IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 23372

JOHN BECHEN and THE MOODY COUNTY CHAPTER OF DAKOTA RURAL ACTION,

Petitioners/Appellants,

v.

MOODY COUNTY BOARD OF COMMISSIONERS, ALVIN GULLICKSON, MARTIN MAY, KENNETH DOYLE, BILL NIBBELINK, and JEAN LARSON, COUNTY AUDITOR,

Respondents/Appellees,

and

BRITTANIA DAIRY, LLP and THE REX NEDEREND FAMILY TRUST,

Intervenors/Appellees.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MOODY COUNTY, SOUTH DAKOTA
THE HONORABLE DAVID R. GIENAPP,
JUDGE PRESIDING

BRIEF OF AMICUS CURIAE AMERICAN PLANNING ASSOCIATION AND SOUTH DAKOTA PLANNERS ASSOCIATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

AMERICAN PLANNING ASSOCIATION AND SOUTH DAKOTA PLANNERS ASSOCIATION

Amicus Curiae American Planning Association ("APA") represents the nation's land use planning professionals – those charged with addressing the public's interest in how land is used and with drafting regulations to ensure that the impacts of adverse land use are minimized. As a nonprofit, educational research organization with more than 34,000 members nationwide, the APA is the oldest and largest organization devoted to advancing state and local land use planning.

More than sixty-five percent of APA members work for government agencies in urban and rural planning. As a result, APA has developed special expertise in the variety of tools available to implement land use plans, including zoning and conditional use permits ("CUPs").

The APA has participated as amicus curiae in many state and federal cases involving planning issues. A few of these cases include Agins v. Tiburon, 447 US 255 (1980), Williamson County Reg'l. Planning Comm'n. v. Hamilton Bank, 473 US 172 (1985), Lucas v. South Carolina Coastal Council, 505 US 1003 (1992), Dolan v. City of Tigard, 512 US 374 (1994), and Palazzolo v. Rhode Island, 533 US 606 (2001).

This case raises issues of importance to planners

nationally. CUPs, sometimes called special permits, are used in virtually every state. The vast majority of states consider them to be administrative tools for implementing adopted land use plans. Holding CUPs subject to referenda, and by inference initiatives, would interfere with the ability of local government to carry out adopted legislative policies, increase development uncertainty and potentially result in grossly inconsistent land-use decisions without regard to important planning principles.

STATEMENT OF THE CASE

APA adopts the statement of the case and facts as set forth by Respondents and Appellees. However, the following points are of particular significance to the arguments set forth in this amicus brief.

The Moody County Commission adopted the Moody County Comprehensive Land Use Plan ("CLUP") after public hearing on January 1, 2003. (App. 2). The CLUP was not challenged and became effective on January 21, 2003. Id. The County Commission adopted the Moody County Zoning Ordinance ("MCZO") after public hearing on January 21, 2003. Id. The MCZO was not challenged and became effective on February 25, 2003. Id.

The Moody County CLUP specifically addressed the siting and approval of concentrated animal feeding

operations ("CAFO") within agricultural zones. It identified CAFOs as intensive agricultural and special uses, but acknowledged that they may be incompatible with surrounding agricultural uses, depending on facts. (App. 5). The CLUP required mandatory public input, a comprehensive site plan review, and environmental assessment procedures before approval of any CAFO. Id. The CLUP set forth general requirements for the location, construction and operation of CAFOs, including a requirement that coordinated precautionary measures be instituted to avoid pollution of the aquifer. Id. In addition, the CLUP included a policy of regulating CAFOs, processing and related operations to protect environmental quality and minimize conflicts with existing and future development areas.

The MCZO listed CAFOs as a conditionally allowed use in agricultural zones, subject to issuance of a CUP by the Board of Adjustment. (Exhibit S, § 2.04.04.) Chapter 4.25 of the MCZO established specific minimum performance standards for construction of a CAFO, including detailed siting, transportation, management and setback requirements. Chapter 4.25 does not grant discretion to the Board of Adjustment to modify these detailed performance standards. (Exhibit S).

In addition to meeting the minimum standards set

forth in Chapter 4.25, a CAFO must comply with the general requirements applicable to all conditional uses under MCZO Section 3.04.01. As established by the County Commission, these requirements are intended to ensure compatibility between CAFOs and surrounding uses, as well as addressing environmental concerns. For instance, before approving a CUP for a CAFO, the Board of Adjustment must hold a noticed public hearing, find that the CUP will not adversely affect the public interest and certify that provision has been made for traffic access, parking, noise, glare, odor, economic impacts, refuse and service areas, utilities, screening and buffering, signage, yards and "compatibility and harmony" with other properties. (Exhibit S, § 3.04.01.)

In summary, the facts show that Moody County adopted a Comprehensive Land Use Plan that contemplated construction of CAFOs in agricultural zones, subject to a series of siting, construction and operational conditions. The Zoning Ordinance implemented the CLUP by establishing detailed minimum performance standards for all CAFOs, depending on size. The Zoning Ordinance further implemented the CLUP by requiring the Board of Adjustment to approve a CUP for all CAFOs.

Although the Zoning Ordinance delegated authority to issue CUPs for CAFOs to the Board of Adjustment, it

constrained the Board's discretion to a narrow range of fact-finding by establishing minimum standards and requiring written findings certifying compliance with the standards. The Board of Adjustment did not have authority or discretion to approve a CAFO unless it complied with the minimum standards established by the County Commission in the Comprehensive Land Use Plan and Zoning Ordinance.

SUMMARY OF ARGUMENT

1. The reserved power of the people to review and overturn government decisions through referenda is limited to legislative decisions that establish a plan or policy, and does not extend to administrative decisions that implement or execute the legislative action.
2. Conditional use permits are quintessentially administrative decisions that implement planning policies adopted in the comprehensive plan or zoning ordinance, which also contain standards and criteria for issuance of the conditional use permit.
3. The Moody County conditional use permit procedure meets the requirements for an administrative decision, in that it implements the policies applicable to CAFOs in the comprehensive plan and zoning ordinance and severely circumscribes the discretion available to the Board of Adjustment. The discretion exercised by the

Board of Adjustment does not involve policy decisions, but is limited to the finding of facts under the zoning ordinance.

4. The overwhelming majority of other states have recognized conditional use permits as administrative decisions of the type not subject to review by initiative or referenda. Conditional use permits are a valuable tool for adding flexibility to one-size-fits all zoning classifications. Because they involve the case-by-case application of previously-adopted development standards to specific factual situations, they are not properly the subject of referenda or, by implication, initiatives.

5. Allowing conditional use permits to be overturned by referenda raises the perverse possibility that CAFOs failing to meet the minimum performance standards of the zoning ordinance could be approved by referendum or initiative, while CAFOs meeting each and every pre-established standard could be denied approval. Use of the referendum power in this manner seriously interferes with implementation of legislatively adopted plans and policies.

ARGUMENT

1. **THE RESERVED POWER OF REFERENDUM DOES NOT EXTEND TO ADMINISTRATIVE DECISIONS.**

The citizens of South Dakota have had the power of initiative and referendum for more than a century. In fact, in 1898, South Dakota became the first state to amend its constitution to provide for direct review of state legislation by the voters. Piott, Stephen, Giving Voters A Voice (U. of Mo. Press 2003). A solid block of western states quickly followed, with 24 states eventually granting the power to their citizens. Bowler, Shaun, et al., Citizens as Legislators (Ohio St. U. Press 1998).

The twin powers of initiative and referendum are among the most cherished of all political rights. In Taylor Properties v. Union County, 1998 SD 90, ¶ 24, 583 NW2d 638, 643, this Court referred to the referendum power reserved to the people by the South Dakota Constitution as a "sacred right." The United States Supreme Court has referred to the referendum process as "a basic instrument of democratic government. . ." Eastlake v. Forest City Enterprises, Inc. 426 US 668, 679 (1976). Other states have referred to the power as a "fundamental right," In re Title, Ballot Title and Submission Clause, 4 P3d 485 (Colo 2000), and "one of the most precious rights of our democratic process," Associated Homebuilders, etc, Inc. v. City of Livermore, 557 P2d 473, 482 (Cal 1976).

However, it is well established in all states that

the powers of initiative and referendum do not extend to administrative or executive decisions. See, e.g., Eastlake, supra, 426 US at 676-77. To ensure that these reserved powers are used only to decide legislative matters, the South Dakota Legislature has clarified the scope of the referendum power by statute:

> Any legislative decision of a board of county commissioners is subject to the referendum process. A legislative decision is one that enacts a permanent law or lays down a rule of conduct or course of policy for the guidance of citizens or their officers. Any matter of a permanent or general character is a legislative decision.
>
> No administrative decision of a governing body is subject to the referendum process, unless specifically authorized by this code. An administrative decision is one that merely puts into execution a plan already adopted by the governing body itself or by the Legislature. . . . SDCL § 7-18-15.1.

In general, therefore, legislative decisions involve the adoption of governmental policies by elected officials, which can be overruled by the people utilizing their reserved rights to legislate directly through referendum. In contrast, administrative decisions involve application of policies already adopted by the government. The power to administer regulations in accordance with pre-existing rules is not reserved to the people through the constitution, it is delegated to their representatives. In Wang v. Patterson, this Court held that the availability

of discretion is the determining factor in whether a decision is legislative or administrative. 469 NW2d 577, 580 (SD 1991). The Court cited McQuillin for the proposition that ""[w]here discretion is left to the local government as to what it may do, when the local government acts, it acts legislatively and its actions are subject to normal referendum procedure." Id., quoting McQuillin Mun. Corp., § 1655 (3rd Ed 2004). In Wang, for instance, the local agency retained discretion to decide whether the challenged condemnation was necessary. Similarly, in Kirschenman v. Hutchinson County Board of Commissioners, the Court found that "the Board retains *complete discretion* to determine whether to grant or deny particular conditional use permits." 2003 SD 4, ¶ 7, 656 NW2d 330, 333 (emphasis added).

As discussed more fully below, there is a crucial distinction between the type of discretion available to the local government when it acts legislatively, and the much more circumscribed discretion available in the administrative context, including CUPs. Legislative discretion allows the governing body, including the people through the power of referendum, to select among competing policies. Administrative discretion is limited to deciding whether the facts of a particular development meet the standards pre-

established by the legislative body. If the administrative body cannot find the required facts, it has *no* discretion to approve the project. Legislative bodies are not similarly constrained when they make policy decisions.

2. **CONDITIONAL USE PERMITS ARE GENERALLY RECOGNIZED AS ADMINISTRATIVE DECISIONS**.

CUPs are the primary tool by which a legislative body can allow problematic uses in specified zones, while still recognizing that individual applications may require the imposition of special conditions. "A special permit is a form of administrative relief which allows a landowner to use his property in a manner *permitted by the zoning ordinance* provided he demonstrates compliance with all standards and criteria enumerated in the legislation." Rohan, Patrick J., *Zoning and Land Use Controls*, § 44.01 [2], p. 44-13 (2002) (emphasis added). The traditional purpose of the CUP, or special use permit, is to provide local government with flexibility and broad latitude in allowing certain activities which are desirable in certain areas in limited numbers, but which must be controlled to avoid detrimental effects. Id., § 44.01[4], p. 44-22. "A zoning board of appeals or adjustment serves in an administrative capacity, and thus does not possess legislative authority." Id., § 49.01[5], p.49-14.

The administrative nature of the board of

adjustment was explained as follows by the International City Managers Association more than 35 years ago:

> The board of adjustment is a quasi-judicial body charged by the zoning ordinance with carrying out certain functions. It is not a legislative body with authority to substitute its judgment for that of the governing body, nor is it charged with the routine administration of the zoning ordinance, which is the responsibility of the zoning enforcement officer. The board must uphold the meaning and the spirit of the ordinance as enacted by the legislature even though it may disagree with the governing body's judgment as to the proper content of the ordinance. … In general, the board's functions fall under three major headings: (1) interpretation of the zoning ordinance; (2) the granting of "special use permits" or "special exceptions"; (3) the granting of "variances." Goodman, William, Ed., *Principles and Practice of Urban Planning*, 438 (ICMA 1968).

Although it recognized that the board must exercise its power to grant CUPs in strict compliance with the governing zoning ordinance, the ICMA went so far as to opine that the "granting of relief is automatic" rather than discretionary, when the board makes the mandatory findings. Id., p. 439. This rather extreme statement serves to underscore the role of the CUP as an implementation tool, since a CUP can only be issued when conditionally allowed in the zone by the legislative body in the adopting ordinance. Most commentators agree that the zoning ordinance must contain standards and criteria for approval of conditional uses, which further highlights the relationship between legislative adoption of the zoning ordinance and its

administrative application through the CUP process.

In other words, the board of adjustment's discretion is limited to determining whether the applicant has made the necessary factual showing to support issuance of the CUP. The board also has no discretion to approve a CUP which fails to make the necessary factual showing, or to disapprove a CUP for any reason other than those listed in the zoning ordinance. The board of adjustment further has no discretion to usurp the legislative function of deciding the zones in which the use should be allowed or the standards for issuance of the CUP. Rohan, supra, § 49.01 [5], p. 49-19.

3. THE MOODY COUNTY CONDITIONAL USE PERMIT PROCEDURE MEETS THE STANDARDS FOR ADMINISTRATIVE DECISIONS AND THEREFORE IS NOT SUBJECT TO REFERENDUM.

State law and the Moody County Zoning Ordinance combine to demonstrate that the CUPs for two CAFOs in this case meet the standards for administrative decisions. Conditional uses are defined by state statute:

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

SDCL § 11-2-17.4.[1]

The State Legislature then mandated that the "requirements" imposed on conditional uses be set forth in the zoning ordinance to be adopted by the County Commission:

> A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify the approving authority, each category of conditional use requiring such approval, the zoning districts in which the conditional use is available, and the criteria for evaluating each conditional use. 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." SDCL § 11-2-17.3.

State law also requires establishment of a board of adjustment in each county, either as a separate board, or as a special function of the planning and zoning commission. SDCL § 11-2-49.

As discussed above, Moody County followed these statutory directives in every respect. After full public hearing, it adopted the CLUP which identified areas generally appropriate for CAFOs, but recognized that special conditions were necessary to protect against the potential

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[1]Sections 11-2-17.3 and 11-2-17.4 became effective on July 1, 2004, after the Moody County CUP decisions in this case. However, to the extent that these statutes codify the decision in Kirschenman, they are reflective of pre-existing law governing the administrative issuance of large-scale CUPs. Compliance with the State Legislature's requirement that evaluation criteria be set forth in the zoning ordinance should also meet the requirements of Kirschenman.

adverse effects of the feeding operations. Similarly, the County Commission adopted a zoning ordinance which established CAFOs as *permitted uses* in agricultural zones, subject only to issuance of a conditional use permit in accordance with specified performance standards. Through both of these actions, the public was fully informed of the possibility that CAFOs could be permitted anywhere within agricultural zones where the performance standards were met.

The public was also fully informed of the criteria for issuance of a CUP for a CAFO, which were set forth in great detail in the zoning ordinance in accordance with SDCL § 11-2-17.3, including notice of the potential size of the uses. If the citizens of Moody County believed that the criteria legislatively established by the County Commission for locating CAFOs were improper as a matter of policy, they had the power to overturn them by referendum. If they believed that the CAFO provisions of the zoning ordinance were inconsistent with state law, they similarly had available the remedy of judicial review. Instead, they took no action when the County Commission adopted its plan and policy for locating CAFOs pursuant to the requirements for conditional uses under state law.

As found by the court below, the MCZO set forth

objective criteria for the board of adjustment to consider before granting a conditional use permit. The board considered each of the objective requirements applicable to CAFOs and those generally applicable to all conditional uses before issuing the CUPs at issue in this case. The board's decision to issue the CUPs was subject to judicial review to insure that it satisfied the standards in the CLUP and MCZO. As measures to implement the policies of the CLUP and MCZO, the CUPs meet the definition of an administrative decision under state law, SDCL § 7-18-15.1.

4. OTHER STATES HAVE RECOGNIZED THE IMPORTANCE OF CONDITIONAL USE PERMITS AS TOOLS FOR IMPLEMENTING PLANS AND ORDINANCES.

The vast majority of state courts have classified conditional use permits as administrative decisions. See, e.g., Sounhein v. City of San Dimas, 55 CalRptr2d 290 (Cal 1996); Willett v. Cerro Gordo County Bd. Of Adjustment, 490 NW2d 556 (Iowa 1992); SuperAmerica Group v. City of Little Canada, 539 NW2d 264 (Minn App 1995); City of Waukesha v. Town Bd. of Town of Waukesha, 543 NW2d 515 (Wisc 1995) rev. den. (1996); AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment, 172 F3d 307 (4th Cir 1999); Raczkowski v. Zoning Com'n Town of Naugatuck, 733 A2d 862 (Conn 1999); City of Olive Branch v. Bunker, 733 So2d 842 (Miss 1999); Gray v. White, 26 SW3d 806 (Mo 1999), rein-

stated 2000). Most of the judicial analysis in these cases focuses on the factual nature of the issues before the boards of adjustment, and the limited scope of their decision-making.

For instance, in Arnel Development Co. v. City of Costa Mesa, the California Supreme Court described the salient characteristics of administrative decisions:

> Prior California decisions had distinguished from zoning legislation a variety of administrative land use decisions, including . . . the granting of a use permit (see Johnston v. City of Claremont, supra, 49 Cal.2d 826, 834, [323 P2d 71 (Cal. 1958)]. . . . In classifying such decisions as adjudicative, courts have emphasized that the decisions generally involved the application of standards established in the zoning ordinance to individual parcels… and often require findings to comply with statutory requirements or to resolve factual disputes. . . . It is significant that the courts have not resolved the legislative or adjudicative character of administrative land use decisions on a case by case basis, but instead have established a generic rule. . . . Thus, even when such actions involve a substantial area . . . or affect the community as a whole, the courts invariably treat them as adjudicative in nature. 620 P.2d 565, 572 n.8 (1980) (citations omitted).

In Wiltshire v. Superior Court, the court relied on the need for notice and an opportunity to be heard in striking down a referendum on a conditional or special use permit:

> The award of a special use permit is characterized as an act adjudicatory in nature requiring notice and an opportunity to be heard. . . . The initiative gives to the electorate . . . the right to approve by a two-thirds vote the issuance of

> the special use permit. In the exercise of that electoral right, there is obviously no opportunity for notice and hearing and factual findings required in the adjudicatory process. . . . Those permits are the product of the adjudicatory process. Due process of law in that setting requires notice and hearing. 218 Cal. Rptr. 199 (Cal. App. 4 Dist. 1985).

In Fasano v. Board of County Commissioners, the Oregon Supreme Court focused on the site-specific nature of administrative decisions:

> It is not part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial or judicial in character. To place them in the hands of legislative bodies, whose acts are not judicially reviewable, is to open the door completely to arbitrary governments. 507 P.2d 23, 26 (Or. 1973), quoting Ward v. Village of Skokie, 186 N.E. 2d 529, 533 (Ill. 1962) (Klingbiel, J., specially concurring).

All of these rulings turn on the fact that legislative actions are fundamentally different from administrative decisions. Under state law, conditional use permits require individual notice and hearing, as well as specific criteria and factual findings. The size or nature of the proposed use does not affect the manner in which the approval must be made under SDCL § 11-2-17.3. Meanwhile, neither referenda nor legislative decisions, like the original Moody County CLUP decision to allow CAFOs under specified conditions, trigger the procedural requirements applicable to individual CUPs.

5. <u>SUBJECTING CONDITIONAL USE PERMITS TO THE REFERENDUM POWER RAISES SERIOUS QUESTIONS ABOUT COMPLIANCE WITH STATUTORY STANDARDS</u>.

If the proposed referendum on Moody County CUPs is upheld, there is no legal reason to restrict the power to "up-or-down" votes on approved permits. A referendum could be sought by a disappointed property owner to overturn denial of a CUP. Similarly, CUPs could be approved by initiative or even revoked, if the time for a referendum had passed. Individual CUPs issued for a specific project could be modified after-the-fact to reduce the size of an approved CAFO, or to increase setbacks or establish new noise and odor control requirements. Or, as in this case, the CUP decision could be challenged by referendum long after the time had expired for judicial appeal or even a referendum in the normal course.

Subjecting site-specific CUPs to referenda potentially deprives the public of important procedural protections built into state law, SDCL § 11-2-17.3. As discussed above, the board of adjustment does not have authority to approve a CUP which fails to meet all of the performance standards established in the MCZO. However, there is no requirement that findings be supported by evidence in a referendum election. It is possible, even likely, that referendum decisions will be made without regard to the specific criteria required by state law to be

set forth in the zoning ordinance. Although the people cannot adopt by referendum any law which could not also be adopted by their local government, a referendum on the CUPs in this case puts the voters of Moody County in direct conflict with the state statute requiring specific criteria for CUP decisions.

The Moody County Commission does not have authority to exercise legislative power when sitting as a board of adjustment. This is made clear by the legislature's requirement that all CUP decisions be made on the basis of specific previously-established criteria set forth in the zoning ordinance. SDCL §11-2-17.3. If the MCZO is interpreted by this Court to have delegated legislative power to the County Commission sitting as the board of adjustment, it would arguably violate both state law and basic principles of constitutional decision-making. In Cowan v. Stroup, the Supreme Court of North Dakota looked at this issue:

> A board of adjustment serves an important role in the zoning structure of a city. Its essential purpose is to deal with zoning cases by furnishing elasticity in the application of regulatory measures. 82 Am.Jur.2d Zoning and Planning § 61. It is not empowered to zone property or to change the zoning pattern in its basic particulars. "Since it is merely a quasi-judicial body it has no power to amend or repeal a zoning ordinance." 82 Am.Jur.2d Zoning and Planning § 258. 284 N.W.2d 447, 450 (N.D. 1979).

The decision of the court below in this case reflects the structure of the planning process as recognized across the nation. The simple structural answer is that the Moody County Commission was barred by law from delegating legislative authority to the board of adjustment. If the CUP process was legislative, *i.e.*, involved establishment of policy, it would have constituted an "unwarranted delegation of legislative functions. The law is well settled on this question." Id.

CONCLUSION

For all of the above reasons, Amicus Curiae American Planning Association and South Dakota Planners Association join with Respondents and Appellees in requesting the Court to affirm the decision below and to uphold its ruling that the CUPs in this case were administrative actions and thus not subject to referendum under the tests set forth in Kirschenman.

Dated this 9th day of December, 2004.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Amicus Curiae American Planning Association and South Dakota Planners Association, hereby certifies that on the 9th day of December, 2004, two true and correct copies of **BRIEF OF AMICUS CURIAE AMERICAN PLANNING ASSOCIATION AND SOUTH DAKOTA PLANNERS ASSOCIATION** were mailed by first-class mail, postage prepaid, to:

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and the original and fourteen (14) copies of **BRIEF OF AMICUS CURIAE AMERICAN PLANNING ASSOCIATION AND SOUTH DAKOTA**

PLANNERS ASSOCIATION 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.

Dated at Aberdeen, South Dakota, this 9th day of December, 2004.

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