

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 28352

JIMMY and LINDA KRSNAK,

Plaintiffs and Appellants

vs.

BRANT LAKE SANITARY DISTRICT,

Defendant and Appellee

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
LAKE COUNTY, SOUTH DAKOTA

THE HONORABLE VINCENT A. FOLEY
Circuit Court Judge

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED AUGUST 17, 2017

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APPELLANT’S BRIEF

PRELIMINARY STATEMENT

For ease of reference, Appellants, Jimmy and Linda Krsnak, will be referred to as either “Appellants” or “Krsnaks.” Appellee in this matter, Brant Lake Sanitary District, will be referred to as either “Appellee” or “BLSD.” References to the settled record, that being the register of actions, if any, will be made by the letters “SR” followed by the applicable page number(s). References to the Transcript of the Summary Judgment

hearing on February 2, 2017, will be made by the letters “SJ-T:” followed by the applicable page number(s). References to transcripts or portions of transcripts that may otherwise be part of the record herein, will be referred to by the appropriate name and/or hearing date followed by “T:” (for “Transcript”) and followed by the applicable page number(s) where necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

The appeal herein is taken pursuant to Appellant’s statutory right to appeal pursuant to SDCL 15-26A-3. Krsnaks underlying claim(s) in this action of Inverse Condemnation and Nuisance were advanced as part of Appellants’ Amended Complaint as filed in this matter on September 7, 2012. SR 344-348. With the subject property as well as the offending “new” BLSD sewer lagoon located just outside of Chester, South Dakota and adjacent to the Krsnaks rural property, this matter was commenced in Lake County and, as a result, it was appropriately venued in Lake County. *See*, SR 344-348.

This appeal is from a cursory e-mail decision & letter/memorandum (Appendix A) and subsequent Order and Judgment of Dismissal entered by Circuit Judge Vince Foley, with such memorandum opinion dated July 5, 2017, and as filed on July 11, 2017, and with the trial court’s Order and Judgment of Dismissal and Notice of Entry thereof being thereafter filed on July 19, 2017. Appendix B; SR 591-593. Thereafter, Appellant timely appealed the matter to this Honorable Court on August 17, 2017. SR 597.

STATEMENT OF LEGAL ISSUES

ISSUE 1

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BRANT LAKE SANITARY DISTRICT [BLSD] SINCE THERE ARE GENUINE ISSUES OF MATERIAL FACT SURROUNDING THE ADVERSE EFFECTS OF SEWAGE BEING ADJACENT TO AND/OR SEWAGE SEEPAGE NEAR LINDA’S GARDEN’S PROPERTY.

Appellant submits that the Circuit Court, Judge Foley, erred in granting summary judgment to BLSD since there are genuine issues of material fact that were called into question in the record by Appellants, however, with such genuine issues of material fact being left unaddressed within or as a part of the Court's brief memorandum opinion. SR 604-605; Appendix A-1-A-3.

Rupert v. City of Rapid City, 2013 S.D. 13, 827 NW2d 55;
Hall v. State ex rel. South Dakota Dept. of Transp., 2006 S.D. 24, 712 NW2d 22;
Gellert v. City of Madison, 50 S.D. 559, 210 NW 978 (1926);
SDCL 15-6-56.

STATEMENT OF THE FACTS

Appellants/Krsnaks reside in rural Lake County (outside the City of Chester) and have for a number of years operated a business, "Linda's Gardens", as a unique family-owned agricultural business venture for the purpose of selling its products at local farmer's markets and also to area businesses who seek out Krsnaks fresh, homegrown, natural and local garden products.

Krsnaks rural/agricultural property is adjacent to (just north of) the wastewater treatment facility operated by the Chester Sanitary District. As noted, Krsnaks own and operate "Linda's Gardens" as a for-profit business venture - looking to increase business each year that they were in operation. *See*, Jimmy Krsnak deposition, pp. 9-10; 29-32. Appellee/BLSD is a recognized sanitary sewer district organized under the laws of the State of South Dakota and located in the southern portion of the same quarter section of land as Appellants. The prior water treatment facility (prior to 2012) consisted of two wastewater treatment cells. Chester entered into a Joint Powers Agreement with BLSD for the purpose of adding a third wastewater treatment lagoon to the facility. *See generally*, Jimmy Krsnak deposition, pp. 14-15. Construction took place in approximately 2011-2012 and the third lagoon - much closer to Appellant's property and garden production area (within approximately only 500-600 feet) was finished late in

2012 - after the commencement of this action. BLSD's (additional) third sewer lagoon is approximately eight (8) acres in size and was, to the detriment of Krsnaks as neighbors, designed and as outlined in the record "to allow for [sewage] seepage of approximately 14,000 gallons per day," while the prior "existing cells [we]re also designed for seepage of approximately 14,000 gallons per day." *See*, Appendix D, F and G; *cf.*, Appendix H.

Following construction and operation of the additional third sewer lagoon, as part of discovery in this file it was established by the Krsnaks - and not factually refuted by BLSD - that they believed that - because the BLSD's Lagoon was/is much closer to their property and garden area and also much bigger than in the past - Appellee's additional third sewer lagoon has been and is more odorous than [only] the Chester Sanitary District's lagoons because it obviously "*stinks more.*" *See*, Appendix D, F and G. In addition, as part of this action, Krsnaks engaged an expert MAI Appraiser, Steven C. Shaykett, who determined that BLSD's "new" sewer lagoon¹ – built adjacent to the original (Chester facility) sewer lagoons to the north (versus to the west) and, as such, significantly closer to the southern edge of Krsnaks property – was only approximately 675 feet from the Krsnaks property and that the Krsnaks property was independently found to be negatively impacted and damaged thereby. *See*, Appendix E-2 and E-4-E-5.²

As a result, Appellants brought an action in 2012 primarily under the theories of inverse condemnation for the unconstitutional and unlawful taking of their property by and through the construction and installation of Appellee's additional third sewer lagoon

¹ As apparently related to a "new" sewer system that was to be built around Brant Lake to serve approx. 230 property owners which, ultimately, was part of other/separate litigation involving BLSD and Excel Underground and involving a recent jury verdict against BLSD.

² *See also*, Krsnaks Opposition to Defendant's Statement of Undisputed Material Facts, Nos. 1-5. Appendix C.

and for the unique and unlawful nuisance (SDCL Ch. 21-10) that resulted therefrom. *See*, SR 344-348; *see also*, SJ-T pp. 14-15; Appendix G. BLSD, after failing to prevail on its initial motion to dismiss as ruled on by the trial court on December 20, 2012 (SR 407), later moved for summary judgment in this matter. Following a summary judgment motion hearing on February 2, 2017, the trial court filed its initial indication of summarily granting summary judgment in favor of BLSD on June 30, 2017, and follow-up cursory letter/memorandum dated July 5, 2017. *See*, Appendix A.

ARGUMENT:

ISSUE PRESENTED

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BLSD SINCE THERE ARE GENUINE ISSUES OF MATERIAL FACT SURROUNDING THE ADVERSE EFFECTS OF THE SEWAGE LAGOON BEING TOO CLOSE IN PROXIMITY TO AND/OR RELATED SEWAGE SEEPAGE OCCURRING NEAR LINDA'S GARDEN'S PROPERTY.

As the Court is aware, South Dakota's summary judgment standard has long-been articulated and explained in our courts as outlined under SDCL § 15-6-56(c). That is, summary judgment can be appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It has also long been held in South Dakota that summary judgment is 'an extreme remedy, [and] is not intended as a substitute for a trial.' In addition, '[s]ummary judgment is not the proper method to dispose of factual questions.' *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶9, 817 NW2d 395, 399, citing, *Bozied v. City of Brookings*, 2001 S.D. 150, ¶8, 638 NW2d 264, 268. However, "an alleged violation of a constitutional right (such as the taking of private property without just compensation) is 'an issue of law to be reviewed under the de novo standard of review.'"

See, Rupert v. City of Rapid City, 2013 S.D. 13, ¶ 8, 827 NW2d 55, 60, citing, *Benson v. State*, 2006 S.D. 8, ¶ 39, 710 NW2d 131, 145.

Furthermore, this Court has generally held that in inverse condemnation claims, somewhat analogous to a part of the claim(s) herein, where there is a question about the unique type or extent of damage(s) to a party's property – that such matters more typically amount to questions of fact to be decided by a jury as the ultimate fact-finders in such cases. *Cf., Rupert v. City of Rapid City*, 2013 S.D. 13, ¶¶ 23-26, 827 NW2d 55, 65-67. Additionally, by way of an inverse condemnation overview, Krsnaks note that the Court reiterated in *Hall v. State ex rel. South Dakota Dept. of Transp.*, 2006 S.D. 24, ¶¶ 13-14, 712 NW2d 22, 27 that:

The United States Constitution provides that private property shall not “be taken for public use, without just compensation.” US Const amend V. [Similarly,] Article VI, Section 13 of the South Dakota Constitution mirrors the federal constitution and states that “[p]rivate property shall not be taken for public use, or damaged, without just compensation.” As [the Court] recently clarified, the damage clause of our constitution provides a remedy additional to that provided by the federal constitution. *Krier*, 2006 SD 10, ¶¶ 23-25, 709 NW2d at 845.

Krier reaffirmed that:

[I]t is a basic rule of this jurisdiction governing compensation for consequential damages that where no part of an owner's land is taken but *because of the taking and use of other property so located as to cause damage to an owner's land*, such damage is compensable if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole.

Id. ¶ 23, 709 NW2d at 847 [Emphasis added] (citing, *State Hwy. Comm'n v. Bloom*, 77 S.D. 452, 461, 93 NW2d 572, 577 (1958)).

Accordingly, the damage clause of the South Dakota Constitution allows ... property owner[s] to seek compensation ‘for the destruction or disturbance of easements of light and air, and of accessibility, or of such other intangible rights as ... enjoy[ed] in connection with and as incidental to the ownership of the land itself.’ Citing, *Hurley v. State*, 82 S.D. 156, 161, 143 NW2d 722, 725 (1966) (quoting 2 Nichols on Eminent Domain § 6.44).

In this case the trial court – after initially simply indicating that it had “granted [BLSD’s] Motion for Summary Judgment” (Appendix A-1) – ultimately made a determination that, essentially, there was no genuine issue of material fact as to, 1.) no evidence presented of “water seepage” impacts to the Krsnak property thereby³; 2.) the suggestion of impact due to the business model of Linda’s Gardens is merely speculative due to inaction towards GAP certification⁴; 3.) the only *effective evidence* presented in

³ Krsnaks, however, are not aware of any *factual or legal issue(s)* in the case at bar pertaining to adverse property effects or property damage issues as related to “water seepage” from BLSD’s new sewer lagoon. There was, however, undisputed evidence presented by Krsnaks about the adverse impacts suffered by them as related to some level of sewage seepage as most likely affecting both well water quality after BLSD installed its new sewer lagoon (Appendix H), *and*, the negative impact/damages to the Krsnaks property and/or business venture after BLSD installed its new sewer lagoon (Appendix E) – including Krsnaks direct/proximate inability to obtain GAP certification (“Good Agricultural Practices” pursuant to USDA regulations) for their gardening business operation because of the all too close proximity of BLSD’s new sewer lagoon. *See*, Jimmy Krsnak deposition at pp. 59-62; *see also*, Appendix D, F and G.

⁴ *See*, Jimmy Krsnak deposition at pp. 59-60: “...One of the problems we’re facing is the new GAP regulations ... that the USDA has come out with has a test that they apply to each location ... And one of those [objective] test questions, *which is critical*, is that the farm - to be certified - has to be a certain distance away from a sanitary [sewer] lagoon. Well, since Brant Lake built their [new] lagoon, *we can no longer get certified* for those points. That wasn’t the case with Chester, Chester was far enough away that we could still get certification under that, under their scenario; but now with Brant Lake [being so much closer to our property], *we can no longer get [GAP] certification*.” [Emphasis added.] *See also*, Appendix D-2, ¶ 6. In addition, it’s important to note that BLSD failed to factually refute in any respect the fact that Krsnaks - having researched GAP certification within their industry - *knew** that they could not obtain the necessary GAP certification because of the close proximity of BLSD’s new sewer lagoon. (“...[W]e **know* that we can’t pass [GAP certification]... Jimmy Krsnak deposition at p. 61, as factually unrefuted by BLSD.)

response remains the ‘stink.’ Even assuming that to be true, and even that it is worse for the Krsnaks due to proximity, it is not unique and fails to establish nuisance. [Citing] *Krier v. Dell Rapids Twp.*, 2006 SD 10, ¶ 23, 709 NW2d 841, 847.

Krsnaks submit, however, that they have outlined genuine issues of material facts in the case at bar as related to BLSD’s taking or de facto taking and/or as to the damaging nuisance condition(s) faced by them and contrary to the trial court’s initial erroneous two points above (*see/cf.*, key footnotes 3-4, *supra*), as well as, arguably, its statement that “the only effective evidence presented in response remains the ‘*stink*’” (Appendix A-2). However, within the underlying record in this case, Krsnaks offered their fact-based descriptions of unique issues and related problems that they face as their property was located (and is still located) within approximately 600 feet of the new BLSD sewer lagoon.⁵ Including, of course, not the least of which such important material fact is that the property currently suffers from the more overwhelming stink as attributable to BLSD’s new/3rd sewer lagoon. *See*, Appendix C-2 at ¶ 4; Appendix F, Jimmy Krsnak Affidavit at ¶¶ 5-6, (*...[T]he odor bec[a]me much more serious. It has actually made us physically ill. We’ve had odor so bad that we just had to leave the place. And it wasn’t that bad with the Chester Sanitary District.*” “*...It’s just the gases or odors coming off the place gets so strong that you get just physically sick*) [Emphasis added].

Additionally, it is important to point out that Appellants, through Linda Krsnak, has offered uncontroverted factual testimony to the extent that, “*Linda’s Gardens gardening or farming operation, has suffered a unique and peculiar injury not a kind suffered by the general public in and around Chester by having the BLSD Lagoon*

⁵ *See*, Appendix D and E; *see also*, Linda Krsnak deposition at pp. 44-45.

encroaching on your undersigned's southern property boundary. That is, there is no other property owner as close as approximately 500-600 feet from the new sewer lagoon and certainly no other property owner at or near this rural area and - to your Affiant's knowledge - there is no other person or entity in the rural Lake County area that is attempting to operate a gardening business immediately adjacent to a new lagoon." See, Appendix D-1-D-2, Linda Krsnak Affidavit at ¶4. That is, Appellants submit that, contrary to arguments or notations below, it is very much a factual - not legal - question as to whether they, as Plaintiffs, can ultimately persuasively prove such an important material fact at trial before the Krsnak's peers; that is, Lake County fact-finding jurors.

Moreover, as to the controlling law in these types of fact-based takings or de facto takings or nuisance cases, Krsnaks would respectfully point the Court toward a review and contrast of other generally analogous cases like *Lawrence County v. Miller*, 2010 S.D. 60, ¶¶ 26-27, 786 NW2d 360, 370 (De Facto taking analogy between airspace easements *over property* as compared to the case at bar wherein Plaintiffs are disrupted in the reasonable use of their property by and through the unreasonable adverse effects and stink *on their property* from the BLSD sewage lagoon near the southern edge of their home and business property.) ("...Under a claim of inverse condemnation, owners are entitled to just compensation for a de facto taking of a portion of their remaining property at the point such a taking actually occurs. *Hurley I*, 81 S.D. 318, 134 NW2d at 784-85. 'Landowners ... have a claim of right to their property. Thus, their allegation that the [County's] actions result in an unconstitutional taking is sufficient to present a justiciable controversy.' *Benson*, 2006 SD 8, ¶ 16, 710 NW2d at 140. Such a claim may be brought directly by a landowner and does not wait upon a formal condemnation action by the

governmental entity which may, or may not, ever occur. *Hurley I*, 81 S.D. 318, 134 NW2d at 784-85. ... A taking of an airspace easement over private property occurs when the actions of the government create a ‘direct and immediate interference with the use and enjoyment of the land.’ *Branning v. United States*, 228 Ct.Cl. 240, 654 F.2d 88, 97 (1981) (citing *Lacey v. United States*, 219 Ct.Cl. 551, 553, 595 F.2d 614, 615 (1979)). *See also*, *Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). Most cases in this arena have dealt with the resulting noise disturbance created by overhead flights. *See*, *Branning*, 654 F.2d at 99. However, the case law on noise disruptions, whether as a taking, disruption in the reasonable use of the land or damage to the value of the land, is analyzed under the same legal rubric as other takings.”). *See also*, *Hall v. State ex rel. South Dakota Dept. of Transp.*, 2011 S.D. 70, ¶¶ 37, 806 NW2d 217, 230 as cited within *Rupert*.⁶

To the foregoing point, Krsnaks submit that their present case in this matter is, in fact, sadly a stronger and more offensive case than the offending factual case presented in *Krier v. Dell Rapids Twp.*, 2006 SD 10, 709 NW2d 841, which BLSD below almost exclusively relied on in arguing this to the trial court. Moreover, Krsnaks submit that through BLSD’s actions in locating the “new” 3rd sewer lagoon closer (only 675 feet) than the State’s accepted design standard distance of such a sewer lagoon (1,320 feet),

⁶ “The underlying intent of the [damages] clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public generally.” *DeLisio v. Alaska Super. Ct.*, 740 P2d 437, 439 (Alaska 1987). “The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the [governmental entity] should not pay for property which it destroys or impairs the value, as well as for what it physically takes.” *Bakke v. State*, 744 P2d 655, 657 (Alaska 1987); *Liddick v. City of Council Bluffs*, 232 Iowa 197, 218, 5 NW2d 361, 372–73 (1942). [Emphasis added.]

that they [Krsnaks] are being unconstitutionally sacrificed as an individual family to/for the benefit of the community [“new” Brant Lake sewer users]; however, based on the foregoing authorities, BLSD should of course be required to justly compensate Krsnaks for the property and/or property rights that it has either destroyed or for what it has caused an impaired value of. *See and compare*, Appendix D, E, F, G and H.

In that regard, Krsnaks submit that a reviewable and analogous and even more strongly malodourous case demonstrating a compensable fact-based taking for similarly situated plaintiffs - even though the offender(s) referenced therein were acting pursuant to supposed state or municipal sewage disposal authority - is outlined in *Parsons v. City of Sioux Falls*, 65 S.D. 145, 272 NW 288 (1937).

In *Parsons*, plaintiff/property owner near the city’s discharge area of untreated sewage into the Big Sioux River brought an action seeking an injunction and damages under the general theories of nuisance and as an uncompensated taking or damaging of private property. In *Parsons* this Court, quoted the Connecticut Supreme Court when it analogously found (and, as subsequently noted, also referenced municipal sewer issues that adversely affected and damaged neighboring properties) by holding that:

‘The right to pour into the river surface drainage does not include the right to mix with that drainage noxious substances in such quantities that the river cannot dilute them, nor safely carry them off without injury to the property of others. The latter act is in effect an appropriation of the bed of the river as an open sewer, and the proposition that it may become lawful by reason of necessity is inconsistent with undoubted axioms of jurisprudence. The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose, it is an unjustifiable wrong. When done for a public purpose, it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without

compensation.’ The Legislature under the provisions of the [South Dakota] statute ... expressly authorizes a municipality to condemn private property, when necessary, in the construction and maintenance of a sewerage system, and the right to discharge sewage into a stream is granted on condition that the disposal shall not ‘create any foul or obnoxious odors in the air or along the stream.’ This is a recognition that legislative sanction cannot justify the taking or damaging of private property without compensation.”

See also, Horstad v. Bryant, 50 S.D. 199, 208 NW 980 (1926); *Gellert v. City of Madison*, 50 S.D. 559, 210 NW 978 (1926) (...[B]ut during ... 1922 changes were made in the sewer system of appellant [City of Madison], causing large quantities of offensive [sewage-related] matter to be cast into said stream immediately above the premises occupied by the respondent, and causing the water of said stream, flowing in close proximity to respondent's home, to be so polluted as to give off odors which are extremely offensive and injurious to health and to cause such premises to be uninhabitable, to the injury of [the property owners] in the sum of \$3,000.”). [Emphasis added.]; *see also/cf.*, *Greer v. City of Lennox*, 79 S.D. 28, 32, 107 NW2d 337, 339 (1961) (In the sense used here a nuisance is a condition which substantially invades and unreasonably interferes with another’s use, possession or enjoyment of [their] land. It may be intentionally or unintentionally created. Citations omitted)

In sum, based on the genuine fact issues outlined showing both an uncompensated taking as well as unlawful nuisance conditions faced by the Krsnaks at their property and as part of their unique business, including within the facts outlined in depositions, affidavits and exhibits in the file, as well as the supporting legal authorities outlined herein, Appellants respectfully request that this Honorable Court reverse the trial court’s order for summary judgment in this matter and allow Krsnaks underlying action(s) to proceed to be hereafter heard and determined by and through their right to fact-finding jury trial in Lake County.

~ CONCLUSION and REQUEST FOR ORAL ARGUMENT ~

Appellants submit that, by and through the arguments and authorities submitted herein, they have established that there are - at a minimum - genuine issues of material

facts in the underlying litigation file issues herein. It was therefore reversible error for summary judgment to have been granted to Appellee/BLSD below and, as a result, Appellants respectfully request this Court to reverse and remand this matter. Finally, Appellants respectfully request to further outline and articulate their arguments and authorities herein at a forthcoming oral argument session before this Honorable Court.

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-25A-66, R. Shawn Tornow, Appellants attorney herein, submits the following:

The foregoing brief, not including the signature page as follows, is 16 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 4,202 words and 22,232 characters.

Dated this 14th day of March, 2018.

/s/ R. Shawn Tornow

R. Shawn Tornow

Respectfully submitted this 14th day of March, 2018, in Sioux Falls, S.D.

/s/ R. Shawn Tornow

R. Shawn Tornow

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CERTIFICATE OF SERVICE:

This is to certify that on this 14th day of March, 2018, your undersigned's office, in addition to e-mailing a copy of Appellant's Brief and, if requested and if necessary, by mailing first-class United States mail, a true and correct copy of Appellant's Brief to Mr. Vince M. Roche, Attorney for Appellee, Davenport, Evans, Hurwitz & Smith, PO Box 1030, Sioux Falls, South Dakota 57101-1030 postage prepaid thereon.

/s/ R. Shawn Tornow

R. Shawn Tornow

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TLO P.C.

From: Foley, Judge Vince <Vince.Foley@ujs.state.sd.us>
Sent: Friday, June 30, 2017 10:45 AM
To: Vince M. Roche; Joel R. Rische; 'Tornow Law Office, P.C.'
Subject: RE: Krsnak v. Brant Lake Sanitary District 05civ12-94

Counsel:

This e-mail is sent to advise you that I have granted the Motion for Summary Judgment. The short opinion is not yet finalized as my reporter is helping Judge Means today. I thought it best to let you know this way before the very long weekend.

Have a nice 4th of July.

Vince Foley



STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

Counties

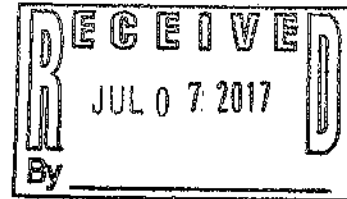
VINCENT A. FOLEY
 Circuit Judge
 314 6th Avenue, Suite 6
 Brookings, SD 57006-2085
Vince.Foley@ujs.state.sd.us

*Beadle, Brookings, Clark
 Codington, Deuel, Grant
 Hamlin, Hand, Jerauld
 Kingsbury, Lake, Miner
 Moody and Sanborn*
http://ujs.sd.gov/Third_Circuit/

KRISTIN A. WOODALL, RPR, CRR
 Official Court Reporter
 314 6th Avenue, Suite 6
 Brookings, SD 57006-2085
 (605) 688-4206
 (605) 688-4838 fax
Kristin.Woodall@ujs.state.sd.us

July 5, 2017

Mr. R. Shawn Tornow
 Tornow Law Office
 PO Box 90748
 Sioux Falls, SD 57109



Mr. Vince M. Roche
 Mr. Joel R. Rische
 Davenport, Evans, Hurwitz & Smith
 206 West 14th Street
 Sioux Falls, SD 57101

Re: Jimmy and Linda Krsnak vs. Brant Lake Sanitary District, Lake County CIV 12-094

Counsel:

The Court grants the Summary Judgment motion of the Defendant. The straight-forward question before this Court is whether a genuine, material issue based upon specific facts exists, thus requiring trial on the merits. Kast v. Shur-co, 2016 S.D. 35, para 15, 878 N.W.2d 605, 612. While this Court did previously deny a full motion to dismiss, the invitation for further evidence was suggested. First, no evidence has been presented of water seepage impacts to the Krsnak property. Second, the suggestion of impact due to the business model of Linda's Gardens is merely speculative due to inaction towards the GAP certification. Third, the only effective evidence presented in response remains the "stink." Even assuming that to be true, and even that it is worse for the Krsnaks due to proximity, it is not unique and fails to establish nuisance. Krier v. Dell Rapids Twp., 2006 S.D. 10, para 23, 709 N.W.2d 841, 847.¹

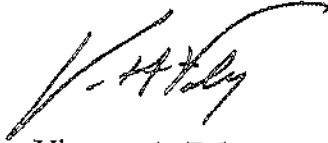
¹ Examining this situation in the context of the examples which derive from law and economics analysis rooted in R.H. Coase, 3 Journal of Law and Economics, 1-44,8 (Oct. 1960) suggests that a widespread harm, such as "stink" or pollution, allows the bargain to be shifted in favor of the polluter. No one person suffers enough to warrant a legal attack on the polluter. Only collectively does action make sense, but then only if the collective can speak in one voice. The other alternative to address such a pollution issue is through government assertion of the collective good. Here, the State of South Dakota has established that collective action through the permitting process.

App. A-2

Accordingly, the Defendant's Motion for Summary Judgment is granted.

Counsel, the December 2012 letter opinion does not appear to be of record although incorporated by reference in an order.

Sincerely,

A handwritten signature in black ink, appearing to read "V. A. Foley", with a long, sweeping horizontal stroke extending to the right.

Vincent A. Foley
Circuit Court Judge

Vaf/kaw

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAKE)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

JIMMY KRSNAK and
LINDA L. KRSNAK,

Plaintiffs,

vs.

BRANT LAKE SANITARY DISTRICT,

Defendant.

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*

CIV. 12-94

**ORDER GRANTING
SUMMARY JUDGMENT
AND JUDGMENT OF DISMISSAL**

The above-entitled matter having come on for hearing before the Court, on September 13, 2016, the Honorable Vincent A. Foley presiding, upon Defendant's Motion for Summary Judgment and Defendant appearing by and through it counsel of record, Vince M. Roche, Davenport, Evans, Hurwitz & Smith, LLP, and Plaintiffs appearing personally and by and through their counsel of record, R. Shawn Tornow, Tornow Law Office. The Court has considered the written submissions and oral arguments of counsel and examined the files and records herein. Further the Court has issued its Letter Opinion, dated July 5, 2017, in the above-captioned matter, which is incorporated by reference in this Order as if fully set forth herein. Having found that no genuine issues of material fact exist precluding Summary Judgment in favor of Defendant pursuant to SDCL 15-6-56, the Court being in all things duly advised, and good cause appearing,

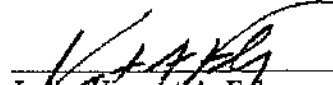
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment be, and hereby is, granted; and

App. B-1

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Amended Complaint, and all causes of action and claims therein against said Defendant, be dismissed on its merits, with prejudice.

Dated this ____ day of July, 2017.

BY THE COURT: Signed: 7/19/2017 10:59:41 AM



Judge Vincent A. Foley
Circuit Court Judge

Attest:
Klosterman, Linda
Clerk/Deputy



App. B-2

STATE OF SOUTH DAKOTA)
; SS
COUNTY OF LAKE)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

JIMMY KRSNAK and
LINDA L. KRSNAK,

*

CIV. 12-000094

*

*

Plaintiffs,

*

vs.

*

*

*PLAINTIFFS
OPPOSITION TO
DEFENDANT'S STATEMENT
OF UNDISPUTED
MATERIAL FACTS*

BRANT LAKE SANITARY DISTRICT,

*

*

Defendant.

*

*

Pursuant to SDCL §15-6-56(c), Plaintiffs hereby submit their opposition to Defendant's statement of undisputed material facts as well as their responsive statements of material facts setting forth the genuine issues that must hereafter be tried in this matter as set forth below.

1.) Within Defendant's Statement of Undisputed Material Facts No. 3, Plaintiffs submit that there is a genuine issue of material fact in this matter and it is outlined as follows: Plaintiffs established during the deposition of Jan Nicolay, Chairperson of the Brant Lake Sanitary District (hereinafter referred to as either "Defendant" or "BLSD"), that the BLSD's "Third Lagoon" was placed north of the existing Chester Sanitary District Lagoons. See, Jan Nicolay Depo. transcript at pp. 13-16, incl., Depo. Ex. 13 (Aerial Map of property in question). In fact, prior to construction, there was review and discussion by the BLSD and its engineers about placing/constructing the BLSD's Lagoon to the west of the Chester Lagoons which would have placed the BLSD's Lagoon further away from Plaintiffs property. See also, Nicolay Depo. transcript at pp. 15-16, incl., Ex. 13;

2.) Within Defendant's Statement of Undisputed Material Facts No. 4, Plaintiffs submit that there is a genuine issue of material fact in this matter and it is outlined as follows: Plaintiffs established during the depositions of both Jan Nicolay and Linda Krsnak that BLSD's

App. C-1

Lagoon was to be substantially completed as of December 31, 2012, and, final completion was as of May 2013. See, Jan Nicolay Depo. transcript at pp. 25-26; Linda Krsnak Depo. transcript at pp. 23-24, 39;

3.) Within Defendant's Statement of Undisputed Material Facts Nos. 7 and 8, Plaintiffs submit that there is a genuine issue of material fact in these matters and it's outlined as follows: It was established during the deposition of Jimmy Krsnak as well as during discovery in this file that the BLSD's Lagoon was, in fact, a higher elevation than the Krsnak's which ultimately could cause groundwater leakage issues and potentially contaminating the Krsnak's sixty-foot well. See, Jimmy Krsnak Depo. transcript at p. 20, Depo. Ex. 12 (at pg. 8, see, No. 3, Denied admission as related to elevation of property); see also, Linda Krsnak Depo. transcript at pp. 32-33 (Krsnaks have both watered the garden grounds and consumed water from their sixty-foot well only after a water treatment system was installed on the property by Jimmy Krsnak in approximately 2013, after the BLSD Lagoon was operational);

4.) Within Defendant's Statement of Undisputed Material Facts Nos. 9 and 10, Plaintiffs submit that there is a genuine issue of material fact in these matters and it's outlined as follows: It was established during the deposition of both Jimmy Krsnak and Linda Krsnak that they believe that - because the BLSD's Lagoon was/is "much, much closer [to the Krsnak's property] and much bigger and [appears to the occupants to be] more odorous than the Chester Sanitary District" because "It stinks more." [Emphasis added] See, Jimmy Krsnak Depo. transcript at pp. 21-22, and, Confidential documents pgs. 8-18; see also, Linda Krsnak Depo. transcript at pp. 8-25, 27-28, 30-32;

5.) Within Defendant's Statement of Undisputed Material Facts No. 11, Plaintiffs submit that there is a genuine issue of material fact in this matter and it is outlined as follows: Plaintiffs submit that it is a clear question of fact in this matter as to whether there is evidence that

sewage is seeping from the BLSD Lagoon onto the Krsnak's property or into the sixty-foot well on their property or whether the increased "stink" emanates more from BLSD's Lagoon. Any resulting sewage seepage, potential or questionable sewage seepage and/or increased malodorous smell and/or the encroachment in physical proximity of the adjacent BLSD Lagoon could, as Plaintiffs assert is a factual question for trial, amount to a taking if, as Plaintiffs submit is clear and undisputed by Defendant in this case, such amounts to a demonstrable loss in property value. Cf., Jimmy Krsnak Depo. transcript at pp. 18-22, 55-58, Depo. Exs. 7 through 11 (Krsnak's water suitability analysis/results); see, Linda Krsnak Depo. transcript at pp. 22-24, 27-28, 32, 34, and see also, Confidential documents pgs. 15-16; see also, Jan Nicolay Depo. transcript at pp. 22-23, 31-41.

Dated this 14th day of December, 2016.

/s/ R. Shawn Tornow

- Filed Electronically -

R. Shawn Tornow, for
Tornow Law Office, P.C.

PO Box 90748

Sioux Falls, South Dakota 57109-0748

Telephone: 605-271-9006

Facsimile: 605-271-9249

E-mail: rst.tlo@midconetwork.com

Attorney for Plaintiffs

property boundary. That is, there is no other property owner as close as approximately 500-600 feet from the new sewer lagoon and certainly no other property owner at or near this rural area and - to your Affiant's knowledge - there is no other person or entity in the rural Lake County area that is attempting to operate a gardening business immediately adjacent to a new lagoon;

5.

Your Affiant submits that she has been uniquely damaged by and through the BLSD's wrongful interference and the resulting taking of her property as reflected in Plaintiffs 2015 appraisal. See, Exhibit 2 at pp. 13:6 through page 15, (*"It's my belief that that third lagoon significantly decreased the property value."* *"...So I would say it would be a minimum of what the appraiser - the appraiser's [before and after value approach] loss."* *[30% loss in value]*); cf., Confidential documents pgs. 8-18 as otherwise filed and fully incorporated herewith;

6.

Your Affiant further submits that she has been uniquely damaged by and through the BLSD's unlawful interference and taking or quasi-taking of her property as a result of the fact that Linda's Gardens, to be specific its products, cannot become GAP certified (Good Agricultural Practices as required by the USDA). See, Exhibit 2 at pp. 16-17, (*"Well, we lost our Sanford account because of the requirement for GAP certification ... and it's our belief that we would be unable to obtain [GAP] certification"*); cf., Confidential documents pg. 16 as otherwise filed and fully incorporated herewith.

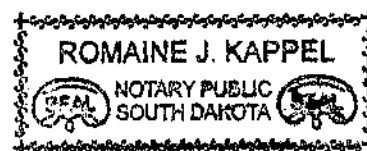
Dated this 14th day of December, 2016.


Linda L. Krsnak, Affiant

Subscribed and sworn to before me
this 14th day of December, 2016.


Notary Public—South Dakota

My Commission Expires: 3-23-18



CONFIDENTIAL

APPRAISAL REPORT
OF THE
LINDA L. LINDHOLM PROPERTY
COMMONLY KNOWN AS
LINDA'S GARDENS
LOCATED AT
24009 465TH AVENUE
CHESTER, SOUTH DAKOTA

CONTROL NUMBER 14-197-R

CLIENT

TORNOW LAW OFFICE, P.C.
ATTN: MR. R. SHAWN TORNOW
4309 SOUTH LOUISE AVENUE, SUITE 101
POST OFFICE BOX 90748
SIOUX FALLS, SOUTH DAKOTA 57109-0748

DATE OF VALUE - APRIL 22, 2015

BY

SHAYKETT APPRAISAL COMPANY, INC.
601 NORTH MINNESOTA AVENUE, SUITE 100
SIOUX FALLS, SOUTH DAKOTA 57104-8413
(605) 332-3553

CONFIDENTIAL

App-E-1 12/14/16

Shaykett Appraisal Company, Inc.

601 N. Minnesota Avenue, Suite 100
Sioux Falls, South Dakota 57104-8413
Phone (605) 332-3553 • Fax (605) 332-0243
Email: shaykettappraisal@shaykettappraisal.com

Kyle J. Martin
State Certified General Appraiser

Steven C. Shaykett, MAI
State Certified General Appraiser

Scott S. Elwood, MAI
State Certified General Appraiser

Travis E. Shaykett
State Certified General Appraiser

George P. Stavrenos
State Registered Appraiser

June 17, 2015

RECEIVED JUN 18 2015

Tornow Law Office, P.C.
Attn: Mr. R. Shawn Tornow
4309 South Louise Avenue, Suite 101
Post Office Box 90748
Sioux Falls, South Dakota 57109-0748

RE: Appraisal Report of the
Linda L. Lindholm Property
Commonly Known as Linda's Gardens
Located at 24009 465th Avenue
Chester, South Dakota
Control #14-197

Dear Mr. Tornow:

In accordance with your request, I have prepared an Appraisal Report of the above referenced property. Purpose of the appraisal is to estimate the "as is" fee simple estate market value of the subject property both before and after the expansion of the Brandt Lake Sanitary District sewer lagoon as the measure of loss in value. Intended use of the appraisal is for negotiation and possible court testimony.

After viewing the subject property initially on November 20, 2014 and again on April 22, 2015, as well as completing an investigation and analysis necessary for the appraisal of the property, it is my opinion that the "as is" fee simple estate market values of the subject property as of April 22, 2015 were as follows:

Before Value	\$215,000
After Value	<u>\$132,200</u>
Loss in Value	\$ 82,800

Analysis of the subject property and the data on which the appraiser's opinion is based are set forth in the following report. Appraisal has been made in conformity with generally accepted appraisal practices in accordance to the Uniform Standards of Professional Appraisal Practice (USPAP). Appraisal is subject to all assumptions, limiting conditions, and other special limiting conditions as set forth in this report.

App. E-2

June 17, 2015

Mr. Tornow

Page 2

Client and intended user of the appraisal is Mr. R. Shawn Tornow and Tornow Law Office, P.C., for the intended use as stated. Use of this report without the consideration of the whole, or for any other use or by any other user is strictly prohibited, and this appraisal, when used in this manner, is null and void and of no effect.

Thank you for this opportunity to provide appraisal services. Authorization to complete the appraisal was given on October 10, 2014 and the property was first viewed on November 20, 2014. Developing the appraisal has taken longer than anticipated, as I wanted to view the property in the growing season. Please contact me if you have any questions or require additional information.

Respectfully submitted,



Steven C. Shaykett, MAI
State Certified General Appraiser
No. 155CG-2015

SCS/kre

App. E-3

DESCRIPTION AND EFFECT OF THE ACQUISITION

Rights Acquired -

In this case, as an inverse condemnation taking the rights acquired are permanent easement equivalent.

Description of the Acquisition -

There is no physical taking on the subject property, but essentially the entire property is affected by the presence of the expanded sewage lagoons.

Effect of the Acquisition -

Effect of the acquisition on the subject property is the effect on the marketability of the property do to the closeness of the expanded lagoons to the home. There is now proximity damages to the home. Furthermore, the increase in smell and proximity to the lagoons has an impact on the use of the property as a vegetables garden farm. There is no change in highest and best use of the residential use of the subject property, but there is a negative impact on the marketability of the both the house and the specialized improvements, so there are damages to the property.

Appraiser has attempted to measure this impact by reviewing sales of properties in close proximity to sewer lagoons. Appraiser has reviewed properties around a number of sewer lagoons in the Sioux Falls area. City of Tea has sewer lagoons at the corner of two of the city's busiest streets. Development is within one-half mile on the south and across the road to the north. Garretson has lagoons that were enlarged about 15 years ago. There is no residential development close by, but commercial development existed and continues today along the east side. New single family development is about one-half mile to the southeast. There is one house off the southwest corner of the lagoons, but that has been there for number of years and has not sold since the house was built there in 1979. Dell Rapids has extensive lagoons southwest of town, but no development of any kind is within a mile. Colton expanded its lagoons in the last 10 years about one-half mile west of town. No development exists around the lagoons for the one-half mile to the town. Humboldt has a small lagoon on the east edge of town. A small, six lot subdivision is located to the north, with access from Highway 38, and two of the six lots have been sold since 2000. Seller lives on one of the lots and reports occasional odor from the lagoons, but would not attribute that as the reason for the slow lot sales. One example of loss in value to residential properties, researched by the appraiser is the Paul Rowland house at the east side of the Hartford lagoons. This rural acreage was appraised at \$145,000 and purchased by the City of Hartford on May 1, 2003, after placement of the new lagoons across the road and some construction caused damages, due to change of water flow. City sold the house at auction on July 27, 2003 for \$99,000. This purchase and resale would indicate a 32 percent loss in value. New residential subdivision developments are within one-quarter mile to the north of the lagoons. Two other examples were researched by the appraiser on the north side of the lagoons at Crooks. A 9.5 acre site improved with an older 2,462 square foot home sold August 20, 2013 for \$189,000, which is \$76.77 per square foot. Assessed value for this property in 2013 was \$217,221, or \$88.23 per square foot. This is a difference of 13.0 percent. Directly to the east of this property a 100 year old 1,792 square foot home on 5.5 acres sold for \$165,000, which is \$92.08 per square foot. This was after the seller has spent \$157,000 for an addition and updating the exterior. Original listing price was \$279,000. Assessed value for this property in 2009 was \$217,302, which is \$121.26 per square foot. This home is within 900 feet of the lagoons to the South. This is a difference of 24.1 percent. It has been the experience of the

DESCRIPTION AND EFFECT OF THE ACQUISITION

appraiser that typically the selling price of residential properties is above the assessed value and not below. Appraiser interviewed the seller's daughter who assisted in selling the property, stated that the ponds had an impact on the price. One of the factors for this property, and the subject as well, is prevailing summer winds from the south when there is more outdoor activity and the growing season for subject. Distance to the lagoons appears to have the most influence on the impact on properties. Subject was about 1,100 feet from the original lagoons, but the new lagoon is within 675 feet of subject. Also, the surface area of the lagoon doubled in size. Any impact can show the loss at over 30 percent or no real measurable loss. However, even the appearance of no measurable loss would not take into account longer marketing time, as suggested by the Humboldt development. There certainly is market evidence that development can occur around existing lagoons, when placed on the immediate edge of the town. However, when moved only one-half mile away from existing development, all other development tends to go in the other directions.

In applying this market information the appraiser considers that the subject property has the house and the specialized improvements within 675 feet of the house. This affects not only the potential for the occasional odor, but being fairly large, may increase the intensity as well as frequency. Owners of the subject property have been developing the property since purchase in 1996 and prior to the construction of the first lagoons in 2001 to become a more fully commercial vegetable and fruit garden farm. Their goal was to become a certified organic farm under the regulations of the Good Agriculture Practices established by USDA. One of the concerns is the possibility of increased chance of disease from birds and animals transferring disease from the lagoon to the plants. This is less of a chance for produce in the greenhouses, but the gardens and the fruit trees have exposure. Also, the owners stated that at times the trees on subject tend to trap the odor, as well as the overhang on the shed, such that some of their workers have complained about becoming ill. In the judgement of the appraiser, with the placement of the lagoons closer and the increase in size of the lagoons, the residential improvements at the subject property in the after would experience a loss in value of 30 percent. This loss would be for the house, site and the shed. Due to the increase in risk for the use of the specialized improvement for commercial vegetable and fruit garden, these improvements would have little to no value. These improvements have a contributory value in the before of \$26,100 and the home, site and shed contributory value of \$188,900.

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAKE)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

JIMMY KRSNAK and
LINDA L. KRSNAK,

Plaintiffs,

vs.

BRANT LAKE SANITARY DISTRICT,

Defendant.

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CIV. 12-000094

*AFFIDAVIT OF
JIMMY KRSNAK
IN OPPOSITION TO
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT*

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

Jimmy Krsnak, being first duly sworn upon his oath, deposes and states as follows:

1.

Your Affiant submits that he is over the age of eighteen and he, along with his wife Linda Krsnak, assists in operating and maintaining the couple's home property as well as the that portion thereof that makes up "Linda's Gardens" and, as such, he is informed and competent to testify to the matters as set forth herein;

2.

Accompanying this Affidavit, please see and review Exhibit 1, which is attached hereto and fully incorporated herewith as my April 14, 2016, deposition testimony in this matter as well as relevant accompanying exhibits and discovery information herein;

3.

Accompanying this Affidavit, please see and review Exhibit 3, which is attached hereto and fully incorporated herewith as Jan Nicolay's April 14, 2016, deposition testimony in this matter as well as relevant accompanying exhibits;

4.

Your Affiant is generally aware that Linda's Gardens has lost sales from and after the final completion of the BLSD Lagoon in mid-2013 through 2014. See, Confidential documents pgs. 5-6 as otherwise filed and fully incorporated herewith; see also, Exhibit 1 at pp. 35-38;

App. F-1


5.

Your Affiant can attest that the BLSD Lagoon is much, much closer to Plaintiffs property and, as such, is much bigger and more odorous causing a sickening stink in and around and across the property. See, Exhibit 1 at pp. 19-20, 23:18-23 - pp. 35:13-15 (...[T]he odor bec[a]me much more serious. It has actually made us physically ill. We've had odor so bad that we just had to leave the place. And it wasn't that bad with the Chester Sanitary District." "...It's just the gases or odors coming off the place gets so strong that you get just physically sick);

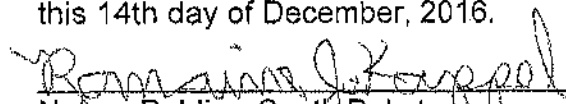
6.

In light of the findings shown within your Affiant's Deposition Exhibits 7 through 11, and having read and reviewed the South Dakota Department of Environment and Natural Resources (DENR's) "Recommended Design Criteria Manual" for Wastewater Collection and Treatment Facilities, including what appears to be the lack of following such design criteria, and what appears to be the related "Allowed [Sewage] Seepage Calculations for the Combined Chester/Brant Lagoons" your Affiant is extremely concerned about future findings of potential contaminants as a result of or related to future anticipated sewage seepage into groundwater and/or within our property's well water given the extremely close proximity of the BLSD's 3rd Sewer Lagoon. See, Deposition Exhibits 7 through 11 and Exhibit 1-A as attached hereto and fully incorporated herewith.

Dated this 14th day of December, 2016.

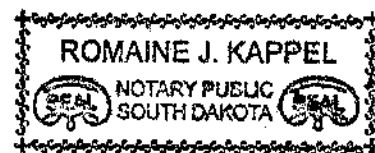

Jimmy Krsnak, Affiant

Subscribed and sworn to before me
this 14th day of December, 2016.


Notary Public—South Dakota

My Commission Expires:

3-23-18



Recommended Design Criteria Manual

Wastewater Collection and Treatment Facilities

South Dakota Department of Environment and Natural Resources

Prepared By: Staff Engineer
Reviewed By: Facilities Management Engineers

Division of Environmental Services
Joe Foss Building
Pierre, South Dakota 57501
Phone: (605) 773-3351

March 1991



App. G-1

The shape of the cells shall be such that there are no narrow, L-shaped or elongated portions. Round or square ponds are considered most desirable. Rectangular ponds shall generally have a length not exceeding three times the width. No islands, peninsulas or coves are permitted. Dikes shall be rounded at corners to minimize accumulation of floating material.

C. Pond Location

1. Separation Distances

A pond site should be as far as practicable from habitation or any area which may be platted and developed within a reasonable future period. A distance of at least one-half mile from the community and one-fourth mile from a farm home or residence is recommended whenever possible. *

(1,320 ft.)

A pond shall not be located within 1,000 feet of a well used to supply potable water.

The high-water line of the pond shall be at least 50 feet from the property line of the adjacent owner. Where an existing pond facility has been established on a site with fixed boundaries, then only the additions and modifications will be subject to the 50 foot separation.

2. Prevailing Winds

If practicable, ponds should be located so that locally prevailing winds will be toward uninhabited areas. Preference should be given sites which will permit an unobstructed wind sweep across the ponds, especially in the direction of the locally prevailing winds. This need not apply to the third cell for ponds operated in series.

3. Surface Runoff

Location of ponds in watersheds receiving significant amounts of runoff water is discouraged unless adequate provisions are made to divert storm water around the ponds and otherwise protect pond embankments. Pond embankments must be above the 100-year floodplain.

4. Groundwater Pollution

Proximity of ponds to water supplies and other facilities subject to contamination and location in areas of porous soils and fissured rock formations should be critically evaluated to avoid creation of health hazards or other undesirable conditions. The possibility of chemical pollution may merit appropriate considerations. The pond bottom should be at least four (4) feet above the high groundwater table and ten (10) feet above rock or impervious soil strata except if synthetic liners are used. The maximum contaminant levels for groundwater affected by ponds and land application techniques shall not be exceeded. In certain areas, lysimeters or monitoring wells will be required; they shall be located and constructed in accordance with the recommendations of the Department. Refer to Chapter XIII for monitoring requirements.

Allowed Seepage calculations for the combined Chester/Brant lagoons.

New Cell Top = 8.5 acres
 Bottom = 7.313 acres
 4 foot level = $8.5 + 7.313 / 2 = 7.9$ acres
 6 foot level = $8.5 + 7.9 / 2 = 8.2$ acres

Allowed seepage is 1/16 inch or .0052 feet (1/16 divided by [16 X 12] 192) per day
At the 6 foot level; 8.2 acres X 43,560 feet/acre X .0052 feet = 1,857.4 cu. Ft.
1,857.4 cu. Ft. X 7.48 gallons per cu. Ft. = 13,893 gallons per day.

Cell No. 1 Top = 4.5 acres
 Bottom = 3.673 Acres*
 4 foot level = $4.5 + 3.673 / 2 = 4.08$ acres
 6 foot level = $4.5 + 4.08 / 2 = 4.29$ acres

Cell no. 2 Top = 4.5 acres
 Bottom = 3.528 acres*
 4 foot level = $4.5 + 3.528 / 2 = 4.01$ acres
 6 foot level = $4.5 + 4.01 / 2 = 4.30$ acres

Allowed seepage is 1/8 inch or .0104 feet (1/8 divided by [8 x 12] 96) per day
At the 6 foot level; (4.29 acres + 4.3 acres) X 43,560 feet/acre X .0104 feet = 3,891.5 cu. ft.
3,891.5 cu. Ft. X 7.48 gallons per cu. Ft. = 29,108 gallons per day.

13,893 gallons per day + 29,108 gallons per day = 43,001 gallons per day. 15,695,365 gallons per year

Originally allowed seepage for Chester lagoon

Cell no. 1 1/16 inches per day.
4.29 acres X 43,560 feet per acre X .0052 feet = 971.7 cu. ft. per day
971.7 cu. ft. X 7.48 gallons per cu. ft. = 7,268 gallons per day.

Cell no. 2 1/8 inches per day.
4.3 acres X 43,560 feet per acre X .0104 feet = 1,948 cu. Ft. per day
1,948 cu. ft. X 7.48 gallons per cu. ft. = 14,571 gallons per day.

7,268 + 14,571 = 21,839 gallons per day. 7,971,235 gallons per year

App. G-3

Chester Sanitary District Lagoon Seepage Calculations

Cell No. 1 Top = 4.5 acres
 Bottom = 3.673 Acres*
 4 foot level = $4.5 + 3.673 / 2 = 4.08$ acres
 6 foot level = $4.5 + 4.08 / 2 = 4.29$ acres

Cell no. 2 Top = 4.5 acres
 Bottom = 3.528 acres*
 4 foot level = $4.5 + 3.528 / 2 = 4.01$ acres
 6 foot level = $4.5 + 4.01 / 2 = 4.30$ acres

Draining the 3 foot working area** of Cell 2 with an average area of 4.15 acres or (4.15×43560) 180,774 sq ft would yield $(3 \times 180,774)$ 542,322 cu ft or $(7.48 \times 542,322)$ 4,056,569 gallons.

The hydraulic load is 36,300** gallons per day \times 365 days = 13,249,500 gallons per year.***

13,249,500 gallon minus the annual drainage of 4,056,569 gallons leaves 9,192,931 gallons lost through evaporation and seepage.

Using an average evaporation of 35 inches**** and an annual average precipitation of 26.27 inches**** leaves a loss of 8.73 inches or $(8.73 / 12)$ 0.72 feet. The combined 6 foot level of both cells of 8.59 acres or (8.59×43560) 374,180.4 sq ft times the annual loss of 0.72 ft equals 269,409.88 cu ft or $(269,409.88 \times 7.48)$ 2,015,186 gallons

9,129,931 gallons lost through evaporation and seepage minus 2,015,186 gallons lost through evaporation leaves 7,114,745 gallons lost annually through seepage. 7,114,745 gallons per year divided by 365 equal a daily seepage rate of 19,492 gallons

*Brant Lake Sanitary District Exhibit A

**BLSD Facility plan and DENR

*** Does not include the approximately 1,500,000 dumped directly into the lagoon. This amount should be added to the annual seepage rate.

****DENR

App. G-4



Report Number 13-098-2080

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www.midwestlabs.com

Date Sampled: 03/27/13
Date Received: 04/01/13
Date Reported: 04/08/13
Page 1 of 1

04/08/13

LINDAS GARDEN
JIMMY KRSTNAK
24009 465TH AVE
CHESTER SD 57016

WATER ANALYSIS

Sample ID 1-WELL
Labnum 2116089

IRRIGATION WATER ANALYSIS

ELEMENT	SODIUM EPA 200.7 ppm	CALCIUM EPA 200.7 ppm	MAGNESIUM EPA 200.7 ppm	pH EPA 150.1 ppm	NITRATE EPA 300.0 ppm	SULFATE EPA 300.0 ppm	CONDUCTIVITY EPA 120.1 mmhos/cm	TOTAL DISSOLVED SOLIDS EST. FROM COND ppm	SODIUM ABSORPTION RATIO (SAR) CALCULATION	PHOSPHORUS EPA 200.7 ppm	POTASSIUM EPA 200.7 ppm	BICARBONATE SM 2320 B ppm	CHLORIDE EPA 300.0 ppm	BORON EPA 200.7 ppm
LEVEL FOUND	41.6	306	75.0	7.31	0.3	869	1.836	1193	0.6	n.d.	8.4	320	5	0.36
CRITICAL LEVEL	300	150	80	6.5/9	60	450	3.00	2000	4	1	60.0	400.0	200	0.8
G R A P H I C	PROBLEMS LIKELY													
	POTENTIAL PROBLEMS													
	NO APPARENT PROBLEMS													

ADDITIONAL ELEMENTS

ELEMENT	CARBONATE EPA 810.1 ppm	IRON EPA 200.7 ppm	MANGANESE EPA 200.7 ppm	COPPER EPA 200.7 ppm	ZINC EPA 200.7 ppm
LEVEL FOUND	0.61	n.d.	2.3	0.02	0.02

App. H-1

Our Report and/or any data on this report are reflective of the analysis of the sample as submitted. Clients are responsible for the accuracy of the data and may not be reproduced in whole or in part, nor may any part be used for any other purpose without our prior written authorization. For applicable test parameters, Midwest Laboratories is in compliance with NELAP requirements.

Rob Ferris

Rob Ferris

DEPOSITION
EXHIBIT NO.
J. KRSTNAK
4-14-16 L. Wiederlich



Midwest
Laboratories, Inc.

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REPORT ON WATER QUALITY ANALYSIS

LINDAS GARDEN
JIMMY KRSNAK
24009 465TH AVE
CHESTER SD 57016

31377

WATER ANALYSIS

Add'l

ANALYTICAL RESULTS
SAMPLE ID: WELL
LABORATORY NUMBER: 2163127

PARAMETER METHOD	SODIUM EPA 2007 Na ppm	CALCIUM EPA 2007 Ca ppm	MAGNESIUM EPA 2007 Mg ppm	pH EPA 150.1	NITRATE EPA 2007 NO ₃ -N ppm	SULFATE EPA 2007 SO ₄ ppm	CONDUCTIVITY EPA 120.1 microhos/cm	TOTAL DISSOLVED SOLIDS TDS ppm	HARDNESS SM 2540B gr/gallon	TOTAL COLIFORM SM 922B MPN/100 mL	IRON EPA 2007 Fe ppm	MANGANESE EPA 2007 Mn ppm	CHLORIDE EPA 2007 Cl ppm
LEVEL FOUND					n.d.					6			
CAUTION LEVEL					10					1			

INTERPRETATION

PARAMETER METHOD	SODIUM EPA 2007 Na ppm	CALCIUM EPA 2007 Ca ppm	MAGNESIUM EPA 2007 Mg ppm	pH EPA 150.1	NITRATE EPA 2007 NO ₃ -N ppm	SULFATE EPA 2007 SO ₄ ppm	CONDUCTIVITY EPA 120.1 microhos/cm	TOTAL DISSOLVED SOLIDS TDS ppm	HARDNESS SM 2540B gr/gallon	TOTAL COLIFORM SM 922B MPN/100 mL	IRON EPA 2007 Fe ppm	MANGANESE EPA 2007 Mn ppm	CHLORIDE EPA 2007 Cl ppm
UNITS													
GRAPHIC													

ADDITIONAL PARAMETERS

PARAMETER METHOD													
UNITS													
LEVEL FOUND													

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App. H-2

15-213-2064

DATE REPORTED:

08/01/13

DATE SAMPLED: 07/25/13
DATE RECEIVED: 07/29/13
Page 1 of 2

39CIV12-000094
Filed: 12/14/2016 5:59:39 PM CST
Lake County, South Dakota



Ref. Lab #: 499952
Report Number
13-213-2064

Page 2 of 2

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**Midwest
Laboratories, Inc.**

REPORT OF ANALYSIS

For: (31377) LINDAS GARDEN
(605)489-2651

Date Reported: 08/01/13
Date Received: 07/29/13
Date Sampled: 07/25/13

Mail to: LINDAS GARDEN
JIMMY KRISNAK
24009 465TH AVE
CHESTER SD 57016

WATER ANALYSIS

Lab number: 2163127 Sample ID: WELL

Analysis	Level Found	Units	Detection Limit	Method
E. coli (generic)	n.d.	MPN/100mL	1	SM 9223B

Notes:

N.D. - Not Detected.
add'l report (WDM).

Respectfully Submitted

Rob Ferris
Client Service Representative
rob@midwestlabs.com (402)829-9871

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For applicable test parameters, Midwest Laboratories is in compliance with NELAP requirements.

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App. H-3



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REPORT ON WATER QUALITY ANALYSIS

DATE REPORTED:
09/04/14

LINDAS GARDEN
JIMMY KRSTNAK
24009 465TH AVE
CHESTER SD 57016

31377

WATER ANALYSIS

ANALYTICAL RESULTS

SAMPLE ID: WASH RACK

LABORATORY NUMBER: 2311572

Add'l

PARAMETER METHOD	SODIUM EPA-2007	CALCIUM EPA-2007	MAGNESIUM EPA-2007	pH EPA-150.1	NITRATE EPA-3000	SULFATE EPA-3000	CONDUCTIVITY EPA-120.1	TOTAL DISSOLVED SOLIDS TDS	HARDNESS SM/2940B	TOTAL COLIFORM SM/9223B	IRON EPA-2007	MANGANESE EPA-2007	CHLORIDE EPA-3000	FLUORIDE EPA-300.0
UNITS	Na ppm	Ca ppm	Mg ppm		NO ₃ -N ppm	SO ₄ ppm	mmhos/cm	ppm	gr/gallon	MPN/100 mL	Fe ppm	Mn ppm	Cl ppm	F ppm
LEVEL FOUND	59.4	311	72.5	7.42	0.3	875	1.920	1248	63.0	225	n.d.	2.82	5	0.2
CAUTION LEVEL	100	80	30	6.5/9.0	10	400	0.75	500	20	1	0.3	0.05	200	4.0

INTERPRETATION

PARAMETER METHOD	SODIUM EPA-2007	CALCIUM EPA-2007	MAGNESIUM EPA-2007	pH EPA-150.1	NITRATE EPA-3000	SULFATE EPA-3000	CONDUCTIVITY EPA-120.1	TOTAL DISSOLVED SOLIDS TDS	HARDNESS SM/2940B	TOTAL COLIFORM SM/9223B	IRON EPA-2007	MANGANESE EPA-2007	CHLORIDE EPA-3000	FLUORIDE EPA-300.0
UNITS	Na ppm	Ca ppm	Mg ppm		NO ₃ -N ppm	SO ₄ ppm	mmhos/cm	ppm	gr/gallon	MPN/100 mL	Fe ppm	Mn ppm	Cl ppm	F ppm
GRAPHIC														
No Apparent Problems														
Potential Problems														
Problems Likely														
Level Exceeds EPA Limits														

ADDITIONAL PARAMETERS

PARAMETER METHOD														
UNITS														
LEVEL FOUND														

DEPOSITION
EXHIBIT NO. 8
J. Krstnak
4-14-16 L. Wierlich

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App. H-4

DATE SAMPLED: 08/27/14
DATE RECEIVED: 08/29/14
Page 1 of 2

39CIV12-000094 Lake County, South Dakota Filed: 12/14/2016 5:59:39 PM CST



Report Number
14-247-2053

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REPORT OF ANALYSIS

Page 2 of 2

Mail to: LINDAS GARDEN
JIMMY KRSTNAK
24009 465TH AVE
CHESTER SD 57016

For: (31377) LINDAS GARDEN
(605)489-2651

Date Reported: 09/04/14
Date Received: 08/29/14
Date Sampled: 08/27/14

WATER ANALYSIS

Lab number: 2311572 Sample ID: WASH RACK

Analysis	Level Found	Units	Detection Limit	Method
E. coli (generic)	n.d.	MPN/100mL	1	SM 9223B

Notes:

N.D. - Not Detected.
add'l report (WDM).

Respectfully Submitted

Rob Ferris
Client Service Representative
rob.ferris@midwestlabs.com (402)829-9871

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App. H-5

U.S. EPA WATER QUALITY GUIDELINES FOR HUMAN CONSUMPTION

Sodium (Na)	Less than 20 ppm: No adverse effects	20-80 ppm: Persons on restricted sodium diets should consult a physician concerning use.	More than 80 ppm: Should be used sparingly by persons on low-sodium diets.
Calcium (Ca)	Less than 80 ppm: No adverse effects	80-150 ppm: Hard water problems such as scale formation can be expected.	More than 150 ppm: May be associated with high levels of sulfate (see sulfate below). Extreme hardness is undesirable for household use.
Magnesium (Mg)	Less than 30 ppm: No adverse effects	30-80 ppm: Contributes to hardness when associated with high calcium levels.	More than 80 ppm: When associated with high sulfate, is likely to have a laxative effect (magnesium sulfate is Epsom Salts).
pH	Less than 6.5: Corrosive to metal	6.5-8.5: No adverse effects	Higher than 8.5: Possible bitter taste, and germicidal activity of chlorine is reduced, corrosive to pipes.
Nitrate Nitrogen (NO ₃ -N)	Less than 2 ppm: No adverse effects	2-10 ppm: No acute toxicity. Could have some negative health effects in young children.	More than 10 ppm: Increasing probability of health effect in children under 6 months of age due to reduced oxygen carrying capacity of the blood.
Sulfate (SO ₄)	Less than 250 ppm: No adverse effects	250-500 ppm: Likely to have a laxative effect, especially when first introduced. Diarrhea may or may not persist.	More than 500 ppm: Strongly laxative.
Conductivity	Less than 0.30: Extremely pure water can be corrosive to metal.	0.30-1.50: No adverse effects	Greater than 1.50: High levels of dissolved solids (see below).
Total Dissolved Solids (TDS)	Less than 200 ppm: No adverse health or nutritional effects. May be corrosive if extremely pure.	200-1000 ppm: No adverse effects	More than 1000 ppm: Increasingly adverse effects, especially diarrhea. Water loses esthetic effect.
Hardness	Less than 6 gr/gal: No adverse effects (17.1 mg/L CaCO ₃ = 1 gr/gal)	6-12 gr/gal: Some scale may form in pipes and water heaters. Softening may be desirable.	More than 12 gr/gal: Scale will form rapidly and laundry will not come clean. Softening for household use is desirable.
Total Coliform*	Negative: No coliform bacteria present in 100 mL of water.		Positive: Water is contaminated with coliforms (sewage) bacteria. Disease transmission is possible if unpurified water is used. EPA restrictions on coliforms is less than 1 colony forming unit (cfu) per 100 mL of water.
Iron (Fe)	Less than 0.3 ppm: No adverse effects	0.3-1.0 ppm: Some staining will occur	More than 1.0 ppm: Iron oxide (rust) will cause extensive staining and will precipitate out, forming a red sludge. Taste will be bitter.
Manganese (Mn)	Less than 0.05 ppm: No adverse effects	0.05-0.50 ppm: May cause black or brown staining of pipes, sinks, and laundry.	More than 0.50 ppm: Besides the staining effect, will cause a metallic taste.
Chloride (Cl)	Less than 200 ppm: No adverse effects	200-500 ppm: Increasingly salty taste.	More than 500 ppm: Very salty taste.

*Holding/Transit time between sampling and analysis cannot exceed 48 hours. If this time has been exceeded, the results might be invalid.
N.D. = Not Detected
EPA Guidelines suggest less than 0.015 ppm (mg/L) for Lead (Pb) and 1.30 ppm (mg/L) for Copper (Cu).

02/2004

App. H-6

14-160-2163


 DATE REPORTED:
06/09/14

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REPORT ON WATER QUALITY ANALYSIS

 LINDAS GARDEN
JIMMY KRISNAK
24009 465TH AVE
CHESTER SD 57016

31377

WATER ANALYSIS

 DATE SAMPLED: 06/02/14
DATE RECEIVED: 06/04/14
Page 1 of 2

Add'l

 ANALYTICAL RESULTS
SAMPLE ID: WASHRACK
LABORATORY NUMBER: 2277074

PARAMETER METHOD	SODIUM EPA 200.7 Na ppm	CALCIUM EPA 200.7 Ca ppm	MAGNESIUM EPA 200.7 Mg ppm	pH EPA 150.1	NITRATE EPA 300.0 NO ₃ -N ppm	SULFATE EPA 300.0 SO ₄ ppm	CONDUCTIVITY EPA 120.1 microhm/cm	TOTAL DISSOLVED SOLIDS TDS ppm	HARDNESS SM 2340B gr / gallon	TOTAL COLIFORM SM 9223B MPN/100 mL	IRON EPA 200.7 Fe ppm	MANGANESE EPA 200.7 Mn ppm	CHLORIDE EPA 300.0 Cl ppm	FLUORIDE EPA 300.0 F ppm
LEVEL FOUND	47.4	321	80.8	7.02	0.4	901	1,901	1236	66.5	90	0.01	2.88	7	0.2
CAUTION LEVEL	100	80	30	6.5/9.0	10	400	0.75	500	20	1	0.3	0.05	200	4.0

INTERPRETATION

PARAMETER METHOD	SODIUM EPA 200.7 Na ppm	CALCIUM EPA 200.7 Ca ppm	MAGNESIUM EPA 200.7 Mg ppm	pH EPA 150.1	NITRATE EPA 300.0 NO ₃ -N ppm	SULFATE EPA 300.0 SO ₄ ppm	CONDUCTIVITY EPA 120.1 microhm/cm	TOTAL DISSOLVED SOLIDS TDS ppm	HARDNESS SM 2340B gr / gallon	TOTAL COLIFORM SM 9223B MPN/100 mL	IRON EPA 200.7 Fe ppm	MANGANESE EPA 200.7 Mn ppm	CHLORIDE EPA 300.0 Cl ppm	FLUORIDE EPA 300.0 F ppm
GRAPHIC														

ADDITIONAL PARAMETERS

PARAMETER METHOD														
UNITS														
LEVEL FOUND														

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 DEPOSITION NO. 9
EXHIBIT NO. 1
J. Krsnak
4-14-14 Wiederrich

App. H-7



Report Number
14-160-2163

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REPORT OF ANALYSIS

Page 2 of 2

Mail to:
LINDAS GARDEN
JIMMY KRISNAK
24009 465TH AVE
CHESTER SD 57016

For: (31377) LINDAS GARDEN
(605)489-2651

WATER ANALYSIS

Date Reported: 06/09/14
Date Received: 06/04/14
Date Sampled: 06/02/14

Lab number: 2277074 Sample ID: WASHRACK

Analysis	Level Found	Units	Detection Limit	Method
E. coli (generic)	4	MPN/100mL	1	SM 9223B

Notes:
add'l report (WDM).

Respectfully Submitted
Rob Ferris
Rob Ferris
Client Service Representative
rob.ferris@midwestlabs.com (402)829-9871

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App. H-8

U.S. EPA WATER QUALITY GUIDELINES FOR HUMAN CONSUMPTION

Sodium (Na)	Less than 20 ppm: No adverse effects	20-80 ppm: Persons on restricted sodium diets should consult a physician concerning use.	More than 80 ppm: Should be used sparingly by persons on low-sodium diets.
Calcium (Ca)	Less than 80 ppm: No adverse effects	80-150 ppm: Hard water problems such as scale formation can be expected.	More than 150 ppm: May be associated with high levels of sulfate (see sulfate below). Extreme hardness is undesirable for household use.
Magnesium (Mg)	Less than 30 ppm: No adverse effects	30-80 ppm: Contributes to hardness when associated with high calcium levels.	More than 80 ppm: When associated with high sulfate, is likely to have a laxative effect (magnesium sulfate is Epsom Salts).
pH	Less than 6.5: Corrosive to metal	6.5-8.5: No adverse effects	Higher than 8.5: Possible bitter taste, and germicidal activity of chlorine is reduced, corrosive to pipes.
Nitrate Nitrogen (NO ₃ -N)	Less than 2 ppm: No adverse effects	2-10 ppm: No acute toxicity. Could have some negative health effects in young children.	More than 10 ppm: Increasing probability of health effect in children under 6 months of age due to reduced oxygen carrying capacity of the blood.
Sulfate (SO ₄)	Less than 250 ppm: No adverse effects	250-500 ppm: Likely to have a laxative effect, especially when first introduced. Diarrhea may or may not persist.	More than 500 ppm: Strongly laxative.
Conductivity	Less than 0.30: Extremely pure water can be corrosive to metal.	0.30-1.50: No adverse effects	Greater than 1.50: High levels of dissolved solids (see below).
Total Dissolved Solids (TDS)	Less than 200 ppm: No adverse health or nutritional effects. May be corrosive if extremely pure.	200-1000 ppm: No adverse effects	More than 1000 ppm: Increasingly adverse effects, especially diarrhea. Water loses esthetic effect.
Hardness	Less than 6 gr/gal: No adverse effects (17.1 mg/L CaCO ₃ = 1 gr/gal)	6-12 gr/gal: Some scale may form in pipes and water heaters. Softening may be desirable.	More than 12 gr/gal: Scale will form rapidly and laundry will not come clean. Softening for household use is desirable.
Total Coliform*	Negative: No coliform bacteria present in 100 mL of water.		Positive: Water is contaminated with coliforms (sewage) bacteria. Disease transmission is possible if unpurified water is used. EPA restrictions on coliforms is less than 1 colony forming unit (cfu) per 100 mL of water.
Iron (Fe)	Less than 0.3 ppm: No adverse effects	0.3-1.0 ppm: Some staining will occur	More than 1.0 ppm: Iron oxide (rust) will cause extensive staining and will precipitate out, forming a red sludge. Taste will be bitter.
Manganese (Mn)	Less than 0.05 ppm: No adverse effects	0.05-0.50 ppm: May cause black or brown staining of pipes, sinks, and laundry.	More than 0.50 ppm: Besides the staining effect, will cause a metallic taste.
Chloride (Cl)	Less than 200 ppm: No adverse effects	200-500 ppm: Increasingly salty taste.	More than 500 ppm: Very salty taste.

*Holding/Transit time between sampling and analysis cannot exceed 48 hours. If this time has been exceeded, the results might be invalid.
M.D. = Not Detected
EPA Guidelines suggest less than 0.015 ppm (mg/L) for Lead (Pb) and 1.30 ppm (mg/L) for Copper (Cu).

App. H-9

02/2004



Midwest Laboratories, Inc.

13611 B Street • Omaha, Nebraska 68144-3693 • (402) 334-7770 • FAX (402) 334-9121

www.midwestlabs.com

REPORT ON WATER QUALITY ANALYSIS

DATE REPORTED:
05/02/14

LINDAS GARDEN
JIMMY KRISNAK
24009 465TH AVE
CHESTER SD 57016

31371

WATER ANALYSIS

Add'l

DATE SAMPLED: 04/28/14
DATE RECEIVED: 04/29/14
Page 1 of 2

SAMPLE ID: WELL

LABORATORY NUMBER: 2262562

ANALYTICAL RESULTS

PARAMETER METHOD	SODIUM EPA2007	CALCIUM EPA2007	MAGNESIUM EPA2007	pH EPA1501	NITRATE EPA3000	SULFATE EPA3000	CONDUCTIVITY EPA1201	TOTAL DISSOLVED SOLIDS TDS	HARDNESS SM2240B	TOTAL COLIFORM SM9223B	IRON EPA2007	MANGANESE EPA2007	CHLORIDE EPA3000	FLUORIDE EPA3000
UNITS	ppm	ppm	ppm		ppm	ppm	mmhos/cm	ppm	gr/gallon	MPN/100 mL	ppm	ppm	ppm	ppm
LEVEL FOUND	40.1	318	74.2	7.11	n.d.	861	1.865	1212	64.4	48	n.d.	3.06	5	0.2
CAUTION LEVEL	100	80	30	6.5/9.0	10	400	0.75	500	20	1	0.3	0.05	200	4.0

INTERPRETATION

PARAMETER METHOD	SODIUM EPA2007	CALCIUM EPA2007	MAGNESIUM EPA2007	pH EPA1501	NITRATE EPA3000	SULFATE EPA3000	CONDUCTIVITY EPA1201	TOTAL DISSOLVED SOLIDS TDS	HARDNESS SM2240B	TOTAL COLIFORM SM9223B	IRON EPA2007	MANGANESE EPA2007	CHLORIDE EPA3000	FLUORIDE EPA3000
UNITS	ppm	ppm	ppm		ppm	ppm	mmhos/cm	ppm	gr/gallon	MPN/100 mL	ppm	ppm	ppm	ppm
GRAPHIC														
No Apparent Problems														
Potential Problems														
Problems														
Level Exceeds EPA Limits														

ADDITIONAL PARAMETERS

PARAMETER METHOD														
UNITS														
LEVEL FOUND														

DEPOSITION
EXHIBIT NO. 10
J. KRISNAK
4-14-14 L. Wiedemick

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App. H-10

Filed: 12/14/2016 6:16:52 PM CST Lake County, South Dakota 39CIV12-000094



Report Number
14-121-2218

**Midwest
Laboratories, Inc.**

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REPORT OF ANALYSIS

For: (31377) LINDAS GARDEN
(605)489-2651

Date Reported: 05/02/14
Date Received: 04/29/14
Date Sampled: 04/28/14


Mail to: LINDAS GARDEN
JIMMY KRSNAK
24009 465TH AVE
CHESTER SD 57016

WATER ANALYSIS

Lab number: 2262562 Sample ID: WELL

Analysis	Level Found	Units	Detection Limit	Method
E. coli (generic)	n.d.	MPN/100mL	1	SM 9223B

Notes:
N.D. - Not Detected.
add'l report (WDM).

Respectfully Submitted

Rob Ferris
Client Service Representative
rob.ferris@midwestlabs.com (402)829-9871

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App. H-11

U.S. EPA WATER QUALITY GUIDELINES FOR HUMAN CONSUMPTION

Sodium (Na)	Less than 20 ppm: No adverse effects	20-80 ppm: Persons on restricted sodium diets should consult a physician concerning use.	More than 80 ppm: Should be used sparingly by persons on low-sodium diets.
Calcium (Ca)	Less than 80 ppm: No adverse effects	80-150 ppm: Hard water problems such as scale formation can be expected.	More than 150 ppm: May be associated with high levels of sulfate (see sulfate below). Extreme hardness is undesirable for household use.
Magnesium (Mg)	Less than 30 ppm: No adverse effects	30-80 ppm: Contributes to hardness when associated with high calcium levels.	More than 80 ppm: When associated with high sulfate, is likely to have a laxative effect (magnesium sulfate is Epsom Salts).
pH	Less than 6.5: Corrosive to metal	6.5-8.5: No adverse effects	Higher than 8.5: Possible bitter taste, and germicidal activity of chlorine is reduced; corrosive to pipes.
Nitrate Nitrogen (NO ₃ -N)	Less than 2 ppm: No adverse effects	2-10 ppm: No acute toxicity. Could have some negative health effects in young children.	More than 10 ppm: Increasing probability of health effect in children under 6 months of age due to reduced oxygen carrying capacity of the blood.
Sulfate (SO ₄)	Less than 250 ppm: No adverse effects	250-500 ppm: Likely to have a laxative effect, especially when first introduced. Diarrhea may or may not persist.	More than 500 ppm: Strongly laxative.
Conductivity	Less than 0.30: Extremely pure water can be corrosive to metal.	0.30-1.50: No adverse effects	Greater than 1.50: High levels of dissolved solids (see below).
Total Dissolved Solids (TDS)	Less than 200 ppm: No adverse health or nutritional effects. May be corrosive if extremely pure.	200-1000 ppm: No adverse effects	More than 1000 ppm: Increasingly adverse effects, especially diarrhea. Water loses esthetic effect.
Hardness	Less than 6 gr/gal: No adverse effects (17.1 mg/L CaCO ₃ = 1 gr/gal)	6-12 gr/gal: Some scale may form in pipes and water heaters. Softening may be desirable.	More than 12 gr/gal: Scale will form rapidly and laundry will not come clean. Softening for household use is desirable.
Total Coliform*	Negative: No coliform bacteria present in 100 mL of water.		Positive: Water is contaminated with coliforms (sewage) bacteria. Disease transmission is possible if unpurified water is used. EPA restrictions on coliforms is less than colony forming unit (cfu) per 100 mL of water.
Iron (Fe)	Less than 0.3 ppm: No adverse effects	0.3-1.0 ppm: Some staining will occur	More than 1.0 ppm: Iron oxide (rust) will cause extensive staining and will precipitate out, forming a red sludge. Taste will be bitter.
Manganese (Mn)	Less than 0.05 ppm: No adverse effects	0.05-0.50 ppm: May cause black or brown staining of pipes, sinks, and laundry.	More than 0.50 ppm: Besides the staining effect, will cause a metallic taste.
Chloride (Cl)	Less than 200 ppm: No adverse effects	200-500 ppm: Increasingly salty taste.	More than 500 ppm: Very salty taste.

*Holding/Transit time between sampling and analysis cannot exceed 48 hours: If this time has been exceeded, the results might be invalid.
 N.D. = Not Detected
 EPA Guidelines suggest less than 0.015 ppm (mg/L) for Lead (Pb) and 1.30 ppm (mg/L) for Copper (Cu).

App. H-12

15-082-4226

REPORT DATE
Mar 23, 2015
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Mar 18, 2015

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Laboratories, Inc.

13611 "B" Street • Omaha, Nebraska 68144-3693 • (402) 334-7770 • FAX (402) 334-9121
www.midwestlabs.comLINDAS GARDEN
JIMMY KRSNAK
24009 465TH AVE
CHESTER SD 57016

Irrigation Suitability

For: (31377) LINDAS GARDEN
WATER ANALYSIS

PAGE 1/2

ISSUE D/
Mar 24, 20
LAB NUME
23803
DATE SAMPLE
Mar 17, 20
TIME SAMPLE
10:00

Irrigation Suitability Results for WELL

ELEMENT	SODIUM	CALCIUM	MAGNESIUM	pH	NITRATE NITROGEN	SULFATE	CONDUCT- IVITY	TOTAL DISSOLVED SOLIDS	SODIUM ABSORPTION RATIO	PHOSPHORUS	POTASSIUM	BICARBONATE	CHLORIDE	BORON
METHOD UNITS	EPA 200.7 ppm	EPA 200.7 ppm	EPA 200.7 ppm	EPA 160.1 ppm	EPA 300.0 ppm	EPA 300.0 ppm	EPA 120.1 microsiemens	COND ppm	(SAR) CALCULATION	EPA 200.7 ppm	EPA 200.7 ppm	SM 2320 B ppm	EPA 300.0 ppm	EPA 200.7 ppm
LEVEL FOUND	39.4	304	71.8	7.36	0.2	861	1.89	1230	0.5	n.d.	7.72	315	5	0.42
CRITICAL LEVEL	120	150	80	5.5/9	40	336	2	1300	2.5	0.7	30	400	200	0.8
PROBLEMS LIKELY														
POTENTIAL PROBLEMS														
NO APPARENT PROBLEMS														
ADDITIONAL ELEMENTS														
ELEMENT	Iron (total)	Manganese (total)	Copper (total)	Zinc (total)	Carbonate as CaCO ₃									
METHOD UNITS	EPA 200.7 ppm	EPA 200.7 ppm	EPA 200.7 ppm	EPA 200.7 ppm	SM 2320 B (1997) * ppm									
LEVEL FOUND	< 0.05	2.849	0.01	0.05	0.7									

DEPOSITION

EXHIBIT NO. 11

J. KRSNAK

4-14-KL-Wiederrich

The result(s) issued on this report only reflect the analysis of the sample(s) submitted.

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APP. H-13

Filed: 12/14/2016 6:16:52 PM CST Lake County, South Dakota 39CIV12-000094

15-082-4226

REPORT DATE
Mar 23, 2015

RECEIVED DATE
Mar 18, 2015

LINDAS GARDEN
JIMMY KRISNAK
24009 465TH AVE
CHESTER SD 57016



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www.midwestlabs.com

REPORT OF ANALYSIS

For: (31377) LINDAS GARDEN
WATER ANALYSIS

Analysis	Level Found As Received	Reporting Limit	Method	Analyst- Date	Verified- Date
Sample ID: WELL	Date Sampled: 2015-03-17 10:00				
Total coliforms	55	1	SM 9223 B *	11/4-2015/03/19	11/7-2015/03/19

All results are reported on an AS RECEIVED basis., MPN = most probable number

For questions please contact:

Rob Ferris
Account Manager
rob.ferris@midwestlabs.com (402)829-9871

App. H-14

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PAGE 2/2
ISSUE DA
Mar 24, 201

39CIV12-000094 39CIV12-000094 Filed: 12/14/2016 6:16:52 PM CST Lake County, South Dakota

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U.S. EPA WATER QUALITY GUIDELINES FOR HUMAN CONSUMPTION

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Sodium (Na) Less than 20 ppm: No adverse effects
 13811 B Street • Omaha, NE 68131 • Phone: 402-441-1111 • Fax: 402-441-1112
 20-80 ppm: No adverse effects. On low-sodium diets, should consider a physician's recommendation.

Calcium (Ca) Less than 80 ppm: No adverse effects
 More than 150 ppm: Hard water problems such as scale formation can be expected.
 More than 150 ppm: May be associated with high levels of sulfate (see sulfate below). Extreme hardness is undesirable for household use.

Magnesium (Mg) Less than 30 ppm: No adverse effects
 More than 80 ppm: When associated with high sulfate, is likely to have a laxative effect (magnesium sulfate is Epsom Salts).

pH Less than 6.5: Corrosive to metal
 Higher than 8.5: Possible bitter taste, and germicidal activity of chlorine is reduced, corrosive to pipes.

Nitrate Nitrogen (NO₃-N) Less than 2 ppm: No adverse effects
 More than 10 ppm: Increasing probability of health effect in children under 6 months of age due to reduced oxygen carrying capacity of the blood.

Sulfate (SO₄) Less than 250 ppm: No adverse effects
 More than 500 ppm: Strongly laxative.

Conductivity Less than 0.30: Extremely pure water can be corrosive to metal.
 Greater than 1.50: High levels of dissolved solids (see below).

Total Dissolved Solids (TDS) Less than 200 ppm: No adverse health or nutritional effects. May be corrosive if extremely pure.
 More than 1000 ppm: Increasingly adverse effects, especially diarrhea. Water loses esthetic effect.

Hardness Less than 6 gr/gal: No adverse effects (17.1 mg/L CaCO₃ = 1 gr/gal)
 More than 12 gr/gal: Scale will form rapidly and laundry will not come clean. Softening for household use is desirable.

Total Coliform* Negative: No coliform bacteria present in 100 mL of water.
 Positive: Water is contaminated with coliforms (sewage) bacteria. Disease transmission is possible if unpurified water is used. EPA restrictions on coliforms is less than 1 colony forming unit (cfu) per 100 mL of water.

Iron (Fe) Less than 0.3 ppm: No adverse effects
 More than 1.0 ppm: Iron oxide (rust) will cause extensive staining and will precipitate out, forming a red sludge. Taste will be bitter.

Manganese (Mn) Less than 0.05 ppm: No adverse effects
 More than 0.50 ppm: Besides the staining effect, will cause a metallic taste.

Chloride (Cl) Less than 200 ppm: No adverse effects
 More than 500 ppm: Very salty taste.
 *Holding/Transit time between sampling and analysis cannot exceed 48 hours. If this time has been exceeded, the results might be invalid.
 N.D. = Not Detected
 EPA Guidelines suggest less than 0.015 ppm (mg/L) for Lead (Pb) and 1.30 ppm (mg/L) for Copper (Cu).

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App. H-15

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 28352

JIMMY and LINDA KRSNAK,

Plaintiffs/Appellants,

vs.

BRANT LAKE SANITARY DISTRICT,

Defendant/Appellee.

Appeal from the Circuit Court

Third Judicial Circuit

Lake County, South Dakota

The Honorable Vincent A. Foley, Presiding Judge

BRIEF OF APPELLEE

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Notice of Appeal filed August 17, 2017

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JURISDICTIONAL STATEMENT

Appellants Jimmy and Linda Krsnak appeal the July 5, 2017 Letter opinion and corresponding July 11, 2017 Order Granting Summary Judgment and Judgment of Dismissal. Notice of Entry of the Summary Judgment and Judgment of Dismissal was served upon Appellants on July 19, 2017. Appellants filed their Notice of Appeal on August 17, 2017.

STATEMENT OF THE ISSUES

ISSUE 1

WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT AND AGAINST THE KRSNAKS ON EACH OF THE KRSNAKS' CLAIMS AGAINST THE DISTRICT.

The Circuit Court granted summary judgment in favor of the District and against the Krsnaks because the Krsnaks failed to establish each element of their claims against the District.

Most relevant authorities:

- *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, 709 N.W.2d 841.
- *Lawrence Cnty. v. Miller*, 2010 S.D. 60, 786 N.W.2d 360.
- *Krsnak v. S.D. Dep't of Env't & Nat. Res.*, 2012 S.D. 89, 824 N.W.2d 429.

STATEMENT OF THE CASE

Appellants Jimmy and Linda Krsnak (“the Krsnaks”) appeal from a Judgment entered by the Third Circuit Court, Lake County, the Honorable Vincent A. Foley, Circuit Court Judge, presiding. The Krsnaks brought inverse condemnation and nuisance claims against Appellee Brant Lake Sanitary District (“the District”) following

construction of a wastewater treatment pond. The District moved for summary judgment asserting the Krsnaks had not established evidence supporting each essential element of their takings or nuisance claim. The Circuit Court properly granted the District's Motion for Summary Judgment. The Krsnaks presented no evidence establishing a dispute of material fact whether the District's treatment pond constituted a taking of the Krsnaks' property under either federal or state law, nor did the Krsnaks present evidence which could establish the treatment pond constituted a public or private nuisance.

STATEMENT OF FACTS

The District is a recognized sanitary sewer district organized under the laws of the State of South Dakota. *See* Appendix H (Statement of Undisputed Material Facts at ¶ 1). The District designed and constructed a treatment pond (the "BLSD Pond") to service an increase in wastewater flow in the Brandt Lake area. *See* Appendix H (Statement of Undisputed Material Facts at ¶ 3). The design of the BLSD Pond was approved by the South Dakota Department of Environment and Natural Resources ("DENR"). *Krsnak v. S.D. Dep't of Env't & Natural Res.*, 2012 S.D. 89, ¶ 6, 824 N.W.2d 429, 433. The BLSD Pond was constructed immediately next to and tied into two previously existing treatment ponds the Chester Sanitary District has operated since 1999 (the "CSD Ponds"). *See* Appendix H (Statement of Undisputed Material Facts at ¶ 2); *see also* Appendix A (aerial map). The BLSD Pond went into operation in late 2012 or early 2013. *See*, Appendix H (Statement of Undisputed Material Facts at ¶ 4); *see also*, Appellant's App'x C-2.

Linda Krsnak, one of the plaintiffs below and appellants herein, owns 8.27 acres of property located in the same quarter-section as the BLSD and CSD Ponds. *See*, Appendix H (Statement of Undisputed Material Facts at ¶ 5); *see also* Appendix A (aerial

map). Ms. Krsnak operates a business known as Linda's Gardens on her property (the "Linda's Gardens Property"), and she and her husband, Jimmy Krsnak, moved their residence to the Linda's Gardens Property sometime after the CSD Pond began operation. *See*, Appendix H (Statement of Undisputed Material Facts at ¶¶ 5-6). The surface of the Linda's Gardens Property sits at a higher elevation than the both the CSD and BLSD Ponds. *See*, Appendix H (Statement of Undisputed Material Facts at ¶ 7); *see also*, Appellant's App. C-2, ¶ 3. A sixty-foot well on the Linda's Garden Property is generally used to water the crops, but the Linda's Garden Property also receives water from a rural water system. *See* Appendix H (Statement of Undisputed Material Facts at ¶ 8); *see also* Appendix C (Deposition of Jimmy Krsnak at 18:2–14).

The Krsnaks opposed construction of both the CSD and BLSD Ponds. Jimmy Krsnak was a party to an unsuccessful lawsuit brought to stop the CSD Ponds. Appendix C (Deposition of Jimmy Krsnak at 12:3–11); *see also Krsnak v. Chester Sanitary Dist.*, 39CIV00000166 (S.D. Cir. Court, 3d Cir. 2000). Summary judgment was granted against the opponents of the CSD Ponds, ending that lawsuit. Appendix C (Deposition of Jimmy Krsnak at 14:12–14); *Chester Sanitary Dist.*, 39CIV00000166.

After the BLSD Pond was approved by the Lake County Board of Adjustment, the Krsnaks filed a civil action challenging the Board of Adjustment's grant of a conditional use permit. *See generally, Krsnak v. Lake Cnty. Bd. of Adjustment*, 39CIV11000125 (S.D. Cir. Ct., 3d Cir. 2011). On July 5, 2011, however, the Circuit Court dismissed the Krsnaks' attempt to seek review of that decision. *See* Appendix F.

The Krsnaks then sought to compel the DENR to stay construction of the BLSD Pond after the DENR had approved the facility's design. *See generally, Krsnak*, 2012

S.D. 89, 824 N.W.2d 429. In that writ of mandamus action,¹ the Krsnaks asserted the DENR failed to comply with applicable South Dakota statutes, administrative rules, and internal guidelines when approving the BLSD Pond. *Id.* ¶ 7, 824 N.W.2d at 433. During the pendency of the Krsnaks’ writ of mandamus action, the Krsnaks commenced this action alleging inverse condemnation and nuisance claims against the District and seeking declaratory judgment of their rights. *See* Appendix I (Amended Complaint).

The Krsnaks’ claims in their writ of mandamus action asserted DENR failed to comply or require the District to comply with SDCL §§ 34A-2-27 and -29, South Dakota Administrative rules in Chapter 74:53:01, and the DENR’s Recommended Design Criteria Manual for Wastewater Collection and Treatment Facilities (“Design Criteria Manual”). *Krsnak*, 2012 S.D. 89, ¶¶ 11–22, 824 N.W.2d at 434–38. This Court affirmed the trial court’s denial of the Krsnaks’ petition for writ of mandamus. *Id.* ¶ 23, 824 N.W.2d 429, 438.

The claims against the District in the Krsnaks’ Amended Complaint were rooted in the same alleged violations of state statutes, regulations, and the Design Criteria Manual. *See* Appendix I (Amended Complaint at ¶¶ 6–10). The District moved for dismissal of the Krsnaks complaint for failure to state a claim. Although that motion was denied, the Circuit Court acknowledged this Court’s holding in *Krsnak* that ARSD Chapter 74:53:01 is not applicable to the BLSD Pond. *See* Appendix B (Letter Opinion at p. 4). Accordingly, the Circuit Court’s Letter Opinion held that the majority of the Krsnaks’ legal theories were untenable. However, the Circuit Court allowed the Krsnaks

¹ The writ of mandamus action was commenced in the South Dakota Circuit Court, Sixth Judicial Circuit, Hughes County.

to proceed with discovery based on the narrow theory that the Krsnaks might demonstrate the lagoon was contaminating the groundwater on the Linda's Gardens Property. *Id.* at pp. 4, 6. The parties then commenced discovery on this theory, and the Krsnaks also attempted to pursue a claim that the smell of the BLSD Pond was a unique injury to them giving rise to a takings claim.²

The Krsnaks' depositions established that, prior to operation of the BLSD Pond, the Krsnaks and several neighbors had complained about the foul smell that emanated from the CSD Ponds. *See* Appendix H (Statement of Undisputed Material Facts at ¶ 9); *see also* Appendix C (Deposition of Jimmy Krsnak at 16:3-15); *see also* Appendix D (Deposition of Linda Krsnak at 7:2–24). Jimmy Krsnak testified during his deposition:

Q. Before the Brant Lake Lagoon was built, you and Linda had complained about the smell of the Chester lagoons, correct?

A. Yes.

Q. And your neighbors had complained about the smell of the Chester Lagoons, correct?

A. Yes. I believe that's true.

Q. When was the smell of the Chester lagoons the worst? What time of year typically did you notice the smell was the worst from the Chester lagoons?

A. You could smell the Chester lagoons any time of the year.

See Appendix C (Deposition of Jimmy Krsnak at 16:3-15).

Linda Krsnak testified similarly:

Q. Before the BLSD lagoon was built, you complained to people about the smell of the Chester lagoons, correct?

² The "bad smell" takings claim was not one of the theories the Circuit Court's December 20, 2012 Letter Opinion permitted Krsnaks to pursue, but Krsnaks attempted to advance it nonetheless.

A. Yes.

Q. Was there a time of year when it was worse than others or was it constant throughout the calendar year?

A. Oh, there's varying degrees of that. And I think that's kind of a relative term, what's worse; is it worse for five or ten seconds or is it worse working in it for half a day or a whole day.

I remember one particular day – I'm not sure of the month, but I think it might have been in 2010 – I went outside in the morning to go to work. . . . I took one breath and I had such a searing pain across the top of my head to the base of my skull. . . . I had a headache, felt sick for the whole rest of the day. I went out and worked in our building that I call our barn. . . . And I worked for about two hours, but I could not work. I had to go in the house. And I was physically sick. I had a headache until the next day.

See Appendix D (Deposition of Linda Krsnak at 7:2–8:4).

After construction of the BLSD Pond, the Krsnaks and their neighbors continued to smell a foul odor emanating from all three treatment ponds. *See Appendix H (Statement of Undisputed Material Facts at ¶ 10); see also Appendix C (Deposition of Jimmy Krsnak at 24:1–24) (“Q. But you know for certain that the neighbors that you just listed have the same odor concerns that you and Linda do, correct? A. Yes.”); see also Appendix D (Deposition of Linda Krsnak at 9:10–18) (“We smell all three lagoons year-round.”).*

The Krsnaks testified they have never witnessed any substance flow from the BLSD Pond onto the Linda's Gardens Property. *See Appendix D (Deposition of Linda Krsnak at 11:8–11).* The Krsnaks also testified they have no evidence the BLSD Pond has contaminated the Linda's Gardens well:

Q. Do you have any proof that the BLSD Lagoon has ever allowed sewage seepage into your well?

- A. I do not have any actual proof; and there's no way to get actual proof because, you know, one microbe is indistinguishable from any other microbe.

See Appendix C (Deposition of Jimmy Krsnak at 18:23–19:3, 20:2–7); *see also* Appendix D (Deposition of Linda Krsnak at 11:4–11) (“Q. But you don’t have any proof that any contamination in your groundwater comes from the BLSD lagoon, correct? A. Not that I’m aware of.”).

The District moved for summary judgment against the Krsnaks’ takings claim on the grounds the Krsnaks had no evidence the BLSD Pond contaminated their property or that their alleged injury was peculiar or distinct from the injury to the public at large. The District moved for summary judgment against the Krsnaks’ nuisance claim on the ground the BLSD Pond was a proper exercise of the District’s statutory authority and it is not an actionable nuisance. Likewise, the District sought summary judgment on the Krsnaks’ declaratory judgment claim, which merely sought a bare declaration of the Krsnaks’ rights and presented no distinct issues of substantive law.

The Circuit Court granted the District’s motion for summary judgment through a letter opinion dated July 5, 2017. The Circuit Court found the Krsnaks failed to present evidence of “water seepage impacts” to the Linda’s Gardens Property—the only plausible legal theory identified in the order denying dismissal. Appellant’s App’x. A-2. The Circuit Court also found the claimed financial impacts to the Linda’s Gardens business model did not preclude summary judgment because they were speculative, and the “stink” the Krsnaks complain of is not unique and did not establish a nuisance. *Id.* at 1.

ARGUMENT

*THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT
BECAUSE THE KRSNAKS FAILED TO PRESENT EVIDENCE OF EVERY ELEMENT
OF EACH OF THEIR CLAIMS AGAINST THE DISTRICT.*

The Krsnaks complaint alleged three claims against the District: (1) inverse condemnation; (2) nuisance; and (3) declaratory judgment of the Krsnaks' rights. The Krsnaks opposed summary judgment on the grounds that they had offered evidence establishing a dispute of material fact with respect to the existence of a taking without compensation and a nuisance. *See* Appendix G (Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment). The District will address the inverse condemnation and nuisance claims in turn. The declaratory judgment claim is dependent on the Krsnaks' substantive claims, and fails for the same reasons as the inverse condemnation claim and nuisance claims.

This Court reviews *de novo* a trial court's grant of summary judgment. *Heitman v. Am. Family Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 509. To avoid summary judgment, the non-moving party must establish the existence of evidence supporting each element on which that party bears the burden at trial. *Karst v. Shur-Co*, 2016 S.D. 35, ¶ 15, 878 N.W.2d 604, 612. The Krsnaks failed to present evidence supporting each element of their claims, and therefore the trial court did not err in granting the District's summary judgment motion.

A. The Krsnaks Did Not Present Evidence to Establish Their Inverse Condemnation Claim

The United States constitution ensures that property owners are compensated for four types of takings: (1) *per se* physical takings, (2) *per se* regulatory takings, (3)

regulatory takings depriving a landowner of his or her reasonable investment backed expectations, and (4) land-use exactions. *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 22, 709 N.W.2d 841, 846. In addition to the U.S. Constitutional protections, the Taking and Damaging Clause of the South Dakota Constitution protects against “incidental or consequential injuries to property” caused by the taking by a governmental entity of nearby property. *Id.* ¶ 23, 709 N.W.2d at 847 (internal quotations omitted); *see also* S.D. Constitution art. VI § 13 (“Private property shall not be taken for public use, or damage without just compensation . . .”). The only theories through which the Krsnaks argued a taking had occurred was through either a *per se* physical taking, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or through a consequential damage taking under the South Dakota Constitution.

The Krsnaks did not present evidence establishing a *per se* physical taking. A physical taking requires a physical occupation or intrusion of property. *Id.* at 434; *see also Lawrence Cnty. v. Miller*, 2010 S.D. 60, ¶ 17, 786 N.W.2d 360, 368 (affirming summary judgment against landowner who failed to establish an actual physical invasion of the airspace over the landowner’s property). The Krsnaks’ potential physical intrusion theory that survived the motion to dismiss was the possibility that the BLSD Pond would seep onto the Linda’s Gardens Property. *See* Appendix B (Letter Opinion at p. 6). In the over four years between narrowly surviving dismissal and the District’s motion for summary judgment, the Krsnaks offered no evidence establishing any wastewater from the BLSD Pond entered the Linda’s Gardens Property. *See* Appendix C (Deposition of Jimmy Krsnak at 18:23–19:3); *see also* Appendix D (Deposition of Linda Krsnak at 10:23–11:7). Rather, in opposition to summary judgment, the Krsnaks could only

speculate that at some time in the future, the BLSD Pond might somehow seep into the Linda's Gardens well. Appellants App'x. C-2, ¶ 3; *Id.* F-2, ¶ 6. However, speculation about a future physical intrusion of property is insufficient to establish a physical taking requiring compensation. *Lawrence Cnty.*, 2010 S.D. 60, ¶ 17, 786 N.W.2d at 367–68 (the landowner's speculation on effects of possible future expansion of airport service was too speculative to constitute a taking where the county had taken no steps toward such action nor expressed any intent of doing so). Further, there is no other evidence of physical intrusion, such as a flow over land. *See* Appendix D (Deposition of Linda Krsnak at 11:8–11); *see also* Appendix C (Deposition of Jimmy Krsnak at 20:2–7). In short, the Krsnaks failed to establish any evidence showing the BLSD Pond, or any substance from the BLSD Pond, physically occupied the Linda's Gardens Property. As such, the Krsnaks have no physical taking claim.

Likewise, the Krsnaks failed to establish the necessary elements of a consequential damage taking under the South Dakota Constitution. A consequential damage taking claim requires the injury to the landowner's property to be "peculiar to the owner's land and not of a kind suffered by the public as a whole." *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 23, 709 N.W.2d at 847 (internal quotation omitted). The claimed injury to the Linda's Gardens Property is not peculiar to that property nor distinct from that suffered by the public as a whole. Both Krsnaks freely admitted at their depositions that many of the neighbors had the exact same complaints they did. *See* Appendix H (Statement of Undisputed Material Facts at ¶ 10); *see also* Appendix C (Deposition of Jimmy Krsnak at 24:1–24); *see also* Appendix D (Deposition of Linda Krsnak at 9:14–18). Indeed, in the Krsnaks' prior lawsuit, they alleged that *twenty-four* adjoining

landowners shared their exact same complaints. *See* Appendix E (Affidavit and Application for Writ of Mandamus at ¶ 19).

In an attempt to avoid the effect of those admissions, the Krsnaks argue the Linda’s Gardens Property is peculiarly injured because of the “*more overwhelming stink*” on that property and because no other person or business is “attempting to operate a gardening business immediately adjacent to the” BLSD Pond. Appellant’s Brief, pp. 11–12. Each of those theories falls short of establishing a peculiar injury allowing for a consequential damages taking under the South Dakota Constitution.

An injury is peculiar when it is different *in kind*, not merely in *degree*, from the public as a whole. *Krier*, 2006 S.D. 10, ¶ 26, 709 N.W.2d at 847–48. In *Krier*, the plaintiff and his neighbors each suffered injury in the form of dust drifting from the newly graveled road onto their properties. *Id.* ¶ 26, 709 N.W.2d at 848. *Krier*’s only claim to a unique injury to his property was that, unlike his neighbors, his residence existed prior to converting the road from pavement to gravel, so only his property value was diminished as a result of the graveling of the road. *Id.* This Court found the type of injury to *Krier*’s property and his neighbors’ was the same—dust from the road—so the fact that *Krier* may have suffered to a greater degree than his neighbors did not entitle him to compensation under the consequential damages rule. *Id.*

The only difference between this case and *Krier* is that this case involves alleged odor, not dust. Otherwise, the cases are indistinguishable. In this case, the Krsnaks and their neighbors each suffer the same purported injury—the smell of the BLSD Pond. *See* Appendix C (Deposition of Jimmy Krsnak at 16:3-15); *see also* Appendix D (Deposition of Linda Krsnak at 9:14–18). Moreover, the Krsnaks and their neighbors have dealt with

the smell of treatment ponds since prior to construction of the BLSD Pond. *See* Appendix D (Deposition of Linda Krsnak at 7:2–8:4); *see also* Appendix C (Deposition of Jimmy Krsnak at 16:3–15). Whether the smell is worse at the Linda’s Gardens Property than it is at other properties—or whether it is worse after the BLSD Pond than prior to the BLSD Pond—is immaterial because that does not change the character of the alleged injury, only the degree.

Likewise, the holding in *Krier* precludes a consequential damages taking based on the purportedly unique use to which the Krsnaks were putting the Linda’s Gardens Property. *Krier* was the only landowner who had built a residence next to the resurfaced road prior to it being converted to gravel. Yet that fact, and the subsequent hit to his property value, did not change the character of his alleged injury—dust intrusion from the newly-graveled road. *Krier*, 2006 S.D. 10, ¶ 28, 709 N.W.2d at 848. Thus, even if the Linda’s Gardens Property is the only property near the BLSD Pond whose owner is attempting to operate a gardening business, the claimed injury to the property—the smell of the BLSD Pond—is still the same. Were the rule otherwise, property owners could always avoid the peculiarity rule in *Krier* by finding some way in which their use of their property differs from their neighbors’ uses.

In a related claim, the Krsnaks assert they were peculiarly injured by their supposed inability to become USDA Good Agricultural Practices certified (“GAP certified”). First, the ability to become GAP certified does not change the character of the injury, only the consequences arriving therefrom. *See id.* Even if it were material, the Krsnaks have offered nothing more than speculation that they would not be able to become GAP certified if they attempted—Linda’s Gardens has never attempted to

become GAP certified. *See* Appendix D (Deposition of Linda Krsnak 16:18–19, 25:14–15); *see also* Appendix C (Deposition of Jimmy Krsnak at 59:15–61:14).

Just as the proximity of the Linda’s Gardens Property to the BLSD Pond does not establish an issue of fact with regard to the peculiarity of the Krsnaks’ alleged injury, neither does evidence that the Linda’s Gardens Property decreased in value. This Court established in *Krier* that a decrease in property value alone, even if it is more dramatic than the decrease in neighboring property values, does not establish a consequential damages taking. *Krier*, 2006 S.D. 10, ¶ 28, 709 N.W.2d at 848 (“The fact that a plaintiff suffers a higher degree of injury or damages will not entitle him to recovery under the consequential damages rule.”).

The Krsnaks’ proffered formulation of peculiarity would eviscerate the peculiarity requirement of the consequential damages rule. Any time a less-than-desirable public project is commenced, under the Krsnaks’ proposed formulation, the closest neighbor or neighbors could seek to exact compensation from the public entity on the basis that no other landowner is as close to the project.³ Likewise, each landowner in proximity to the project could claim peculiar injuries based on their own esoteric use of their own property. That would allow “not-in-my-back-yard” litigants to exercise disproportionate control over public projects and grind the pace of those projects down to the sometimes halting pace of litigation, just as the Krsnaks have attempted to do with the BLSD and CSD Ponds.

³ Notably, there is real property between the BLSD Pond and the Linda’s Gardens Property, so the claim that no other property is exposed to the smell of the BLSD Pond as intensely as the Linda’s Gardens Property is inaccurate. *See* Appendix A (Aerial Map).

The cases cited in the Krsnaks' brief are inapplicable to the facts of this case and do not provide support for their claims. The Krsnaks' analogy between sewage smell and airplane airspace intrusion is flawed because airspace intrusions involve actual physical occupation of a property's airspace to the exclusion of the property owner. *See, e.g., Lawrence Cnty.*, 2010 S.D. 60, 786 N.W.2d at 368 (affirming summary judgment against property owner on an inverse condemnation claim in which the alleged injury of possible further airspace intrusion was too speculative). Likewise, *Parsons v. City of Sioux Falls*, 272 N.W. 288 (S.D. 1937), in which the city was discharging sewage upstream of the Plaintiff's riparian property, involves actual physical occupation and intrusion on the property owner's land. The plaintiff in *Parsons* owned the shoreline and stream bed all the way to the low water level as well as a right to use and enjoyment of the stream along his property. *Id.* at 291. The city's sewage discharge left sludge on the landowner's property and directly interfered with his use of the stream. *Id.* at 290. Thus, actual physical invasion of the plaintiff's property, not merely unpleasant odor emanating from a nearby source, supported the Court's finding that a taking had occurred. *Id.* at 292; *see also Gellert v. City of Madison*, 210 N.W. 978 (S.D. 1926) (finding a taking had occurred where sewage was discharged in a stream that crossed the property leased by the plaintiff) The smell allegedly emanating from the BLSD Pond near the Linda's Gardens Property does not physically occupy the Linda's Gardens Property to the exclusion of the Krsnaks, and the Krsnaks have no evidence the contents of the BLSD Pond have actually physically intruded on the Linda's Gardens Property.

In short, the Krsnaks have presented no evidence to establish a physical intrusion of the Linda's Gardens Property, nor have they shown a peculiar injury establishing a

consequential damages taking. Therefore, the Circuit Court did not err in granting the District's motion for summary judgment.

B. The Krsnaks Did Not Present Evidence to Establish Their Nuisance Claim

To survive summary judgment on their nuisance claim, the Krsnaks were required to present evidence showing the District is “*unlawfully* doing an act, or omitting to perform a duty, which act or omission either . . . [a]nnoys, injures, or endangers the comfort, repose, health, or safety of others” or “renders other persons insecure in life, or in the use of property.” SDCL § 21-10-1 (emphasis added). “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.” SDCL § 21-10-2; *see also Krier*, 2006 S.D. 10, ¶ 19, 709 N.W.2d 841, 846 (holding the township’s maintenance of a township road could not be a nuisance because the township had a statutory duty to maintain the road); *Ostrowski v. City of Spearfish*, 2004 S.D. 55, ¶ 13, 679 N.W.2d 491, 497 (holding the city’s operation of a park could not be a nuisance because it was authorized by law).

The District has express statutory authority under state law to construct and operate the BLSD Pond. *See* SDCL § 34A-5-26. Therefore, no nuisance claim can succeed against the District *unless* some act or omission vitiates its statutory authority. *See Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, ¶ 48, 557 N.W.2d 748, 761 (analyzing whether a public utility violated any statute or mandatory safety code to determine whether provision of electric service could constitute a nuisance). In their Brief, the Krsnaks do not identify a single applicable statute or regulation they claim the District has violated and thereby created a nuisance.

The Krsnaks' previously-asserted statutory or regulatory violations have already been rejected by this Court and the Circuit Court below. The Circuit Court expressly rejected the Krsnaks' nuisance claim based on the District's alleged failure to comply with ARSD § 74:53:01:15 because this Court held that regulation does not apply to the BLSD Pond. *See* Appendix B (Letter Opinion at 4); *see also Krsnak*, 2012 S.D. 89, ¶ 18, 824 N.W.2d at 436. The Krsnaks' nuisance claims narrowly survived dismissal solely on the ground the Circuit Court found plausible—at least at the pleading stage—the allegation that the BLSD Pond would allow “significant sewage seepage” onto the Linda's Gardens Property and into the state's groundwaters. *See* Appendix B (Letter Opinion at pp. 4–5). Thus, to survive summary judgment, the Krsnaks were required to present some evidence the BLSD Pond has discharged sewage into either the Linda's Gardens well or the groundwaters of the state.

Summary Judgment was proper because the Krsnaks offered no evidence the BLSD Pond seeped into surrounding groundwaters or flowed onto the Linda's Gardens Property. *See* Appendix C (Deposition of Jimmy Krsnak at 18:23–19:3, 20:4–7, 54:12–15); *see also* Appendix D (Deposition of Linda Krsnak at 11:1–11). The Krsnaks presented water analyses from samples taken between July 2013 through March 2015 to the Circuit Court and now to this Court. Those results—which they mischaracterize as undisputed—are immaterial because they fail to establish seepage from the BLSD Pond. There are no baseline tests from prior to the BLSD Pond, nor does any expert opinion link any of the test results to the BLSD Pond. After four years of discovery, the Krsnaks offered only lay person speculation that those “undisputed” results are evidence of seepage, despite their candid deposition testimony in which the Krsnaks admit they have

no evidence to tie any well contamination the BLSD Pond. *See* Appendix C (Deposition of Jimmy Krsnak at 18:23–19:3, 20:2–7); *see also* Appendix D (Deposition of Linda Krsnak at 11:4–11). Such speculation is insufficient to prevent summary judgment, and the Circuit Court did not err in disregarding those tests.

Likewise, the proximity of the BLSD Pond—specifically, the allegation its placement within 675 feet of the Linda’s Gardens Property may not be in compliance with the Design Criteria Manual—is immaterial. As this Court has already held, the Design Criteria Manual sets forth recommendations, not requirements, *Krsnak*, 2012 S.D. 89, ¶ 22, 824 N.W.2d 429, 437–38 (holding application of the standards set forth in the DENSR Recommended Design Criteria Manual is discretionary), and the placement of the BLSD Pond was approved by the DENR. *Id.* ¶ 2, 824 N.W.2d at 432. Thus, the design and construction of the BLSD Pond was expressly authorized by the DENR.

The BLSD Pond is a proper exercise of the District’s statutory authority, authorized by the DENR, and the Krsnaks failed to present any evidence showing the District has violated any applicable state laws or regulations in building or operating the BLSD Pond. Therefore, the Circuit Court properly granted summary judgment in favor of the District rejecting the Krsnaks’ nuisance claim.

CONCLUSION

After over four years of discovery between surviving dismissal and the District’s motion for summary judgment, the Krsnaks are unable present evidence establishing essential elements of their inverse condemnation and nuisance claims. Instead, they offer only speculation. The Circuit Court properly granted the District’s motion for summary

judgment, and the District requests this Court affirm the Circuit Court's Order Granting Summary Judgment and Judgment of Dismissal.

Dated at Sioux Falls, South Dakota, this _____ day of May, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 4,762 words and 24,191 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Brief of Appellee” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on April 30, 2018.

The undersigned further certifies that an electronic copy of “Brief of Appellee” was emailed to the attorneys set forth below, on April 30, 2018:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 28352

JIMMY and LINDA KRSNAK,

Plaintiffs and Appellants

vs.

BRANT LAKE SANITARY DISTRICT,

Defendant and Appellee

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
LAKE COUNTY, SOUTH DAKOTA

THE HONORABLE VINCENT A. FOLEY
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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JIMMY and LINDA KRSNAK,

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APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
LAKE COUNTY, SOUTH DAKOTA

THE HONORABLE VINCENT A. FOLEY
Circuit Court Judge

APPELLANT’S REPLY BRIEF

PRELIMINARY STATEMENT

Once again, for ease of reference, Appellants, Jimmy and Linda Krsnak, will be referred to as either “Appellants” or “Krsnaks.” Appellee in this matter, Brant Lake Sanitary District, will be referred to as either “Appellee” or “BLSD” and references to Appellee/Brant Lake’s Brief will be referred to as “BLSD’s Brf.” followed by the applicable page number(s). References to the settled record, that being the register of

actions, if any, will be made by the letters “SR” followed by the applicable page number(s). References to the Transcript of the Summary Judgment hearing on February 2, 2017, will be made by the letters “SJ-T:” followed by the applicable page number(s). References to transcripts or portions of the summary judgment motion hearing transcript that is part of the record herein, will be referred to by the appropriate name and/or hearing date followed by “MHT:” (for “Transcript”) and followed by the applicable page number(s) where necessary.

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

Please see Appellant’s initial brief filing herein.

STATEMENT OF LEGAL ISSUES

ISSUE 1

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BRANT LAKE SANITARY DISTRICT [BLSD] SINCE THERE ARE GENUINE ISSUES OF MATERIAL FACT SURROUNDING THE ADVERSE EFFECTS OF SEWAGE BEING ADJACENT TO AND/OR SEWAGE SEEPAGE NEAR LINDA’S GARDEN’S PROPERTY.

Appellant submits that the Circuit Court, Judge Foley, erred in granting summary judgment to BLSD since there are genuine issues of material fact that were called into question in the record by Appellants, however, with such genuine issues of material fact being left unaddressed within or as a part of the Court’s brief memorandum opinion. SR 604-605; Appendix A-1-A-3.

Rupert v. City of Rapid City, 2013 S.D. 13, 827 NW2d 55;
Gellert v. City of Madison, 50 S.D. 559, 210 NW 978 (1926);
SDCL 15-6-56.

STATEMENT OF THE FACTS

Please see Appellant’s initial brief filing herein.

APPELLANTS REPLY ARGUMENT:

As to the applicable standard of review, please see Appellant’s initial brief filing.

As previously noted, this Court has generally held that in inverse condemnation claims, somewhat analogous to a part of the claim(s) herein, where there is a question

about the unique type or extent of damage(s) to a party's property – that such matters more typically amount to questions of fact to be decided by a jury as the ultimate fact-finders in such cases. *Cf., Rupert v. City of Rapid City*, 2013 S.D. 13, ¶¶ 23-26, 827 NW2d 55, 65-67. As part of their inverse condemnation overview, Krsnaks have noted - and within BLSD's Brief they have failed to distinguish - that which the Court reiterated in *Hall v. State ex rel. South Dakota Dept. of Transp.*, 2006 S.D. 24, ¶¶ 13-14, 712 NW2d 22, 27 that:

The United States Constitution provides that private property shall not “be taken for public use, without just compensation.” US Const amend V. [Similarly,] Article VI, Section 13 of the South Dakota Constitution mirrors the federal constitution and states that “[p]rivate property shall not be taken for public use, or damaged, without just compensation.” As [the Court] recently clarified, the damage clause of our constitution provides a remedy additional to that provided by the federal constitution. *Krier*, 2006 SD 10, ¶¶ 23-25, 709 NW2d at 845. *Krier* reaffirmed that:

[I]t is a basic rule of this jurisdiction governing compensation for consequential damages that ... *because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole.*

Id. ¶ 23, 709 NW2d at 847 [Emphasis added] (citing, *State Hwy. Comm'n v. Bloom*, 77 S.D. 452, 461, 93 NW2d 572, 577 (1958)).

Accordingly, the damage clause of the South Dakota Constitution allows ... property owner[s] to seek compensation ‘for the destruction or disturbance of easements of ... air, and of accessibility, or of such other intangible rights as ... enjoy[ed] in connection with

and as incidental to the ownership of the land itself.’ Citing, *Hurley v. State*, 82 S.D. 156, 161, 143 NW2d 722, 725 (1966) (quoting 2 Nichols on Eminent Domain § 6.44).

In the instant case, Appellants submit that BLSD has failed in any meaningful or relevant way to counter their key footnoted facts/argument within their initial brief as outlined on pages 10-13 and, specifically, footnote Nos. 3 through 6.

Moreover, at BLSD’s Brf. pgs. 9-10 it wrongfully claims that Krsnaks presented no evidence of a *per se* physical taking in this case. However, BLSD fails to address Jimmy Krsnak’s concerns about the allowed BLSD sewage seepage [that began in 2012-2013] as related to the Krsnak’s/Linda’s Garden’s Water Analysis documents from 2013-2015 [*see*, initial brief Appendix H-1 through H-15 – uniquely showing extremely and/or dangerously high rates of coliform in Linda’s Garden’s water, as referenced/relied on within Jimmy Krsnak Affidavit, 12/14/16, Appendix F-1-F-2 & *cf.*, Appendix G-1 through G-3; *see also*, February 2, 2017, Summary Judgment MHT at pgs. 11-14; 16-18.].

As argued to the trial court below, Krsnaks continue to submit that they have outlined genuine issues of material facts in the case at bar as related to BLSD’s taking or de facto taking and/or as to the damaging nuisance condition(s) faced by them and contrary to the trial court’s initial erroneous two decisional points (*see/cf.*, key footnotes 3-4, within Appellant’s initial brief at pg. 10). Once again, within the underlying record in this case, Krsnaks offered their fact-based descriptions of their unique and peculiar issues and related problems that they face as their property was/is located within approximately 600 feet of the new intruding and offensive BLSD sewer lagoon.

As such, it’s important to reiterate that Appellants, through Linda Krsnak, have offered uncontroverted factual testimony to the extent that, “*Linda’s Gardens gardening*

or farming operation, has suffered a unique and peculiar injury not a kind suffered by the general public in and around Chester by having the BLSD Lagoon encroaching on your undersigned's southern property boundary. That is, there is no other property owner as close as approximately 500-600 feet from the new sewer lagoon and certainly no other property owner at or near this rural area and - to your Affiant's knowledge - there is no other person or entity in the rural Lake County area that is attempting to operate a gardening business immediately adjacent to a new lagoon." See, Appendix D-1-D-2, Linda Krsnak Affidavit at ¶4; see also, SJ MHT at pgs. 16-18. Contrary to *Krier*, Appellee's brief in the instant case fails to address these unique situation-specific facts for the Krsnaks, as the non-moving party in this case.

Moreover, as to the controlling law in these types of fact-based takings or de facto takings or nuisance cases, Krsnaks continue to point the Court toward a review and contrast of other generally analogous cases like *Lawrence County v. Miller*, 2010 S.D. 60, ¶¶ 26-27, 786 NW2d 360, 370 (De Facto taking analogy between airspace easements over property as compared to the case at bar wherein Plaintiffs are disrupted in the reasonable use of their property by and through the unreasonable adverse effects and stink on their property from the BLSD sewage lagoon near the southern edge of their home and business property.) ("...Under a claim of inverse condemnation, owners are entitled to just compensation for a de facto taking of a portion of their remaining property at the point such a taking actually occurs. *Hurley I*, 81 S.D. 318, 134 NW2d at 784-85. 'Landowners ... have a claim of right to their property. Thus, their allegation that the [County's] actions result in an unconstitutional taking is sufficient to present a justiciable controversy.' *Benson*, 2006 SD 8, ¶ 16, 710 NW2d at 140. Such a claim may be brought

directly by a landowner and does not wait upon a formal condemnation action by the governmental entity which may, or may not, ever occur. *Hurley I*, 81 S.D. 318, 134 NW2d at 784-85. ... A taking of an airspace easement over private property occurs when the actions of the government create a ‘direct and immediate interference with the use and enjoyment of the land.’ [additional citations/comment omitted]. *See generally*, *Fulmer v. State, Dept. of Roads*, 178 Neb. 20, 131 NW2d 657 (1964); *Liddick v. City of Council Bluffs*, 232 Iowa 197, 201, 5 NW2d 361, 365 (“The abutting property owners, however, insist that the [adjacent] viaduct will destroy or seriously interfere with their rights of access ... and to the passage of light and air [to their property], and that these rights are valuable, and are their ‘private property,’ which they have never parted with in any way, or for which they have never been compensated, and that the viaduct will effect a ‘taking’ of these property rights in the constitutional sense, and that payment therefor should be made [for] the property [] taken. ... We agree with the contentions of the abutting owners...”).

While Krsnaks also believe that within the record and within their brief(s) to this Court, that they have sufficiently distinguished the underlying facts herein from the facts outlined within *Krier v. Dell Rapids Twp.*, 2006 SD 10, 709 NW2d 841, they additionally submit as persuasive the legal reasoning underpinning the cases of *Albers v. Los Angeles County*, 62 Cal.2d 250, 263, 398 P.2d 129, 137 (CA 1965) and also *Bacich v. Board of Control of California*, 23 Cal.2d 343, 349, 144 P.2d 818, 822-823 (CA 1943) (“The test frequently mentioned by the authorities, that [the property owner] may recover [only] if he has suffered a damage peculiar to himself and different in kind, as differentiated from degree, from that suffered by the public generally, is of no assistance in the solution of

the problem. If he has a property right and it has been impaired, the damage is necessarily peculiar to himself and is different in kind from that suffered by him as a member of the [p]ublic or by the public generally, for his particular property right as a property owner and not as a member of the public has been damaged.”). The foregoing reasoning can be seen as particularly persuasive and applicable given the specific uniquely fact-driven [professionally appraised] damages as were established and unrefuted in the trial court record herein which BLSD has also failed to address within its brief – as specifically outlined within the Shaykett Appraisal Company MAI appraisal [as shown within Appellant’s initial brief, Appendix E-1 through E-5] of the Krsnak’s property:

Effect of the acquisition on the subject property is the effect on the marketability of the property due to the closeness of the expanded lagoons to the home. There is [sp] now proximity damages to the home. Furthermore, the increase in smell and proximity to the lagoons has an impact on the use of the property as a vegetables garden farm. There is no change in the highest and best use of the residential use of the [Krsnak’s] property, but there is a negative impact on the marketability of both the house and the specialized improvements, so there are damages to the property.

...Distance to the lagoons appears to have the most influence on the [adverse] impact on the properties. [Krsnak’s property] was about 1,100 feet from the original lagoons, but the new lagoon is [only] within 675 feet of [their property]. Also, the surface area of the lagoon[s] doubled in size.

...In the judgement of the appraiser, with the placement of the lagoons closer [to the Krsnak’s property] and the increase in size of the lagoons, the residential improvements at the[ir] property in the after [value] would experience a loss in value of 30 percent. {Amounting to Krsnak’s loss in value of at least **\$82,800**.} [Emphasis added.] See, initial Appendix D-1-D-2; E-2-E-5 (Appraisal Report).

Moreover, Krsnaks submit that BLSD has failed to adequately distinguish the applicable holdings outlined by this Court in *Parsons v. City of Sioux Falls*, 65 S.D. 145, 272 NW 288 (1937), and *Gellert v. City of Madison*, 50 S.D. 559, 210 NW 978 (1926) (Specifically, *Gellert* [again, ironically similarly in Lake County] dealt with leased - not owned property - and this Court’s holding dealt with “large quantities of offensive

[sewage-related] matter to be cast into said stream immediately above the premises occupied by the respondent, and causing the water of said stream, flowing in close proximity to respondent's home, to be so polluted as to give off odors which are extremely offensive and injurious to health and to cause such premises to be uninhabitable, to the injury of [the property owners] in the sum of \$3,000.”), and also *Greer v. City of Lennox*, 79 S.D. 28, 32, 107 NW2d 337, 339 (1961) (In the sense used here a nuisance is a condition which substantially invades and unreasonably interferes with another’s use, possession or enjoyment of [their] land. It may be intentionally or unintentionally created. Citations omitted).

~ CONCLUSION ~

Appellants submit that, by and through the arguments and authorities submitted herein and knowing that this Court must ‘view the evidence most favorably to the [Krsnaks] and resolve reasonable doubts against [BLSD]’ and understanding that “there is ‘no magic formula that enables a court to judge, in every case, whether a given government interference with property is a taking ... Instead, the viability of a takings claim is dependent upon situation-specific factual inquiries.’” [*see, Rupert v. City of Rapid City*, 2013 S.D. 13, ¶10, 827 NW2d at 61; *Schliem v. State ex rel. Dept. of Transp.*, 2016 S.D. 90, ¶7, 888 NW2d 217, 221], they have established that there are - at a minimum - genuine issues of situation-specific material facts in the underlying file issues herein. Krsnaks continue to contend that it was therefore reversible error for summary judgment to have been granted to Appellee/BLSD below and, as a result, Appellants respectfully request this Court to hereafter reverse and remand this matter back to the trial court.

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-25A-66, R. Shawn Tornow, Appellants attorney herein, submits the following:

The foregoing reply brief, not including the signature page as follows, is 11 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 2,981 words and 15,872 characters.

Dated this 6th day of July, 2018.

/s/ R. Shawn Tornow
R. Shawn Tornow

Respectfully submitted this 6th day of July, 2018, in Sioux Falls, S.D.

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CERTIFICATE OF SERVICE:

This is to certify that on this 6th day of July, 2018, your undersigned's office, in addition to e-mailing a copy of Appellant's Reply Brief and, if requested and if necessary, by mailing first-class United States mail, a true and correct copy of Appellant's Brief to Mr. Vince M. Roche and/or Joel R. Rische, Attorneys for Appellee, Davenport, Evans, Hurwitz & Smith, PO Box 1030, Sioux Falls, South Dakota 57101-1030 postage prepaid thereon.

/s/ R. Shawn Tornow