permissible land use makes sense. Allowing counties the flexibility for a more rigorous county planning commission or a more streamlined board of adjustment process also makes sense. The logic of local control, however, falls apart when examining the legal protection courts afford in the form of judicial review of county zoning decisions.

The majority opinion in *Metropolitan Associates* held that allowing counties to opt out of *de novo* review for property tax assessments was a violation of equal protection and that such legislation could not withstand a rational basis review. 796 N.W.2d at 119-22. In finding a lack of a rational basis, the court reasoned that the characteristics of the opt-out class were not so different from the other class as to support substantially different legislation. *Id.* Likewise, no characteristics of property owners in Moody County can reasonably support substantially different standards of review. There is no rational basis connecting the goal of local flexibility and unequal standards of review.

This Court should find an equal protection violation, reverse the circuit court, and remand for a *de novo* review of the Board's decision.

II. The Board Exceeded Its Jurisdiction by Exercising Original Jurisdiction.

The Board appears to argue that the zoning officer actually took action on Mustang's CUP application, using such phrases as, "the zoning officer … made the determination that the [CUP] could be granted[.]" (Board Brief at 27.) Regardless of how the Board attempts to massage the undisputed facts, the circuit court found the following: "The officer sent the application to the BOA with the recommendation that the permit be granted." (R. 173 at Findings of Fact 13.) The circuit court further found that the Board had original jurisdiction to grant the CUP. (R. 173 at Conclusion of Law 52.) The circuit

court plainly found that the zoning officer did not take any action on the CUP application, other than expressing the personal opinion that the CUP could be granted. The zoning officer did not grant the CUP, nor does she have such power under the Ordinances. The Board did not file a notice of review with respect to the circuit court's finding that the Board exercised original jurisdiction when it granted the CUP, therefore, the Board cannot argue otherwise in this appeal. *See Johnson v. Radle*, 2008 SD 23 ¶ 19, 747 N.W.2d 644.

Ultimately, a county's exercise of zoning power is entirely derived from the legislature's delegation of such power. *See Cary v. City of Rapid City*, 1997 SD 18, ¶¶ 19-20, 559 N.W.2d 891. This Court has found that the legislature's overhaul of SDCL chapter 11-2 was "sufficiently comprehensive to make reasonable the inference that the Legislature intended to occupy the field and leave no room for supplementary county regulation." *In re Yankton Cnty. Comm'n*, 2003 SD 109 ¶ 21, 670 N.W.2d 34. As the Board exercised original jurisdiction in this case, SDCL chapter 11-2 must delegate original jurisdiction to the Board in order for the Board's action to be lawful.

The Board has failed to identify a single statute that expressly and specifically delegates original jurisdiction over CUPs to boards of adjustment. Instead, the Board stretches or adds language to statutes or case law to craft its argument.

First, the Board argues that SDCL 11-2-17.3 permits counties to specify the approving authority for CUPs. The Board stretches this language to argue that Moody County can designate anyone or any entity it pleases. This begs the question: may a county designate the governor, a town mayor, or the Prime Minister of the United

Kingdom to decide CUPs? The answer is certainly "no," because such individuals are not recipients of legislatively delegated original jurisdiction under SDCL chapter 11-2.

The phrase "board of adjustment" appears nowhere in SDCL 11-2-17.3. The only fair reading of SDCL 11-2-17.3 is that a county may designate any approving authority which otherwise has original jurisdiction delegated to it. A board of adjustment is not an entity to which the legislature has delegated original jurisdiction, at least not presently. (From July 1, 2003, through July 1, 2004, boards of adjustment had original jurisdiction to hear CUPs under SDCL 11-2-53; on July 1, 2004, the Legislature amended SDCL 11-2-53 and removed the delegation of original jurisdiction to boards of adjustment.)

This Court has repeatedly held that when the legislature delegates authority, that delegation will be strictly construed. *See City of Sioux Falls v. Peterson*, 25 N.W.2d 556, 557 (S.D. 1946) ("acts of the state legislature granting the police power to municipal corporations … will be strictly construed"); *Aman v. Edmunds Cent. Sch. Dis. No. 22-5*, 494 N.W.2d 198, 200 (S.D. 1992) (delegation of power to school districts is strictly construed); *First Nat. Bank of Minneapolis v. Kehn Ranch, Inc.*, 394 N.W.2d 709, 718 (S.D. 1986) (delegation to agency must be clear and express). Nowhere in SDCL chapter 11-2 does the legislature delegate original jurisdiction to the Board. Under a strict construction of the delegation of power under SDCL chapter 11-2, this Court should conclude that the Board exceeded its authority when it exercised original jurisdiction.

Second, the Board criticizes the Citizens' reading of SDCL 11-2-53. SDCL 11-2-53 provides that a "board of adjustment may … [h]ear and decide appeals[.]" The Board argues that the Citizens' argument transforms this language into "the Board 'may *only*' … consider appeals." (Board Brief at 23 (emphasis in original).) The Board's argument

transforms SDCL 11-2-53 into the following: "board of adjustment may … [h]ear and decide appeals … [*or do anything else it pleases*.]" In fact, SDCL 11-2-53 simply provides that one power that may be exercised by the Board is hearing and deciding appeals for CUPs.

Third, the Board argues that since SDCL 11-2-60 grants boards of adjustment the power "to effect any variation in the ordinance," the Board has original jurisdiction to grant CUPs. The Board argues that since "variance" is a zoning term of art, then "variation" must mean the Board can grant a CUP as a matter of original jurisdiction. There are many intermediate dots missing between the language of SDCL 11-2-60 and the Board's argument that it has original jurisdiction to grant CUPs. A conditional use is, by definition, a use of land that is permissible without a variation (or variance) of an ordinance, provided the conditions are satisfied. *See* SDCL 11-2-17.4. The Board fails to identify any legal authority, or present a cogent argument, supporting the proposition that the power to effect a "variation" in an ordinance means the same thing as original jurisdiction to grant CUPs. *See Hart v. Miller*, 2000 SD 53 ¶ 42, 609 N.W.2d 138 ("failure to cite authority for an argument on appeal constitutes waiver of that issue" (citations omitted).

Fourth, the Board notes, "[t]here has never been a prohibition in state law against the Board's consideration of conditional use permits." County governments, and more specifically boards of adjustment, do not have zoning power independent of legislative delegation. Rather, counties and boards of adjustment derive their zoning power from the legislature, and any delegation of such power is strictly construed. *See Yankton Cnty. Comm'n*, 2003 SD 109 ¶ 21; *Peterson*, 25 N.W.2d at 557; *Aman*, 494 N.W.2d at 200;

Kehn Ranch, 394 N.W.2d at 718. The absence of an express prohibition of a board of adjustment's original jurisdiction over CUPs is irrelevant. The legislature must clearly and expressly delegate a zoning power to the Board, or the Board does not legally have such power. *Id*.

Finally, the Board argues that this Court has implicitly or tacitly approved of boards of adjustment exercising original jurisdiction. This Court has not addressed the issue of boards of adjustment exercising original jurisdiction. As stated by the Board, this Court "has had numerous cases come before it … [and] [i]t has not once taken issue with the Board's authority to pass upon such matters." (Board Brief at 25.) More accurately, this Court has not addressed, one way or the other, the issue of a board of adjustment's authority to exercise original jurisdiction.

This is a matter of first impression in South Dakota, but prior cases have firmly and consistently held that delegation of legislative power must be strictly construed. *See Peterson*, 25 N.W.2d at 557; *Aman*, 494 N.W.2d at 200; *Kehn Ranch*, 394 N.W.2d at 718. Simply put, nothing in SDCL chapter 11-2 delegates original jurisdiction to the Board, therefore, the Board exceeded its authority when it exercised original jurisdiction granting Mustang's CUP.

III. The Premature Creation of the Board Is Void Ab Initio, Therefore, the Board Necessarily Exceeded Its Jurisdiction.

As established in the Citizens' initial brief, Moody County prematurely created the Board with original jurisdiction to hear CUPs several months before the legislature authorized original jurisdiction (which lasted only from July 2003 through July 2004). The creation of the Board also predated by more than a year the enactment of SDCL 11-2-17.3, upon which the Board relies heavily for its argument in favor of having original jurisdiction over CUPs. Even if the legislature authorized boards of adjustment to have original jurisdiction over CUPs under the July 2003 version of SDCL chapter 11-2 or SDCL 11-2-17.3 (effective July 1, 2004), Moody County created the Board and vested it with original jurisdiction over CUPs in February 2003 before the legislature acted.

Moody County prematurely vested the Board with original jurisdiction over CUPs. In their initial brief, the Citizens cited and discussed several cases establishing that premature action on power not yet delegated renders such action void *ab initio*. *See Armco Steel v. City of Kansas City*, 883 S.W.2d 3, 7 (Mo. 1994); *North Liberty Land Co. v. Incorporated City of North Liberty*, 311 N.W.2d 101, 102-03 (Iowa 1981); *City of Santa Fe v. Armijo*, 634 P.2d 685, 687-88 (N.M. 1981). The Board failed to respond to this argument or cite contrary authority, therefore, the Board has conceded this argument. *See Hart*, 2000 SD 53 ¶ 42 ("failure to cite authority for an argument on appeal constitutes waiver of that issue" (citations omitted).

Since Moody County's premature vesting of original jurisdiction in the Board renders such action void *ab initio*, Moody County either has no valid board of adjustment or it has a board of adjustment that lacks original jurisdiction over CUPs. Accordingly,

this Court should: (1) reverse the circuit court's decision; (2) void Mustang's permit; (3) require Mustang to proceed with its prior application (or a new application) before the Moody County Board of Commissions; and (4) require any appeal to be reviewed *de novo* by the circuit court.

IV. The Board's Decision Should Be Reversed, because the Board Exceeded Its Jurisdiction, Failed to Pursue Its Authority in a Regular Manner, and Failed to Perform Acts Required by Law.

The Board notes that counsel for the Citizens "conceded" that "assuming *arguendo*, the zoning ordinance is valid, there were no procedural or substantive due process violations[.]" (Board Brief at 31.) Whether due process was violated is not relevant to determining whether the Board exceeded its jurisdiction, failed to pursue its authority regularly, or failed to perform acts required by law.

First, the Board acknowledges it never adopted rules, despite the requirement of SDCL 11-2-54 that it "shall adopt rules[.]" This is not an issue of following "parliamentary rules," as the Board argues, but goes directly to whether "the law of the land" has been followed by the Board. (Board Brief at 32, quoting *In re Depont*, 142 S.W.3d 528, 532 (Tex. App. 2004).) The law of South Dakota requires the Board to adopt rules in accordance with SDCL chapter 11-2, and it failed to do so. The Board's decision should be reversed under *Armstrong v. Turner County Board of Adjustment*, because the Board "neglected to do some act required by law," namely adoption of rules as required by SDCL 11-2-54. 2009 SD 81 ¶ 12, 772 N.W.2d 643 (quoting *Jensen v. Turner Cty. Bd. of Adjustment*, 2007 SD 28, ¶ 4, 730 N.W.2d 411).

Second, Moody County failed to follow the two-step process to create the Board as required by SDCL 11-2-18 through 11-2-20. The Board initially argues that this

procedural problem is academic, because Mustang could erect its CAFO without any permit if the Board was not validly created. If the Board was not validly created, then Mustang would need to obtain its CUP from the county commission, as substantive ordinances would still be in effect governing land use; Mustang would not be free to do as it pleases.

Conceding that a two-step process was not followed when the Board was created, the Board next argues that a "careful reading" of SDCL 11-2-18 and 11-2-19 does not reveal any two-step requirement. As explained in more detail in the Citizens' initial brief, the legislature created an intentional, deliberative two-step process to enact ordinances. First, the planning commission holds a hearing on new ordinances, with proper notice, and then makes a recommendation to the board of commissioners; the board of commissioners then sets a hearing after receiving the planning commission recommendations, reviews the recommendations at the second hearing, and finally takes action based on the recommendations. *See* SDCL 11-2-18 through 11-2-20. Given the unlawful creation of the Board, the Board necessarily exceeded its jurisdiction and this case should be reversed or alternatively remanded for Mustang to proceed before the county commission. *Armstrong*, 2009 SD 81 ¶ 12.

Third, the Board responded to the Citizens' argument regarding Commissioner Peper's residence and eligibility to serve on the Board. The Board rhetorically asks, "why does it make any difference?" It makes a difference, because *Armstrong* commands that if a board of adjustment fails to pursue its authority in a regular manner, then its decision must be reversed. 2009 SD 81 ¶ 12. If Peper was not eligible to serve on the Board, then

such irregularity warrants reversal or a remand to the Board with an appropriate, eligible member to replace Peper on the Board.

The Citizens will not reiterate all of the facts related to Peper's residence discussed in their initial brief. The most compelling evidence is Peper's own words. When Peper purchased his home in Sioux Falls, he completed legal documents and himself indicated the Sioux Falls home would be his principal residence. (Peper Dep. 29, Dep. Ex. 14.) The day after the Citizens filed their petition raising the issue of Peper's residence, Peper removed the "owner-occupied" status from the Sioux Falls home. (Dep. Exs. 17 & 18.) However, at the time the Board rendered its decision, Peper's own words indicated his principal residence and home was in Sioux Falls, not in Moody County.

CONCLUSION

The Citizens respectfully request that this Court reverse the circuit court's decision and the Board's issuance of Mustang's CUP and, if appropriate, remand this matter for further proceedings with a *de novo* review of any county-level decision.

Dated at Sioux Falls, South Dakota, this 18th day of March, 2014.

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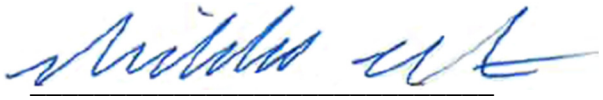
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Appellant's Brief complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 4,302 words and 22,677 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 18th day of March, 2014.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.



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The undersigned hereby certifies that the foregoing "Appellant's Reply Brief" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on March 18, 2014.

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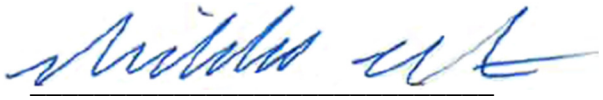

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26897

SHAWN TIBBS, VIRGIL STEMBAUGH, GENE GULLICKSON AND JANET GULLICKSON,

Petitioners/Appellants,

vs.

MOODY COUNTY BOARD OF COMMISSIONERS, sitting as THE BOARD OF ADJUSTMENT, and MUSTANG PASS, LLC,

Respondents/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Moody County, South Dakota

The Honorable Gregory J. Stoltenburg, Circuit Court Judge

APPELLANTS' BRIEF IN RESPONSE TO AMICUS BRIEF

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Notice of Appeal filed December 5, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSIVE ARGUMENT 1

I. This Court Has Not Implicitly Approved of or Considered the Constitutionality of SDCL Chapter 11-2. 1

II. Equal Protection. 6

A. Arbitrary Classifications. 6

B. Strict Scrutiny/Rational Basis Review. 8

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Armstrong v. Turner County Board of Adjustment,
2009 SD 81, 772 N.W.2d 643 ..... 1, 3-5

City of Aberdeen v. Meidinger,
233 N.W.2d 331 (S.D. 1975) 7-8

City of Chamberlain v. R.E. Lien, Inc.,
521 N.W.2d 130 (S.D. 1994) 4

Elliott v. Board of County Commissioners,
2005 SD 92, 703 N.W.2d 361 ..... 1-2, 5

Goos RV Center v. Minnehaha County Commission,
2009 SD 24, 764 N.W.2d 704 ..... 1-3, 5

In re Davis,
2004 SD 70, 681 N.W.2d 452 8-9

Jensen v. Turner County Board of Adjustment,
2007 SD 28, 730 N.W.2d 411 ..... 1-2, 5

Kraft v. Meade County,
2006 SD 113, 726 N.W.2d 237 6-8

Metropolitan Associates v. City of Milwaukee,
796 N.W.2d 717 (Wis. 2011) 9-10

Metropolitan Life Insurance Company v. Kinsman,
2008 SD 24, 747 N.W.2d 653 4-5

State ex rel. Dunker v. Spink Hutterian Brethren,
90 N.W.2d 365 (S.D. 1958) 2-4

State v. Rolfe,
2013 SD 2, 825 N.W.2d 901 4

Steinkruger v. Miller,
2000 SD 83, 612 N.W.2d 591 4

RESPONSIVE ARGUMENT

Appellants Shawn Tibbs, Virgil Stembaugh, Gene Gullickson, and Janet Gullickson ("the Citizens") submit this brief to respond to the arguments presented by Amicus Curiae Agriculture United for South Dakota ("Ag United").

I. This Court Has Not Implicitly Approved of or Considered the Constitutionality of SDCL Chapter 11-2.

Ag United argues that this Court has implicitly approved of SDCL Chapter 11-2's writ of certiorari appeal scheme, because "the Court has never found the provisions at issue in this case to be unconstitutional." Ag United then references four cases in which zoning issues have been considered by this Court. *See Elliott v. Board of County Commissioners*, 2005 SD 92, 703 N.W.2d 361; *Jensen v. Turner County Board of Adjustment*, 2007 SD 28, 730 N.W.2d 411; *Goos RV Center v. Minnehaha County Commission*, 2009 SD 24, 764 N.W.2d 704; *Armstrong v. Turner County Board of Adjustment*, 2009 SD 81, 772 N.W.2d 643.

The issue of Equal Protection was mentioned exactly zero times in the above-cited four cases. Quite plainly, this Court has simply not considered whether the differing appeal standards in county commission jurisdictions and board of adjustment jurisdictions violates the Equal Protection Clause. While the constitutionality of a statute may be raised *sua sponte* by this Court, the fact remains that the Equal Protection issue raised by the Citizens has not been considered by this Court previously. While this Court has the power to raise constitutional questions *sua sponte*, this Court "declin[es], whenever possible, to

pass upon constitutional questions." *State ex rel. Dunker v. Spink Hutterian Brethren*, 90 N.W.2d 365, 368 (S.D. 1958) (citations omitted).

In *Elliott*, it was unclear whether the county commissioners were acting as a zoning officer, a board of adjustment, or a county commission, and the trial court failed to adequately address this jurisdictional confusion. 2005 SD 92 ¶ 16. Accordingly, this Court remanded the case to the circuit court to address, for the first time, the circuit court's jurisdiction. *Id*. ¶ 18. For this Court to have addressed the constitutionality of SDCL Chapter 11-2 under the Equal Protection in *Elliott* would have violated this Court's policy of declining to address constitutional questions whenever possible. *Dunker*, 90 N.W.2d at 368.

In *Jensen*, less than two-thirds of the members of the board of adjustment voted to approve a conditional use permit, yet the permit was issued anyway. 2007 SD 28, ¶ 1. While three board members voted to approve of the permit, this Court determined that the applicable statute required four votes; as a result, this Court reversed the board's decision and remanded the matter to the circuit court to enter an order reversing the board's decision. *Id*. ¶¶ 14-15. In *Jensen*, this Court disposed of the appeal without any need to address the constitutionality of any statute. For this Court to have addressed the constitutionality of SDCL Chapter 11-2 under the Equal Protection in *Jensen* would have violated this Court's policy of declining to address constitutional questions whenever possible. *Dunker*, 90 N.W.2d at 368.

In *Goos RV*, opponents appealed the county commission's approval of a conditional use permit to circuit court under the *de novo* standard of review. 2009

SD 24 ¶¶ 1 & 8. The *de novo* standard was used, because conditional use permits go through the county commission in Minnehaha County (as opposed to a board of adjustment), and appeals to circuit court from county commission decisions are reviewed *de novo* under SDCL 7-8-30. *Id.* ¶ 8. The circuit court provided a *de novo* review, but affirmed the decision of the county commission. The aggrieved parties in *Goos RV* received the most favorable standard of review before the circuit court, therefore, there was no need to address the constitutionality of the less favorable writ of certiorari standard of review applicable in board of adjustment counties. For this Court to have addressed the constitutionality of SDCL Chapter 11-2 under the Equal Protection in *Goos RV* would have violated this Court's policy of declining to address constitutional questions whenever possible. *Dunker*, 90 N.W.2d at 368.

In *Armstrong*, opponents filed a petition for writ of certiorari to the circuit court challenging the board of adjustment's approval of a conditional use permit for a grain storage facility. 2009 SD 81. The circuit court denied the writ finding in favor of the county and permit recipient. On appeal, for the reasons set forth in *Armstrong*, this Court found that one of the members of the board of adjustment had a disqualifying interest, which resulted in the opponents' due process rights being violated. *Id.* ¶¶ 32-33. As a result of the due process violation, this Court reversed and remanded for a new hearing before the board of adjustment without participation by the disqualified board member. *Id.* For this Court to have addressed the constitutionality of SDCL Chapter 11-2 under the Equal Protection

in *Armstrong* would have violated this Court's policy of declining to address constitutional questions whenever possible. *Dunker*, 90 N.W.2d at 368.

If an appeal can be resolved without addressing the constitutionality of a statute, this Court has consistently and appropriately declined to address constitutional questions. The reason for this policy of abstention is set forth below:

> To declare statutes unconstitutional is a delicate power of the courts to be exercised with great caution. The fact that in declaring a statute unconstitutional the court annuals the act of a co-ordinate department of government justifies the attitude of the courts in declining, whenever possible, to pass upon constitutional questions.

Dunker, 90 N.W.2d at 368 (citations omitted).

Most recently, this Court summarized its policy of abstaining from addressing unnecessary constitutional questions:

> [W]e review the constitutionality of a statute only when it is necessary to resolve the specific matter before us, and then only to first decide if the statute can be reasonably construed to avoid an unconstitutional interpretation."

State v. Rolfe, 2013 SD 2 ¶ 13, 825 N.W.2d 901 (quoting *Steinkruger v. Miller*, 2000 SD 83, ¶ 8, 612 N.W.2d 591 (citing *City of Chamberlain v. R.E. Lien, Inc.,* 521 N.W.2d 130, 131 (S.D. 1994))). This Court, like courts throughout the nation, avoids constitutional issues if they are not necessary to resolve an appeal.

In *Metropolitan Life Insurance Company v. Kinsman*, this Court wrote, "we refrain from hasty ventures into constitutional analysis until after any preliminary obstacles have been surmounted and judgment is unavoidable." 2008 SD 24, ¶ 9, 747 N.W.2d 653. While Ag United quotes from *Kinsman* in its

argument addressing what Ag United dubs "Rules of Determining Statutory Constitutionality," Ag United omits from its brief any reference to this Court's policy of abstention.

This Court will not address the constitutionality of a statute until doing so is necessary and "unavoidable." *Kinsman*, 2008 SD 24, ¶ 9. Ag United argues that this Court has implicitly approved of the constitutionality of the board of adjustment writ of certiorari appeal scheme set forth in SDCL Chapter 11-2 by relying on four cases: *Elliott*, *Jensen*, *Goos RV*, and *Armstrong*. As set forth above, this Court was able to resolve all four appeals in a manner that would make a constitutional analysis of SDCL chapter 11-2 unnecessary and completely avoidable. Ag United argues the omission of Equal Protection analysis in those four cases should be interpreted to mean this Court has implicitly approved of the board of adjustment writ of certiorari appeal scheme. However, given this Court's long-standing policy of abstention from constitutional issues until such issues become "unavoidable," the omission of Equal Protection analysis is meaningless. Whether the writ of certiorari appeal scheme from board of adjustment appeals denies Equal Protection to South Dakota citizens is an issue that has been avoidable in past cases. This Court has simply not addressed the pending Equal Protection challenge in prior cases.

II. Equal Protection.

A. Arbitrary Classifications.

In their prior briefing, the Citizens extensively addressed the issue of arbitrary classification. The Citizens will confine their argument to addressing new or differently nuanced arguments raised by Ag United.

Ag United relies heavily upon *Kraft v. Meade County*, 2006 SD 113, 726 N.W.2d 237, in support of its SDCL chapter 11-2 "classification" argument. In *Kraft*, there were different notice and procedural provisions applicable to governmental annexation and incorporation, which are two different governmental actions. This Court found no arbitrary classification in *Kraft*, "because the differing notice requirements for annexation and incorporation are not dependent upon any classification of the citizenry. Rather, the required notice is dependent on whether the government action is one of incorporation or annexation." *Id.* ¶ 11. Ag United argues that the classification of citizens is not the issue in this case, and further argues that "the distinction lies in the source of the decision-making body and not in the citizen bringing the appeal."

Notably, *Kraft* involved the same decision-making body and its two governmental powers: annexation and incorporation. This Court found no constitutional violation when one set of procedures applied to annexation and another set applied to incorporation. Differing *governmental action* was central to the decision in *Kraft*.

With conditional use permits, the same governmental action is involved in county commission and board of adjustment counties: that is, the issuance of a conditional use permit. If a citizen happens to live in Minnehaha County, any

appeal to circuit court is reviewed *de novo*. In Grant County and Moody County, however, conditional use permit appeals are reviewed under the restrictive writ of certiorari standard at the circuit court level. The same governmental action (issuance of a conditional use permit) is involved, but a citizen's residence is the classification that determines the rights afforded on appeal.

Ag United argues that different decision-making bodies (county commission versus board of adjustment) are involved, which makes the classification acceptable. Again, *Kraft* did not involve different decision-making bodies, but rather involved different governmental actions. Moreover, that different decision-making bodies are involved does not mean that classifications are not created by SDCL chapter 11-2. In *City of Aberdeen v. Meidinger*, this Court rejected the notion that different decision-making bodies can cure an Equal Protection violation. 233 N.W. 2d 331 (S.D. 1975).

In *Meidinger*, the exact same criminal offense resulted in different penalties, depending on whether the enforcing municipality had established municipal courts. *Id*. at 333. Necessarily, there were two decision-making bodies in *Meidinger*: municipal courts (which could impose enhanced penalties) and other courts enforcing municipal laws (which could not impose enhanced penalties). The existence of different decision-making bodies did not render the statutory scheme in *Meidinger* constitutional. While the legislature did not expressly create classifications among citizens in *Meidinger*, the legislation allowing for enhanced penalties in municipalities with municipal courts had the

effect of classifying citizens. *Id*. ("[t]here can be no doubt that the statute did set up classifications among persons in the state").

Harmonizing *Meidinger* and *Kraft* in the context of conditional use permits and different standards of review in circuit court is straightforward. The issue is not whether different *decision-making bodies* are involved (a proposition necessarily rejected in *Meidinger*), but rather whether different *governmental actions* are involved. In county commission and board of adjustment counties, the same *governmental action* is involved (granting or denying a conditional use permit), but the action is taken by different decision-making bodies. This is the precise situation in *Meidinger* that this Court found to be unconstitutional. Just as in *Meidinger*, there is no doubt that our legislature created classifications among persons in this state, depending on whether they live in county commission or board of adjustment counties.

B. Strict Scrutiny/Rational Basis Review.

The Citizens rely on their prior briefing on the issue of fundamental rights and strict scrutiny. Ag United did not raise any unique points, therefore, the Citizens will not simply repeat their argument here. For the reasons stated previously, fundamental rights are involved and this Court should find that SDCL chapter 11-2 fails a strict scrutiny analysis.

After determining that arbitrary classifications are present in SDCL chapter 11-2, the next issue is determining "whether a rational relationship exists between a legitimate legislative purpose and the classifications created." *In re Davis*, 2004 SD 70, ¶ 5, 681 N.W.2d 452. The Citizens have extensively briefed

the lack of a rational relationship between the legislative purpose and the classifications created, and further highlighted the lack of an adequate determining principle. The remainder of this argument will focus on the arguments of Ag United which warrant a further response.

Ag United and the parties to this appeal devote much time to discussing *Metropolitan Associates v. City of Milwaukee*, 796 N.W. 2d 717 (Wis. 2011). *Metropolitan Associates* reviewed the Wisconsin legislature's more subtle second attempt to classify citizens into different groups with writ of certiorari and *de novo* appeal rights in tax assessment appeals. The Wisconsin legislature allowed counties to opt out of *de novo* review of tax assessment appeals, thus providing local control to counties. *Id*. at 720.

Ag United points out that the Wisconsin legislation "dealt specifically with the standard of review being afforded to its citizens and the standard of review was the focus of the amended statute." (Ag United Brief at § D.4.) Ag United further argues: "the fact the standard of review in Metropolitan was the entire purpose behind the statute at issue rather than merely incident, as in this case, is also significant to the determination of whether the classification bears a rational relationship to a legitimate legislative purpose." (*Id*.)

Ag United is correct that the purpose behind legislative action is important. It is important in opining whether there is a "determining principle" for purposes of deciding whether classifications are arbitrary. *See Davis,* 2004 SD 70 ¶ 7. Ag United's discussion of *Metropolitan Associates* actually cuts against its

overall argument, both on the issue of arbitrary classification as well as for determining a rational basis.

With the Wisconsin legislation, there was an express connection between the legislative action and the intended goal. Despite the clarity of the legislation, *Metropolitan Associates* found no rational basis to treat citizens of different counties differently in terms of standard of review rights. The court held that the legislature's "irrational denial of *de novo* review to a distinct class of citizens" was unconstitutional. *Metropolitan Associates*, 796 N.W.2d at 733.

SDCL Chapter 11-2 certainly focuses on local control, allowing counties with fewer resources and less urban planning expertise to adopt a more streamlined approach through adoption of a board of adjustment. However, there is no rational relationship between that ostensible goal and denying citizens in board of adjustment counties *de novo* review rights at the circuit court level. SDCL Chapter 11-2 undoubtedly deprives citizens of important legal rights. The fact that such a deprivation is "merely incidental" as noted by Ag United (Ag United Brief at § D.4) undermines Ag United's argument. That the deprivation of equal review rights at the circuit court level is an incidental effect of SDCL Chapter 11-2 supports the Citizens' argument that there is no rational relationship between the legislature's goal and the deprivation of rights, since it happened incidentally.

CONCLUSION

The Citizens respectfully request that this Court reverse the circuit court's decision and the Board's issuance of the conditional use permit and, if appropriate, remand this matter for further proceedings with a *de novo* review of any county-level decision.

Dated at Sioux Falls, South Dakota, this 28th day of April, 2014.

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The undersigned hereby certifies that this Brief of Appellees complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 2,570 words and 14,207 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 28th day of April, 2014.

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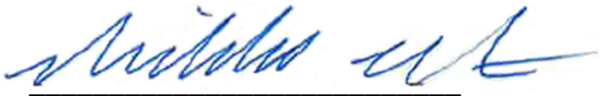

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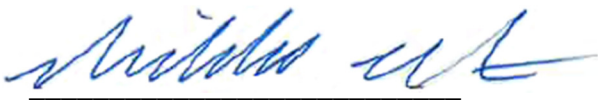

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