IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27198

STATE OF SOUTH DAKOTA, by and through the South Dakota Department of Transportation and the South Dakota Department of Transportation Commission,

Plaintiff and Appellant,

v.

ROBERT L. MILLER AND THOMAS P. WALSH,

Defendants and Appellees.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

APPELLANT'S BRIEF

Attorneys for Appellant
Karla L. Engle
Special Asst. Attorney General
South Dakota Dept. of Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586

Anthony M. Hohn
Special Asst. Attorney General
Davenport, Evans, Hurwitz & Smith
PO Box 1030
Sioux Falls, SD 57101-1030

Attorneys for Appellees
Mark V. Meierhenry
Clint Sargent
Christopher J. Healy
Meierhenry Sargent, LLP
315 S. Phillips Ave
Sioux Falls, SD 57104

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PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellant, State of South Dakota, is referred to as the "State." Defendants and Appellees Robert L Miller and Thomas P. Walsh, Sr., are referred to collectively as "Landowners." The settled record is denoted "SR." The transcripts of the jury trial are denoted "TT". Transcripts of a hearing are referred to as "HT" followed by the date of the hearing. Trial exhibits will be referred to as "TE" followed by the exhibit number. Materials included in the Appendix will be denoted as "Appx." followed by the tab number and page number.

JURISDICTIONAL STATEMENT

The parties tried this eminent domain action before a jury. On June 27, 2014, the jury entered a verdict of $551,125.00 for the taking and damaging of property owned by Landowners. *SR 1261, Appx. Tab A at 1.* A judgment incorporating the verdict was filed by the Clerk of Courts on July 21, 2014. *SR 1268, Appx. Tab B at 2.* On July 22, 2014, Landowners served notice of entry of the judgment on the State of South Dakota ("the State"). *SR 1273.* The State served a motion for new trial on July 31, 2014, and this motion was filed on August 4, 2014. *SR 1318.* The Court denied this motion by order signed and filed on August 21, 2014. *SR 1335.* Notice of entry of the order denying a new trial was served on August 27, 2014, and filed on August 29, 2014. *SR 1441.* The State served its notice of appeal and docketing statement on August 28, 2014. *SR 1445-1446.* The notice of appeal and docketing statement were filed on September 2, 2014. *Id.* Jurisdiction is proper in this Court under SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

Issue 1. Did the trial court abuse its discretion by allowing testimony about how

diversion of travel to and from Cliff Avenue diminished the value of Landowners' property located nearly 500 feet away?

The trial court ruled that Landowners could present evidence about the diminished value of Landowners' property due to the closure of a public highway intersection located nearly 500 feet away from Landowners' property.

Darnall v. State, 108 N.W.2d 201 (S.D. 1961)

State v. Henrikson, 1996 S.D. 62, 548 N.W.2d 806

U.S. Const. amend. V

S.D. Const. Art. VI, § 13

Issue 2. Did the trial court abuse its discretion by modifying the pattern jury instruction to instruct the jury to determine the value of Landowners' property before and after "the project" rather than before and after "the taking?"

The trial court replaced the reference to "the taking" with "the project" in the pattern jury instruction concerning the before and after method of calculating eminent domain damages.

Darnall v. State, 108 N.W.2d 201 (S.D. 1961)

State v. Henrikson, 1996 S.D. 62, 548 N.W.2d 806

State Highway Commission v. Fortune, 91 N.W.2d 675 (S.D. 1958)

Issue 3. Did the trial court abuse its discretion by prohibiting the State's expert from offering testimony about why Lot 15 did not have unity of use with the rest of Landowners' property and therefore should not be included in the property valued for purposes of just compensation?

The trial court prohibited the State's expert from testifying about why Lot 15 did not have the requisite unity of use with Landowner's remaining property so as to be included in the parcel valued by the jury.

State Highway Commission v. Bloom, 93 N.W.2d 572 (S.D. 1958)

Hurley v. State, 82 S.D. 156, 143 N.W.2d 722 (1966)

Nebraska Elec. Generation and Transmission Co-op., Inc. v. Tinant, 241 N.W.2d 134 (S.D. 1976)

Basin Elec. Power Co-op. v. Poindexter, 305 N.W.2d 46 (S.D. 1981)

Issue 4. Where Landowners offered testimony that Lot 15 would be put to a use separate and distinct from the use of the rest of their property, did the trial court err in ruling as a matter of law that Lot 15 should be included in the larger parcel for purposes of valuation and compensation?

The trial court ruled as a matter of law that Lot 15 should be included in the valuation parcel and instructed the jury accordingly.

State Highway Commission v. Bloom, 93 N.W.2d 572 (S.D. 1958)

State Highway Commission v. Fortune, 91 N.W.2d 675 (S.D. 1958)

Hurley v. State, 82 S.D. 156, 143 N.W.2d 722 (1966)

Nebraska Elec. Generation and Transmission Co-op., Inc. v. Tinant, 241 N.W.2d 134 (S.D. 1976)

STATEMENT OF THE CASE

The State appeals from a jury verdict in this eminent domain action tried in the Second Judicial Circuit in Minnehaha County. The Honorable Susan Sabers presided.

STATEMENT OF THE FACTS

The State planned a project to reconstruct Cliff Avenue (also known as South Dakota Highway 115) and its interchange with Interstate 90. *SR 1, 65.* Before the State's project, the intersection of Cliff Avenue and 63rd Street was less than 100 feet from the eastbound on-ramp to Interstate 90. *SR 66.* To enhance safe and efficient traffic movements on Cliff Avenue and the on-ramp, the State decided to eliminate the intersection as part of its project. *Id.*

Landowners own real property ("the Property") south of the interchange on-ramp. *TE 200.* The Property consists of Lots 5, 6, 7, 8 and 15 of North Side Gardens. *Id.; TT 103.* Lots 5 through 8 are immediately south of the Interstate 90 on-ramp and north of 63rd Street. *TE 200.* Lot 15 sits south of 63rd Street. *Id.* None of these lots abut Cliff Avenue and none of these lots have direct access to Interstate 90, which is a controlled access highway. *Id.; SR 12-15.* The Property is located 492 feet east of the intersection of Cliff Avenue and 63rd Street. *Exhibit B to the Affidavit of Mark Leiferman, Plaintiff's Physical Exhibit filed August 16, 2013, attached as Appx. Tab C at 7.*

An aerial photo showing the Property was admitted into evidence and a copy of photo is attached to this Brief as Appendix Tab D. *TE 200, attached as Appx. Tab D at 8; TT 102-103.* The photo shows the Property outlined in yellow and also shows the pre-project street system. *TE 200, Appx. Tab D at 8; TT 103.*

Lots 5, 6, 7, and 8 are vacant. *TE 56; TT 333.* On Lot 15, there is a shed used for storage. *TT 135, 335-336.* All of the lots are zoned for commercial use. *TT 327.*

To re-construct the eastbound on-ramp to Interstate 90, the State required a small temporary and permanent easement over Lots 6, 7, and 8. *TT 103-105; TE 203 and 204.*

The State did not dispute the compensability of those takings. *SR 1.* Appendix Tab E contains a diagram depicting the easement areas across the Property. *TT 103-105; TE 204.* There was no permanent or temporary taking of land in Lots 5 or 15. *TT 327.*

Before the State's project, drivers wishing to access the Property came from Cliff Avenue, turned east onto 63rd Street at the Cliff Avenue/63rd Street intersection, and then proceeded down 63rd Street to their destination. *SR 66.* Before the State's project, 63rd Street was a narrow gravel road that intersected with Cliff Avenue and extended roughly 1,282 feet, ending in a cul-de-sac roughly 280 feet east of the Property. *SR 66.* An aerial photo showing distance measurements between the Property and various points is attached at Appendix Tab C.

Before and after the State's project, Wayland Avenue intersects with 63rd Street at the boundary between the Property and the neighbor to the east. *SR 72, Appx. Tab D.* Wayland Avenue is a narrow dirt road that is sometimes not passable. *SR 72.* Because of its poor condition, travelers likely did not use Wayland Avenue to access the Property. *SR 66.*

As part of its project, the State built a 300-foot asphalt extension of 63rd Street to connect with another segment of 63rd Street to the east. *SR 66; TE 207.* Once this extension was built, the segment of 63rd Street that runs along the Property became connected with National Avenue. *SR 66; TT 508-509; TE 207.* National Avenue runs roughly north and south through an industrial park and then intersects with East 60th Street North ("60th Street"), a major thoroughfare. *SR 66.* Another north-south road further to the east, Gulby Avenue, also connected 63rd Street and 60th Street. *Id.; TE 207.*

Appendix Tab F contains an aerial photo with the location of the new 63rd Street extension superimposed. *TE 207 at Appx. Tab C.*

After this extension of 63rd Street was built, the State closed the Cliff Avenue/63rd Street intersection. *TT 508-510.* Both before and after the State's project, the only direct ingress and egress to Landowners' property is via 63rd Street. *SR 66-67.* Because of the State's closure of the Cliff Avenue/63rd Street intersection, drivers wishing to access the Property had to take a new route to reach 63rd Street after the project. *Id.* Rather than coming from Cliff Avenue and turning east onto 63rd Street at the former intersection, drivers now come from 60th Street and travel north on National Avenue or Gulby Avenue, then turn west onto 63rd Street. *SR 66.*

This new route caused a change in travel distances to the Property. Drivers coming from the east on 60th Street will likely travel about 1,000 feet less to reach the Property. *SR 66.* For drivers coming from the west on 60th Street or the south on Cliff Avenue, they will likely travel about 1,650 feet farther to reach the Property. *SR 66-67.* Finally, drivers coming from the north on Cliff Avenue will likely travel about 3,600 feet farther to reach the Property. *SR 67.*

In his appraisal report, Landowners' appraiser attributed substantial damages to the Property due to the State's closure of the Cliff Avenue/63rd Street intersection, even though the intersection was nearly 500 feet away from the property. *SR 73.* According to Landowners' appraiser, the loss of a shorter route to and from bustling Cliff Avenue, with its close proximity to the interstate, changed the highest and best use of the property and sharply reduced the land values. *Id.* The State filed a motion for partial summary judgment, alleging the closure of the intersection did not amount to a compensable taking

or damaging of the property. *SR 58; See the State's Statement of Undisputed Material Facts, attached as Appx. Tab K.* The trial court granted the State's motion, having determined the "closure of the intersection here at issue did not effect a compensable taking of [Landowners'] property." *Order Granting Plaintiff's Motion for Partial Summary Judgment, SR 211, attached as Appx. Tab G at 22.* The trial court entered an order prohibiting the parties from presenting evidence about damages to Landowners' property due to the closure of the intersection and also ordering that "damages relating to the intersection closure may not be considered by the jury in awarding consequential damages[.]" *SR 201, Appx. Tab G at 11.*

After the court's ruling, Landowners produced a new appraisal report that continued to attribute damages to "elimination of rights of access from Cliff Avenue." *Exh. 1 to Second Decl. of Counsel Karla Engle* at 1, *SR 444.* The State filed a second motion for partial summary judgment, alleging Landowners had no other access rights to Cliff Avenue that were taken or damaged by the State. *SR 332.* The State argued Landowners could not claim compensation due to the State's construction of a median in Cliff Avenue. *HT January 13, 2014, at 18-20, Appx. Tab H at 26-28.* The State also argued Landowners did not suffer a compensable taking when a neighbor, Kelly Inns, LTD, abandoned hotel development plans because of the State's project. *Id.* Although the hotel plans had contemplated establishing an alternate access route between Cliff Avenue and the Kelly Inns property, the State asserted that Landowners could not claim the infringement of a private property right due to their neighbor's frustrated development plans. *Id.* In addition, the State filed a motion in limine seeking to exclude the valuation

opinion of Landowners' expert, because the opinion was based on these non-compensable items of loss. *SR 883.*

The circuit court partially granted and partially denied the second summary judgment motion. *SR 915-916, Appx. Tab I at 35.* The court reaffirmed its conclusion that Landowners had no private property right of access to Cliff Avenue, but interpreted its prior ruling as only disallowing "stand-alone" damages for closure of the intersection. *HT January 13, 2014, at 45-46, Appx. Tab H at 32-33; SR 916, Appx. Tab I at 35.* Contradicting its previous decision, the court entered a new order, which allowed Landowners to present evidence and collect compensation for depreciated property value caused by the State's diversion of travel to and from Cliff Avenue. *Id.*

At trial, the circuit court allowed the State to assert a standing objection for each witness who offered testimony about depreciated property values due to loss of access to Cliff Avenue. *TT 1-4, Appx. Tab J at 38-41.* Over the State's objection, Landowner Miller testified that the Property was diminished in value by $1,017,460.00, due mainly to diminished access to and from Cliff Avenue. *TT 443-445; TT 447-449, Appx. Tab J at 58-60 and 62-64.* Also over the State's objection, Landowners' appraiser also testified about how the State's project changed the access route to the Property and sharply diminished its value. *TT 368-369, Appx. Tab J at 49-50.* According to Landowners' expert, the State's project changed the Property's highest and best use from a high-end commercial property to a low-end industrial property, resulting in a diminution in value of $539,300 after the project. *TT 377-378, Appx. Tab J at 52-53.* Landowner's appraiser testified that the change in value was attributed to the shorter access route to Cliff Avenue. *TT 409-410, Appx. Tab J at 56-57.*

The jury entered a verdict of $551,125. *SR 1261, Appx. Tab A at 1.* The State appeals on the grounds the trial court committed reversible error. The prejudicial error consists of: (1) admitting evidence of decreased property value resulting from the State's diversion of travel to and from Cliff Avenue; (2) offering an instruction that allowed the jury to award compensation for damage due to "the project" rather than "the taking"; (3) preventing the State's expert from offering testimony about his reasons for excluding Lot 15 from the unit of property to be valued; and (4) deciding as a matter of law that Lot 15 should be included in the valuation parcel, even though that lot was intended to be used for separate and distinct uses than the property burdened by the State's easements.

Additional facts will be discussed as they relate to the State's arguments.

ARGUMENT

ISSUE 1.

Did the trial court abuse its discretion by allowing testimony about how diversion of travel to and from Cliff Avenue diminished the value of Landowners' property located nearly 500 feet away?

A. The Standard of Review

The taking or damaging of a private property right is an essential element of a claim for compensation under the state and federal constitutions. U.S. Const. amend. V. ("...nor shall private property be taken for public use, without just compensation."); S.D. Const. Article VI, § 13 ("Private property shall not be taken for public use, or damaged, without just compensation...."). The question of whether there has been a taking or damaging of private property is a question of law for the court, not a jury, to decide. Rupert v. City of Rapid City, 2013 SD 13, ¶ 29, 827 NW2d 55, 67. Legal questions are reviewed de novo. *In re Woodruff,* 1997 S.D. 95, ¶ 9, 567 N.W.2d 226, 228.

The standard of review on evidentiary rulings is well-established. A circuit court's ruling is "presumed correct and will not be reversed unless there is a clear abuse of discretion." *State v. Berget,* 2014 S.D. 61, ¶ 13, 853 N.W.2d 45, 51 (citations and quotations omitted). "An abuse of discretion occurs when the circuit court exercises its discretion to an end or purpose not justified by, and clearly against reason and evidence. *Id.* (citations and quotations omitted). This Court will not overturn the circuit court's abuse of discretion unless there is also prejudicial error. *Id.* To show prejudicial error, an appellant must establish affirmatively from the record that the jury probably would have returned a different verdict if the alleged error had not occurred. *Supreme Pork, Inc. v. Master Blaster, Inc.,* 2009 S.D. 20, 764 N.W.2d 474, 491 (citing *Sander v. Geib, Elston, Frost Professional Ass'n,* 506 N.W.2d 107, 113 (S.D. 1993)). This Court, however, reviews de novo the circuit court's application of the law underlying the circuit court's exercise of discretion. *Berget,* 2014 S.D. 6, ¶13, 853 N.W.2d at 51 (citing *State v. Rolfe,* 2013 S.D. 2, ¶ 15, 825 N.W.2d 901, 905).

B. The trial court correctly decided the Property did not enjoy the same access rights to Cliff Avenue as property that actually abuts Cliff Avenue.

The taking or damaging of a private property right is a crucial element for compensation under eminent domain law. U.S. Const. amend. V. ("...nor shall private property be taken for public use, without just compensation."); S.D. Const. Article VI, § 13 ("Private property shall not be taken for public use, or damaged, without just compensation...."). South Dakota law recognizes that landowners have special rights of reasonable access to conventional streets that abut their property. "It is universally recognized that an owner of land abutting on a conventional street or highway has certain private rights in the street or highway distinct from that of the general public." *Hurley v.*

State, 82 S.D. 156, 161, 143 N.W.2d 722, 725 (1966) (quoting *State Hwy. Comm'n v. Bloom,* 77 S.D. 452, 461, 93 N.W.2d 572, 577 (1958)). *See also Darnall v. State,* 108 N.W.2d 201, 204 (S.D. 1961)("When a conventional highway is established, an abutting owner has a right separate and distinct from that of the general public to its use. This includes the right of access, ingress and egress to the highway subject only to the easement of the public.") An abutting landowner's right of access, however, "is not absolute, but is subject to reasonable regulation and restriction by the state under its police power in the public interest." *Hurley,* 82 S.D. at 160, 143 N.W.2d at 724.

Landowners' Property does not abut Cliff Avenue – the nearest lot sits 492 feet east of the Cliff Avenue intersection with 63rd Street. *Appx. Tab C at 7, Exhibit B to the Affidavit of Mark Leiferman, Plaintiff's Physical Exhibit filed August 16, 2013.* Because of this, the trial court correctly concluded that Landowners could not claim the special access rights that inure to owners whose property abuts Cliff Avenue.

C. The trial court correctly decided that the closure of the intersection was not a compensable taking or damaging of private property.

Under this state's consequential damages rule, even if government action results in no physical invasion of real property, the owners can recover compensation if they "can prove 'the consequential injury is peculiar to [their] land and not of a kind suffered by the public as a whole.'" *Krier v. Dell Rapids Township,* 2006 SD 10, ¶ 26, 709 N.W.2d 841, 847-48 (quoting *Bloom,* 77 S.D. at 461, 93 N.W.2d at 577) (alteration in original). The owners' injury "must be different in kind and not merely in degree from that experienced by the general public." *Id.* ¶ 26, 709 N.W.2d at 848 (quoting *Hurley,* 82 S.D. at 163, 143 N.W.2d at 726).

The trial court correctly determined that the closure of the intersection was not a peculiar injury to Landowner's property that was different in kind from the injury suffered by the general public. The trial court reasoned that this Court has previously rejected an owner's claim for compensation due to lack of access to a nearby, but not abutting, roadway. In *Darnall v. State,* 108 NW2d 201 (SD 1961), the Darnalls owned a café, cabins and gas pump along a state highway. They sought compensation because a new interstate highway was built without a direct connection to the existing highway that fronted their property. *Id.* at 202. A curb and sidewalk separated this abutting highway from the interstate, preventing traffic from the abutting highway from entering the interstate and preventing traffic from the interstate from entering the abutting highway, except at two interchanges nearly a mile north and south of the Darnalls' property. *Id.* As a result, interstate traffic had a long circuitous route to reach the Darnalls' land. *Id.* Meanwhile, direct access from the Darnalls' property to the abutting highway remained unchanged. *Id.*

In disallowing the Darnalls' claim for compensation, the Court reasoned that property owners cannot claim a right to dictate the layout of the street system or insist on ready access to the traffic that travels upon it. "The construction of a highway past a place of business gives owners no vested right to insist that it remain there as a changeless road in a changing world…; no legal damage results though the traffic may be diverted by authorities and incidental loss result. A highway may be relocated either by marking or construction which would direct traffic some distance away from a business mainly dependent on it." *Id. at 205 (citations omitted).*

Drawing a distinction between a compensable taking and the non-compensable exercise of police power, the *Darnall* Court identified a litany of governmental actions which may divert traffic but result in no compensable taking or damaging of private property.

> While they may adversely affect an established business, relocations of a highway, prohibitions against crossing it or against left and U turns, the designation of one-way streets and other similar restrictions and regulations have been upheld as proper exercises of the police power of the state and not of the power of eminent domain. As such they are not compensable....Curbs or median strips dividing a street or highway which prevent motorists from crossing it to reach a motel or garage, except by a more circuitous route, have been approved and held not to be [a] basis for an award of damages....Though one change is accomplished by signs and the other by construction, both are based on the police power of the state; both bring the same result and are *damnum absque injuria.*

Darnall, 108 NW2d at 206 (citations omitted).

The trial court also correctly reasoned that *State v. Henrikson,* 1996 S.D. 62, 548 N.W2d 806, prohibits compensation for mere diversion of travel. In *Henrikson,* the State constructed a median in the abutting street, which prevented left turns from the street into the owner's property. Both owners testified that the inability to turn left into the property, because of the median, decreased the value of the property. *Id.* at ¶12-13. The State objected and moved to strike this testimony on the grounds that damages due to the median were not compensable. *Id. at ¶ 18.* The trial court overruled the objection, but attempted to cure the problem by instructing the jury that the median was not compensable damage. *Id.* The jury returned a verdict that could only be justified by the valuation opinions offered by the owners, which included damages attributable to the median. *Id. at ¶ 21*

This Court concluded the trial court's admission of the landowner's testimony was prejudicial error requiring a new trial. *Id.* "There is no way to justify this verdict other than the testimony of [owners]. As they included improper damages for the median, which are not compensable under *Darnall* and *Hurley,* it was error for the trial court to refuse to strike their testimony[.]" *Id.* at ¶21, 548 N.W.2d at 811.

South Dakota's refusal to allow compensation for mere diversion of travel is not an anomalous result. Courts across this nation have distinguished between "...general rights, which [landowners] have in common with the public, and special rights, which they hold by virtue of their ownership of this property. In order to constitute a taking or damaging of their property, it is the special rights that must have been violated." *Georgia Dept. of Transportation v. Bae,* 738 S.E.2d 682, 683 (Ga. Ct. App. 2013) (citing *Tift County v. Smith,* 131 S.E.2d 527 (Ga. 1963)).

> Succinctly, the restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation....The landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway, to which they have access, is subject to the same police power regulations as every other member of the traveling public. Re-routing and diversion of traffic are police power regulations.

South Carolina State Highway Department v. Carodale Associates, 235 S.E. 2d 127, 129 (S.C. 1977) (citations omitted). *See also Salvation Army v. Ohio Dept. of Transportation,* 2005 WL 1252545 (Ohio Ct. App. 2005) (closure of intersection abutting property, which caused patrons to travel circuitous access route of 1.25 miles to reach property, was not compensable because losing an intersection of two public roads is an inconvenience shared with the general public); *Georgia Dept. of Transportation v. Durpo,* 469 SE2d 404 (Ga. App. 1996) ("If the property owner has the same access to the public road or

highway which abuts his property, as he did before the road closing, then his damage is not special....Circuity of travel and the inconvenience caused by traffic flow and traffic patterns are not compensable as takings."); *Courteaus, Inc. v. State,* 268 N.W.2d 65 (Minn. 1978) ("Those who are not abutting owners have no right to damages merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route."); *Illinois v. Greenwell*, 359 N.E.2d 780, 784 (Ill. App. Ct. 1977) (disallowing compensation for closure of road one-quarter mile east of property because direct access to road was unchanged and circuity of travel is not compensable); *Warren v. Iowa State Highway Commission,* 93 N.W.2d 60, 67-68 (Iowa 1958) (ruling business owners may find themselves left in a by-water of commerce when the route of a highway is changed so the main flow of traffic is diverted, but this gives them no claim for damages against the highway authority which diverted the traffic).

Before the State's project, Landowners had a short route from their property to Cliff Avenue's busy thoroughfare. After the project, the Landowners' Property lies in a cul-de-sac that no longer allows them to travel the short distance west to Cliff Avenue. Instead, landowners will exit their properties onto 63rd Street as they always did, but they will now have to travel east and south before they reach another main thoroughfare, 60th Street North. The shorter route to Cliff Avenue will be lost, but Landowners' immediate access to the abutting 63rd Street is unchanged. Having lost no direct rights of access to this abutting street, Landowners' injury is no different than the inconvenience the public will experience when a favored route of travel is replaced with a more circuitous route.

Landowners even conceded that they could not claim a private property interest in the Cliff Avenue/63rd Street intersection. *SR 211, Appx. Tab G at 22.* In its initial ruling, the trial court deemed this to be a fatal admission:

> [Landowners] maintain that their concession of no intersection-related property rights has "nothing to do with the 'evidence' of such closure and the production of evidence of the damage to landowner's real estate." ...Under the condemnation law of this State, the Court finds that that concession precludes the jury's consideration of any closure-related diminution in value in awarding damages. "[W]here there is no physical taking and the owner's access to the highway on which he abuts is not unreasonably diminished or interfered with, his loss is due to diversion of traffic, a lawful exercise of the police power and there can be no recovery." *Henrikson,* 548 N.W.2d at 810 (citing *Darnall v. State,* 108 N.W.2d 201, 205 (1961)).

Id.

Unable to show any special injury distinct from the burden borne by the public, the trial court's initial ruling was correct – Landowners should have been prohibited from offering evidence and collecting compensation for diminished land values due to the closure of the Cliff Avenue/63rd Street intersection.

D. The abandonment of hotel development plans by Kelly Inns as a result of the State's project did not equate to the infringement of private access rights held by Landowners.

Landowners presented evidence that their Property was devalued because, due to the State's project, Kelly Inns did not build a hotel which may have established an alternate access route between Cliff Avenue and the Kelly Inns' land. *TT 368-369; TT 409-410; TT 443-445; TT 447-449.* The contemplated access route would have extended from Cliff Avenue, over a Perkins Restaurant property, to Kelly Inns' land. *TE 8, attached as Appx. Tab L.* It was undisputed that Landowners' Property enjoyed no easement or other access rights over the Kelly Inns land at the time of the taking. *TT*

159-160, 286-289. Although Landowners presented evidence that Kelly Inns intended to purchase Lot 15 for part of its hotel, this purchase was never consummated. *TT 252.* Kelly Inns decided to abandon its hotel project and put its vacant land up for sale in October, 2010, over a year and a half before the taking of Landowners' Property. *TT 254-255; SR 1250.*

Possibilities are not property rights. To support a claim for compensation, Landowners must show interference with a right that existed as of the date of taking. *City of Sioux Falls v. Kelley,* 513 N.W.2d 97, 102 (S.D. 1994) ("The fair market value of property is to be determined at the time of the taking.") A speculative or uncertain possibility that Landowners might have secured the right to use Kelly Inns' proposed access route will not suffice. *Nebraska Elec. Generation & Transmission Coop., Inc. v. Tinant,* 90 S.D. 284, 291-292, 241 N.W.2d 134, 138 (S.D. 1976)(noting that elements of damage must not be remote, speculative or uncertain; they must be direct and proximate, and not such as are merely possible.). Nor can a neighbor's decision to forgo development, because of an upcoming government project, result in a compensable taking of Landowners' Property. *See City of Brookings v. Mills,* 412 N.W.2d 497, 501 (S.D. 1987) (disallowing compensation due to an owner's voluntary decision not to pursue development plans because of a planned government project).

In this case, Landowners had nothing more than potential property rights. Those rights never came to fruition. As such, damages based on those hypothetical rights are improper. Similarly, Landowners cannot be awarded damages based on a neighbor's potential development project that was later abandoned, whatever the reason.

E. Once the trial court determined Landowners held no private property rights to Cliff Avenue, it was reversible error to allow evidence about the diminution in value of the Property caused by diversion of traffic to and from Cliff Avenue.

After properly determining Landowners had no access rights to Cliff Avenue, the trial court committed the same error that led to reversal in *Darnall* and *Henrikson* -- allowing testimony about how non-compensable diversion of traffic had devalued the Property. In this case, the State is taking the precise action the *Darnall* court reasoned was not a compensable taking – installing a curb preventing movements from one roadway to another. Landowners' direct access to 63rd Street is unchanged, even though Cliff Avenue traffic may very well pass by due to the new route those travelers must take to reach Landowners' property. As the Court observed in *Darnall,* any resulting reduction in land values "is due to diversion of traffic, a lawful exercise of the police power and there can be no recovery." *Darnall,* 108 N.W.2d *at 207.* Consequently, the trial court erred as a matter of law when it permitted testimony about losses due to diversion of traffic to and from Cliff Avenue.

The trial court's allowance of this testimony is also inconsistent with the ruling in *Henrikson,* which deemed admission of such evidence to be reversible error. *Henrikson,* 1996 S.D. 62, ¶21, 548 N.W.2d 806, 811. As in *Henrikson,* the jury's verdict proves that compensation was awarded for diversion of travel. In the course of this trial, three witnesses gave their opinion as to the amount of Landowners' loss. John Schmick, the State's appraiser, testified the value of the loss was $27,200. *TT 594, Appx. Tab J at 77.* Schmick attributed no severance damages to Property. *TT 591- 594.* In his opinion, the depreciated value was solely the result of: (1) the square foot value of the permanent easement area; and (2) the value of the temporary deprivation of the land needed for the

temporary easement. *Id.* Dan Mueller, the Landowners' expert, testified the damage suffered by Landowners was $539,300, due in part to the closure of the intersection and the neighbor's decision, as a result of the project, not to build a second access route to Cliff Avenue. *TT 368-370, 378, Appx. Tab J at 49-51 and 53.* Finally, Landowner Miller testified that the Property sustained damages totaling $1,017,460, also because of the lost access routes to Cliff Avenue. *TT 444-448, Appx. Tab J at 59-63.* The jury returned a verdict of $551,125. *SR 1261.* There is no way to justify this verdict other than by the jury accepting the opinions of Mueller and Miller, which were almost exclusively based on the loss of an existing and potential access route to Cliff Avenue.

In this case, the trial court made two legally inconsistent rulings. On the one hand, the trial court determined Landowners had no private property rights to Cliff Avenue, a street located 492 feet away from Landowners' Property. On the other hand, the trial court allowed Landowners to present evidence and collect compensation for the diversion of traffic to and from Cliff Avenue. These rulings cannot possibly be reconciled with each other or with the law in South Dakota.

Our state and federal constitutions require the taking or damaging of a private property right before compensation is allowed. The trial court abused its discretion when it allowed testimony about damages caused by diversion of travel without any infringement of a private property right. The State was clearly prejudiced by the admission of this evidence, because the jury's verdict can only be supported by this improper damages testimony. Due to this prejudicial error, the State requests reversal and remand for a new trial.

Issue 2.

Did the trial court abuse its discretion by modifying the pattern jury instruction to instruct the jury to determine the value of Landowners' property before and after "the project" rather than before and after "the taking"?

A. Standard of Review.

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions. To constitute reversible error, an instruction must be shown to be both erroneous and prejudicial, such that in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. Accordingly, jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient. This is a question of law reviewed de novo.

State v Whistler, 2014 S.D. 58, ¶ 13, 851 N.W.2d 905, 910 (citations and quotations omitted).

B. The jury instructions were an incorrect and conflicting statement of the law.

"The instructions to the jury should be definite and certain as applied to the facts of the case. A term should not be so used that doubt can arise as to its meaning and application to the facts." *State Highway Commission v. Fortune,* 91 N.W.2d 675, 686 (S.D. 1958) (citing 53 Am.Jur., Trial, § 545).

Over the State's objection, the trial court modified Instruction 7, which was based on Civil Pattern Jury Instruction 50-90-20. *Instruction 7, SR 1252, attached as Appx. Tab M; TT 662-663.* The court's modification replaced the reference to "the taking" with "the project." *Civil Pattern Jury Instruction 50-90-20, attached as Appx. Tab N; SR 1252.* Rather than instructing the jury to assign a value to the Property before "the taking" and after "the taking" and then award the difference, the modified instruction told the jury to

determine the value before "the project" and after "the project" and then award the difference. *Id.; Ibid.*

The trial court's modification of Instruction 7 was inconsistent with the law. Our state and federal constitutions and this Court's precedent require a compensable injury before owners can collect compensation for governmental actions. *Henrikson,* 1996 S.D. 62, ¶21, 548 N.W.2d at 811; *Darnall,* 108 N.W.2d at 207.

By replacing the reference to "the taking" with "the project," the jury was not required to tie damages to a compensable taking by the government. Instead, the modified instruction improperly permitted the jury to award compensation for *any* aspect of the State's project, including non-compensable diversion of travel. Furthermore, the taking of Landowners' property – a permanent and a temporary easement – was easily ascertainable. Nonetheless, the jury was instructed to consider the State's entire project. Such an instruction amounts to an abuse of discretion.

The trial court also erred in giving Instruction 7 because it conflicted with another instruction. On the one hand, Instruction 7 instructs the jury to award the difference in the Property's value before and after "the project," and it was undisputed that the State closed the intersection as part of the project. *SR 1252, Appx. Tab M.* On the other hand, the trial court gave the jury Instruction 12, which told the jury that Landowners were not entitled to damages for the closing of the Cliff Avenue/63rd Street intersection. *Instruction 12, SR 1257, attached as Appx. Tab O.* The result was two highly confusing instructions.

The inability to reconcile the instructions is demonstrated by the circuit court's discussion with counsel during settlement of the instructions. The court told

Landowners' counsel that the apparent conflict could be resolved by telling the jury that the intersection closure must be part of the diminution in value of the property.

> THE COURT: I leave it to argument, Mr. Sargent, where you can tell the jury, you're right, it's not a stand-alone but – well, not that you'll say that to the jury – but it is inherently part of the consequential damages and the depreciation to the remaining tract.

TT 641, Appx. Tab J at 80.

In contrast, the trial court prohibited the State from arguing that Instruction 12 prevented the jury from awarding compensation for the intersection closure.

> THE COURT: ...The instruction to which landowners are objecting says that the jury cannot award damages for the closure of the intersection. It does not say they cannot consider it. It does not say they cannot consider it as part of consequential damages or the diminution in value to the remaining tract.
>
> If the State tells the jury that the jury cannot consider it and you object, Mr. Sargent, I'm going to strike the argument. I don't think it's fair to say that they can't consider it.

TT 643, Appx. Tab J at 82.

Because the use of the term "project" in place of "taking" resulted in an incorrect statement of the law that also conflicted with another instruction, the trial court abused its discretion by giving Instruction 7.

The prejudicial effect of the erroneous Instruction 7 is demonstrated by Landowners' counsel's closing arguments and the jury's verdict. Landowners' counsel specifically drew the jury's attention to Instruction 7 and emphasized that the jury must value the property before and after the "project."

> Instruction Number 7 is the before and after rule that Mr. Meierhenry described to you in opening statement, the language that he used. You are to decide this case determining the before value – that's the first thing that you have to do – immediately before, but here's the important part, and unaffected by the project....

> Then the second thing you do is you look at it, okay, now after the project and affected by the project. Well, then we know that we've got totally different access[.]"

TT 670, Appx. Tab J at 88. Because Landowners relied on the erroneous aspects of Instruction 7 in their closing argument, it's likely the improper instruction influenced the jury's verdict. The prejudicial effect of the instruction is further substantiated by the verdict, which can only be justified by evidence that included improper damages for loss of access routes to and from Cliff Avenue. *See Henrikson,* 1996 S.D. 62, ¶21, 548 N.W.2d at 811 (reversing and remanding for new trial where jury's verdict could only be justified based on testimony that included improper severance damages for the median). *See also Darnall,* 79 S.D. 59, 108 N.W.2d 201 (S.D. 1961).

Because Instruction 7 was incorrect, conflicting and prejudicial, the State asks this Court to find reversible error and remand for a new trial.

Issue 3.

Did the trial court abuse its discretion by prohibiting the State's expert from offering testimony about why Lot 15 did not have unity of use with the rest of Landowners' property and therefore should not be included in the property valued for purposes of just compensation?

A. Standard of Review.

Review of a challenge to an evidentiary ruling "requires a two-step process; first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a prejudicial error that 'in all probability' affected the jury's conclusion." *Supreme Pork, Inc. v. Master Blaster, Inc.,* 2009 S.D. 20, ¶ 59, 764 N.W.2d 474, 491 (quotations in original).

In this case, the Court abused its discretion by prohibiting the State's appraiser from addressing an essential aspect of his valuation opinion. Further, that ruling affected the jury's verdict.

B. Eminent domain law requires that all lots valued as a single parcel be devoted to a single use.

When the State effects a partial taking of land and the parties disagree about the remaining tracts which have been devalued, the jury is required to determine the issue of what constitutes the parcel for purposes of valuation and damage. *State Highway Commission v. Bloom,* 93 N.W.2d 572, 576 (S.D. 1958). In deciding the issue, the jury considers a three-factor test consisting of: (1) unity of ownership; (2) physical contiguity; and (3) unity of use. *Hurley,* 82 S.D. at 164, 143 N.W.2d at 727. Unless there is no dispute of facts, the question of what constitutes the parcel for purposes of valuation and compensation is a question of fact for the jury. *Tinant,* 241 N.W.2d at 139.

C. The trial court erroneously concluded that it had already decided the parcel issue before trial.

When the State filed this condemnation action, it identified Lots 5, 6, 7, and 8 as the property that should be valued for purposes of just compensation. *SR 18.* Landowners filed a *Motion to Permit Evidence of the Parcel,* requesting that they be allowed to present evidence to the jury that Lot 15 be included with Lots 5 through 8 in the valuation parcel. *SR 305, attached as Appx. Tab P.* The State did not oppose Landowners' request to permit the jury to decide whether Lot 15, which was separated from the other lots by 63rd Street, had the requisite unity of use to be included in the valuation parcel. *HT January 13, 2014 at 34-35, 39, Appx. Tab H at 31-33.* Although the State was unwilling to concede that Lot 15 was conclusively part of the valuation

unit, the State and Landowners agreed this would be a factual issue for the jury at trial. *Id.; SR 305, Appx. Tab P.* Landowners did not move for summary judgment on the issue.

After the hearing, the Court entered an order stating, "Defendant's Motion to Permit Evidence of "The Parcel", filed in Civ. 12-1860, is **GRANTED**." *SR 915-916, Appx. Tab I at 35.* (emphasis in original). Based on that order, Landowners could present evidence of what the valuation parcel should be.

At trial, Landowner's appraisal expert testified that he believed Lot 15 should be included with Lots 5 through 8 as a single unit to be valued by the jury, even though Lot 15 was across the street from the other lots. *TT 327-328, Appx. Tab J at 47-48.* He explained the three-factor test for deciding the parcel of land to be valued and also discussed his reasons for concluding the unity of use factor was satisfied. *Id.* He offered all of this testimony without any interruption from the trial court.

In the State's case, the State sought to elicit testimony from its appraisal expert that Lot 15 should not be included in the valuation parcel, because it was not part of a single or unified use with the other lots. On its own, the trial court interrupted the testimony and, after a short bench conference, called a break in the proceedings. *TT 535, Appx. Tab J at 66.* After dismissing the jury, the trial court, for the first time, stated that its prior ruling on Landowners' Motion to Permit Evidence of the Parcel precluded the State from offering testimony that Lot 15 was not part of the larger parcel taken or damaged by the State. *TT 535-536, Appx. Tab J at 66-67.* According to the Court, the issue of whether Lot 15 was part of the larger parcel had been definitively decided by the Court, and the State was prevented from offering testimony about the issue. *TT 536, 539, Appx. Tab J at 67, 70.*

The State asserted the court's prior ruling permitted Landowners to offer testimony that Lot 15 should be included in the larger parcel, but did not preclude the State from offering contrary testimony. *TT 540, Appx. Tab J at 71.* The Court disagreed and ruled as follows:

> I don't want a legal explanation from this gentleman, who politely I believe to be wrong on this, so I don't want him to describe the law because I get to do that at the end of the trial. If he says he broke off 15 because he doesn't think it was part of the parcel I'll let him say that, but ultimately it may be either subject to a motion to strike or some sort of directed mini verdict on that issue. I'm not going to preclude that in either way at this time.

TT 546-547, Appx. Tab J. at 72-73.

The State's expert appraiser subsequently testified that he had valued Lots 5 through 8 as a single unit and did not include Lot 15 in his valuation of those lots. *TT 577-579, Appx. Tab J at 74-76.* Because of the Court's ruling, the State's appraiser did not offer any testimony about the three-factor test or why Lot 15 did not satisfy the unity of use factor of the test.

D. The trial court abused its discretion when it prohibited the State's expert from offering testimony about why Lot 15 should not be included in the parcel valued by the jury.

The trial court's refusal to allow the State's testimony was contrary to reason and evidence. First, the refusal of the evidence was premised on an erroneous conclusion -- that the court had decided the issue as a matter of law before trial. This conclusion is not supported by the language of the motion, which only asked the trial court "to permit evidence of damage to Lot 15," not exclude contrary evidence or decide the issue as a matter of law. *SR 305, Appx. Tab P.* The conclusion is not supported by the transcript of the motions hearing,

where the State agreed there was a factual dispute about Lot 15 which would have to be decided by the jury. *HT January 13, 2014, at 39, Appx. Tab H at 31; SR 305.* Most importantly, the court's conclusion was not supported by the court's order, which simply granted Landowners' request to present evidence on the parcel issue and did not grant summary judgment. *SR 915-916, Appx. Tab I at 34-35.*

Second, the trial court's refusal of the State's evidence was contrary to the rule favoring broad admissibility in eminent domain cases.

> Great latitude is allowed in the reception of evidence to prove the value of property in condemnation cases, and generally any relevant and material evidence, if competent under general rules of evidence, is admissible to prove market value. If the proffered evidence tends to aid the trier of fact in arriving at a conclusion on the issue of value and damage, it should be received.

Basin Elec. Power Co-op v. Poindexter, 305 N.W.2d 46, 48 (S.D. 1981).

The trial court prevented the State's expert from explaining the three-factor unity test and his opinion about its application to the Landowners' lots. Since the issue of what constitutes the parcel is a question of fact for the jury when the facts are in dispute, the trial court's ruling excluding evidence that would have aided the jury in deciding just compensation.

Third, the trial court's ruling deprived the State of an opportunity to counter Landowners' evidence. Landowners' expert was permitted to testify, without interruption, about the test and his reasons for concluding the three factors were satisfied for all of Landowners' Property, including Lot 15. In contrast, the court required the State's expert to offer nothing more than a conclusory opinion, without any supporting information to permit the jury to

determine the propriety of including Lot 15 in the valuation parcel.

Where the issue of the parcel to be valued is normally a question of fact for the jury, and where the trial court allowed testimony on the application of the unity of use factor from Landowners' expert, it was an abuse of discretion for the court, *sua sponte,* to refuse to allow testimony on the same subject from the State's expert.

E. The trial court's error was prejudicial.

The issue of the valuation parcel had a significant impact on the question of value and compensation. Because Landowners were seeking severance damages for loss of an access route to and from Cliff Avenue, increasing the size of the valuation parcel increased the amount of property Landowners could claim was devalued due to the State's project. So, the trial court's error on this issue had a strong probability of affecting the result. In fact, of the three valuation opinions offered in this case, only the State's expert offered an opinion of value that did not include Lot 15 or attribute damage to it – an opinion he was not allowed to explain. *TT 577-579, 594, Appx. Tab J at 74-77.* Both Landowner and Landowners' expert included Lot 15 in their opinions of value in the "before" and "after" conditions. *TT 327-328, 443-444, Appx. Tab J at 47-48 and 58-59.* Both testified that all of Landowners' Property, including Lot 15, experienced a substantial diminution in value due the State's project. *TT 378, 444, Appx. Tab J at 53 and 58.* Because inclusion of Lot 15 would have an impact on the value and damage to the Property, the trial court's refusal of the State's evidence was prejudicial error that requires a new trial.

Issue 4.

Where Landowners offered testimony that Lot 15 would be put to a use separate and distinct from the use of the rest of their property, did the trial court err in ruling as a matter of law that Lot 15 should be included in the larger parcel for purposes of valuation and compensation?

A. Standard of Review.

As previously discussed, where there are factual disputes about unity of use, the issue of what property should be included in the valuation parcel is a question for the jury. *State Highway Commission v. Bloom,* 93 N.W.2d 572, 576 (S.D. 1958). "When there is no dispute in the facts, the question whether physically separated parcels of land constitute one parcel because of common use is a question of law for the Court." *State Highway Commission v. Fortune,* 91 N.W.2d 675, 682 (S.D. 1958). Questions of law are reviewed by this Court de novo, with no deference afforded to the trial court's ruling. *In re Woodruff,* 1997 S.D. 95, ¶ 9, 567 N.W.2d 226, 228.

B. All the property in a valuation parcel must be devoted to a single or unified use.

In order to consider physically separated lots as a single parcel for purposes of valuation, our law requires that all of the properties share a unity of use.

> ...[P]hysically separated parcels or tracts of land held in one ownership will be considered as contiguous and will constitute one distinct parcel of land within the meaning of the condemnation statutes if the parts are devoted to a single use.

State Highway Commission v. Bloom, 93 N.W.2d 572, 576. It is not enough to show various lots are used for disparate commercial purposes – the lots or tracts must be "used as a unit for a single purpose." *Hurley v. State,* 82 S.D. 156, 164, 143 N.W.2d 722, 726 (1966).

> The factor most often applied and controlling in determining whether land is a single tract, is unity of use. Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use. There must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the continued ownership of the parcel taken reasonably and substantially necessary to the enjoyment of the highest and best use of the remainder parcel.

4A *Nichols on Eminent Domain §14B.03[1] at 14B-10.* "Absent unity of present use or reasonably probable future use, the ultimate burden of persuasion will not be met." *Id. at* § 14B.03[2] at 14B-10. Mere possibility will not satisfy the unity of use factor. *Id. at § 14B.03[3] at 14B-11 and -12.*

> In many cases the court can, as a matter of law, determine that lots are distinct or otherwise, but ordinarily it is a practical question to be decided by the jury or other similar tribunal which passes upon matters of fact, which should consider evidence on the use and appearance of the land, its legal divisions and the intent of its owner and conclude whether on the whole the lots are separate or not.

Nebraska Elec. Generation and Transmission Cooperative, Inc., v. Tinant, 241 N.W.2d 134, 139 (S.D. 1976)(quoting 4 *Nichols on Eminent Domain,* § 14.31, at 715).

C. The trial court erred by including Lot 15 in the valuation parcel, because the evidence showed it was not likely that Lot 15 would be devoted to a single or unified use with Lots 5 through 8.

At the close of trial, Landowners moved for a directed verdict on the grounds that there was no evidence to support exclusion of Lot 15 from the property to be valued by the jury. *TT 656, Appx. Tab J at 83.* The State countered that a directed verdict was improper, because evidence presented by the Landowner disproved the unity of use factor. *TT 657, Appx. Tab J at 84.*

The trial court determined its earlier ruling had left the issue to the jury after all. *Id.* The court also reasoned the State had been afforded an adequate opportunity to present evidence concerning Lot 15 to the jury. *TT 621-622, Appx. Tab J at 78-79.* The court concluded all the evidence showed Landowner's Property was best suited for commercial uses before the State's project, so the disputed unity of use factor had been satisfied. *TT 657-658, Appx. Tab J at 84-85.* Based on this conclusion, the trial court granted Landowners' motion and instructed the jury that the valuation parcel consisted of Lots 5, 6, 7, 8, and 15. *Id.; Instruction 6A, SR 1251, attached as Appx. Tab Q.*

The trial court committed reversible error, because even Landowners' evidence showed Lot 15 did not satisfy the unity of use factor. According to Landowners' appraiser, Dan Mueller, all of Landowners' lots satisfied the unity of use factor because all the lots were best suited to some type of commercial use before the State's project. *TT 327-328, Appx. Tab J at 47-48.* He added the lots might be devoted to a single use: "…[Y]ou could use this property in such a way that Lot 15 could be incorporated into a development that would also make use of Lots 5, 6, 7, and 8." *Id. at 328, Appx. Tab J at 48.* He acknowledged that Lots 5 through 8 were vacant land and Lot 15 housed a pole building, *TT 405 Appx. Tab J at 54,* so there was no current unified use of the property. As to future use, Mueller testified on cross-examination:

> Q. What I'm asking you is, Lot 15 didn't have to be used as one project with 5,6,7 and 8, correct?
> A. It didn't have to be, but it could.
> Q. It's possible, but you don't have to use it.
> A. It's very possible.
> …
> Q. Between 5, 6, 7, 8, and 15, there's no interdependence between those where they have to be used for the same thing.

A. They don't have to be, but again it gets back to highest and best use and it might be – and I think it's very plausible – that someone could. ...

TT 406, Appx. Tab J at 55.

Mueller's testimony establishes the mere possibility of unified use, not the actual or probable common use required by the law. In addition, the fact that all of Landowners' Property could be put to various types of commercial use does not demonstrate the type of unified or common use contemplated by South Dakota law. Use as a unit and for a single purpose is required. *Hurley,* 82 S.D. at 164, 143 N.W.2d at 726 (determining two platted lots intended and best suited for combined use as a gas station were a single parcel for valuation purposes). In *State Highway Commission v. Bloom,* 93 N.W.2d 572, 576 (S.D. 1958), this Court ruled it was error to include land devoted to hay production with land used for grazing cattle. If satisfying the general category of agricultural use is not enough to show unified or common use, then Landowners' five parcels cannot qualify as a single use merely because they are all suited for various types of commercial use.

Not only did Mueller's testimony fail to satisfy the unity of use factor, testimony from Landowners' other witnesses disproved unified use. Landowners' engineer presented a conceptual plan he had drawn for the Property that devoted Lot 15 to apartment buildings while lots 5 through 8 were slated for office buildings. *TT 182; TE 17.* The President of Kelly Inns, Ltd, which owned the neighboring lots to the west of the Property, testified that before the State project, Kelly Inns had planned to purchase Lot 15 from Landowners, so the lot could be

included in the construction of its hotel. *TT 252-253, Appx. Tab J at 44-45.* She testified it was "very unlikely" that Kelly Inn would have purchased any part of Lots 5 through 8 for its hotel. *TT 253, App Tab J. at 45.* Landowner Walsh testified that without the State's project, part of Lot 15 would have been sold for the Kelly Inn hotel project and the remainder of the Property would have been put to a variety of commercial uses. *TT 301, Appx. Tab J at 46.* Kelly Inns' architect likewise testified that his final set of architectural plans for the Kelly Inns hotel incorporated Lot 15 into the hotel project, but did not include any part of Lots 5 through 8. *TT 172-173, Appx. Tab J at 42-43; TE 8, Appx. Tab L.*

Because there was ample evidence to show that the intended and probable use for Lot 15 was not a single or unified use with Lots 5 through 8, the trial court committed reversible error when it directed the jury to include Lot 15 in the valuation parcel. The trial court's error was prejudicial, because the jury's verdict was impacted by the court's decision. Due to the court's ruling, an entire additional parcel of land was included in the verdict. Of the three valuation opinions offered in this case, only the State's expert offered an opinion that did not include damage to Lot 15. *TT 577-579, 594, Appx. Tab J at 74-77.* He testified to total compensation of $27,200. *TT 594, Appx. Tab J at 77.* Both Landowner and Landowners' expert included Lot 15 in their opinions of value in the "before" and "after" conditions. *TT 327-328, 424, Appx. Tab J at 47-48.* Both testified that all Landowners' Property, including Lot 15, experienced a substantial diminution in value because of the State's actions -- $4.45 per square foot according to Mueller and $8.34 per square foot according to Landowner

Miller. *TT 375, 444, Appx. Tab J at 59.* The jury's verdict of $551,125 was more than the total damage opinion offered by Landowners' expert and less than the total damage opinion offered by Landowner Miller. *Id.* The verdict is only justified with reference to testimony that erroneously included Lot 15 in the valuation parcel. Because the trial court committed prejudicial error, reversal for a new trial is warranted.

CONCLUSION

Infringement of a private property right is the cornerstone of every eminent domain case. Because of this court's evidentiary ruling on the issue of access to Cliff Avenue and its instructions to the jury, Landowners were allowed to circumvent this requirement. The trial court excluded expert testimony that was directly relevant to the jury's determination of value and damage, and then the court decided this very issue in a manner that misapplied the law to the facts.

The State respectfully requests this Court to reverse the judgment and order a new trial.

REQUEST FOR ORAL ARGUMENT

Oral argument is respectfully requested.

STATE OF SOUTH DAKOTA
MARTY JACKLEY, ATTORNEY GENERAL

By: _____
Karla L. Engle
Special Assistant Attorney General
South Dakota Department of Transportation
Office of Legal Counsel
700 East Broadway Ave.
Pierre, SD 57501-2586
605 773-3262
karla.engle@state.sd.us
Attorney for Appellant

and

Anthony M. Hohn
Special Assistant Attorney General
Davenport Evans Hurwitz and Smith
P.O. Box 1030
Sioux Falls, SD 57101-1030
605-336-2880
ahohn@dehs.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b), I certify this *Appellant's Brief* complies with the type volume limitations set out in said statute. This brief was prepared using Microsoft Word, and contains 9,639 words, and 47,636 characters (without spaces), excluding the cover, table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, appendix, and any certificates of counsel. I have relied on the word and character count of the word processing program to prepare this Certificate.

Dated this 29th day of January, 2015.

STATE OF SOUTH DAKOTA
MARTY JACKLEY, ATTORNEY GENERAL

Karla L. Engle
Special Assistant Attorney General
South Dakota Department of Transportation
Office of Legal Counsel
700 East Broadway Ave.
Pierre, SD 57501-2586
605 773-3262
karla.engle@state.sd.us
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies she filed this original *Appellant's Brief* and two copies with the Clerk of the South Dakota Supreme Court, by hand-delivering the same to the Clerk's Office at the address listed below and further certifies that she mailed two true and correct copies of this *Appellant's Brief* by first class United States mail, postage prepaid to opposing counsel at the address listed below:

Mark Meierhenry
Clint Sargent
Christopher Healy
Meierhenry Sargent, LLP
315 S. Phillips Ave.
Sioux Falls, SD 57104

Ms. Shirley A. Jameson-Fergel
Clerk of Court
South Dakota Supreme Court
500 East Capitol Ave.
Pierre, SD 57501-5070

On this 29th day of January, 2015.

STATE OF SOUTH DAKOTA

By: _____
Karla L. Engle
Special Assistant Attorney General

STATE'S APPENDIX

27198

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27198

The State of South Dakota, by and through the Department of Transportation
Plaintiff and Appellant,

v.

Robert L. Miller and Thomas P. Walsh,
Defendants and Appellees.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Susan Sabers
Circuit Court Judge

APPELLEES' BRIEF

Attorneys for Appellant
Mark V. Meierhenry
Clint Sargent
Christopher Healy
Meierhenry Sargent LLP
315 S. Phillips Ave
Sioux Falls, SD 57104

Attorneys for Appellee
Karla Engle
South Dakota Department of Transportation
700 EAST BROADWAY AVENUE
PIERRE, SD 57501

Notice of Appeal filed on the 28th day of August, 2014

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Cases

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PRELIMINARY STATEMENT

The Appellees will adopt the terminology of the State in its brief.

Robert L. Miller and Thomas P. Walsh, Sr. will be "Landowners". The Appellant will be referred to as "State" or "DOT".

The State's SR (settled record), TT (transcript), TE (trial exhibit), Appx (appendix materials) will likewise be used.

JURISDICTION STATEMENT

The State correctly and timely appealed and this Court has jurisdiction.

REPLY TO STATEMENT OF ISSUES

Issue 1. Did the trial court abuse its discretion by allowing testimony about how diversion of travel to and from Cliff Avenue diminished the value of Landowners' property located nearly 500 feet away?

The Trial Court applied the settled law of South Dakota which permits admission of all relevant evidence of the effects of the project on the Landowners' real estate subsequent to the State's initiation of a partial taking.

State Highway Commission v. Bloom, 93 N.W.2d 572 (S.D. 1958).

State Highway Commission v. Hayes Estate, 140 N.W.2d 680 (S.D. 1966).

Schuler v. Board of Sup'rs of Lincon Tp., 81 N.W. 890, (S.D. 1900).

Hall v. State Ex Rel South Dakota Department of Transp., 2006 S.D. 24, 712 N.W.2d 22.

Issue 2. Did the trial court abuse its discretion by modifying the pattern jury instruction to instruct the jury to determine the value of Landowners' property before and after "the project" rather than before and after "the taking"?

The Trial Court found that the use of the word "project" used in Instruction 7 was "legally accurate and factually necessary" TT 662 L. 17-18. This Court's prior decisions support Judge Saber's ruling.

State Highway Commission v. Bloom, 93 N.W.2d 572 (S.D. 1958).

State Highway Commission v. Hayes Estate, 140 N.W.2d 680 (S.D. 1966).

Hall v. State Ex Rel South Dakota Department of Transp., 2006 S.D. 24, 712 N.W.2d 510.

Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510.

Issue 3. Did the Trial Court abuse its discretion by prohibiting the State's expert from offering testimony about why Lot 15 did not have unity of use with the rest of Landowners' property and therefore should not be included in the property valued for purposes of just compensation?

The Trial Court properly precluded the State's appraiser from testifying as to his opinion of the law of South Dakota on the valuation of a parcel.

LDL Cattle Co. v. Guetter, 1996 S.D. 22, 544 N.W.2d 523.

Shearn v. Anderson, 48 N.W.2d 821 (S.D. 1951).

SDCL § 15-6-61

Issue 4. Where Landowners offered testimony that Lot 15 would be put to a use separate and distinct from the use of the rest of their property, did the trial court err in ruling as a matter of law that Lot 15 should be included in the larger parcel for purposes of valuation and compensation?

The Trial Court properly ruled that there was no reasonable factual basis for the jury to conclude that Lot 15 was not part of the larger parcel and properly ruled as a matter of law on this issue.

State Highway Commission v. Fortune, 91 N.W.2d 675 (S.D. 1958).

Basin Electric Co-op, Inc. v. Cutler, 254 N.W.2d 143, 148 (S.D. 1965).

Shearn v. Anderson, 48 N.W.2d 821, (S.D. 1951).

SDCL § 15-6-61

STATEMENT OF THE CASE

The State condemned a portion of the real estate of Landowners as a part of a highway project. A jury trial was conducted to determine the proper measure of damages for a partial taking. Pursuant to South Dakota law, landowners were justly compensated for the property taken and consequential damages to the remainder caused by the project.

A part of the evidence involved determining the extent of the parcel to be valued.

The State raises four (4) issues on appeal. The first two issues are another attempt to support statements of the law which have been roundly rejected by the

Court. The first, that elements of the State's highway project that affect the fair market value of the landowners' property should not be considered by a jury. *State Highway Commission v. Bloom*, 93 N.W.2d 572 (S.D. 1958), *Schuler v. Board of Sup'rs of Lincon Tp.*, 81 N.W. 890, (S.D. 1900), and *State Highway Commission v. Hayes Estate,* 140 N.W.2d 680 (S.D. 1966) each hold the law of South Dakota to be a jury must be informed of all factors which legitimately bear on the fair market value. The second, that the trial court incorrectly instructed the jury to consider the entire State highway project rather than simply the easement taken from landowners for the purpose of determining diminution in value. This issue was explicitly raised in *Bloom,* and the Court ruled in favor of landowners.

Issues 3 and 4 are on the evidentiary issues raised in an attempt to present the State's appraisers legal observations and conclusions of the application of case facts to legal instructions. The trial court permitted the appraiser to testify as to his opinions on the parcel but prevented the appraiser from giving legal opinions. The trial court then granted a directed verdict on the parcel issue which was overwhelmingly supported by the evidence.

FACTS

Northside Gardens Addition to the City of Sioux Falls consists of 19 lots numbered 2-20. (Landowners TE 1, State TE 200, appx. 9). The addition is bounded on the North by Interstate 90 and Cliff Avenue on the West. *Id.* A newer industrial development lies to the east of the Addition and the area to the south is mostly residential. (TT of Dan Mueller 319). The addition was in a premier

location for development as it adjoined two of the busiest roadways in the area. (TT Dan Mueller)(TT 424:3-9).

Robert Miller purchased his first lots in North Side Gardens, Lots 18 and 19 and the Perkins Restaurant located on Lot 19 with his wife, Joni, in 1990. (Appx. 11 TE 4). Many of the Northside Gardens lots to the east contained single family dwellings at that time, but in the mid-1990's Mr. Miller began working with homeowners in the area to purchase their properties. (TT 427:21-25). The plan was to acquire enough property in Northside Gardens to create a commercial development in northern Sioux Falls that the city could be proud of. This was the beginning of a plan that Mr. Miller would eventually invest "thousands of hours in thinking and talking to people and trying to purchase properties."(TT 428:4-6).

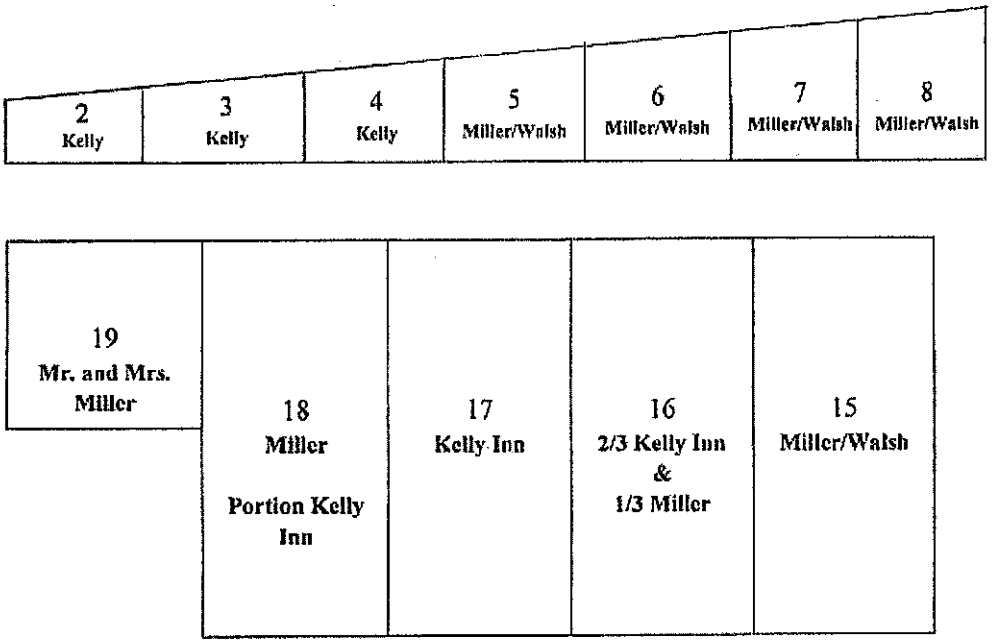
In 1999 Mr. Miller was able to acquire the remainder of Lot 18 and Lot 17. (Appx 11 TE 4, TT 428: 7-25). Mr. Miller continued assembling property in 2000 by purchasing Lots 2, 3, and 4 which comprised the corner of Cliff Avenue and Interstate 90. (TE 4). Tom Walsh, Sr. owned Lot 20 Northside Gardens and the Burger King Restaurant thereon, and was another experienced businessman with a 40 year history of successfully developing properties. (TT 300:1-4)(TT 437:11-15). He and Miller shared a joint interest in developing Northside Gardens both from a business and civic perspective by creating a first tier entrance to the City of Sioux Falls. (TT 300:18-20)

Mr. Walsh officially became financially invested in the development in 2004. (TE 4). Miller and Walsh jointly purchased Lots 5, 6, 7, 8, and 15 (the

Miller-Walsh property) in May of that year. (*Id.*) Miller and Walsh had now acquired enough property to begin specific plans for developing the area. Mr. Miller had long thought that the location would be ideal for a hotel and the types of businesses that accompany a hotel development. The Kelly Inn partnered with Bob Miller for the purchase of Lot 16. Kelly Inns Limited also traded Miller property in Omaha, NE for Lots 2, 3, 4, a small part of 18 and all of 17 in June of 2004. (TE 4). This marked the official beginning of a new Kelly Inn hotel as the cornerstone of the Northside Gardens commercial development.

At this time, the breakdown of land ownership of Lots 2-8 and 15-19 looked like this:

OWNERSHIP BEFORE THE PROJECT



Over the next several years, Kelly Inn with the support of Miller and Walsh hired Dick Sayre of Sayre Associates to prepare a conceptual plan for the proposed hotel and surrounding Northside Garden property. (TE 5, Appx 7). Kelly Inn also hired Miller, Sellers and Heroux Architectural firm to prepare plans for the hotel project (Appx. 7). As shown on the engineering concepts and architectural plans, the access to the proposed development was 63rd Street to Cliff Avenue and also across Miller's Perkins Lots 18 and 19. (TT 184:14-25) (Appx 7).

The arrangement of the owners of the real estate was described by Gary Kulm of Mr. Miller's organization. The working relationship of the major people or owners of Lots 2 through 19 "was terrific. They were all friends ... obviously when Dave Sweet and Brenda Schmidt of Kelly Inn asked Bob to come down to Omaha was one indication they were working well together." (TT 128:1-8).

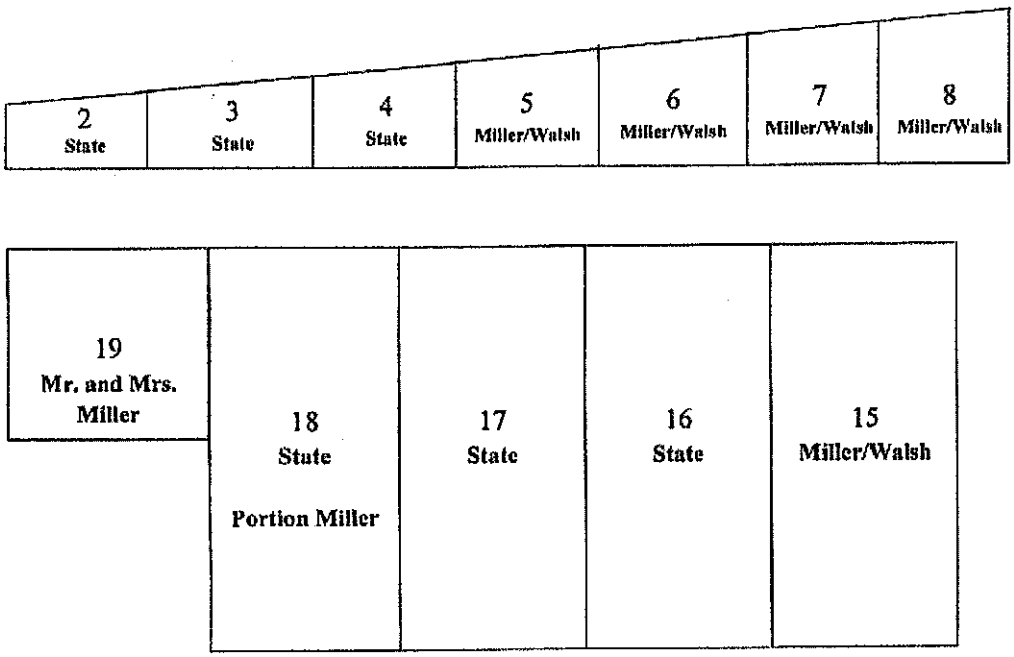
Kelly Inns limited operates 20 hotels in eight states and has opened three brand new hotels and is working on its fourth since Ms. Schmidt became President of the company in 2000. (TT 216:7-10, 217:20-25). Ms. Schmidt told the jury that there had been discussions between the major people Dave Sweet, Bob Miller, and Tom Walsh since 1999. (TT 219:17-25). The plan was to build an 80-100 unit hotel costing approximately $7,000,000. (TT 233). Miller, Walsh, and Kelly Inn had verbally agreed on across-parking arrangements and access easements for the hotel across the Burger King and Perkin's parking lots. (TT 235). A general sense of cooperation among the parties as their business interests were aligned in developing this part of Sioux Falls. (236:15-23). Ms. Schmidt said

the Kelly Inn project would have been built well before 2012, but the state's highway project stalled construction and eventually destroyed the development altogether. (TT 339:1-14, 345:1-16) . Mr. Miller echoed that belief in his testimony.

The Cliff Avenue DOT project killed the Northside Gardens development venture. The major contributing factor was that the project closed the intersection at 63rd Street and Cliff Avenue and purchased the Kelly Inn Property in lieu of condemnation in effect destroying all commercially viable access to the development area. (TT245:15-16). The parties used all effort legally possible to prevent the project from destroying the development. From 2004 until 2010, the Kelly Inn group, and Miller and Walsh sought to change the Cliff Avenue raod design of the project by lobbying city and State officials. (TT 238:20-25, 239:1-4).

Once it was clear the State would make no changes in the project, Kelly Inn shut down its hotel construction plans. (TT 245:12-16).

OWNERSHIP AFTER THE PROJECT



The State now owns lots 2, 3, 4, and 17. The possibility of a commercial development on the Miller-Walsh property is now destroyed. (TT 370:13-24).

ARGUMENT

I. South Dakota law requires that a landowner subject to a partial taking receive just compensation for the part taken as well as consequential damages to the remainder.

a. Consequential damages include all attributes of the property in the after condition that reasonably bear on the fair market value of the property.

This case is a "partial taking" case. (Appx. 2, 10). A partial taking occurs when a portion of an owner's land is condemned for public use, but the remainder of the parcel continues to vest with the landowner. Partial takings have been recognized in South Dakota since *Schuler v. Board of Sup'rs of Lincon Tp.*, 81 N.W. 890, (S.D. 1900). Partial takings require the landowner recover just

compensation for the property taken and compensation for damage to the remainder of the parcel. *State Highway Commission v. Bloom,* 93 N.W.2d 572, 578 (S.D. 1958). Damage to the remainder is recoverable to the landowner "even though the consequential damage is of a kind suffered by the public in common." *Id.*

The proper measure of damages in partial takings case is the difference between the fair market value of the parcel before the taking and the fair market value of what remains after the taking. *State Highway Commission v. Hayes Estate,* 140 N.W.2d 680, 684 (S.D. 1966). South Dakota's earliest partial takings case, *Schuler,* 81 N.W. 890, (S.D. 1900), set the precedent for how certain facets of a government's project may be considered for purposes of calculating consequential damages. The jury:

> "may not allow the [landowner] damages for the extra cost of fencing, extra amount of highway taxes, and loss by reason of diversion of travel, as such, [the court] very properly instructed them that these various elements of damage might be taken into consideration in determining how much the plaintiff's lands would be depreciated in value by reason of the establishment of the highway, as that was the ultimate fact to be found by them." *Id.* at 892.

The Court went on to say,

> "while the [landowners] could not recover for these as separate and distinct causes of damage, the jury had a right to consider them in determining the question of how much the plaintiff's lands were depreciated in value by reason of the proposed highway." *Id.* At 893.

The condemnor in *Schuler* argued, as the State does here, that allowing these factors of damage as evidence was judicial error. The *Schuler* Court found

that contention to be "not tenable." *Id.* This remains the law of South Dakota in partial takings cases.

The clearest recital of what can be considered by a jury in determining consequential damages in a partial taking case is found in *State Highway Commission v. Hayes Estate,* 140 N.W.2d 680, 684 (S.D. 1966).

> In estimating the damages to the remainder, or in other words, the depreciation in value of the part not taken, the landowner is entitled to have the jury informed as to *all* those facts which legitimately bear upon the market value of the [property] before and after the taking and those factors which would ordinarily influence a prospective purchaser in negotiating for the property. The manner in which the [property] was used before the taking and the manner in which it can be used afterwards is of prime importance. Anything which is directly injurious to its particular adaptability or detracts from its use at maximum efficiency affects market value and is competent and a legitimate factor in establishing total damages sustained within the contemplation of an award of just compensation. *Id* citing 18 Am.Jur., Eminent Domain, § 266. (emphasis supplied).

Landowner Bob Miller and expert appraiser Dan Mueller offered testimony at trial of the diminution in value as a result of the DOT's highway project. The taking of a portion of the Miller Walsh property, the closure of the intersection at Cliff Avenue and E. 63rd Street, and the purchase in lieu of condemnation of the Kelly Inn property, which took away landowners access to Cliff Avenue through the Kelly Inn and Perkins lots, were facets of the DOT's highway project that were presented to the jury for consideration in determining the after value of the property. Consistent with the law, the jury did not award compensation for these factors as separate and distinct causes of damage, but considered them in determining the fair market value of the real estate after the highway project.

Appraiser Dan Mueller valued the Miller-Walsh property before the project at $6.50 per square foot for a total value of $778,800. (Appx. 5, TT 375:15-25). He valued the parcel's remaining property after the DOT's project at $2.05 per square foot for a total value of $239,550.00 and rounded that figure to $239,500.00. (Appx. 5, TT 378:1-3). Mr. Mueller's opinion is that the property value was diminished as a result of the DOT project by $539,300.00. (Appx. 5, TT 378:9).

Mr. Mueller cited the decreased size of the parcel making it less adaptable to particular uses and the total loss of reasonable access to Cliff Avenue as reasons for the diminution. (Appx. 5, TT 367:15-17, 370:13-24). Mr. Mueller testified that the cause of the loss of reasonable commercial access is two-fold. First, the property's access was diminished by the closure of the intersection at Cliff Avenue and E. 63rd Street. (Appx. 5, TT 410:2-13). Second, the Miller-Walsh property had a potential alternative access across Perkins and the Kelly Inn property. "That is no longer a possibility being that the Kelly Inn site is no longer owned privately, it's now owned by the State of South Dakota." (Appx. 5, TT 369:19-21). The result of these two facets of the highway project was the loss of all commercially viable access.

The changes brought about by the project "dramatically" affected the highest and best use of the Miller-Walsh property. (Appx. 5, TT 370:11).

> In the before situation you have property that had the attributes that are necessary for commercial development. It wasn't in a position to be as prime as property that would, say, front Cliff Avenue, but it was sloped properly, it had suitable access, convenient enough access that some form of commercial use would have worked on that

> property. In the after situation that's not at all realistic to think that that could happen. So really what you've done is you've categorized the property from a commercial property to what I see as an industrial property, and probably a fairly low-end one at that. *Trial Testimony of Dan Mueller* (Appx. 5, TT 370:13-24).

b. The State agreed all economically viable access was destroyed when it bought out the Kelly Inn property in lieu of condemnation.

The State offered the expert testimony of appraiser John Schmick to value the Miller-Walsh property for condemnation. Mr. Schmick testified that the Miller-Walsh property in the before situation had a highest and best use of vacant industrial. (TT 582). He valued Lots 5, 6, 7, 8, and 15 at $2.90 per square foot before the taking. (TT 579:8-10). He then considered the taking to determine the after value. As a part of the analysis of the Miller-Walsh property, Mr. Schmick considered the closure of the intersection at Cliff Avenue and E. 63rd St. (TT 585:5-6). When asked if that closure affected the value of the Miller-Walsh property, Mr. Schmick testified:

> It really didn't. I mean, you had a dead-end street before, you've got a dead-end street afterwards. It just comes from a different direction. But zoning hasn't changed. You're still fronting 63rd Street. The uses that are allowed by zoning in the before are still allowed in the after. And in terms of low-end commercial these are going to be more destination-oriented things. You know, being they don't need to front on Cliff so those uses can still be there. *Id.*

Mr. Schmick valued the property at $2.90 in the after condition, finding no consequential damage to the Miller-Walsh property after the taking. (TT 591:3-7).

On the cross examination of Mr. Schmick by Landowners' Attorney Clint Sargent, evidence was presented that the State had purchased the Kelly Inn's property in lieu of condemnation as a part of the highway project. The State hired Mr. Schmick to conduct the appraisal of the Kelly Inn property for the purposes of eminent domain litigation. (Appx. 4, TT 606:24-25, 607:1-3) The Kelly Inn property was located directly beside the Miller-Walsh property and was similar in size. (Appx. 11, 4). Within the Kelly Inn Appraisal were concept drawings of the Kelly Inn project, which showed the Kelly Inn using portions of the Miller-Walsh property for its development. (Appx. 4, TT 610:23-25, 611:1-2). The appraisal also references several times the proposed development plan of the area and a conditional use permit for Lots 2, 3, 4, 5, 6, 15, 16, 17, and 18. *Id.*

Mr. Schmick also considered the closure of the intersection at Cliff Avenue and E. 63rd Street in his appraisal of the Kelly Inn property, but to a very different result. Mr. Sargent, referring to page 41 of the Kelly Inn Appraisal, asked Mr. Schmick:

Q: In the after condition you knew 63rd Street was going to be closed, correct?

A:Yes.

Mr. Sargent offered Exhibit 108 (p. 41 of the appraisal report), which was not received but allowed to be used for purposes of questioning.

Q: In talking about the right of access in the after condition you state: "In addition, taking of right of access will also close the 63rd Street connection to Cliff Avenue. As a result, the subject will be left with no economically viable access to support development of the land." That was your conclusion?

A: Correct.

Q: So as it relates to Miller/Walsh you use the language that the access has been upgraded, but just a year before you had stated – or two years before – that the

closure of 63rd Street and *the overall effect of that resulted in no economically viable access*, correct?

A: Those are the Statements in the report.

(Appx. 4, TT 613:10-25, 614:1-3).

Mr. Schmick found the loss of economically viable access diminished the value of the Kelly Inn Property by 74.6%. (TT 614:10-15). When confronted with the apparent inconsistency between the 74.6% reduction in value to the Kelly Inn property and the 0% reduction in value to the neighboring Miller-Walsh property by Mr. Sargent, Mr. Schmick stated "I think that is a gross misrepresentation of the two assignments," but offered no further explanation.

On re-cross by Mr. Sargent, Mr. Schmick was asked to further explain the source of damage considered for the Miller-Walsh property and the Kelly Inn property. He was asked:

Q: Because even if you say that the square foot price of this land is higher than the Miller/Walsh land they're still suffering the same diminution in value as a result of their loss of access. Wouldn't you agree with that?

A: The source of the loss was the same.

Q: The source of the loss of access was the same, and when it relates to the Kelly Inn you call that loss of access no economically viable access, correct? That's what you wrote in your report.

A: That is the term and that is correct.

(Appx. 4, TT 654:20-25, 655:1-5).

Mr. Schmick's opinion that one property had suffered a 74.6% reduction in value, but the property next door had sustained no damage as a result of the exact same State action is a clear contradiction. It is disingenuous for the State to

pay one landowner for damage caused by a project, but to claim the damage is non-compensable for another. The verdict should be affirmed on these grounds.

c. The State incorrectly applies the consequential damage standard of an inverse condemnation case to this case.

South Dakota law recognizes damaging cases under Article 6, Section 13 of the South Dakota Constitution even when no property is actually taken. These are also referred to as inverse condemnation cases. Damaging cases have been recognized in South Dakota since *Searle v. City of Lead,* 73 N.W. 101 (S.D. 1887), our State's seminal inverse condemnation case. The State cites inverse condemnation cases to support its position that to find consequential damage, the injury must be peculiar to the owners land and not of a kind suffered by the public as a whole. *Krier v. Dell Rapids Township,* 143 N.W.2d 726 (S.D. 2006), *Darnall v. State*, 108 N.W.2d 201 (S.D. 1961). However, these cases apply a different legal analysis that what is appropriate in a partial taking case.

As pointed out above, South Dakota takings jurisprudence recognizes consequential damages to the remainder when part of an owner's land is taken for a public purpose. Damage to the remainder is recoverable to the landowner "even though the consequential damage is of a kind suffered by the public in common." *State Highway Commission v. Bloom,* 93 N.W.2d 572, 578 (S.D. 1958). Therefore, there is no requirement that the damage to Mr. Miller and Mr. Walsh's real estate be peculiar or that it be different in kind and not merely degree from that experienced by the general public.

The State dedicates several pages of its brief supporting the incorrect premise that Mr. Miller and Mr. Walsh's injuries must be of a kind not suffered by the public as a whole. Because of its misplaced analysis, these arguments must be disregarded. The evidence presented at trial was consistent with the analysis of a partial taking as explained above. All facets of the State's project and all factors of damage that "legitimately bear upon the market value of the [property] before and after the taking and those factors which would ordinarily influence a prospective purchaser in negotiating for the property" are to be considered by the fact finder in determining just compensation. *Hayes Estate,* 140 N.W.2d 680, 684 (S.D. 1966).

The State cites on page 16 of its brief a passage from *State v. Henrikson* 548 N.W.2d 810, a partial taking case: "*Where there is no physical taking*, and the owner's access to the highway on which he abuts is not unreasonably diminished or interfered with, his loss is due to diversion of traffic, a lawful exercise of the police power and there can be no recovery." *Id.* (emphasis supplied).

This quote is used to support the State's position that landowners must show a special injury. This logic requires the Court to ignore the opening phrase of the sentence. The passage from *Henrikson* clearly explains that the analysis applies when there is "no physical taking", a factually distinguishable scenario to that presently before the Court. (Appx. 2, 10).

Because South Dakota approaches consequential damages differently in partial takings than in inverse condemnations, Judge Sabers was correct in

allowing evidence of various factors of the DOT's highway project and how those factors diminished the fair market value of the Miller-Walsh property.

Moreover, even applying the inverse condemnation analysis, landowners suffered a peculiar injury not suffered by the public as a whole. Their access through Kelly Inn and Perkins was destroyed by the State's acquisition of the Kelly Inn property in lieu of condemnation.

d. The State continually objected to evidence regarding access to Cliff Avenue claiming Miller and Walsh had no right to such access, which is contradictory to the settled law of South Dakota as stated in *Bloom*.

The State repeatedly objected at trial to all evidence of the destruction of access to Cliff Avenue resulting from the highway project. However, the State's position that Miller and Walsh had no right of reasonable access to Cliff Avenue is incorrect under *Bloom* and irrelevant for calculating damages in a partial takings case.

The State concedes in its brief that a property owner has special rights of reasonable access to an abutting street. *Appellant's brief*, p. 10. It then argues that because the Miller-Walsh property does not abut Cliff Avenue, damages caused by a diminishment of access to this existing roadway are not compensable. The Court in *State Highway Commission v. Bloom* 93 N.W.2d 572, 578 (S.D. 1958) explains that the right to reasonable access is not confined to the abutting street.

> "He has the right, as the owner of the land, to access to such land and to every part thereof where it abuts upon a highway. This is a right resting upon the ownership of the subject property and connected with and appurtenant to such subject property, and is, therefore, a property right. It is a special private right entirely distinct from the public right, and is one that pertains, not only to

> the part of the highway abutting the owner's land, but *extends sufficiently beyond his own premised as to insure reasonable facilities for connection with those highways in which he has no special rights*." (emphasis supplied).

Cliff Avenue was an existing right of way providing a corridor between Interstate 90 and the City of Sioux Falls. In the before condition, the Miller Walsh property had a right to reasonable access not only to 63rd street, but also to Cliff Avenue by way of 63rd Street and through the Kelly Inn and Perkins parking lots. The parties had verbal agreements for access easements across Perkins and Burger King. Ms. Schmidt testified "We were working on agreements. There were not any issues with us agreeing upon access throughout Burger Kings and Perkins and our lot." (TT 235:7-9). The evidence presented by Mr. Mueller and Mr. Miller explains how the destruction of this right caused damage to the Miller-Walsh property.

Further, evidence of the diminished access was relevant and properly admissible under the legal standards set forth in *Schuler, Bloom,* and *Hayes Estate.* The proper consequential damage determination in a partial taking case requires a jury hear evidence of all factors of damage legitimately bearing on the fair market value. The State's position that evidence of the diminishment of access to Cliff Avenue is inadmissible fails to acknowledge the plain reading of *Bloom.* The reasoning also defies the well settled standard for determining just compensation once a partial taking has occurred.

II. The use of the word "project" in place of "taking" in South Dakota Civil Pattern Jury Instruction 50-90-20 is both legally accurate and factually appropriate.

a. Standard of Review

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard...To constitute reversible error, an instruction must be shown to be both erroneous and prejudicial such that in all probability they produced some effect upon the verdict and were harmful to the substantial righs of a party. Accordingly, jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient. *State v. Whistler,* 581 N.W.2d 675, 686 (S.D. 2014).

b. Under *Bloom,* consequential damages include all damage caused by the highway project, not simply the part that encumbers the subject property.

At trial, the State objected to the use of the word "project" in Jury Instruction Number 7.

Counsel for Miller and Walsh explained during settlement of instructions why using the word "project" was legally correct in this case. "This is a consequential damage case. That's the language used in *Schuler* that the Court's repeated several times. And in those cases it talks about the project. It's the damage caused by the project as a whole." (TT 624:16-20). The litany of cases that discuss consequential damage after a partial taking illustrate what must be considered when determining the diminution in value. *Schuler, Bloom, Hayes Estate.*

The State argues that the consequential damages are limited to those caused strictly by the taking, and claims that not instructing the jury in this way is reversible error. The State cites no case that limits consequential damages in this way. To the contrary, the law of South Dakota is clear that a jury is to consider "anything which is directly injurious to its particular adaptability or detracts from its use at maximum efficiency affects market value and is competent and a

legitimate factor in establishing total damages sustained within the contemplation of an award of just compensation." *Hayes Estate* at 684.

Even clearer is this passage from *State Highway Commission v. Bloom*, which addresses the discrepancy between "taking" and "project" directly:

> For the purpose of determining severance damage to the part not taken, the part of the Defendant's land taken is to be considered as an integral and inseparable part of a single highway project *not limited to the segment of the highway on his land* but extending so far as the construction and use of the highway has reasonable tendency to cause detriment to the part not taken and to reduce the market value of his land not taken from the view point of a ready, able, and willing buyer. *State Highway Commission v. Bloom*, 93 N.W.2d 572, 579 (S.D. 1958) (emphasis supplied).

Thus, Jury Instruction 7 is legally accurate. The State's allegation that use of the term "project" is an incorrect statement of the law is misguided and discredited by the plain language of *Bloom* cited above.

The *Bloom* Court considered precisely this argument from the State, and wrote:

> The requested instruction (by the State) which would have limited the severance damage to that caused by the proposed construction and use of the segment of the highway over the Defendant's land was properly rejected. *Id.*

The jury was properly instructed as to the law of South Dakota.

III. The trial court did not abuse its discretion by limiting State's expert to discuss only facts and opinions and not interpret South Dakota law.

a. Standard of Review.

Review of a challenge to an evidentiary ruling "requires a two-step process; first, to determine whether the trial court abused its discretion in making

an evidentiary ruling; and second whether this error was a prejudicial error that 'in all probability' affected the jury's conclusion." *Supreme Pork, Ink. V. Master Claster, Inc.*, 764 N.W.2d 474. The test for an abuse of discretion is not whether the Supreme Court would reach the same result, but rather, whether it believes a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion. *State v. A.B.*, 758 N.W.2d 910, (S.D. 2008). An "abuse of discretion" refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence. *State v. Dillon*, 788 N.W.2d 360 (S.D. 2010).

b. The trial court was within its discretion to limit the testimony of appraiser John Schmick.

The trial court only disallowed a legal analysis of the "parcel rule" by appraiser John Schmick, but allowed Mr. Schmick freedom to testify to the attributes of the subject property and his opinions of value, the charge of any expert appraiser. The specific rulings from Judge Sabers are as follows:

> I don't want a legal explanation from this gentleman, who politely I believe to be wrong on this, so I don't want him to describe the law because I get to do that at the end of the trial. If he says he broke off 15 because he doesn't think it was part of the parcel I'll let him say that, but ultimately it may be either subject to a motion to strike or some sort of directed mini verdict on that issue. (TT 546:22-25, 547:1-5).

And:

> I think that factually his determination was that 15 was not part of a larger parcel, and then he can testify as to his valuation, which is his purpose here today. He's not going to cite the case law. He's not going to instruct the jury that legally it's not part of it. We're not going that route with him. But I think he can say on his review of the facts his personal conclusion was that 15 was to be broken off and that's how he handled that...(TT 550:8-16).

For a reversal, the State must be able to establish that no "judicial mind, in view of the law and the circumstances could have reasonably reached the same conclusion." *Nickles v. Schild*, 617 N.W.2d 659 (S.D. 2000). The procedural history of this case was extensive by the time of trial. The State had filed two lengthy motions for Partial Summary Judgment, several other motions had been filed and argued by both sides, and three motion hearings had been held. The trial court was well versed in the law, facts, and circumstances surrounding this case. The entirety of the testimony presented by Miller and Walsh had supported their position that they intended the subject property to be a part of a greater commercial development. In the discussion surrounding this ruling, Judge Sabers stated:

> Well, on page 45 of the prior hearing transcript I say that I find unity of title, contiguous lots and unity of use based on the evidence before me. I think there's been probably even stronger evidence of that at this trial...(TT 546:13-17).
>
> The transcript from that hearing is even more direct and reads:
>
> I do find unity of title, contiguous lots and unity of use based on the evidence presented at this stage. So I will allow evidence of the parcel, those five lots will be treated as the parcel for the purposes of the upcoming trial. (Appx. 8, HT 45:6-9)

Nevertheless, Mr. Schmick was allowed to testify at trial that Lot 15 was a separate parcel. In his direct examination Mr. Schmick did give his opinions for Lot 15 as follows:

Q: Okay. Now were you able to make a determination as to what the price per square foot of Lot 15 would have been?

A: Yes. As an appraiser there's a difference of opinion as to what should be included here. Under jurisdictional exception I can value Lot 15 and extrapolating from the values I have I'm putting a price of $112,000 on it.

Q: So that's as a parcel as a whole of Lot 15?

A: As an individual parcel.

(TT 578:20-25, 579:1-2).

Mr. Schmick was allowed freely offer evidence of all aspects of the property, including that he believed Lot 15 was its own separate parcel. Both sides were permitted to offer evidence regarding the present and possible future uses of the property both before and after the taking. Ultimately, the trial court made a directed verdict on the parcel issue making the ruling on Mr. Schmick's testimony moot. (Appx. 3, Jury Instruction 6A). The State offered no testimony, through Mr. Schmick or any other witness, that Lots 5, 6, 7, 8, and 15 were going to be used by Mr. Miller and Mr. Walsh for any purpose other than a high-end commercial development. For these reasons, the trial court was well within its discretion to disallow Mr. Schmick from offering the jury a legal explanation of the parcel rule.

c. The limitation of John Schmick's testimony did not affect the jury's conclusion as the jury completely disregarded his opinions.

The State must also show that the court's ruling "'in all probability' affected the jury's conclusion." *Supreme Pork, Ink. V. Master Claster, Inc.*, 764 N.W.2d 474. Mr. Schmick ultimately testified that the Miller-Walsh property, including lot 15 which he valued separately, suffered no damage as a result of the highway project. (TT 613:10-25). Once the jury was made aware that he found a

74.6% reduction in value to the property next door as a result of the same highway project, his credibility was destroyed. (TT 614:10-25). The jury ultimately found Mr. Schmick's opinions to be unbelievable and awarded $551,125.00, the amount for the permanent taking and damaging opined by Landowners' appraiser plus the value of the temporary easement per Mr. Miller. (Appx. 1).

If the Court were to find the trial court had erred by limiting the testimony of Mr. Schmick, it would undoubtedly be harmless. SDCL § 15-6-61 states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice...

Mr. Schmick was given great latitude in his testimony despite serious questions of credibility. The trial court denied landowners motion to strike his testimony and allowed the jury to consider the opinions of Mr. Schmick. If any error occurred in the limitation of his testimony, it was certainly harmless for all of the reasons stated above.

IV. The trial court correctly ruled Lots 5, 6, 7, 8, and 15 have unity of use, unity of title, and contiguity and therefore constitute a parcel for purposes of valuation in eminent domain.

a. Standard of review

The Court reviews the trial court's ruling on a directed verdict by the abuse of discretion standard. *Gilkyson v. Wheelchair Express Inc.*, 579 N.W.2d 1, 3

(S.D.1998) (citing *Bland v. Davison County*, 566 N.W.2d 452, 460 (S.D. 1997) (additional citations omitted). A trial court's decisions and rulings on motion for directed verdict are presumed correct. *Id.* An abuse of discretion occurs when "no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Bridge v. Karl's Inc.*, 538 N.W.2d 521, 523 (S.D.1995)

b. The evidence overwhelmingly supports the unity of use element.

Judge Sabers ruled at the hearing on landowners Motion to Permit Evidence of the parcel:

> I do find unity of title, contiguous lots and unity of use based on the evidence presented at this stage. So I will allow evidence of the parcel, those five lots will be treated as the parcel for the purposes of the upcoming trial. (Appx. 8, HT 45:6-9)

When it became apparent that Mr. Schmick was going to offer testimony that Lot 15 was not a part of that larger parcel, Judge Sabers dismissed the jury to discuss the matter. In that discussion, Judge Sabers stated:

> Previously before the Court was a motion by landowners to allow evidence of the larger parcel. In ruling upon that motion the Court the Court determined as a matter of law, or so it thought, that the three requirements of larger parcel were met. The Court expressly found that the unity of ownership was met because Mr. Walsh and Mr. Miller owned the lots at issue, including Lot 15. The Court further found that unity of use was met because the case law says that it can be a planned future use and I found that the broader development plan met that requirement here. (TT535:24-25, 536:1-9).

After a lengthy discussion of the differing interpretations of the trial courts previous ruling, the court allowed Mr. Schmick to testify that Lot 15 should not be

included in the parcel, but warned such a question may ultimately be decided by a directed verdict.

Landowners made the Motion for Directed Verdict on the larger parcel rule at the close of evidence. Judge Sabers ruled on that Motion as follows:

> The Court was – frankly, back at the time of the hearing on this matter, the Court was very close on this issue and at that time based on the evidence presented had found enough evidence of unity of use, ownership and contiguity to submit the issue to the jury. Now we have closed the evidence and the Court has heard all there is to hear on those issues.
>
> Mr. Sargent's motion is granted. I find that unity of use, unity of ownership and contiguity have been established as a matter of law. The facts that are in dispute in this matter do not relate to those three factors; either the use, ownership, or contiguous nature of the properties. I find that to submit the issue to the jury would be in error in this matter as there is no reasonable basis for the jury to find on these facts otherwise. So I will grant that motion. (TT 657:14-25, 658:1-4).

South Dakota has held that where facts are undisputed, the question of whether physically separated tracts of land constitute one parcel for condemnation purposes because of a common use is a question of law for the courts. *State Highway Commission v. Fortune*, 91 N.W.2d 675 (1958). In *State Highway Commission v. Bloom*, 93 N.W.2d 576 (S.D. 1958), the South Dakota Supreme Court stated:

> "In the *Fortune* cases this court held that physically separated parcels or tracts of land held in one ownership will be considered as contiguous and will constitute one distinct parcel of land within the meaning of the condemnation statutes if the parts are devoted to a single use. Also it was held that where there is no dispute in the facts, the question whether physically separated parcels of land constitute one parcel because of common or unitary use is a question of law for the Court. In this case there was no dispute as to the title, location and use of land belonging to the defendant. Therefore it was for the Court to determine and the Court did

> determine by instructions given that there was such unity of title and use as to require consideration of the land as one parcel for the determination of any severance damage."

The Miller-Walsh property had been devoted to the unified use of creating a commercial assemblage. Mr. Miller had started combining the properties in 1999 to create one commercial development. He had accomplished his commercial assemblage and had moved into the next phase of constructing his "anchor" tenant the Kelly Inn hotel - when the State's highway project killed the development.

It is well settled that such unified use need not necessarily be the current use. Instead, plans to unify separate parcels all owned by a single owner can satisfy the unity of use rule. It is the "widespread and predominant view [that] ... where the property owner shows an intended unifying use of the property, where the property is reasonably adaptable to such use within the immediate future, or within a reasonable period of time, such as to affect the market value of the property." 59 A.L.R.4th 308 (1988).

The State offered no facts to contradict that all of the Miller-Walsh property's probable use was a high-end commercial development. The State only presented questions of timing claiming the project was in its "infancy" and purely speculation. The trial evidence showed otherwise. The trial testimony of Mr. Miller, Mr. Walsh, their transactional lawyer John Quantance, Kelly Inn's President Brenda Schmidt, Perkins' Operations Manager Gary Kulm, architect Dave Sellers, and engineer Dick Sayre all confirmed a high-end commercial development that had gone far past the planning stage with all parts of the Miller-

Walsh property being used. Countless emails, invoices, concept drawings and plans were admitted as evidence that corroborate their testimony.

The evidence presented at trial and in earlier submissions to the court clearly shows the intent to use Lots 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, and 19 for a joint commercial effort. The testimony of engineer Dick Sayre proves his instructions and intentions to use all the Lots in conjunction with one another to develop the property in a matter suited for its highest and best use, high end commercial property. (TT 183-185). Several of his concepts demonstrate the same.

c. *Bloom's* conclusion on unity of use is inapposite to the facts of this case.

The State points out that in *Bloom,* 93 N.W.2d 572, the Court found that a 240 acre tract owned by the Blooms was incorrectly considered a part of the larger parcel for valuation purposes. The Court questioned whether the physically separated tract was a part of the larger parcel holding the 240 acres of "flood irrigated hayland" did not share a unified use with the remainder of the ranch which was used for cattle grazing. The Court stated that landowners argued the hay was cut and hauled by truck to the ranch, but the decision is silent on what constitutes a physically separated tract.

The Court faced another larger parcel question involving a physically separated tract in *State Highway Commission v. Olson,* 136 N.W.2d 233 (S.D. 1965). The *Olson* Court provides further insight into definition of a physically separated parcel on page 235. "In *Bloom*, hay was grown on a 240 acre parcel of flood irrigated hay land, cut and hauled by truck to the home ranch two or three

miles away." *Olson* at 235. Lot 15 is separated from 5, 6, 7, and 8 by only E. 63rd Street but all of the lots were used together in the overall Kelly Inn concept. The facts surrounding the unity of use analysis made in *Bloom* are clearly distinguishable from those in the present case, and therefore use of the *Bloom* analysis in this case must be considered accordingly.

Mr. Sayre's concepts show the malleability of 63rd Street due to the unity of use of Lots 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 18, and 19. (TE 5A-E, Appx. 7). 63rd Street appears in different locations over the various lots in Northside Gardens in different drawings to accommodate the highest and best use of the development. Different parts of Lots 5, 6, 7, 8, and 15 are used for the street depending on which concept you look at. Mr. Sayre testified that Mr. Miller, Mr. Walsh, and the Kelly Inn would have been responsible for designing and financing the upgrade of E. 63rd Street. (TT 189:2-11). This is evidence of two things. First, the flexibility in location supports the unity of use of the lots. Second, it demonstrates that Lot 15 is only separated by an unimproved road which could be readily moved by private developers to allow the assemblage to realize its highest and best use.

The holding of *Bloom* offers little help to the State here as the Bloom's controversial tract was miles from the main parcel. Lots 5, 6, 7, 8, and 15 had a unified use, a commercial assemblage with adjoining lots. They were contiguous in nature with the exception of E. 63rd Street. The evidence shows that 63rd could be moved to promote the unified use of the Lots and therefore they are a larger parcel for purposes of valuation.

d. The trial court is vested with considerable discretion in determining the probability of a future use.

The State could offer no evidence that Miller and Walsh either used or intended to use Lots 5, 6, 7, 8, and 15 for any purpose other than the specific development planned by the landowners and executives of the Kelly Inn. Instead, the State only argued that the use which united each of these lots had not yet been realized.

> "The trial judge in a jury case is vested with considerable discretion in determining the reasonable probability of [planned use] within a reasonable time. It has been held that where the facts establish the existence of the probability, a finding to such effect will not be defeated because an actual application for [a planned use]. The burden of proving the existence of the reasonable probability [is] upon the condemnee."

Basin Electric Co-op, Inc. v. Cutler, 254 N.W.2d 143, 148 (S.D. 1965) citing Nichols on Eminent Domain, Vol. 4, s 12.322(2).

Miller and Walsh satisfied that burden with overwhelming evidence at every phase of this case. It was clear at the close of evidence that Lots 5, 6, 7, 8, and 15 would have been a part of a unified development plan but for the highway project. The State has failed to show that "no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion."

The trial court's decision to grant landowner's Motion for Directed Verdict on the larger parcel should be upheld and the Court should affirm the jury's verdict in whole.

CONCLUSION

The trial court fairly and correctly presided over the proceedings in this case. For all of the above stated reasons, Appellees respectfully request the jury's

verdict be affirmed and the State of South Dakota required to abide by the Final Judgment entered.

The Appellees request oral argument.

Respectfully submitted this 18th day of March, 2015.

MEIERHENRY SARGENT LLP

Mark V. Meierhenry
Clint Sargent
Christopher Healy
315 South Phillips Avenue
Sioux Falls, SD 57104
605-336-3075
mark@meierhenrylaw.com
clint@meierhenrylaw.com
chris@meierhenrylaw.com
Attorneys for the Appellant

Certificate of Service

The undersigned hereby certifies that two true and correct copies of the foregoing Appellees' Brief and all appendices were mailed by first class mail, postage prepaid to:

Karla Engle
South Dakota Department of Transportation
700 EAST BROADWAY AVENUE
PIERRE, SD 57501

On this 18th day of March, 2015.

MEIERHENRY SARGENT, LLP

By:

Certificate of Compliance

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 7,962 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27198

STATE OF SOUTH DAKOTA, by and through the South Dakota Department of Transportation and the South Dakota Department of Transportation Commission,

Plaintiff and Appellant,

v.

ROBERT L. MILLER AND THOMAS P. WALSH,

Defendants and Appellees.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

APPELLANT'S REPLY BRIEF

Attorneys for Appellant
Karla L. Engle
Special Asst. Attorney General
South Dakota Dept. of Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586

Anthony M. Hohn
Special Asst. Attorney General
Davenport, Evans, Hurwitz & Smith
PO Box 1030
Sioux Falls, SD 57101-1030

Attorneys for Appellees
Mark V. Meierhenry
Clint Sargent
Christopher J. Healy
Meierhenry Sargent, LLP
315 S. Phillips Ave
Sioux Falls, SD 57104

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ISSUE 1.

Did the trial court abuse its discretion by allowing testimony about how diversion of travel to and from Cliff Avenue diminished the value of Landowners' property located nearly 500 feet away?

A. Landowners incorrectly claim they can be compensated for every aspect of a public project, even when the State's action does not infringe on a private property right.

Landowners seek compensation for every decrease in land value arising from a public improvement project. Although the general measure of damages in eminent domain is the difference in property value before and after the taking, Landowners make the unsupported leap that all losses are compensable, even if they are not the result of the taking or damaging of a private property right.

Landowners' argument is contrary to the case law they urge this Court to consider. *Schuler v. Board of Sup'rs of Lincoln Tp.*, 81 N.W. 890 (S.D. 1900) is this Court's first enunciation of the "before" and "after" method of determining compensation in eminent domain. *Schuler*, however, requires that all compensation arise from the infringement of a private property right.

> It is not sufficient that compensation be made for the property taken, but 'just compensation' must also be made for other parts of the property damaged. In whatever manner, therefore, the part remaining shall be *damaged by the taking*, for such damage the party must be fully compensated.

81 N.W. at 892 (emphasis supplied).

Landowners ignore this language from *Schuler* and instead focus on a section of the opinion that attributes damages to "diversion of travel." According to Landowners, this reference means the State's closure of the Cliff Avenue intersection is compensable,

even though Landowners acknowledged they had no private property rights in the intersection. *State's Appx. Tab G at 22.* However, a careful reading of the entire opinion shows *Schuler* is distinguishable from this case. In *Schuler,* the township replaced an abutting road on one end of the owners' property with a new abutting road at the other end of the property. *Id.* at 892-893. By closing the existing abutting road, the township rendered the owners' buildings, which were oriented toward the old road, inaccessible or unusable. *Id.* at 892. The Court allowed the owner to collect compensation for the resulting diminution in property value. *Id. at 893. Schuler,* then, stands for the unremarkable proposition that an owner has a right of reasonable access to an abutting street and can collect compensation for damages arising from the loss of access to that street.

The situation in *Schuler* has nothing to do with this case. Unlike the owner in *Schuler*, the street abutting Landowners' Property is unchanged. Landowners still enter and exit the Property from 63rd Street and that street connects to the larger street system. The usefulness and accessibility of the only building on the Property, a storage shed, remains the same. Hence, *Schuler* does nothing to establish a compensable taking or damaging of Landowners' Property.

Landowners' reading of *Schuler* also cannot survive subsequent case law, which denies compensation for mere diversion of travel. Twelve years after *Schuler*, in a case very similar to this one, the Court disallowed compensation for the closing of two streets that previously intersected with the street abutting the owner's land. *Hyde v. Minnesota D. & P. Ry. Co.,* 136 N.W. 92 (S.D. 1912), *overruled in part on other grounds by Krier v. Dell Rapids Twp.,* 2006 S.D. 10, ¶ 25, 709 N.W.2d 841, 847. Relying on the

consequential injury test, the Court reasoned the owner's damages were not different in kind from the circuity of travel suffered by the general public. *Hyde,* 136 N.W. at 101. The Court wrote: "Possibly the depreciation in plaintiff's property might have been greater in degree than that of other owners of property in the vicinity, but it was of the same nature, and did not physically interfere with any right, easement or appurtenance belonging to the plaintiff's property." *Id.*

Nearly fifty years later, this Court denied compensation when the State built a new controlled-access highway parallel to an owner's abutting street, resulting in the diversion of traffic to the interstate rather than directly past the owner's commercial property. *Darnall v. State,* 108 N.W.2d 201 (S.D. 1961). After considering the consequential injury test, the *Darnall* Court concluded the State's diversion of travel was a burden shared by all the traveling public, so no compensation could be allowed. *Darnall,* 108 N.W.2d at 205.

Less than twenty years ago, in *State v. Henrikson,* 1996 S.D. 62, 548 N.W.2d 806, this Court denied compensation for damages arising from the construction of a median, even though the median would divert travelers to a more circuitous route. Again, the Court considered the consequential injury test and refused recovery, even though the median caused diversion of travel. *Id.*

Finally, in *Hall v. State ex rel. S.D. Dept. of Transportation,* 2011 S.D. 70, 806 N.W.2d 217, this Court allowed compensation for the State's closure of an interstate interchange abutting an owner's land. Significantly, the Court based its ruling on the fact that the owner's property enjoyed a private property right to the interstate interchange. According to the Court, the State's agreement for acquisition of the right of way included

a promise to provide the interchange for the benefit of the owner's abutting property. *Id.* ¶ 28. The Court also found that the State had paid less compensation to the owner, because the proximity of the interchange would increase the value of the land after the interchange was built. *Id.* When the State removed the interchange nearly 50 years later, the Court concluded the State must pay damages, because the State had promised interchange access to the original owner and had used the interchange to avoid paying full compensation for the original taking. *Id.* ¶¶ 28-30.

The allowance of compensation in *Hall* was based on facts the Court acknowledged were unique -- the State's promise of interchange access and the State's payment of reduced compensation in reliance on the existence of the interchange. Unlike *Hall,* there is no evidence the Cliff Avenue intersection was promised to Landowners as part of an earlier eminent domain proceeding or other agreement. In fact, as noted above, Landowners conceded they have no private property rights in the intersection. *State's Appx. Tab G at 22.* Because Landowners seek compensation based on the State's diversion of traffic and nothing more, South Dakota case law will not allow recovery.

B. The *Bloom* case does not allow Landowners to escape the requirements of the consequential injury rule.

Landowners hope to avoid application of the consequential injury rule, which requires a peculiar injury to an owner's land that is different in kind from that suffered by the general public. The rule is not satisfied here, because every member of the public is required to travel a longer, less convenient route to get from Cliff Avenue to 63rd Street after the intersection closure. Although Landowners claim their diminished property value far exceeds the fuel costs and lost time incurred by motorists generally, Landowners' injury is only different in degree, not in kind. The source of their monetary

losses derives from the same injury suffered by the public – the loss of a shorter route from Cliff Avenue to 63rd Street. Because Landowners' injury is the same as that suffered by the public, the trial court erred when it permitted Landowners to present evidence and collect compensation for the State's re-routing of traffic.

Nevertheless, Landowners try to avoid the application of the rule by relying on a passage in *State Highway Commission v. Bloom,* 93 N.W.2d 577 (S.D. 1958). Landowners claim *Bloom* establishes a broad right of recovery for damages to an owner's remaining property even though the "damage is of a kind suffered by the public in common." *Id.* at 577-578. Landowners' interpretation of this single passage cannot be reconciled with the issue presented in *Bloom* or the reasoning adopted by the Court.

1. The issue in *Bloom* is different than the issue here.

In the *Bloom* case, Bloom owned farm and ranch land and also leased government-owned land. The State took a strip of Bloom's land and a strip of the government land for construction of a controlled-access interstate highway. The highway separated one part of Bloom's ranch from the other. The State argued Bloom should receive damages for only that part of the interstate actually constructed across his land, even though other parts of the interstate, including the portion built on the leased government land, inhibited Bloom's ability to move cattle from one part of his severed property to the other. This Court rejected the State's argument:

> In a number of jurisdictions consequential damages are limited to those caused by the taker's use of the land acquired from the owner of the remaining area....But because of the difficulty in application many courts have modified this rule[.] "...[W]here a part of an owner's land is taken for a public improvement such as this, *and the part taken 'constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put*,' the owner is entitled to recover the full damage to his remaining property due to such public improvement, even

> though portions of the public improvement are located on land taken from surrounding owners."

Id. at 578 (italics added). In the Court's view, the takings across Bloom's land and neighboring property constituted an integral and inseparable part of a single use – construction of a controlled-access interstate highway. Because of this single and inseparable use, the Court concluded Bloom was entitled to compensation for damage arising from the interstate highway as a whole, even though part of the highway was located on land he did not own. The Court's ruling was premised on the inability to separate the damage arising out of the use of Bloom's land from the damage caused by other segments of the interstate highway. Because the damage to Bloom's land could not be readily apportioned between the various segments of highway, the Court reasoned that Bloom should be allowed recovery for all damage arising from the severance of his property by the highway.

The *Bloom* Court pointed to *City of Bristol v. Horter,* 43 N.W.2d 543 (S.D. 1950), involving the taking of land for sewage sloughs, to further elucidate the need for a special rule when damages cannot be readily apportioned among various properties. *Bloom,* 93 N.W.2d at 578. In *Horter,* a city acquired land from the defendants and other neighbors to construct sewage sloughs. *Id.* (citing *Horter,* 81 N.W. at 892). The Court acknowledged that damage from the disposition of malodorous sewage "could not be separated into parts on the basis of previous ownership of the parts taken or by any other workable method." *Id.* at 578. Hence, the defendants were compensated for all damage attributed to the sewage sloughs, even though the sloughs were partially constructed on land they did not own. *Id.*

The narrow exception announced in *Bloom* applies when damages attributed to a public improvement cannot be readily apportioned between the use of an owner's land and the use of other lands for the same purpose. That rule has no application to the facts of this case. It was undisputed that the State took a narrow strip of right of way from Landowners for construction of the interstate ramp and to improve drainage along the ramp. *TT 102-103, 105.* In contrast, the intersection was not closed in order to build the ramp or to improve drainage. The intersection was closed to enhance safe and efficient traffic flow. *TT 112.* There was no integral and inseparable use that unified the taking of the right of way and the closure of the intersection. Nor was it impossible to separate damages attributed to the taking of the right of way from damages attributed to the closed intersection. In their testimony, Landowner Miller and Landowners' appraiser did just that. They testified that damages to the remaining property were due to the lost travel routes to Cliff Avenue, not the reduction in land size caused by the State's taking of right of way. *State's Appx. Tab J at 56-57, 58-60 and 62-64.* Because the taking of right of way and the closure of the intersection were separate and distinct actions, and the damages flowing from these actions could be readily segregated, the rule adopted in *Bloom* has no application here.

2. Landowners ignore the *Bloom* Court's application of the consequential injury rule.

Landowners' assertion, that an owner can collect compensation even when he has suffered the same injury as the general public, is also not supported by the rationale laid out in the *Bloom* opinion. The Court determined an owner has a right to access his land, which is "...a right resting upon the ownership of the subject property and connected with and appurtenant to such subject property, and is, therefore, a property right. *It is a*

special private right entirely distinct from the public right[.]" *Bloom,* 93 N.W.2d at 578-579 (quoting *Hyde,* 136 N.W. at 99) (emphasis added). The *Bloom* Court then concluded that this distinct private right had been infringed when the interstate highway prevented Bloom from accessing all of his property as he had before the highway was built. Because of the interstate highway, it would be "...more difficult and expensive if not impossible" to move cattle back and forth from the ranch land north of the interstate to the ranch land south of the interstate. *Id.* at 579. Although added labor, expense and inconvenience could not be collected as a separate item of damage, the Court concluded these additional burdens on his property could be considered in awarding compensation for the reduced value of the remaining land. *Id.*

Contrary to Landowners' assertion, the *Bloom* case represents the *application* of the consequential injury rule, not the abandonment of it. The Court concluded Bloom had a right, distinct from the public, to access all of his land. The State infringed on that private right of access when it severed the property, resulting in an injury different from the mere circuity of travel suffered by the public as a whole. In contrast, Landowners have suffered no severance of their Property due to the State's highway project. They merely suffer from circuity of travel caused by the intersection closure – the same injury sustained by the public. Damages from this general injury are not recoverable.

3. The State's building of the 63rd Street extension satisfies the requirements of *Bloom.*

Finally, Landowners claim *Bloom* stands for the proposition that owners have rights of access to streets that abut their property and the streets beyond. Landowners quote a section of *Bloom,* which states that a property owner's rights of access include not only access to the abutting street, but also "...extends sufficiently beyond his own

premises as to insure him reasonable facilities for connection with those highways in which he has no special rights." *Bloom,* 93 N.W.2d at 579.

Again, Landowners misconstrue *Bloom*. The quoted section simply ensures that an owner's abutting street connects with the larger street system. Otherwise, the government could entirely land-lock an owner's property by leaving an owner's direct access to the abutting street undisturbed, while closing all intersections connecting the abutting street with the rest of the street system. That is the outcome the State avoided when it built the 63rd Street extension. If the State had simply closed the 63rd Street/Cliff Avenue intersection, without first building the street extension, the Property would have been essentially land-locked. The only other street connecting with 63rd Street is Wayland Avenue, an extremely narrow and often impassable dirt road. To avoid land-locking the Property, the State extended 63rd Street to connect with another segment of 63rd Street, which in turn connects with two other streets and the larger street system. Rather than running afoul of *Bloom*, the State complied with the dictates of that case, by ensuring the segment of 63rd Street abutting Landowners' property still connected with the larger street system. Accordingly, Landowners are not permitted to seek damages for the closing of 63rd Street.

C. The consequential injury rule is not confined to inverse condemnation cases.

In a further effort to avoid the consequential injury rule, Landowners claim the rule only applies to inverse condemnation lawsuits where there has been no physical taking of land by the government. That assertion is untrue. The rule was applied by this Court in *State v. Henrikson,* 1996 S.D. 62, 548 N.W.2d 806, a condemnation action filed by the State to acquire five acres out of a parcel totaling roughly 55 acres. Furthermore,

it would be nonsensical to accept Landowners' argument and apply the consequential injury rule only to inverse condemnation cases brought by property owners. The question of compensability should always rest on the nature of the government's action and its peculiar and distinct effect on the owner's property – not the identity of the plaintiff.

D. Landowners' reliance on *Hayes Estate* is misplaced, because the question of a compensable taking was not at issue.

In a continued effort to allow compensation for every aspect of a government project, Landowners quote the following passage from *State Highway Commission v. Hayes Estate*, 140 N.W.2d 680, 684 (S.D. 1966):

> [T]he landowner is entitled to have the jury informed as to *all* those facts which legitimately bear upon the market value of the [property] before and after the taking and those factors which would ordinarily influence a prospective purchaser in negotiating for the property.

(Emphasis supplied by Landowners).

The State has no quarrel with this passage from *Hayes Estate,* except that it has no application here. The quoted language in *Hayes Estate* describes how to measure damages where the taking (acquisition of right of way that severs a ranch) is undisputed. *Hayes Estate* does not wrestle with the question now before this Court --- whether a governmental action amounts to a compensable taking. Furthermore, Landowners' expansive reading of *Hayes Estate* cannot be reconciled with this Court's rulings in *Henrikson* and *Darnall,* which disallowed compensation for diversion of traffic caused by a median *(Henrikson)* and by a curb separating two highways (*Darnall)*. If, as Landowners contend, every alleged loss flowing from a government action should be admitted into evidence and compensated, then *Henrikson* and *Darnall* would have to be overruled.

E. Property abutting Cliff Avenue, such as the Kelly Inn land, has special rights of access that do not extend to Landowners' Property, located nearly 500 feet away from Cliff Avenue.

In a misguided effort to establish a compensable taking, Landowners attack the value opinions of the State's appraiser. Landowners criticize the appraiser, because he attributed no damages to the Property due to the closure of the Cliff Avenue/63rd Street intersection. Meanwhile, Landowners point out that the same appraiser, in a separate appraisal assignment, assessed substantial damages to the Kelly Inn land due to loss of all access to Cliff Avenue. Landowners claim there is no way to reconcile this difference in the appraisals.

Landowners ignore two key distinctions between the Kelly Inn land and the Property. The Kelly Inn land abuts Cliff Avenue and the State was taking all of its access rights to Cliff Avenue. *TE 200; TT 614.* Landowners' Property does not abut Cliff Avenue and the State did not take any access rights to the abutting 63rd Street. These differences carry both legal and factual significance. This Court has long recognized that an owner of property abutting a highway has special private rights of access, distinct from those of the general public, which qualify for compensation when taken by the government. *Hurley v. State,* 143 N.W.2d 722, 724 (S.D. 1966). In contrast, this Court has denied compensation when an owner complained about lack of easy access to a non-abutting highway. *Darnall,* 108 N.W.2d at 205. By allowing Landowners to receive compensation for diversion of travel to and from Cliff Avenue, a non-abutting street, the trial court blurred the legal distinction between the Kelly Inn land and the Property. By doing so, the Court deprived the State of the ability to distinguish the appraisals on these legal grounds.

The difference in the two appraisals is also explained by the difference in the location of the two properties. The Kelly Inn land abutted Cliff Avenue, a busy thoroughfare, and two national chain restaurants. *TE 200.* In contrast, Landowners' Property was nearly 500 feet away from Cliff Avenue, adjacent to vacant land and modest residential homes. *Id.* Because of this locational difference, the State's appraiser opined that before and after the State's project, the Property was best suited to destination-oriented commercial and industrial uses that are not dependent on high volumes of traffic. *TT 585-586.* Consequently, even constrained by the trial court's erroneous ruling that circuity of travel is compensable, the State's appraiser found no damage due to the loss of a shorter access route to and from Cliff Avenue. *Id.*

F. Landowners had no right of access to Cliff Avenue through the Kelly Inn and Perkins land.

Landowners claimed the Property was devalued because the State purchased the Kelly Inn property as part of its project. Landowners claim this purchase "took away landowners' access to Cliff Avenue through Kelly Inn and Perkins lots." *Appellees' Brief at 11.* According to Landowners, if the Kelly Inn project had been built, a motorist could leave the Property and access Cliff Avenue by traveling down 63rd Street and then winding through the Kelly Inn and Perkins parking lots. *Appellee's Brief at 19.* In support of this claimed access route, Landowners quote testimony from the President of Kelly Inns, LTD, Brenda Schmidt. But Ms. Schmidt actually testified about a potential access easement for the Kelly Inn Property, not Landowners' Property. *TT 234-235.* In another section of their brief, Landowners concede that they had no enforceable easement rights over their neighbors' properties. Instead, Landowners claim the Property had "a potential alternative access" to Cliff Avenue across the Perkins and Kelly Inn lands

"[t]hat is no longer a possibility" because the State bought the Kelly Inn land as part of its highway project. *Appellee's Brief at 12.*

In eminent domain, compensation is determined by the value of the property on the date of taking. *City of Sioux Falls v. Kelley,* 513 N.W.2d 97, 102 (S.D. 1994). Elements of damage cannot be remote, speculative or uncertain. *Basin Elec. Power Coop., Inc. v. Cutler,* 254 N.W.2d 143, 146 (S.D. 1977). There was no evidence that Landowners' Property enjoyed any easement or other enforceable access rights across the Kelly Inn and Perkins parking lots. Without any enforceable access rights to Cliff Avenue, Landowners cannot recover for the loss of a *potential* access route to and from this street.

G. Landowners concede that testimony about lost access to Cliff Avenue had an effect on the jury's verdict.

Landowners acknowledge the jury heard evidence about diminished land values due to the closure of the intersection and the lost "possibility" of access over the Kelly Inn and Perkins lots. *Appellee's Brief at 11-12.* Landowners further acknowledge that this evidence was used by the jury to determine the after value of the Property. *Id.* Through these admissions, Landowners have conceded that the disputed evidence had an effect on the jury's verdict, a necessary prerequisite for granting a new trial.

Issue 2.

Did the trial court abuse its discretion by modifying the pattern jury instruction to instruct the jury to determine the value of Landowners' property before and after "the project" rather than before and after "the taking"?

The trial court modified the pattern jury instruction to allow compensation for diminution in land values due to the "project" instead of the "taking." Landowners

defend the trial court's modified instruction, by continuing to argue that South Dakota allows compensation for every aspect of a government project.

Landowners' position directly conflicts with this Court's opinion in *Darnall,* where the Court outlined a variety of governmental actions that will not give rise to compensation. 108 N.W.2d at 206. Although *Darnall* is a seminal takings case and deals a heavy blow to Landowners' position, they never even mention that case in their brief.

Similarly, if every governmental action entitles an owner to compensation, then Landowners must overcome the contrary ruling of *Henrikson,* where this Court disallowed compensation for diversion of traffic caused by a median. 548 N.W.2d at 811. Landowners, however, make only a passing reference to *Henrikson.*

Because the reference to "project" rather than "taking" cannot be reconciled with landmark rulings disallowing recovery for mere circuity of travel, the court's instruction was misleading and erroneous, and warrants a new trial.

Issue 3.

Did the trial court abuse its discretion by prohibiting the State's expert from offering testimony about why Lot 15 did not have unity of use with the rest of Landowners' property and therefore should not be included in the property valued for purposes of just compensation?

Landowners claim the trial court prohibited the State's appraiser from offering a "legal explanation" about the three-factor test for determining whether Lot 15 should be included in the valuation unity. According to Landowners, this explanation would have been unnecessary and inappropriate. If that were true, then the trial court should have also interrupted Landowners' appraiser, who was permitted to explain the three-factor test and offer opinions about how the facts relating to Lot 15 satisfied each factor of the test.

If an abuse of discretion means anything, it must encompass a judicial decision to allow one party to present evidence on a subject and then prohibit the other party from doing the same. The trial court, *sua sponte*, interrupted the State's appraiser and prevented him from offering testimony on the same subjects that Landowners' appraiser was allowed to address without interruption. The excluded testimony would have been directly relevant to an issue before the jury – the question of what constitutes the valuation parcel. The trial court's one-sided ruling was the exercise of discretion "to an end or purpose not justified by, and clearly against reason and evidence." *State v. Dillon*, 788 N.W.2d 360 (S.D. 2010) (citations omitted).

In defense of this inequitable result, Landowners claim the trial court granted summary judgment on this issue before the trial. But summary judgment cannot be granted without notice to the adverse party. *Schuldt v. State Farm Mut. Auto. Ins. Co.*, 272 N.W.2d 94 (S.D. 1975). Landowners never address the fact that their motion and notice of hearing, and the trial court's order, do not even mention summary judgment. Landowners' assertion is also contradicted by the trial court's statement, at the close of the trial, that summary judgment was never issued.

> The Court was – frankly, back at the time of the hearing on this matter, the Court was very close on this issue and at that time based on the evidence presented *had found enough evidence of unity of use, ownership and contiguity to submit the issue to the jury.*

TT 657 (italics added).

Not only was the evidence incorrectly excluded, but Landowners concede the court's evidentiary ruling was prejudicial to the State. Landowners acknowledge the verdict can only be explained with reference to Landowners' appraiser's opinion, which included damage to Lot 15. *Appellees' Brief at 25.* The grounds for reversal have been

met.

Issue 4.

Where Landowners offered testimony that Lot 15 would be put to a use separate and distinct from the use of the rest of their property, did the trial court err in ruling as a matter of law that Lot 15 should be included in the larger parcel for purposes of valuation and compensation?

Landowners do not dispute that their witnesses testified Lot 15 would be sold to Kelly Inn for its hotel, and Landowners' remaining lots would be put to other commercial uses. Landowners make the vague assertion that these disparate commercial uses constituted a "commercial assemblage" and therefore the unity of use requirement was satisfied. Landowners do not cite a single case where unity of use rested on such a broad interpretation. In the cases cited by Landowners, this Court found the unity of use factor had not been satisfied, even though the disallowed parcels and the owners' other lands were all devoted to some type of agricultural use. *State Highway Comm'n v. Olson,* 136 N.W.2d 233, 236-237 (S.D. 1965) (excluding crop and hay land in the ranch land valued by the jury); *Bloom,* 93 N.W.2d at 581 (disallowing inclusion of flood irrigated hay land with other ranch lands). Landowners' hopes to enjoy the benefits of a nearby hotel project do not establish the single, integrated and inseparable use required by our law. The trial court incorrectly decided this issue in favor of Landowners. As such, a new trial is required.

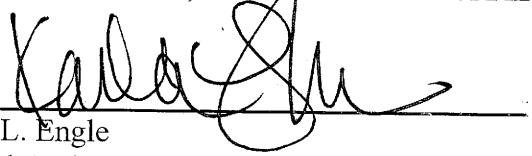
CONCLUSION

The inconvenience Landowners suffer because of the re-routing of Cliff Avenue traffic is the same inconvenience their neighbors and other motorists will bear. The trial court committed reversible error when Landowners were allowed to present evidence and receive compensation due to this change in traffic flow. By revising the pattern jury

instruction, the trial court permitted the jury to award compensation for this general injury, despite seminal rulings disallowing such damages. The trial court also prevented the State from refuting Landowners' testimony that Lot 15 should be part of the valuation parcel, and then improperly decided this issue in favor of Landowners.

The State respectfully requests reversal and a new trial to remedy these errors.

STATE OF SOUTH DAKOTA
MARTY JACKLEY, ATTORNEY GENERAL

By: 
Karla L. Engle
Special Assistant Attorney General
South Dakota Department of Transportation

and

Anthony M. Hohn
Special Assistant Attorney General
Davenport Evans Hurwitz and Smith

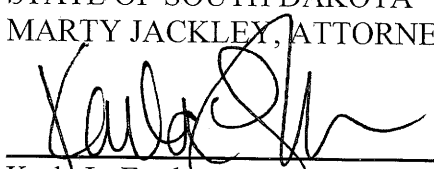
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b), I certify this *Appellant's Reply Brief* complies with the type volume limitations set out in said statute. This brief was prepared using Microsoft Word, and contains 4,928 words, excluding the cover, table of contents, table of authorities, and certificates of counsel. I have relied on the word count of the word processing program to prepare this Certificate.

Dated this 6th day of April, 2015.

STATE OF SOUTH DAKOTA
MARTY JACKLEY, ATTORNEY GENERAL



Karla L. Engle
Special Assistant Attorney General
South Dakota Department of Transportation
Office of Legal Counsel
700 East Broadway Ave.
Pierre, SD 57501-2586
605 773-3262
karla.engle@state.sd.us
Attorney for Appellant

CERTIFICATE OF SERVICE

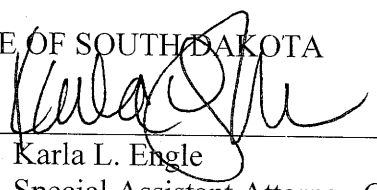
The undersigned hereby certifies she filed this original *Appellant's Reply Brief* and two copies with the Clerk of the South Dakota Supreme Court, by hand-delivering the same to the Clerk's Office at the address listed below and further certifies that she mailed two true and correct copies of this *Appellant's Reply Brief* by first class United States mail, postage prepaid to opposing counsel at the address listed below:

Mark Meierhenry
Clint Sargent
Christopher Healy
Meierhenry Sargent, LLP
315 S. Phillips Ave.
Sioux Falls, SD 57104

Ms. Shirley A. Jameson-Fergel
Clerk of Court
South Dakota Supreme Court
500 East Capitol Ave.
Pierre, SD 57501-5070

On this 6th day of April, 2015.

STATE OF SOUTH DAKOTA

By: 
Karla L. Engle
Special Assistant Attorney General