STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT

JOHN TRUDO, ERIKA TRUDO, WILLIAM CHAPMAN JR, AMY BARBER, NATHAN OLIVER, AMANDA OLIVER, WILLIAM WIMP, PAULA WIMP, CHRISTOPHER TAYLOR, WENDI TAYLOR, CONSTANCE MING, MATTTHEW SCOTT, KENDRA SCOTT, CLYDE THOMPSON, JANET THOMPSON, ZACHARY BADER, LAUREN BADER, TERRY GILBERTSON, JAKE DOWLING, JAMIE DOWLING, KARA TAYLOR, CHAD BLODGETT, PAMELA BLODGETT, JEREMY GOULDIN, SARAH GOULDIN, SCOTT PERRY, HANNA KRAFT, NATHAN CHERRY, MELINDA CHERRY, JOHN SAMUEL, CAITLIN SAMUEL, JOSEPH DAVIS, STEPHANY FISCHER, LOREN WERMERS, ANGELA WERMERS, RANDY NELSON, SANDY NELSON, ADAM GERDES, VALLENE MORRIS, DANIEL CROUSE, JANET BACKES, JEROME HARDY, MELISSA CROUCH, WILLIAM BERRY III, JOHN OSBURN, CAROL OSBURN, DOMINIC BRADFORD, KATELYN BRADFORD, CHRISTOPHER BURNS, KATHERINE BURNS, KYLE PFEIFLE, NICOLE JENSEN, BRANDON JENSEN, JARED RUNDELL, SARA RUNDELL, AMBER BERRY, CORY KALISZEWSKI, LONALD SCHNITTGRUND, LESA SUMNERS, KYLE KIENZLE, BALEIGH KIENZLE, MARIE KELLER, COLE SMITH, VALERIE SMITH, BRADY ROTHSCHADL,KATELYNN ROTHSCHADL, RANDALL JANSSEN, TIMOTHY MEFFORD, ALEXANDRIA MEFFORD, KATHY BAUMBERGER, TORI PURCELL, ANN WILEY, DANIEL DROWN, SHEILA DROWN, ASHLEY WAGNER,	)	46 CIV 20 - 177 **MEMORANDUM IN OPPOSITION TO MEADE COUNTY'S MOTION TO DISMISS**

Filed: 9/11/2020 3:08 PM CST Meade County, South Dakota 46CIV20-000177

TREVER WAGNER, REBEKAH WOJAHN,)
BRADLEY WOJAHN, JAMIE NELSON,)
CHRIS NELSON, MEGAN SALISBURY, BRYCE)
SALISBURY, ADAM GEIGLE, NATASHA)
GEIGLE, MICHAEL SOUZA, JEREMIAH)
SUTTON, HEATHER HEINERT, SARAH NAVA,)
BLAKE HALLERT, JAMES LITTLE,)
MISTY LITTLE, NICOLE MOORE)
MICHAEL MOORE, MIKE ESPOSTO,)
JAMES RADENIC, DEBORAH RADENIC,)
KOREY SCHULTZ, KELLY SCHULTZ,)
LORI KIEHN, JOHNATHAN CINA, KRISTIN)
CINA, MATTHEW WAGNER, WENDY)
WAGNER, CARISA GERVING, ROBERT)
GERVING, ANDREA FISCHER, SCOTT SMITH,)
SAMANTHA SMITH, MICHAEL LORGE,)
CAROLYN LORGE, MARK WIRKUS,)
CATHERINE WIRKUS, COURTNEY AHRENDT,)
EZRA AHRENDT, SANDRA RAUE, JASON)
HANSON, CHRIS CONNERS, DEIDRA)
CONNERS, JUSTIN SCHUMMER, ROBERT)
MINICK, GENEVA MINICK, JENNIFER)
BIGGERS, JOHN BIGGERS, WILLIAM)
SCHAMBER, GLENDA SCHAMBER, DAVID)
LOWE, RICHARD OXNER, BRENDA OXNER,)
JUSTIN BOMWICH, DIANA BROMWICH,)
THERESA MAXON, BRUCE STACY, SHERI)
STACY, ALBERT REITZ, JOSEPH WEST, JULIE)
WEST, KALYN AGA, RANDY AGA, BEAU)
DEINES, DANIELLE HIGH BEAR, ERIC HIGH)
BEAR, CARLOS, LLORENS, JENNI LLORENS,)
DAVID MCKELVEY, SHILOU MCKELVEY,)
CRYSTAL POWELL, JOCELYN POWELL)
SHANE GALLES, TRISTA GALLES,)
residents of Meade County, South Dakota)
)
Plaintiffs,)
)
v.)

Filed: 9/11/2020 3:08 PM CST Meade County, South Dakota 46CIV20-000177

)
SOUTH DAKOTA HOUSING DEVELOPMENT)
AUTHORITY, a South Dakota Public Authority,)
MEADE COUNTY, a local government agency)
and WAYNE GUTZMER, CARL BRUCH, BOB)
POWLES, DAYLE HAMMOCK, BOB MALLOW,)
CURTIS NUPEN, JIM SCHROEDER, DEAN)
WINK, TIM POTTS, CRAIG SHAVER, BILL)
RICH, JACK WILSON the duly elected,)
qualified, and acting Members of the Meade)
County Commission, individual and in their)
official capacities, and KIRK CHAFFEE, the)
duly appointed, qualified and acting)
Equalization Director of Meade County,)
HIGH PLAINS TITLE SERVICE, INC D.B.A.)
MEADE COUNTY TITLE COMPANY, BLACK)
HILLS TITLE, INC, a South Dakota)
Corporation, STEWART TITLE COMPANY,)
a Texas Corporation., RENNER AND)
SPERLICH ENGINEERING COMPANY., a)
South Dakota Corporation, SPERLICH)
CONSULTING, INC., a South Dakota)
Corporation, LONGBRANCH CIVIL)
ENGINEERING, INC, a South Dakota)
Corporation, KALE MCNABOE, an employee)
of SPERLICH CONSULTING, INC and the)
registered agent of LONGBRANCH CIVIL)
ENGINEERING, INC, RAYMOND FUSS,)
Developer of Fuss Subdivision, LARRY FUSS,)
Developer of Fuss Subdivision, ADELAIDE)
FUSS, Developer of Fuss Subdivision, KEITH)
KUCHENBECKER,Developer of Hideaway)
Hills Subdivision,LINDA KUCHENBECKER,)
Developer of Hideaway Hills Subdivision,)
REMAX OF RAPID CITY, a South Dakota)
Corporation, RONALD SJODIN, Agent of)
REMAX OF RAPID CITY, VIVIAN SJODIN,)
Agent of REMAX OF RAPID CITY, FOUST)
CONSTRUCTION, INC, a South Dakota)

Corporation, NEIL FOUST, an employee of FOUST CONSTRUCTION, INC and the registered agent of FOUST CONSTRUCTION, INC., MELVIN LAMKE, a professional surveyor.
Defendants.

COME NOW, Plaintiffs by and through their undersigned attorney of record John M. Fitzgerald and now file this memorandum in support of their motion to deny Meade County's Motion to Dismiss. All allegations stated in this memorandum are based upon information and belief personally known to the undersigned.

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PRELIMINARY STATEMENT

Throughout this brief the following parties will be referred to as follows:

Meade County Commission will be referred to as "the Commission."

Meade County Planning Committee will be referred to as "the Planning Committee"

Northdale Sanitation District will be referred to as "NDSD."

BACKGROUND

Stagebarn Subdivision

1) In approximately 1993, the Commission and Planning Committee approved the Stagebarn Subdivision.

2) Prior to its approval and construction, committee chairman Bob Powles paid for the creation of a water well to serve the Stagebarn Community.

3) Following the creation of the Stagebarn Subdivision Water Utility District, for the purpose of enrichment, Bob Powles entered into a contract for the selling of water he owns to the water/utility district.

4) Upon information and belief, Bob Powles held the position of chairman of the planning committee during this time.

5) After the approval of the Stagebarn Subdivision, and with the water contract in place, which made Bob Powles the site manager in perpetuity, multiple homes were moved from Ellsworth Air Force Base to the subdivision. These homes were not constructed in accordance with relevant building codes and were not brought into conformance.

6) The partners of the Stagebarn subdivision were Keith Kuchenbecker and Peggy Beardlsey, supported in part by the investments of family members.

7) In conclusion, Bob Powles used his position as a Meade County official to directly enrich himself as Site Manager and vendor of a political subdivision of the State of South Dakota, the Stagebarn water utility district and did so with the full knowledge of Meade County.

8) The houses placed on this subdivision were inappropriate and would not have been approved but for his status as an entrusted official for Meade County.

9) The County Commissioners had to vote to approve these homes and their moving permits with direct knowledge and consideration of the building code violations. This operated as a nonfeasance or a passive failure to enforce building codes in the county.

Cobblestone Ridge Mobile Home Park

1) In 2001, the Pennington County Commissioners approved Bob Powles' proposed Cobblestone Ridge Mobile Home Park next to and adjacent to NDSD.

2) Cobblestone Ridge Mobile Home Park was a partnership with several members of the Powles family, specifically the sons of Bob Powles, and Christopher Dressen.

3) Cobblestone Ridge Mobile Home Park included a secondary business with a planned and constructed 7" well with the intention to provide surplus water to NDSD.

4) The existing NDSD's well was classified as "vulnerable;" however the Powles well is marked as "non-vulnerable."

5) Currently Bob Powles sells water to the NDSD and is its site manager co-current with his son, Brandon Powles. As owner of the water supply he holds his position as site manager in perpetuity.

Hideaway Hills (I)

Nonfeasance, Misfeasance and Malfeasance

1) In 2000, Kieth Kuchenbecker and Larry Fuss proposed the development of the Hideaway Manufactured Housing Community. Fuss and Kuckenbecker disclosed the existence of an underground mine on the property.

2) Upon belief, Bob Powles' 2001 plans for Cobblestone Ridge were motivated in part by the proposed Hideaway Hills Community as additional water and sewer capacity would be a necessity to support that expansion.

3) In 2001, Larry Fuss sold his interest in the land to Kieth Kuchenbecker as he had serious doubts in the prudence of building homes on the site.

4) In 2003, after years of county Planning Committee and Commissioners Meetings, Hideaway HIlls (1) was approved as a stick built subdivision. Bob Powles used his position as committee chairman to persuade the committee to commit fraud and the crime of malfeasance in motivating the Commission to approve Hideaway 1.

5) The Committee and the Commission chose to not enforce its own ordinance, Ordinance 20. The ordinance required a private developer to produce maps of any *"man made features,"* on or adjacent to the property. The mine is a manmade feature which is ultrahazardous. The committee knew about the mine and chose not to require a map of it.

6) Ordinance 20 also gave the County the power to request a soils report if it deemed the geology or terrain was unusual. Upon information and belief the county did request this soils report but proceeded negligently in determining

whether the proposed subdivision was safe to build on. This operated as an exception to the public duty rule and created a special relationship to the residents of Hideaway Hills.

7) The Planning committee fraudulently recorded in their meeting minutes that the DENR had approved Kuchenbecker's sewage lift station. DENR had in fact told Kuchenbecker in writing it did not approve of his sewage lift station. The recorded *"approval,"* of the DENR, is a highly magnified DENR stamp which tells nothing about what is being approved or what document is being stamped, *"approved."* This fraudulently recorded approval operated as a misfeasance by the committee and county.

8) In 2003 NDSD, controlled in fact by Bob Powles, applied for and received a loan from the State of South Dakota to provide sewer infrastructure and a conforming lift station to Hideaway Hills (1). The approximately 150 homes would enrich Bob Powles as he receives compensation directly from the sale of his water to any homes serviced by the sanitation district. Neither the committee nor the Commission chose to record the fact that its committee chairman was using state funds to provide a reward to a private developer that was in turn going to enrich its chairman.

9) Bob Powles used his position of power as Chairman of the Committee to both persuade and enrich himself in his other official capacity as site manager for the NDSD, a subdivision of the State of South Dakota.

10) Bob Powles used his position on the Committee to encourage both the Commission and the Committee to engage in reckless acts, commit the crime of malfeasance and to enrich himself and others such as to knowingly approve of permits of homes in the Stagebarn Subdivision, which did not

conform to construction standards, and to approve residential homes above a dangerous mine. A pattern of nonfeasance, misfeasance, fraud and malfeasance was developing which would reach its pinnacle in Hideaway II when power influence and corruption was used to approve homes on top of a sewage lagoon, which had been found to be 4% poisonous to humans.

HIDEAWAY (II)

1) In 2000 Bob Powles and the NDSD requested an opinion from Dale Hansen on if and how NDSD could sell its sewage lagoons. Attorney Dale Hansen advised that NDSD could not sell the lagoons to a board member or the family of a board member. However, Hansen did advise that the Board could sell the disused lagoons by collecting sealed bids, through a realtor or at an auction. Hansen, at this time, advised against an auction. This inquiry was in response to a request from Larry Fuss who intended to build a road across the lagoons to serve as a secondary ingress and egress point for the residents of the proposed Hideaway Hills Manufactured Housing Community. The lagoons are approximately 12 acres.

2) The sale of the sewage lagoons stalled until 2005.

3) Bob Powles and NDSD did not accept Fuss's offer, but instead decided to call for sealed bidding for sale of the lagoons in 2004. At this time, the sale of the lagoons did not include the promise of free water and sewer hookups. This would come later when Bob Powles made plans to buy the lagoons.

4) Either NDSD received no bids or chose not to sell its lagoons to the highest bidder. NDSD had the property appraised prior to the request for bids. The appraisal came back for $67,000. This was not considered to be enough

money by the NDSD Board and therefore the prospects of selling the property through a private realtor was also not going to be an option.

5) NDSD hired a consultant to advise on whether or not it would be safe to build a community on the lagoons. The consultant tested the land and found that soils in the sewer lagoon land contained 4% volatile substances in addition to very high levels of arsenic and other toxins. The consultant advised Bob Powles and NDSD for *in-place* closure of the land; however, it stated that there were not any state-regulated limits yet established for the analyzed constituents. This report recommends *not* to construct residential homes within the former sewage lagoons.

6) Bob Powles and his sons started Canyon Construction in late 2004 ahead of the decision to auction the sewage lot. This was an attempt to distance himself from the inside deal which he was brokering for his own benefit.

7) Bob Powles and NDSD decided to auction the lagoons. NDSD and Powles negotiated that NDSD would, in the seller's agreement with the auctioneer, provide free water and sewage hookups to *"30 or 31"* homes in the former sewage lot.

8) NDSD and Powles conspired to control how much information they would disclose to the auctioneer regarding the property. They agreed they would disclose some easement information.

9) NDSD paid for an auctioneer who advertised the land to investors and property developers as, *"prime development land... approved by DENR for cost effective reclamation."* DENR's approval was not for the construction of homes, but rather was for the approval of the report of the previously hired

consultant who recommended *"in-place reclamation,"* i.e. fencing off the property and leaving it as an open field.

10) At the auction, Bob Powles' sons, acting through Canyon Construction, purchased the lagoons and its 31 free water and sewer hookups for $101,260.

11) Bob Powles then used his position on the Meade County Planning Committee to persuade the Commission to recklessly approve the subdivision. Not only was Bob Powles using his official position to enrich himself by providing water to Hideaway (II), but Powles was also going to enrich himself and his family directly as developers.

12) In displaying that the Commissioners were ready willing and able to do whatever Powles wanted them to do no matter how reckless, on June 19, 2006 the Commission granted final approval to the Hideaway (II) plat. At that same meeting the Commission dealt with the fruits of its prior misfeasance and criminal malfeasance, Daisy drive was collapsing into an underground mine. The Commissions' told *"Kale Mcnobe to tell his clients the original developers to fix the part of the Daisy Drive that was caving into an underground mine because they weren't going to close the road."*

13) All county commissioners had direct knowledge now that malfeasance of Bob Powles and themselves was causing direct injury to the residents of Hideaway Hills (I). Instead of choosing to prohibit any further malfeasance, the entire Commission voted to approve further malfeasance of Hideaway II.

14) In the time since the approval and occupancy of homes in Hideaway (II), many residents have reported rare, concerning and unusual health conditions most presumably linked to their homes being in hazardous sewage lagoons.

INTRODUCTION

NEITHER THE PUBLIC DUTY DOCTRINE NOR OFFICIAL IMMUNITY BARS PLAINTIFFS CLAIMS AS THE COUNTY'S OFFICERS ENGAGED IN CORRUPTION, BAD FAITH CRIMINAL ACTIVITY MISFEASANCE AND MALFEASANCE

In understanding the public duty rule, it is necessary to know the difference between nonfeasance, misfeasance and malfeasance. **Nonfeasance** is the failure to act where action is required. The public duty rule applies to nonfeasance. In order to establish liability for nonfeasance the Plaintiff must establish a special relationship.

Misfeasance is the willful inappropriate action or intentional incorrect action or advice. **Malfeasance** is the willful and intentional action that injures a party, (corruption, fraud). The public duty rule does not apply to misfeasance or malfeasance. "As the Minnesota Supreme Court explained in *Domagala,* although [T]here is no duty to protect another from the conduct of a third party absent a special relationship, [However] "general negligence law imposes a general duty of reasonable care when the *defendant's own conduct* creates a foreseeable risk of injury to a foreseeable plaintiff." ....805 N.W.2d at 23 (emphasis added). "In other words, when a person acts in some manner [misfeasance/malfeasance] that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others." *Id.* at 26. Ariola v. City of Stillwater, Minn: Court of Appeals 2014. "Accordingly, if a governmental unit engages in misfeasance that causes injury to an individual, and the governmental unit is not otherwise immune, liability should attach. Id at *See*

Cracraft, 279 N.W.2d at 803. "[public duty rule]...does not apply where the government's duty is defined by other generally applicable principles of law. Id:

> *The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.*
>
> *Thus, under § 314, an actor might still have a duty to take action for the aid or protection of the plaintiff in cases involving misfeasance (or affirmative acts), where the actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other. Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists.*

[Robb v. City of Seattle, 295 P. 3d 212 - Wash: Supreme Court 2013]

> *Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists.*

[Id at 18.]

Malfeasance on the other hand is essentially the commission of a crime or corruption by an official which subjects that official to removal from his or her own office. South Dakota recognizes malfeasance in multiple statutes. SDCL 8-9-2 provides:

> ***Contract with township officer void--Removal from office.***
>
> *No township officer shall become a party to or interested directly or indirectly in any contract made by the township of which he is an*

officer; and every contract or payment voted for or made contrary to the provisions of this section is void. Any violation of this section shall be a malfeasance in office for which the officer so offending may be removed from office.

[SL 1888.]

When Peggy Beardsley and Keith Kuchenbecker entered into an agreement to create the Stage Barn subdivision, Powles used his influence to approve the subdivision. Powles also knew that he would be providing water to the Stage Barn subdivision and making money for himself. When the Commission approved the subdivision, Meade County was contracting with Breadsley and Kuchenbecker and Bob Powles was directly benefiting. The same logic follows when the County Commission approved Hideaway (I) and Bob Powles benefited. Or in Hideaway (II) when the Commission approved the plat and Powles benefited directly as a developer and directly as the site manager of NDSD.

3-16-7. Officer's interest in public contract as misdemeanor.

No public officer who is authorized to sell or lease any property, or make any contract in the officer's official capacity may become voluntarily interested individually in any sale, lease, or contract, directly or indirectly with such entity. A violation of this section is a Class 2 misdemeanor unless the act is exempted by law.

[PenC 1877.]

3-16-8. Self-dealing in award or terms of agency contract prohibited.

A state officer or employee may not solicit nor accept any gift, favor, reward, service, or promise of reward, including a promise of future employment, in exchange for recommending, influencing, or attempting to influence the award of or the terms of a contract by the state agency the officer or employee serves.

[SDCL 3-16-8]

As a chairman of the county planning Committee, Bob Powles' had power to allow or keep projects from going on to a final vote to the Commission. His approval was a contract as it was *a statement which reasonably induced action of forbearance*. [Rest. 2nd Contracts §90]. Powles was authorized to make these statements and official recommendations for final approval to the Commission. When he approved the Stagebarn subdivision and Hideaway (I) he became interested and directly benefited in the contracts with Beardsley and Kuchenbecker committing a class 2 misdemeanor. Further, even though Bob Powles recused himself from voting on Hideaway (II), he used his position as chief operating officer of the NDSD to provide 30 or 31 free water and sewer hookups to the sewage lagoons his son purchased, committed another misdemeanor. He however did not disclose on the record the pecuniary interest he was deriving from approval of the subdivision.

In all three circumstances **1)** Stagebarn, **2)** Hideaway (I) and **3)** Hideaway (II), Powles approved of and convinced the Commission to allow non-conforming houses installed in the subdivision, houses on top of an old underground mine or houses within sewage. In all three instances the Meade County Commission acted recklessly, willfully and wantonly and criminally placing residents in danger of death or serious bodily injury because Bob Powles stood to financially benefit from the Commission's approval of these acts and crimes. The Commission was acting as a corrupt criminal enterprise to enrich at least one of its members. Further discovery may show that Powles was not the only government official benefitting from the misfeasance and malfeasance.

A municipality is accountable in tort for its own positive misfeasance, generally classified as *"active wrongdoing"* in these cases, but not for mere nonfeasance. The corporate body is not chargeable with the negligence of its officers or agents in the performance of a public duty laid upon it by law, unless the wrongdoing is its own by direction or participation. *"Active wrongdoing"* and *"positive misfeasance"* have the same essential connotation. Misfeasance is the

wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Hart v. Freeholders of Union, 57 *N.J.L.* 90 (*Sup. Ct.* 1894); Allas v. Rumson, 115 *N.J.L.* 593 (*E. & A.* 1935). In Cockran v. Public Service Electric *Co.*, 97 *N.J.L.* 480 (*E. & A.* 1922). In this case, the misfeasance rises to the higher level - malfeasance as the Committee and the Commission were participating directly in the commission of these crimes and were active or passive co-conspirators in approving dangerous subdivisions for the benefit of at least one of its officials.

> *Even a discretionary act, however, will not be protected by official immunity if the conduct is willfully wrong or done with malice or corruption...*

[Southers v. City of Farmington, 263 SW 3d 603 - Mo: Supreme Court 2008 *citing* Schooler v. Arrington, 106 Mo.App. 607, 81 S.W. 468, 469 (1904)]

Southers continues:

> *Further, the protections of the public duty doctrine are not intended to be limitless, and, just as the doctrine of official immunity will not apply to conduct that is willfully wrong or done with malice or corruption,[11] the public duty doctrine will not apply where defendant public employees act "in bad faith or with malice." See Jackson v. City of Wentzville, 844 S.W.2d 585, 588 (Mo.App.1993)*

[*Id.*]

NO OFFICIAL IMMUNITY

The doctrine of official immunity shields governmental officers and employees from liability when their alleged negligence arises from a discretionary act. Official immunity does not extend to negligent acts committed in the furtherance of that officer's ministerial function. Ordinarily a sub-committee like that of the Meade County planning committee holds ministerial duties and discretionary functions. The planning committee had the discretionary power to require more of a developer than what Ordinance 20 required. I.e. the committee had the discretionary authority to require a soils test, but was not mandated to. It had the power to require variances. Essentially the planning committee had the power to effectively prevent a

developer from subdividing land by use of its discretionary authority. But it also had ministerial duties like mandating ordinance 20 be followed. However once the planning committee approved of either Hideaway I or II, the Commission was required to vote to approve or disapprove of Hideaway I or II as final approval of the plats is the county's ministerial duty and its only authority.

Approval of a plat, as a ministerial function, is unshielded from official immunity. ("With respect to those issues, we hold that the board did not act unlawfully in approving the tentative map; once the developer complied with the conditions attached to that approval and submitted a final map corresponding to the tentative map, the board performed a ministerial duty in approving the final map.") Youngblood v. Board of Supervisors, 586 P. 2d 556 - Cal: Supreme Court 1978,. ("Therefore, in 1972 at the time of the filing the above statutes were all that were applicable to rural subdivisions. We conclude that under these statutes nothing remained for the Board to do but the ministerial act of endorsing their approval on the plats which had complied with all statutory requirements. Clearly mandamus was a proper remedy when it refused to do so.") (Emphasis Added) El Dorado at Santa Fe, Inc. v. BD. OF CTY. COM'RS, 551 P. 2d 1360 - NM: Supreme Court 1976.

In conclusion for this portion of the memorandum, the Meade County Commision and the Planning Committee engaged in the willful, wanton, criminal and reckless discharge of their duties. This was motivated by the desire of personal financial gain of its chairman Bob Powles. Powles committed these crimes by using his official position as committee chairman to encourage, facilitate and promote subdivisions which were ultrahazardous and dangerous to the lives of the residents Hideaway Hills (1) and (2). The Commission had full knowledge of these crimes and approved of the criminal activities. The public policy of this state cannot allow the use of official immunity or the public duty doctrine to shield officials which commit crimes and put the lives of hundreds of people at risk of death or serious bodily harm for the financial gain of its members. At least 14 homes have been evacuated

from Hideaway (I) and several residents of Hideaway (II) residing within the former sewage lagoons have become sick with such conditions as irritable bowel syndrome to cancer.

The following portion of the brief will address more fully the public duty rule (nonfeasance) and the exception to the rule, the special relationship.

PUBLIC DUTY RULE AND THE SPECIAL RELATIONSHIP EXCEPTION

The *"public duty rule,"* is not a rule specific to lawsuits against governmental entities. *"When our Legislature waived immunity for public entities, it created no new causes of action, but only imposed upon those entities basically the same liability in tort individuals bear. Local governments will not ordinarily be liable for the conduct of third parties where private persons are not."* Tipton v. Town of Tabor, 567 NW 2d 351 (SD 1997).

> A widely accepted corollary to the public duty doctrine is the "special duty" or "special relationship" rule. *See Restatement of Torts (Second)* § 315 (1965). To establish liability under this restrictive template, plaintiffs must show a breach of some duty owed to them as individuals. The reason justifying this exception holds that when a public entity acts on behalf of a particular person actively causing injury, the law may impose liability because the government has by its conduct already made a policy decision to deploy its resources to protect such individual.

[*Id.* at ¶ 13.]

"Special duty," therefore, could also effectively be termed *"assumed"* duty. It is somewhat unfortunate that the terms *"public"* duty and *"special"* duty have been used, inasmuch as they give the misleading impression that the distinction applies only to governmental tortfeasors. Perhaps *"no duty"* and *"assumed"* duty would be more appropriate. Cracraft v. City of St. Louis Park, 279 NW 2d 801 (Minn 1979). *"Special duty"* is nothing more than convenient terminology, in contradistinction to *"public duty,"* for the ancient doctrine that once a duty to act for the protection of

others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance. Id.

The terms *"public duty,"* or *"public duty doctrine,"* are nothing more than the common-law defense of no-duty. The court in Cracraft, astutely points to the *Restatement Second of Torts*, which explains the common law defense of no duty:

> *The common-law rule, of course, is that generally there is no duty to prevent the misconduct of a third person. As stated in Restatement, Torts (2d), § 315:*
>
> *"There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless*
>
> *"(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or*
>
> *"(b) a special relation exists between the actor and the other which gives to the other a right to protection."*

[Cracraft at 804.]

In this case and in others, if a *"special relation"* is found, the actor will owe a duty to the plaintiff either to prevent the misconduct of third parties or to protect the plaintiff from the misconduct of third parties.

Tort liability depends upon the existence of and breach of duty, and unless a specific statute creates a legal obligation, ascertaining a duty and defining its limitations, as we have said, remain a function of the courts. "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." [Tipton (II) at ¶ 12 *citing* Keeton et al., *supra,* § 53, at 356.]

The public duty doctrine is not government specific, but is simply a collection of jurisprudence which describes applications to the exceptions stated in *Restatement (2nd) of Torts, §315* to government employees and officers. As this brief will show, all of the jurisprudence dealing with public duty are situations involving passive inaction which causes injury or *"should have acted but didn't act."*

As of 1999, the South Dakota Supreme Court has limited the jurisprudence involving governments in the application of the exceptions to *§315* to law enforcement or public safety only:

> *"Upon reviewing our previous public duty doctrine cases, we now specifically clarify that the public duty rule extends only to issues involving law enforcement or public safety."*

[EP v. Riley, 604 NW 2d 7 (SD 1999)]

Whether the causes of action in Hideaway Hills have to do with issues involving *"public safety,"* the brief we will assume the issues are ones of public safety.

While there is not much of a consensus across the United States as to when law enforcement owes a private citizens a duty to protect them from a third party's misconduct or control the misconduct of third parties, there is somewhat of a consensus as to when government entities owe private citizens a duty to protect against or control the misconduct of third parties. The recognizable consensus in general is that building/electrical/fire code inspectors are not required to find violations of the code, however if an inspector has direct or actual knowledge of a dangerous condition and a code requires mandatory action a *"special relation,"* will be created. Most of these cases find their origins in the States of Washington and Minnesota.

ANTHOLOGY

SHOULD HAVE ACTED BUT DID NOT ACT

The South Dakota Supreme Court cites the seminal Washington case Campbell v. City of Bellevue, for this proposition 530 P. 2d 234 (Wash 1975). In City of Bellevue, Plaintiff and his family lived next to a creek. Their neighbor, Mr. Schafer, had lights in and about the stream next to the residences. The lights were controlled by switches inside the Schafer residence. In the fall of 1970 a fire broke out next to one of the lights. The Plaintiff Campbell advised the caretaker of the Shafer residence about the fire and corrective measures were taken. In March 1971, the

police were called in response to a dead racoon in the stream. After an officer arrived he noted that the Plaintiff's neighbor, Hansen, received an electrical shock when he tried to retrieve the dead racoon. Hansen and Plaintiff Campell both testified they called the City's building department about the incident.

The City's building inspector, Sharpe testified that while he couldn't remember talking with either Hansen or Campell, he received a message about the incident on March 16, 1971. On March 16th, inspector Sharpe and his supervisor drove to the Shafer residence and inspected the wiring in and about the stream:

> *This inspection consumed approximately 20 minutes during the course of which Mr. Sharpe did not determine the nature and extent of the outdoor lighting system which included several underwater lights and floodlights along both banks of the stream, as well as considerable underwater wiring. Since no one was then home, a red tag was affixed to the front door of the residence advising that:*
>
> *"Wiring running thru creek is unsafe and constitutes a threat to life. This situation will have to be corrected immediately or the service will be disconnected."*
>
> *No action was taken to sever or otherwise disconnect the outdoor wiring, and no corrective measures were specified on the red tag.*

[City of Bellevue at ¶ 4.]

Sharpe testified that he called the caretaker of the Schaffer residence and the caretaker assured him the problem would be taken care of. The City made no further inspections of the wiring in the stream. Rather than disconnecting the outdoor electrical system, the caretaker placed electrical tape over two switches, one of which controlled the outdoor lighting system. However one of the two switches controlled the garage door so both switches were turned on when the garage door needed to be opened-rather than use the process of elimination.

On August 6th, 1971 the caretaker opened the garage turning both switches on to unload furniture. During the process of unloading, the Plaintiff's son fell into the stream while playing next to it. He received a paralyzing shock but survived.

While his mother Barbara Campbell was trying to pull him out of the creek, she received a lethal shock and passed away.

The Plaintiff's claims were that, (1) a more thorough inspection on March 16, 1971, would have revealed the extensive underwater wiring and further nonconformity with electrical code requirements increasing the dangerous propensities of the system; (2) the City's electrical code and standards of electrical inspection practice in the community required that the lead wire to the system be severed and red tagged; and (3) the State and City electrical codes fixed specific times within which corrective action be taken (60 days) and standards of electrical inspection practice prescribed a definite follow-up procedure. Id. at ¶6. (60 days after the red tag)

The "caretaker," of the Schaffer residence failed to disconnect the system after having knowledge of its dangers and actual control of the system. While the City of Bellevue did not create the dangerous condition of underwater wiring and failing outdoor wiring, it too knew of the dangerous condition at least enough to affix a "red tag," but failed to follow its own statutes which mandated the wiring be severed immediately or alternatively after 60 days. Actual knowledge of the dangerous condition created by the third-party's misconduct and failure to enforce the City's code, required the City to prevent the misconduct of the caretaker or protect the Plaintiffs from injury thus, satisfying the exceptions in Restatement (2nd) of Torts §315.

While City of Bellevue centers upon the defense of sovereign immunity, discretionary/ministerial acts. The fundamentals of the "special relationship," exception are firmly discussed.

> *We have no particular quarrel at this time with the general premise on which the cases relied upon by the City stand, i.e., negligent performance of a governmental or discretionary police power duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public. Nevertheless, we note that running either explicitly or implicitly through some of the leading cases cited by the City is the thread of an exception to the general rule they espouse, i.e., where a relationship*

> *exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class of persons, then tort liability may arise.*

[Id. at ¶ 10]

City of Bellevue found the existence of a duty, with actual knowledge of a dangerous condition, a City ordinance requiring the electricity supplying the dangerous condition be severed and failure to comply with the City's ordinance requiring severing the electricity supplying the dangerous condition, (breach of duty). Since the City knew of the dangerous condition and failed to act the question became: Should that failure to act make the City of Bellevue liable? The Washington Supreme Court answered in the affirmative. The City knew of the dangerous condition and a statute required the City to act. The inaction was a proximate cause of the injury.

The instant case is further distinguishable from Bellevue because the argument in model would be one in which the City not only knew of the ultrahazardous condition, but by their decisions, affirmatively set in place a hazardous activity for the monetary interests of its governmental members. It would be as if,the City of Bellevue helped place the dangerous electrical wiring in the creek because one of its government officials would derive a pecuniary benefit.

Four years after Bellevue, Cracraft added some additional items for consideration, 279 NW 2d 801 (Minn 1979). Cracraft involved the explosion of an extremely flammable liquid on the loading dock of a school which killed two students and severely injured another.

> *On October 27, 1974, a 55-gallon drum of duplicating fluid, an extremely volatile and highly flammable liquid, ignited on the loading dock of Benilde High School. The dock is adjacent to the school's football field and is commonly used by students as a means of ingress and egress.*
>
> *As a result of the explosion, three youths received first, second, and third-degree burns over their entire bodies. Two of the boys died, including Kenneth Kasper. A third boy, plaintiff John Cracraft, received severe burns over 50 percent of his body.*

The city fire inspector, Gerald Hines, inspected the entire premises on September 13, 1974. This inspection was conducted pursuant to a city ordinance. The presence of a drum of duplicating fluid on the dock would be a violation of the fire code. Mr. Hines testified, in deposition, that he did not see the drum at the time of his inspection. He stated that if it was there at the time of the examination, it would have been noticed and removed.

[Id at 803.]

Assumably the argument in Cracraft was that the drum of duplicating fluid, which violated City fire code, was at the school in September as the Plaintiff's claims were that fire inspector negligently inspected the premises. The Court in Cracraft followed basically the same principles in analysing whether a duty exists as in the City of Bellevue. However Cracraft included one new topic for consideration in analyzing whether a duty exists, reliance *on specific acts or representations by government.* Cracraft, makes perfectly clear that its factors are not intended to be exhaustive in the search for whether or not a duty exist:

There is no bright line. But, without intending to be exhaustive, there are at least four factors which should be considered.

First, actual knowledge of the dangerous condition is a factor which tends to impose a duty of care on the municipality. Second, reasonable reliance by persons on the municipality's representations and conduct tends to impose a duty of care. Of course, reliance on the inspection in general is not sufficient. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves. Third, a duty of care may be created by an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole. Finally, the municipality must use due care to avoid increasing the risk of harm.

(Emphasis Added)
[Cracraft at 807]

The Cracraft court concluded:

We hold, therefore, that a municipality does not owe any individual a duty of care merely by the fact that it enacts a general ordinance

requiring fire code inspections or by the fact that it undertakes an inspection for fire code violations. A duty of care arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons from the risks associated with fire code violations.

[Cracraft at 806]

Undoubtedly, if the Plaintiff had proved the fire inspector knew of the drum's existence in his September inspection, had cited the school for violation of the fire code which required the drum's removal and then had failed to follow up with the school, the court's decision would have been different.

However, a City statute requiring fire inspections did not create a "special relation," between the City inspector and Plaintiff to protect the Plaintiff from a drum of highly flammable fluid with no evidence that the drum was located at the school at the time of the inspection. Again in our case, it would be as if the city had knowingly placed the drum of ultra flammable fluid at the school knowing it could explode and kill because one of its officials was deriving a pecuniary benefit from the activity.

Finally the Washington Court of Appeals revisited the exceptions in 1989: ("The public duty doctrine bars liability for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.'") (Taylor, 111 Wn.2d at 163 (*quoting* J & B Dev. Co. v. King Cy., 100 Wn.2d 299, 303, 669 P.2d 468 (1983)). The four exceptions to the doctrine are: (1) the legislative intent exception; (2) the failure to enforce exception; (3) the rescue doctrine; and (4) the special relationship exception. (Bailey v. Forks, 108 Wn.2d 262, 268, 737 P.2d 1257, 753 P.2d 523 (1987); Waite v. Whatcom County, 775 P. 2d 967 - Wash: Court of Appeals, 1st Div. (1989)

The South Dakota supreme court's analysis and decision of the exceptions to *Restatement Second of Torts §315* is found in Tipton v. Town of Tabor, 567 NW 2d

351 - SD: Supreme Court 1997 . This case referred to as Tipton (II) deviates slightly, but importantly from Cracraft and so this memorandum advocates for a reversal in part of Tipton (II).

ACTUAL KNOWLEDGE

In following the first Cracraft factor for consideration, *"Actual Knowledge,"* the South Dakota supreme court cites, Hage v. State, in stating *"actual knowledge"* means knowledge of *"a violation of law constituting a dangerous condition."* Hage v. Stade, 304 N.W.2d 283, 288 n. 2 (Minn.1981). The Hage court purports to directly reference Cracraft; however, Hage misaplies Cracraft which is then misapplied in Tipton (II). The court in Hage concluded:

> *Thus, there is no evidence that the state had actual knowledge of any dangerous conditions which were violations of any fire code and which would serve to impose a special duty on the state under the first Cracraft factor. Hage v. Stade, 304 NW 2d 283, 288 - Minn: Supreme Court 1981*

The court in Cracraft did not require *"actual knowledge of a dangerous condition,"* to be coupled with, *"violation of any [] code which would serve to impose a special duty..."* The statute that protects a particular class is the third Cracraft factor of consideration as to whether or not a special duty exists:

> *Third, a duty of care may be created by an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole.*

[Id.]

Cracraft requires only *"actual knowledge of a dangerous condition."* *Id* at 807. To require Plaintiffs establish that the government had actual knowledge of a dangerous condition violating a special class ordinance would be incredibly restrictive as no governmental body has the power to conceive of every possible dangerous situation and proscribe a statute against it. Had the City's inspector been

made aware of the dangerous condition in Cracraft, assured the Plaintiffs the barrel would be immediately removed and then reassured the school the barrel had been removed a *"special relation,"* would have been created without the need for a special ordinance.

The Court in Tipton (II) added the element of foreseeability to actual knowledge. As foreseeability is a necessary element in the duty formulation, actual knowledge denotes a foreseeable plaintiff with a foreseeable injury. Mid-Western Elec., Inc. v. DeWild Grant Reckert, 500 N.W.2d 250, 254 (S.D.1993). And further the court in Tipton (II) distinguished actual knowledge from constructive knowledge. *"Only where the circumstances are such that the defendant `must have known' and not `should have known' will an inference of actual knowledge be permitted."* ***Id.*** See also Minick v. Englert, 84 S.D. 73, 79, 167 N.W.2d 551, 555 (1969) In addressing actual knowledge the Tipton (II) court found, To Tabor and Bon Homme's knowledge, the hybrids had never bitten or snapped at anyone who had approached the cage. Before the attack on Crystal, the animals were nothing more than a community curiosity and annoyance. Tipton (II) at ¶ 22.

The court in Tipton(II) however found that the actual knowledge element could be satisfied with both direct and circumstantial evidence. Of important note to the Hideaway Hills case is that the court in Tipton (II) analyzed whether any circumstantial evidence existed in general knowledge of the public-outside of the Town of Tabor. *"[a]t least at the time of the attack, there is no support in the record for the assertion there was actual knowledge [that] wolfdog hybrids were more dangerous than other dogs."* Id. The Plaintiffs then presented publications from the *Sioux Falls Argus Leader* and *Wolftracks*, a publication of Wolf Haven America. *Wolftracks*, at that time, was a nationally recognized publication.

> *These articles raise serious concerns about keeping wolfdogs as pets, particularly in town. However, our quandary with this is twofold: (1) the articles were all published sometime after the attack on Crystal Tipton; and (2) there is no showing that Sutera, O'Donnell, or other employees of Tabor or Bon Homme were ever aware of this*

information. In truth, only in recent years has public awareness been raised about the hazards of maintaining wolf hybrids, especially by irresponsible owners.

In essence the South Dakota Supreme Court,went further than Bellevue and Cracraft. The Court looked for whether circumstantial evidence existed, i.e. whether there was any evidence that *"wolfdogs,"* were, *"generally,"* or *"inherently,"* dangerous when kept as pets.

Finding not even *"circumstantial evidence,"* that the Town of Tabor, knew of the dangers of keeping wolfdogs, prior to the accident, the Court addressed the theory of a four year old girl committing a trespass. But see SDCL 40-34-15 *("No dog may be declared vicious if an injury or damage is sustained to any person who was committing a willful trespass...").*

The court then dealt with the question as to whether the wolf dogs were, *"wild,"* or, *"domesticated."* Obviously the Town of Tabor would not be allowed to license animals which were wild. *"If an animal is domesticated, the owner must know of its dangerous tendencies to be strictly liable."* I.e. the possessor of a *"wild animal,"* would be strictly liable.

"But the notice necessary to hold an owner of an animal strictly liable for an attack on a human being is notice that the animal had a propensity to attack human beings, and notice that it had a ferocious disposition toward other animals may not be sufficient." Harper et al., *The Law of Torts § 14.11*, at 274 (2d ed 1986)(citing *Restatement (Second) of Torts*, § 509 cmt g (1977)). ***Id.***

In its conclusion in Tipton (II), the Court declined to decide whether or not the Town of Tabor had actual knowledge of the dangerous propensities of the *"wolfdogs."* Holding:

Chief Justice Miller restated the same observation in Tipton I when writing "any combination" of [the Cracraft] factors may be sufficient. 538 N.W.2d at 787. It may be conceivable for some other factor by itself to create liability; we need not decide that question today. No matter the proof on actual knowledge, however, alone it is inadequate to establish a private duty. To impose tort liability upon local law

enforcement for failure to protect an individual solely upon actual knowledge of imminent danger directly conflicts with the principal rationale behind the public duty rule: it judicially intrudes upon resource allocation decisions belonging to policy makers. For a rudimentary illustration on this point, one need only imagine a variety of simultaneous public emergencies. Only when actual knowledge is coupled with one or more of the other factors, [Carcraft] can we uphold both the spirit and substance of the private duty exception. Consider, for example, actual knowledge of a dangerous violation of an enactment protecting a special class, or such knowledge accompanied by reasonable reliance, or local entity conduct aggravating danger. In each of these combinations, the rationale appears to remain intact.

Tipton (II) at ¶ 28.

Of important note is the statement above that, "it may be conceivable for some other factor by itself to create liability." Chief Justice Miller is stating exactly what the Court in Carcraft stated. The factors in Carcraft are not all inclusive or exhaustive. Not only are other factors available for consideration but, *"it may be conceivable for some, 'other factor by itself to create liability.' Tipton (II)."* It is fundamental for the proposition that, under South Dakota jurisprudence, interpretation of liability of Carcraft requires something more than actual knowledge, but could be established by other factors outside of Cracraft.

ENACTMENT FOR A PARTICULAR CLASS

[¶ 29] We are unaware of any "public duty" jurisdiction which pins special duty liability solely upon actual knowledge. Minnesota courts have yet to decide this question. Washington cases link actual knowledge with a violation of an enactment protecting a special class. See Campbell, supra; Livingston, 751 P.2d at 1200.

(Emphasis added)
[Bellevue]

The ordinances at issue in the case were two *Municipal Codes § 16.32.110.* The statutes read:

> *Unsafe prior installations. The building official shall have the authority to inspect, any previously installed electrical equipment such as is regulated by this code, even though it may have been installed in accordance with former city regulations. Should he find such installation or equipment to be manifestly unsafe to life or property, he shall serve written notice to the owner and/or user thereof that such unsafe conditions exist and must be eliminated within a period of not to exceed sixty days. If such requirements are not complied with within the stated time, he shall disconnect or cause to be disconnected, the current from such installation or equipment. After the building official has disconnected such installation or equipment from the electric current, or caused the disconnection, it shall be unlawful for any person to reconnect such installation or equipment to the electric current without the approval of the building official.*

The second code provided:

> *In order to safeguard persons and property from the danger incident to unsafe or improperly installed electrical equipment, the building official shall immediately sever any unlawfully made connection of electrical equipment to the electrical current if he finds that such severing is essential to the maintenance of safety and the elimination of hazards*

(Emphasis Added)
[Bellevue Municipal Code § 16.32.110 (Ordinance No. 163, § 11, June 12, 1956)]

The first statute gives the offender 60 days to remedy the situation or otherwise be disconnected by the building official while the second ordinance required the building official to i*mmediately sever* the power to the dangerous condition.

In interpreting the electrical ordinances the court found ultimately its holding, the ordinances at issue applied to the general public and *to a class of persons "residing within the ambit of the danger involved."*

> *In the instant case, the City's electrical inspector was alerted to and knew of the nonconforming underwater lighting system and of the extreme danger created thereby to neighboring residents in proximity to the stream in question. Yet, the inspector failed to comply with the City's ordinances (Bellevue Municipal Code §§ 16.32.090 and .110) directing that he sever or disconnect the lighting system until it was brought into compliance with electrical code requirements. These*

requirements were not only designed for the protection of the general public but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved, a category into which the plaintiff and his neighbors readily fall.

Id at ¶13.

This holding relied on just two of the factors discussed in Cracraft, (1) actual notice of a dangerous condition and (3) an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole.

In attempting to discern what statute or ordinances "set forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole," Cracraft again looks to the *Restatement Second of Torts*:

It is a basic principle of negligence law that public duties created by statute cannot be the basis of a negligence action even against private tortfeasors. Restatement, Torts (2d), § 288, states in part:

"The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively

"(a) to protect the interests of the state or any subdivision of it as such, or

"(b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or

*"(c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public * * *."*

[Emphasis Added]
Cracraft

In sum Cracraft places boundaries on governmental statutes or ordinances where it is shown that the regulation's purpose is, exclusively to protect the state or subdivisions, to secure rights which individuals or entitled only as members of the public, or services [exclusively] imposed upon the government to give to the public.

The ordinance in Bellevue applied to the discovery of a dangerous electrical

condition and the ordinance required the building official sever the electricity. The ordinances however applied to the general public and to a specific class of persons, when those persons were residing in the *"ambit of danger."* In Cracraft, although the ordinance applied by law to the general public, the court still wasn't able to rule out it's possible applicability to persons and classes of person. *"If there were no additional considerations in this case, it could be concluded at this point that the defendant municipality had no duty, public or special, to inspect and correct fire code violations. There are additional considerations, however. The municipality's own ordinances require that it undertake inspections for fire code violations."* at 805.

A simplified way of looking at it is that any ordinance or statute which requires *mandatory acts* may become applicable to a specific person or class of persons when additional factors are present such as actual knowledge. Statutes that do not require *mandatory* acts do not apply to particular persons or classes of persons. In Tipton (II) Tabor's ordinance was a mere licensing ordinance which created no mandatory action. The court held: [¶ 23] Tabor's ordinance in effect at the time forbade keeping dogs of fierce, dangerous or vicious propensities. Owning or keeping vicious dogs also constitutes a public nuisance under state law. SDCL 40-34-13. South Dakota law provides the following definition... at ¶ 23. *"We believe the generality of these enactments is determinative. Simply because certain laws give Tabor and Bon Homme authority to act does not mean that a special class is created and needs to be protected. These enactments have no particular applicability to children, visitors to town, or anyone in particular. The record fails to support this element."* at ¶ 36. Said another way the Town of Tabor was neither required under its ordinance or state law to take action against the owner of the Wolfdogs *had it known* the Wolfdogs were dangerous.

The outcome of Tipton (II) would have been different if the statute would

have *mandated* the town remove all vicious dogs when aware of their viciousness. And the town had knowledge of prior attacks by the Wolfdogs.

REASONABLE RELIANCE

"For reasonable reliance to occur, the Tiptons must have depended on *"specific actions or representations which [caused them] to forgo other alternatives of protecting themselves."* Id. at ¶ 31. "[] reliance occurs from *"some sort of contact between the governmental unit and the plaintiff which usually induces detrimental reliance by the individual."* Id. Would not the vicious dog ordinances and state statutes be applicable if the Town of Tabor had promised to remove the dogs? By ordinan*ce and state statute the Town was authorized to do so.*

THE MUNICIPALITY MUST USE DUE CARE TO AVOID INCREASING THE RISK OF HARM

South Dakota holds that this is an *"aggravation of the danger."* Minnesota holds this element as any act which materially changes the risk to the Plaintiffs.

PUBLIC DUTY DOCTRINE

The public-duty rule "requires that a governmental unit owe the plaintiff a duty different from that owed to the general public in order for the governmental unit to be found liable" in a negligence claim. Radke v. Cnty. of Freeborn, 694 N.W.2d 788, 793 (Minn.2005). *[The Public Duty Rule] applies only if the public entity truly has a duty owed only to the public at large, such as a duty to provide law enforcement services or regulate the practice of medicine. (Emphasis Added)* Gatlin-Johnson v. City of Miles City, 291 P. 3d 1129 - Mont: Supreme Court 2012.

> *"The public duty doctrine was not intended to apply in every case to the exclusion of any other duty a public entity may have.... It does not apply where the government's duty is defined by other generally applicable principles of law."*

Gatlin-Johnson ex rel. Gatlin v. City of Miles City, 367 Mont. 414, 291 P.3d 1129, 1133 (Mont.2012).

> *Though some consider this doctrine a form of immunity, we view the rule principally within the framework of duty—if none exists, then no liability may affix. When our Legislature waived immunity for public entities, it created no new causes of action, but only imposed upon those entities basically the same liability in tort individuals bear.*

[Tipton v. Town of Tabor, 567 NW 2d 351 (SD1997) *citing* Cracraft v. City of St. Louis Park, 279 NW 2d 801 (Minn. 1979).]

> *Once the existence of a duty and a breach thereof is shown, the plaintiff must next show a causal relationship between that breach and some damages.*

J & B DEV. CO. v. King County, 669 P. 2d 468 - Wash: Supreme Court 1983

Abnormally Dangerous Activities are an EXCEPTION to the Public Duty Rule

The rules for strict liability for abnormally dangerous activities rarely apply to activities carried on in pursuance of a public duty. *Restatement (Second) of Torts,* § 521 (1981). IE: The transmission of electricity as a public necessity (Kentucky Utilities Co. v. Auto Crane Co., 674 SW 2d 15 - Ky: Court of Appeals 1983).

There have been many American cases which have passed upon the question of whether a particular use of the land was natural or non-natural for the purpose of applying the Rylands v. Fletcher doctrine. Thus, Prosser, *supra,* summarizes at page 510:

> *The conclusion is, in short, that the American decisions, like the English ones, have applied the principle of Rylands v. Fletcher only to the thing out of place, the abnormally dangerous condition or activity which is not a `natural' one where it is." (Emphasis supplied)*

The American Law Institute has considered this question in §§ 519 and 520 of the Restatement of the Law of Torts (1938).

These sections state:

"§ 519. MISCARRIAGE OF ULTRA-HAZARDOUS ACTIVITIES CAREFULLY CARRIED ON.

Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

"§ 520. DEFINITION OF ULTRA-HAZARDOUS ACTIVITY.

An activity is ultrahazardous if it

(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and

(b) is not a matter of common usage."

(Emphasis Added)
[Restatement of the Law of Torts]

Recognizing the evolving nature of the law in this area, the American Law Institute published Tentative Draft No. 10 in 1964 in which certain changes were recommended for §§ 519 and 520. Thus, in § 519 and § 520 the substitution of the words "abnormally dangerous" is suggested in place of the word "ultrahazardous." In § 520, the following factors are said to be pertinent in determining whether an activity is abnormally dangerous:

(a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;

(b) Whether the harm which may result from it is likely to be great;

(c) Whether the risk cannot be eliminated by the exercise of reasonable care;

(d) Whether the activity is not a matter of common usage;

(e) Whether the activity is inappropriate to the place where it is carried on; and

(f) The value of the activity to the community.

[Restatement of the Law of Torts]

Clearly the facts in this case satisfy every element of section 520's elements for considerations as to whether or not an activity can be called ultrahazardous. Building homes on top of mines and lagoons, involves a high degree of risk, which cannot be eliminated by the exercise of reasonable, is not a matter of common usage, wholly inappropriate and of zero value to the community.

Referring to these factors, F. James, The Law of Torts, Supp. to Vol. 2, § 14.4 (1968), states:

"If the utility of the activity does not justify the risk which it creates, it may be negligence merely to carry it on, and the rule stated in this Section is not necessary to subject the defendant to liability for harm resulting from it."

...

In the final analysis, we are impressed by the magnitude of the activity and the attendant risk of enormous damage. The impounding of billions of gallons of phosphatic slimes behind earthen walls which are subject to breaking even with the exercise of the best of care strikes us as being both "ultrahazardous" and "abnormally dangerous," as the case may be.

[Cities Service Company v. State, 312 So. 2d 799 - Fla: Dist. Court of Appeals, 2nd Dist. 1975]

Some activities are of such grotesque and predictable danger that there is no duty of the plaintiff to prove that something is ultra dangerous: (the storage of gasoline immediately adjacent to a private residence relieved plaintiff of proving negligence) (Watson v. Great Lakes Pipeline Company, 182 NW 2d 314 - SD: Supreme Court 1970).

However: (a pump used within its intent is not ultra dangerous) (Fleege v. Cimpl, 305 NW 2d 409 - SD: Supreme Court 1981).

The distinction as recognized in South Dakota is one of whether or not a risk *may be eliminated by the exercise of reasonable care. "Most ordinary activities can be made entirely safe by the taking of all reasonable precautions; and when safety cannot be attained by the exercise of due care there is reason to regard the danger as an abnormal one." Restatement (Second) of Torts § 520, comment h at 38 (1977).* (Fleege v. Cimpl)

Allowing for the construction of a subdivision over a known underground mine or within a known toxic sewage lagoon is not an activity which may be made safe in the exercise of reasonable care. The County, in this instance, approved an ultrahazardous activity wherein the danger was known, predictable and obvious. Allowance of this ultrahazardous condition was itself a breach of the public duty doctrine. Approval, construction and occupancy of homes within normal circumstances is not ultrahazardous, but the said activity becomes ultrahazardous when safety cannot be attained by an exercise of due care. Standard construction techniques and methodologies are unable to guarantee safety in such circumstances as those in the instant case.

PUBLIC DUTY ARGUMENT

THE COUNTY AND ITS COMMISSIONERS HAD ACTUAL KNOWLEDGE OF A DANGEROUS CONDITION
(ABANDONED MINE AND ABANDONED SEWAGE LAGOONS)

Meade County and its commissioners knew not only that the Hideaway Hills (I) subdivision was being built on top of an inherently dangerous mine and that the Hideaway Hills (II) subdivision was atop a sewage lagoon, but that this specific mine and this sewage lagoon were dangerous. Commissioner Bob Mallow owned a home for multiple decades by one of the entrances to the mine. Goldie Prestjohn - a long time and current resident of Black Hawk and highschool classmate of Commissioner Bob Mallow will testify that she and Mallow were both acutely aware of the dangers of the mine and when the land was slated to be approved for development. She stated to Commissioner Mallow, *"what's the matter with you! You know about that mine."* Further, in the 1960s Mallow was instrumental in inviting the National Guard to the mine to dynamite its entrances due to his concern his children would be harmed by the mine.

The entire Commission had actual knowledge of the gypsum mine. Keith Kuchenbecker gave the Commission a booklet entitled *"Hideaway Hills, a Manufactured Housing Community."* This booklet was produced by Mr. Kuchenbecker in response to claims by the Meade County Commissioners that they *"couldn't remember,"* or *"didn't know,"* the subdivision had been located above an underground mine. On page two (2) of the booklet the following was written:

> *Soil Suitability*
>
> *A visual field investigation which included test holes was conducted at the proposed Hideaway Hills Manufactured Housing Community site. A detailed soils report is enclosed and contains the six soils formations found on the site. Based on initial visual observations, on-site soil appears suitable for the development.*
>
> *In the 1980s the state cement plant mined gypsum from the site. One can still identify spoil pile areas by abnormal terrain and exposed gypsum fragments. In the early 1900s an underground gyp mining operation took place on the NE corner of the property. Field boring operation may be required to identify any cavities that pose a safety hazard.*

(Emphasis Added)

Not only did Commissioner Mallow have direct, first hand personal knowledge of the gypsum mine, but the entire Meade County Commission in 2000 knew the gypsum mine lay underneath the proposed Hideaway Hills Subdivision.

There is no denying the Planning Committee and County Commission both knew about the sewage lagoon as well. Bob Mallow, in his capacity as Manager of NDSD, participated in the actions to cover up the dangerous condition by misrepresenting a consultant report. He then, in his capacity as Planning Committee Chairman, brought forward a proposal to approve a replat of the "*former sewage lot.*" This was recommended for approval by Planning even though Powles knew that the land could never be used for residential purposes. The Commission approved the residential plat of Hideaway (II) with full knowledge that the land was a former sewage lagoon and was still then toxic.

ASSUMING A NOT OTHERWISE REQUIRED DUTY TO PROTECT

Upon information and belief the soils report produced by Kuchenbecker and Fuss was ordered by the Meade County Planning Committee because of their firsthand knowledge of the gypsum mine and its dangers. Meade County Ordinance 20 provides:

> *If the property proposed for development involves areas where, in the view of the planning board, the soils characteristics, terrain, natural and man-made drainage, geology, ground cover or its location impose unusual requirements, the planning board may request supplementary data to demonstrate the feasibility of subdividing the land. If the planning board requests additional data or information, the subdivider shall have a period of 14 days in which to comply. The requirements stated above may be waived for proposed Ghost Plats.*

[Ordinance 20, page 13-14]

Soil testing is not required in Meade County and has only begun to be required in neighboring Pennington County in 2019. The Planning Committee

requested Kuchenbecker and Fuss perform a soils test so as to assess the dangers of building on the mine. The report concluded, *"field boring operation may be required to identify any cavities that pose a safety hazard." (Emphasis Added)* Rather than proceed with due care and perform an investigation of the dangers, the Commission approved the land for development in 2002. It is well established that one who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so. As stated in Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425, 1427 (1922):

> "* * * It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all * * *"

[Isler v. Burman, 232 NW 2d 818 - Minn: Supreme Court 1975]

> *"Special duty" is nothing more than convenient terminology, in contradistinction to "public duty," for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance.*

[Cracraft at 806.]

Ordinance 20 did not require Meade County to order a soils report but once the soils report was ordered and brought attention to the fact that, *"Field boring operation may be required to identify any cavities that may be a safety hazard,"* Meade County owed a duty to proceed non negligently. There are no soils characteristic in the area of Hideaway of Hills that are materially different from other regions of Southern Meade County. The only logical reason Meade County could have for requesting the soils report would be to identify whether it would be safe to build a subdivision on top of a gypsum mine.

ENACTMENT FOR A PARTICULAR CLASS RESIDING IN THE "AMBIT OF DANGER" AND VIOLATION OF THE ENACTMENT RESULTING IN THE PROXIMATE CAUSE OF THE LOSS

The residents of Hideaway Hills were protected by an ordinance which required the County Commissioners to *knowledgeably* decide whether or not a proposed subdivision was in accordance with the best use of land.

Ordinance 20 provides:

> *Section 1.02 Purpose It is the purpose of this Ordinance to promote the safety, health, convenience and general welfare; to encourage the use of lands and natural resources in the County in accordance with their character, adaptability, and suitability for particular purposes; to conserve economic stability and property values; to facilitate adequate provision for street and roadways, sewerage and drainage, water supply and distribution, educational and other public resources, by establishing herein standards for community development in accordance with these objectives and by providing for the enforcement of such standards.*

(Emphasis Added)
[Ordinance 20]

This ordinance while broad is clearly susceptible to a special class of individuals- those who will come to live on the new subdivisions in Meade County. The County is clearly undertaking a duty to promote, *"the safety, health, convenience and general welfare,"* not exclusively for the residents of Meade County in general, but to those who will live on the, *"improvements as land is subdivided."* Nothing in the ordinance states that the ordinance is *exclusively for the general public only.* Further, the ordinance contains language which creates a special class. *"[T]o encourage the use of lands and natural resources in the County in accordance with their character, adaptability, and suitability for particular purposes; to conserve economic stability and property values; to facilitate adequate provision for street and roadways, sewage and drainage."*

The approval of a subdivision on top of a gypsum mine or in a sewage lagoon was clearly *not in accordance with [The land's] character, adaptability and suitability for [a] particular purpose."* Property values have collapsed and clearly, *"economic stability and property values,"* were neither stabilized nor considered. And finally, the

"roadways," are collapsing, the sewage lines are likely to collapse, water is draining into the mine and the yards are poisoned.

The ordinance contains mandatory requirements developers must conform with in order to establish the tenants of the ordinance. Meade County threw Ordinance 20 out of the window. The failure to require the developers comply with Ordinance was a proximate cause of the Plaintiffs injuries.

First, Ordinance 20 requires developers to produce a *"map of all man made features:"*

> ***B. Preliminary Plat/Plans - Submission Requirements***
>
> *The following information is required for preliminary plans of subdivisions:*
>
> *1. Vicinity sketches, if not previously submitted to planning board;*
>
> *2. Names of:*
>
> *a) Subdivision*
>
> *b) Subdivider*
>
> *c) Surveyor and/or Engineer*
>
> *d) Adjacent landowners and addresses*
>
> *e) Specification on one or more maps showing:*
>
> *Location*
>
> *Property boundaries*
>
> *On-site and adjacent man-made features*

(Emphasis Added)
[Ordinance 20, pp 12]

Just like in the City of Bellevue case, this ordinance is meant to protect the public and a specific class of individuals *within the ambit of danger*. The Commissioners knew the (feature) man-made mine existed below the proposed

subdivision, it ordered a soils test to determine the safety/economic feasibility of building on top of the mine and then failed to enforce its own ordinance requiring the developers to produce a map of the mine. The mine map would have shown both the enormous size and proximity of the mine to the surface and would have alerted the public and abated the foreseeable risk of death and serious bodily injury. Further the map would have been available to the public prior to the subdivision's approval and as part of the public record which would have exposed the fraud, recklessness and negligence that was taking place.

Similarly, the Commission, understanding that Hideaway (II) was to be in former sewage lagoons, actually did know of the risks there. Instead, the Commission plowed ahead with the reckless approval of a plat for homes in land which was impossible to be used for anything more than *"in-place"* reclamation. While the consultant recognizes that there is nothing illegal in statute about placing homes in sewage lagoons - that itself doesn't mean the conduct does not represent a reckless disregard that injures those residents there.

ORDINANCE REQUIRES VARIANCE

Ordinance 20 required the developers to produce a map of the mine. The County Commission, in both Hideaway Hills (I) and Hideaway Hills (II) declined to enforce Ordinance 20 and instead decided to close their eyes to the clear and present danger presented by the "soils report." The dangers of the mine and the dangers of the former sewage lot.

A duty to disclose and warn the public of a *"dangerous industry,"* is also found in Ordinance 20:

> INDUSTRY: An industry that is considered dangerous or detrimental to public health or welfare will require a Public Hearing by the County Commissioners. The Meade County Commissioners may require a Public Hearing on any new industry.

(Emphasis Added)
[Ordinance 20, Pp. 5.]

Building on top of a mine or within a sewage lagoon is certainly a *"dangerous or detrimental,"* industry. The common thread between this part of the ordinance and the part requiring a map of all man-made features are the same, a duty to expose dangers to those who will reside within the ambit of danger.

The Commission knew both proposed developments were on top of dangerous conditions. Ordinance 20 required the Commission to exercise its power and require developers Fuss and Kuchenbecker to produce documentation of the exact dangers. The commission failed to do so. It further violated its own ordinance mandating the highest and best use of land, preservation and stabilization of property values.

FAILURE TO AVOID INCREASING THE HARM

Instead of requiring a map of the mine or a variance the Commission chose to not vote on the Hideaway HIlls Manufactured Housing Community. Curiously the proposed subdivision was not part of the new business of either the Planning Committee nor the Meade County Commission until the fall of 2002. The proposed subdivision and documentation lapsed after July 17, 2001. Not concerned with following state law, the Meade County Commission took up the final approval of the subdivision in August of 2002. However, what was once discussed as a manufactured housing community, was now slated for approval as a *"stick-built housing community."*

The Meade County Commission materially changed the risk to the residents of Hideaway Hills by approving the development of *"stick-built homes."* While manufactured homes could have been removed from the subdivision after the owners discovered the mine, stick built homes cannot be removed from a subdivision. The current catastrophe occurring in Meade County has been

aggravated by the County's approval in materially changing the risk. The homeowners are trapped on an ultrahazardous condition on the real estate.

THE PUBLIC DUTY DOCTRINE DOES NOT BAR THE PLAINTIFFS CLAIMS AS THE COUNTY ENGAGED IN MISFEASANCE AND MALFEASANCE

The public duty rule applies to "Nonfeasance." Meade County engaged in Misfeasance and Malfeasance. The County engaged in Misfeasance as it took an affirmative act which placed the residents of Hideaway Hills (I) and Hideaway Hills (II) in inherent danger. Misfeasance is an exception to the public duty rule because rather than inaction, the governmental body affirmatively acts to place the plaintiffs at risk - thus the common law duty of reasonable care is applied. The difference between misfeasance and nonfeasance can easily be seen when a reverse analysis of Cracraft, City of Bellevue, and Tipton v. Town of Tabor (II) is applied. If the City in Cracraft had knowling agreed to put the barrel of flammable fluid in the school, the City would have engaged in misfeasance. If the City in City of Bellevue had agreed to place the lethal electrical wiring in the creek, the city would have engaged in misfeasance. If the Town of Tabor had knowling allowed vicious dogs into the community the town would have engaged in misfeasance.

Meade County engaged in misfeasance as it recklessly engaged in a lawful activity with reckless disregard to the residents of Hideaway Hills. Knowingly approving a subdivision on top of a gypsum mine was misfeasance. Knowingly approving a subdivision on a known hazardous former sewage lagoon was a misfeasance.

MEADE COUNTY ENGAGED IN MISFEASANCE

The public duty rule applies in cases of misfeasance. A duty does not attach when there is nonfeasance, or "passive inaction or a failure to take steps to protect [others] from harm." *Id.* at 22 (quotations omitted). Ariola v. City of Stillwater

Court of Appeals of Minnesota. October 27, 2014 Not Reported in N.W.2d2014 WL 5419809.

As the Minnesota Supreme Court explained in *Domagala,* although there is no duty to protect another from the conduct of a third party absent a special relationship, *"general negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff."* 805 N.W.2d at 23 (emphasis added).

MEADE COUNTY ENGAGED IN MALFEASANCE

At the time Hideaway Hills (I) was approved, Bob Powles was the acting chairman of the Meade County Planning Committee. At the same time Bob Powles was also the Site Manager of the NDSD, a sanitation district for the Northdale Subdivision which includes water, sewer and street maintenance.

On information and belief Bob Powles organized the district, formally a division of the Northdale Homeowners Association, into a subdivision of the state so he could apply and receive no interest loans from the State DENR without personal liability. His agreement to allow his ownership of the wells and sewer to become a subdivision of the State of South Dakota was part and parcel with a compensation package that gave him a monthly flat fee per water and sewer hookup. Powles had a vested interest in expanding the NDSD as his monthly compensation would increase as a function of the number of new hookups.

Powles used his position on the Meade County Planning Commission to encourage and approve the approval of Hideaway Hills (1) as he stood to benefit directly some $3,000 to $4,000 per month from the expansion of the district. This theory is confirmed when studying the record.

In August of 2002, the DENR approved Keith Kuchenbecker's sewage system and lift station on the condition that he fulfilled a number of required contingencies. Kuchenbecker represented to the Commission that he was approved

by virtue of a clearly fraudulent document purported to be DENR"s approval.The Plaintiffs' have produced to the court documents which show Mr. Kuchenbecker's waste system was not approved by DENR. The Commission let this clearly fraudulent DENR document pass through the Commission as the commissioner's knew Powles was going to apply for a loan from the DENR to provide sewage and water systems to Kuckenbecker free of charge. Powles was going to make all of the money back plus $20.00 per month per hookup in perpetuity from the Hideaway Hills subdivision.

FAILURE TO ENFORCE UNIFORM BUILDING CODES WHEN COMBINED WITH ACTUAL KNOWLEDGE OF THE BUILDING CODE VIOLATION WHICH CANNOT BE CORRECTED CREATES A SPECIAL CLASS

Ordinarily negligent failure to enforce Uniform Building Codes (UBC) *without* actual knowledge of the building code violation, *"which is inherently dangerous,"* does not result in County liability. The rationale of this jurisprudence is clear - if the County was liable for failing to detect violations in the UBC, then the County would be placed in the role of an insurer of compliance with uniform building codes. While general negligence is exempted by the public duty doctrine, knowledge of an inherently dangerous violation of the uniform building code is not exempted. Again the state of Washington provides multiple cases as to why this exemption is particularly excluded from the public duty doctrine. The case of ATHERTON CONDO APARTMENT-OWNERS ASS'N BD OF DIRECTORS v. Blume Dev. Co., 799 P. 2d 250 - Wash: Supreme Court 1990 is applicable to the case. In holding that the City of Lynnwood was not liable for failing to correct defects in the builder/developers plans with the uniform building codes that were initially found to be defective in the preliminary approval of the plans, the Supreme Court of Washington held:

> *Here, Owners argue that Lynnwood building officials (Farrens an collier) possessed actual knowledge of the UBC violations at Atherton. (17 items identified as fire resistance standards) As evidence, Owners*

point to the plan review sheet which Farrens completed and the notations which he made on the building plans.

Zimbelman v. Chaussee Corp., supra, is instructive in resolving this issue. In Zimbelman, a King County building official reviewed plans for a condominium complex. The building official noted deviations from UBC requirements, including plans which did not conform with exit requirements, insufficient fire-resistant materials in certain required locations, and flooring below minimum fire resistance standards. The building official returned the plans with the necessary corrections noted. A building permit was issued and the building inspected. The building inspector did not note any deficiencies and did not attempt to verify if the previously noted deviations had been corrected. A certificate of occupancy was then issued. The building as constructed, however, violated UBC standards. In finding that there was no evidence that the building official had actual knowledge, the Court of Appeals stated:

"Awareness of code violations in the plans as submitted only establishes knowledge of defective plans, not knowledge of defective construction. The County cannot be charged with knowing that the contractor would fail to correct the deficiencies identified by the County in the plans. If the County instead had required submission of amended plans which incorporated the noted corrections, the approval of such corrected plans would not be actual knowledge of the contractor's subsequent failure to build in compliance with code requirements. Even if the County failed to note some defects in the plans, this would not constitute actual knowledge of inherently dangerous and hazardous conditions created by the contractor."

[Atherton citing *Zimbelman*, 55 Wn. App. at 283.]

In the instant case, Meade County had actual knowledge of an *inherently dangerous and hazardous condition* (building on an underground mine; building within a toxic sewage lagoon). This inherently dangerous and hazardous condition was highlighted by the soils study requested by the Meade County Planning department, which stated, "coring may be necessary to identify cavities which pose a safety hazard" and an additional soils study requested by NDSD to whom Commission Powles was its manager which identified the toxins in the soil. Not only did the County understand an inherently dangerous condition existed, but failed to

request any measures be taken to identify the hazards or require their presence be abated. The abatement of these inherently dangerous and hazardous conditions were not possible to be abated by reasonable care, (affidavit of Patrick Ealy). Thus the County had knowledge that the subdivision's plans were defective and since the dangers of building on a mine could not be abated, the County had knowledge that construction of the subdivision (Hideaway Hills I) would violate the Uniform Building Code. Additionally, since the dangers of building in a disused sewage lagoon could not be abated, the County had knowledge that construction of the subdivision (Hideaway Hills II) would be a violation of the Uniform Building Code.

FAILURE TO ENFORCE UNIFORM BUILDING CODE EXCEPTION TO THE PUBLIC DUTY DOCTRINE

Again the state of Washington hails in defining the failure to enforce (building code) exception, This is the "failure to enforce" exception to the public duty doctrine.

> *Courts construe the failure to enforce exception narrowly. Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wash.2d 506, 531, 799 P.2d 250 (1990). The statute must create a mandatory duty to take specific action to correct a violation. Forest v. State, 62 Wash.App. 363, 369, 814 P.2d 1181 (1991). Such a duty does not exist if the statute vests the public official with broad discretion. Forest, 62 Wash.App. at 370, 814 P.2d 1181. Where the plaintiff alleges a breach of a duty to enforce a building code, the plaintiff must establish actual knowledge that the violation is an inherently dangerous condition.*

Taylor v. Stevens County, 759 P. 2d 447 - Wash: Supreme Court 1988

The question is thus distilled to the Court, is building on top of an underground mine (Hideaway Hills (I)) an *inherently dangerous condition?* Congress has noted that underground mining is an inherently dangerous industry. (See 30 U.S.C. sec. 801 (1983).) McColgan v. United Mine Workers of America, 464 NE 2d 1166 - Ill: Appellate Court, 1st Dist. (1984). The Kentucky Supreme Court found a

mining company strictly liable for homes built knowingly on top of mines. Island Creek Coal Co. v. Rodgers, 644 SW 2d 339 - Ky: Court of Appeals 1982.

A further question to this Court - is building on top of a disused sewage lagoon an *inherently dangerous condition*. The dangers of arsenic and fecal coliforms fall within a layperson's knowledge. The existence of these articles in concerning levels was confirmed and known to the Defendants. Not only is this danger predictable to inflict injury, but it would be absolutely expected. Many Hideaway Hills (II) plaintiffs submit that they have suffered injury from exposure to this *inherently dangerous condition*.

The State of Washington has found a special relationship through code enforcement when coupled with knowledge of an ultrahazardous condition. In Halvorson v. Dahl, 574 P. 2d 1190 - Wash: Supreme Court 1978, the Washington Supreme Court found the existence of a special relationship when the City of Seattle knew of a fire code violation in a particular hotel for 6 years prior to the fire that killed the decedent. Once a duty to act for the protection of others is voluntarily assumed, due care must be assumed. Pepper v. JJ Welcome Construction, 871 P. 2d 601 - Wash: Court of Appeals, 1st Div. 1994

APPLYING CARCRAFT TO HIDEAWAY HILLS

The most fundamental question in applying the jurisprudence of Carcraft to the causes of action in Hideaway Hills would be first to ascertain whether or not Meade County had *actual knowledge* of the dangerous condition. This question is

easily answered. Meade County ordered a soils test to be conducted in the year 2000. This soils test provided the following information:

> *Soils... underground gyp mining in the early 1900s. Boring may be necessary...*

Meade County had direct knowledge from the results of the soils test that the land in which the subdivision was to be developed was above an underground gypsum mine.

Similarly, Planning Committee Chairman Bob Powles had direct knowledge of the hazards within the sewage lagoon. He himself specifically manipulated the recommendation of the environmental consultant hired by NDSD to represent that the property was prime development land - ignoring the report's statements concerning hazardous materials in the ground. Mr. Bob Powles, through his capacity to Meade County Planning, ultimately allowed that plat, marked as *"formally Sewage Lot 1,"* to be approved without question of the hazards he had direct knowledge of. Meade County approved a residential plat with direct knowledge that it was *formally Sewage Lot 1* without question. There was no concealment to Meade County authorities that they were approving the placement of residential homes into a sewage lagoon.

THE PUBLIC DUTY RULE IS AIMED AT PLACING RESPONSIBILITY ON THIRD PARTY OFFENDERS AND NOT ON GOVERNMENT, IN THIS MATTER GOVERNMENT ACTED IN CONCERT WITH THE THIRD PARTY OFFENDERS

"The rule [public duty rule] promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments." Tipton (II) at Id. In this case, developer Keith Kuchenbecker presented a plan to the Meade County Commission in 2000 for the development of a Mobile Home park. The commissioners were given a soils report conducted by the county in which it was told that the proposed development would lie on top of an underground gypsum mine. It is common knowledge that mines are ultrahazardous features on land. Relative to that danger, is the likelihood of collapse of the real estate and its fixtures and the death of those that live on top of the mine. Beyond all possibility of doubt is the fact that those who live on top of a mine would be rendered *"insecure in life, or in the use of property"* SDCL §21-10-1.

Even prior to the year 2000 soils report, the Meade County Commission knew of the mine and its dangers. Commissioner Bob Mallow lived near the mouth of the mine and abstained from voting to accept the plat. Further the community had institutional knowledge of the vastness of the mine, prior collapses and crimes committed in the mine.

This became a *modus operandi* for Meade County when in 2006 they approved the construction of homes in an area of former sewage lagoons. The Commission knew this area of land was a former lagoon and had a soils report of

the hazards. Rather, the commission disregarded this report and approved the construction of homes in the sewage lagoons. Further the commission knew of the sewage lagoons as they were purchased by Bob Powles, were nearby Bob Powles home and were clearly visible from interstate 90. This vote for Hideaway (II) came on the same agenda where the Commission ordered that Hideaway (I) developers repair a road which was collapsing into a gypsum mine.

FINAL CONCLUSION

A dissertation on the public duty doctrine is necessary to understand the difference between misfeasance and nonfeasance. While the distinction between misfeasance and nonfeasance may be difficult to grasp or ascertain, the gap between malfeasance and nonfeasance is much easier to digest. Bob Powles, as a government official, actively and affirmatively pushed Hideaway (I) and Hideaway (II) through the planning committee because the developments were going to make him rich. Each of these developments presented different and distinguishable risks of death and serious bodily injury to the residents of Hideaway Hills (I) and (II). While Hideaway (I) placed residents at risk of catastrophic death on account of a collapse of an underground gypsum mine, the Hideaway (II) development subjected the residents to the slower, more certain and more painful cause of death by poisoning. In Carcraft and Tipton (II), the court opined that there are other considerations which can represent malfeasance. The facts of this case represent one of the

grossest examples of malfeasance in the history of South Dakota and must surely meet the additional considerations yet alluded to by the Chief Justice.

All of the public duty cases in existence deal with situations in which *"arms length transactions,"* are taking place, i.e. an injured plaintiff suing a government because the government failed to protect them from the misconduct of a third party malfeasor who the government knew nothing about. The conduct of the third party misfeasor or malfeasor is unknown to the government. In these cases the plaintiff alleges causes of action in which no evidence exists where the government was aware or was acting as a co-conspirator with the 3rd party malfeasor.

No cases exist in which the government approved of ultrahazardous subdivision(s) because approval of the subdivision benefited one or more of the government officials charged with carrying on the governmental duties imposed upon them .

This case is easily distinguishable from every public duty case as the planning committee in this case actively and intentionally caused Hideaway (I) and Hideaway (II) to be approved by the committee and foreseeably by the Commission because an individual public official stood to receive a financial benefit from the development of land which was ultrahazardous for human habitation.

WHEREFORE THE PLAINTIFFS PRAY MEADE COUNTY'S MOTION TO DISMISS BE DENIED

Dated this 11th day of September 2020.

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