

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
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COUNTY OF MINNEHAHA)	SECOND JUDICIAL CIRCUIT
* * * * *	*	* * * * *
JOHN CUNNINGHAM,	*	AFFIDAVIT AND VERIFIED PETITION
Applicant	*	SETTING FORTH THE ILLEGALITY OF
Vs	*	THE SIOUX FALLS CITY COUNCIL
CITY OF SIOUX FALLS	*	DECISION AS FILED ON
CITY COUNCIL (Council)	*	SEPTEMBER 28, 2020
Respondents	*	
* * * * *	*	* * * * *

Comes now John Francis Cunningham as applicant and pursuant to the provisions of SDCL 21-31-1 hereby makes this affidavit and application for a writ of certiorari issued upon the above named respondents, setting forth the impropriety and illegality of the action of the Sioux Falls City Council (hereafter “the Council”). That further, this affidavit and application is related to improper and/or illegal actions at the special meeting of the Council held on September 10, 2020 to act on the Sioux Falls Board of Ethics complaint 20B under Sioux Falls SD Code of Ordinances Section 35.058(f)(6) in that they illegally deprived the complainant (the applicant) the rights guaranteed in Section 35.058 (f)(6) of the Code of Ordinances of Sioux Falls.

Applicant/affiant submits that he submitted a complaint to the Sioux Falls Board of Ethics (hereafter “the Board”) pursuant to Section 35.009(a) dated May 13, 2020. The complaint alleged a violation of Section 35.053(e). The Board assigned the designator 20B to the complaint.

A copy of Ordinance Section 35.009 is attached as Exhibit 1

A copy of Ordinance Section 35.053 is attached as Exhibit 2

A copy of Board of Ethics complaint 20B is Exhibit 3

After reviewing all evidence the Board forwarded their findings of probable cause in its report to the Council on August 11, 2020. A copy of the report to the Council is attached as Exhibit 4

The Code of Ordinances of Sioux Falls section 35.058 requires that upon receiving the report from the Board of Ethics, the Council shall hold a hearing within 30 days of receiving the report. The Council scheduled a hearing for September 10, 2020. In establishing the procedural rules for that hearing, the Council violated the provisions of section 35.058 (f)(6) to wit: The Council determined

- a. That the complainant could not produce evidence at the hearing and could only participate as a witness answering only the questions asked by the Board or the defendant or his counsel.
- b. Furthermore, that the complainant not be afforded the right to be assisted by counsel at the hearing.

A copy of that ordinance (Section 35.058) is attached as Exhibit 5 (emphasis added)

The Council held its hearing on September 10, 2020 and dismissed the complaint, and adopted their findings of fact and conclusion at its meeting on September 28, 2020. The applicant/affiant submits that the procedure for the hearing violated City ordinance 35.053(f)(6).

The applicant submits that pursuant to the Respondents' violation of City ordinance section 35.058 (f)(6) the applicant has no plain, speedy and adequate remedy in the ordinary course of law and applicant therefore hereby respectfully requests a writ of certiorari compelling the Council to properly perform the hearing required by section 35.058(f), specifically requiring adherence to section 35.053(f)(6) requiring that the Council receive evidence from the person filing the complaint (Applicant).

The applicant/affiant submits that the Sioux Falls SD Code of Ordinances Section 35.059 and SDCL chapter 21-31 (Exhibit 6) both provide for Judicial Review of the Council's action. The Applicant/affiant respectfully requests that the Court take judicial review of the actions of the City Council and issue a writ of Certiori directing the Council to conduct a hearing consistent with the requirements of Sioux Falls Code of Ordinances section 35.058 (f)(6)

In making this request, the Applicant deposes and states that he is a person beneficially interested in the matter and deposes and states as follows:

The affiant/Applicant is a citizen of the City of Sioux Falls and is eligible to submit a complaint of violation of Sioux Falls SD Code of Ordinances Section 35.009(a)

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The affiant/Applicant learned of a violation of ethics by Councilor Neitzert and did submit a complaint of an ethics violation as provided in Section 35.009 on May 13, 2020.

3

The Affiant/Applicant submits that the Sioux Falls Board of Ethics (Board) received the complaint and assigned the designator 20B and subsequently asserted jurisdiction.

4

The Affiant/Applicant submits that the Board, after hearing testimony from the complainant and the defendant submitted its recommendation to the Sioux Falls City Council on August 11, 2020. Section 35.058(e) in which it found probable cause of a violation of Section 35.053

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The Affiant/Applicant submits that the Sioux Falls City Council at a meeting on August 24, 2020 did establish the rules of procedure for the hearing under Section 35.058 (f).

6

The Affiant/Applicant submits that the Sioux Falls City Council did establish at that meeting that the complainant (Affiant/Applicant) would be prohibited from presenting evidence at the hearing to be held on August 26 under Section 35.058(e). and that furthermore, his attorney of record, Mr. R. Shawn Tornow, would not be allowed to act on his behalf at the hearing.

Affiant/Applicant submits that these rules violate the provisions of Section 35.058(f)(6) which states: "The city council shall receive evidence from the city council member alleged to have committed wrongdoing, and from the person making a complaint against the official or employee of unethical conduct or behavior, or any other person as the city council deems necessary;

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The Affiant/Applicant submits that these rules not only unduly restricted the complainant, they unduly restricted the evidence and information available to the Council in order to make a valid

conclusion, and therefore did not comply with the provisions of Section 35.058(f)(6) and failed to meet the requirements established for a meeting required by that ordinance.

8

Affiant/Applicant submits that the procedures adopted by the Sioux Falls City Council for its hearing of September 10, 2020 did not meet the requirements of Section 35.058(e) of the Code of Ordinances of Sioux Falls in that they denied due process for the complainant required by ordinance and materially affected the evidence available to the Council and that such meeting is not valid under the ordinance cited above. Therefore Affiant/Applicant petitions the court pursuant to SDCL 21-31-1 for a writ of certiorari directing that the Council hold a hearing on the matter consistent with the requirements of its Ordinance 35.058(f)(6). Such writ does not require that the Court review or rule on the findings of the Council, only that the procedures did not follow the requirements of the City's ordinance.

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Further, that the Supreme Court of South Dakota affirmed the requirement and established the rule for a writ of Certiorari in its decision in the case of Elliott vs Board of Commissioners of Lake County (SD 23425 2005) in part:

“A board's actions will be sustained unless it did some act forbidden by law *or neglected to do some act required by law.*”(Emphasis added)

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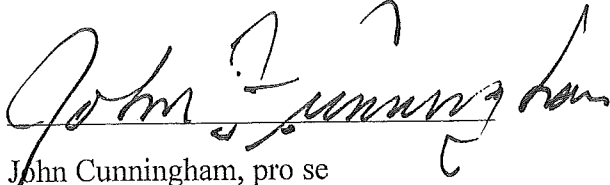
In sum, in light of the error, irregularity and/or illegality due to the aforementioned explicit violation of Section 35.058(f)(6) clearly demonstrating that the Council “neglected to do some act required by law” does respectfully submit and request that for all the reasons previously set forth, this court use its authority under Section 21-31-1 of the Codified Laws of South Dakota to right the wrongful denial of the due process required by the ordinance and issue a writ of certiorari directing that a hearing be held consistent with the provisions of the ordinance, specifically that the complainant be provided the opportunity to present evidence with the assistance of counsel.

Affiant does not seek de novo review of the Council's actions, only a writ of certiorari requiring that the Council hold a hearing consistent with, and not neglect, an act required by its own law

specifically Code of Ordinances Sioux Falls SD 35.058(f)6) requiring that the Council accept evidence provided by the complainant.

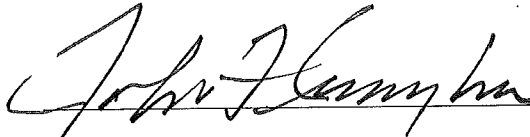
Affiant further requests that the writ ensure that also in the rules of procedure Council must respect the right of the complainant to be represented by counsel.

Respectfully submitted,



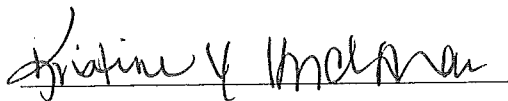
John Cunningham, pro se
Address 4904 S. Oxbow, #305
Sioux Falls, SD 57106
(678) 371-5902

^{15th}
Dated this ~~15~~ Day of October, 2020



John Cunningham, pro se / affiant

With the above signature being subscribed and sworn to before me this 15th Day of October, 2020



Notary Public, State of South Dakota

My Commission expires 3/27/21



CERTIFICATE OF SERVICE

I, John Cunningham, do hereby certify that on October 14, 2020, I caused copies of the foregoing AFFIDAVIT AND VERIFIED PETITION SETTING FORTH THE ILLEGALITY OF THE SIOUX FALLS CITY COUNCIL DECISION AS FILED ON SEPTEMBER 28, 2020 to be personally served except where noted:

Clerk of the Court
Second Judicial Circuit
425 N Dakota Ave,
Sioux Falls, SD 57104

City Attorney
City of Sioux Falls
224 West 9th Street
Sioux Falls SD 57104

§ 35.009 COMPLAINTS.

(a) Any person who is a resident of the city or is doing or attempting to do business with the city may file a complaint with the board. The complaint shall be in writing, signed and dated, and include an address and telephone number. All complaints shall be sworn to by a notary public and filed with the office of the city attorney, except for any referral from the fraud coordination committee pursuant to the city's fraud control policy. Complaints shall describe in detail the act or acts complained of and the specific section(s) of the respective subchapter in this chapter that have been allegedly violated.

(b) All complaints, and any subsequent filings and proceedings before the board, shall remain confidential unless the accused elects to make the complaint public pursuant to §§ 35.025 through 35.036, or unless the accused elects to make the complaint public or the board has issued its report pursuant to §§ 35.050 through 35.059. If the board determines that the complainant (the person who filed the complaint) has violated any confidentiality provisions under this chapter, then the board may immediately dismiss the complaint. Dismissal under this section does not affect the right of the board or any person other than the complainant to initiate a complaint based on the same factual allegations.

(c) After an initial review of the complaint, the board may dismiss any complaint that it finds to be frivolous. A "frivolous" complaint is one which lacks a rational basis in fact or law. No investigation is required if the board determines that a complaint is frivolous on its face, illegible, too indefinite, does not identify the accused, or is unsigned or is not verified by an oath of affirmation. Except for the fraud coordination committee, any person who files a frivolous complaint with the board shall be civilly liable to the person charged for all costs incurred in defending the charge, including, but not limited to, costs and attorney's fees. In determining if a complaint is frivolous, the board may consider the following:

(1) The timing of the complaint with respect to when the facts supporting the alleged violation became known to the complainant, and with respect to the date of any pending election in which the accused is a candidate or is otherwise involved with that election in any manner, if any;

(2) The nature and type of publicity surrounding the filing of the complaint, and the degree of participation by the complainant in publicizing the fact that a complaint was filed with the board;

(3) The existence and nature of any relationship between the accused and the complainant before the complaint was filed;

(4) If the accused is a candidate for election to office, the existence and nature of any relationship between the complainant and any candidate or group opposing the accused;

(5) Any evidence that the complainant knew or reasonably should have known that the allegations in the complaint were groundless; and

(6) Any evidence of the complainant's motives in filing the complaint.

(1992 Code, § 12.5-9) (Ord. 24-09, passed 3-16-2009; Ord. 57-12, passed 8-7-201

Exhibit 1

35.053 CONFLICTS OF INTEREST; CITY COUNCIL MEMBERS.

City officials shall not:

(a) Participate or vote in matters in which they have a direct or indirect financial interest in any contract with the city;

(b) Participate or vote in matters in which they may be directly or indirectly financially interested in the sale of land to the city, or in which they may have rights or interests in the sale of any materials, supplies or services to the city;

(c) Participate or vote in any other matters in which they may have a direct or indirect financial interest, or in which an immediate family member has a direct or indirect financial interest;

(d) Except when acting in an official capacity, appear on behalf of any private person before any city agency. An official may appear at any place on behalf of constituents in the course of their duties as representatives of the electorate or in the performance of public or civic obligations. Officials shall not receive compensation for those appearances, unless specifically authorized by action of the city council. However, this section shall not apply to any official who has fully informed the city agency of his or her private interest in a matter and he or she does not participate in any decision related thereto;

(e) Directly or indirectly solicit any gift, or accept any gift whether in the form of money, services, loan, travel, entertainment, hospitality, thing or promise, or any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence, or could reasonably be expected to influence the officer, in the performance of their official duties, or was intended as a reward for any official action:

(1) Legitimate political contributions are not gifts under the provisions of this subchapter; and

(2) It is not a conflict of interest for any official to receive a gift or gratuity that is an unsolicited item of nominal intrinsic value.

(f) Participate or vote in matters having a financial interest in any property within 300 feet of property involved in a zoning matter before the city council; and

(g) Participate or vote in matters that come before the city council directly or indirectly involving the interest of a present business client or customer of any official or the interest of a person or entity who has been a business client or customer of any official within the prior 12 months. A business client or customer is any person or entity for which the official is employed or if in the past 12 months payment has been received by the official from the person or entity in the amount of \$5,000 or greater and that fact is or should be known by the official.

(1992 Code, § 12.5-30) (Ord. 24-09, passed 3-16-2009) Penalty, see § 35.999

Exhibit 3

CONFIDENTIALITY WAIVED AUGUST 24, 2020

CONFIDENTIAL

CONFIDENTIAL



City of Sioux Falls Board of Ethics Complaint Form

Name of Complainant: John F. Cunningham
Address: 4904 S Oxbow #312
Telephone Number: (379) 371-5902
Email Address: jfc0706@gmail.com

Please cite section of ethics ordinance violated: 35.053 (c)

Statement of alleged violation of the City's Ethics Ordinance(s). Please be specific and include names of individuals, locations, and dates, as applicable.

I recently learned that a councilor, Greg Neitzert, accepted a gift of travel from an organization specifically intended to directly and/or indirectly influence an officer (Councilor Neitzert) in the performance of his official duties.

Attachment 1 is a further description and discussion

Attachment 2 is an e-mail from the Councilor admitting to the action

Attachment 3 is a statement of the organization clearly indicating an agenda of influencing the actions of local elected officials.

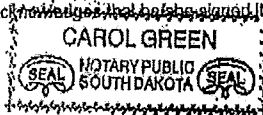
I have initiated the above complaint. The information provided is true to the best of my knowledge and belief. Pursuant to Sections 35.035 and 35.058(b) of the Code of Ordinances of Sioux Falls, SD, this complaint shall remain confidential unless the accused elects to waive confidentiality. I understand that I am bound by this confidentiality provision. I further understand that a violation of this confidentiality provision may result in the dismissal of this complaint.

John F. Cunningham
Signature

13 MAY 2020
Date

On this the 13 day of May, 2020, personally appeared before me, _____
to be the signer of the foregoing document, and he/she acknowledged that he/she signed it.

Carol Green
Notary Public—South Dakota
My Commission expires: 4-25-2023



Received by:

Carroll Green
Name

May 18, 2020
Date

Please return completed form to the City Attorney's Office.

[http://nrsfile/Topics/General Templates/Document Library/Attorney \(F9906\)/F990672.docx](http://nrsfile/Topics/General Templates/Document Library/Attorney (F9906)/F990672.docx)

08/04/2014

00001

Exhibit 3



CITY OF
SIOUX FALLS

BOARD OF ETHICS

224 West Ninth Street
Sioux Falls, SD 57104
605-367-8880

August 11, 2020

Via hand-delivery

Sioux Falls City Council
235 W. 10th Street
Sioux Falls, SD 57104

Re: Ethics Complaint 20-B

Dear Honorable City Council Members:

This letter will serve as the Sioux Falls Board of Ethics' Report and recommendations to City Council.

A Citizen complaint was filed on May 18, 2020 requesting review of a course of behavior by a city council member. It has been identified as Complaint 20-B.

FACTS

The accused named in Ethics Complaint 20-B did not waive confidentiality, consistent with the rights provided in the Sioux Falls City Ordinances.

The Board of Ethics began consideration of Complaint 20-B on June 19, 2020. The Board voted to go into executive session, pursuant to SDCL 1-25-2 (1) and (3), to confidentially review the complaint and take initial closed-door testimony. The June 19th session was recessed to allow additional investigation. The Board resumed its consideration in another executive session on July 17, 2020. After discussion and consideration of additional research, the Board came out of executive session and agreed to what was anticipated to be the final meeting on the matter, beginning 3 p.m., Tuesday, Aug. 11. The Board reconvened in executive session on Aug. 11, discussed a draft of this report and then came out of executive session to consider a resolution in public session.

Honorable City Council Members

Page 2

August 11, 2020

The following report was approved by the Sioux Falls Board of Ethics, in a 5-0 vote, at the meeting of Aug. 11, 2020.

Complaint 20-B alleges a violation of Sioux Falls City Ordinance 35.053(e) asserting that a city officer accepted a "gift of travel" "under circumstances which it could reasonably be inferred that the gift was intended to influence, or could reasonably be expected to influence the officer, in the performance of their official duties. ..."

The Board accepted the complaint and complied with the provisions of Sioux Falls City Ordinance §§ 35.009, 35.010, 35.058 and the Rules of Procedure, City of Sioux Falls Board of Ethics, Article III. The Board makes the following findings based upon the evidence received:

FINDINGS

1. The Board finds the circumstances and nature of the complaint worthy of investigation and chooses not to dismiss the complaint pursuant to Ordinance 35.009(b) based on any disclosure of the complaint.
2. The Board finds the complaint does not lack a rational basis in fact or law and, furthermore, the complaint is not "frivolous" as that term is used in Ordinance 35.009(c).
3. The Board finds the facts surrounding the event from which the complaint originated establish probable cause of a violation of the Ordinances that warrant the Council to conduct proceedings to review and clarify policies concerning travel paid for by third parties. The Board finds the facts surrounding the event from which the complaint originated do not warrant imposition of sanctions on any individual in this situation.
 - a. The accused acknowledges attendance at a seminar for which travel and other expenses were paid by third parties. The host of the seminar is a group with an acknowledged political agenda. The conference included multiple settings for attendees to be potentially influenced by commercial or political interests. The accused indicates attendance was educational and did not include overt attempts to influence regarding any specific issue. The Board notes that the complaint singled out only one individual for attendance at this conference, even though other Sioux Falls officials or officers also attended. Other attendees were not named in this complaint but were named in sworn closed-door testimony. The Board finds that attendance at such events funded by third parties raises ethical questions regarding the appearance of potential influence.
 - b. The Board finds the accused contemporaneously reported the travel in question to the City Council and the City Council took no action to disapprove, rebuke or otherwise sanction the travel for the accused or other city officers or officials in attendance.

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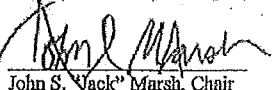
Honorable City Council Members
Page 3
August 11, 2020

- c. The Board finds other incidents of past travel by City officers for which a third party paid expenses. While the Board did not thoroughly investigate or determine the full extent of such practices by City officers or officials, the practice appears to be common. The Board did not determine whether attendance at any prior event(s) was specifically improper.
- d. The facts here do not warrant individual sanctions for the travel subject to this Complaint 20-B. It would be unfair to find against a single individual who was following an apparent common practice among City officers.
- e. The Board finds the City Council rules lack specific guidance on attendance at seminars, conventions or other travel for which payment or reimbursement is provided by third parties. The Board finds that Ordinance 35.053(e) to be overly broad as it does not provide sufficient guidance of what actions or payments could reasonably be inferred or expected to influence an officer in an inappropriate or unethical manner. The Board notes that public accountability, transparency, and confidence in public officials would be enhanced if travel involving third-party payments were publicly announced and specifically approved by City Council before such travel takes place.

RECOMMENDATIONS

Based upon its consideration of Complaint 20-B, the board recommends no sanctions be imposed upon the accused. The Board generally would discourage attendance by City officers or officials at any seminar, convention or similar event financed by third parties in the absence of specific procedures requiring public disclosure and prior Council approval. At a minimum, the Board recommends (a) the City Council review and adopt policies that inform officers and officials when and whether attendance is acceptable for seminars, conventions or other travel that is financed by a third party and (b) that any such proposed travel shall be a matter of public record and be approved by vote of the City Council prior to attendance by the officer or official.

Dated this 11th day of August, 2020


John S. Jack Marsh, Chair
On behalf of the Sioux Falls Board of Ethics

00116

Exhibit 4

§ 35.058 COMPLAINT PROCEDURE.

(a) A complaint that a city official has violated the conflicts of interest or standards of conduct outlined in this subchapter shall be made in accordance with this chapter, except that a report concerning a city official may be referred to the board by the fraud coordination committee. Anonymous complaints shall not be considered. All complaints shall be referred to the board of ethics who shall review the complaint in light of the conflicts of interest and standards of conduct as set forth in this subchapter, or the fraud control policy if it is a referral from the fraud coordination committee. A copy of the complaint shall be sent to the city official against whom a complaint has been filed by certified mail within two business days of the written filing.

(b) All complaints, subsequent filings and proceedings of the board shall remain confidential unless otherwise provided herein. The accused may choose to waive confidentiality and make the complaint public. Upon the election by the accused, any subsequent filings and proceedings with the board become public. If the accused chooses to waive confidentiality, then the board has the right to make a public statement limited to that information as reasonably necessary to mitigate any adverse publicity resulting from a public statement by the accused.

(c) The board of ethics shall have all the powers of investigation as are afforded the city council by the city charter. The board performing the review of the complaint shall report to the city council in writing not more than 60 days after the day of assignment, unless an extension is granted by a majority of the eligible council members. For purposes of this section, an **ELIGIBLE COUNCIL MEMBER** means any council member who is not named in the complaint. If the board determines that the facts as alleged do not establish probable cause that there has been a violation of this subchapter or otherwise dismisses a complaint under this subchapter, a report of the board's findings shall be given to the city council, and the matter shall be considered concluded. If the board determines that the facts as alleged establish probable cause that there has been a violation of this subchapter, the report containing the board's findings and recommended sanctions shall be given to the city council.

(d) The board's report to the city council shall be a public record, but all filings and proceedings prior to the report shall remain confidential unless the accused had elected to make the complaint public. Until a time as the board issues its report to the city council or the accused elects to make the complaint public, no complainant, board member, nor any person who has access to any confidential information related to the functions or activities of the board shall divulge that information to any person who is not authorized to have it.

(e) Upon receiving a report from the board of ethics that there is probable cause to believe that a violation of the conflicts of interest or standards of conduct or a violation of the fraud control policy by a city council member may exist, the eligible members of the city council shall schedule a public hearing to be held within 30 days of receipt of that report.

(f) All hearings of the city council under this subchapter shall be conducted as follows:

(1) The city council shall have all the powers of investigation including subpoena power as are given to it by reason of the city charter;

(2) A city council member against whom a complaint has been filed may elect to be represented by outside legal counsel of his or her own choosing and at their own expense. The city council member(s) has the right to a full and complete hearing with the opportunity to call witnesses and present evidence;

(3) The board of ethics chairperson or his or her designee shall present the evidence and examine witnesses in support of the board's report with the board bearing the burden of proof on behalf of the city;

(4) The city attorney shall act as legal advisor to the eligible city council members conducting the hearing, unless there is a conflict of interest for the city attorney;

(5) All proceedings shall be taken verbatim by a court reporter;

(6) The city council shall receive evidence from the city council member alleged to have committed wrongdoing, *and from the person making a complaint against the official* or employee of unethical conduct or behavior, or any other person as the city council deems necessary; (Emphasis Added)

(7) The city council may request and, if necessary, subpoena witnesses, books, records or any documents which relate to the allegations or complaint;

(8) The eligible city council members, upon completion of a public hearing, shall render a decision in the form of a resolution and, in addition, the eligible city council members shall thereafter have prepared findings of fact, conclusions of law and a final order to be filed within 20 days with both the city clerk and the city council member against whom a complaint has been filed either determining no violation occurred, or if supported by clear and convincing evidence the order shall set forth the remedy as provided by this chapter to be complied with in order that voluntary compliance may be had and final determination obtained. In the event that voluntary compliance is not obtainable, action consistent with the city charter may be taken; and

(9) All decisions and orders rendered by the city council shall be made public.

(1992 Code, § 12.5-35) (Ord. 24-09, passed 3-16-2009; Ord. 03-11, passed 1-18-2011; Ord. 57-12, passed 8-7-2012)

Exhibit 5

§ 35.059 JUDICIAL REVIEW.

Pursuant to Article IX of the South Dakota Constitution, any final order by the city council is subject to judicial review as provided by SDCL ch. 21-31 within 20 days of the filing of the city council's final order.

(1992 Code, § 12.5-37)

Exhibit 6