STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF DOUGLAS	)	FIRST JUCICIAL CIRCUIT

GORDON HEBER,
PETITIONER,

VS.

DOUGLAS COUNTY BOARD
BOARD OF ADJUSTMENT
DOUGLAS COUNTY PLANNING
COMMISSION,
RESPONDENT.

MEMORANDUM DECISION
AND ORDER

This matter came on for hearing February 9, 2006 at the Douglas County Courthouse in Armour, South Dakota. This case is before the Court as a Petition for a Writ of Certiorari and Application for a Writ of Prohibition against the Douglas County Planning Commission.

FACTS

The factual background of this case is as follows. On February 2, 2005 the Plaintiff, Gordon Heber (Heber), submitted two building permit applications to the Douglas County Zoning Administrator (Larson) seeking approval for the planting of shelterbelts and riparian buffers on his land. It appears that Heber had previously been informed that building permits were necessary before planting trees even on land zoned as agricultural. On February 2, 2005 Larson issued building permits 424 and 425 to Heber approving the shelterbelts as they had been proposed. No appeal from the issuance of these building permits was ever filed.

On March 10, 2005, thirty-six (36) days after Larson approved the permits, the Douglas County Planning Commission met and reviewed Heber's approved building permits. This hearing was conducted without any official notice being given to Heber. At that meeting the Planning Commission read a letter from the Douglas County

Conservation District which expressed concerns as to the two building permits. The commission also heard complaints from two concerned landowners. The main concern from all of the parties seemed to be that these proposed plans were not really "shelterbelts". All members of the planning Commission then voted in favor of a motion to deny the already issued building permits 424 and 425.

The next day, March 11, 2005, the Planning Commission met in a special session where they revoked the previous day's motion to deny the permits and instead approved a motion to "table" any action on the permits. This meeting was also conducted without any official written notice to Heber. As a result of this meeting, the Board referred the matter to the Douglas County Drainage Board, who had "more expertise in this area", and chose to wait for their direction for further action on the permits. The Douglas County Commissioners, sitting as the Drainage Board, met on March 15, 2005 and voted to recommend that no further action be taken on permits 424 and 425 until more information is received from Heber. Larson was directed to write Heber and inform him of the decision.

Throughout the next few months there were numerous exchanges of letters and information between Heber and the Drainage Board as well as meetings held by the different county boards. During this entire process Heber questioned the Board's authority to request further information and their ability to suspend his already issued building permits. However, Heber did cooperate with the requests of the various boards with the intention of avoiding litigation, and in the hopes of getting his project approved.

The final plans for the riparian buffers on Heber's land were approved by the National Resources Conservation Service (NRCS) around September of 2005. On October 4, 2005 the County Commissioners held a special meeting, in part to discuss Heber's building permits. At that meeting Heber presented to the Commissioners, who also sat as the Drainage Board, a more detailed site plan, as well as specifically identifying the project's location, density, and materials and species of vegetation. At that meeting the Douglas County Drainage Board approved a motion to recommend that the Planning Commission lift its suspension of permits 424 and 425.

Despite the recommendation by the Drainage Board to lift the suspension of the permits, the Planning Commission issued yet another letter to Heber on October 14, 2005

informing him that the Commission had decided to "delay any action on terminating the suspension of building permits #424 and #425 until a specific site plan (SEC. 913) is received by the Douglas County Planning Commission." (letter from Larson 10/14/2005) In that same letter Larson requested Heber to classify a riparian buffer in accordance with the zoning ordinance.

In response to the October 14th letter, George Sherrard, the District Conservationist for the NRCS, wrote a letter to the Planning Commission further defining and describing a riparian buffer. The sum of the letter indicated that the riparian buffer fit within a permitted agricultural use outlined in the Zoning Ordinance as an erosion control device as per Sec. 503(8). Also, on October 25th a letter was sent to the Planning Commission by Heber's attorney again questioning the Commission's ability to suspend the permits and requesting a speedy resolution of this matter. Then on October 27th the Planning Commission met in a special session where they decided no further action could be taken on Heber's permits until "detailed site plans are submitted to the Douglas County Planning Commission for review." (Letter from Kelly 10/27/2005) It should be noted that very detailed plans were previously submitted to the Drainage Board, to which the Board of Adjustment had deferred its decision. It was after this letter from the Planning Commission that Heber's attorney filed for a Writ of Certiorari with this Court. An Amended Petition was later filed which included an Application for Writ of Prohibition.

Discussion

Issue #1: JURISDICTION

Respondents claim that this Court does not have jurisdiction to hear this case. Respondent claims that Heber did not file his petition with the Court within 30 days in accordance with SDCL 11-2-61. This Court finds that argument to be without merit.

First, the South Dakota Supreme Court has made it quite clear that the South Dakota Legislature has intended to completely occupy the field of board of adjustment appeals. *In re Yankton County Commission*, 2003 SD 109, ¶18, 670 NW2d 34. In that decision the Supreme Court recognized that in the 2003 Amendment to SDCL 11-2-58 and 11-2-61, the Legislature had created a way for board of adjustment appeals to be heard by the board of county commissioners "in accordance with the county ordinance.

Id. at ¶19. However, in 2004 the Legislature again amended the aforementioned statutes to take out that part which allowed appeals to county commissioners. *See* SDCL 11-2-58 and 11-2-61. Because the Supreme Court has made it clear that state law preempts county law in this area, this Court can only logically conclude that the Legislature does not intend appeals from the boards of adjustment to be heard by anyone but circuit courts. This appears to be the case even though the local ordinance specifically allows an appeal to the County Commissioners. *See* Zoning Ordinance Sec. 1101. This issue was brought up by the Court during oral arguments and at any rate, the issue of a County Commissioner appeal is deemed waived and superseded by SDCL 11-2-61 & 62.

That brings us to the issue of whether or not the filing of the appeal was timely, and this Court believes that it was. SDCL 11-2-61 states that:

> any person or persons, jointly or severally, aggrieved by *any decision* of the board of adjustment . . . 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. (emphasis added)

When the Douglas County Board of Adjustment declined to follow the Drainage Board's recommendation to stop its suspension of the building permits, that was a decision by which Heber was aggrieved. Up to that point Heber had been complying with the Drainage Board and the Board of Adjustment as per their instructions to resolve this matter amicably. The Board of Adjustment had specifically deferred this issue to the Drainage Board. Once the Board of Adjustment made the decision not to follow the Drainage Board's recommendation, Heber realized that there would be no timely or amicable resolution of this case. The file shows that Heber clearly filed his Petition within 30 days of that decision by the Board of Adjustment.

The statute does not specify that a person can only appeal from a "final" decision or the "first" decision, but rather it states that a person aggrieved by "any" decision may file for a writ of certiorari. It is quite clear to this Court that no final decision has been made in this case. Therein lies the problem. The record unmistakably shows that Heber has submitted detailed site plans and information to both the Drainage Board and the Board of Adjustment. The record shows that Heber has submitted much more information than that of a neighboring landowner who applied for the same type of permit, which was granted without any dispute. The Drainage Board, who the Planning

Commission deferred to, held a hearing and looked at substantial plans and other information and recommended that the suspensions be lifted and the permits granted. Heber could have appealed the initial decision to suspend his permits made in March, but he was led to believe that if he cooperated this issue could be resolved without litigation.

It is clear from the record that on October 14, 2005 the Planning Commission decided to ignore the recommendation of the very board it had earlier decided to defer to. That decision is appealable. Consequently, Heber timely filed for his Petition for Writ and the Court finds it has jurisdiction.

Issue # 2: THE DOUGLAS COUNTY PLANNING COMMISSION/BOARD OF ADJUSTMENT HAS EXCEEDED IT'S AUTHORITY AND ACTED ILLEGALLY.

The Supreme Court has recognized that "[s]ince the legislature specified that an appeal to circuit court must be in the form of a petition for a writ of certiorari, the Court is limited in its review." *Elliott v. Lake County Bd. of Comm.*, 2005 SD 92, ¶14, 703 NW2d 361. The standard of review under a writ of certiorari "cannot be extended further than to determine whether the ... board ... has regularly pursued the authority of such board ... ." *Id.*(citing SDCL 21-31-8). The Supreme Court recently stated:

> 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. Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding ... .

Id. (citing *Hines v. Board of Adjustment of City of Miller*, 2004 SD 13, ¶10, 675 NW2d 231, 234 (internal quotations and citations omitted)).

A. THE PLANNING COMMISSION/BOARD OF ADJUSTMENT HAD NO AUTHORITY TO REVIEW A DECISION OF THE ZONING ADMINISTRATOR THAT HAD NEVER BEEN APPEALED

The Zoning Ordinance in this case gives abundant authority and discretion to the Zoning Administrator to interpret and enforce the ordinance. Section 1101 of the Ordinance states:

> "It is the intent of this Ordinance that all questions of interpretation and enforcement shall be first presented to the Zoning Administrator, and that such questions shall be presented to the Board of Adjustment only on appeal from the decision of the Zoning Administrator, * * *." (emphasis added)

Section 901 of the Ordinance provides that the Zoning Administrator "shall be designated by the Douglas County Commission," and "shall administer and enforce this Ordinance". Notable here is the fact that the Administrator is appointed by the County Commissioners, to administer and enforce the Ordinance, which indicates that he stands independently of the Planning Commission and the Board of Adjustment, and his decisions are reviewed only on appeal. It does not appear, through the Court's interpretation of the Ordinance, that the Administrator is subject to the direction or control of either board.

The Board of Adjustment does have the right to hear appeals of decisions made by the Administrator. (Sec. 1007) The Ordinance provides specific rules to be followed to appeal a decision of the Zoning Administrator. Section 1007(1) provides that an "appeal will not be heard" (emphasis added) until the person desiring to appeal the administrator's decision files a "written appeal" with the Zoning Administrator within five (5) days of the decision. Thereafter, written notice of the appeal shall be given to the appellant prior to meeting as per Sec 1007(3). This section contemplated that the Board of Adjustment will hold a hearing on the appeal and decide the same by upholding, overruling or amending the decision of the Administrator.

The building permits in this case were issued on February 2, 2006. Over a month later, (thirty-seven days) after Larsen granted Heber's permits, the Board of Adjustment *sua sponte* decided to review the permits and deny them. Then, the very next day the Board decided to rescind its previous day's decision and table the permits. This was all done without a written notice of appeal being filed and without written notice of hearing being provided to Heber. It was further done after the time for appeal had expired. This Court finds nothing in the Zoning Ordinance, or South Dakota law, that authorizes the actions taken by the Board of Adjustment. It is clear from the County ordinance as well as from state statutes that the Board of Adjustment has only the authorization to hear appeals taken from a decision made by the Zoning Administrator (Larson).

The county ordinances provide a process for appeals which require written notice of appeal not more than five days after the decision by the administrator is rendered. Thereafter, written notice of hearing was required to be given to Mr. Heber. The Board of Adjustment is then required to hold a hearing on that appeal. Nothing like that happened in this case. A review of the record reveals that, even to this day, there has never been a written appeal filed in regard to Heber's building permits. There is no authorization in the Zoning Ordinance for a Board of Adjustment to *sua sponte* review an authorized permit without a pending appeal.

It is also clear to this Court, and the Court finds, that Larson was not acting in his own capacity as Administrator when he wrote the March 30, 2005 letter to Heber informing him that his permits had been suspended. Instead, Larson was acting at the direction of and because of the vote taken by the Planning Commission. This also is an act in excess of the Board of Adjustment's authority. Respondent claims that the Zoning Administrator has the authority to revoke an improperly issued permit or a permit based upon misrepresented information. That did not happen in this case. The Board of Adjustment decided to suspend the permits and to direct Larson to inform Heber of such. In doing so the Board was outside the scope of its authority conferred by South Dakota Statutes, SDCL 11-2-53, and the Zoning Ordinance itself.

Although this Court cannot, in its limited review, decide this issue on its merits, it can review the record to determine if the Board of Adjustment acted in excess of its authority or otherwise acted illegally. Such a review in this case shows that the Board of Adjustment did in fact exceed its authority and was not regularly pursuing the authority conferred upon it.

B. DOUGLAS COUNTY HAD NO AUTHORITY TO REQUIRE A BULDING PERMIT FOR THE PLANTING OF A RIPARIAN BUFFER CONSISTING OF SHELTERBELTS, TREES, SHRUBS AND GRASSES.

The land that is in question in this case is zoned as agricultural and it is the stated intent of the Ordinance to protect agricultural lands and to limit "residential, commercial and industrial development to those areas where they are best suited". The permitted uses of agricultural lands in Agricultural Districts are defined by Sec. 503 of the

Ordinance. Under Sec. 501(8) "farm drainage , flood control... and erosion control devices meeting all county, state and soil conservation district regulations" are permitted. Under Sec. 501(20) shelterbelts are also authorized.

Building permits are required in Douglas County whenever the owner plans on erecting a building or structure or otherwise moving or adding to an existing building or structure, or if the owner plans on changing the use of his land. *See* Zoning Ordinance 911. The location of shelterbelts is restricted only so as to prohibit view obstructions and requires that they be planted at least one hundred feet from a change in ownership property line. (Sec. 517 Zoning Ordinance)

Mr. Heber's planned riparian buffer consisted of a shelterbelt as well as an erosion control device consisting of trees, shrubs and grasses, in compliance with 7 C.F.R. Sec. 1410.6(b). That federal regulation requires Mr. Heber's planned improvement to reduce sediment or nutrient runoff when grass, shrubs, or trees are grown. This is all well documented in the record by information submitted by Mr. Heber as well as the NRCS. Consequently, there can be little if any dispute that the proposed improvements are permitted uses under Sec. 503 of the Ordinance.

Since Mr. Heber's land is zoned agricultural he is allowed to engage in any permitted "use" of the property that is authorized by the Ordinance without the necessity of obtaining a building permit. Sec. 517 does not specifically require a building permit for a shelterbelt. Apparently the Zoning Administrator may enforce the shelterbelt setback requirements under Sec.901 of the Ordinance. Here, Heber is not changing the use from agricultural to residential, commercial, industrial or other use. Rather, he is changing a small portion of his property from pasture or row cropping to a riparian buffer, which is a permitted agricultural use. Since there is no change in use, there is no need for Heber to apply for or to receive a building permit.

C. THE BOARD OF ADJUSTMENT ACTED ARBITRARILY AND BEYOND ITS JURISDICTION IN DENYING THE PERMITS.

In this case the Board of Adjustment acted in violation to the precepts of Hines v. Board of Adjustment of City of Miller, 2004 SD 13, 675 NW2d 231. In *Hines*, the Court considered the denial of a variance request where the Board acted upon the request of

neighbors. In *Hines*, the Court, quoting from Cary v. City of Rapid City, 1997 SD 18, 559 NW2d 891, stated:

> "The ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners." *Id.* Because the Constitution protects a landowner's right to use land for any legitimate purpose, we are wary of decisions that are based on "whims of neighboring landowners." *Id.* ¶ 22. This is so because their decisions may be lacking "any standards or guidelines," leading to decisions that may be arbitrary or capricious. *Id.* Worse, their opinions may be wholly self-serving." **** "To base a decision solely on the opinion of neighbors was arbitrary and beyond its jurisdiction."

2004 SD at ¶15, 675 NW2d at 235.

In Hines, the Court clearly indicated that decisions of a Board of Adjustment that are arbitrary and lacking standards or guidelines may be reviewed by the Court on a petition for writ of certiorari.

In the present case the minutes of the meeting of the Board indicate that the matter of the Heber permits was brought to their attention by a group of neighbors. If that had not been the case, the permits would have remained approved and, presumably, Heber would have been allowed to plant the riparian buffer without interference by the local zoning authorities. These concerned neighbors have not been specifically identified in any of the minutes that make up the record in this case. Nor have their specific concerns been put on the record. One can surmise that their concerns were potential flooding problems caused by the proposed planting by Heber, but their concerns were never officially put on the record.

The Court finds that the Board of Adjustment in this case acted beyond its jurisdiction and arbitrarily for the following reasons:

1. The proposed planting of vegetation by Heber was a permitted agricultural use under the Ordinance;
2. The proposed riparian buffer was approved by the Zoning Administrator who is charged with interpretation and enforcement of the ordinance;
3. The Board reviewed the decision of the Zoning Administrator without an appeal being filed, but rather, on the verbal concerns of unidentified neighbors;
4. The Ordinance contained no standards or guidelines to apply to Heber's proposed planting, other than the same comply with all county, state, and soil conservation district guidelines;

5. Heber clearly showed his riparian buffer complied with such guidelines by submitting plans, maps, materials from NRCS, and letters and comment by NRCS officials;
6. A neighboring landowner was given permission and authority to plant a very similar buffer on her land that lies on the same creek with the same flooding issues without dispute or controversy;
7. The Board of Adjustment agreed and directed to refer their concerns to the Drainage Board who had more knowledge about the flooding issue and subsequently refused to abide by the decision and recommendation of the Drainage Board to lift the suspension of the building permits; and
8. The Board decided to continue its suspension of the permits despite the lack of any standards or guidelines that could be applied to guide the Board in any further decision.

Consequently, since the Board's decision is clearly arbitrary and lacks any reasoned application of Mr. Heber's proposed improvement to any standards, they have acted outside their authority.

CONCLUSION

This Court finds that the Board of Adjustment did not have jurisdiction over the matter as there was no prior appeal of the Zoning Administrator's decision, there was no written notice of appeal served upon the landowner, there was not a change in use that required a building permit, and the Board's decision to continue suspension of the building permits after the Drainage Board had resolved flooding issues in favor of Heber constituted an arbitrary decision.

ORDER

Therefore, based upon all of the above and foregoing, it is hereby

ORDERED that the Writ of Certiorari and Writ of Prohibition are granted, and it is further

ORDERED that in accordance with SDCL 11-2-65, the decision by the Board of Adjustment to "table" any action on building permits #424 and 425 is reversed and set aside as a nullity due to the Board of Adjustment's lack of jurisdiction, and it is further

ORDERED that the prior decision of the Zoning Administrator granting building permits #424 and 425 is upheld and reinstated, and shall be final.

The Court further orders that this decision shall incorporate the Findings of Fact and Conclusions of Law, and that the facts as found and recited herein shall become a part of and shall supplement the Court's Findings of Fact and Conclusions of Law; and that since this decision is primarily a question of law, that all briefs of the parties shall be filed with the Clerk of Courts and become a part of the record herein.

Dated this 12th day of April, 2006

BY THE COURT

Bruce V. Anderson
Circuit Court Judge

ATTEST:
Douglas County Clerk of Courts

STATE OF SOUTH DAKOTA
First Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

APR 12 2006

Dorene Winckler
Douglas County Clerk of Courts
By: