



An Agricultural Law Research Article

**Procedural Mishaps Created a Big Stink for
Residents of Yankton County: Zoning
Attempts to Limit a Concentrated
Feedlot Operation in South Dakota**

by

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PROCEDURAL MISHAPS CREATED A BIG STINK FOR RESIDENTS OF YANKTON COUNTY: ZONING ATTEMPTS TO LIMIT A CONCENTRATED FEEDLOT OPERATION IN SOUTH DAKOTA

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In *Heine Farms v. Yankton County*¹ the South Dakota Supreme Court upheld requirements which the legislature has established for implementing valid zoning ordinances by county governments. This decision confirmed that a county must execute certain procedures before a zoning ordinance will be upheld. Yankton County had not enacted the prerequisite comprehensive plan in order to pass community-desired zoning ordinances. As a result of this decision, the will of the majority was thwarted and Heine Farms continued to operate its 20,000 head cattle operation in Yankton County.

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I. INTRODUCTION

Cattle are the leading agricultural commodity in South Dakota, generating revenue of approximately \$1.5 million per year.² This high revenue makes cattle

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1. *Heine Farms v. Yankton County*, 2002 SD 88, 649 N.W.2d 597.

2. *Agricultural Statistics—South Dakota*, at

production a leading factor for South Dakota's future.³ However, as essential as the cattle market may be in South Dakota, dissatisfaction has developed among citizens trying to prevent cattle feedlot expansion and the potential harmful effects of concentrated animal feedlots.⁴ Those opposed have turned to the democratic process in hopes of utilizing majority rule.⁵ Unfortunately, in some counties the democratic process has not prevailed due to failures of the government to implement prerequisite comprehensive plans.⁶ This inadequacy leaves the majority without a voice or method to halt concentrated feedlot expansion and raises the question as to what is more important: agricultural expansion that generates revenues or the will of the majority?

The situation is straightforward: giant feedlots enter a new state, concentrate thousands of cattle in a single area and create potential environmental hazards and rural disputes between residents and feedlot owners.⁷ This situation occurred in *Heine Farms v. Yankton County*, where the South Dakota Supreme Court affirmed that a county must enact certain procedural requirements before zoning ordinances can be executed and enforced against a growing feedlot operation.⁸ This casenote details the events leading to litigation and decisions by the trial court and the South Dakota Supreme Court in *Heine Farms v. Yankton County*. The background examines the evolution of land use controls and focuses specifically on governmental concerns regarding feedlots—the foundations for regulation and county zoning authority over concentrated feedlot operations. Next, the analysis section discusses local and state governmental controls as well as the foundations necessary for local governments to enact valid zoning ordinances within the State of South Dakota. The note concludes with recommendations to ensure counties have the necessary procedures in place.

http://www.classbrain.com/artstate/publish/article_724.shtml (last visited March 15, 2005). Animal agriculture plays an important role in South Dakota and national economies. South Dakota is undergoing significant and rapid change in livestock production. See generally Charles Abdalla et al., *Community Conflicts Over Intensive Livestock Operations: How and Why Do Such Conflicts Escalate?*, 7 DRAKE J. AGRIC. L. 7 (2002) (focusing on why community groups and individuals oppose intensive scale livestock operations in their communities and why forms of economic activity have become the pariah of rural communities in the United States, with particular emphasis on Pennsylvania).

3. *Agricultural Statistics—South Dakota*, at http://www.classbrain.com/artstate/publish/article_724.shtml (last visited March 15, 2005).

4. See Thomas R. Head, III, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States*, 6 ENVTL. L. 503 (2000).

5. See Ben Shouse, *Big Dairies, New Questions*, ARGUS LEADER, Nov. 7, 2004, at 4A.

6. *Heine Farms*, 2002 SD 88, ¶18, 649 N.W.2d at 602.

7. See Ben Shouse, *Study: Small Farms Cause Bulk of Water Pollution*, ARGUS LEADER, Nov. 7, 2004, at 1A. Concerned citizens and upset communities can be found anywhere concentrated animal feeding operations are located. Leah N. Hansen, Note, *Canadian Connection v. New Prairie Township: Sniffing Out An Opening In The Doctrines Of Preemption And Conflicts of Law, And Allowing Local Governments The Authority To Regulate Odor Concerns*, 3 GREAT PLAINS NAT. RESOURCES J. 177, 195 (1999). Part of the concern is generated from the lack of local control given to local governments. *Id.* Concentrated feedlot operations have caused fury among residents, causing problems and turmoil for counties within the State of South Dakota to deal with. Shouse, *Big Dairies, New Questions*, *supra* note 5, at 4A. Ignoring these problems created by gigantic feedlot operations will undoubtedly lead to severe future environmental troubles and litigation issues. See generally Matt M. Dummermuth, Note, *A Summary and Analysis of Laws Regulating the Production of Pork in Iowa and Other Major Pork Producing States*, 2 DRAKE J. AGRIC. L. 447 (1997) (analyzing different states and the impact gigantic commercial feedlots have on the different states).

8. *Heine Farms*, 2002 SD 88, ¶ 16, 649 N.W.2d at 601.

II. FACTS AND PROCEDURES

In 2001, the Heine brothers, Gary, Ronald, Gene, Thomas, and Steven purchased 360 acres of land in Yankton County.⁹ They were “residents, landowners, and taxpayers in Yankton County” and had established a corporation, Heine Farms.¹⁰ The brothers planned to launch a 15,000-20,000 head cattle feedlot operation through their corporation on the newly purchased land in Yankton County.¹¹

In January of the following year, the public learned of Heine Farms’ proposal.¹² Many Yankton County residents reacted to the proposal with apprehension.¹³ Those citizens initiated a petition that sought to implement certain zoning regulations in the county.¹⁴ Specifically, the proposed ordinance prohibited concentrated animal feedlot operations stating, “1,500 animal units or more would have to be at least one mile from any residential dwelling and three miles from any incorporated municipality.”¹⁵ The proposed zoning ordinance also set stipulations and requirements for a cattle feedlot waste management system, by prohibiting a system with more than 7,500 head of cattle.¹⁶ This proposal would essentially have

9. Kevin Woster, *Cattle Feedlot Project Stirs Debate in Yankton County*, ARGUS LEADER, Mar. 16, 2001, at 1A.

10. *Heine Farms*, 2002 SD 88, ¶ 2, 649 N.W.2d at 598. The Heine brothers already operated an 8,000 to 10,000 head cattle feedlot just across the Missouri River in Nebraska and were looking to expand their partnership with the purchase of new land near Utica, which was located a few miles northwest of Yankton. Woster, *supra* note 9, at 1A.

11. *Heine Farms*, 2002 SD 88, ¶ 2, 649 N.W.2d at 598. The proposed feedlot was estimated as a four million dollar project and planned to employ fifteen to twenty people. Lance Nixon, *Feedlot Ordinance on Ballot*, ARGUS LEADER, Mar. 10, 2001, at 6C. Settje-Agri-Services and Engineering of Raymond, Nebraska were hired by the Heine family to build, design, and run the proposed feedlot. *Family Proposes 15,000-animal Feedlot Near Utica*, ARGUS LEADER, Jan. 14, 2001, at 8B. The Heine brothers planned to manage a safe and clean feedlot operation that would clear all state and federal regulations. *Id.* Heine planned to operate with modern technology to control dust and odor. *Id.* Furthermore, plans had been made for the use of a modern drainage system to properly dispose of waste so groundwater pollution would not take place. *Id.*

12. *Heine Farms*, 2002 SD 88, ¶ 3, 649 N.W.2d at 598. Around 300 people attended the Yankton National Guard Armory for a public hearing held by the Heine’s explaining the plans they were pursuing. *See Family Proposes 15,000-animal Feedlot Near Utica*, *supra* note 11, at 8B.

13. *See Family Proposes 15,000-animal Feedlot Near Utica*, *supra* note 11, at 8B. Many people expressed concerns of potential odor and dust as well as damage to roads and groundwater contamination. *Id.*

14. *Heine Farms*, 2002 SD 88, ¶ 3, 649 N.W.2d at 598. Guy Larson and Bernie Hunhoff led the petition of opposition against Heine’s proposed feedlot. *Opponents Want Election on Yankton Feedlot*, ARGUS LEADER, January 25, 2001, at C6. Guy Larson was associated with a group called Families Respecting Everybody’s Environment, who were in support of the proposed ordinance. Lance Nixon, *Feedlot Ordinance on Ballot*, *supra* note 11, at 6C. They claimed, “[t]he feedlot could pollute the air and water, cause noise and traffic problems and lead to a drop in property values.” *S.D. Water Board Denies Permit for Utica Feedlot*, ARGUS LEADER, September 7, 2001, at 1B. Another woman also opposed to the feedlot commented, “[t]he feedlot will create odor and dust and will attract flies.” *Family Proposes 15,000-animal Feedlot Near Utica*, *supra* note 11, at 8B.

15. Woster, *supra* note 9, at 1A.

16. *Heine Farms*, 2002 SD 88, ¶ 3, 649 N.W.2d at 598. *See generally* John H. Davidson, *South Dakota Groundwater Protection Law*, 40 S.D. L. REV. 1 (1995) (discussing animal feedlot classifications and the regulations imposed for surface water discharge and waste management). Citizens’ opposed to feedlot operations argue the feedlots cause substantial damage to the environment because of the considerable amount of waste they create. *See Trevor Oliver, Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota*, 83 MINN. L. REV. 1893, 1894 (1999). The author notes that these giant animal feedlots often outdo the ecosystem’s capacity to deal with waste and argues animal waste causes various

prevented Heine Farms' feedlot from operating at the size and location originally planned.¹⁷

In response to the initiative, a hearing was held to inform the public of Heine Farms' plans and persuade them to abandon the initiative petition.¹⁸ Approximately 300 people attended the hearing to learn about Heine Farms' proposal of using modern technology to control dust and odors as well as the proper disposal of animal waste without polluting the groundwater.¹⁹ At the meeting, the concerns expressed only strengthened the opposition and affirmed circulation of the initiative petition to stop Heine Farms from expanding.²⁰

The seeds of this conflict were sown in 1993 when the Yankton County Commissioners first attempted to establish a comprehensive plan in Yankton County.²¹ To enact valid zoning ordinances, a county must have a comprehensive plan in effect or be actively working toward the enactment of such a plan.²² A comprehensive plan "describes in words, and may illustrate by maps, plats, charts, and other descriptive matter; the goals, policies, and objectives" of the commissioners.²³ This requirement must be fulfilled before the county commission is vested with the statutory power to enact zoning laws.²⁴ The Yankton County Commissioners had not passed a comprehensive plan, which meant they had no authority to enact valid zoning ordinances within the county.²⁵

Despite the absence of a comprehensive plan, the Yankton County Commissioners attempted to impose restrictions and regulate certain areas of the county.²⁶ To establish this county-wide ordinance, the commissioners submitted the initiative, by way of referendum, to the voters of Yankton County who soundly defeated the measure.²⁷ Despite two failed attempts, Yankton County was unable to

environmental problems. *Id.* at 1893-94. The author points out that animal manure "emits hydrogen sulfide, ammonia gas, and other compounds harmful to human health." *Id.* See also Dummermuth, *supra* note 7, at 481. Manure management plans are required for most animal feedlot operations through general permits or groundwater discharge permits. *Id.*

17. Brief for Appellant at 3-4, Heine Farms v. Yankton County, 2002 SD 88, 649 N.W.2d 597 (No. 22055) [hereinafter Appellant's Brief].

18. *Family Proposes 15,000-animal Feedlot Near Utica*, *supra* note 11, at 8B.

19. *Id.*

20. *Id.* A common reason for opposition is that large feedlots foul the water, they stink, creating a health hazard and a decrease in residential property values, and they hurt small farms through driving down prices. See Shouse, *Big Dairies, New Questions*, *supra* note 5, at 4A.

21. Appellant's Brief, *supra* note 17, at 3.

22. S.D.C.L. § 11-2-13 (2004). South Dakota Codified Laws section 11-2-13 states: For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

Id.

23. *Heine Farms*, 2002 SD 88, ¶ 18, 649 N.W.2d at 602.

24. Brief for Appellee at 13, Heine Farms v. Yankton County, 2002 SD 88, 649 N.W.2d 597 (S.D. 2002) (No. 22055) [hereinafter Appellee's Brief]. As early as 1967, statutes were passed authorizing preparation of comprehensive zoning plans. *Heine Farms*, 2002 SD 88, ¶ 17, 649 N.W.2d at 602 n.3.

25. Appellant's Brief, *supra* note 17, at 3. By establishing a zoning ordinance throughout the county, the commissioners would be vested with power to oversee and authorize any zoning efforts made within the county. See *e.g.*, *Coyote Flats v. Sanborn County Comm'n*, 1999 SD 87, ¶ 9, 596 N.W.2d 347, 350.

26. Appellant's Brief, *supra* note 17, at 3.

27. *Id.* Without placing a comprehensive plan or a zoning ordinance into effect, the

enact valid land use regulations or a comprehensive plan.²⁸ Therefore, Yankton County had not complied with the statutory requirements and did not have the authority to regulate and legally zone land in Yankton County at the time Heine brothers purchased their land in 2001.²⁹

Meanwhile, the dispute over Heine Farms' new feedlot continued.³⁰ On January 24, 2001, those opposed to the feedlot filed an initiative petition with the Yankton County Auditor after obtaining the required number of signatures.³¹ After review, the Yankton County State's Attorney determined the petition was sufficient for a public vote, and the initiative was presented to the Yankton County Commission Board for approval.³² Heine Farms responded by filing suit in the First Judicial Circuit Court, seeking a declaratory judgment that the initiated ordinance was invalid.³³ In the action, Heine Farms asked the trial court for a declaratory judgment because the Yankton County ordinance was "illegal and invalid, and that it [could] not be adopted by initiative."³⁴ Heine Farms also sought a temporary injunction to stop Yankton County from submitting the ordinance to a public vote, which ultimately would have prohibited adoption of the ordinance.³⁵ Yankton County responded with a motion to dismiss, asserting that Heine Farms' exclusive remedy for appealing the actions of the county commission was a direct appeal to the circuit court pursuant to S.D.C.L. section 7-8-27.³⁶ Further, the county contended that the declaratory

commissioners of Yankton County lacked the authority to enact or pass valid zoning ordinances throughout the county. *Heine Farms*, 2002 SD 88, ¶¶ 17-18, 649 N.W.2d at 602.

28. Appellant's Brief, *supra* note 17, at 3.

29. *Id.* Yankton County had not met the statutory requirements to establish a comprehensive plan, which is a prerequisite for the enactment of a zoning ordinance. Appellee's Brief, *supra* note 24, at 7-8. This prerequisite had not been fulfilled and the people of Yankton County were denied the right to voice their feelings on the proposed feedlot. *See Heine Farms*, 2002 SD 88, ¶ 18, 649 N.W.2d at 602. If the county commission had followed the procedural requirements and established a comprehensive plan and a zoning ordinance, the people would have been allowed to pass the ordinance through right of initiative and keep Heine Farms from creating their feedlot. *See id.* at 602 n.4.

30. *See Heine Farms*, 2002 SD 88, ¶ 4, 649 N.W.2d at 598.

31. *Id.* On January 31, 2001, the auditor verified the submitted petition through notarization and confirmed there were sufficient signatures on it to support its submission for a public vote. *Id.*

32. *Id.*

33. *Id.* A declaratory judgment is: "a binding adjudication that establishes the rights and other legal regulations of the parties without providing for or ordering enforcement." BLACK'S LAW DICTIONARY 846 (7th ed. 1999).

34. Appellant's Brief, *supra* note 17, at 4.

35. *Heine Farms*, 2002 SD 88, ¶ 4, 649 N.W.2d at 598. A temporary injunction is granted "before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case." BLACK'S LAW DICTIONARY 788 (7th ed. 1999). Furthermore, a temporary injunction,

shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

S.D.C.L. § 15-6-65(d) (2004). "It is only where the statute or ordinance is unconstitutional or otherwise invalid and where in the attempt to enforce it there is a direct invasion of property rights resulting in irreparable injury that an injunction will issue to restrain enforcement thereof." *Rutzen v. City of Belle Fourche*, 20 N.W.2d 517, 519 (S.D. 1945).

36. Appellant's Brief, *supra* note 17, at 4. This response was based on S.D.C.L. § 7-8-27, which states: "From all decisions of the board of county commissioners upon matters properly before it, there may be an appeal to the circuit court by any person aggrieved. . ." S.D.C.L. § 7-8-27 (2004).

judgment sought was an “impermissible collateral attack on the Commissioners’ decision to adopt the initiative measure by the voters.”³⁷

At a hearing on February 5, 2001, the court denied Heine Farms the temporary injunction, but deferred its ruling regarding the declaratory judgment, reasoning that more time was needed to research the entire issue.³⁸ The trial court also declined Yankton County’s motion to dismiss, finding that S.D.C.L. section 7-8-27 was “not an exclusive remedy for aggrieved persons,” but abstained from giving its final decision until a later date.³⁹ The court refused to dismiss the action pursuant to S.D.C.L. section 7-8-27 based on the language “may” found expressly in the statute that gives an aggrieved person the option of appealing a decision of the county commissioners to the circuit court.⁴⁰ Subsequently, the Yankton County Commissioners accepted the proposed ordinance and set the county vote date for March 20, 2001.⁴¹

Before the vote, the continuation trial of Heine Farms’ action was held on March 15, 2001.⁴² Heine Farms asserted that the Yankton County ordinance was illegal and invalid.⁴³ Yankton County once again renewed its motion to dismiss and, in addition, made a motion for summary judgment.⁴⁴ It was the county’s contention that since the county commission had ultimately submitted the initiated ordinance to a public vote, Heine Farms should be required to institute an action directly against the board of commissioners in circuit court.⁴⁵ The trial court did not rule on Heine’s motions and the trial proceeded.⁴⁶ Meanwhile, the voters advanced to the polls on March 20, 2001, and “adopted the initiated ordinance by a vote of 3,790 to 1,714.”⁴⁷

On April 9, 2001, the trial court released a memorandum decision that denied the county’s motion for summary judgment and motion to dismiss.⁴⁸ It declared “the initiated ordinance illegal and unenforceable” based upon Yankton County’s failure to have a previously enacted comprehensive plan.⁴⁹ The court took into consideration the preliminary efforts made by Yankton County, but ultimately determined these initial efforts by the commissioners in 1993 were not adequate.⁵⁰ The trial court stated that a comprehensive plan is a necessary predicate for county commissioners to adopt a zoning ordinance.⁵¹ The technical defect by the county in not enacting the proper requisites for enacting zoning ordinances made the present ordinance invalid because “the procedural requirements of S.D.C.L. section 11-2 et seq. were not followed by the initiative process.”⁵² The court expressed that it was impossible for

37. Appellant’s Brief, *supra* note 17, at 6.

38. *Id.* at 4.

39. *Id.* at 4-5.

40. *Heine Farms*, 2002 SD 88, ¶ 11, 649 N.W.2d at 600. See also S.D.C.L. § 7-8-27 (2004).

41. *Heine Farms*, 2002 SD 88, ¶ 4, 649 N.W.2d at 598.

42. *Id.* ¶ 5.

43. Appellant’s Brief, *supra* note 17, at 4.

44. *Heine Farms*, 2002 SD 88, ¶ 5, 649 N.W.2d at 598.

45. *Id.*

46. *Id.* The court reasoned it needed more time to examine the entire issue before making a decision. *Id.*

47. *Id.* ¶ 6. The proposed ordinance passed by a margin of 69 % to 31 %. Appellant’s Brief, *supra* note 17, at 4.

48. *Heine Farms*, 2002 SD 88, ¶ 6, 649 N.W.2d at 598.

49. *Id.* at 602 n.4. In making this decision the court took into consideration “the outcomes of the vote on the initiated ordinance.” *Id.* at 599 n.2.

50. *Id.* ¶ 6.

51. *Id.* ¶ 15.

52. Appellant’s Brief, *supra* note 17, at 5. The trial court noted procedural defects which marred the enactment of the zoning ordinance in Yankton County. *Id.* at 1. First, there was no

the Yankton County Commission to adopt an ordinance and the court enjoined Yankton County from enforcing the proposed ordinance.⁵³ Yankton County appealed this decision to the South Dakota Supreme Court.⁵⁴

In *Yankton County v. Heine Farms*, the county claimed that the trial court erred in two respects: first, in denying its motion to dismiss or motion for summary judgment⁵⁵ and second, by declaring the initiated zoning ordinance illegal and enjoining the county from enforcing it.⁵⁶ In regard to the first issue, Yankton County believed that, since the county commission had proposed the initiated ordinance to a public vote there was no remedy available.⁵⁷ The South Dakota Supreme Court rejected this argument.⁵⁸ By a 4-1 majority, the court held that “no appeal lies from a purely ministerial act of a county commission” and furthermore that “an appeal was not a remedy, let alone an exclusive remedy” for which Heine Farms to rely.⁵⁹ The court based this reasoning on S.D.C.L. section 7-18A-13, which states:

When a petition to initiate is filed with the auditor, he shall present it to the board of county commissioners at its next regular or special meeting. The board *shall* enact the proposed ordinance or resolution and *shall* submit it to a vote of the voters in the manner prescribed for a referendum within sixty days after the final enactment.⁶⁰

Using in this statute the word “shall” demonstrates the legislative intent to create a compulsory obligation upon the county commission.⁶¹ The statute does not confer discretion on the county commission.⁶² With regard to this case, the compulsory obligation of the Yankton County Commission was to enact the initiated ordinance and submit it to the public for a vote.⁶³ Therefore, the duty to enact the ordinance by the Yankton County Commissioners was purely ministerial and no appeal is allowed from a ministerial act by a county commission.⁶⁴

comprehensive plan in effect prior to the enactment of the ordinance passed by initiative. *Id.* at 2. Furthermore, zoning must be done in accordance with a comprehensive plan, otherwise any attempt is invalid. *Id.*

53. *Heine Farms*, 2002 SD 88, ¶¶ 6, 17, 649 N.W.2d at 598-99, 602.

54. *Id.* ¶ 6.

55. *Id.* ¶¶ 6-9.

56. *Id.* ¶ 14.

57. *Id.* ¶ 9. South Dakota Codified Laws section 7-8-32 states: “appeal to the circuit court from decisions of the board of county commissioners, as provided in this chapter, is an exclusive remedy.” S.D.C.L. § 7-8-32 (2004).

58. *Heine Farms*, 2002 SD 88, ¶ 13, 649 N.W.2d at 601.

59. *Id.* The court distinguished the cases that Yankton County had relied on by stating that the actions in those cases were based upon decisions made by the county commission and in the present situation, the action by the county commission was purely ministerial. *Id.* ¶¶ 11-13. Therefore, no appeal lies from a purely ministerial act by the county commission. *Id.* ¶ 13. See also *Wold v. Lawrence County Comm’n*, 465 N.W.2d 622 (S.D. 1991) (holding that the decision by the county commission was a waiver of certain zoning requirements); *Ridley v. Lawrence County Comm’n*, 2000 SD 143, 619 N.W.2d 254 (reasoning that the trial courts decision dismissing of a petition for a writ of certiorari should be upheld because an appeal to a circuit court is the sole avenue for relief from a decision of the board of county commissioners in granting a rezoning request); *Weger v. Pennington County*, 534 N.W.2d 854 (S.D. 1995) (asserting that the decision made by the county commission was in regard to personnel appointments to the county air quality board and therefore an appeal was an exclusive remedy).

60. S.D.C.L. § 7-18A-13 (2004) (emphasis added).

61. *Heine Farms*, 2002 SD 88, ¶ 13, 649 N.W.2d at 601.

62. *Id.* ¶ 13.

63. *Id.*

64. *Id.*

In reference to the county's second argument, the court confirmed that the Yankton County Commission could not pass a zoning ordinance executing the goals, objectives, and policies of a comprehensive plan if a comprehensive plan had not previously been established.⁶⁵ Furthermore, the court stated that "if the Yankton County Commission could not adopt such an ordinance, neither could the residents of Yankton County through their right of initiative."⁶⁶ The majority relied upon *Custer City v. Robinson*,⁶⁷ which holds it was "fundamental that an ordinance or resolution proposed by the electors of a municipality under the initiative law must be within the power of the municipality to enact or adopt."⁶⁸ The *Heine Farm* court also based its reasoning on *State v. Quinn*,⁶⁹ where the court expressed that a county has only the powers that are expressly granted through statutes and those that are reasonably inferred from the powers clearly granted.⁷⁰ And in *Heine Farms*, without establishing the powers expressly granted through the statutes, the South Dakota Supreme Court upheld the lower court's reasoning that it was not possible for a county commission to adopt an ordinance "implement[ing] [a] comprehensive plan" that was non-existent.⁷¹

Acting Justice, Gors, in his dissent, stated that "the people's power to initiate legislation is plenary, curbed only by the South Dakota Constitution and statutes."⁷² The people in South Dakota have the plenary power to initiate legislation through S.D.C.L. section 7-18A-9.⁷³ Justice Gors proposed, the plenary power granted by statute to the people of Yankton County provided them the ability to enact the proposed zoning ordinance limiting Heine Farms' operation.⁷⁴ Justice Gors relied on *Christensen v. Carson*,⁷⁵ indicating that South Dakota was the first state in 1898 to grant legislative power to its people.⁷⁶ According to Gors, the county commission's inability to enact a comprehensive plan undoubtedly "trumps the will of the people" by not allowing them to initiate the proposed ordinance that would prohibit Heine

65. *Id.* ¶ 18.

66. *Id.*

67. 108 N.W.2d 211, 212 (1961).

68. *Heine Farms*, 2002 SD 88, ¶ 16, 649 N.W.2d at 601; *Custer City v. Robinson*, 108 N.W.2d 211, 212 (S.D. 1961). The court reasoned that even though this decision was applied toward municipal ordinances, the principle was equally applicable to county ordinances initiated by the public. *Id.*

69. 2001 SD 25, ¶ 10, 623 N.W.2d 36, 38.

70. *Heine Farms*, 2002 SD 88, ¶ 17, 649 N.W.2d at 601.

71. *Id.*

72. *Id.* ¶ 23 (Gors, J., dissenting).

73. S.D.C.L. § 7-18A-9 (2004). This statute states: "The right to propose ordinances and resolutions for the government of a county shall rest with five percent of the registered voters in the county, based upon the total number of registered voters at the last preceding general election." *Id.*

74. *See Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603 (Gors, J., dissenting).

75. 533 N.W.2d 712 (S.D. 1995).

76. *Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603 (Gors, J., dissenting). In *Christensen v. Carson*, the petitioner sought a writ of mandamus to force the proposed initiative toward a public vote. 533 N.W.2d 712, 713 (S.D. 1995). The circuit court granted the request but the supreme court reversed and held that the petition was not within the proper scope of the initiative power and the petitioners had not satisfied the procedural requirements necessary under the referendum process. *Id.* at 715-16. With this said, the majority noted that South Dakota was the first state to reserve legislative power to its people and that statutes have since extended this to counties and other districts. *Id.* at 714. And, other statutes allow for particular issues to be submitted to the public for a vote. *Id.* Contrarily, Justice Sabers dissented asserting that the proposed ordinance fell within the proper scope of the initiative power. *Id.* at 716. Accordingly, Justice Sabers relied on the reasoning that the legislature's power runs concurrent with the power of the people who have the ability to initiate laws on any subject. *Id.* at 718.

Farms from establishing their feedlot operation.⁷⁷ To support his reasoning, Gors referenced *Vitek v. Bon Homme County*,⁷⁸ where the court stated citizen legislation on zoning is a traditional right of the voters to “override the view of their elected representatives as to what serves the public interest and to legislate on the subject for themselves.”⁷⁹ Gors believed the people of Yankton County had voiced their desire to prevent the proposed feedlot operation and they should not suffer due to the county commissioners’ failure to take appropriate actions.⁸⁰ Regardless of Justice Gors reasoning, the majority ruled that the people within the county did not have the power to prohibit Heine Farms development.⁸¹

III. BACKGROUND

In the nineteenth century few land controls were in existence.⁸² In fact, rural areas did not even become accustomed to zoning until the 1970’s.⁸³ The purpose of zoning was and still is to protect the community and the people by resolving conflicts between different land uses, such as the site of a proposed feedlot near a residential or recreational area.⁸⁴ For this reason, zoning can be seen as a burden upon farm owners’ desire to operate as they wish.⁸⁵ In particular, the regulation of animal feedlots becomes more problematic as local governments respond to concentrated feedlot expansion issues.⁸⁶ As concentrated feedlots expand, a substantial impact is placed on the environment as well as residents located near the concentrated feedlots.⁸⁷ Regulations can limit the size of the prospective operation, in addition to

77. *Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603 (Gors, J., dissenting).

78. 2002 SD 45, ¶¶10-12, 644 N.W.2d 231, 234-35. (quoting *Spaulding v. Blair*, 403 F.2d 862 (4th cir. 1968)).

79. *Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603 (Gors, J., dissenting). In *Vitek v. Bon Homme County Board of Commissioners*, the citizens within the county signed petitions with the county auditor to force the county board to submit to the people a referendum vote regarding the variance granted for the operation of a hog facility. 2002 SD 45, ¶ 3, 644 N.W.2d 231, 232. The board rejected the petitions and citizens sued for a writ of mandamus. *Id.* ¶¶ 3-4. The circuit court denied the writ, but the South Dakota Supreme Court reversed and applied “a liberal rule of construction permitting rather than preventing citizens from exercising their powers of referendum.” *Id.* ¶ 7. The court relied on the South Dakota Constitution and asserted that the referendum process has been reserved to the people. *Id.* ¶ 10. This gives citizens the right to propose measures and have them submitted to a vote. *Id.* The majority in *Heine Farms v. Yankton County* pushed this case aside with the reasoning that no violence was done of the rights of initiative and referendum and allowing Yankton County to ignore the statutory requirements would “run afoul” the requirement that initiated legislation must be within the jurisdiction and power of the county board to enact. 2002 SD 88, ¶ 18, 649 N.W.2d at 602 n.5.

80. *Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603.

81. *See id.* ¶¶ 17-18.

82. Wendy K. Walker, Note, *Whole Hog: The Pre-Emption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 VAL. U.L. REV 461, 465 (2002) (The author focuses on the preservation of resources and the development of practices that will protect the environment by upholding the economic value of farming, which is so essential in many states. Furthermore, the note focuses on right to farm statutes that uproot local land use control, particularly zoning).

83. *Id.*

84. *Id.* at 466. Conflicts often arise between neighbors who own property coupled with their zealous esteem of using it the way they choose. *Id.* at 465.

85. *Id.* at 467. There are strong feelings among property owners to be able to use their land in ways that are most beneficial to them, creating many conflicts over land uses and zoning. *See Coyote Flats v. Sanborn County Comm’n*, 1999 SD 87, ¶ 35, 596 N.W.2d 347, 355.

86. Head, *supra* note 4, at 503.

87. *See Shouse, Big Dairies, New Questions, supra* note 5 at 4A.

preventing the construction of additional feedlots.⁸⁸

A. FEEDLOT REGULATION CONCERNS AND ISSUES

In the past decade, animal feeding operations have significantly increased in size.⁸⁹ Large commercial feedlots have replaced the traditional family farm, and in the late 1960's and early 1970's the transition from customary pasture livestock operations began to change into partially or totally enclosed, high capacity livestock industries.⁹⁰ The boost in consolidation of livestock production created giant commercial animal feedlots across the United States.⁹¹ Out of nearly two million farms located in the United States, twenty percent of those farms generate over ninety percent of the United States' entire beef output, creating an intense agriculture system, particularly with livestock operations.⁹² In recent years, the actual number of feedlot operations in the United States has decreased while their size has significantly increased.⁹³

Local governmental regulation of large animal feedlots has become a matter of growing public debate.⁹⁴ These new feedlots often exceed neighbors' tolerance for the odor they produce as well as the environment's ability to handle the waste,

88. *Id.* See generally Thomas R. Head, *supra* note 4 (stating that county ordinances are necessary to restrict the construction and operation of animal feeding operations). County governments are actively working toward implementation of zoning ordinance and nuisance controls to monitor and limit the expansion of the commercial feedlots. *Id.* at 508. Since county governments are closest to the center of the problem, they are often better equipped to manage the conflicts that arise from the growth of concentrated feedlot operations. *Id.* at 575.

89. See Oliver, *supra* note 16, at 1893.

90. Walker, *supra* note 82, at 462. "Today, significant transformations in the economics and technologies of the agricultural industry have challenged governmental approaches to farmland preservation." *Id.* at 461.

91. See generally Oliver, *supra* note 16 (discussing regulations of feedlot operations and their causes).

92. Walker, *supra* note 82, at 471-72. See also Michael M. Maloy, *An Overview of Nutrient Management Requirements in Pennsylvania*, 10 PENN ST. ENVTL. L. REV. 249, 252 (2002) (The author notes as the concentration of livestock within a centralized area has increased, so has the task of safely disposing and managing the large quantities of animal waste.).

93. Head, *supra* note 4, at 507. See also Walker, *supra* note 82, at 503. "Increasing corporatization and consolidation in livestock production has created a new breed of giant animal feedlots, of sizes overwhelming previous conceptions of a 'large' feedlot." See Oliver, *supra* note 16, at 1893. Increasingly, more industrialized and highly specialized operations establish a greater share of all animal production and has concentrated more animals into one area thus producing more manure and wastewater, as well as raising potential significant environmental damages. See Michael M. Maloy, *supra* note 92, at 252.

94. Head, *supra* note 4, at 507. Over the last decade, a rather controversial transformation has been experienced by the nation's livestock and poultry industries. *Id.* The size of feedlot operations has dramatically increased in recent years, while the number of feedlot operations has steadily began to decrease. *Id.* In the cattle industry forty percent of all cattle produced come from just two percent of the feeding operations. *Id.* at 511. These changes have caused the public and counties many challenges and conflicts in determining how to best deal with the issue. *Id.* at 507. One explanation for the shift from small family farms to corporate farms is due to the "vertical integration." *Id.* at 511 n.31. Vertically integrated farms are those operations where one corporation or entity controls many, if not all of the phases for animal production. *Id.* Large concentrated feeding corporations combine their own farms, contract farms and other entities dealing with animal production, such as feed mills and transportation services into one consolidated group that oversee the entire operation. *Id.* These corporate farms are attractive to contractors because they guarantee a steady operation and protect investors from large substantial risks. *Id.*

causing harmful environmental problems.⁹⁵ Frustration and irritation has been prevalent in community meetings with those who live close to feedlot operations and among livestock farmers.⁹⁶ In fact, small livestock farmers are opposed to huge concentrated feedlot operations and have expressed concerns toward relaxed regulatory standards and the environment.⁹⁷ The pressure imposed by these two groups force state and local governments to confront and mitigate the concentrated feedlot operation issue.⁹⁸

Many states are just beginning to react to this dilemma.⁹⁹ County and municipal governments, particularly in the Midwest, have attempted to address potential problems and generate tighter controls within the county or municipal ordinances by increasing the scope of county regulation under the belief that federal and state regulations are too lenient.¹⁰⁰ Some concentrated feedlot operations are regulated

95. Oliver, *supra* note 16, at 1894. "The discussion in farming communities has grown more acrimonious as proponents of giant feedlots find themselves angrily opposed by smaller farms and other longtime rural residents." *Id.* at 1894. Expansion and building new feedlot operations have caused community meetings in rural areas to become hostile. *Id.* at 1896. This hostility is caused by the lack of respect and regard given to neighbors where feedlots are being created and expanded. *Id.*

96. *Id.* at 1896.

97. *See id.* Small dairy farmer, Norris Patrick who farms about 50 cattle argues that allowing large concentrated feedlot operations into South Dakota will put all of the local people out of business. *See* Shouse, *Big Dairies, New Questions*, *supra* note 5, at 4A.

98. *See* Oliver, *supra* note 16, at 1897.

99. *See id.* at 1894. States including Iowa, Minnesota, Oklahoma, Michigan, Missouri, Nebraska, and South Dakota have started to take varying actions via regulation and provide direction for requirements of large commercial feedlot operations. *See* Dummermuth, *supra* note 7, at 449. "The driving forces that have caused state legislatures and regulatory agencies to re-examine and revise their laws and regulations over the past few years have been similar in all the states, although in varying degrees. The major driving forces have been, and continue to be, environmental concerns about water quality and odors, structural and social concerns over vertical and horizontal integration trends, and economic issues such as adding value to agricultural products and competing with other states and countries to become the most efficient producers of pork in the world." *Id.* at 449. *See also* Walker, *supra* note 82, at 474-75. Missouri and Kansas have pursued legislative amendments to aid in controlling the amount of waste discharged into to water. *Id.* at 474-75.

100. Head, *supra* note 4, at 537. *See also* Oliver, *supra* note 16, at 1898. In South Dakota, feedlots generally fall under the "state's general permit category for concentrated animal feeding operations." Davidson, *supra* note 16, at 61. The state controls feedlot operations through the surface water pollution discharge permit program. *Id.* at 60. This regulation is found under S.D.C.L. § 34A-2-27 which states:

No person may carry on any of the following activities without a valid construction permit from the water management board for the disposal of all wastes which are, or may be, discharged thereby into the groundwaters of the state, nor may any person carry on any of the following activities without approval of plans and specifications from the secretary of the department pursuant to § 34A-2-29 for the disposal of all wastes which are, or may be, discharged thereby into surface waters of the state:

- (1) The construction, installation, modification or operation of any disposal system or part thereof, or any extension or addition thereto;
- (2) The increase in volume or strength of any wastes in excess of the permissive discharge specified under any existing permit;
- (3) The construction, installation, or operation of any industrial, commercial, or other establishment, or any extension or modification thereof or addition thereto, the operation of which would cause an increase in the discharge of wastes into the groundwaters of the state or would otherwise alter the physical, chemical or biological properties of any groundwaters of the state in any manner not already lawfully authorized;
- (4) The construction or use of any new outlet for the discharge of any waters into the waters of the state.

S.D.C.L. § 34A-2-27 (2004).

under the Federal Water Pollution Control Act.¹⁰¹ However, many accidental manure spills and other environmental dangers that occur also raise questions of federal regulation adequacy.¹⁰² To deal with some these concerns, local governments have attempted to manage the feedlot industry by passing local laws which classify the feedlot as a nuisance, or by passing zoning ordinances which restrict the sites available.¹⁰³ These local governments justify their management attempts through the state's regulatory power.¹⁰⁴

B. GOVERNMENTAL FOUNDATION FOR REGULATION

I. STATE DIRECTIVE

A state's authority to pass certain types of legislation, specifically environmental statutes, usually rests on the state's police power and is independent of the federal regulation.¹⁰⁵ By virtue of the state's police power, each state has inherent authority to "protect the health, safety, and welfare of its citizens."¹⁰⁶ Within each state, various levels of local government, including counties possess regulatory authority.¹⁰⁷ This authority varies widely and depends upon the extent of regulatory authority granted to the local governments by the state.¹⁰⁸

Most states possess constitutional or statutory provisions that allow counties and municipalities extensive authority to regulate the same issues that the state regulates.¹⁰⁹ Local governments within these states hold what is referred to as "Home Rule" authority.¹¹⁰ "Home Rule" is "[a] state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms."¹¹¹ Home Rule charters may also be granted by the state legislature, which essentially serves as a constitution for local governments.¹¹² The

101. Head, *supra* note 4, at 507-08.

102. *Id.* at 508.

103. *Id.* at 508. Believing that federal and state regulations are too lenient, many local governments have taken the initiative to regulate the location and operation of animal feeding operations within their jurisdictions. *Id.* at 507-08. Local governments and civilian groups have started to generate tighter controls within the county or municipal ordinances, limiting the operation and construction of concentrated animal feedlots. *Id.* at 507.

104. *Id.* at 538-40. See also Hansen, *supra* note 7, at 185.

105. Head, *supra* note 4, at 539-40. See generally Hansen, *supra* note 7, at 184-85 (explaining how local governments derive legislative authority through state governments).

106. Hansen, *supra* note 7, at 184. Local governments gain their power from the state's power and the amount of power a state has dictates the amount of power that can be given to a local government. *Id.* at 185. See also Paul Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN. ST. ENVTL. L. REV. 1 (2002) (focusing on the environmental costs and economic benefits of airports faced in many communities and the local governmental attempts at regulating them).

107. Head, *supra* note 4, at 539. See also Dempsey, *supra* note 106, at 12.

108. Head, *supra* note 4, at 539-540. If a local ordinance conflicts with state law, state law preempts the conflicting local law. *In re Appeal from decision of Yankton County Commission*, 2003 SD 109, ¶ 15, 670 N.W.2d 34, 38.

109. Head, *supra* note 4, at 540. "County governments have gone through an enormous change." Michelle Timmons et al., *County Home Rule Comes to Minnesota*, 19 WM. MITCHELL L. REV. 811, 816 (1993). Counties are now clothed with more responsibilities and wider discretion resulting in a "county government that is more professional, more flexible, and better equipped to handle the complexities that confront local governments in today's political and social environment." *Id.*

110. Head, *supra* note 4, at 540.

111. BLACK'S LAW DICTIONARY 738 (7th ed. 1999).

112. Timmons et al., *supra* note 109, at 816. "Effective home rule has two basic

Home Rule charter permits counties extensive freedom in administering and regulating county affairs.¹¹³ Thirty six states have adopted varying Home Rule statutes.¹¹⁴

II. SOUTH DAKOTA STATE DIRECTIVE

South Dakota, by statute, allows county's to control and regulate governmental zoning issues and concerns¹¹⁵ by permitting localities to adopt Home Rule.¹¹⁶ This enables counties to exert authority over local issues when they arise rather than waiting for the state government to act.¹¹⁷ Home Rule authority grants counties the power to make policy decisions and regulate the same subject matter as the state, which may include regulating animal feedlots.¹¹⁸ A county in South Dakota is a "creature of statute and has no inherent authority."¹¹⁹ Therefore, a county has only those powers that "are expressly conferred upon it by statute and such that can be reasonably implied from those expressly granted."¹²⁰ The foundation for each county's regulatory power and for the rights of county residents is found in the South Dakota statutes.¹²¹

In 1898, South Dakota became the first state to reserve legislative authority to its citizens through enactment of an amendment to Article III, section one of the State's Constitution.¹²² Article III, section one provides to the people "the right to refer legislative acts to a public vote" and grants them initiative and referendum measures at the state and municipal levels.¹²³ The right of initiative and referendum established

components. First, effective home rule includes an affirmative grant of power to a city or a county government to manage its own affairs. Second, effective home rule gives a city or county government a fair amount of autonomy from state legislative control." *Id.*

113. *Id.* at 814. The author focuses on the concept of the Home Rule and explains the difference between traditional county governments and the charter form of government. *Id.*

114. *Id.* at 817. Currently, Alaska, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington and Wisconsin have some form of county home rule in place. *Id.* at 817 n.30.

115. Dummermuth, *supra* note 7, at 508.

116. S.D.C.L. § 6-12-1 (2004). South Dakota's Home Rule statute states the local government has the authority to "pay the cost of election conducted on the question of adoption or amendment of a charter." *Id.*

117. See Timmons et al., *supra* note 109, at 818. Local governments in many states have a provision commonly called "Home Rule" authority. Head, *supra* note 4, at 540. Adoption of the Home Rule has many advantages. Timmons et al., *supra* note 109, at 819. County governments are more visible and responsive to citizens. Further, the home rule process educates voters of counties about their specific county government. *Id.* Local citizens and officials initiate and draft the charter, and then adoption must be passed by the citizens within the county. *Id.* at 820. The charter form of government also promotes continued involvement by the county voters. *Id.* This involvement includes using initiative and referendum. *Id.* Regardless of whether a state allows this authority, power is usually granted to adopt resolutions or zoning ordinances that are consistent with the state law. Head, *supra* note 4, at 540.

118. Timmons et al., *supra* note 109, at 818. See also Head, *supra* note 4, at 540.

119. State v. Hansen, 68 N.W.2d 480, 481 (S.D. 1955).

120. *Id.*

121. See *id.*

122. Christensen v. Carson, 533 N.W.2d 712, 714 (S.D. 1995).

123. *Id.* at 714. "Voter approval is nothing new in South Dakota government." *Id.* at 714 n.1 (citing Chip J. Lowe, Note, *Restrictions on Initiative and Referendum Powers in South Dakota*, 28 S.D. L. REV. 53-54 (1982)).

by the constitution has now been permitted through state statutes to voters in South Dakota counties.¹²⁴

The initiative and referendum processes allow citizens the opportunity to contribute in the policy making and legislating processes of local governments.¹²⁵ The important distinction between initiative and referendum is evidenced the South Dakota Constitution, codified law, and case law.¹²⁶ Article III, section one of the South Dakota Constitution explains the notion of initiative and referendum.¹²⁷ Initiative is the constitutional reservation of power in the people.¹²⁸ The right of initiative gives people the ability to enact or reject proposed bills and laws independent of the legislative body and promotes extensive involvement by the public.¹²⁹

Referendum is a right constitutionally reserved to the people in the state or local subdivisions.¹³⁰ In the course of the referendum process, proposals are submitted to the people for approval or rejection of any act which the legislature passed.¹³¹ The rationale for the referendum process is to cancel or suspend laws that are not yet effective to allow people a voice through direct legislation.¹³² South Dakota has reserved referendum control to the people.¹³³ As a result, the public makes the final

124. *Id.* at 714 n.1 (citing S.D.C.L. ch. 7-18A; S.D.C.L. § 38-8A-12; S.D.C.L. §§ 13-6-41 to 49). South Dakota also has in place statutes that allow specific issues to be submitted to the public for a vote. *Id.* Those statutes include: S.D.C.L. § 38-27-18; S.D.C.L. § 11-2-22; and S.D.C.L. 9-4-4.9. *Id.* This constitutional right is also codified at S.D.C.L. § 9-20-19. Karen A. Adams, Note, *Kirschenman v. Hutchinson County Board of Commissioners: Administrative and Legislative Boundaries for Zoning Ordinances*, 8 GREAT PLAINS NAT. RESOURCES J. 20, 23 (2004).

125. Adams, *supra* note 124, at 23.

126. *Christensen*, 533 N.W.2d at 714.

127. *Id.*

128. S.D. CONST. art. III, § 1. In defining initiative, article III states:

[t]he legislative power of the state shall be vested in a legislature which shall consist of a senate and house of representatives. However, the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state. . . .

Christensen, 533 N.W.2d at 715.

129. Adams, *supra* note 124, at 24. Initiative refers to a proposal which originates with the people. *Christensen*, 533 N.W.2d at 714. The right of initiative does not seek to limit the legislative power to enact laws, but instead compels performance of measures preferred by the people. *Byre v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985). It encourages people to enact measures themselves in the event the legislature fails to act. *Id.*

130. S.D. CONST. art. III, § 1. For the referendum, article III states:

[a]nd also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions.

Christensen, 533 N.W.2d at 715. The referendum process is limited through the constitution by laws which were enacted "for the immediate preservation of the public peace, health or safety, [in] support of the state government and its existing public institutions." *Id.*

131. *Byre*, 362 N.W.2d at 79. Referendum calls for a reaction among citizens regarding the measured initiated by the government. *Christensen*, 533 N.W.2d at 714. Without referendum action by the people, a proposal would automatically become law. *Id.* An example of the right of referendum is a response to a procedure commenced by the government. *Id.* Furthermore, procedural requirements must be associated with the referendum process. *Id.* Referendum provides a way for direct political participation, which grants the people a final say through voting. *Taylor Properties v. Union County*, 1998 SD 90, ¶ 21, 583 N.W.2d 638, 642. It includes a veto power over enactments of representative bodies. *Id.* at ¶ 23.

132. *Byre*, 362 N.W.2d at 79.

133. *Taylor Properties*, 1998 SD 90, ¶ 24, 583 N.W.2d at 643. The supreme court held

determination of its greatest interest through the referendum process.¹³⁴

Through referendum and initiative measures, the people can reserve in themselves power to deal with matters that might otherwise be assigned to the legislature.¹³⁵ The people have the capacity to suggest measures that shall be submitted to a vote of the electors, giving the people the ability to get involved in local government.¹³⁶ Thus, any legislative decision of a board of county commissioners is subject to the referendum process.¹³⁷ A legislative decision is defined as: “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.”¹³⁸ A legislative decision implements a new policy or plan that has a general or permanent character.¹³⁹ Therefore, adopting a “zoning code and a comprehensive plan” is generally considered a legislative decision.¹⁴⁰ The ability held by the people to address legislative issues is also expressly extended to county governments through comprehensive plans and adjuncts as provided by S.D.C.L. section 11-2-22.¹⁴¹ Under this statute, a comprehensive plan, zoning ordinance, and subdivision ordinance may be brought to a vote of the qualified voters of the county.¹⁴² Additionally, the South Dakota Legislature formed an entity called a county planning commission,¹⁴³ which has the authority to prepare a comprehensive

that the use of referendum did not violate a landowner’s due process rights. *Id.* People are able to express their desire concerning a legislative scheme proposed by the government. *Christensen*, 533 N.W.2d at 714. It is an ability for voters to exercise their rights through direct legislation and supersede the views of elected officials as to what best serves the public interest. *Taylor Properties*, 1998 SD 90, ¶¶ 21, 24, 583 N.W.2d at 643.

134. *Taylor Properties*, 1998 SD 90, ¶ 23, 583 N.W.2d at 643. We have held that where the local government has discretion as to what it may do and it acts under that discretion, it is a legislative act subject to referendum. *Kirschenman v. Hutchinson County Board of Comm’n*, 2003 SD 4, ¶ 7, 656 N.W.2d 330, 333 (citing *Wang v. Patterson*, 469 N.W.2d 577, 580 (S.D. 1991)). Furthermore, in determining whether an act is legislative or administrative, we apply a liberal rule of construction to permit citizens to exercise their powers of referendum. *Id.*

135. *Taylor Properties*, 1998 SD 90, ¶ 23, 583 N.W.2d at 643.

136. *Vitek v. Bon Homme County Board of Comm’rs*, 2002 SD 45, ¶ 10, 644 N.W.2d 231, 234. In addition, when a local government has discretion over what it may do and then acts, it acts legislatively and its actions are subject to standard referendum measures. *Christensen v. Carson*, 533 N.W.2d 712, 716 (S.D. 1995).

137. *Taylor Properties*, 1998 SD 90, ¶ 13, 583 N.W.2d at 640.

138. *Id.*

139. *Id.* See also *Leonard v. City of Bothell*, 557 P.2d 1306, 1308 (Wash. 1976).

140. *Leonard*, 557 P.2d at 1309 (citing *Fleming v. Tacoma*, 502 P.2d 327 (1972)).

141. *Taylor Properties*, 1998 SD 90, ¶ 24, 583 N.W.2d at 643.

142. S.D.C.L. § 11-2-22 (2004). The statute states:

The comprehensive plan, zoning ordinance, and subdivision ordinance may be referred to a vote of the qualified voters of the county pursuant to §§ 7-18A-15 to 7-18A-24, inclusive. The effective date of the comprehensive plan, zoning ordinance, or subdivision ordinance on which a referendum is to be held shall be suspended by the filing of a referendum petition until the referendum process is completed. However, if a comprehensive plan, zoning ordinance, or subdivision ordinance is referred to a referendum vote, no land uses that are inconsistent with the plan or ordinance may be established between the time of adoption of the resolution or ordinance by the board, as provided in § 11-2-20, and the time of the referendum vote.

Id.

143. *Coyote Flats v. Sanborn County Comm’n*, 1999 SD 87, ¶ 9, 596 N.W.2d 347, 350. For a county planning commission:

[t]he board of county commissioners of each county in the state may appoint a commission of five or more members to be known as the county planning commission. If a county proposes to enact or implement any purpose set forth in this chapter then the board of county commissioners shall appoint a county planning commission. The total membership of the county planning commission shall always be an uneven number and at least one member shall be a member of the board of

plan for a county according to S.D.C.L. section 11-2-11.¹⁴⁴ These foundations established by the legislature create regulatory methods for counties.¹⁴⁵ Zoning ordinances and other controls are included and in accordance with comprehensive plans.¹⁴⁶

C. REGULATION METHODS

I. ZONING

The legislature "intended that the rights of landowners would be protected from arbitrary or detrimental zoning by the public hearing process."¹⁴⁷ This guarantees protection for landowners and provides counties with the power to decide zoning issues.¹⁴⁸ The county board, as a delegate of the county, has general power over its property and the management of its business affairs.¹⁴⁹ The board has no power beyond what has been provided through the statutes.¹⁵⁰ Therefore, counties, municipalities and other political subdivisions must carefully "comply with statutory requirements, including notice and hearing, in order to provide due process of law."¹⁵¹

Boards of county commissioners are vested with powers expressly granted through statutes and powers reasonably essential to enable them to perform the powers imposed upon them.¹⁵² Prior to 2000, county commissioners had extensive discretion in the area of zoning under S.D.C.L. section 11-2-36.¹⁵³ Under this statute,

county commissioners. The county planning commission is also the county zoning commission.

S.D.C.L. § 11-2-2 (2004).

144. *Coyote Flats*, 1999 SD 87, ¶ 9, 596 N.W.2d at 350. "[T]he county planning commission may prepare, or cause to be prepared, a comprehensive plan for the county including those municipalities within the county which are either unincorporated or which have requested by resolution of the governing board of such municipality to be included."

S.D.C.L. § 11-2-11 (2004). A comprehensive plan is:

a document which describes in words, and may illustrate by maps, plats, charts, and other descriptive matter, the goals, policies, and objectives of the board to interrelate all functional and natural systems and activities relating to the development of the territory under its jurisdiction.

S.D.C.L. § 11-2-1(3) (2004).

145. See *Pennington County v. Moore*, 525 N.W.2d 257, 260 (S.D. 1994). To aid counties in local zoning authority, the legislature has allowed counties to develop a comprehensive plan under S.D.C.L. section 11-2-1(3). *Coyote Flats*, 1999 SD 87, ¶ 9, 596 N.W.2d at 350. The comprehensive zoning plan provides protection and guidance to the overall development of the county. See *id.* ¶ 33. Through comprehensive plans, counties in South Dakota are allowed to control and establish regulations by zoning ordinances, which may include regulating animal feedlots. See *Dummermuth*, *supra* note 7, at 508.

146. *Coyote Flats*, 1999 SD 87, ¶ 9, 596 N.W.2d at 350. See also *Moore*, 525 N.W.2d at 259. South Dakota Codified Laws section 11-2-1(10) defines a zoning ordinance as: "any ordinance adopted by the board to implement the comprehensive plan by regulating the location and use of buildings and uses of land." S.D.C.L. § 11-2-1(10) (2004).

147. *Moore*, 525 N.W.2d at 260 (citing *Pilgrim v. City of Winona*, 256 N.W.2d 266, 270 (Minn. 1970)).

148. See *id.*

149. State *ex rel.* *Jacobsen v. Hansen*, 68 N.W.2d 480, 481 (S.D. 1955).

150. *Id.*

151. *Moore*, 525 N.W.2d at 259.

152. *Pearson v. Johnson*, 238 N.W. 644, 646 (S.D. 1931).

153. *Ridley v. Lawrence County Comm'n*, 2000 SD 143, ¶ 9, 619 N.W.2d 254, 258. In this statute, the legislature granted the board of county commissioners the ability to: adopt zoning ordinances, resolutions or regulations designating or limiting the

boards of county commissioners were granted extensive jurisdiction over the enactment of zoning ordinances.¹⁵⁴ However, in 2000 the legislature repealed S.D.C.L. section 11-2-36 and “enacted a comprehensive statutory zoning scheme.”¹⁵⁵ Under this scheme, a county board falls into one of three positions when enacting zoning ordinances. First, if the county board has a comprehensive plan in place, its authority to adopt a zoning ordinance is found under S.D.C.L. section 11-2-13.¹⁵⁶ Second, if the county board is in the process of establishing a comprehensive plan it may implement temporary zoning and land use controls through S.D.C.L. section 11-2-10.¹⁵⁷ Third, if the county board does not have a comprehensive plan in place or is not in the process of establishing a plan, the board must follow certain statutory mandates to enact zoning ordinances within the county.¹⁵⁸ Without following the proper protocol or already having in place a comprehensive plan, a board cannot enact new zoning ordinances.¹⁵⁹ However, if the county does have a comprehensive plan in place and an unpopular zoning ordinance is passed, the people that are dissatisfied can bring a cause of action against the county board.¹⁶⁰

location . . . [a]ll such provisions shall be uniform for each class of land or building throughout any district, but the provisions in one district may differ from those in other districts.

S.D.C.L. § 11-2-36 (1999) (repealed in 2000).

154. *Ridley*, 2000 SD 143, ¶ 9, 619 N.W.2d at 258.

155. *In re Appeal from decision of Yankton County Commission*, 2003 SD 109, ¶ 18, 670 N.W.2d 34, 39. For a county to effectively pass a zoning ordinance proper steps must be followed. *See State ex rel. Jacobsen v. Hansen*, 68 N.W.2d 480, 481 (S.D. 1955).

156. S.D.C.L. § 11-2-13 (2004). South Dakota Codified Laws section 11-2-13 states:

For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

“Boards of county commissioners may not disregard the clear intent of a comprehensive zoning plan.” *Pennington County v. Moore*, 525 N.W.2d 257, 259 (S.D. 1994).

157. *Moore*, 525 N.W.2d at 260. In establishing any temporary zoning ordinances, a county must follow all statutory mandates set forth under S.D.C.L. § 11-2-10. *Id.*

If a county is conducting or in good faith intends to conduct studies within a reasonable time, or has held or is holding a hearing for the purpose of considering a comprehensive plan, the board in order to protect the public health, safety, and general welfare may adopt as emergency measures a temporary zoning ordinance and map and a temporary subdivision ordinance, the purposes of which are to classify and regulate uses and related matters as constitutes the emergency. Before adoption or renewal of the emergency measure or measures, the board shall hold at least one public hearing. Notice of the time and place of the hearing shall be given once at least ten days in advance by publication in a legal newspaper of the county. Any emergency measure is limited to one year from the date it becomes effective and may be renewed for one year. In no case may such a measure be in effect for more than two years.

S.D.C.L. § 11-2-10 (2004).

158. *See Moore*, 525 N.W.2d at 259. “There are binding statutes that set forth procedural mandates for the adoption of zoning regulations: [t]he power to decide matters of zoning, which by necessity may include the power to exercise discretion, is not synonymous with the power to disregard the mandates of the enabling legislation and the comprehensive plan. . . . Both the enabling legislation and the comprehensive plan are specific in setting out the procedures to be followed.” *Id.* (citing *Save Centennial Valley Ass’n, Inc. v. Schultz*, 284 N.W.2d 452,457 (S.D. 1979)).

159. *Id.* If a county fails to implement the proper procedures, zoning ordinances that fail to comply with the state enabling statutes are void. *Id.*

160. *See Kirschenman v. Hutchinson County Board of Comm’n*, 2003 SD 4, ¶ 5, 656 N.W.2d 330, 332. *See also Vitek v. Bon Homme County Board of Comm’rs*, 2002 SD 45, ¶ 10, 644 N.W.2d 231, 234.

South Dakota's legislature has two methods for challenging a decision of the county commission board: 1) appeal under the provisions of S.D.C.L. section 7-8-27, by an aggrieved party, or 2) appeal under S.D.C.L. section 7-8-28, by the state's attorney.¹⁶¹ Accordingly, S.D.C.L. section 7-8-27, allows for an appeal by a person who has suffered a personal or individual grievance.¹⁶² On the other hand, under S.D.C.L. section 7-8-28 an appeal is granted through taxpayer challenges.¹⁶³ This section does not require a person to be aggrieved from the county boards' decision.¹⁶⁴ Rather, section 7-8-28 provides the state's attorney the authority to decide whether the case has merit and is of public interest.¹⁶⁵

II. STRIKING A PROPER BALANCE BETWEEN GOVERNMENT AND CITIZENS

The creation of only two classes of appeals against a county board's decision is due to an attempt to strike an appropriate balance between the obligation of county governments to operate in a competent and organized manner and the right of its citizens to pursue unfairness in the courts.¹⁶⁶ "If every taxpayer possessed the unlimited privilege of constantly asserting the public right and interest in his own person and seeking judicial determination thereof at public expense, governmental processes might be most seriously handicapped."¹⁶⁷ The South Dakota Supreme Court has recognized that the availability of strict limitations on taxpayer challenges to county commission actions was established to aid in reducing lawsuits brought by taxpayers and to prevent "unnecessary interference with the conduct of public affairs."¹⁶⁸ It is important to note, this strict limitation does not refuse a taxpayer the

161. *Smith v. Tobin*, 367 N.W.2d 757, 760 (S.D. 1985).

162. *Id.* In the statute,

[t]he term 'any person aggrieved' is most likely broad enough to include, persons who are not actually parties to the proceeding before the county board, but we think it can only include such persons when they are able affirmatively to show that they are 'aggrieved' in the sense that by the decision of the board they suffer the denial of some claim of right either of person or property, or the imposition of some burden or obligation in their personal or individual capacity as distinguished from any grievance which they might suffer by the decision solely in their capacities as members of the body public of the county, or taxpayers or electors thereof, common in nature to a similar grievance suffered by all or many other electors or taxpayers.

Barnum v. Ewing, 220 N.W. 135, 138 (S.D. 1928).

163. *Ridley v. Lawrence County Comm'n*, 2000 SD 143, ¶ 11, 619 N.W.2d 254, 258. Even though the residents of the family farm corporation were not considered "aggrieved" by the zoning changes, there was still an appeal action through the general taxpayer challenge laid out in S.D.C.L. § 7-8-28. *Id.* South Dakota Codified Laws § 7-8-28 declares:

[u]pon written demand of at least fifteen taxpayers of the county, the state's attorney shall take an appeal from any action of such board if such action relates to the interests or affairs of the county at large or any portion thereof, in the name of the county, if he deems it to the interest of the county so to do; and in such case no bond need be required or given and upon serving the notice provided for in § 7-8-29, the county auditor shall proceed the same as if a bond had been filed and his fees for making the transcript shall be paid as other claims by the county.

S.D.C.L. § 7-8-28 (2004).

164. *Ridley*, 2000 SD 143, ¶ 11, 619 N.W.2d at 258.

165. *Weger v. Pennington County*, 534 N.W.2d 854, 857 (S.D. 1995).

166. *Ridley*, 2000 SD 143, ¶ 7, 619 N.W.2d at 258.

167. *State ex rel Cook v. Richards*, 245 N.W. 901, 906 (S.D. 1932). Good public policy requires the use of discretion to prevent unnecessary interference. *Id.* If everyone was allowed an unlimited privilege of continuously asserting their public right at the public expense, government authority and processes would be seriously hindered. *Id.*

168. *Weger*, 534 N.W.2d at 857 (citing *Simpson v. Tobin*, 367 N.W.2d 757, 761 (S.D. 1985)).

ability to bring a complaint regarding public interest before the court.¹⁶⁹ However, the legislature has limited the appeals of public interest to three circumstances.¹⁷⁰ First, the action of the commission “must relate to the interests or affairs of the county.”¹⁷¹ Second, a “written demand of at least fifteen taxpayers must be presented.”¹⁷² Third, the county’s interest to appeal must be considered by the states attorney.¹⁷³ The supreme court’s previous holdings on taxpayer dealings “stand for the proposition that where there is a remedy by appeal, that remedy must be followed, rather than actions in equity or at common law.”¹⁷⁴

The supreme court has further reasoned that in taxpayer appeals, “the intent of the statute must be determined from what the legislature said, rather than what the court thinks the legislature should have said.”¹⁷⁵ The interpretation of the statute must be limited “to the plain, ordinary meaning of the language used by the legislature.”¹⁷⁶ One purpose of statutory construction analysis is to determine the true intent of the law.¹⁷⁷ One of the key rules of statutory construction is to give words and phrases their basic meaning and effect, thus possibly striking the proper balance between the government and the citizens.¹⁷⁸ By adhering to what the legislature has established, recognizing citizen concerns, and interpreting the language in the statutes, an acceptable balance of authority will likely be accomplished for county regulation.¹⁷⁹

D. COUNTY ZONING AUTHORITY OVER CONCENTRATED FEEDLOT OPERATIONS

The development of concentrated feedlot operations has imposed new conflicts with zoning regulations.¹⁸⁰ Due to their intense nature, animal feeding operations create conflicts with neighboring property owners.¹⁸¹ In South Dakota, no law prohibits local zoning of agricultural facilities.¹⁸² South Dakota allows local governments to enact ordinances that require setbacks, which are separation distances to control feedlot odor, but some counties have no separation distances.¹⁸³ This gives the local government some control over the feedlot and the community where the feedlot resides.¹⁸⁴ The power granted to local governments through

169. *Id.*

170. *Id.* at 857-858.

171. *Id.* at 858.

172. *Id.*

173. *Id.*

174. *Id.* at 859.

175. *Hagemann v. N.J.S. Engineering Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843 (citing *M.B. v. Konenkamp*, 523 N.W.2d 94, 97 (S.D. 1994)).

176. *Id.*

177. *Hagemann*, 2001 SD 102, ¶ 5, 632 N.W.2d at 843.

178. *See id.* *See also* *Ridley v. Lawrence County Comm’n*, 2000 SD 143, ¶ 7, 619 N.W.2d 254, 258 (citing *Weger*, 534 N.W.2d at 858).

179. *Hagemann*, 2001 SD 102, ¶ 5, 632 N.W.2d at 843. *See also* *Ridley*, 2000 SD 143, ¶ 7, 619 N.W.2d at 258.

180. *Walker*, *supra* note 82, at 464.

181. *Id.* at 464-65.

182. *Head*, *supra* note 4, at 574.

183. *Hansen*, *supra* note 7, at 190. *See also* *Cordell v. Codrington County*, 526 N.W.2d 115, 118 (S.D. 1994). In *Cordell*, the S.D. Supreme Court held that “this commercial feedlot is not in compliance with the county ordinances prohibiting such an operation within 80 rods of an established residence and does not meet the requirements for a variance by the Board of Commissioners.” *Id.*

184. *Hansen*, *supra* note 7, at 190. To reduce the loss of agricultural land and resources the South Dakota Legislature enacted S.D.C.L. § 21-10-25.1 which states:

It is the policy of the state to conserve, protect, and encourage the development and

comprehensive plans has created much conflict and litigation through challenging the zoning ordinances that individual counties place into effect.¹⁸⁵ These disputes are refuted by the authority granted to local governments over animal feedlots.¹⁸⁶ The local government's power runs in collaboration with the principle that "initiated legislation must be within the jurisdiction and power of a county board to enact."¹⁸⁷

IV. ANALYSIS

It is well established that zoning ordinances are often in conflict with common law property rights and only find their authority through the state police power.¹⁸⁸ The capacity to operate the preferred business on one's own land should not be ignored.¹⁸⁹ On the other hand, the majority of the populace has a right to be heard and their opinion should not be completely disregarded.¹⁹⁰ It is a county's responsibility to find a proper zoning balance between landowner rights and desires and the will of local residents.¹⁹¹ The desire to find a balance is essential, and ideally, there should be no conflict when implementing a zoning ordinance.¹⁹² Finding that proper balance introduces an important question: *Should the will of the people be ignored because the county does not have in place the proper procedures for enacting a valid zoning ordinance?*¹⁹³

The will of the people should not be disregarded.¹⁹⁴ Despite South Dakota's long history of direct democracy, in *Heine Farms v. Yankton County*, the view of the registered voters in Yankton County was ignored.¹⁹⁵ The court ruled that because the county had not implemented proper procedures, the zoning ordinance was

improvement of its agricultural land for the production of food and other agricultural products. The Legislature finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of §§ 21-10-25.1 to 21-10-25.6, inclusive, to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

S.D.C.L. § 21-10-25.1 (2004).

185. See generally Walker, *supra* note 82, at 475-76 and n.104-05 (discussing that a lack of state response toward concentrated animal feedlots has caused numerous local governments to adopt zoning ordinances to control the location and expansion of feedlots, which include instituting setback distances).

186. See *Heine Farms v. Yankton County*, 2002 SD 88, ¶ 18, 649 N.W.2d 597, 602.

187. *Id.*

188. *Pennington County v. Moore*, 525 N.W.2d 257, 259 (S.D. 1994). People want to have the assurance that because they own the land, they are able to control and use the land by their personal preference and not have the government constantly monitoring and interfering with their daily activities. See *Coyote Flats v. Sanborn County Comm'n*, 1999 SD 87, ¶ 35, 596 N.W.2d 347, 355.

189. *Coyote Flats*, 1999 SD 87, ¶ 35, 596 N.W.2d at 355. A common state goal is to promote commerce and trade. See *Dummermuth*, *supra* note 7, at 513. With local zoning and regulations, this goal can be seriously diminished. *Id.*

190. See *Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603 (Gors, J., dissenting).

191. See *Hansen*, *supra* note 7, at 195. The author articulates that states, particularly Minnesota are moving in the right direction by granting counties local control in the areas of feedlot operations. *Id.* The author also emphasizes that in the past years an outcry for local regulation has become stronger and conventional thinking supports the idea that local governments are better able to deal with citizen needs. *Id.*

192. See *Adams*, *supra* note 124, at 31.

193. See *Heine Farms*, 2002 SD 88, ¶¶ 14-15, 649 N.W.2d at 601.

194. See *id.* ¶ 23 (Gors, J., dissenting).

195. See *id.*

unlawful.¹⁹⁶ As a result, the people were denied their right to enact a zoning ordinance that would affect the Heine Farms feedlot operation.¹⁹⁷

The dissent in *Heine Farms v. Yankton County* presents the better reasoned authority which should be followed.¹⁹⁸ Justice Gors is persuasive in stressing that the court wrongfully permitted the county commission's failure to enact a comprehensive plan to exclude the undoubtedly expressed will of the people.¹⁹⁹ The will of the people within South Dakota is paramount to a county's failure to adopt a zoning ordinance. This reasoning is based on the people's power to initiate legislation, which is only limited by the South Dakota Constitution and state statutes.²⁰⁰

It is inequitable for the people within the county to be denied their right to be heard.²⁰¹ Citizens are given the power to determine what best serves their needs as well as the authority to legislate for themselves through initiative and referendum measures by the South Dakota Constitution.²⁰² By granting citizens this authoritative power, they are left with the ultimate authority to decide important issues through the voice of majority.²⁰³

In contrast, it has been argued that unbridled discretion granted to citizens of a state leads to unrestricted and illegal zoning ordinances that often cause more damage than good to the general public.²⁰⁴ Arguments have also been made claiming that allowing the majority of people to enact any zoning measure they desire without the oversight and direction of the government would be absurd and cause massive chaos.²⁰⁵ However, the South Dakota Constitution and state statutes²⁰⁶ have set forth mandates that citizens must follow in expressing their desires, making the argument of unbridled discretion unpersuasive.²⁰⁷

The argument against legislative enactments by the county government through

196. *See id.* ¶ 18.

197. *See id.* ¶¶ 17-18.

198. *See id.* ¶ 23 (Gors, J., dissenting).

199. *Id.*

200. *See id.*

201. *See Kirschenman v. Hutchinson County Board of Comm'n*, 2003 SD 4, ¶ 7, 656 N.W.2d 330, 333 (citing *Wang v. Patterson*, 469 N.W.2d 577, 580 (S.D. 1991)). *But see Cary v. City of Rapid City*, 1997 SD 18, ¶ 23, 559 N.W.2d 891, 895 (concluding "the ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners").

202. *Kirschenman*, 2003 SD 4, ¶ 7, 656 N.W.2d at 333. *But see Cary*, 1997 SD 18, ¶ 23, 559 N.W.2d at 895.

203. *Kirschenman*, 2003 SD 4, ¶ 7, 656 N.W.2d at 333.

204. *See generally Cary*, 1997 SD 18, ¶ 23, 559 N.W.2d at 895 (asserting that "delegations of legislative authority which allow this ultimate decision [over one's property] to be made by a minority of property owners without an opportunity for review are unlawful"). *See also State ex rel Cook v. Richards*, 245 N.W. 901, 906 (S.D. 1932).

205. *Cary*, 1997 SD 18, ¶ 23, 559 N.W.2d at 895. *See also Richards*, 245 N.W. 901, 906 (S.D. 1932) (asserting that "sound public policy requires the exercise of some substantial discretion in order to prevent continual and unnecessary interference with the conduct of public affairs upon technical and picayunish objections"). *But see Ridley v. Lawrence County Comm'n*, 2000 SD 143, ¶ 7, 619 N.W.2d 254, 257; *Weger v. Pennington County*, 534 N.W.2d 854, 858 (S.D. 1995) (stating the legislature has clearly established the procedures for citizens to follow in regard to enacting and protesting acts of county commissions, making the argument of chaos impractical). Furthermore, "South Dakota case law establishes that improperly adopted zoning regulations are invalid and will not be enforced." *Pennington County v. Moore*, 525 N.W.2d 257, 259 (S.D. 1994) (citing *City of Brookings v. Martinson*, 246 N.W. 916 (S.D. 1933)).

206. *Hagemann v. N.J.S. Engineering, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843.

207. *Brye v. City of Chamberlain*, 362 N.W.2d 69, 79 (S.D. 1985).

its citizens, however, was successfully upheld in *Heine Farms v. Yankton County*.²⁰⁸ The majority of people in Yankton County wanted to propose an ordinance to limit the Heine Farms operation.²⁰⁹ Instead of respecting the will of the people, the South Dakota Supreme Court invalidated the county's proposed ordinance.²¹⁰ Furthermore, the decision by the court overlooked what the Constitution and statutes have established in regard to citizen legislation and county regulation.²¹¹ The court's decision to declare the county's zoning ordinance illegal presented a dilemma as to which level of government is better equipped to regulate concentrated animal feedlots.²¹²

A. LOCAL REGULATION

Demands for local regulation and authority have become stronger, and county governments need to respond.²¹³ It is essential that local governments not be powerless when dealing with concentrated animal feedlots, as localized zoning tackles particular conflicts within each specific county and ultimately gives county governments control to resolve land use conflicts between neighbors.²¹⁴ Granting counties the power to enact zoning ordinances seems like common sense because conflicts can be dealt with immediately instead of waiting for state government to get involved.²¹⁵

Allowing local governments to decide land uses is strongly favored by local residents because local zoning gives them the opportunity to contribute their opinions to the decision making process and affords them the protection they deserve.²¹⁶ People prefer to engage in decision making processes when the decision impacts them and where they are given some control over the result.²¹⁷ An involved community with interests in local government procedures and a safe place to live is a common interest among county residents.²¹⁸

208. *Heine Farms v. Yankton County*, 2002 SD 88, ¶ 18, 649 N.W.2d 597, 602.

209. *Id.* ¶ 3.

210. *Id.* ¶ 17.

211. *Id.* ¶ 23 (Gors, J., dissenting).

212. *Id.* ¶¶ 17-18. Because the county had not taken the proper steps to implement a comprehensive plan, which was a prerequisite for enactment of a zoning ordinance, the people's right of initiative was denied. *Id.* ¶ 16. Due to the fact that Yankton County did not have a comprehensive plan in place, the trial court held that the county's initiated ordinance was illegal and unenforceable. *Id.* ¶ 15. The preliminary efforts of establishing a comprehensive plan were not completed and Yankton County raised no argument to the contrary. *Id.* ¶ 17.

213. *See generally* Head, *supra* note 4, at 507-508 (discussing approaches local governments have taken in regard to citizen groups' demanding "tighter controls" over animal feedlot operations).

214. *See id.* at 575. The author notes more uniform state law is often preferable to local government regulations, but local governments are more suited to control the location and areas of construction where animal feedlots might appear. *Id.* at 509-510. The author feels concentrated animal feeding operations have the greatest impact at the local level and therefore, local governments should be given power to deal with regulating them. *See id.* at 575.

215. Abdalla et al., *supra* note 2, at 38.

216. *See* Hansen, *supra* note 7, at 178. *See also* Walker, *supra* note 82, at 494.

217. Abdalla et al., *supra* note 2, at 38. Localized zoning is also preferred among local communities not only for the contribution it allows, but also for the economic benefits the agricultural community receives. Walker, *supra* note 82, at 493.

218. Abdalla et al., *supra* note 2, at 24.

B. STATE REGULATION

There is also a strong preference for state-wide control rather than local control.²¹⁹ Since counties in South Dakota are free to enact zoning ordinances, a mix of state regulation and local zoning enforcement is created, making it difficult to establish a standardized system.²²⁰ A standardized system presents the strongest urging for state-wide control because it institutes administrative efficiency, which is an ideal way to manage issues and uphold laws within the state.²²¹ A standardized system also provides security for trade and commerce.²²² Furthermore, it would provide steady and constant regulations.²²³

The state government in many instances molds and defines the local governments' authority through the state statutes.²²⁴ The South Dakota Supreme Court has stressed the necessary regulations of state statutes, which establishes procedural mandates for the implementation of zoning regulations.²²⁵ In addition, the supreme court has upheld what the legislature commanded in regard to enactment of zoning ordinances, stating that:

[t]he power to decide matters of zoning, which by necessity may include the power to exercise discretion, is not synonymous with the power to disregard the mandates of the enabling legislation and the comprehensive plan. . . . Both the enabling legislation and the comprehensive plan are specific in setting out the procedures to be followed to effectuate a change in the comprehensive plan. . . . These *provisions* are mandatory and *may not* be disregarded by the *Commission*.²²⁶ (emphasis in original)

As a result, the legislature paved the foundation for what counties must do to effectuate a change within its jurisdiction.²²⁷ As a result, counties would be effectively functioning under the legislature's mandates.²²⁸

In establishing the method for enacting a zoning ordinance, the legislature wanted to ensure that the rights of landowners would be protected from arbitrary and harmful zoning.²²⁹ As a result, all other political subdivisions must follow the statutory requirements to guarantee due process of law.²³⁰ It is essential to ensure that county

219. See Dummermuth, *supra* note 7, at 513. See also Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland* 45 U. PITT. L. REV 289, 322-23 (1984) (arguing that local ordinances are counterproductive toward encouraging farms to continue farming). Opponents to local government regulation suggest that by allowing authority at the local level, a "patchwork of inconsistent regulation" is produced making local regulation too burdensome. Head, *supra* note 4, at 503-04.

220. Head, *supra* note 4, at 504.

221. See Dummermuth, *supra* note 7, at 513. See also Hand, *supra* note 219, at 322.

222. See Dummermuth, *supra* note 7, at 513.

223. See *id.*

224. See Hansen, *supra* note 7, at 177 n.88. "In many instances, the state's granting of a charter defines the boundaries of the unit and classifies it under state laws that provide detailed descriptions of the power and authority local governments can exercise." *Id.*

225. Pennington County v. Moore, 525 N.W.2d 257, 259 (S.D. 1994).

226. *Id.*

227. *Id.*

228. See *id.* See also *supra* notes 179-183 and accompanying text.

229. Moore, 525 N.W.2d at 260. Only in cases where the landowner has "sat on his rights" should he be banned from fighting the proposed ordinance issued against his property. *Id.*

230. *Id.* at 259.

ordinances are lawfully passed and that the people are heard on important issues.²³¹

Since the legislature laid the foundation and set the procedural requirements for counties to follow, it seems reasonable that counties would follow what the legislature intended.²³² However, that did not happen in the *Yankton County v. Heine Farms* case.²³³ There, the county had not adopted the procedural requirements making the proposed zoning ordinance invalid.²³⁴ As a result, Yankton County stripped the people of their power to regulate Heine Farms' feedlot.²³⁵ In order to protect the citizens' rights and interests and prevent another case like Heine Farms, it is essential the county follow state statutory requirements.²³⁶ Allowing local governments the power to regulate concentrated animal feedlots should be granted cautiously to protect the system from litigation.²³⁷ This places a huge responsibility upon local governments to comply with and follow state law, making state-wide control a safer option.²³⁸

C. A MIX OF LOCAL AND STATE LAW

Answering the question of which is the better option, local or state-wide control, is difficult and requires that many factors be taken into consideration.²³⁹ If South Dakota and its county governments fail to work together, the South Dakota Supreme Court will be forced to determine where the power to regulate feedlots should reside.²⁴⁰ The optimal solution is to find a balance between the two levels of government.²⁴¹ A unified front by local and state governments would establish a standardized statewide system, rather than an assortment of local government regulations.²⁴² Sound and predictable laws gathered from logical state reasoning and local input creates the best solution to diffuse controversial claims.²⁴³ The ideal solution is to have a balance of state and local laws and actions that allow feedlots to function freely and effectively with governmental oversight.²⁴⁴

To create this balance, the state legislature or board of county commissioners

231. *See id.*

232. *See* Hagemann v. N.J.S. Engineering Inc., 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843. *See also Moore*, 525 N.W.2d at 259-60.

233. *See* Heine Farms v. Yankton County, 2002 SD 88, ¶¶ 16-18, 649 N.W.2d 597, 601-02.

234. *See id.*

235. *Id.* ¶ 23 (Gors, J., dissenting).

236. *See* Hansen, *supra* note 7, at 195. If the state legislature fails to assist local governments in adequately regulating feedlots, local governments will attempt regulation on their own, creating unnecessary litigation. *Id.*

237. *See generally id.* (commenting local governments should be granted some control but that control given should be closely monitored by state law to ensure frivolous litigation claims will not arise).

238. *See* Head, *supra* note 4, at 575.

239. *See* Dummermuth, *supra* note 7, at 513. In answering this important question, factors to consider include, environmental concerns, such as water and odor as well as the quickness that new laws can be enacted to protect the environment from damage. *Id.* Another factor is the economic concerns regarding feedlot operations, such as the size of the industry, the benefit of stability, the cost of enforcement, and the ability of officials to monitor current feedlot situations. *Id.* Determining what issues belong under which level of government is a difficult question to answer. *Id.*

240. *See* Hansen, *supra* note 7, at 195.

241. *See generally* Head, *supra* note 4, at 575 (discussing local and state governments working together to create a uniform system followed by the counties throughout the state).

242. *See generally id.* (commenting about local and state governments working together to create a uniform system followed by the counties throughout the state).

243. *See id.*

244. *See* Dummermuth, *supra* note 7, at 513.

within South Dakota needs to take action and make sure proper laws are being followed and the people within the state are being heard.²⁴⁵ By enacting the proper laws and establishing a solid foundation for citizens to follow, the situation that occurred in *Heine Farms v. Yankton County* will be avoided.²⁴⁶ Furthermore, any action through the legislature should be considered strongly and thought out carefully to ensure local communities are getting the most benefit.²⁴⁷ By assuring this result, citizens of local communities within South Dakota will be able to provide input to pertinent issues and concerns directly affecting them and the vote of the majority will not be disregarded.²⁴⁸ It is essential that future government actions eliminate the tensions among different levels of government and provide a balanced voice for its citizens.²⁴⁹ In accomplishing this result, citizens in South Dakota will be granted the balance and representation they deserve throughout the various levels of government.²⁵⁰

V. CONCLUSION

County governments are better situated to deal with concentrated animal feedlots because they have stronger relations to the agricultural community. Allowing substantial local governmental involvement with state input provides the best answer to animal feedlot regulation and diffuses frivolous claims over the proper steps regarding implementation of rules and expressing power. Local governments are usually at the center of land disputes and are better able to handle and dispose of the problem quickly and efficiently. Local governments know how to approach zoning issues in their communities, which positions them at an advantage over any state efforts made toward zoning and controlling areas.

The people have a right to be heard, but the Constitution and statutes provide mandates. The constitution provides the people within the state a right to express their will. This expression should be done through the rules established by the Constitution and statutes. The elected officials must also fulfill their duty to act in accordance with the established regulations, so the people in South Dakota are not ignored. Elected officials accept the responsibility to represent their constituents. They should listen to the people and should fulfill their position by making sure counties are following proper legislation.

The problem Yankton County faced should rouse all counties in South Dakota to re-examine the procedural steps they have taken to make certain all of the state enabling legislation has been followed. Heine Farms was able to overcome the overwhelming opposition to their proposed feedlot by virtue of the County's failure to enact proper procedural requirements. Failure of the Yankton County Commissioners to enact a comprehensive plan was absurd and resulted in a "big stink" because the electorate in South Dakota was ignored.

245. See Hansen, *supra* note 7, at 195.

246. See *Heine Farms v. Yankton County*, 2002 SD 88, 649 N.W.2d 597.

247. See Hansen, *supra* note 7, at 195.

248. See *Heine Farms*, 2002 SD 88, ¶¶ 17-23, 649 N.W.2d at 602-03.

249. See Abdalla et al., *supra* note 2, at 42. The author expresses that governments must reduce risk and uncertainty in regard to all of the issues surrounding intense livestock operations. *Id.*

250. See *Heine Farms*, 2002 SD 88, ¶ 23, 649 N.W.2d at 603 (Gors, J., dissenting).