STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LINCOLN	)	SECOND JUDICIAL CIRCUIT

* *

LINCOLN COUNTY	*	41CIV. 20-000275
Plaintiff,	*	**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**
DAVID TUNTLAND,	*	
Defendant.	*	

* *

INTRODUCTION

Plaintiff brought an *action* for declaratory judgment asserting that Defendant David Tuntland missed the time period to challenge the passage of the Lincoln County Board of Commissioners' (the "Board") bonding Resolution No. 2002-27 (the "Resolution"). Plaintiff in this *motion* argues again that the time period for Defendant's "challenge" to the "Lincoln County Commissioner's Resolution has expired and the Courts do not have jurisdiction to hear an appeal or for it to be referred to a vote in the County." *Pltf's Mot. p. 2.* Plaintiff relies on SDCL 7-18A-8 (effective date of resolutions), 7-8-29 (time allowed for appeal of a board decision by a person aggrieved), and 15-6-13(d) (regarding counterclaims against the State of South Dakota), arguing that Tuntland did not challenge the County Board's Resolution within 20 days of the last date of publication of the Resolution, which occurred on February 28, 2020. *Pltf's Brief in Sprt of Rule 15-6-12(c) motion, p. 2, ¶9; pp. 4-5.* The statutes are not applicable. Tutland's defenses and challenges are specific to the Board's failures to give notice and to pass the Resolution by the statutory mandated "super majority.". Accordingly, Plaintiff's motion for relief for judgment on

the pleadings under SDCL 15-6-12(c) must be denied and Defendant Tutland's counterclaims addressed on the merits.

ARGUMENT

South Dakota Codified Laws, 15-6-12(c) permits a party to obtain judgment on the pleadings in certain limited circumstances. A motion for judgment on the pleadings is appropriate *only* when there are no disputed facts, and the issues of law must be resolved in the movant's favor. However, the legal issues to be resolved do not favor the Plaintiff Lincoln County and as for the notice issue also in dispute, the parties dispute the facts and hence, judgment on the pleadings is inappropriate and should be denied.

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *M.S. v. Dinkytown Day Care Center, Inc.,* 485 N.W.2d 587, 588 (S.D.1992) (internal quotations omitted). It is only an appropriate remedy to resolve issues of law when there are no disputed facts. *Id. Loesch v. City of Huron*, 723 N.W.2d 694, 695 (S.D. 2006). The Court found that Loesch's arguments relate solely to whether the trial court erred in finding that his action was time barred by South Dakota law, and that a question of statutory interpretation is a question of law which the appellate courts would review de novo. *State v. $1,010.00 in American Currency,* 722 N.W.2d 92, 94 (S.D. 2006); *Loesch,* 723 N.W.2d at 695. South Dakota courts have said, "[s]ince statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject." *Dahn v. Trownsell,* 576 N.W.2d 535, 539 (S.D. 1998) (quoting *Moss v. Guttormson,* 551 N.W.2d 14, 17 (S.D. 1996) (reversed on other grounds).

I. Defendant's Challenge to the Board's Resolution is Timely: The asserted 20-day time limit is Not Applicable in this Case.

1. **The "twenty-day period" to challenge a County Commission's "decisions in Circuit Court" (SDCL 7-8-29) is inapplicable.**

Plaintiff Lincoln County seeks to dismiss Defendant Tutland's counterclaim, and for judgment on the pleadings in Plaintiff's favor, on the basis that SDCL 7-8-29 creates "a twenty-day period within which to challenge County Commission *decisions* in Circuit Court," and thus bars any challenge to the passage of the Resolution. *Pltf's Brief, pp. 4-5.* However, SDCL 7-8-29, is inapplicable.

South Dakota Codified Laws, 7-8-29 is part of Chapter 7-8-1, et seq. which addresses County Board powers vis a vis *individual landowners* whose cases come before the Board and in turn, the Board, acting in a quasi-judicial capacity, render a "decision" specifically affecting the aggrieved person. South Dakota Codified Laws, 7-8-29 is titled "time allowed for appeal," and describes the period for appealing a "decision" made by the Board on a case before it:

> "Such appeal shall be taken within twenty days after the publication of the decision of the board by serving a written notice on one of the members of the board …".

Likewise, SDCL 7-8-27 confirms that these sections (7-8-27 and 7-8-29, etc.) relate to the "appeal" of Board "decisions."

In *Heine Farms v. Yankton County ex rel. County Com'rs,* 649 N.W.2d 597, 600 (S.D. 2002) the Court held that it is "only the *decisions* of a county commission are subject to a circuit court appeal is made clear…". The Court also held that the word "decision" means "a determination quasi-judicial in nature and *it is only from a quasi-judicial determination that an appeal will lie.*" *Heine,* 649 N.W.2d at 600 (emphasis in *Heine*), citing *Weger v. Pennington County*, 534 N.W.2d 854, 857 (S.D. 1995). Thus, South Dakota law establishes that it is only when the board is acting in a quasi-judicial capacity, deciding a case involving a landowner or

private citizen, that the date from which to appeal as found under SDCL 7-8-29, commences within the 20-day period from publication of the decision.

The cases decided under SDCL 7-8-29 confirm the proposition stated above. The cases involve "decisions" relating to individual landowners on issues such as, *appeals from zoning decisions*, (*Bison Tp. v. Perkins County,* 640 N.W.2d 503 (S.D. 2002)); *tax appeals* (*State ex rel. Aurora County v. Circuit Court, Fifth Judicial Circuit, Brown County*, 268 N.W.2d 607 (S.D. 1978)); *assessed valuation of property* (*Tidball v. Miller*, 25 N.W.2d 554 (S.D. 1946)); and *conditional use permits*. (*Schrank v. Pennington County Bd. Of Com'rs,* 584 N.W.2d 680 (S.D. 1998).

The South Dakota Supreme Court has made this explicit. South Dakota Codified Laws, 7-8-27 (using the same "appeal" and "decision" language found under 7-8-29) "provides for an appeal from 'decisions' of the board of county commissioners only to such persons who suffer personal or individual grievances, *as distinguished from* those grievances suffered by taxpayers or the public generally." *Simpson v. Tobin*, 367 N.W.2d 757, 760 (S.D. 1985) (emphasis added). Further, "only *quasi-judicial* acts appear to be appealable under this statute." *Simpson*, 367 N.W.2d at 762 (emphasis added). In short, there is a difference between when a board renders a "decision" and when it legislatively passes a "resolution." Hence, the 20-day Plaintiff seeks to apply is only applicable to quasi-judicial decisions, and does not apply to legislative acts such as the Resolution here, where the Resolution affects "taxpayers or the public generally," like Tuntland.

Furthermore, SDCL 7-8-29 does not apply and there is no "appeal" remedy "when the board of county commissioners exercises political power or legislative power, or administrative power, or discretionary power, or purely administrative power." *Heine* at 600, citing *Codington*

County, 212 N.W. 626, 627 (S.D. 1927) (distinguished on other grounds). Passage of a resolution has specifically been held *not* to be quasi-judicial, but rather is an exercise of a board's legislative or political authority. *See, Heine; Kirschenman v. Hutchinson County Bd. Of Com'rs*, 656 N.W.2d 330, 332-334 (S.D. 2003).

Moreover, an "appeal" of a board's quasi-judicial "decision" would be to the circuit court. When addressing the legality of a legislative resolution, there is no existing "case" to "appeal" because the very nature of the resolution is one of a legislative act affecting voters of the whole county, i.e. "taxpayers or the public generally." *Simpson*, 367 N.W.2d at 760. The 20-day period in SDCL 7-8-29 does not apply to the Board of Commissioners acting in a "legislative" or "political" capacity. Hence, SDCL 7-8-29 is inapplicable to the underlying dispute.

Defendant Tuntland is not challenging a quasi-judicial "decision." Rather, Tuntland is challenging the passage of a legislative "Resolution." He is specifically challenging whether the Resolution was passed properly as a legislative and political act and whether the Board passed the Resolution with the statutory mandated margin of Board votes for issuing bonds.

Therefore, because the statutes Plaintiff relies upon are not applicable, Defendant Tutland's challenge is timely.

2. South Dakota Codified Laws 7-18A-8 does not establish a statute of limitations period within which to challenge the legitimacy of a Resolution Either.

The effective date of enacted resolutions is governed under SDCL-7-18A-8. However, Plaintiff also argues this statute is a "time-bar" to Tuntland's opposition to the Resolution 2002-27 (*Pltf's Brief, pp. 4-5*). References to a 20-day period within the statute is not applicable to the issue at hand. South Dakota Codified Law 7-18A-8 does not create a limitations period

applicable to Defendant's challenge to the passage of the Resolution, and does not create a bar to Defendant's counterclaim. SDCL 7-18A-8 is part of 7-18A-1, et. seq. which is entitled "Ordinances and Resolutions," and goes on to describe what a "resolution" is, when resolutions take effect, and even penalties for violations of resolutions. SDCL 7-18A-8 is itself called "Effective date" of resolutions, and provides in part:

> [E]very resolution or ordinance passed by a board *shall take effect* on the twentieth day after its completed publication unless suspended by operation of a referendum.

SDCL § 7-18A-8 (emphasis added). By its own terms it describes when the resolution "shall take effect;" it says nothing about how quickly someone must act to challenge "passage" of a resolution, including a challenge to the Board's authority to act. Further, SDCL 7-18A-8 does not create a statute of limitations to challenge whether the resolution was properly passed, or in the alternative, whether it is void.[1] Tuntland's expressed challenges to the Resolution are that it was *not properly noticed*, and it was not passed by a *sufficient number of votes*—a "super majority." Because the Board acted without giving notice as alleged, and passed the Resolution without a sufficient number of votes—as a bonding resolution—it is void and unenforceable. There is no 20-day period applicable to those challenges, and SDCL 7-18A-8 says nothing to the subject.

Tuntland is not challenging when the Resolution purportedly went into effect; he is challenging whether it was properly passed under South Dakota law. Notably, Tuntland is not asking to put the Resolution up to a referendum; he is asking for a declaration that it was not

[1] In fact, Chapter 7-18A-1, et seq. provides a process for "nullification" of resolutions, including the nullification of the sale of bonds. However, that section, SDCL 7-18A-10 provides that proposals to nullify a county's sale of bonds must be commenced "within a period of thirty days after the first publication of the advertisement of the notice of sale of such bonds." SDCL 7-18A-10. Plaintiff has alleged it has been delayed in selling bonds (*Pltf's Brief, p. 3*), so this 30-day period has not even begun. Plaintiff has cited no applicable statute of limitations barring Tuntland's challenge, and since we are only four months after the Resolution's passage, there could be no time-bar to the challenge.

properly passed according to statute and is void. Tuntland's challenges to the Resolution's passage are not addressed, or barred, by either SDCL 7-8-29 or 7-18A-8.

3. SDCL 15-6-13(d) governing claims against the State Is Also Inapplicable since the counterclaims are against the Board of Commissioners.

Plaintiff argues that SDCL 15-6-13(d), governs because it addresses "Counterclaim[s] Against the State of South Dakota." Lincoln County is not the state but is a governmental subdivision. The Lincoln County Board is not the state of South Dakota nor is the Board an agency of the state, nor are the Board members "officers" of the state:

> This chapter shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of South Dakota or an officer or agency thereof.

SDCL §15-6-13(d).

The South Dakota Supreme Court has previously explained that county commissioners are not officers of the state. "The commissioners of McCook County do not fall within the category of the 'state, or an officer, agency or employee of the state.'" *Hofer v. Board of County Com'rs of McCook County,* 334 N.W.2d 507, 508 (S.D. 1983). Like the board of commissioners in McCook County, the commissioners of Lincoln County are not officers of the state and SDCL 15-6-13(d) is not applicable.

South Dakota Codified Laws 15-6-13 is similar to the prohibition of counterclaims against the United States as found under Rule 13(d) of the Federal Rules of Civil Procedure:

> **Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim – or to claim a credit – against the United States or a United States officer or agency.

In other words, SDCL 5-16-13(d) was intended to reaffirm the general principle of sovereign immunity by specifically stating that Rule 13 does not expand the right of a party to sue the United States or a United States officer or agency. 6 *Fed. Prac. & Proc. Civ. §1427.*

This Rule provides that a party is limited to claims that could have been brought against the United States, when sought to be asserted by a counterclaim. SDCL 15-6-13(d) should be interpreted congruently with FRCP 13(d), meaning counterclaims can give no broader right of claim than a claim raised by complaint. This rule does not expand the ability of a party to bring a counterclaim, but it does not shrink it either; and it specifically has no application to claims against county boards of commissioners. In short, 15-6-13(d) does not help Plaintiff's 20-day limitation period arguments.

II. This Court has Subject Matter Jurisdiction of Tuntland's Challenge to the Resolution's Passage

Plaintiff's first argument is that since Tuntland's challenge to the Resolution was untimely, this Court does not have jurisdiction. *See, Pltf's Brief, pp. 3-4.* Because Tuntland's challenges are not time barred, as proven above, this Court has subject matter jurisdiction to address all of Tuntland's counterclaims, and the Court should decide the merits of those claims.

Further, the above statutes Plaintiff has cited, even if applicable (which they are not for the reasons cited above), do not exclude other remedies, such as the writ of prohibition or declaratory judgment, both of which Tuntland has pled. As the South Dakota Supreme Court stated in *Simpson,* "this Court is of the opinion that SDCL 7-8-27 … are not exclusive remedies, but instead are cumulative remedies only, and that in South Dakota a common law taxpayer action does exist." 367 N.W.2d at 762. See also, *Kirschenman* 656 N.W.2d 330 (writ of mandamus granted to compel board of commissioners to allow voters to vote on conditional use permit for hog operation) and *Vitek v. Bon Homme County Bd. of Com'rs,* 644 N.W.2d 231, (S.D. 2002), (writ of mandamus granted to let voters vote on variance).

Plaintiff has challenged whether Tuntland has standing in this case. *Pltf's Brief, p. 3.* However, because Tuntland is a landowner who will be assessed to pay for the public safety

center, Tuntland has standing to challenge the bonding Resolution and assert his claims in this case.

1. SDCL 7-21-16.1 and 6-8B and Case Law Permit David Tuntland's Challenges to the Passage of the Resolution, along with Permitting David Tuntland's Claims for Relief.

As demonstrated above, Plaintiff has relied upon inapplicable statutes to suggest this Court has no jurisdiction to offer the relief Tuntland seeks. The applicable statutes include SDCL 7-21-16.1 governing lease-purchase agreements and 6-8B,[2] governing bonding and permit Tuntland's challenges and counterclaims.

South Dakota Codified Laws 6-8B is titled "Bonds of Local Public Bodies." It applies to the Resolution at issue in this case. Moreover, the Board specifically identified the same statute in the Resolution to justify the Resolution. Specifically, the statute requires the Lincoln County *voters* to vote on the bond issue for the Public Safety Center. *SDCL 6-8B-2, 6-8B-3, 6-8B-4, and 6-8B-8.*[3] Although Plaintiff cited SDCL 6-8B, the Board nevertheless seeks to enforce the Resolution, that is, issue the bonds, without any input from the *voters* contrary to the intent of SDCL6-8B.

Likewise, SDCL 7-21-16.1 is applicable to this case, and provides that"[a]ny *lease-purchase agreement* for a term exceeding one year requires the approval of ***more than sixty-percent*** of the members-elect of the board of commissioners." (emphasis added). For a five-member Board, this means four votes for passage, and only three approved the Resolution.

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[2] SDCL 6-8B is specifically referenced in the text of the Resolution. Pltf's Complaint Ex. 6: "§101. Declaration of necessity. The County is authorized by the South Dakota Codified Laws, Chapter … 6-8B … to enter a lease-purchase agreement …".

[3] SDCL 7-18A-15.1 also requires "legislative decisions of a board of county commissioners" to be "subject to the referendum process."

The text of the Resolution specifically states it is a "lease-purchase" agreement"[4] and is for a term "exceeding one year,"[5] and therefore SDCL 7-21-16.1 applies. Tuntland has claimed that the Resolution was not properly passed because it was passed by only 60% of the commissioners, not the "***more than 60%***" mandated by statute. "More" means "a greater or additional amount of degree." *Oxford American Desk Dictionary & Thesaurus* 518 (3rd ed. Oxford University Press 2010).

County commissioners only have "those powers as are expressly conferred upon it by statute…". *Heine,* 649 N.W.2d at 601. Board resolutions that call for the issuance of bonds must be enacted by "*more* than sixty percent." The board did not have the "power" to pass a resolution as it did in this case—with only sixty percent—it needed "more." Further, SDCL 6-8B requires approval by the "voters," that is, the Lincoln County voters, and they have been denied an opportunity to vote on the Resolution.

The running of 20 days from the date of publication of the illegal Resolution cannot absolve the illegal and void Resolution of its illegal passage. SDCL 7-21-17, relating specifically to local bond issues for projects such as the Public Safety Center in this case, provides further that "[e]ach contract made in violation of the provisions of 7-21-16 is null and void." In short, an illegally passed resolution can only lead to "null and void" bonds. The only course of action for Plaintiff is to go back and pass a resolution properly.[6] We are only four months removed from the illegal passage of the Resolution—the Board should rescind the current Resolution and start again.

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[4] "Pltf's Complaint Ex. 6, RESOLUTION RELATING TO LEASE-PURCHASE OF NEW COUNTY LINCOLN COUNTY PUBLIC SAFETY CENTER …"

[5] Pltf's Complaint Ex. 6, Resolution, §2.01, "not exceeding 30 years."

[6] Plaintiff should want to proceed legally because bonds sold based on an illegal resolution could result in individual liability for the board members. See, 7-21-17 and 7-21-27.

2. **Plaintiff failed to provide sufficient "notice" of the Resolution, violating Due Process.**

Tuntland also wrote to the Board and pled in his Answer and Counterclaim that Plaintiff failed to provide adequate "notice" of the Resolution, preventing him and other voters and property owners of Due Process. *See, letter from Tuntland's counsel to Plaintiff dated March 24, 2020,* Complaint *Ex.* 1*: Def's Counterclaim* ¶¶ 10-16, 45, 50-56, 58-59. On this issue, there is at least a fact issue preventing judgment in Plaintiff's favor.

Defendant pled that notice was defective because no text of the Resolution was provided prior to, or even at, the February 18, 2020 meeting at which the Resolution was allegedly "passed." Further, the discussion by the Board members at that meeting reflected that the Board members did not fully understand what they were voting on.

> "And did we draft a resolution?" Commissioner Schmidt;
>
> "Bill [Deputy State's Attorney William Golden] has seen that then?" Chairman Poppen;
>
> "I don't believe in the Nancy Pelosi method of you gotta pass something in order to know what's in it." Commissioner Ahrens;
>
> "What I'm going to want to see is public meeting so that voters can come to the table and be a part of the process." Unidentified Commissioner;
>
> "I'm gonna be hard pressed to approve this today just given the fact that we received the information [the Agenda, but not draft of the Resolution] on Friday." Unidentified Commissioner.

See, Pltf's Complaint *Ex.* 1, *Letter dated March 24, 2020; Def's Counterclaim,* ¶¶ 10-16.

Notice relating to passage of Board of Commissioners' Resolutions is important, and has been held to implicate the Constitutional Right of Due Process. *Abata v. Pennington County Bd. Of Com'rs*, 931 N.W.2d 714, 720, 723 (S.D. 2019); *Schafer v. Deuel County Bd of Com'rs*, 725

N.W.2d 241, 246-247 (S.D. 2006) holding "municipalities and other political subdivisions must scrupulously comply with statutory requirements including notice and hearing, in order to provide due process of law." In *Schafer*, those Due Process concerns were identified as "safeguarding against the arbitrary exercise of power, informing the decision makers, affording the affected landowners with the opportunity to formally voice their concerns and present evidence in opposition to opposed measures, and providing an avenue for expression of public opinion," 725 N.W. 2d at 246 --the very issues Tuntland has complained about in this case.

In this case, David Tuntland pled that there had not been sufficient notice of the Board's intention to saddle the taxpayers of Lincoln County with $50 million dollars of debt, prior to the meeting at which the Resolution was voted on. *See, Def's Counterclaim*, ¶ 10-16. Tuntland also pled his opposition to the Resolution. *Def's Counterclaim* ¶ 47-49. In response to this pleading, Plaintiff has asserted "no additional information could have been provided in the notice due to the terms and conditions of the resolution …" *See, Pltf's Compl. ¶ 47; Pltf's Answer to Counterclaim, ¶¶ 15, 16, 17, and 19.* Plaintiff has not explained why "no additional information could have been provided," but such a bare allegation fails to establish the facts as undisputed—which Plaintiff must do at this stage of the case.

CONCLUSION

Because Plaintiff relies on statutes which are inapplicable and do not establish a "twenty-day" period to challenge the illegally passed Resolution, Plaintiff's motion for judgment on the pleadings must be denied. Defendant Tuntland has properly challenged passage of the Resolution, and Tuntland's Counterclaims must be addressed on the merits. Further, Defendant Tuntland has raised a fact issue as to the sufficiency of the "notice" required prior to passage of the Resolution, and Plaintiff's motion must be denied for this reason also.

Dated at Sioux Falls, South Dakota, this 17th day of June, 2020.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant David Tuntland, hereby certifies that a true and correct copy of the foregoing "Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings" was served by electronic filing with the Clerk of the Court by using the Odyssey File & Serve system, which sent notification of such filing upon:

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on this 17th day of June, 2020.