

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 30889

MERLE G. BIERSCHENK AND ANITA J.
BIERSCHENK,
Plaintiffs/ Appellees,

vs.

RICHARD D. PARCEL and WENDY PARCEL,
Defendant and Appellant,

and

WILLIAM BOSCH, CO-TRUSTEE OF THE
WILLIAM AND MARGARET BOSCH
FAMILY TRUST DATED JULY 17, 2023,
Defendants/ Appellees.

Appeal from the Circuit Court, Fourth Judicial Circuit
Butte County, South Dakota

The Honorable Michael Day

APPELLANT'S BRIEF

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PRELIMINARY MATTERS

Appellants-Defendants Richard D. Parcel and Wendy Parcel will be referred to as “Richard” and “Wendy”, respectively, or collectively as the “Parcels.” Appellee-Plaintiffs Merle G. Bierschenk and Anita J. Bierschenk will be referred to as “Merle” and “Anita”, respectively, or collectively as the “Bierschenks.” Appellee-Defendant William Bosch will be referred to as “Bosch”.

Reference to the settled record will be cited as “SR _____” followed by the starting page number and further description of the relevant portion of the document when necessary. Reference to the transcript of the summary judgment hearing on September 25, 2023 hearing will be cited as “SJ H _____”. Reference to the transcript of the motions hearing on August 12, 2024 will be cited as “MH _____”. The Appendix of this brief will be referred to as “Appx. p. _____”.

JURISDICTIONAL STATEMENT

This is an appeal of the trial court’s final judgment quieting title in favor of the Bierschenks to a 16 foot wide access easement and 4 foot wide water pipeline easement over the properties of the Parcels and Bosch; declaring the existence of a 25 foot wide public access easement across Parcels’ property; and permanently enjoining Parcels from blocking those easements. SR p. 425, Appx. p. 46. The Judgment was filed with the Circuit Court of Butte County on October 9, 2024. *Id.* Notice of Entry of Judgment

was filed and served on October 10, 2024. SR p. 430. Richard and Wendy Parcel filed their Notice of Appeal on November 6, 2024. SR. p. 438.

STATEMENT OF THE ISSUES

Issue 1. Whether the trial court erred in granting summary judgment declaring the existence of a 25 foot public easement crossing the Parcels' property.

The trial court granted Bierschenks' Partial Motion for Summary Judgment determining a 25 foot wide public easement existed across the Parcels' property.

Most relevant cases and statutory provisions:

- a. *Busselman v. Egge*, 2015 S.D. 38, 864 N.W.2d, 786
- b. *Thieman v. Bohman*, 2002 S.D. 52, 645 N.W.2d 260
- c. *Bergin v. Bistodeau*, 2002 S.D. 53, 645 N.W.2d 252

Issue 2. Whether the trial court erred in quieting title, in favor of Bierschenks, to a 16 foot wide easement for road right-of-way and a four foot wide easement for water pipeline, as the Bierschenks commercial use of the easement exceeded its scope.

The trial court determined a 16 foot wide easement for road right-of-way and a four foot wide easement for water pipeline access existed, with no restriction on the scope of its use, and quieted title to the Bierschenks.

Most relevant cases and statutory provisions:

- a. *Knight v. Madison*, 2001 SD 120, 634 N.W.2d 540

b. *Picardi v. Zimmiond*, 2005 SD 24, 693 N.W.2d 656

Issue 3. Whether the trial court erred in granting a permanent injunction enjoining Parcels from blocking or obstructing the easements.

The trial court granted a permanent injunction enjoining Parcels from blocking or obstructing the 25 foot public easement and the 16 foot easement.

Most relevant cases and statutory provisions:

a. SDCL § 21-8-14

STATEMENT OF THE CASE

The Bierschenks filed a Summons and Complaint on June 26, 2023. SR p. 1 & 2. Their Complaint alleged two causes of action: the first to quiet title, pursuant to SDCL § 21-1-41, in favor of the Bierschenks to an easement crossing a real property owned by the Parcels, and the second for injunctive relief under SDCL § 21-8-14 to prevent the Parcels from blocking access to the easement. SR p. 2. The Complaint was served on the Parcels who timely filed an Answer on July 26, 2023. SR p. 20.¹

Bierschenks moved for summary judgment on August 27, 2023. SR p. 24. In their Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment, Bierschenks, for the first time, sought a declaratory

¹ William Bosch was also served with the Summons and Complaint (SR p. 13) but did not file an Answer. William Bosch owns Lot 14A which sits to the south of Parcels' property and is adjacent to the easements in dispute.

judgment that a 25 foot wide easement, dedicated to public use in accordance with SDCL§ 11-3-12, exists across the Parcels' lot. SR p. 24 and 25; Brief in Support of Motion for Summary Judgment, p. 10-13. Parcels answered and resisted the Motion for Summary Judgment. SR 61, 63, 66, 68, and 71. The trial court, the Honorable Michael Day, held a hearing on the Motion for Summary Judgment on September 25, 2023. On November 20, 2023 the trial court issued a Memorandum of Decision granting Bierschenks' Motion for Summary Judgment on the issue of whether a 25 foot easement dedicated to public use exists across the Parcels' lot. SR p.97, Appx p. 13. An Order Granting Plaintiffs' Motion for Summary Judgment was entered on March 21, 2024. SR p. 117, Appx p. 22.

On August 12, 2024, the court held a motions hearing to determine the remaining issues after which both the Parcels and Bierschenks submitted proposed Findings of Fact and Conclusions of Law. SR 372, 382.² The trial court entered its Findings of Fact and Conclusions of Law and Order on September 4, 2024. SR 403, Appx p. 26.

On October 9, 2024, in accordance with its order granting summary judgment and its September 4, 2024 findings and conclusions, the trial court entered judgment quieting title in favor of the Bierschenks (Lot 14 C) to a 16

² After the August 12, 2024 hearing, the trial court ordered the parties to submit proposed findings of fact and conclusions of law. It was stipulated and ordered that each party's submitted proposed findings of fact and conclusions of law would be treated as objections to the submissions of the other party. SR p. 366.

foot wide access easement and 4 foot wide water pipeline easement over the property of the Parcels and Bosch (Lot 14 A and Lot 14 B); declaring a 25 foot wide public access easement across Parcels property; and permanently enjoining Parcels from blocking the easements. SR p. 425.

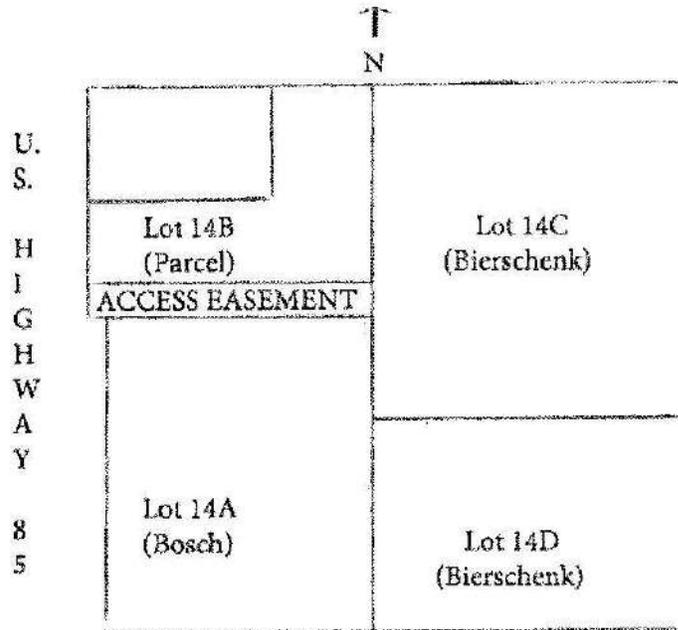
STATEMENT OF THE FACTS

Merle and Anita Bierschenk own Lot 14C of the Prairie View Addition in the City of Belle Fourche. MH 14:8-9:6. The Bierschenks purchased the property from a sheriff's sale in 2014 and received the deed in 2015. MH 30:15-17. The Bierschenks do not live at Lot 14C. MH 31:1-2. Merle Bierschenk built eighteen 12' by 50' storage units on Lot 14 C which he rents out to those seeking to store large recreational vehicles. MH 17:1-4; 31:5-8.

Richard and Wendy Parcel own Lot 14B of the Prairie View Addition. SR 252, Exhibit 2. Wendy Parcel, then known as Wendy Preszler, purchased Lot 14 B in 2004. *Id.* Richard Parcel's name was added to title to the property in 2014. *Id.*

At the onset of this litigation, William and Margaret Bosch owned Lot 14A of the Prairie View Addition. SR 258, Exhibit 3. It is now owned by the William and Margaret Bosch Family Trust. *Id.*

The easement in dispute and adjacent lots are generally depicted as follows (not to scale)³:



Lots 14A, 14B, and 14C of the Prairie View Addition were previously one single lot legally described as Lot 14, Section 3, Township Eight North, Range Two East, Black Hills Meridian, Butte County, South Dakota. SR 229, Exhibit 1. In 1948, the entirety of Lot 14 was owned by H.W. Kirby. *Id.* In a warranty deed dated April 28, 1948, H.W. Kirby conveyed the east half of Lot 14 to Emily B. Goode “together with a perpetual easement, for road right of

³ This depiction of the properties was produced by Bierschenks’ in their Complaint and Brief in Support of Motion for Summary Judgment. The trial court incorporated it into its Memorandum of Decision (SR p. 97) and Findings of Fact and Conclusions of Law (SR p. 403).

way sixteen (16) feet wide” and “a perpetual easement four (4) feet wide for a water pipeline” across the west half of Lot 14. *Id.*, Appx p. 1.

The location of the sixteen foot easement created in the 1948 deed is as follows:

Beginning at a point 164.04 feet South of the Northwest corner or (sic) said Lot 14, on U.S. Highway 85, and continuing due east across the West half of Lot 14 to the east line of the West Half of Lot 14

Id. The location of the four foot water pipeline easement is as follows:

Beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line of the West Half of Lot 14.

Id.

The 1948 deed also puts the following express limitation on the conveyance of the East Half of Lot 14 and the easements:

Only one family private dwelling, with or without attached garage, having a value of not less than \$1,500.00 may be placed upon the above described land, this not to apply to necessary outbuildings such as sheds, barns and chicken coops. It is understood and agreed that this restriction is for the benefit of the grantee and also for the benefit of all the property and premises located on said Lot 14

Id.

In 2004 the west half of Lot 14 was owned by Guy M. Ferris. SR 252, Exhibit 2. In anticipation of selling a portion of the west half of Lot 14, Guy M. Ferris filed a plat dividing the west half of Lot 14 into Lot 14A on the southern portion and Lot 14B on the northern portion (Excluded from Lot 14

is the west 174 feet of the north 90 feet of Lot 14 which was conveyed at an earlier time). SR p. 68, Affidavit of Richard Parcel, ¶ 4; SR p. 252, Exhibit 2, Appx. p. 2. Because Guy Ferris was prohibited from gaining access to Lot 14A from the west off US Highway 85, an access easement across the southerly portion of Lot 14B was provided so he could gain access to Lot 14A. SR p. 68, Affidavit of Richard Parcel, ¶ 6. The Plat specifically provides that the 25' Access Easement is dedicated for Lot 14A. *Id.*; SR p. 252, Exhibit 2; Appx. p. 2.

Shortly after filing the 2004 Plat, Guy M. Ferris conveyed Lot 14B to Wendy Preszler, now known as Wendy Parcel, who later filed a quit claim deed adding Richard Parcel as joint tenant owner of Lot 14B. SR p. 252, Exhibit 2. In 2012, Guy M. Ferris conveyed Lot 14A to William A. Bosch. SR p. 258, Exhibit 3. In 2008, a Plat was filed dividing the east half of Lot 14 into Lot 14C and Lot 14D. SR p. 229, Exhibit 1.

Richard Parcel parks his pickup on the southern portion of his property, Lot 14B. MH 65:20-22. Several photographs of Richard's pickup parked on the southern portion of the property were submitted as hearing exhibits. SR 262, 263, 281, 283; Exhibits 4, 5, C, D. Both Richard and Merle agreed those pictures generally depict how Ricard's pickup is always parked. MH 19:9-13; 66:14-15. To the south of where Richard parks his pickup, and generally running east to west across Lot 14 B, from Highway 85 to Lot 14C, is a gravel road. SR 262, 263, 281, 283; Exhibits 4, 5, C, D. As the gravel road

approaches Highway 85, the road veers slightly to the north to avoid a power pole. MH 38:3-39:6; SR 262, Exhibit 4. Going east, the gravel road slightly bulges to the south near where Richard's pickup is parked. MH 69:16-20; SR 262, Exhibit 4. The gravel road has looked this way since before the Parcels owned the property. MH 62:12-19; 69:16-20. A two-wire gate had always existed at the east edge of the easement along the boundary between Lot 14 B and Lot 14 C. MH 58:13-59:3. The Parcels opened the gate after receiving a letter from Bierschenks' counsel in July of 2021. *Id.* The gate could be opened by anyone at any time. MH 40:1-3. Later, Merle tore out the gate and a fence running along the boundary between Lot 14B and Lot 14C without obtaining permission from the Parcels. MH 40:4-41:7.

The sixteen foot easement was created in 1948 well before the east half of Lot 14 was divided into Lot 14A and Lot 14B. SR 229, Ex. 1; Appx 1. The north boundary of the sixteen foot easement starts 164.04 feet south of the northwest corner of the original Lot 14 and the south boundary of the 16 foot easement starts 180.04 feet south of the northwest corner of the original Lot 14. *Id.* While a portion of the sixteen foot easement runs across the southern portion of Lot 14B owned by the Parcels, it is unclear where the southern boundary of the 16 foot easement sits in relation to the boundary between Lot 14B and Lot 14A. MH 65:12-19; 37:13-17.

Richard testified that a portion of the 16 foot easement runs on to the Bosch property to the South (Lot 14A) MH 65:12-19. Although Merle testified

that he once measured 180 feet south from the original northwest corner of Lot 14 (MH 42:18-43:9) he also testified he did not know if the sixteen foot easement sits entirely on Lot 14B owned by the Parcels. MH 37: 13-17.

Merle had a surveyor locate easement pins for the twenty-five foot easement but not the sixteen foot easement. MH 32:3-11. The surveyor did not provide Merle a written plat or map of the sixteen foot easement. MH 33:19-20. At the August 12, 2024 motions hearing, Merle introduced a photograph purporting to show Richard Parcel's pickup within the 16 foot easement. SR 265, Ex. 6. As depicted in Exhibit 6, Merle was measuring from the boundary between Lot 14A and Lot 14B, not the southern boundary of the sixteen foot easement. MH 32:12-20.

At the August 12, 2024 motions hearing, the Parcels introduced photographs showing Richard and Wendy measuring the distance between Richard's pickup and a dumpster located on Mr. Bosch's property (Lot 14A), near the property line. MH 66:24-67:20. Their measurements showed a distance of 17 feet. *Id.* The Parcels park in that location, close to their front door of their home, to accommodate Wendy's handicap. MH 68:5-12.

STANDARD OF REVIEW

Our standard of review on summary judgment requires this Court to determine whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law. The circuit court's conclusions of law are reviewed de novo. However, all facts and favorable inferences from those facts must be viewed in a light most favorable to the

nonmoving party. We will affirm the circuit court's ruling on a motion for summary judgment when any basis exists to support its ruling.

United Bldg. Centers v. Ochs, 2010 S.D. 30, ¶ 10, 781 N.W.2d 79, 82.

A circuit court's factual findings, however, are reviewed for clear error.

Stockwell v. Stockwell, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 59. The application of those facts to the law is reviewed de novo. *Huether v. Mihm Transp. Co.*, 2014 S.D. 93, ¶ 14, 857 N.W.2d 854, 860.

ARGUMENT

1. The Trial Court erred in granting summary judgment determining the existence of a 25 foot wide public access easement.

a. A cause of action for declaratory judgment of a public easement was contrary to Bierschenks' Complaint and not properly before the trial court.

Parcels resisted the Motion for Summary Judgment on the grounds that the Motion sought relief that was not pled in the Bierschenks' Complaint. SR p. 71, Brief in Resistance to Motion for Summary Judgment. The Complaint raised two causes of action, the first seeks to quiet title to the easement pursuant to SDCL 21-1-41 and the second seeks injunctive relief under SDCL 21-8-14 to prevent the Parcels from blocking access to the easement. SR p. 2, Complaint, p. 6-9. However, Plaintiffs' Motion for Summary Judgment and Brief in Support of the Motion for Summary Judgment indicated that

Plaintiffs are seeking declaratory judgment that a 25 foot wide easement, dedicated to public use in accordance with SDCL 11-3-12, exists across the Parcels' lot. SR p. 24 & 25, Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, p. 10-13.

In its memorandum decision granting summary judgment, the trial court did not address this issue. SR 97, Appx. p. 13. The allegation that a public easement exists and the request that the court declare the existence of such an easement is a wholly unique cause of action and request for relief that had not been pled and placed in dispute. Parcels were not served a complaint alleging such a cause of action or given an opportunity to answer. At no time did Bierschenks amend their complaint.

SDCL § 15-6-56(a) provides that a

party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

At the time Bierschenks filed their Motion for Summary Judgment, they had not commenced an action seeking declaration of public easement under SDCL § 11-3-12. SDCL § 16-6-56(a) requires a motion for summary judgment be filed at least 30 days after an action has

been commenced. So the motion was untimely to the extent it sought relief under SDCL § 11-3-12.

SDCL § 15-6-15(b) contemplates that issues not raised by the pleadings can be tried by the express or implied consent of the parties. That did not happen here. The matter was not tried but determined by summary judgment. There was no express or implied consent. Rather, the Parcels expressly objected to the new issue of determining the issue of a public easement under SDCL § 11-3-12 in their response to the Motion for Summary Judgment. SR 61, 71.

Under the applicable rules of civil procedure, it was not proper to determine this claim through summary judgment. As a matter of due process and fundamental fairness, the Parcels should not be subject to summary judgment on a claim that has not been properly served upon them. As a matter of law, Bierschenks were not entitled to summary judgment and the trial court committed reversible error in granting such judgment.

b. The City of Belle Fourche is a necessary party to an action seeking to declare the existence of a public easement.

Parcels also resisted the Motion for Summary Judgment by arguing that the City of Belle Fourche was an indispensable party to an action under SDCL § 11-3-12 to determine the existence of a public

easement. SR p. 71, Brief in Resistance to Motion for Summary Judgment. In its Memorandum Decision, the trial court made no factual findings or legal conclusions as to the City being an indispensable party. SR 97, Appx. p. 13.

The property in question lays within the jurisdiction of the City of Belle Fourche. The Bierschenks asked the trial court to declare that, under the provisions of SDCL 11-3-12, the 25 foot access easement noted on the 2004 plat was dedicated as a public easement. In order for a road to be dedicated for public use under SDCL 11-3-12, the dedication must be accepted by the appropriate governmental entity. "There must be an unconditional offer by the grantor to create a public highway and there must be an unconditional acceptance by the appropriate public entity that it becomes one" *Selway Homeowners Association v. Cummings*, 2003 SD 11, ¶ 20, 657 N.W.2d 307, 313 *citing Tinaglia v. Ittzes*, 257 N.W.2d, 724, 728-729 (S.D.1977) (emphasis added). The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication. *Bergin v. Bistodeau*, 2002 S.D. 53, ¶ 16, 645 N.W.2d 252, 255-256.

In an action to determine if a road has been dedicated for public use, the governmental authority that would have to accept such dedication is an indispensable party. *Busselman v. Egge*, 2015 S.D. 38,

¶13, 864 N.W. 2d 786, 791. See also *Thieman v. Bohman*, 2002 S.D. 52, 645 N.W.2d 260 and *Smith v. Albrecht*, 361 N.W.2d 626 (S.D.1985).

In *Smith*, a property owner sought a declaration that a road leading to his property had been dedicated for use as a public road... The property owner sought the declaration with the apparent intention of having the county maintain the road. *Thieman* involved a suit “seeking a declaration that an alley/road bordering the parties’ property was a public road and seeking to enjoin [respondent] from blocking this alley/road.” Unlike in *Smith*, “*Thieman* was not attempting to force City to maintain the alley/road[.]” In both *Smith* and *Thieman*, this Court held that the governmental authority was an indispensable party. “ ‘Unless [the governmental authority] is made a party to the action and can be ordered to maintain or accept the road that passes over [respondent’s] property, complete relief cannot be accorded to the parties in this action.’ ” “ ‘[The governmental authority] either on its own as the party ultimately responsible for the road, or as the representative of [governmental entities’] taxpayers, is an indispensable party[.]’ ”.

Busselman, 2015 S.D. 38 ¶ 8, 864 N.W.2d at 789 (internal citations omitted).

“An indispensable party is one ‘whose interest is such that a final decree cannot be entered without affecting that interest or in whose absence the controversy cannot be terminated.’ ” *Thieman*, 2002 S.D. 52, ¶ 13, 645 N.W. at 262 (quoting *Smith*, 361 N.W.2d at 628 (S.D.1985)). The circuit court has no discretion as to the inclusion

of indispensable parties. *Busselman*, 2015 S.D. 38 ¶ 6, 864 N.W.2d at 788.

The trial court relied heavily on this court's decision in *Bergin*, 645 N.W.2d 252, 256 (S.D. 2002) in its ultimate finding that a public easement exists. One must note that the City of Hill City was a party to the *Bergin* litigation. *Id.* However, the City of Belle Fourche was not been made a party to this action. Based on the foregoing authority, the City is an indispensable party to an action to declare an easement has been dedicated for public use. Because of the absence of this indispensable party, Bierschenks were not entitled to judgment as a matter of law. The trial court's grant of summary judgment must be reversed.

c. The trial court erred in determining an easement for the benefit of Lot 14A was void, yet a public easement remained.

In granting summary judgment, the trial court found that "the 2004 Plat properly indicates an unambiguous intent by Guy Ferris to offer a 25' easement along the southern portion of Lot 14B as an access easement for public use." SR 97, Memorandum Decision, p. 7; Appx. p. 19. This finding was clearly erroneous and not supported by the law.

The relevant portion of the plat expressly stated, "25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT." SR 252, Exhibit 2; Appx. 2. In its analysis of this language, the trial court found that Guy Ferris

attempted to create an easement for his own benefit as the owner of Lot 14A. SR 97, Memorandum Decision, Page 6; Appx. p.18. The trial court then, relying on SDCL § 43-13-6, found that such an easement was void as a matter of law as Mr. Ferris owned both the dominant estate (Lot 14A) and the servient estate (Lot 14B) *Id.* p. 5-6; App. 17-18. The trial court noted “[i]f one attempts to create an easement upon their own land ‘the purported interest is a nullity’ because an easement is ‘a nonpossessory interest in the land of another.’” *Id.*, citing *The Law of Easements & Licenses in Land* § 3.11.

Although the trial court described Mr. Ferris’ attempt to create a 25 foot easement for the benefit of Lot 14A a “nullity”, it did not terminate the easement. The trial court found that because the dedication to Lot 14 A was void, the pertinent language of the plat could now be read as “ACCESS EASEMENT ... DEDICATED THIS PLAT.” *Id.* The trial court then, relying on this Court’s decision in *Bergin v. Bistodeau*, 645 N.W.2d at 255, found that the Mr. Ferris’ use of the word “dedicated” in the plat, indicated an intent to grant the easement for public use. *Id.* p. 6-7; Appx p. 18-19. The trial court then indicated the language in the plat should be read as “ACCESS EASEMENT DEDICATED [for public use] THIS PLAT.” *Id.*

The trial court’s reasoning and findings are contradictory. First, the trial court found that Mr. Ferris intended to create an access easement for his own benefit as the owner of Lot 14A. Such a finding is reasonable given the language of the plat that it was an “ACCESS EASEMENT FOR LOT 14 A...”

SR. 252, Ex. 2; Appx. p. 2. The trial court then found Mr. Ferris also intended it to be a public easement due to his inclusion of the word “dedicated”. It is contradictory to claim that Mr. Ferris intended to create both a limited easement for his sole benefit and a public easement. If he was indeed intending to create a public access easement, there would be no need for another easement for the specific benefit of Lot 14A. (See *Tinaglia v. Itzes*, “No doubt the Haleys could have limited the easement so that it would have run only to the benefit of the owners of Lot 19 and the SE¼NW ¼ of Section 32. In fact, however, they neither did so nor, on the face of the certificate, did they attempt to do so, for the grant of such a limited easement is totally incompatible with the grant of an easement to the public.” 257 N.W.2d at 730). The trial court’s findings that Mr. Ferris had two separate and contradictory intents when creating the easement was clearly erroneous.

The trial court relied on the *Bergin* decision, 645 N.W.2d 252 (S.D. 2002), to support its finding of a public easement. However, this matter is distinguishable. In *Bergin*, Gene Rada, the then owner of the property in question, filed a plat that read:

Acceptance of this plat by the Common Council of Hill City will cause the vacation of the dedicated access easement across Lot 5 as shown on the plat filed in Plat Book 14, Page 92 in the Pennington County Register of Deeds Office and grants a dedicated access easement on portions of Lots 6 & 7 in its place.

Id. at 255. The *Bergin* plat specifically references acceptance by the Common Council of the Hill City and an existing access easement that will be replaced

by the newly dedicated easement. *Id.* Those are details and context that speak to the intent of Mr. Rada that are not present in the plat created by Mr. Ferris. The language describing the easement in Mr. Ferris' plat does not contemplate acceptance by the City of Belle Fourche or any other governmental entity. It does not reference an existing access easement that will be vacated and replaced. The only similarity is that both plats contain the word "dedicated."

In *Bergin*, this Court defined "dedication" as a legal term of art with the following definition:

Dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner that manifests an intention that the property dedicated shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication.

Id. citing *Tinaglia v. Itzes*, 257 N.W.2d at 728-729 (emphasis added).

"Black's Law Dictionary defines 'dedicate' as '[t]o appropriate and set apart one's private property to some public use; as to make a private way public by acts evincing an intention to do so.' " *Id.* citing Black's Law Dictionary 412 (6th ed. 1990) (emphasis added). In this case, Mr. Ferris' dedication was not an "unequivocal act." Rather, it was conditioned and limited by the inclusion of the words "for Lot 14A." That added language cannot be ignored in determining Mr. Ferris' intention in granting the easement. The plat made by Mr. Rada in *Bergin* did not limit the dedication to the benefit of a specific

lot. In *Bergin*, this Court limited the scope of its ruling: “Under the facts of this case, the word ‘public’ need not precede ‘dedication’ in order to evince an intent to dedicate property for public use.” 645 N.W.2d at 256. The facts here are materially different. There was no express or implied intent to dedicate an easement for public use. When read in its entirety, as it must be, *Tingalia*, 257 N.W.2d at 730 citing *Piechowski v. Case*, 255 N.W.2d 72, 74 (S.D. 1977), the 2004 Plat expresses an intention to create access easement for Lot 14A, rather than the public. It was improper for the trial court to infer Mr. Ferris’ intent and add “for public use” to the language of the plat.

In *Tinaglia*, the Court endorsed the idea that a property owner can limit an easement so that it would run only to the benefit of a specific lot rather than create a public easement. 257 N.W.2d at 730. However, as the trial court here noted, this attempt to create such an easement was a nullity as Ferris owned both the servient and dominant estates. As a matter of law, the 25 foot easement is a nullity and does not exist. The trial court committed reversible error in granting summary judgment finding the existence of a 25 foot public easement. Such judgment should be reversed.

2. The Trial Court erred in quieting title to a 16 foot access easement as Bierschenks’ use of the easement for commercial purposes exceeded the scope of the easement.

The Parcels do not contest that a 16 foot access easement was created by the 1948 deed but contend that Bierschenks have exceeded the scope of the easement. The trial court concluded that the deed that created the original 16 foot access easement contained no restrictions limiting the manner for which the easement may be used. SR 403, Conclusions of Law ¶12-14; Appx. p. 26. The trial court further concluded that the restrictions contained in the deed were restrictions on the use of the east half of Lot 14 in accordance with SDCL 11-5, not a restriction on the easement. *Id.* The trial court's legal conclusions were erroneous.

SDCL §43-13-5 provides "[t]he extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Under this statute, neither the physical size nor the purpose or use to which an easement may be put can be expanded or enlarged beyond the terms of the grant of the easement. *Knight v. Madison*, 2001 SD 120 ¶6, 634 N.W.2d 540, 542.

The conveyance of the east half of Lot 14 and the 16 foot easement to access the east-half was subject to a stipulation that "[o]nly one family private dwelling, with or without attached garage, having a value of not less than \$1,500.00 may be placed upon the above described land, this not to apply to necessary outbuildings such as sheds, barns and chicken coops. SR 229, Ex. 1; Appx. p. 1. It is understood and agreed that this restriction is for the benefit of the grantee and also for the benefit of all the property and

premises located on said Lot 14.” *Id.* ” The Bierschenks do not live on Lot 14 C. MH 31:1-2. Rather, they have built several storage units that are rented out for the storage of large recreational vehicles. MH 31: 5-19. Merle Bierschenk intends for his customers to use the easement to reach the storage units. MH 29: 1-3.

The trial court attempted to distinguish this matter from *Picardi v. Zimmiond*, 2005 SD 24, 693 N.W.2d 656. Such a distinction is not warranted. The 1948 deed conveying the east half of Lot 14 and the easement document are one in the same. The language of the 1948 deed was unambiguous that the conveyance was contingent on the property being used for one private family dwelling. SR 229, Ex. 1, Appx. p. 1. The “conveyance” includes “the East Half (E1/2) of Lot Fourteen (14)... together with a perpetual easement, for road right of way, sixteen (16) feet wide...” *Id.* Because the easement was part of the conveyance, the restrictions on use apply to the easement as well as the east half of Lot 14. Read in its entirety, the intent of the grantor is clear that the use of the east half of Lot 14, and the easement to access that Lot, not exceed one residential unit. The restriction was for the benefit of the grantee and the other property and premises located on Lot 14. *Id.*

The language creating the easement in the 1948 deed was “clear, definite, and certain in its purpose and scope.” *Picardi*, 2005 at ¶2, 693 N.W.2d at 650. The scope of the 16 foot easement was clearly limited to access for one residential unit on the east half of Lot 14. The Bierschenks

development of commercial storage units on Lot 14 C and attempts to route their commercial traffic through the Parcels' property, clearly exceed the scope of the easement. The Bierschenks were not entitled to judgment quieting title to the easement as they had exceeded its scope. This Court should vacate the trial court's judgment, and remand this matter for entry of judgment in favor of the Parcels on the quiet title action.

3. The Trial Court erred in granting a permanent injunction enjoining Parcels from obstructing or interfering with use of the easements.

a. There are no enforceable easements.

SDCL § 21-8-14 provides that a permanent injunction may be granted to "prevent the breach of an obligation." Biershenks contend Parcels have an obligation not to block access to these easements in dispute. However, as shown above, the trial court's finding of a 25 foot public easement was erroneous. Guy Ferris could not intend to create both a limited easement for Lot 14 A and a public easement. The plain language of the plat shows he intended a limited easement for Lot 14 A. The trial court stated such easement is contrary to law and was a "nullity." The trial court also erred in quieting title in the 16 foot easement to the Bierschenks as their use of the easement and dominant estate for commercial purposes clearly exceeded the scope of the easement.

Bierschenks claim for injunctive relief should have failed as there is no enforceable obligation for the Parcels to allow Bierschenks' commercial traffic across their property. The trial court erred in granting injunctive relief.

b. The trial court's findings that Parcels were blocking the easement were clearly erroneous.

For the Bierschenks to be entitled to injunctive relief barring the Parcels from obstructing the 16 foot easement, they must first show that the Parcels were in fact blocking the easement and needed to be enjoined from doing so in the future. The trial court made numerous findings of fact related to this issue that were clearly erroneous:

i. Finding # 17

17. Defendant Richard Parcel has a practice of parking his pickup in the Easement (as depicted in Exhibits 4,6,9, and 10) and has parked in the same manner for years. *Exhibit 4; Transcript at 21-22, 41, 66; Defendant's Exhibit C*. At times other vehicles or equipment have been parked directly in front of his pickup, including a pickup and car-hauling trailer. *Transcript at 53, 54-55; Exhibits 5, 6, 12*.

SR 403, FOF #17, Appx p. 30. This finding was not supported by the evidence. Merle Bierschenk expressed his opinion that Richard Parcel was parking his vehicles within the 16 foot easement but also admitted that he did not know where the southern boundary of the 16 foot easement began. MH 37:13-17. Bierschenk never had the 16 foot easement platted. MH 33:19-20. Any measurements taken by Bierschenk are not reliable as he did not

know the proper starting point. Based on the measurements Richard and Wendy Parcel took, their vehicles were parked outside of the 16 foot easement. MH 66:24-67:20. Based on the testimony provided, the finding that Parcels parks their vehicle within the 16 foot easement is clearly erroneous.

ii. Finding # 19

19. Due to the frequency that Plaintiff Merle Bierschenk and other users of the Easement were forced to drive around Defendant Richard Parcel's pickup, a trail that deviates to the south of the Easement is now visible. Transcript at 13; Exhibits 4, 6, 9.

R 403, FOF #19, Appx. p. 30-31. This finding was also not supported by the evidence. Richard Parcel testified that the trail existed prior to Parcels purchasing the property and "always" looked like the path depicted in the photographs introduced as the hearing. MH 61:20-62:19. In fact, the trial court noted such testimony in Finding of Fact #15 SR 403, Appx. p. 30. The path the trail takes is not due to where Richard Parcel parks his pickup as it looked that way prior to the Parcels purchasing the property.

Merle Bierschenk also agreed that the road veers to the north as one approaches the highway due to a power pole in the way of the easement along the highway. MH 38:3-39-6; SR 262, Exhibit 4; Appx p. 4. This shows that variables other than where Parcels park their vehicles have shaped the path of the trail.

Furthermore, the evidence does not support the claim that the trail "deviates to the south of the easement..." Richard Parcel did admit that someone driving around his pickup may have to cross slightly onto the

Boschs' property (Lot 14 A). MH 54:14-17. However, as noted above, it is unclear where the southern boundary of the 16 foot easement begins. The trial court found "there is disagreement as to whether the entirety of the Easement falls within Defendant Parcels' property (Lot 14B)..." SR 403, Finding of Fact #14, Appx p. 30, The fact that the trail, and anyone driving on the trail may cross onto Bosch's property, does not mean they cross out of the path of the easement.

iii. Finding # 23

23. At some point, Defendant Parcels installed a two-wire fence on the east end of the Easement at the property line separating Defendant Parcel's property (Lot 14B) and Plaintiff Bierschenks' property (Lot 14C). *Transcript at 14-15.*

SR 403, Finding of Fact #14, Appx p. 31. This finding was not supported by the evidence. Richard Parcel testified that the two-wire fence had always existed. MH 58:13-59:3. It was not installed by the Parcels. Rather, it was a gate that Parcels simply closed. However the gate could be opened by anyone at any time. MH 40:1-3 Bierschenks eventually tore out the gate. MH 40:4-41:7

The testimony shows this gate existed prior to the Parcels owning the property, Furthermore it was not locked. The existence of this gate does not show an intent by the Parcels to block or inhibit the easement.

These three findings by the trial court were erroneous. Assuming the Bierchenks have use of the 16 foot easement, they did not put forth sufficient evidence for the trial court to find the Parcels were blocking or impairing the

easement in anyway. Without a showing that the Parcels were blocking the easement, Bierschenks were not entitled to injunctive relief.

CONCLUSION

The trial court erred in granting summary judgment with regards to the 25 foot easement. That request for relief was not properly before the court, an indispensable party was missing from the action, and the trial court made contradictory and erroneous findings regarding the intent of Mr. Ferris when he created the 25 foot easement. It appears as a matter of law, the easement is void. For these various reasons, Bierschenks were not entitled to judgment. The trial court's grant of summary judgment should be reversed.

With regards to the 16 foot easement, the Bierschenk's commercial use of Lot 14C and the easement, exceeds the original scope of the easement. Bierschenks were not entitled to judgment quieting title.

The grant of injunctive relief was erroneous as the Bierschenks do not have an enforceable right to enforce with injunctive relief. The 25 foot easement is void and the 16 foot easement is limited to use of one residential property. Assuming the Bierschenks have the right to use the 16 foot easement for commercial purposes, there was not sufficient evidence put forth that the Parcels are blocking such easement in anyway.

The trial court's judgments should be vacated and this matter remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Parcels request oral argument in this matter.

Respectfully submitted this 23rd day of December, 2024.

ANKER LAW GROUP, P.C.



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Attorneys for the Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to S.D.C.L. § 15-26A-66, the foregoing brief is typed in proportionally spaced typeface in Century Schoolbook style font 12 point, does not exceed thirty-two pages, and does not exceed the word limit.

The word processor used to prepare this brief indicated that there are no more than 6853 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.



Jordan D. Bordewyk, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2024, a true and correct copy of Appellant's Brief with Appendix was served electronically through Odyssey File and Serve upon:
upon:

John W. Burke
Thomas Braun Bernard & Burke, LLP
jburke@tb3law.com

And upon the following party by first class mail, postage prepaid:

William W. Bosch
Co-Trustee of the William and Margaret Bosch Family Trust
1825 Country Oak Lane
Spearfish, SD 57783


Jordan D. Bordewyk, Esq.

APPENDIX

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WARRANTY DEED RECORD No. 134

71713

KNOW ALL MEN BY THESE PRESENTS

H. W. Kirby, a widower
grantor, of Butte County, State of South Dakota, for and in consideration of
Three Hundred Fifty and 00/100 (\$350.00) * * * DOLLARS,

GRANTS, CONVEYS AND WARRANTS TO Emily B. Goode
grantee of

Belle Fourche, South Dakota P. O., the following described real estate in the County of
Butte, in the State of South Dakota: The East Half (E $\frac{1}{2}$) of Lot Fourteen (14) Section Three (3) Township
Eight (8) North, of Range Two (2), E.B.H.M., as the same is platted and recorded in Plat Book 4, page 13,
Register of Deeds office, Butte County, South Dakota., together with a perpetual easement, for road right
of way, sixteen (16) feet wide across the West Half of Lot 14, beginning at a point 164.04 feet South of
the Northwest corner of said Lot 14, on U.S. Highway 85, and continuing due east across the West half of
Lot 14 to the east line of the West Half of said Lot 14, and together with a perpetual easement four (4)
feet wide for a water pipe line, beginning at a point 180.04 feet south of the Northwest corner of said
Lot 14, and continuing due east across the West Half of Lot 14 to the east line on the West Half of Lot 14.

This conveyance is made upon the following express stipulations, which are fully understood by the grantee:

Only one family private dwellings, with or without attached garage, having a value of not less than
\$1500.00 may be placed upon the above described land, this not to apply to necessary outbuildings such as
sheds, barns and chicken coops. It is understood and agreed that this restriction is for the benefit
of the grantee and also for the benefit of all the property and premises located on said Lot 14.

The line fence to be constructed between the west half and the east half of Lot 14 is to be paid for
equally between the parties hereto.

Dated this 28th day of April, 1948

H. W. Kirby

CERTIFIED COPY
HEREBY CERTIFIED THAT THIS IS A TRUE AND
CORRECT REPRODUCTION OF INFORMATION
APPEARING ON A RECORD FILED IN THE
REGISTER OF DEEDS OFFICE, BUTTE COUNTY,
BELLE FOURCHE, SOUTH DAKOTA

DATE ISSUED

7/24/2024

Mary Beth Kindig, Deputy
REGISTER OF DEEDS

STATE OF SOUTH DAKOTA }
County of BUTTE } ss.

On this the 28th day of April, 1948, before me, Sterling H. Clark, the undersigned officer, personally
appeared W. H. Kirby, known to me or satisfactorily proven to be the person whose name is subscribed
to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

(SEAL)
My commission expires Oct. 21st, 1950

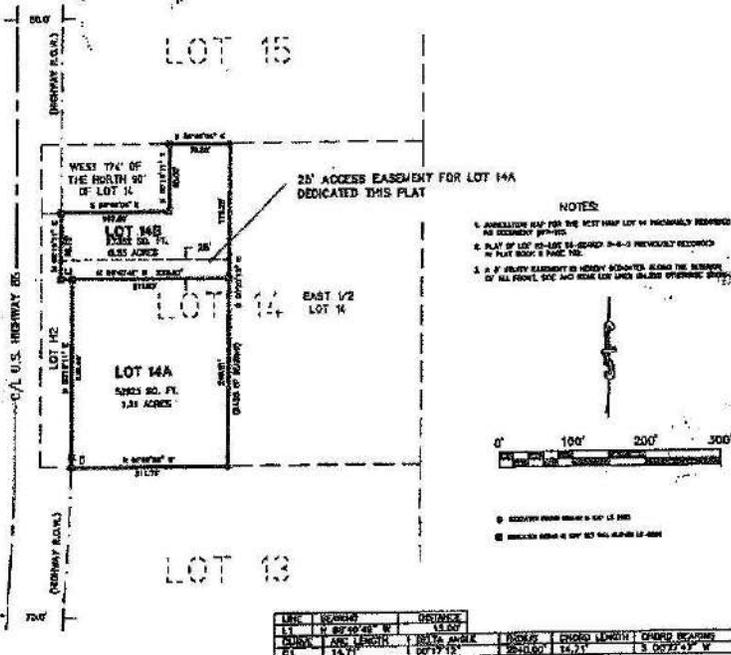
Sterling H. Clark
Notary Public, Butte County, South Dakota

STATE OF SOUTH DAKOTA, County of Butte, ss.



Filed for record this 28th day of April A.D., 1948, at 2:45
o'clock P.M., and recorded in Book 134, of Deeds on page 599.
By _____ Deputy. p. 004 Ruth S. Wood Register of Deeds.

2004 2800 PLAT OF LOTS 14A AND 14B,
 A SUBDIVISION OF THE WEST 1/2 OF LOT 14 EXCEPT THE WEST 174' OF THE NORTH 80' OF LOT 14,
 AND EXCEPT LOT 12, LOCATED IN THE PRAIRIE VIEW ADDITION TO THE CITY OF BELLE FOURCHE,
 ALL LOCATED IN THE SE 1/4 NE 1/4 SECTION 3, T.8N, R.2E, B.H.M.,
 BUTTE COUNTY, SOUTH DAKOTA.



- NOTES:
1. ADEQUATE EASE FOR THE WEST HALF LOT 14 NECESSARILY REQUIRED FOR EGRESS PURPOSES.
 2. PLAT OF LOT 14-LOT 14 EXCEPT 174'-0" PREVIOUSLY RECORDED IN PLAT BOOK 8 PAGE 18.
 3. A 20' EGRESS EASEMENT IS SHOWN LOCATED ALONG THE SOUTHWEST CORNER OF THIS PLAT AND ALONG LOT 14B. ALL OTHER EGRESS EASEMENTS ARE SHOWN ON THE PLAT.

LINE	BEARING	DISTANCE	BEARING	DISTANCE	BEARING	DISTANCE	BEARING	DISTANCE
1	N 89° 48' 00" W	15.00						
2	S 89° 48' 00" E	15.00						
3	N 00° 00' 00" E	14.71						
4	S 00° 00' 00" W	14.71						

SURVEYOR CERTIFICATE

I, Randy L. Deibert, P.O. Box 408, Spearfish, S.D., being a Registered Land Surveyor in the State of South Dakota, #5084, do hereby certify that at the request of the owner and under my supervision, I have caused to be surveyed and platted the property shown and described hereon. I also certify that this plat is true and correct to the best of my knowledge and belief.

This survey does not constitute a title search to determine ownership or encumbrances of record. I further state that I did not obtain the signatures for this certificate other than the Surveyor Certificate. In witness whereof, I have hereunto set my hand and seal on this 29th day of Sept, 2004.

Randy L. Deibert R.L.S., 5084
 OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
 State of South Dakota
 County of Butte



I, Allison Jensen, Director of Equalization, hereby certify that I have received a copy of this plat.

Allison Jensen, County Director of Equalization

OFFICE OF REGISTER OF DEEDS
 State of South Dakota
 County of Butte

Filed for record this 29th day of Sept, 2004, at 1:03 PM, and recorded in Book of Plats 800, Page 138.

Register of Deeds
 Butte County, South Dakota
 Recorded: October 13, 2004
 at 1:03 PM P.M.
 Book 800 Page(s) 138
 Fee 16.00



CERTIFICATE OF OWNERSHIP
 State of South Dakota
 County of Butte

Owner do hereby certify that I/we are the owner of the property shown and described hereon, and that development of this property shall conform to all existing applicable zoning, subdivision, erosion and sediment control regulations.

OWNER ADDRESS
 Gary M. Ferris 1163 River Spur Rd S
 Spearfish, SD 57753

ACKNOWLEDGMENT OF OWNERSHIP:
 State of South Dakota
 County of Butte

On this 29th day of Sept, 2004, before me a Notary Public, personally appeared Gary M. Ferris known to me to be the person(s) described in the foregoing instrument and acknowledged to me that they executed the same.

My commission expires: August 1, 2005
 Notary Public



APPROVAL OF HIGHWAY AUTHORITY
 State of South Dakota, County of Butte

The location of the proposed access roads abutting the county or state highway as shown hereon, is hereby approved. Any change in the proposed access that require additional approval, shall require additional approval.

HIGHWAY AUTHORITY: Approved

CERTIFICATE OF TREASURER:
 State of South Dakota, County of Butte

I, Don Seidner, County Treasurer of Butte County, certify that all taxes and special assessments which are levied upon the herein platted property, registered to this Owner hereon as shown by receipts of my office have been paid.

Date: Sept 29, 2004
Don Seidner
 Butte County Treasurer



OFFICE OF THE CITY ENGINEER
 State of South Dakota
 County of Butte

I, Terry Walcott, City Engineer for the City of Fourche, do hereby certify that I have approved this plat with respect to the duties of my office and that I have received a copy of said plat for the City files.

Terry Walcott
 Butte Fourche City Engineer



RESOLUTION OF THE COMMON COUNCIL:
 State of South Dakota
 County of Butte

Be it resolved that the City of Belle Fourche Common Council, having viewed this plat and having received a recommendation from the Belle Fourche Planning Commission, do hereby approve this plat. Resolution adopted by unanimous vote of the Belle Fourche Common Council on the 21st day of Sept, 2004.

David S. ...
 City Finance Officer Mayor



RECOMMENDATION OF THE CITY OF BELLE FOURCHE PLANNING COMMISSION:
 State of South Dakota
 County of Butte

This plat is hereby recommended for approval to the City of Belle Fourche Common Council on the 15th day of Sept, 2004.

ATTEST:
 Secretary
...
 Chairman

CERTIFIED COPY
 HEREBY CERTIFIED THAT THIS IS A TRUE AND CORRECT REPRODUCTION OF INFORMATION APPEARING ON A RECORD FILED IN THE REGISTER OF DEEDS OFFICE, BUTTE COUNTY, BELLE FOURCHE, SOUTH DAKOTA
 DATE ISSUED: 7/24/2024
Mary Beth ...
 REGISTER OF DEEDS

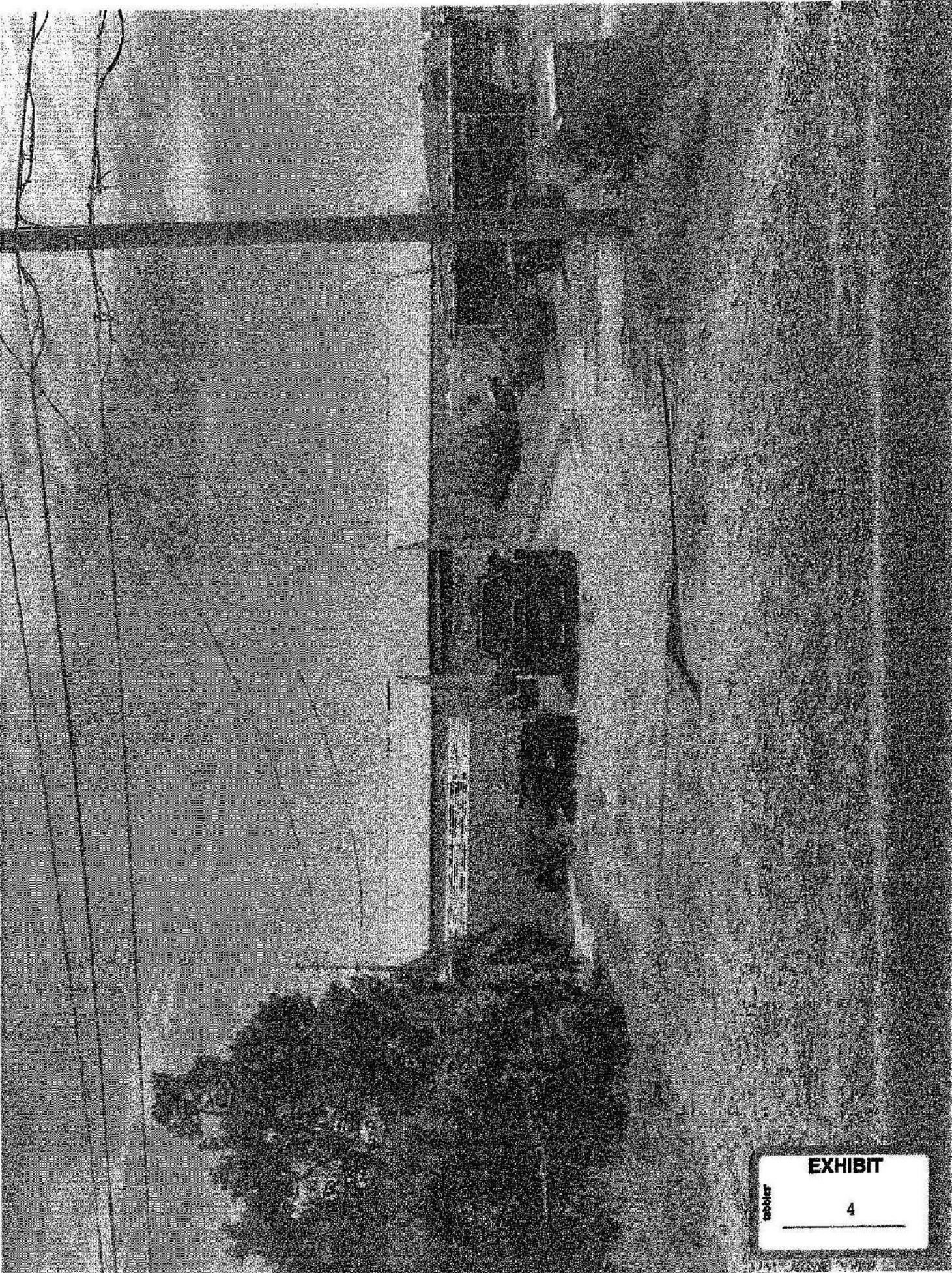


EXHIBIT
tabbiter
4

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

09CIV-000067

Plaintiffs,

vs.

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH,

Defendants.

COME NOW the Plaintiffs, Merle and Anita Bierschenk ("Plaintiff Bierschenks"), by and through their attorney of record, John W. Burke, and, pursuant to SDCL 15-6-56(c)(1), hereby identify the following material facts as to which there is no genuine issue to be tried:

1. Lots 14A, 14B, 14C, and 14D were originally part of a larger, approximately five-acre tract originally described as Lot 14 in Section 3, Township 8 North, Range 2, E.B.H.M. *Affidavit of John W. Burke ("Affidavit of Burke") at Ex. 1 (McDonald/Kirby Warranty Deed (1946) (Recorded in Book 127, Page 272))*.

2. In 1946, the entirety of Lot 14 was owned by a single owner, H.W. Kirby. *Id.*

3. Lot 14 was divided into two halves, an east half and a west half, when H.W. Kirby transferred the east half of Lot 14 to Emily B. Goode in 1948. *Affidavit of Burke at Ex. 2 (Kirby/Goode Warranty Deed (1948) (Recorded in Book 134, Page 599))*.

4. The *Warranty Deed* wherein H.W. Kirby transferred the east half of Lot 14 to Ms. Goode in 1948 included a 16' wide "perpetual easement for road right of way" across the west

half of Lot 14 by including the following language:

The East Half (E½) of Lot Fourteen (14) Section Three (3) Township Eight (8) North, or Range Two (2), E.B.H.M., as the same is platted and recorded in Plat Book 4, page 13, Register of Deeds office, Butte County, South Dakota., together with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen, beginning at a point 164.04 feet South of the Northwest corner or [sic] said Lot 14, on Highway 85, and continuing due east across the West half of Lot 14 to the east line of the West Half of said Lot 14, and together [sic] with a perpetual easement four (4) feet wide for a water pipe line [sic], beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line on the West Half of Lot 14.

Id. (emphasis in original).

5. In 1958, after H.W. Kirby had passed away, the administrator of his estate transferred the west half of Lot 14 to Harold Hartshorn, except a 90' x 174' tract in the northwest corner. *Affidavit of Burke at Ex. 3 (Kirby/Hartshorn Administrator's Deed (1958) (Recorded in Book 156, Page 218)).*

6. In 2004, the west half of Lot 14 (except the 90' x 174' tract in the northwest corner) was platted, resulting in Lots 14A and 14B. *Affidavit of Burke at Ex. 4 (Plat of Lots 14A and 14B (2004) (Recorded in Doc. No. 2004-2400)) ("2004 Plat").*

7. When the west half of Lot 14 was platted in 2004, the 16' wide easement providing access for the east half of Lot 14 to Highway 85 had been in existence for more than 55 years, from 1948 through 2004. *Affidavit of Burke at Ex. 2 (Kirby/Goode Warranty Deed (1948) (Recorded in Book 134, Page 599)).*

8. The *2004 Plat* included a 25' access easement that traverses, west to east, the entirety of Lot 14B. *2004 Plat.*

9. The Highway Authority's approval of the *2004 Plat* was accompanied by

the following statement: "Note: The only allowed access to Lot 14A will be relocation of existing access from Lot 14B." *Id.*

10. The 2004 Plat included the following annotation regarding the 25' wide access easement: "25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT." *Id.*

11. The 2004 Plat does not state that the 25' wide access easement was "exclusive" to Lot 14A; does not refer to the easement as "private;" and does not state that the easement is "only for" or "limited to" Lot 14A. *Id.*

12. In November of 2004, Defendant Wendy Parcel (known then as Wendy Preszler) purchased Lot 14B "according to the plat filed in the office of the Butte County Register of Deeds as Document No. 2004-2400, subject to easements, reservations and restrictions of record." *Affidavit of Burke at Ex. 5 (Ferris/Preszler Warranty Deed (2004) (Recorded in Doc. No. 2004-2694))*.

13. After getting married to Defendant Richard Parcel, Defendant Wendy Parcel transferred Lot 14B to herself and Defendant Richard Parcel in a *Quitclaim Deed*. *Affidavit of Burke at Ex. 6 (Parcel/Parcel Quitclaim Deed (2014) (Recorded in Doc. No. 2014-2114))*.

14. The *Quitclaim Deed* of Lot 14B to Defendant Parcels provided that it was "[s]ubject to exceptions and reservations contained in patents from the U.S. Government and prior conveyances of record. Also subject to existing easements for roads and highways; irrigation ditches, canals and laterals; and easements for electrical power and transmission lines, if any." *Id.*

15. The east half of Lot 14 was platted in 2008, resulting in Lots 14C and 14D. *Affidavit of Burke at Exh. 7 (Plat of Lot 14C and Lot 14D of Prairie View Addition to the City of Belle Fourche (2008) (Recorded in Doc. No. 2008-1325))* (“2008 Plat”).

16. The 2008 Plat included the “25.0’ ACCESS EASEMENT” across the south end of Lot 14B previously included in the 2004 Plat. *Id.*

17. The 2008 Plat additionally included the following statement by the City Engineer at the time: “THE LOCATION OF THE PROPOSED ACCESS ROADS ABUTTING THE COUNTY OR STATE HIGHWAY AS SHOWN HEREON, IS HEREBY APPROVED.” *Id.*

18. Defendant Parcels’ state that they “have never contended Plaintiffs did not have the right to use of the Access Easement.” *Answer of Richard D. Parcel and Wendy Parcel at ¶ 6.*

19. The 2004 Plat was “made out, certified, acknowledged, and recorded” as required by SDCL 11-3-12. *2004 Plat.*

20. The “25’ ACCESS EASEMENT” was “marked [and] noted” on the 2004 Plat. *2004 Plat.*

Dated this 27th day of August, 2023.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Plaintiff Bierschenks

By: /s/ John W. Burke

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E-mail: jburke@tb3law.com

STATE OF SOUTH DAKOTA)
COUNTY OF BUTTE)
MERLE G. BIERSCHENK and ANITA J.)
BIERSCHENK)
Plaintiffs)
vs.)
RICHARD D. PARCEL, WENDY PARCEL)
and WILLIAM W. BOSCH)
Defendants.)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
Case No. 09CIV23-000067
**DEFENDANTS' RESPONSE TO
PLAINTIFFS' STATEMENT OF
UNDISPUTED MATERIAL FACTS**

In response to the separate enumerated statements of material fact to which the Plaintiffs contend there is no genuine issue to be tried, Defendants Richard D. Parcel and Wendy Parcel submit the following:

1. SMF #1 is admitted.
2. SMF #2 is admitted.
3. Defendants admit SMF #3 to the extent H.W. Kirby transferred the east half of Lot 14 to Emily B. Goode in 1948, but deny such a transfer had the effect of dividing Lot 14 into two halves. A re-plat would be necessary to divide the lot into two halves.
4. Defendants admit that H.W. Kirby granted a 16 foot wide "perpetual easement for road right of way" across the west half of Lot 14 but such grant was subject to a stipulation that "[o]nly one family private dwelling, with or without attached garage, having a value of not less than \$1,500.00 may be placed upon the above described land, this not to apply to necessary outbuildings such as sheds, barns and chicken coops. It is understood and agreed that this restriction is for the benefit of the grantee and also for the benefit of all the property and premises located on said Lot 14." *Affidavit of John W. Burke, Exhibit 2.*
5. SMF #5 is admitted.
6. SMF #6 is admitted.

7. Defendants admit that the 16 foot wide easement was in place but subject to the stipulations laid in out in response to SMF #4 above.
8. SMF #8 is admitted.
9. SMF #9 is admitted.
10. SMF #10 is admitted.
11. Defendants deny that SMF #11, while factually accurate, is material. The language used to describe the easement should be strictly construed according to its plain meaning rather than inferring meaning from language not included.
12. SMF #12 is admitted.
13. SMF #13 is admitted.
14. SMF #14 is admitted.
15. SMF #15 is admitted.
16. In response to SMF #16, Defendants admit that the 2008 Plat includes that language but deny that the 2008 re-plat of the east half of Lot 14 impairs Defendants interest in Lot 14B as Defendants were not provided notice of the re-plat, did not participate in the re-plat, nor consent to the re-plat.
Affidavit of Richard Parcel ¶ 9; Affidavit of John W. Burke, Exhibit 7.
17. In response to SMF #17, Defendants admit that the 2008 Plat includes that language but deny that the 2008 re-plat of the east half of Lot 14 impairs Defendants interest in Lot 14B as Defendants were not provided notice of the re-plat, did not participate in the re-plat, nor did they consent to the re-plat. *Affidavit of Richard Parcel ¶ 9; Affidavit of John W. Burke, Exhibit 7.*
18. In response to SMF #18, Defendants admit that Plaintiffs have right to use of the sixteen foot access easement, but subject to the stipulations laid in out in response to SMF #4 above.
19. SMF # 19 is denied as it is a legal conclusion and not a statement of fact.
20. In response to SMF #20, Defendants admit that a 25 foot access easement is marked and noted on the 2004 Plat, but that easement, by its express terms, is for the benefit of Lot 14A. *Affidavit of John W. Burke, Exhibit 4.*

ANKER LAW GROUP, P.C.

Dated: September 11, 2023.

/s/ **Jordan D. Bordewyk**

Jordan D. Bordewyk
*Attorneys for Richard D. Parcel
and Wendy Parcel*
1301 West Omaha Street, Suite 207
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sanker@ankerlawgroup.com

STATE OF SOUTH DAKOTA)
COUNTY OF BUTTE)
MERLE G. BIERSCHENK and ANITA J.)
BIERSCHENK)
Plaintiffs)
vs.)
RICHARD D. PARCEL, WENDY PARCEL)
and WILLIAM W. BOSCH)
Defendants.)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

Case No. 09CIV23-000067

**DEFENDANTS' STATEMENT OF
MATERIAL FACTS AS TO WHICH A
GENUINE ISSUE EXISTS**

In compliance with S.D.C.L. § 15-6-56(c)(2), Defendants Richard and Wendy Parcel file this separate, short and concise statement of material facts as to which they contends a genuine issue exists to be tried.

Statement of Fact No. 1. H.W. Kirby granted a 16 foot wide "perpetual easement for road right of way" across the west half of Lot 14 but such grant was subject to a stipulation that "[o]nly one family private dwelling, with or without attached garage, having a value of not less than \$1,500.00 may be placed upon the above described land, this not to apply to necessary outbuildings such as sheds, barns and chicken coops. It is understood and agreed that this restriction is for the benefit of the grantee and also for the benefit of all the property and premises located on said Lot 14." *Affidavit of John W. Burke, Exhibit 2.*

Statement of Fact No. 2. In early 2004, Richard and Wendy Parcel began negotiations with Guy Ferris for the purchase of the West Half of Lot 14, located in the SE¼NE¼, Section 3, Range 2 East, Black Hills Meridian, Butte County, South Dakota. *Affidavit of Richard Parcel, ¶ 3.*

Statement of Fact No. 3. As part of the negotiated sale, Mr. Ferris agreed to plat the western half of Lot 14 into Lot 14A (the southerly portion of the West Half of Lot 14) and Lot 14B (the northerly portion of the West Half of Lot 14). *Affidavit of Richard Parcel, ¶ 4.*

Statement of Fact No. 4. Once the plat was completed the Parcels purchased Lot 14B from Mr. Ferris. *Affidavit of Richard Parcel, ¶ 5.*

Statement of Fact No. 5. Because Mr. Ferris was prohibited from gaining access to Lot 14A from the west off US Highway 85, an access easement across the southerly portion of Lot 14B was provided so he could gain access to Lot 14A. The Plat specifically provides that the 25' Access Easement is dedicated for Lot 14A. *Affidavit of Richard Parcel*, ¶ 6.

Statement of Fact No. 6. As part of the Approval of Highway Authority it was noted "The only allowed access to Lot 14A will be relocation of existing access from Lot 14B". This confirms prohibition of access from US Highway 85 and the intent of the easement as only being dedicated to Lot 14A. *Affidavit of Richard Parcel*, ¶ 7.

Statement of Fact No. 7. The City of Belle Fourche, nor any other governmental entity, has not been made a party to this action. *Complaint and Answer*.

Statement of Fact No. 8. The house on Lot 14B (which was on the property since the 1930's) sets on the southerly portion of Lot 14B and is only 6 feet from the edge of the 25' easement. *Affidavit of Richard Parcel*, ¶ 8.

Statement of Fact No. 9. Neither Richard Parcel or Wendy Parcel received any notice of the 2008 platting of the East Half of Lot 14 into Lots 14C and 14D. *Affidavit of Richard Parcel*, ¶ 9.

Statement of Fact No. 10. Neither Richard or Wendy Parcel signed off on or accepted the 2008 plat. *Affidavit of John W. Burke, Exhibit 7*.

Statement of Fact No. 11. Plaintiffs have access to Lot 14C and Lot 14D from 8th Avenue to the east and through Lot 15 which they also own. *Affidavit of Richard Parcel*, ¶ 10.

ANKER LAW GROUP, P.C.

/s/ **Jordan D. Bordewyk**

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jordan@ankerlawgroup.com
sanker@ankerlawgroup.com

Dated: September 11, 2023.

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

**MERLE G BIERSCHENK and ANITA J.
BIERSCHENK,**

Plaintiffs,

v.

**RICHARD D. PARCEL, WENDY
PARCEL, and WILLIAM W. BOSCH,**

Defendants.

09CIV23-000067

**MEMORANDUM OF DECISION
IN RE: PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

FILED

NOV 20 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By

On September 25, 2023, a Motions Hearing was held before the Honorable Judge Michael W. Day on Plaintiff's Motion for Summary Judgment. Plaintiffs—Merle and Anita Bierschenk—appeared through their attorney John W. Burke. Defendants—Richard and Wendy Parcel—appeared personally and with their attorney Jordan D. Bordewyk. Defendant—William W. Bosch—appeared personally Pro Se and did not take part in any arguments.

Accordingly, this Court, having heard the arguments of Counsel and considering the briefs from both parties, with good cause showing, issues its Memorandum of Decision.

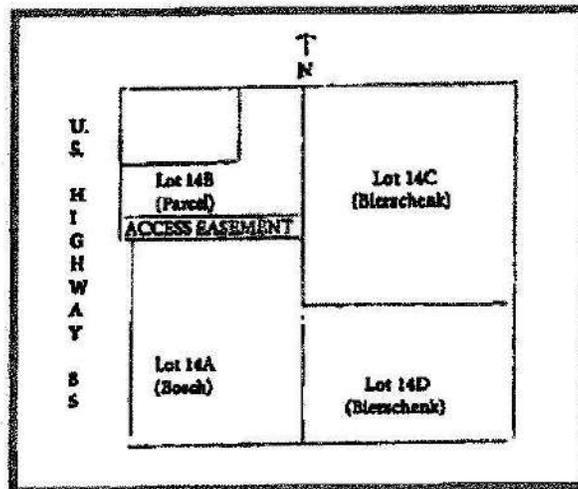
PROCEDURAL POSTURE

Plaintiff filed a motion for summary judgment on August 27, 2023, and subsequently submitted a brief in support of the motion for summary judgment. The Plaintiff filed a statement of undisputed material facts contemporaneously. The Defendant's response was filed on September 11, 2023, which is fourteen calendar days after the Plaintiffs filed their motion for summary judgment. Additionally, Defendant contemporaneously filed a response to Plaintiff's statement of undisputed material fact and an answer in resistance to motion for summary judgment. On September 18, 2023, Plaintiff filed a reply brief in support of plaintiffs' motion for summary

judgment. A notice of hearing was filed on August 27, 2023, for a hearing date of September 25, 2023.

FACTUAL BACKGROUND

This lawsuit was filed on June 26, 2023, by Mr. & Mrs. Bierschenk ("Bierschenks") against Mr. & Mrs. Parcel ("Parcels") and Mr. William Bosch ("Mr. Bosch"). The Bierschenks are requesting this Court quiet title to the easement referred to therein and injunctive relief against the Parcels so the Bierschenks may use the access easement. The controversy stems from a piece of land known as "Lot 14." Lot 14 is currently split into four subdivided parcels of land owned by three different parties, namely the Bierschenks, the Parcels, and Mr. Bosch. The piece of land known as Lot 14—in its current state—and the controversial easement ("ACCESS EASEMENT") is depicted below.



Lot 14 was owned by H.W. Kirby in 1946. Mr. Kirby owned the entirety of Lot 14. In 1948, Mr. Kirby conveyed the eastern half of Lot 14 (currently the Bierschenk's half) to Emily Goode. The conveyance in 1948 to Ms. Goode is when an initial 16' access easement was created with a 4' utility easement. The easement was created by a warranty deed and states as follows:

[T]ogether with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot 14, beginning at point 164.04 feet South of the North west corner of said Lot 14, and together [sic] with a perpetual easement four (4) feet wide for a water pipe line, beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line of the West Half of Lot 14. This conveyance is made upon the following express stipulations, which are fully understood by the grantee: Only one family private dwelling, with or without attached garage, having a value of not less than \$1500.00 may be placed upon the above described [sic] land, this is not to apply to necessary outbuildings such as sheds, barns, and chicken coops. It is understood and agreed that this restriction is for the benefit of the grantea [sic] and also for the benefit of all the property and premises located on said Lot 14.

In 1958, H.W. Kirby passed away and the western half of Lot 14 (currently the Parcel's and Mr. Bosch's half) was devised to Harold Hartshorn (without a division into its current subdivision of Lot 14A and Lot 14B). In 2004, the western half was platted. The 2004 plat expressly noted an easement. The terms of the easement were a "25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT." The 2004 plat was accepted by the City of Belle Fourche on June 21, 2004, and signed by the record owner, Guy Ferris.

Furthermore, in 2008 the eastern half (the Bierschenk's half) of Lot 14 was platted and signed by the owner of record Kenneth and Linda Gabert. The 2008 platting recognizes by depiction (but does not expressly state) a 25' access easement. The City of Belle Fourche expressly accepted the plat on June 16, 2008.

STANDARD OF REVIEW

A grant of summary judgment is proper if the pleadings, depositions, answers and interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SDCL 15-6-56(c); *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶¶ 8-9, 817 N.W.2d 395, 398-99. Summary judgment is not the proper method to dispose of factual questions. *Id.* This

Court determines whether summary judgment is proper by reviewing whether the moving party has “clearly demonstrate[ed] an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. “A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that ‘a reasonable jury could return a verdict for the non-moving party’.” *SD State Cement Plant Comm’n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, ¶ 9, 616 N.W.2d 397, 400–01 (quoting *Weiss v. Van Norman*, 1997 S.D. 40, ¶ 11, n.2, 562 N.W.2d 113, 116 (internal citations omitted)) (emphasis added).

“All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party.” *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444. “Yet, the party challenging summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.” *Id.* Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial.” *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762. “Summary judgment [] should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy.” *Berbos v. Krage*, 2008 S.D. 68, 15, 754 N.W.2d 432, 436 (quoting *Richard v. Lenz*, 539 N.W.2d 80,83 (S.D. 1995)). “If undisputed facts fail to establish each required element in a cause of action, summary judgment is proper.” *McKie v. Huntley*, 2000 S.D. 160, ¶ 17 (citing *Groseth Int’l Inc. v. Tenneco Inc.*, 410 N.W.2d 159, 169 (S.D. 1987)).

ANALYSIS

Prior to November 2004, Guy Ferris owned the entire eastern portion of Lot 14.¹ The western portion of Lot 14 included both future Lots 14A and 14B.² June 2004, Guy Ferris platted the eastern portion of Lot 14 into Lot 14A and Lot 14B.³ November 2004 Guy Ferris sold Lot 14B to Wendy Preszler (a/k/a Wendy Parcel—Plaintiff).⁴

Summary judgment requires that all material facts necessary to find for the moving party must be undisputed. Additionally, the party that is moving for summary judgment must be entitled to such judgment as a matter of such that the law as applied to the undisputed facts would satisfy the legal requirement to a judgement in the movants favor. The Court does not make any findings of facts, rather, makes a finding as to what facts are undisputed, (i.e., would not need to be proved at trial) and are material to the outcome of the case. Subsequently, the Court will then consider the undisputed facts considering the law and determine if the law as applied to the undisputed facts would render it appropriate to dispose of the claim through summary judgment.

An easement may be created by a plat.⁵ However, the owner of the servient and dominant estate may be not the same person.⁶ If one attempts to create an easement upon their own land “the purported interest is a nullity” because an easement is “a nonpossessory interest in the land of another.”⁷

¹ Factually presented by Plaintiff's statement of material facts (“SMF”) as to which there is no genuine issue ¶ 6. The Defendant does not dispute Plaintiff's SMF ¶ 6 but expressly admits ¶ 6 in Defendant's SMF ¶ 6.

² *Id.*

³ *Id.*

⁴ Factually presented by Plaintiff's statement of material facts (“SMF”) as to which there is no genuine issue ¶ 12. The Defendant does not dispute Plaintiff's SMF ¶ 12 but expressly admits ¶ 12 in Defendant's SMF ¶ 12.

⁵ A conclusion of law. *Kokesh v. Running*, 652 N.W.2d 790, 793 (S.D.2002).

⁶ SDCL § 43-13-6 “A servitude thereon cannot be held by the owner of the servient tenement. A servitude is extinguished by the vesting of the right to servitude and the right to the servient tenement in the same person.”

⁷ The Law of Easements & Licenses in Land § 3:11 (emphasis added).

1. Whether there is an easement.

Thus, when Mr. Guy Ferris attempted to create a 25' easement on his land for the benefit of Lot 14A (i.e., himself) his interest in his own land would be a nullity rendering a sale of such land to Wendy Preszler not subject to a 25' easement along the southern portion of Lot 14B. However, because such creation of an easement includes another aside from himself—namely the public—through the dedication, the entire easement does not fail. However, Mr. Bosch does not possess a 25' easement for the benefit of his dominate estate because the nonpossessory interest in land was created while there was unity of ownership extinguishing such interest at the time of purported creation.

2. What are the terms of the easement.

The issue now turns to what are the terms of the easement. The scope of an easement “is determined by the terms of the grant.”⁸ The easement was created by Guy Ferris via a grant when he platted the eastern portion of Lot 14 in 2004.⁹ The easement expressly stated, “25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT.”¹⁰ As stated above, the portion of the easement provided to benefit Lot 14A is void as a matter of law. The easement could now be read as “ACCESS EASEMENT ... DEDICATED THIS PLAT.”

The South Dakota Supreme Court ruled that the legal connotation of the word dedicated is generally to mean “devotion of property to a public use.”¹¹ Additionally, “Black’s Law Dictionary defines ‘dedicate’ as [‘][t]o appropriate and set apart one’s private property to some public use, as to make a private way public by acts evincing an intention to do so.[’]”¹² In *Bergin*

⁸ SDCL § 43-13-5

⁹ Factually presented by Plaintiff’s statement of material facts (“SMF”) as to which there is no genuine issue ¶ 8. The Defendant does not dispute Plaintiff’s SMF ¶ 8 but expressly admits ¶ 8 in Defendant’s SMF ¶ 8.

¹⁰ Factually presented by Plaintiff’s statement of material facts (“SMF”) as to which there is no genuine issue ¶ 10. The Defendant does not dispute Plaintiff’s SMF ¶ 10 but expressly admits ¶ 10 in Defendant’s SMF ¶ 10.

¹¹ *Bergin v. Bistodeau*, 645 N.W.2d 252, 255 (citing *Tinaglia v. Itzes*, 257 N.W.2d 724, 720 (S.D.1977)).

¹² *Id.* at 256 (citing Black’s Law Dictionary 412 (6th ed 1990)).

v. Bistodeau, the Supreme Court addressed an issue that is very similar to the case here.¹³ In *Bergin*, the petitioner argues that the respondent's phrasing in the plat accepted by Hill City was inadequate to dedicate something to public use.¹⁴ However, the Supreme Court found that the word "dedicated" is a term of art which indicates an *intent to dedicate some piece of land to public use*.¹⁵ The Supreme Court went even further to say that it would be "redundant" to insert "public use" as a modifier to "dedicated" in order to satisfy SDCL § 11-3-12¹⁶ in dedicating land to public use.¹⁷

Here, the same issue is presented by the Defendant—Parcels. The Parcels are contending that such phrasing in the 2004 Plat required additional modification such as "for public use" to satisfy SDCL § 11-3-12; such contention is incorrect as a matter of law. The 2004 Plat expressly states "dedicated this plat." Considering the Supreme Court's definition of the word "dedicated" the 2004 Plat should be read as "ACCESS EASEMENT DEDICATED [for public use] THIS PLAT."

Therefore, the 2004 Plat properly indicates an unambiguous intent by Guy Ferris to offer a 25' easement along the southern portion of Lot 14B as an access easement for public use.

3. Whether the easement was accepted by the public (i.e., the City of Belle Fourche).

The issue then turns to whether the City of Belle Fourche ("City") has accepted the offer to dedicate. As the Defendants argues correctly, the "[t]he mere filing of a plat without public acceptance does not vest fee simple title to streets and alleys...it is simply an offer to dedicate."¹⁸

¹³ *Bergin*, 645 N.W.2d 252.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Statute authorizing private land being offered for public use

¹⁷ *Bergin*, 645 N.W.2d 256.

¹⁸ *City of Belle Fourche v. Dittman*, 325 N.W.2d 309, 312 (S.D.1982).

However, the Defendants' argument that the City has failed to accept such dedication is without merit. The Defendant contends that there is a legal distinction between "approval" of a plat and "acceptance" of an offer to dedicate.¹⁹ The Defendants does not offer any supporting legal authority to reach such a legal conclusion.²⁰ Rather, the Supreme Court offers clarity in the *Bergin* case. In *Bergin*, the Supreme Court expressly affirmed that Hill City accepted the offer to dedicate the easement.

[Hill] City accepted [the] offer of a dedicated easement [...] by formal resolution [...]. This resolution stated: "I, [...] Acting Finance Officer of Hill City, do hereby certify that at an official meeting held on [...], the Common Council of Hill City did by resolution approve the [...] plat. [...]. **Therefore, there was an intent to dedicate and an acceptance by City.**"²¹

Here, the similarity is extraordinarily close. The 2004 Plat was approved the City of Belle Fourche on June 21, 2004. The Resolution of the Common Council of Belle Fourche states,

Be it resolved that the City of Belle Fourche Common Council, having viewed this plat and having received a recommendation from the Belle Fourche Planning Commission does hereby approve this plat. Resolution adopted by unanimous vote of the Belle Fourche Common Council.²²

Thus, considering the Supreme Court's clear indication that acceptance of a plat with an offer to dedicate a piece of land to public use in conjunction with a formal approval by a city

¹⁹ *Brief In Resistance To Motion For Summary Judgment Page 4.*

²⁰ *Id.*

²¹ *Bergin v. Bistodeau*, 645 N.W.2d 252, 256 (emphasis added).

²² *Affidavit of John Burke Exhibit 4.*

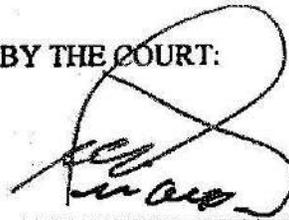
common council indicates that SDCL § 11-3-12 has been satisfied—as a matter of law—the 2004 Plat approved by the City of Belle Fourche Common Council has been approved and the 25' easement running along the southern portion of Lot 14B is dedicated to the public. The above-named parties have all the rights and duties that are provided by an easement dedicated to public use.

CONCLUSION

Therefore, the Plaintiff's motion for summary judgment is **GRANTED** in whole on the issue of whether a twenty-five (25') side easement dedicated to public use exists across Defendants' Lot 14B.

Dated this 20th day of November, 2023.

BY THE COURT:



Michael W. Day
Presiding Circuit Court Judge

FILED

NOV 20 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

9v

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

Plaintiffs,

vs.

RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH,

Defendants.

09CIV23-000067

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

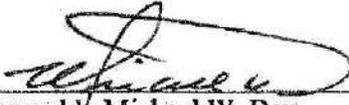
The above-captioned matter came before the Court on September 25, 2023 on *Plaintiffs' Motion for Summary Judgment*. John W. Burke appeared on behalf of Plaintiffs Merle and Anita Bierschenk; Jordan D. Bordewyk appeared on behalf of Defendants Richard and Wendy Parcel; and Defendant William W. Bosch appeared personally. The Court having examined all the pleadings, files, and records herein, and having heard and considered the arguments of counsel, concludes, as a matter of law, that a twenty-five feet (25') wide easement dedicated to use by the public exists across Lot 14B of Prairie View Addition to the City of Belle Fourche, South Dakota in the location depicted in the *Plat of Lots 14A and 14B (Recorded in Doc. No. 2004-2400)*, a copy of which is attached hereto. Therefore, it is hereby:

ORDERED that, in accordance with the Court's *Memorandum of Decision in Re: Plaintiffs' Motion for Summary Judgment*, which is incorporated herein by this reference, *Plaintiffs' Motion for Summary Judgment* is **GRANTED**. 3/21/2024 2:03:23 PM

Attest:
Adams, Denise
Clerk/Deputy



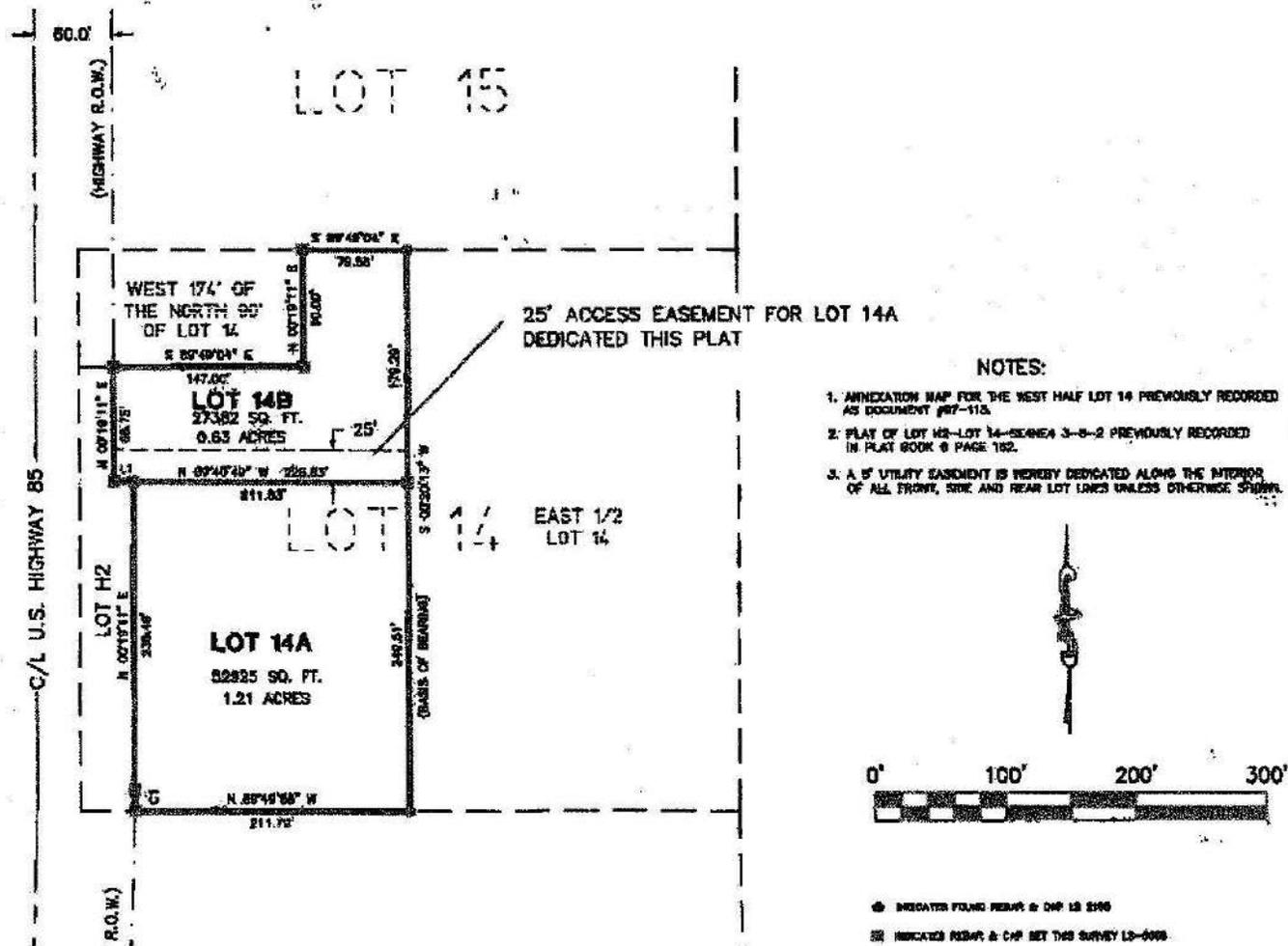
BY THE COURT:



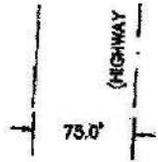
Honorable Michael W. Day
Fourth Circuit Court Judge

2004-2400 PLAT OF LOTS 14A AND 14B,
 A SUBDIVISION OF THE WEST 1/2 OF LOT 14 EXCEPT THE WEST 174' OF THE NORTH 90' OF LOT 14,
 AND EXCEPT LOT H2. LOCATED IN THE PRAIRIE VIEW ADDITION TO THE CITY OF BELLE FOURCHE,
 ALL LOCATED IN THE SE1/4 NE1/4 SECTION 3, T.8N., R.2E., B.H.M.,
 BUTTE COUNTY, SOUTH DAKOTA.

Appx. p. 023



- NOTES:
1. ANNEXATION MAP FOR THE WEST HALF LOT 14 PREVIOUSLY RECORDED AS DOCUMENT #87-115.
 2. PLAT OF LOT H2-LOT 14-SERIES 3-8-2 PREVIOUSLY RECORDED IN PLAT BOOK # PAGE 182.
 3. A 5' UTILITY EASEMENT IS HEREBY DEDICATED ALONG THE INTERIOR OF ALL FRONT, SIDE AND REAR LOT LINES UNLESS OTHERWISE SHOWN.



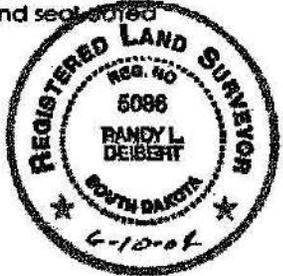
LOT 13

LINE	BEARING	DISTANCE				
L1	N 89°40'49" W	15.90'				
CURVE	ARC LENGTH	DELTA ANGLE	RADIUS	CHORD LENGTH	CHORD BEARING	
C1	14.71'	00°17'12"	2940.00'	14.71'	S 00°27'47" W	

SURVEYOR CERTIFICATE

I, Randy L. Deibert, P.O. Box 408, Spearfish, S.D., being a Registered Land Surveyor in the State of South Dakota, #5086, do hereby certify that at the request of the owner and under my supervision, I have caused to be surveyed and platted the property shown and described hereon. I also certify that this plat is true and correct to the best of my knowledge and belief. This survey does not constitute a title search to determine ownership or easements of record. I further state that I did not obtain the signatures for the certificates other than the Surveyor Certificate. In witness whereof, I have hereunto set my hand and seal on this 10th day of April, 2004.

[Signature]
Randy L. Deibert R.L.S. 5086



OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
State of South Dakota
County of Butte

I, Allison Jensen County Director of Equalization, hereby certify that I have received a copy of this plat.

[Signature]
Allison Jensen County Director of Equalization

OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte

Filed for record this 10th day of Sept., 2004, at 1:02 p.m., M., T., and recorded in Book _____ of Plats on page _____ File Document _____

Butte County Register of Deeds

Register of Deeds
Butte County, South Dakota
Recorded October 19, 2004
at 12:30 P. M.
Book 2004-2400
Page(s) 135
Fee 10.00
By *[Signature]*
Register of Deeds



CERTIFICATE OF OWNERSHIP
State of South Dakota
County of Butte

[Signature] do hereby certify that I/We are the owners of the property shown and described hereon, that we do approve this plat as hereon shown and that development of this property shall conform to all existing applicable zoning, subdivision, erosion and sediment control regulations.

OWNER ADDRESS

APPROVAL OF HIGHWAY AUTHORITY
State of South Dakota, County of Butte

The location of the proposed access roads abutting the county or state highway as shown hereon, is hereby approved. Any change in the proposed access shall require additional approval. *Note: The only allowed access to Lot 14A will be relocation of existing access from Lot #8*

CERTIFICATE OF TREASURER:
State of South Dakota, County of Butte

I, Dee Schuldies County Treasurer of Butte County certify that all taxes and special assessments which are liens upon the herein platted property, registered to this Owner hereon as shown by receipts of my office have been paid.

Date: Sat 30, 2004
[Signature]
Butte County Treasurer



OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte

I, Jenny Walther City Engineer for the City of Fourche, do hereby certify that I have approved this plat with respect to the duties of my office and that I have received a copy of said plat for the City files.

[Signature]
Belle Fourche City Engineer

RESOLUTION OF THE COMMON COUNCIL:
State of South Dakota
County of Butte

Be it resolved that the City of Belle Fourche Common Council, having viewed this plat and having received a recommendation from the Belle Fourche Planning Commission does hereby approve this plat. Resolution adopted by unanimous vote of the Belle Fourche Common Council on this 21 day of June, 2004.

[Signature]



OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
State of South Dakota
County of Butte

I, Wilson Jensen ~~deputy~~ Director of
Equalization, hereby certify that I have
received a copy of this plat.

Wilson Jensen ~~deputy~~
County Director of Equalization

OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte

Filed for record this 15th day of Sept, 2004,
at 1:50 P.M. and recorded in Book 2004-2400
of Plats on page 135 File Document 1000

Butte County Register of Deeds

CERTIFICATE OF OWNERSHIP
State of South Dakota
County of Butte

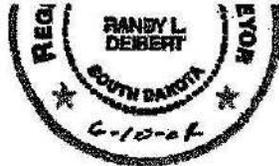
Greg M. Faurie do hereby certify that I/we
are the owners of the property shown and described hereon,
that we do approve this plat as hereon shown and that
development of this property shall conform to all existing
applicable zoning, subdivision, erosion and sediment
control regulations.

OWNER	ADDRESS
<u>Greg M. Faurie</u>	<u>1103 Ave. Jefferson St</u>
<u>W. M. Jensen</u>	

ACKNOWLEDGMENT OF OWNERSHIP:
State of South Dakota
County of Butte

On this 15th day of Sept, 2004, before me
a Notary Public, personally appeared
Greg M. Faurie known to me to be the person(s)
described in the foregoing instrument and acknowledged
to me that they executed the same.

My commission expires: _____
Wilson Jensen
Notary Public



Register of Deeds
Butte County, South Dakota
Recorded October 19, 2004
at 12:50 P.M.
Doc# 2004-2400
Book PA15 Page(s) 135
Fee 10.00
By John A. Wells
Register of Deeds



certify that all taxes and special assessments which are liens upon
the herein platted property, registered to this
Owner hereon as shown by receipts of my office have been paid.

Date: Sept 30, 2004
Dee Schuldies
Butte County Treasurer



OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte
I, Terry Wallsten City Engineer for the City of
Fourche, do hereby certify that I have approved this
plat with respect to the duties of my office and that
I have received a copy of said plat for the City files.

Terry Wallsten
Belle Fourche City Engineer

RESOLUTION OF THE COMMON COUNCIL:
State of South Dakota
County of Butte

Be it resolved that the City of Belle Fourche Common
Council, having viewed this plat and having received a
recommendation from the Belle Fourche Planning Commission,
does hereby approve this plat. Resolution adopted by
unanimous vote of the Belle Fourche Common Council
this 21 day of June, 2004.

Shirley DeConcini 1000 Hill
City Finance Officer Mayor



RECOMMENDATION OF THE CITY OF
BELLE FOURCHE PLANNING COMM.:
State of South Dakota
County of Butte

This plat is hereby recommended for approval to the City
of Belle Fourche Common Council this 15 day of June
2004.

ATTEST: _____
Secretary
Wilson Jensen
Chairman



STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

Plaintiffs,

vs.

RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH, Co-Trustee of the William and Margaret Bosch Family Trust dated July 17, 2023,

Defendants.

09CIV-000067

23-

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing was held on August 12, 2024. The Court having considered the testimony of the witnesses, having reviewed the exhibits admitted and post-hearing submissions¹ and having reviewed the entire file content; and good cause having been shown; now makes and enters the following Findings of Fact and Conclusions of Law.²

FINDINGS OF FACT

1. Any finding of fact more appropriately labeled as a conclusion of law, or vice versa, is to be considered as such for purposes of the record.
2. The Court incorporates the entirety of the testimony and evidence admitted during

¹ The matter was deemed fully submitted to the Court on August 29, 2024.

² Per the agreement of counsel and this Court's *Order Regarding Motions and the Parties' Submission of Post-Hearing Proposed Findings of Fact and Conclusions of Law*, the parties agreed to submit simultaneous proposed Findings of Fact and Conclusions of Law, with each party's submission deemed an objection to the opposing party's proposed findings of fact and conclusions of law. Therefore, there is no need for either party to file and serve objections to the opposing party's proposed findings of fact and conclusions of law.

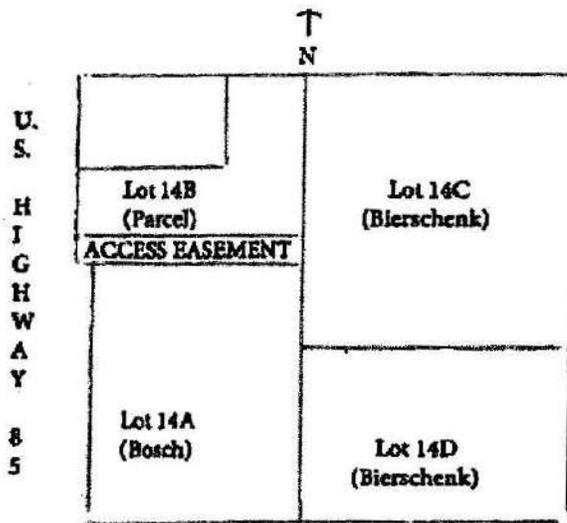
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SEP 04 2024
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

the hearing held on August 12, 2024, as well as the prior submissions of the parties. John W. Burke appeared on behalf of Plaintiff Bierschenks at the hearing; Jordan D. Bordewyk appeared on behalf of Defendants Richard and Wendy Parcel (collectively "Defendant Parcels"); and William W. Bosch appeared personally without counsel and did not present any evidence or argument.

3. This action concerns the existence and scope of an easement across property owned by Defendants Richard and Wendy Parcel (collectively "Defendant Parcels").

4. Plaintiff Bierschenks own Lot 14C of the Prairie View Addition to the City of Belle Fourche. The Defendants own adjacent Lots to the west of Lot 14C. Defendant Parcels own Lot 14B and Defendant William and Margaret Bosch Family Trust dated July 17, 2023 ("Defendant Bosch Trust") owns Lot 14A.

5. The easement in dispute affords access to Lot 14C (owned by Plaintiff Bierschenks) from U.S. Highway 85 ("Highway 85"). The easement and the adjacent lots are generally depicted (not to scale) as follows:



6. This Court previously ruled on Plaintiff Bierschenks' claim regarding a twenty-five feet (25') wide easement by plat. *See Order Granting Plaintiffs' Motion for Summary Judgment (03/21/24)*. Therefore, the issues before the Court concern the existence and scope of a separate easement by written grant (Count 1) and Plaintiff Bierschenks' claim for injunctive relief (Count 2).

7. The parties' Lots (Lots 14A, 14B, 14C, and 14D) were originally part of a larger, approximately five-acre tract described as Lot 14 in Section 3, Township 8 North, Range 2, E.B.H.M. *Exhibit 1 (McDonald/Kirby Warranty Deed); Exhibit 2*.

8. In 1946, the entirety of Lot 14 was owned by a single owner, H.W. Kirby. *Id.*

9. In 1948, H.W. Kirby transferred the east half of Lot 14 to Emily B. Goode. *Exhibit 1 (Kirby/Goode Warranty Deed)*. The pertinent conveyance language of the *Warranty Deed* provided as follows:

The East Half (E½) of Lot Fourteen (14) Section Three (3) Township Eight (8)

North, of Range Two (2), E.B.H.M., as the same is platted and recorded in Plat Book 4, page 13, Register of Deeds office, Butte County, South Dakota., together with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen, beginning at a point 164.04 feet South of the Northwest corner or [sic] said Lot 14, on Highway 85, and continuing due east across the West half of Lot 14 to the east line of the West Half of said Lot 14, and together [sic] with a perpetual easement four (4) feet wide for a water pipe line [sic], beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line on the West Half of Lot 14.

Id.

10. The 16' road right-of-way easement ("Easement") and 4' water pipeline easement initially set forth in the *Kirby/Goode Warranty Deed* were restated in several subsequent deeds.

Exhibit 1.

11. Defendant Richard Parcel admitted that a 16' Easement exists by virtue of the *Kirby/Goode Warranty Deed*, and further admitted that Plaintiff Bierschenks have the right to use the 16' Easement. *Transcript at 46, 65. See also Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts at ¶ 18 ("In response to SMF #18, Defendants admit that Plaintiffs have right to use of the sixteen foot access easement, but subject to the stipulations laid out in response to SMF #4 above."); Answer of Richard D. Parcel and Wendy Parcel at ¶ 6 ("Defendants Parcel have never contended that Plaintiffs did not have the right to use of the Access Easement.")*. Defendant Parcels disagree, however, as to the scope of the Easement and/or the purposes for which it may be used. *Id. at 46-47.*

12. Defendant Richard Parcel admitted that prior to Defendant Wendy Parcel's purchase of Lot 14B, they were aware that there was a 16' easement across the

property for the benefit of the east half of Lot 14. *Transcript at 50.*

13. Defendant Parcels agree that the north boundary of the Easement begins at 164.04 feet south of the northwest corner of Lot 14. *Transcript at 65.*

14. Although there is disagreement as to whether the entirety of the Easement falls within Defendant Parcels' property (Lot 14B), Defendant Parcels agree that the Easement is located in the southern portion of their property (Lot 14B). *Transcript at 65.*

15. Defendant Richard Parcel agreed that the Easement was present long before his wife (Defendant Wendy Parcel) purchased the property in 2004, that it is graveled, and that it has "always" looked like the path depicted in Exhibit 4. *Transcript at 61-62.*

16. The Plaintiffs purchased the property from a sheriff's sale. After purchasing Lot 14C in 2015, Plaintiff Merle Bierschenk typically accessed Lot 14C from Highway 85 by using the Easement. *Transcript at 12.*

17. Defendant Richard Parcel has a practice of parking his pickup in the Easement (as depicted in Exhibits 4, 6, 9, and 10) and has parked in the same manner for years. *Exhibit 4; Transcript at 21-22, 41, 66; Defendant's Exhibit C.* At times other vehicles or equipment have been parked directly in front of his pickup, including a pickup and a car-hauling trailer. *Transcript at 53, 54-55; Exhibits 5, 6, 12.*

18. Because Defendant Richard Parcel's pickup is parked in the path, Plaintiff Merle Bierschenk has had to drive around the pickup by proceeding on the right (or south) side of the pickup. *Transcript at 12-13.*

19. Due to the frequency that Plaintiff Merle Bierschenk and other users of the

Easement were forced to drive around Defendant Richard Parcel's pickup, a trail that deviates to the south of the Easement is now visible. *Transcript at 13; Exhibits 4, 6, 9, 10.*

20. Although he initially disagreed, Defendant Richard Parcel admitted that driving around his pickup results in users of the path having to drive onto the north edge of Defendant Bosch Trust's property (Lot 14A). *Transcript at 53, 54, 58* (“[R]ight now you have to go to the south and over a little bit on Mr. Bosch's property the way people are doing it now, agreed? Agreed.”).

21. At some point after Plaintiff Merle Bierschenk began using the Easement, Defendant Richard Parcel stopped him and informed him that “he didn't want [Plaintiff Merle Bierschenk's] druggie employees using th[e] easement.” *Transcript at 13.*

22. On another occasion, Defendant Richard Parcel again stopped Plaintiff Merle Bierschenk as he was using the Easement and told Plaintiff Merle Bierschenk that he was not supposed to be using it. *Transcript at 13-14.* Defendant Wendy Parcel joined in the encounter and the parties had a heated debate. *Id.* Plaintiff Merle Bierschenk ultimately called the police, who instructed him to not use the path until the matter was resolved in court. *Id.*

23. At some point, Defendant Parcels installed a two-wire fence on the east end of the Easement at the property line separating Defendant Parcels' property (Lot 14B) and Plaintiff Bierschenks' property (Lot 14C). *Transcript at 14-15.*

24. In July of 2021, Plaintiff Bierschenks' attorney wrote a letter to Defendant Richard Parcel explaining why Plaintiff Bierschenks believed they had the legal right to

use the Easement and requesting that Defendant Parcel remove the wire fence. *Exhibit 11.*

25. Defendant Richard Parcel admitted that he removed the wire fence after receiving the letter from Plaintiff Bierschenks' attorney and Plaintiff Merle Bierschen returned to using the Easement. *Transcript at 16, 59.*

26. In connection with Plaintiff Bierschenks' construction of two open-faced storage units on Lot 14C, they hired Joe Couch to haul gravel to Lot 14C. *Transcript at 18.*

27. Mr. Couch initially used the Easement to gain access Plaintiff Bierschenks' property (Lot 14C); however, after he was confronted by Defendant Richard Parcel, he would not drive through the Easement because he did not want to get involved in the dispute. *Transcript at 18-19.*

28. In addition to requiring users of the Easement to have to travel several feet onto the north edge of Defendant Bosch Trust's property (Lot 14A), the location of Defendant Richard Parcel's pickup makes it more difficult for users of the Path pulling a trailer to enter the easement from Highway 85. *Transcript at 19.*

29. The parties agree that the property pin for the property line separating Defendant Parcel's property (Lot 14B) and Defendant Bosch Trust's property (Lot 14A) is located immediately on the right (south side) of the power pole located in the foreground of Exhibit 4. *Transcript at 38, 43, 51-52.*

30. Defendant Richard Parcel admitted that he continued to park his pickup in the same location in the Easement even after this Court confirmed the existence of the

separate 25' easement by plat in November of 2023. *Transcript at 60-61.*

31. Defendant Richard Parcel admitted that the distance between the right (or south side) of his pickup (where it is typically parked) and his dumpster is approximately 17'. *Transcript at 63.* However, he also admitted that the dumpster is situated on Defendant Bosch Trust's property (Lot 14A). *Transcript at 52, 55-56.*

32. Certain of Defendant Richard Parcel's testimony was not credible. For example, although he later admitted that driving around his pickup requires users of the Easement to drive onto a portion of Defendant Bosch Trust's property (Lot 14A), he initially testified that it did not. *Transcript at 53, 54, 58 ("[R]ight now you have to go to the south and over a little bit on Mr. Bosch's property the way people are doing it now, agreed? Agreed.")*. Next, although he initially testified that he recognized a red dumpster depicted in Exhibit 12 and testified that the dumpster was his, he later testified that the red dumpster was never situated where it was located in the photograph. *Transcript 52-53, 57.* Also, he testified that Defendant Parcel's dumpster, which is situated on Defendant Bosch Trust's property (Lot 14A) "never" moves. *Transcript at 56.* Finally, he testified that he could not park his pickup farther to the south due to ruts in the Easement, and when asked if he could park farther to the south if the ruts were filled in, he stated: "I don't know." *Transcript at 72-73.*

57. The Parcels reside on their Lot 14B. The Plaintiffs do not reside on their Lot 14C.

CONCLUSIONS OF LAW

Easement by written grant.

1. The Court had jurisdiction over the parties and subject matter. Venue is proper.

2. “An easement is a property interest in land owned by or in the possession of another, which entitles the easement owner to a limited use or enjoyment of the land in which the interest exists.” *Ehlebracht v. Crowned Ridge Wind II, LLC*, 2022 S.D. 19, ¶ 33, 972 N.W.2d 477, 488 (quoting *Picardi v. Zimmiond*, 2004 S.D. 125, ¶ 16, 689 N.W.2d 886, 890).
3. Generally, easements are created in three different ways: (1) by written grants; (2) pursuant to a plat; or (3) by force of law. *Id.* (quoting *Kokesh v. Running*, 2002 S.D. 126, ¶ 12, 652 N.W.2d 790, 793). Examples of easements created “by force of law” would include implied easements (i.e., easements by necessity and easements implied from prior use) and prescriptive easements. See *Springer v. Cahoy*, 2012 S.D. 32, ¶ 7, 814 N.W.2d 131, 133 (discussing implied easements); *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. 12, ¶ 7, 657 N.W.2d 300, 304 (discussing prescriptive easements).
4. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. *SDCL 43-13-5*. With regard to an easement granted in a written instrument, the terms and extent of the easement “are ascertained either by the ‘words clearly expressed, or by just and sound construction’ of the easement document.” *DeHaven v. Hall*, 2008 S.D. 57, ¶ 15, 753 N.W.2d 429, 435 (quoting *Picardi v. Zimmiond*, (*Picardi II*), 2005 S.D. 24, ¶ 20, 693 N.W.2d 656, 662)).
5. The Court “look[s] first to the language of the grant itself to discover the extent and nature of the easement agreement and its terms.” *Id.* The Court then gives “terms their plain and ordinary meaning” and “utilize[s] no additional interpretation in the absence of ambiguity.” *Id.* “If the terms of the agreement are specific in nature, the terms are ‘decisive of the limits of

the easement.” *Id.* According to the South Dakota Supreme Court, “[it] will not resolve disputes over unambiguous language by resorting to what the parties might have included in a contract.”

Id.

6. “[C]lear language is necessary to create either a condition subsequent or precedent.” *Id.* (quoting *City of Huron v. Wilcox*, 17 S.D. 625, 628, 98 N.W. 88, 89 (1904)). “Forfeitures and conditions subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention . . . to that effect.” *Id.*

7. Once an easement is created, it “runs with the land.” SDCL 43-25-30 provides as follows:

A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

SDCL 43-25-30. See also *Wildwood Ass'n v. Harley Taylor, Inc.*, 2003 S.D. 98, ¶ 20, 668 N.W.2d 296, 303 (“An easement appurtenant runs with the land and serves the dominant estate.”).

8. Here, the *Kirby/Goode Warranty Deed* created two easements by written grant: (1) a 16' wide easement for road right-of-way; and (2) a 4' wide easement for a water pipeline.

9. As stated in the *Kirby/Goode Warranty Deed*, the 16' Easement for road right-of-way begins at a point 164.04' south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C).

10. The 4' water pipeline easement begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line on the west half of Lot 14 (i.e., the property line of Lot 14C).

11. With regard to the extent and nature of the 16' Easement, the plain and ordinary meaning of the language of the grant itself—as set forth in the *McDonald/Kirby Warranty Deed*—makes clear that the Easement was intended to be perpetual in nature and to provide road right-of-way for vehicular travel.

12. The pertinent language contains no restriction limiting the manner or type of travel for which the Easement may be used.

13. The provision conveying the Easement contains no language limiting or restricting its use to that necessary for a single one-family private dwelling. The easement language in this case is in stark contrast to the easement considered in *Picardi v. Zimmiond*, 2005 S.D. 24, 693 N.W.2d 656. In that case, the easement specifically provided: “This easement shall be used for access to one single family residence located upon the Picardi property.” *Picardi*, 2005 at ¶ 2, 693 N.W.2d at 650. The South Dakota Supreme Court held that “the language of the easement document” was “clear, definite and certain in its purpose and scope,” and that it “limit[ed] the Picardi’s scope of use “for access to one single family residence located upon the Picardi property.” *Picardi*, 2005 at ¶ 23, 693 N.W.2d at 663.

14. Although the *McDonald/Kirby Warranty Deed* provides elsewhere in that only a single one-family dwelling may be placed upon the East Half of Lot 14, that restriction concerned the use of the East Half of Lot 14 consistent with SDCL Chapter 11-5, not the Easement. “[C]lear language is necessary to create either a condition subsequent or

precedent.” *Id.* (quoting *City of Huron v. Wilcox*, 17 S.D. 625, 628, 98 N.W. 88, 89 (1904)). Here, the *McDonald/Kirby Warranty Deed* does not contain clear language conditioning the use of the Easement upon a single one-family dwelling existing upon on the East Half. “Forfeitures and conditions subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention . . . to that effect.” *Id.* Further, the final time that the single one-family dwelling restriction on East Half of Lot 14 was included in a conveyance document was in 1961. *Exhibit 1 (Myers/Myers Affidavit)*. Thus, the restriction ceased existing years ago. See *SDCL 11-5-4* (“The restrictions authorized by §§11-5-1 and 11-5-2 continue in force for a period as may be prescribed in a declaration or contract but not exceeding forty years from the date of such declaration or contract.”). Prior to amendment of the statute in 2021, such restrictions were only valid for 25 years. *Id.*

15. While Defendant Parcels may have preferred that the Easement be limited to use necessary for a single one-family dwelling, this Court “will not resolve disputes over unambiguous language by resorting to what the parties might have included in a contract.” *Id.* *DeHaven v. Hall*, 2008 S.D. 57, ¶ 15, 753 N.W.2d 429, 435 (citing *Wessington Springs Educ. Ass’n v. Wessington Springs School Dist. #36-2*, 467 N.W.2d 101, 104 (S.D. 1991)).

16. “The grant of an easement does not dispossess the landowner;” rather, “the owner of the servient tenement retains all the incidents of ownership in the easement.” *Picardi II*, 2005 S.D. at ¶ 25, 693 N.W.2d at 663. However, the servient tenement may not substantially interfere with the dominant owner’s reasonable use of the easement. “In the absence of contrary language in the easement, a servient owner may reasonably use that portion of its real property subject to an egress, ingress, and roadway easement for its own purposes up to the point where such uses

substantially interfere with the dominant owner's reasonable use of the easement." *DeHaven v. Hall*, 2008 S.D. 57, ¶ 31, 753 N.W.2d 429, 439-40 (*Picardi II*, 2005 S.D. at ¶ 30, 693 N.W.2d at 665)).

17. Although the Easement was recorded and Defendant Parcels admit its existence, giving them actual notice, they additionally had constructive notice of the Easement prior to purchasing Lot 14B due to having observed it. *Transcript at 50*. See *Johnson v. Radle*, 2008 S.D. 23, ¶ 16, 747 N.W.2d 644, 651 ("If facts are sufficient to put a purchaser of a title or lien upon inquiry of any adverse right or equity of a third party, his want of diligence in making such inquiry is equivalent to a want of good faith.").

Injunctive Relief.

18. SDCL 21-8-14 provides as follows:

Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

- (1) Where pecuniary compensation would not afford adequate relief;
- (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
- (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
- (4) Where the obligation arises from a trust.

SDCL 21-8-14.

19. The four basic factors to be considered are as follows:

- (1) Did the party to be enjoined cause the damage?
- (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law?
- (3) Is the party to be enjoined acting in bad faith or is its injury-causing behavior an "innocent mistake"?
- (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party?"

Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418 (internal citations omitted).

20. “A suit for injunction is inherently an equitable action.” *Sherburn*, 1999 S.D. at ¶ 18, 593 N.W.2d at 418 (quoting *Knodel v. Kassel Township*, 1998 S.D. 73, ¶ 8, 581 N.W.2d 504, 507).

21. The decision to grant a permanent injunction rests in the discretion of the trial court. *Sherburn v. Patterson Farms, Inc.*, 1999 S.D. 47, ¶ 17, 593 N.W.2d 414, 418 (citing *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472, 475 (S.D. 1991)). In contrast, “[w]hether the facts of a particular case meet the[] statutory prerequisites [of SDCL 21-8-14] is a question of law. *Magner v. Brinkman*, 2016 S.D. 50, ¶ 19, 883 N.W.2d 74, 83 (citing *Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 4, 620 N.W.2d 198, 200).

22. An injunction will be granted if the elements thereof are proven by a preponderance of the evidence. *Brookings Mall, Inc. v. Captain Ahab's, Ltd.*, 300 N.W.2d 259, 264 (S.D. 1980).

23. In this case, SDCL 21-8-14(1), (2), and (3) each authorize the entry of a permanent injunction.

24. With regard to SDCL 21-8-14(1), pecuniary compensation would not afford adequate relief. Monetary compensation generally does not offer adequate relief in an encroachment case and this case is no exception. An award of money will not afford adequate relief to Plaintiff Bierschenks for the inability to fully use the Easement; the Easement is unique in that it affords direct access to Highway 85. In the words of the South Dakota Supreme Court: “Because ‘no one should be permitted to take land of another merely because he is willing to pay

a market price for it[.]’ monetary compensation generally does not offer adequate relief in encroachment cases.” *Hedlund v. River Bluff Estate, LLC*, 2018 S.D. 20, ¶¶ 16-17, 908 N.W.2d 766, 772 (*Hoffman v. Bob L., Inc.*, 2016 S.D. 94, ¶ 10, 888 N.W.2d 569, 573). “[A] trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction.” *Magner v. Brinkman*, 2016 S.D. 50, ¶ 22, 883 N.W.2d 74, 84 (citing *Beatty v. Smith*, 14 S.D. 24, 84 N.W. 208, 211 (1900)). See also *Ladson v. BPM Corp.*, 2004 S.D. 74, ¶ 20, 681 N.W.2d 863, 869 (upholding permanent injunction barring BPM Corporation from keeping livestock on land adjacent to the plaintiff’s property since, “[w]ithout a permanent injunction, it is likely that [the plaintiff] will be forced to bring an unknown number of future lawsuits to address his pecuniary losses caused by BPM’s livestock.”).

25. With regard to SDCL 21-8-14(2), it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. As Plaintiff Merle Bierschenk testified, one would not know where to start in terms of determining monetary compensation. It would be extremely difficult, if not impossible: (i) to assign a monetary value to Defendant Parcels’ obstructing the Easement since it will not be known whether Defendant Richard Parcel will park his pickup in the Easement seven days a week in the future, or four days a week; how many years he may continue to do so; and, when he does so, the extent to which the Easement will be obstructed since that is dependent on where Defendant Parcels park their vehicles; (ii) to know whether and how many potential renters are lost because the he/she drove by the storage units and viewed the difficulty of access and therefore elected to store their vehicle/ equipment elsewhere; (iii) to know whether and how many existing renters cease renting from Plaintiff

Bierschenks due to difficulty of access. *Transcript at 29-30.*

26. For the reasons described above, an injunction is necessary to prevent a multiplicity of judicial proceedings.

27. The four basic factors required to be considered by the Court when evaluating the propriety of an injunction support the issuance of an injunction.

28. First, because it is Defendant Parcels that are obstructing the use of the Easement, the parties to be enjoined caused—and are continuing to cause—the damage. *Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418.*

29. Second, irreparable harm will result without an injunction because there is a lack of an adequate and complete remedy at law. *Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418.* “Harm is irreparable ‘where it cannot be readily, adequately, and completely compensated with money.’” *Magner v. Brinkman, 2016 S.D. 50, ¶ 21, 883 N.W.2d 74, 83 (quoting Strong v. Atlas Hydraulics, Inc., 2014 S.D. 69, ¶ 17, 855 N.W.2d 133, 140 (quoting Knodel, 1998 S.D. 73, ¶ 13, 581 N.W.2d at 509))*. As discussed above, given that the conduct in question concerns the obstruction of the right to use an easement for access to property, and the fact that it would be extremely difficult, if not impossible, to fix monetary compensation as relief, the harm “cannot be readily, adequately, and completely compensated with money.” *Id.*

30. Third, Defendant Parcels’ obstruction of the Easement is not an innocent mistake and, at times, may be viewed as acting in bad faith. *Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418.* Defendant Richard Parcel admitted to the existence of the 16’ Easement and admitted that Plaintiff Bierschenks have the right to use the 16’ Easement. *Transcript at 46, 65.* Nevertheless, Defendant Richard Parcel continued to park in the Easement, including after this Court

confirmed the existence of the separate 25' easement by plat in November of 2023. *Transcript at 60-61.* In addition, at some point, Defendant Parcels installed a two-wire fence on the east end of the Easement at the property line separating Defendant Parcels' property (Lot 14B) and Plaintiff Bierschenks' property (Lot 14C). *Transcript at 14-15.*

31. In balancing the equities, because there are other places on their property (Lot 14B) where they can park their vehicles, Defendant Parcels will not suffer a hardship by being enjoined from parking in the Easement, and certainly will not suffer a hardship that is disproportionate to the benefit to be gained by Plaintiff Bierschenks' being able to use the Easement without obstruction. *Transcript at 26-27.* Defendant Richard Parcel admitted that there were other places to park their vehicles, but testified that it could not be done "very easily" due to "crap" on their property that would have to be moved. Having to move such personal property is not a hardship. Defendant Richard Parcel also admitted that when they go on vacation they park Defendant Wendy Parcel's car in front of their large steel garage ("shop"), and not in the path of the Easement. *Transcript at 73.*

32. Defendant Parcels are substantially interfering with Plaintiff Bierschenks' (the dominant owners') reasonable use of both the 16' Easement and the previously confirmed 25' easement by plat. *Exhibits 6, 7.*

33. With regard to the 16' Easement, because the north boundary of the 16' Easement is located 164.04' south of the northwest corner of Lot 14, the south boundary is located 180.04' south of the northwest corner of Lot 14 (i.e., $164.04' + 16' = 180.04'$). Based upon the 2004 *Plat of Lots 14A and 14B*, the distance from the northwest corner of Lot 14 to the southwest corner of Lot 14B is approximately 178.75' ($88.75' + 90.00' =$

178.75'). *Exhibit 2*. As a result, approximately 14.71' of the Easement lies on Defendant Parcels' property (Lot 14B) and approximately 1.29' of the Easement lies on Defendant Bosch Trust's property (Lot 14A). Defendant Richard Parcel testified that his pickup is approximately 7' wide. *Transcript at 55*. Thus, where it is typically parked, his pickup obstructs at least half of that portion of the Easement located on Defendant Parcels' property (Lot 14B)—i.e., 7' of the 14.71'. *See also Exhibits 4, 6, 9, and 10*.

34. With respect to the 25' easement by plat, Defendant Richard Parcel's own testimony confirms that Defendant Parcels are substantially interfering with Plaintiff Bierschenks' use. The *2004 Plat of Lots 14A and 14B* reflects that the entirety of the 25' easement is located on Defendant Parcels' property (Lot 14B). *Exhibit 2*. Defendant Richard Parcel testified that the distance between the right (or south side) of his pickup where it is typically parked to Defendant Parcels' dumpster is approximately 17'. *Transcript at 62-63*. However, he also admitted that the dumpster is situated on Defendant Bosch Trust's property (Lot 14A). *Transcript at 52, 55-56*. Taken together, these distances total approximately 24' ($7' + 17' = 24'$). Thus, even when measured from the dumpster—which is actually situated on Defendant Bosch Trust's property (Lot 14A)—Defendant Parcels are obstructing approximately one-third of the 25' easement by plat. However, as just noted, the 25' easement by plat does not extend onto Defendant Bosch Trust's property (Lot 14A). *Exhibit 2*.

35. Defendant Parcels' substantial interference with Plaintiff Bierschenks' reasonable use of the Easement is further evidenced by the fact that Defendant Parcels' conduct requires Plaintiff Merle Bierschenk and others to drive several feet onto—and

effectively trespass on—the north edge of Defendant Bosch Trust's property (Lot 14A). While there presently is not a fence on the north edge of Defendant Bosch Trust's property (Lot 14A), that may not always be the case. Defendant Parcels' conduct is not ameliorated by the fact that the absence of such a fence today allows travel onto the north edge of Defendant Bosch Trust's property (Lot 14A).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and the Court having examined all the pleadings, files, and records herein, and being otherwise advised in the premises, it is hereby:

ORDERED as follows:

- (1) Title to a sixteen (16) feet wide easement across Lot 14B and Lot 14B (the servient estates) for road right-of-way and a four (4) feet wide easement for a water pipeline are quieted in favor of Lot 14C (the dominant estate).
- (2) The sixteen (16) feet wide easement begins at a point 164.04' south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C).
- (3) The four (4) feet wide easement for a water pipeline begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line on the west half of Lot 14 (i.e., the property line of Lot 14C).
- (4) The Defendants are enjoined from obstructing, partially obstructing, and/or otherwise interfering with the use of (i) the sixteen (16) feet wide road right-of-

way easement and the four (4) feet wide water pipeline easement, both by grant, and (ii) the twenty-five (25) feet wide easement by plat previously recognized by the Court in its *Order Granting Plaintiffs' Motion for Summary Judgment* (03/21/24).

Dated this 4th day of September 2024.

BY THE COURT:



Michael W. Day
Fourth Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



FILED

SEP 04 2024

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Lot 14C of Prairie View Addition to the City of Belle Fourche, Butte County, South Dakota, according to the plat recorded in the Office of the Butte County Register of Deeds as Document No. 2008-1325.

(the dominant tenement). The sixteen feet (16') wide easement begins at a point 164.04 feet south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C). The four feet (4') wide easement for a water pipeline begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line of the west half of Lot 14 (i.e., the property line of Lot 14C).

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a twenty-five feet (25') wide easement dedicated to use by the public exists across:

Lot 14B of Prairie View Addition to the City of Belle Fourche, Butte County, South Dakota, according to the plat recorded in the Office of the Butte County Register of Deeds as Document No. 2004-2400

in the location depicted in the attached *Plat of Lots 14A and 14B (Recorded in Doc. No. 2004-2400)* identified as a "25' ACCESS EASEMENT"

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants are enjoined from obstructing, partially obstructing, and/or otherwise interfering with the use of (i) the sixteen feet (16') wide road right-of-way easement and the four feet (4') wide water pipeline easement, both by grant, and (ii) the twenty-five feet (25') wide easement by plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Butte County Register of Deeds is hereby authorized and directed to record a copy of this *Judgment* in the chain of title of the above-described properties.

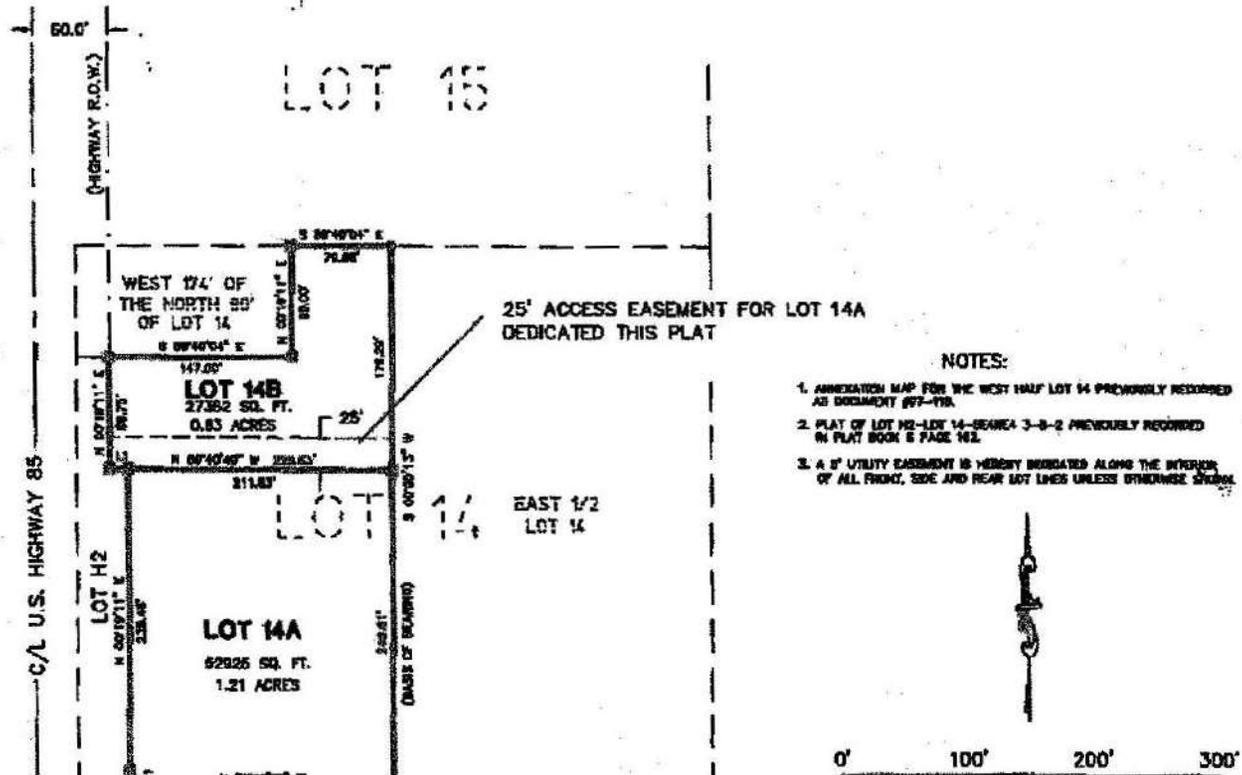
BY THE COURT: 10/9/2024 1:31:05 PM

Attest:
Jensen, Alana
Clerk/Deputy




Honorable Mike Day
Fourth Circuit Court Judge

**2004-2466 PLAT OF LOTS 14A AND 14B,
 A SUBDIVISION OF THE WEST 1/2 OF LOT 14 EXCEPT THE WEST 174' OF THE NORTH 90' OF LOT 14,
 AND EXCEPT LOT H2, LOCATED IN THE PRAIRIE VIEW ADDITION TO THE CITY OF BELLE FOURCHE,
 ALL LOCATED IN THE SE1/4 NE1/4 SECTION 3, T.8N, R.2E, B.H.M.,
 BUTTE COUNTY, SOUTH DAKOTA.**





■ INDICATES FOUND CORNER & CAP TO THIS
 ■ INDICATES CORNER & CAP SET FOR THIS SURVEY (S-2004)

LINE	BEARING	DISTANCE			
L1	N 89°40'49" W	18.00'			
CURVE	ARC LENGTH	DELTA ANGLE	RADIUS	CHORD LENGTH	CHORD BEARING
C1	14.71	00°17'12"	2940.00'	14.71	S 02°27'47" W

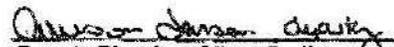
SURVEYOR CERTIFICATE

I, Randy L. Delbert, P.O. Box 408, Spearfish, S.D., being a Registered Land Surveyor in the State of South Dakota, #5086, do hereby certify that at the request of the owner and under my supervision, I have caused to be surveyed and platted the property shown and described hereon. I also certify that this plat is true and correct to the best of my knowledge and belief. This survey does not constitute a title search to determine ownership or easements of record. I further state that I did not obtain the signatures for the certificates other than the Surveyor Certificate. In witness whereof, I have hereunto set my hand and seal on this 10th day of August, 2004.

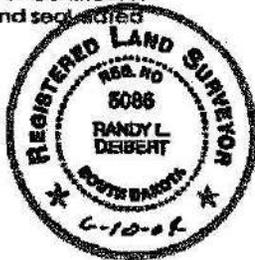

 Randy L. Delbert R.L.S. 5086

OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
 State of South Dakota
 County of Butte

I, Danson Jensen ~~dean~~ Director of Equalization, hereby certify that I have received a copy of this plat.


 County Director of Equalization

OFFICE OF REGISTER OF DEEDS
 State of South Dakota
 County of Butte



Register of Deeds
 Butte County, South Dakota
 Recorded October 19, 2004
 at 12:50 P.M.
 Book 1804-2400
 Page(s) 135
 Fee 10.00

APPROVAL OF HIGHWAY AUTHORITY
 State of South Dakota, County of Butte

The location of the proposed access roads abutting the county or state highway as shown hereon, is Herby approved. Any change in the proposed access shall require additional approval. *Note: The only allowed access to lot 13A will be relocation of existing access from Lot 11B*

HIGHWAY AUTHORITY: [Signature]

CERTIFICATE OF TREASURER:
 State of South Dakota, County of Butte

I, Dee Schilders County Treasurer of Butte County certify that all taxes and special assessments which are liens upon the herein platted property, registered to this Owner hereon as shown by receipts of my office have been paid.

Date: Sept 28, 2004


 Butte County Treasurer



OFFICE OF THE CITY ENGINEER
 State of South Dakota
 County of Butte

I, Tracy Wetzel City Engineer for the City of Fourche, do hereby certify that I have approved this plat with respect to the duties of my office and that



OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte

at 12:50 P. M.
Date 2004-24-20
Book PB15 Page(s) 135
Fee 18.00
By [Signature]
Register of Deeds

Filed for record this 30 day of Sept. 2004,
at 1:00 p.m. and recorded in Book
of Plats on page _____ File Document _____

Butte County Register of Deeds

CERTIFICATE OF OWNERSHIP
State of South Dakota
County of Butte

Coulters do hereby certify that I/We
are the owners of the property shown and described hereon,
that we do approve this plat as hereon shown and that
development of this property shall conform to all existing
applicable zoning, subdivision, erosion and sediment
control regulations.

OWNER ADDRESS
Guy M. Ferris 1103 Texas, Spearfish SD
[Signature] 57783



OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte
I, Terry Walterschaff City Engineer for the City of
Fourche, do hereby certify that I have approved this
plat with respect to the duties of my office and that
I have received a copy of said plat for the City files.

[Signature]
Belle Fourche City Engineer



RESOLUTION OF THE COMMON COUNCIL:
State of South Dakota
County of Butte

Be It resolved that the City of Belle Fourche Common
Council, having viewed this plat and having received a
recommendation from the Belle Fourche Planning Commission,
does hereby approve this plat. Resolution adopted by
unanimous vote of the Belle Fourche Common Council
this 21 day of Sept 2004.

[Signature] [Signature]
City Finance Officer Mayor



RECOMMENDATION OF THE CITY OF
BELLE FOURCHE PLANNING COMM.:
State of South Dakota
County of Butte

This plat is hereby recommended for approval to the City
of Belle Fourche Common Council this 15 day of June
2004.

ATTEST: _____
Secretary
[Signature]
Chairman

ACKNOWLEDGMENT OF OWNERSHIP:
State of South Dakota
County of Butte

On this 30th day of Sept 2004, before me
a Notary Public, personally appeared
Guy M. Ferris known to me to be the person(s)
described in the foregoing instrument and acknowledged
to me that they executed the same.

My commission expires: 9/20/08
[Signature]
Notary Public



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

Appeal No. 30889

**MERLE G. BIERSCHENK and
ANITA J. BIERSCHENK,**

Plaintiffs and Appellees,

vs.

**RICHARD D. PARCEL and
WENDY PARCEL,**

Defendants and Appellants,

and

**WILLIAM W. BOSCH, Co-Trustee
of the William and Margaret Bosch
Family Trust dated July 17, 2023,**

Defendants and Appellees.

Appeal from the Circuit Court
Fourth Judicial Circuit
Butte County, South Dakota
THE HONORABLE MICHAEL W. DAY

BRIEF OF APPELLEE BIERSCHENKS

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Pro Se Appellee
William W. Bosch, Co-Trustee of the
William and Margaret Bosch Family Trust
dated July 17, 2023
1825 Country Oak Lane
Spearfish, SD 57783

NOTICE OF APPEAL FILED NOVEMBER 6, 2024

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PRELIMINARY STATEMENT

Throughout the *Brief of Appellee Bierschenks*, the Plaintiffs/Appellees Merle G. Bierschenk and Anita J. Bierschenk are collectively referred to as “Bierschenks.” The Defendants/Appellants Richard D. Parcel and Wendy Parcel are collectively referred to as “Parcels.” Defendant/Appellee William W. Bosch, Co-Trustee of the William and Margaret Bosch Family Trust dated July 17, 2023, is referred to as “Bosch Trust.” The settled record is denoted “SR,” followed by the appropriate pagination. The transcript of the hearing is referenced using “HT,” followed by the corresponding page number(s). Documents in the Appendix will be referenced using “APP,” followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The Parcels appeal from a *Judgment* of the Fourth Judicial Circuit Court, which was signed and filed on October 9, 2024. *SR at 425-29*. A *Notice of Entry of Judgment* was filed and served on October 10, 2024. *Id. at 430*. The Parcels filed a *Notice of Appeal* on November 6, 2024. *Id. at 438*. Jurisdiction in this Court is therefore proper under SDCL 15-26A-6.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DECLINED TO LIMIT THE 16’ WIDE EASEMENT BY GRANT TO USE ONLY FOR A ONE FAMILY PRIVATE DWELLING.

The circuit court declined to limit the 16’ wide easement by grant to use only for a one family private dwelling.

DeHaven v. Hall, 2008 S.D. 57, 753 N.W.2d 429.

Ehlebracht v. Crowned Ridge Wind II, LLC, 2022 S.D. 19, 972 N.W.2d 477.

Springer v. Cahoy, 2012 S.D. 32, 814 N.W.2d 131.

Thompson v. E.I.G. Palace Mall, LLC, 2003 S.D. 12, 657 N.W.2d 300.

SDCL 43-13-5.

II. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT CONFIRMING THAT THE 2004 PLAT DEDICATED A 25' WIDE EASEMENT FOR USE BY THE PUBLIC.

The circuit court granted summary judgment confirming that the *2004 Plat* dedicated a 25' wide easement for use by the public.

Bergin v. Bistodeau, 2002 S.D. 53, 645 N.W.2d 252.

Busselman v. Egge, 2015 S.D. 38, 864 N.W.2d 786.

Nelson v. Garber, 2021 S.D. 32, 960 N.W.2d 340.

Thieman v. Bohman, 2002 S.D. 52, 645 N.W.2d 260.

SDCL 11-3-12.

SDCL 15-6-8(a).

SDCL 15-6-19(a).

III. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED A PERMANENT INJUNCTION ENJOINING OBSTRUCTION OR INTERFERENCE WITH THE EASEMENTS.

The circuit court entered a permanent injunction enjoining the Parcels and the Bosch Trust from obstructing, partially obstructing and/or otherwise interfering with the use of the easements.

Matter of Estate of Simon, 2024 S.D. 47, 11 N.W.3d 36.

Spring Canyon Properties, LLC v. Cal SD, LLC, 2024 S.D. 68, 14 N.W.3d 325.

Weber v. Weber, 2023 S.D. 64, 999 N.W.2d 230

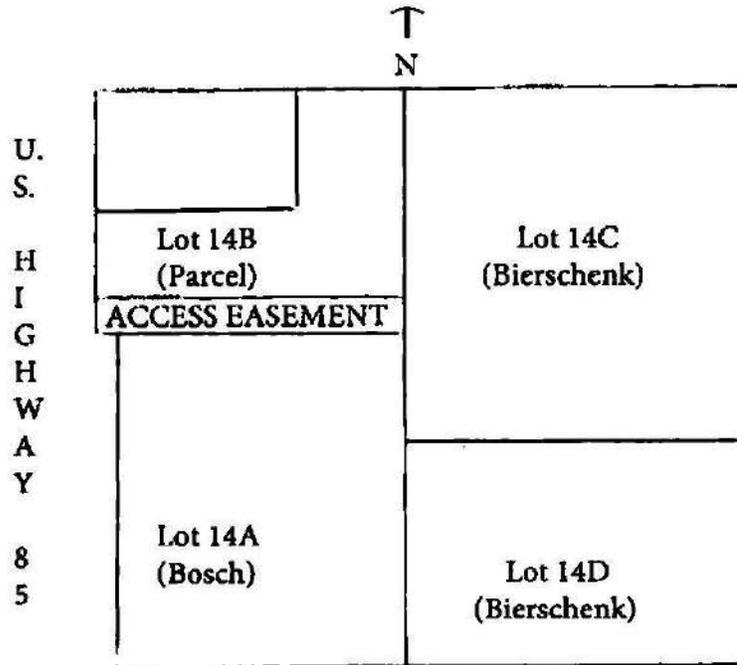
STATEMENT OF THE CASE

This action concerns the Bierschenks' right to access their property by using a gravel path across the Parcels' property. The Bierschenks commenced this action seeking to confirm the existence of two separate easements: (1) a 16' wide easement (and accompanying 4' wide easement for a water pipeline) by written grant; and (2) a 25' wide easement by plat. *SR at 6-9 (Complaint)*. In addition, they sought injunctive relief to enjoin the Parcels from obstructing use of the easement. *SR at 9*.

The action proceeded in the Fourth Judicial Circuit Court, Butte County, before the Honorable Michael W. Day. The circuit court confirmed the existence of the 25' wide easement by plat by granting summary judgment in favor of the Bierschenks. *SR at 117*. An evidentiary hearing was held to address the Bierschenks' claim of a 16' wide easement by grant and request for injunctive relief. *Id. at 287*. The circuit court subsequently ruled in favor of the Bierschenks and entered findings of fact and conclusions of law quieting title to the 16' wide easement and enjoining the Appellees from obstructing the use of both the 16' wide easement and the 25' wide easement. *Id. at 403, 423*. The Parcels appealed. *Id. at 438*.

STATEMENT OF THE FACTS

The Bierschenks own Lot 14C of the Prairie View Addition to the City of Belle Fourche ("City"). The Parcels and the Bosch Trust each own adjacent lots to the west of Lot 14C—the Parcels own Lot 14B and the Bosch Trust owns Lot 14A. *SR at 256, 260*. The easements in dispute afford access to the Bierschenks' property (Lot 14C) from U.S. Highway 85 ("Highway 85"). *Id. at 231, 253*. The access easement and the parties' Lots are depicted (not to scale) as follows:

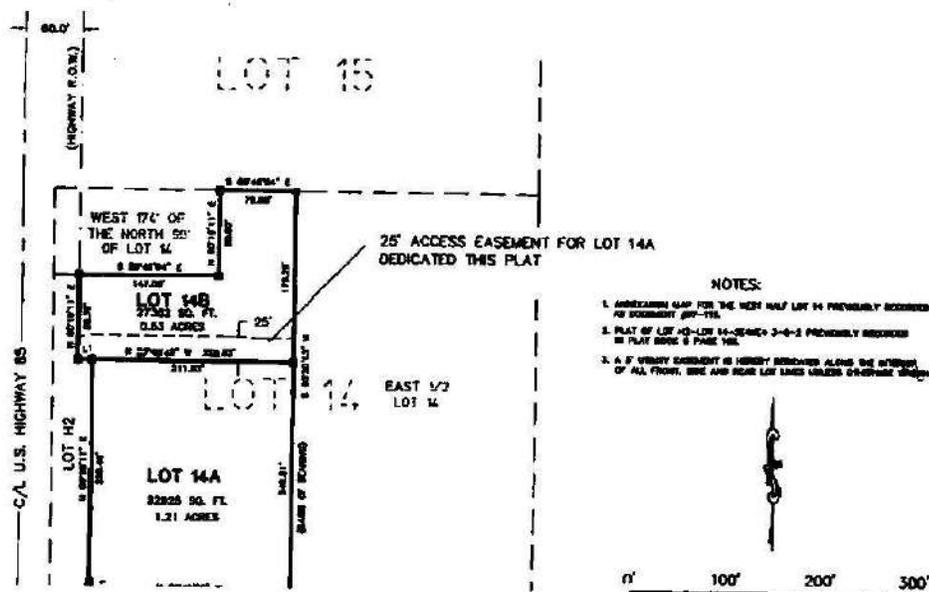


The parties' Lots were originally part of a larger, approximately five-acre tract described as Lot 14 in Section 3, Township 8 North, Range 2, E.B.H.M. *SR at 230, 253, 247, 405 (F/of/F No. 7)*. In 1946, the entirety of Lot 14 was owned by a single owner, H.W. Kirby. *Id. at 230*. In 1948, H.W. Kirby transferred the east half of Lot 14 to Emily B. Goode by *Warranty Deed* ("*Warranty Deed*"). *Id. at 231 (Warranty Deed)*. The pertinent conveyance language provided as follows:

The East Half (E½) of Lot Fourteen (14) Section Three (3) Township Eight (8) North, of Range Two (2), E.B.H.M., as the same is platted and recorded in Plat Book 4, page 13, Register of Deeds office, Butte County, South Dakota., **together with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen,** beginning at a point 164.04 feet South of the Northwest corner or [sic] said Lot 14, on Highway 85, and continuing due east across the West half of Lot 14 to the east line of the West Half of said Lot 14, and **together** [sic] **with a perpetual easement four (4) feet wide for a water pipe line** [sic], beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line on the West Half of Lot 14.

Id. (bold emphasis added). The 16' wide easement—described as a “perpetual easement, for road right-of-way easement” and the perpetual 4' wide easement for a water pipeline were restated in several subsequent deeds.¹ *SR at 229, 476 (F/of/F No. 10).*

In 2004, the Parcels began negotiating with Guy Ferris for the purchase from him of a portion of the west half of Lot 14. *HT at 47.* As part of those negotiations, it was agreed that Mr. Ferris would plat the west half of Lot 14. *Id.* Later that year, the west half of Lot 14 (except a 90' x 174' tract in the northwest corner) was platted, resulting in two lots—Lots 14A and 14B (“2004 Plat”). *SR at 48.* The following illustration is taken from the 2004 Plat:



Id.

In November of 2004, approximately one month after the west half of Lot 14 was

¹ Hereinafter, the 16' wide easement and accompanying 4' wide easement for a water pipeline are collectively referred to as the “16' wide easement.”

platted, Wendy Parcel (known then as Wendy Preszler) purchased Lot 14B. *SR at 254; HT at 50*. She purchased Lot 14B “according to the [2004 Plat] and “subject to easements, reservations and restrictions of record.”² *Id.* Notably, Richard Parcel admitted that *before Lot 14B was purchased* they were aware that there was a 16’ wide easement across the property for the benefit of the east half of Lot 14. *HT at 50; SR at 406-07 (F/of/F No. 12)*. He likewise agreed that the 16’ wide easement is located along the southern portion of Lot 14B. *HT at 65*.

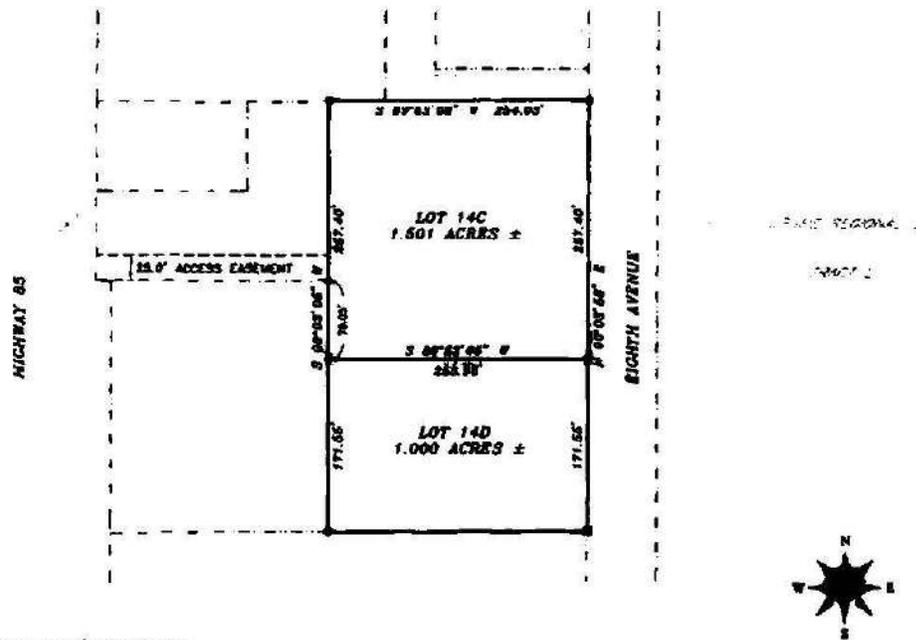
When the west half of Lot 14 was platted in 2004, the 16’ wide easement providing access for the east half of Lot 14 to Highway 85 had been in existence for more than fifty-five years (1948-2004). *SR at 231 (Warranty Deed)*. Consistent with this long-standing access, the *2004 Plat* included a 25’ wide access easement that traverses, west to east, the entirety of Lot 14B. *SR at 48*.

It is noteworthy that the *2004 Plat* reveals that the Highway Authority would not permit a separate access point (i.e., an approach or curb cut) to Lot 14A from Highway 85. This is clear from a handwritten condition on the *2004 Plat* that accompanied the Highway Authority’s approval: “Note: The only allowed access to Lot 14A will be relocation of existing access from Lot 14B.” *SR at 48*. Given the Highway Authority’s disallowance of a separate access point to Lot 14A from Highway 85, it follows that the *2004 Plat* would confirm the manner of access to Lot 14A. This was accomplished with

² After they married, Appellant Wendy Parcel transferred Lot 14B to herself and Richard Parcel in a *Quitclaim Deed*. *SR at 256*. It specified that the conveyance was “[s]ubject to exceptions and reservations contained in patents from the U.S. Government and prior conveyances of record” as well as “existing easements for roads and highways; irrigation ditches, canals and laterals; and easements for electrical power and transmission lines, if any.” *Id.*

the following annotation regarding the 25' access easement: "25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT." *Id.* Importantly, the 2004 Plat did not state that the access easement was "exclusive" to Lot 14A; did not refer to the easement as "private;" and did not state that the easement is "only for" or "limited to" Lot 14A. *Id.*

Four years later, in 2008, the east half of Lot 14 was platted. *SR at 55.* That platting resulted in the east half being divided into Lots 14C and 14D ("2008 Plat"). *Id.* It contains the following illustration:



Id.

The 2008 Plat included the "25.0' ACCESS EASEMENT" across the south end of Lot 14B (the Parcels' property) that had been previously dedicated in the 2004 Plat. *SR at 55.* The 2008 Plat additionally included the following affirmation by the City Engineer: "THE LOCATION OF THE PROPOSED ACCESS ROADS ABUTTING THE COUNTY OR STATE HIGHWAY AS SHOWN HEREON, IS HEREBY APPROVED." *Id. at 57.*

Merle Bierschenk acquired Lot 14C in 2015. *SR at 250*. He typically accessed Lot 14C from Highway 85 by using the easement across the Parcels' property (Lot 14B). *HT at 12*. Unfortunately, Richard Parcel had a practice of parking his pickup in the easement. *SR at 262, 264, 267-68, 281 (photographs); HT at 21-22, 41, 66; SR at 407 (F/of/F No. 17)*. And, at times, additional vehicles or equipment were parked in the easement, including another pickup and a car-hauling trailer. *SR at 263-64, 272 (photographs); HT at 53-55; SR at 407 (F/of/F No. 17)*.

Because Mr. Parcel's pickup was parked in the easement, Mr. Bierschenk was forced to drive around the pickup by proceeding to the right (or south) of the pickup. *HT at 12-13; SR at 407 (F/of/F No. 18)*. Due to the frequency that Mr. Bierschenk and others were forced to drive around Mr. Parcel's pickup, a trail that deviates to the south of the easement is visible. *SR at 262, 264, 267-68, 281 (photographs); HT at 13; SR at 407-08 (F/of/F No. 19)*. Although Mr. Parcel initially disagreed, he ultimately admitted that driving around his pickup results in users of the easement having to drive onto the north edge of the Bosch Trust's property (Lot 14A). *HT at 53-54, 58 (Q ". . . [R]ight now you have to go to the south and over a little bit on Mr. Bosch's property the way people are doing it now, agreed? A Agreed.")*; *SR at 408 (F/of/F No. 20)*.

At some point after Mr. Bierschenk began using the easement, Mr. Parcel stopped him and informed him that he did not want Mr. Bierschenk or his employees using the easement. *HT at 13; SR at 408 (F/of/F No. 21)*. On another occasion, he again stopped Mr. Bierschenk and told him that he was not supposed to be using the easement. *HT at 13-14; SR at 408 (F/of/F No. 22)*. Wendy Parcel joined in that encounter and the parties had a heated debate. *Id. at 14; SR at 408 (F/of/F No. 22)*. Mr. Bierschenk called the

police; they instructed him to not use the easement until the matter was resolved in court. *Id.*

At some point, the Parcels installed a two-wire fence on the east end of the easement, at the property line separating their property (Lot 14B) from the Bierschenks' property (Lot 14C).³ *HT at 14-15; SR at 408 (F/of/F No. 23)*. As a result, in July of 2021, the Bierschenks' attorney wrote to Mr. Parcel and explained why the Bierschenks believed they had the legal right to use the easement and requesting that the Parcels remove the wire fence. *SR at 269*. Mr. Parcel admitted that he removed the wire fence after receiving the letter. *HT at 16, 59; SR at 409 (F/of/F No. 25)*. Thereafter, Mr. Bierschenk returned to using the easement. *HT at 16; SR at 409 (F/of/F No. 25)*.

Richard Parcel also confronted third parties that used the easement. The Bierschenks hired Joe Couch to haul gravel to Lot 14C. *HT at 18*. After Mr. Couch began using the easement, he was confronted by Mr. Parcel *Id. at 19*. Thereafter, Mr. Couch would not drive through the easement because he did not want to get involved in the dispute. *Id.; SR at 409 (F/of/F No. 27)*.⁴

³ The Parcels state that the “two-wire gate had always existed at the east edge of the easement along the boundary line between Lot 14B and Lot 14C;” that “[t]he gate could be opened by anyone at any time;” and that Merle Bierschenk “tore out the gate and a fence running along the boundary between Lot 14B and Lot 14C without obtaining permission from the Parcels.” *Appellants' Brief at 9*. Apart from being contrary to Mr. Bierschenk's testimony, the circuit court did not make such findings. Instead the circuit court found that “[Mr.] Parcels installed a two-wire fence” and that “[Mr. Parcel] admitted that he removed the wire fence.” *SR at 408-09 (F/of/F Nos. 23, 25)*. It is noteworthy that the circuit court certain of Mr. Parcel's testimony not credible.” *SR at 480*.

⁴ The Parcels state that the Bierschenks “built eighteen 12' by 50' storage units on Lot 14C.” *Appellants' Brief at 5*. See also *Appellants' Brief at 22* (the Bierschenks “have built several storage units”). Although presumably inadvertent, that is misleading.

The Bierschenks subsequently commenced the instant action. In their *Answer* to the *Complaint*—and in contradiction to the foregoing conduct—the Parcels asserted that they “have never contended Plaintiffs did not have the right to use of the Access Easement.” *SR at 21*. However, and disappointingly, even after the circuit court determined that the 25’ wide easement existed by the virtue of the *2004 Plat*, Richard Parcel did not change his conduct. He admitted that he continued to park in the same location during the nearly nine months that passed between the circuit court’s memorandum decision confirming the 25’ wide easement and the evidentiary hearing on the 16’ wide easement. *HT at 60-61; SR at 97, 409-10 (F/of/F No. 30)*.

STANDARD OF REVIEW

This appeal implicates three standards of review: (1) the standard when reviewing a circuit court’s findings of fact and conclusions of law after an evidentiary hearing; (2) the standard when reviewing a circuit court’s grant of summary judgment; and (3) the standard when reviewing a circuit court’s grant or denial of injunctive relief.

“[W]hen a circuit court issues findings of fact and conclusions of law, [this Court] review[s] the ‘findings of fact under the clearly erroneous standard’ and the ‘conclusions of law de novo.’” *Torgerson v. Torgerson*, 2024 S.D. 50, ¶ 13, 11 N.W.3d 50, 56 (quoting *Leedom v. Leedom*, 2020 S.D. 40, ¶ 11, 947 N.W.2d 143, 147). ““Once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo.”” *Id.* (quoting *State v. Myhre*, 2001 S.D. 109, ¶ 9, 633

There are not eighteen separate storage units on Lot 14C. Instead, there are two large 3-sided structures, each containing eighteen stalls measuring 12’ x 50’ in which recreational vehicles, equipment, etc. can be parked. *HT at 11, 17, 31*.

N.W.2d 186, 188). When considering whether a finding is clearly erroneous:

The question is not whether this Court would have made the same findings that the trial court did, but whether on the entire evidence we are left with a definite and firm conviction that a mistake has been committed. This Court is not free to disturb the lower court's findings unless it is satisfied that they are contrary to a clear preponderance of the evidence. Doubts about whether the evidence supports the court's findings of fact are to be resolved in favor of the successful party's version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's action.

Matter of Estate of Simon, 2024 S.D. 47, ¶ 20, 11 N.W.3d 36, 41 (quoting In re Estate of Olson, 2008 S.D. 97, ¶ 9, 757 N.W.2d 219, 222).

This Court reviews a circuit court's grant of summary judgment under the de novo standard of review. *Koenig v. London, 2021 S.D. 69, ¶ 20, 968 N.W.2d 646, 652–53 (quoting Zochert v. Protective Life Ins. Co., 2018 S.D. 84, ¶ 18, 921 N.W.2d 479, 486)*. This Court's task is to “determine whether genuine issues of material fact exist and whether the law was applied correctly.” *Id.* (quoting *Blanchard v. Mid-Century Ins. Co., 2019 S.D. 54, ¶ 16, 933 N.W.2d 631, 636*). “The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party.” *Id.* However, this Court will affirm a circuit court's grant of summary judgment “so long as there is a legal basis to support its decision.” *Id.*

As for injunctive relief, this Court “review[s] a circuit court's decision to grant or deny injunctive relief for an abuse of discretion.” *Spring Canyon Properties, LLC v. Cal SD, LLC, 2024 S.D. 68, ¶ 21, 14 N.W.3d 325, 331 (quoting New Leaf, LLC v. FD Dev. of Black Hawk LLC, 2010 S.D. 100, ¶ 12, 793 N.W.2d 32, 35)*. “Abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.” *Weber v. Weber, 2023 S.D. 64, ¶ 15, 999 N.W.2d 230, 234 (Taylor v.*

Taylor, 2019 S.D. 27, ¶ 14, 928 N.W.2d 458, 465). It is ““a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.”” *Id.*

ARGUMENT

Before discussing the three issues presented by the Parcels’ appeal, a review of the law regarding the creation of easements is appropriate.

“An easement is a property interest in land owned by or in the possession of another, which entitles the easement owner to a limited use or enjoyment of the land in which the interest exists.” *Ehlebracht v. Crowned Ridge Wind II, LLC*, 2022 S.D. 19, ¶ 33, 972 N.W.2d 477, 488 (quoting *Picardi v. Zimmiond*, 2004 S.D. 125, ¶ 16, 689 N.W.2d 886, 890). Generally, easements are created in three different ways: (1) by written grants; (2) pursuant to a plat; or (3) by force of law. *Id.* (quoting *Kokesh v. Running*, 2002 S.D. 126, ¶ 12, 652 N.W.2d 790, 793). Examples of easements created “by force of law” would include implied easements and prescriptive easements. See *Springer v. Cahoy*, 2012 S.D. 32, ¶ 7, 814 N.W.2d 131, 133 (discussing implied easements); *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. 12, ¶ 7, 657 N.W.2d 300, 304 (discussing prescriptive easements).

“The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.” *SDCL 43-13-5*. With regard to an easement granted in a written instrument, the terms and extent of the easement “are ascertained either by the ‘words clearly expressed, or by just and sound construction’ of the easement document.” *DeHaven v. Hall*, 2008 S.D. 57, ¶ 15, 753 N.W.2d 429, 435 (quoting *Picardi v. Zimmiond*, (*Picardi II*), 2005 S.D. 24, ¶ 20, 693 N.W.2d 656, 662)). This Court

“look[s] first to the language of the grant itself to discover the extent and nature of the easement agreement and its terms.” *Id.* This Court then gives “terms their plain and ordinary meaning” and “utilize[s] no additional interpretation in the absence of ambiguity.” *Id.* “If the terms of the agreement are specific in nature, the terms are ‘decisive of the limits of the easement.’” *Id.* This Court “will not resolve disputes over unambiguous language by resorting to what the parties might have included in a contract.” *Id.* Once an easement is created, it “runs with the land.” *SDCL 43-25-30. See also Wildwood Ass’n v. Harley Taylor, Inc., 2003 S.D. 98, ¶ 20, 668 N.W.2d 296, 303 (“An easement appurtenant runs with the land and serves the dominant estate.”).*

Importantly, a party seeking to prove that an easement is conditioned upon some other event or circumstances has a high bar. “[C]lear language is necessary to create either a condition subsequent or precedent.” *DeHaven, 2008 S.D. at ¶ 15 (quoting City of Huron v. Wilcox, 98 N.W. 88, 89 (1904)).* “Forfeitures and conditions subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention . . . to that effect.” *Id. (emphasis added).*

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DECLINED TO LIMIT THE 16’ WIDE EASEMENT BY GRANT TO USE ONLY FOR A ONE FAMILY PRIVATE DWELLING.

As discussed earlier, the transfer of the east half of Lot 14 in 1948 included an easement to allow access to the property from Highway 85. *SR at 231 (Warranty Deed).* The pertinent language provided that the real property was transferred “together with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen” and “together [sic] with a perpetual easement four (4) feet wide for a water

pipe line [sic].” *SR at 231 (Warranty Deed)*.

The circuit court held that the foregoing language “created two easements by written grant: (1) a 16’ wide easement for road right-of-way; and (2) a 4’ wide easement for a water pipeline. *SR at 412 (C/of/L No. 8)*. With regard to the extent of the 16’ wide easement, the circuit court determined that the plain and ordinary meaning of the language of the grant itself “makes clear that the Easement was intended to be perpetual in nature and to provide road right-of-way for vehicular travel.” *Id. at 413 (C/of/L No. 11)*. The circuit court additionally noted that “[t]he pertinent language contains no restriction limiting the manner or type of travel for which the Easement may be used.” *Id. (C/of/L No. 12)*.

In their brief, the Parcels confirm that they “do not contest that a 16 foot access easement was created by the 1948 deed.” *Appellants’ Brief at 21*. Instead, they challenge the scope of the easement. *Id.* Specifically, they contend that other language in the *Warranty Deed*—which restricted *use of the property*—also acted to create a limitation regarding *use of the easement*. The language relied upon by the Parcels states as follows:

This conveyance is made upon the following express stipulations, which are fully understood by the grantee:

Only one family private dwellings [sic] with or without attached garage, having a value of not less than \$1500.00 may be placed upon the above described land, this not to apply to necessary outbuildings such as sheds, barns and chicken coops. It is understood and agreed that this restriction is for the benefit of the grantee and also for the benefit of all the property and premises located on said Lot 14.

The line fence to be constructed between the west half and the east half of Lot 14 is to be paid for equally between the parties hereto.

SR at 231 (Warranty Deed). The Parcels’ interpretation should be rejected. The circuit

court was correct when it concluded that the restriction of one family private dwelling “concerned the use of the East Half of Lot 14 consistent with SDCL Chapter 11-5, not the Easement.” *SR at 413.*⁵

Because “[t]he extent of a servitude is determined by the terms of the grant,” it is appropriate to begin with the language in the *Warranty Deed*. *SDCL 43-13-5*. This brings to light a number of items that demonstrate that the 16’ wide easement is not limited only to accessing a one family private dwelling.

First, the language conveying the 16’ wide perpetual easement for road right-of-way contains no language restricting the easement to use for accessing a one family private dwelling. *SR at 231 (Warranty Deed)*. In fact, the language does not contain any language limiting or restricting its scope. *Id.* By way of example, the result would be different if the *Warranty Deed* had instead provided: “together with an perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen . . . for the limited purpose of ingress and egress to a one family private dwelling.” See e.g., *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 2, 693 N.W.2d 656, 659 (*emphasis added*) (*discussing easement which stated: “This easement shall be used for access to one single family residence located upon the Picardi property.”*).

Second, the easement specifically provides that it is “perpetual.” Black’s Law Dictionary defines “perpetual” as follows: “Never ceasing; continuous; enduring; lasting;

⁵ The Parcels seem to suggest that the circuit court specified that the 16’ wide easement was for “commercial purposes.” *Appellants’ Brief at 20 (“The Trial Court erred in quieting title to a 16 foot access easement as Bierschenks’ use of the easement for commercial purposes exceeded the scope of the easement.”)*, 23 (“for commercial purposes”). The circuit court did not make that specification. *SR at 403, 423, 425.*

unlimited in respect of time; continuing without intermission or interval.” *Black’s Law Dictionary* 1140 (6th Ed. 1990). The use of the term “perpetual” is at odds with the Parcels’ claim that the easement is “clearly limited to access for one residential unit on the east half of Lot 14.” *Appellants’ Brief* at 22. Under the Parcel’s interpretation, the 16’ easement would seemingly spring into and out of existence depending on whether one family private dwelling exists on the east half of Lot 14. This reading particularly strains logic when considering the corresponding “perpetual easement” for a water pipeline. By their nature, water pipelines are not something that can be swiftly installed and dug up depending upon whether one family private dwelling is located on the east half of Lot 14. As this Court has observed, courts “do not interpret language to reach an absurd result.” *In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Ctr.*, 2013 S.D. 10, ¶ 35, 826 N.W.2d 649, 660 (“*In re PSD*”).

Third, the “stipulation[]” which calls for “one family private dwelling[]”—which the *Warranty Deed* aptly describes as a “restriction”—only addresses the number and types of structures which may be placed on the east half. *SR* at 231 (*Warranty Deed*). The restriction portion of the *Warranty Deed* makes no reference whatsoever to the 16’ wide easement—much less any restriction on the use of the easement. *Id.*

Fourth, the restriction that only “one family private dwelling[]” may be placed on the east half is, in actuality, in the nature of a covenant which, as the *Warranty Deed* states, would be “for the benefit of the grantee and also for the benefit of all the property and premises located on said Lot 14.” *See e.g., Hammerquist v. Warburton*, 458 N.W.2d 773, 773–74 (S.D. 1990) (“referring to a provision that tract “shall not be further

subdivided and shall be restricted to one (1) family dwelling only . . . ,” as a restrictive covenant). While the 16’ wide easement and 4’ wide easement for a water pipeline each specifically state that they are “perpetual,” the restriction regarding the use of the east half does not. SR at 231 (Warranty Deed). Nor does it state that it “runs with the land.” Id. And, regardless, the one family private dwelling “restriction” ceased after twenty-five years. SDCL 11-5-4.⁶

The Parcels are asking this Court to conclude that a restrictive covenant regarding *use of the property* impliedly created a limitation regarding *use of the easement*. Like the circuit court, this Court should decline the invitation. Forfeitures and conditions subsequent are not favored in the law. *DeHaven, 2008 S.D. at ¶ 15 (quoting City of Huron, 98 N.W. at 89)*. Here, the language of the *Warranty Deed* does not “unequivocally indicate[] an intention” to have the existence or use of the 16’ wide easement conditioned upon the presence of one family private dwelling on the east half of Lot 14. *Id.* The ““clear language is necessary to create either a condition subsequent or precedent”” is simply not present. *Id.* This Court should adhere to its “well-established rule that in ascertaining the parties’ intent, [it] will not rewrite [a contract or covenant] or add to its language.” *Wilson v. Maynard, 2021 S.D. 37, ¶ 28, 961 N.W.2d 596, 604 (quoting Edgar v. Mills, 2017 S.D. 7, ¶ 29, 892 N.W.2d 223, 231)*.

⁶ Prior to 2021, such restrictions were only valid for twenty-five years; thus, it would have fallen away in 1973. In 2021, the statute was amended to increase the period to forty years. *Id.* Incidentally, the one family dwelling restriction was not included when the east half of Lot 14 was transferred in 1968. *SR at 240.*

II. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT CONFIRMING THAT THE 2004 PLAT DEDICATED A 25' WIDE EASEMENT FOR USE BY THE PUBLIC.

A. The creation of an easement by plat.

The controlling statute for easements created by plat is SDCL 11-3-12. “Under the provisions of a statute like SDCL 11–3–12, the filing and recording of a plat has been held to manifest an indisputable intention on the part of the owner to *dedicate to public use* that which is designated as public on the plat.” *Bergin v. Bistodeau*, 2002 S.D. 53, ¶ 15, 645 N.W.2d 252, 255 (quoting *Tinaglia v. Ittzes*, 257 N.W.2d 724, 729 (S.D. 1977) (*emphasis in original*)). Importantly, however, “the word ‘public’ need not precede ‘dedication’ in order to evince an intent to dedicate property for public use.” *Id.* at ¶ 18. That is because in property cases, “dedication” has been “accepted . . . a legal term of art”:

Dedication is generally defined as the *devotion of property to a public use* by an unequivocal act of the owner that manifests an intention that the property dedicated shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication.

Id. at ¶ 16 (quoting *Tinaglia*, 257 N.W.2d at 728-29 (*emphasis in original*)). “By its very nature, ‘dedication’ is ‘[t]o appropriate and set apart one’s private property to some public use; as to make a private way public by acts evincing an intention to do so.’” *Nelson v. Garber*, 2021 S.D. 32, ¶ 28, 960 N.W.2d 340, 348. For that reason, there is no requirement that “public” precede “dedication” in a plat in order for the dedication to be deemed for public use. In the words of this Court, “such a requirement would be

redundant.” *Bergin*, 2002 S.D. 53, ¶ 18.⁷

As for the nature of the dedication, “a dedication is express where the appropriation is formally declared, and is implied where it arises by operation of law from the owner’s conduct and the facts and circumstances of the case. *Bergin*, 2002 S.D. 53, ¶ 17 (quoting *Tinaglia*, 257 N.W.2d at 729). ““A statutory dedication is in the nature of a grant based on substantial compliance with the terms of the applicable statute, while a common-law dedication is generally held to rest upon the doctrine of estoppel in pais.”” *Id.* (quoting *Tinaglia*, 257 N.W.2d at 729; *Cole v. Minn. Loan & Trust Co.*, 117 N.W. 354 (1908)).

B. The 2004 Plat established a 25’ wide easement for use by the public.

South Dakota law is clear that “[u]nder the provisions of a statute like SDCL 11–3–12, the filing and recording of a plat has been held to manifest an indisputable intention on the part of the owner to *dedicate to public use* that which is designated as public on the plat.” *Bergin*, 2002 S.D. 53, ¶ 15 (*emphasis in original*). Here, the 2004 Plat was “made out, certified, acknowledged, and recorded” as required by SDCL 11-3-12. *SR at* 48. Likewise, there is no question that the “25’ ACCESS EASEMENT” was “marked [and] noted as such” on the plat and, as such, constituted land intended to be used for a

⁷ This Court has noted that “[w]ords contained in a plat such as ‘dedicated as a 66 foot public right-of-way,’ ‘public highway’ or ‘public road’ are obvious terminology that the road has been offered by the land owner to be dedicated as a public highway per SDCL 31-1-1. *Selway Homeowners Ass’n v. Cummings*, 2003 S.D. 11, ¶ 21, 657 N.W.2d 307, 313–14 (citing *Tinaglia*, 257 N.W.2d at 730). It has likewise stated that it is “equally clear that words in a plat such as ‘private road’ or ‘private driveway’ establish that the owner of the realty retains full incidents of his or her ownership even though it may to some extent, be used for vehicular traffic as that owner deems fit. *Id.* (citing *Knight v. Madison*, 2001 S.D. 120, ¶ 7, 634 N.W.2d 540, 543).

way, common, or other public use. *Id.* See also *SDCL 11-3-12*. Clearly, the 25' wide access easement was dedicated for use by the public.

The fact that the *2004 Plat* does not use the word “public” in the description of the 25' wide access easement is of no consequence. As just explained, “[b]y its very nature, ‘dedication’ is ‘[t]o appropriate and set apart one’s private property to some public use; as to make a private way public by acts evincing an intention to do so.’” *Nelson, 2021 S.D. 32*, ¶ 28. Further, nowhere in the *2004 Plat* does it suggest that use of the easement is limited to Lot 14A. *SR at 48*. It does not refer to the access easement as “exclusive” or “private;” and it does not state that the easement is “only for” or “limited to” Lot 14A. *Id.* Finally, it is illogical to conclude that the City would specify a 25' wide access easement where a 16' wide “road right of way” easement existed for decades—but then not permit the owner of the east half of Lot 14 to use the easement. Again, courts “do not interpret language to reach an absurd result.” *In re PSD, 2013 at ¶ 35*.⁸

The circuit court reached the same conclusion. The circuit court noted that this

⁸ In their brief, the Parcels do not argue that the City did not accept the dedicated easement. In passing, however, they reference the need for such acceptance. *Appellants' Brief at 14*. Here, there was acceptance and approval of the *2004 Plat* by the City's legislative body, the Common Council. The *2004 Plat* specifically provided as follows:

Be it resolved that the City of Belle Fourche Common Council having viewed this plat and having received a recommendation from the Belle Fourche Planning Commission, does hereby approve this plat. Resolution adopted by unanimous vote of the Belle Fourche Common Council this 21 day of June, 2004.

SR at 49. Compare *O'Brien v. City of Chicago, 105 N.E.2d 917, 919 (Ill. App. Ct. 1952)* (holding that an order passed by the city council “approv[ing] a plat of resubdivision for a church site” constituted “an acceptance.”). That the City accepted the easement is reinforced by the *2008 Plat*, in which the City Engineer confirmed the following: “THE LOCATION OF THE PROPOSED ACCESS ROADS ABUTTING THE COUNTY OR STATE HIGHWAY AS SHOWN HEREON, IS HEREBY APPROVED.” *SR at 56*.

Court has held “that the legal connotation of the word dedicated is generally to mean ‘devotion of property to a public use,’ and that ‘dedicate’ is defined as ‘to appropriate and set apart one’s private property to some public use, as to make a private way public by acts evincing an intention to do so.’” *Id. at 102 (citing Bergin, 2002 S.D. at ¶ 16)*. The circuit court additionally noted that in Bergin v. Bistodeau this Court “found that the word ‘dedicated’ is a term of art which indicates *an intent to dedicate some piece of land to public use,*” and “that it would be ‘redundant’ to insert ‘public use’ as a modifier to ‘dedicated’ in order to satisfy SDCL § 11-3-12 in dedicating land to public use.” *Id. at 103*. With this background, the circuit court concluded that the *2004 Plat* “indicate[d] an unambiguous intent by Guy Ferris to offer a 25’ easement along the southern portion of Lot 14B as an access easement for public use.” *SR at 103*.

The circuit court also addressed the language in the *Plat 2004* which specifically referenced access to Lot 14A. It recognized that when Mr. Ferris created the 25’ wide access easement, he owned both the servient and dominant estate. *SR at 102*. Relying upon SDCL 43-13-6, the circuit court noted that “the owner of the servient and dominant estate may be not [sic] the same person.” *SR at 101*. According to the circuit court, “[i]f one attempts to create an easement upon their own land ‘the purported interest is a nullity’ because an easement is ‘a nonpossessory interest in the land of another.’” *Id. (citing The Law of Easements & Licenses in Land § 3:11) (emphasis in original)*.

Given that Mr. Ferris owned both the servient and dominant estates, the circuit court held that Mr. Ferris’s attempt to create a 25’ wide easement for the benefit of Lot 14A was a “nullity” and “void as a matter of law.” *Id. at 101-02*. This was “because the nonpossessory interest in land was created where there was unity of ownership

extinguishing such interest at the time of purported creation.” *Id.* In light of the nullity of the attempted grant of an easement to Lot 14A, the circuit court commented that the annotation in the *2004 Plat* could be read as follows: “ACCESS EASEMENT . . . DEDICATED THIS PLAT.” *Id. at 102.* The result according to the circuit court was that: (1) the Bosch Trust “does not possess a 25’ easement for the benefit of his dominate [sic] estate” and (2) the land sold to Appellant Wendy Parcel, Lot 14B, was “not subject to a 25’ easement along the southern portion of Lot 14B.” *Id.*

C. The Parcels’ arguments.

In an effort to overturn the circuit court’s ruling, the Parcels advance three arguments. They will be addressed seriatim.

1. Whether the Bierschenks’ claim of a 25’ easement by plat was properly before the circuit court.

The Parcels argue that the Bierschenks “are seeking declaratory judgment” that a 25’ wide easement exists and that such relief was not pled in the *Complaint*. *Appellants’ Brief 11-12.* They assert that this was “a wholly unique cause of action and request for relief that had not been pled and placed in dispute.” *Id. at 12.* The Bierschenks disagree.

SDCL 15-6-8(a) provides that a pleading which sets forth a claim for relief “shall contain: (1) A short and plain statement of the claim showing that the pleader is entitled to relief; and (2) A demand for judgment for the relief to which he deems himself entitled.” The Bierschenks’ *Complaint* surpassed this requirement. This is especially true when one considers that ““South Dakota still adheres to the rules of notice pleading[.]”” *East Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, ¶ 13, n. 6, 852 N.W.2d 434, 439 (quoting Gruhlke v. Sioux Empire Fed. Credit Union, Inc.,*

2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409). ““Under notice pleading, a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.”” *Id.* (quoting *St. Pierre v. State ex rel. S.D. Real Estate Comm'n*, 2012 S.D. 25, ¶ 20, 813 N.W.2d 151, 157).

While the *Complaint* did not specifically cite SDCL 11-3-12, multiple paragraphs in the *Complaint* made it clear that the Bierschenks were alleging that an easement had been created by the *2004 Plat* and/or the *2008 Plat*. Consider the following:

- Paragraphs 11-13 described the platting of the west half of Lot 14, including the illustration from the *2004 Plat* and key language. *SR at 4-5.*
- Paragraphs 14-17 described the platting of the east half of Lot 14, including the illustration from the *2008 Plat* and pertinent language. *SR at 5.*
- In Count 1 it was specifically alleged in paragraph 35 that “an express easement to use the Access Easement to access Lots 14C and 14D (formerly the East Half of Lot 14) from U.S. Highway 85 exists by virtue of the 2004 Plat of the West Half of Lot 14 and/or the 2008 Plat of the East Halt of Lot 14.” *SR at 7.*

The Parcels’ argument is further undermined by the fact that they specifically responded to these allegations in their *Answer*. *SR at 20.* Indeed, two of their affirmative defenses made specific reference to the *2004 Plat* and the *2008 Plat*. *Id. at 22.*

Finally, the fact that the Bierschenks’ claim of an easement by plat was not in a separate Count is of no import. In East Side Lutheran Church of Sioux Falls, this Court rejected the argument that because “the complaint did not outline each separate cause of

action” the plaintiff could not raise those separate actions on appeal. *Id.* at ¶ 13, n. 6.

Based upon their contention that the Bierschenks’ claim of a 25’ wide easement by plat was not properly pled, the Parcels’ separately contend that the Bierschenks’ motion for summary judgment was untimely under SDCL 15-6-56(a). This argument fails for two reasons. First, the Rule provides that a party may move for summary judgment “at any time after the expiration of thirty days from the commencement of the action”—not commencement of the claim. *SDCL 15-6-56(a) (emphasis added)*. The Bierschenks’ motion for summary judgment (08/27/23) was filed more than thirty days after this action was commenced (06/27/23). *SR at 11-12, 24*. Second, as just explained, the Bierschenks’ claim of an easement by plat was sufficiently pled.⁹

Given the preceding, the Bierschenks heartily disagree with the suggestion that the Parcels were denied “due process and fundamental fairness” by the summary judgment proceedings on the claim of a 25’ wide easement by plat.¹⁰

2. Whether the City was an indispensable party.¹¹

The Parcels next contend that the City was an indispensable party. This argument

⁹ Because the issue was raised by the pleadings, the Parcels’ corollary argument that the Bierschenks’ claim for a 25’ wide easement by plat was not tried by express or implied consent of the parties pursuant to SDCL 15-6-15(b) fails for the same reason.

¹⁰ One other matter bears mentioning. In response to the Bierschenks’ motion for summary judgment, the Parcels included what might be termed a “conditional” motion. They referenced SDCL 15-6-56(f) and stated that “[i]f the Court is not inclined to deny Plaintiffs’ Motion for Summary Judgment, it should continue the hearing on the same to allow Defendant Parcels to conduct additional necessary discovery.” *SR at 76*. The Parcels, however, did not comply with SDCL 15-6-56(f) by submitting an affidavit detailing the required information. *Stern Oil Co. v. Border States Paving, Inc., 2014 S.D. 28, ¶ 26, 848 N.W.2d 273, 281-82*. In addition, the Bierschenks received no request from the Parcels to conduct such discovery. *SR at 94*.

¹¹ The Parcels did not allege that the City was an indispensable party in their *Answer*. *SR at 20-22*.

also fails.

Preliminarily, it should be noted that the Parcels do not discuss or apply the controlling statute, SDCL 15-6-19(a), in their brief.¹² That statute provides as follows:

A person who is subject to service of process shall be joined as a party in the action if:

- (1) In his absence complete relief cannot be accorded among those already parties; or
- (2) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

SDCL 15-6-19(a).

Under subpart (1), a party must be joined if “[i]n his absence complete relief cannot be accorded among those already parties.” *SDCL 15-6-19(a)(1)*. In this case, the relief sought by the Bierschenks was the ability to use the 25’ wide easement. No request was made to require the City to build a road, improve a road, or maintain a road—or do anything beyond the actions it already took. *SR at 10*. As such, complete relief can be accorded among the existing parties—the Bierschenks, the Parcels, and the Bosch Trust.

The City is likewise not an indispensable party under subpart (2). The City does not have a unique “interest” to protect in this action and the Parcels have not

¹² The Parcels similarly failed to discuss or apply SDCL 15-6-19(a) before the circuit court. *SR at 72-74*.

demonstrated otherwise. In the *2004 Plat*, the predecessor owners of the west half of Lot 14 dedicated the 25' wide access easement for use by the public at large; they did not convey a road or street to the City. *SR at 253*. Further, the Bierschenks' request for confirmation that predecessor owners dedicated the 25' access easement for use by the public does not impact the City's "interests" since no responsibility or obligation has or will befall the City. Any doubt in this regard is eliminated by SDCL 11-3-12, which provides that "[n]o governing body shall be required to open, improve, or maintain any such dedicated streets, alleys, ways, commons, or other public ground solely by virtue of having approved a plat or having partially accepted any such dedication, donation or grant." *SDCL 11-3-12*.

Instead of discussing the application of SDCL 15-6-19(a), Defendant Parcels direct this Court to Busselman v. Egge, 2015 S.D. 38, 864 N.W.2d 786, Thieman v. Bohman, 2002 S.D. 52, 645 N.W.2d 260, and Smith v. Albrecht, 361 N.W.2d 626 (S.D. 1985). The Parcels' reliance upon these cases is misplaced. In those cases, the issue was whether a road had been dedicated for public use, not whether an easement had been dedicated for use by the public.

In Busselman, the plat "contain[ed] language dedicating 'the streets, roads, and alleys, if any, as shown and marked on said plat,' and the plaintiffs contended "that the service road had been dedicated and accepted." *Id. at ¶ 4*. The circuit court ruled that the "service road was a dedicated right-of-way for public use" *Id. at ¶ 10*. This Court noted that "even though [Busselman is] not attempting to force [any governmental authority] to maintain [the service road], that is the effect of declaring it to be a dedicated . . . road." *Id.* For that reason, it held that the governmental entity—either the city or the

township—was an indispensable party. *Id. at* ¶ 13.

Similarly, in Thieman, the plat depicted “an alley/road, 40 feet in width, running along the north edge of Lots 1–7” that had been used by various people for many years. *Thieman, 2002 S.D. 52, ¶ 2*. The circuit court ruled ““that the alley or road is a dedicated alley or road, open to the public.”” *Id. at* ¶ 9. This Court held that the “[t]he trial court cannot make a determination regarding City’s responsibility for the alley/road without City being a party to the action,” and that while the “[the plaintiff] was not attempting to force City to maintain the alley/road, that is the effect of declaring it to be a dedicated public alley/road.” *Id. at* ¶ 16.

Finally, the plaintiff in Smith requested a declaration “that a road leading to the various plaintiffs’ properties had been dedicated and accepted for use as a public road.” *Smith, 361 N.W.2d at 626*. The trial court “declared that a public road existed.” *Id.* This Court reversed, noting, among other things, that the county would “be responsible for the judicially declared public highway when that road becomes part of the county highway system.” *Id. at 628*.

Unlike the plaintiffs in Busselman, Thieman, and Smith, the Bierschenks are not asking this Court to create or confirm the dedication of a public *road* or *street* in Belle Fourche. Rather, they only desire to confirm that the 25’ wide easement was created for use by the public.

3. Whether the circuit court erred when it ruled that the 25’ wide easement was a nullity to the extent that it purported to grant an easement for the benefit of Lot 14A.

As previously noted, the circuit court determined that the attempt of the prior owner of the west half of Lot 14, Guy Ferris, to grant an access easement for the benefit

of Lot 14A was a “nullity” and “void as a matter of law” because he owned both the servient and dominant estate. *SR at 101-02 (citing SDCL 43-13-6)*. Notwithstanding this flaw, the circuit court concluded that the “entire easement does not fail.” *Id. at 102*. This was because the easement “include[d] another aside from himself [Mr. Ferris]—namely the public—through the dedication.” *Id.* The Parcels contend that the circuit court’s “reasonings and findings are contradictory.” *Appellants’ Brief at 17*. Specifically, they submit that “[i]t is contradictory to claim that Mr. Ferris intended to create both a limited easement for his sole benefit and a public easement,” and that “[i]f [Mr. Ferris] intended to create both a limited easement for his sole benefit and a public easement, there would be no need for another easement for the specific benefit of Lot 14.”

Respectfully, the Parcels are incorrect in both respects. First, the circuit court did not hold that Mr. Ferris intended to create a “limited easement for his sole benefit.” *SR at 101 (emphasis added)*. Again, nowhere does the 2004 Plat state that it is “exclusive” to Lot 14A, “private,” or “only for” or “limited to” Lot 14A.” *SR at 48*. Second, contrary to the Parcels’ suggestion, there is a logical reason why the Mr. Ferris would specify the access to Lot 14A despite creating an easement for public use. The Highway Authority wanted it clear that the 25’ wide easement was the only means of access to Lot 14A from Highway 85. This Court will recall that the following handwritten note next to the Highway Authority’s approval: “Note: The only allowed access to Lot 14A will be relocation of existing access from Lot 14B.” *SR at 48*.

Interestingly, the Parcels now appear to argue that the entire 25’ easement is a nullity. *Appellants’ Brief at 20 (“As a matter of law, the 25 foot easement is a nullity and does not exist.”)*. It is believed that this is a new argument. In any case, such an

argument should be summarily rejected as it is inconsistent with the Parcels' position before the circuit court. In response to the Bierschenks' motion for summary judgment, they contended that the 25' wide easement in the *2004 Plat* "was a private easement for the benefit of Lot 14." *SR at 76*. Further, in response to the Bierschenks' Rule 56(c) statement of material facts, the Parcels stated: "Defendants admit that a 25 foot access easement is marked and noted on the 2004 Plat, but that easement, by its express terms, is for the benefit of Lot 14A." *SR at 64*.¹³

III. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED A PERMANENT INJUNCTION ENJOINING OBSTRUCTION OR INTERFERENCE WITH THE EASEMENTS.

A. Injunctive relief was appropriate because there are enforceable easements.

The Parcels contend that the circuit erred by entering a permanent injunction because, according to them, "[t]here are no enforceable easements." *Appellants' Brief at 23*. This approach is curious given Richard Parcel's testimony that the Bierschenks "have the right to use the 16' Easement," and the Parcels' assertion in their *Answer* that

¹³ Any argument that the entire easement was nullified because Mr. Ferris owned both the servient and dominant estate is moot for another reason. When Mr. Ferris conveyed Lot 14B to Appellant Wendy Parcel, the *Warranty Deed* provided that the purchased was "according to the plat filed in the office of the Butte County Register of Deeds as Document No. 2004-2400 [the *2004 Plat*]" and "subject to easements, reservations and restrictions of record." *SR at 254*. This Court dismissed such an argument in Hofmeister v. Sparks, 2003 S.D. 35, 660 N.W.2d 637. In that case, the defendant (Sparks) argued "that the access easement was extinguished because at one point in time, he simultaneously owned both the servient tenement (HES 417) and the land that benefited from the easement (Hailstorms)." *Id. at ¶ 18*. This Court held: "[W]e need not address this issue because even if this access easement was extinguished, it was subsequently revived. Here, the record reflects that if the easement was extinguished when Sparks owned both Hailstorm and HES 417 at the same time, during that same period of ownership, Sparks also deeded an identical access easement for the benefit of Hailstorm to Hofmeister's predecessors in interest." *Id. at ¶ 19*. That is what happened here.

they “have never contended Plaintiffs did not have the right to use of the Access Easement.” *HT at 46; SR at 21, 406 (F/of/F No. 11)*. Setting that aside, the Parcels’ argument may be quickly dispensed with. As demonstrated above—and as the circuit court held—a 16’ wide easement for road right-of-way exists by virtue of the grant in the *Warranty Deed*. Likewise, as detailed above—and also as the circuit held—a 25’ wide easement dedicated for use by the public exists by virtue of the *2004 Plat*. Thus, if this Court upholds either or both of the easements, injunctive relief is appropriate.

B. The circuit court’s findings of fact regarding the Parcels’ obstruction of the Bierschenks’ use of the easements were not clearly erroneous.

The circuit court held that the Parcels “are substantially interfering with [the Bierschenks’] (the dominant owners’) reasonable use of both the Easement and the previously confirmed 25’ easement by plat.” *SR at 419*. The Parcels maintain that three of the circuit courts’ findings of fact pertaining to such interference are clearly erroneous. The Bierschenks disagree.

Finding of fact No. 17: Defendant Richard Parcel has a practice of parking his pickup in the Easement (as depicted in Exhibits 4, 6, 9, and 10) and has parked in the same manner for years. *Exhibit 4; Transcript at 21-22, 41, 66; Defendant’s Exhibit C*. At times other vehicles or equipment have been parked directly in front of his pickup, including a pickup and a car-hauling trailer. *Transcript at 53, 54-55; Exhibits 5, 6, 12*.

This circuit court’s finding of fact that Richard Parcel has a practice of parking in the easement is not clearly erroneous. Mr. Bierschenk testified that the pin for the property line that separates the Parcels’ property (Lot 14B) from the Bosch Trust’s property (Lot 14A) is located immediately to the south side of the power pole shown in the foreground of Exhibit 4 (*SR at 262*). *HT at 12, 38, 43*. Richard Parcel agreed that this is where the pin is located. *HT at 51-52, 54*. Mr. Bierschenk further testified that

Exhibit 6 (*SR at 264*) depicts him measuring 16' from that property line and that Exhibit 7 (*SR at 265*) depicts him measuring 25' from the property line. *HT at 21-23, 32-33*. He knew where the property line was because he had had a surveyor "put a pin there and one over here on this other side in the middle of the easement halfway down." *HT at 33*. See also *HT at 33* ("I spent the money and hired the surveyor so I knew what I was doing . . ."). These two photographs clearly support the circuit court's finding that the Parcels are parking in the easements. In the end, all doubt as to whether the Parcels are obstructing the easement is eliminated when one reviews Exhibit 12 (*SR at 272*).¹⁴

Finding of fact No. 19: Due to the frequency that Plaintiff Merle Bierschenk and other users of the Easement were forced to drive around Defendant Richard Parcel's pickup, a trail that deviates to the south of the Easement is now visible. Transcript at 13; Exhibits 4, 6, 9, 10.

In support of their claim that this finding of fact is clearly erroneous, the Parcels point to Richard Parcel's testimony "that the trail existed prior to the Parcels purchasing the property and 'always' looked like the path depicted in the photographs introduced as the hearing." *Appellants' Brief at 25*. The Parcels are mistaken in their review of the testimony. When Mr. Parcel testified how the trail had "always looked," he was not referring to the path deviating around the Parcels' vehicles. Rather, he was saying that that the easement had always appeared as a gravel path. His testimony was as follows:

¹⁴ The Parcels contend that Mr. Bierschenk admitted that he did not know where the southern boundary of the 16' easement began. *Appellants' Brief at 24*. A review of the transcript will confirm that the exchange concerned the fact that the addition of measurements on the *2004 Plat* suggests that that southern property line of Lot 14B is located 178.75' from the northwest corner of Lot 14, while the *Warranty Deed* suggests that it is 180.04' feet from the northwest corner (i.e., 160.04' + the 16' easement = 180.04'). *HT at 36-37*. As is readily apparent, this is a difference of approximately 1.29' (i.e., approximately 15-16 inches. Either way, this does not change the fact that the Parcels are obstructing both easements.

- Q And I know you said it had been there even before you bought it. Has it generally looked like this? I mean, was it dirt, gravel? What did it look like?
- A Always looked like this. Gravel.
- Q So when you say “always looked like this,” it has always looked like what we see in Exhibit 4 in terms of the makeup of the ground you’re driving on?
- A Yep.

HT at 62.

Similarly, the Parcels’ claim that “the evidence does not support the claim that the trail ‘deviates to the south of the easement’” is belied by the testimony—including Richard Parcel’s own testimony—and photographs. As noted earlier, Mr. Parcel admitted that users of the easement have to drive across the property line and onto the Bosch Trust’s property to get around his pickup. *HT at 58 (Q “. . . [R]ight now you have to go to the south and over a little bit on Mr. Bosch’s property the way people are doing it now, agreed? A Agreed.”).*

Further, as just noted, the parties agree that the pin for the property line that separates the Parcels’ property (Lot 14B) from the Bosch Trust’s property (Lot 14A) is located immediately to the south side of the power pole shown in the foreground of Exhibit 4 (*SR at 262*). *HT at 12, 38, 43, 51-52, 54*. A review of the photographs found in Exhibit 6 (*SR at 264*) and Exhibit 8 (*SR at 266*) supporting the finding that the path to go around Mr. Parcels’ pickup requires one to travel south of the easement and actually onto the Bosch Trust’s property.

Finding of fact No. 23: At some point, Defendant Parcels installed a two-wire fence on the east end of the Easement at the property line separating Defendant Parcels’ property (Lot 14B) and Plaintiff Bierschenks’ property (Lot 14C). *Transcript at 14-15.*

The Parcels contend that this finding of fact is clearly erroneous because Richard

Parcel testified “that the two-wire fence had always existed,” that “[i]t was not installed by the Parcels.” *Appellants’ Brief at 26*. First, the fact that the circuit court did not accept Mr. Parcel’s account does not mean that its finding was clearly erroneous. Second, the circuit court’s finding was supported by testimony. Merle Bierschenk testified that Mr. Parcel “put up a two-wire fence across [the easement] so I couldn’t go down through it then.” *HT at 14-15*. He later testified that “[the Parcels put some wires across back then, two years ago or three years ago, two and half years, whenever it was * * * [t]wo wires, like barbed wires, they put across it. Put a new post in, they did, and then put two wires across it.” *Id. at 39*. And, it must be recalled that the circuit court found that certain of Mr. Parcel’s testimony was not credible.” *SR at 480*.

The Parcels have not demonstrated that the circuit court’s findings of fact “are contrary to a clear preponderance of the evidence,” especially when doubts must “be resolved in favor of the [Bierschenks’] version of the evidence and of all inferences fairly deducible therefrom which are favorable to the [circuit] court’s action.” *Matter of Estate of Simon, 2024 S.D. at ¶ 20*. It also cannot be said that the circuit court’s grant of injunctive relief was “a choice outside the range of permissible choices” or was “arbitrary or unreasonable.” *Weber, 2023 S.D. at ¶ 15*.

CONCLUSION

Based upon the foregoing, the Bierschenks respectfully request that this Court affirm the circuit court’s *Judgment* in all respects.

REQUEST FOR ORAL ARGUMENT

Appellee Bierschenks, by and through their counsel, respectfully requests the opportunity to present oral argument before this Court.

Dated this 5th day of February, 2025.

Respectfully submitted,

THOMAS BRAUN BERNARD & BURKE, LLP
*Attorneys for Appellees Merle G. Bierschenk and
Anita J. Bierschenk*

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that the *Brief of Appellee Bierschenks* complies with the type volume limitation provided for in SDCL 15-26A-66. The *Brief of Appellee Bierschenks* was prepared using Times New Roman typeface in 12-point font and contains 9,936 words. I relied on the word count of our word processing system used to prepare *Brief of Appellee Bierschenks* and the original and all copies are in compliance with this rule.

/s/ John W. Burke
John W. Burke

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2025, I filed the foregoing *Brief of Appellee Bierschenks* relative to the above-entitled matter via Odyssey File and Serve, and that such system effected service of the same on the following individual:

Jordan D. Bordewyk
Anker Law Group, PC
1301 West Omaha Street – Suite 207
Rapid City, SD 57701

and separately served a true and correct copy of the same on the following individual via first class U.S. mail:

William W. Bosch
1825 Country Oak Lane
Spearfish, SD 57783

/s/ John W. Burke
John W. Burke

APPENDIX

1. Memorandum of Decision in Re: Plaintiff’s Motion for Summary Judgment
(11/20/23) App. 1
2. Order Granting Plaintiffs’ Motion for Summary Judgment (03/21/24) App. 10
3. Findings of Fact, Conclusions of Law, and Order (09/04/24) App. 14
4. Amended Order Re: Findings of Fact and Conclusions of Law (09/16/24) App. 34
5. Judgment (10/09/24) App. 36

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G BIERSCHENK and ANITA J. BIERSCHENK,

Plaintiffs,

v.

RICHARD D. PARCEL, WENDY PARCEL, and WILLIAM W. BOSCH,

Defendants.

09CIV23-000067

**MEMORANDUM OF DECISION
IN RE: PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

FILED

NOV 20 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

On September 25, 2023, a Motions Hearing was held before the Honorable Judge Michael W. Day on Plaintiff's Motion for Summary Judgment. Plaintiffs—Merle and Anita Bierschenk—appeared through their attorney John W. Burke. Defendants—Richard and Wendy Parcel—appeared personally and with their attorney Jordan D. Bordewyk. Defendant—William W. Bosch—appeared personally Pro Se and did not take part in any arguments.

Accordingly, this Court, having heard the arguments of Counsel and considering the briefs from both parties, with good cause showing, issues its Memorandum of Decision.

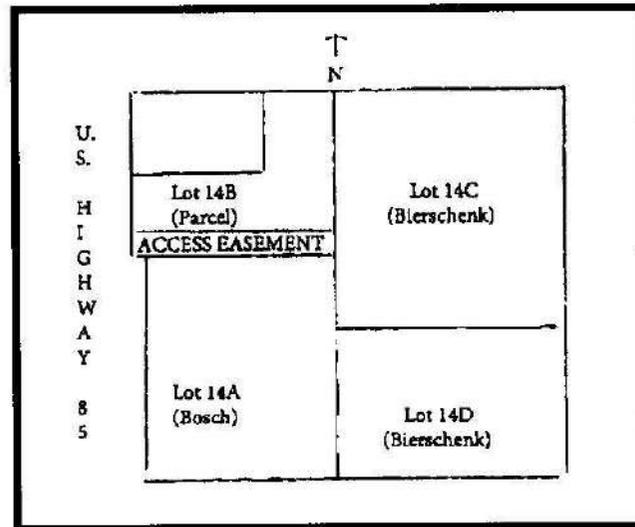
PROCEDURAL POSTURE

Plaintiff filed a motion for summary judgment on August 27, 2023, and subsequently submitted a brief in support of the motion for summary judgment. The Plaintiff filed a statement of undisputed material facts contemporaneously. The Defendant's response was filed on September 11, 2023, which is fourteen calendar days after the Plaintiffs filed their motion for summary judgment. Additionally, Defendant contemporaneously filed a response to Plaintiff's statement of undisputed material fact and an answer in resistance to motion for summary judgment. On September 18, 2023, Plaintiff filed a reply brief in support of plaintiffs' motion for summary

judgment. A notice of hearing was filed on August 27, 2023, for a hearing date of September 25, 2023.

FACTUAL BACKGROUND

This lawsuit was filed on June 26, 2023, by Mr. & Mrs. Bierschenk (“Bierschenks”) against Mr. & Mrs. Parcel (“Parcels”) and Mr. William Bosch (“Mr. Bosch”). The Bierschenks are requesting this Court quiet title to the easement referred to therein and injunctive relief against the Parcels so the Bierschenks may use the access easement. The controversy stems from a piece of land known as “Lot 14.” Lot 14 is currently split into four subdivided parcels of land owned by three different parties, namely the Bierschenks, the Parcels, and Mr. Bosch. The piece of land known as Lot 14—in its current state—and the controversial easement (“ACCESS EASEMENT”) is depicted below.



Lot 14 was owned by H.W. Kirby in 1946. Mr. Kirby owned the entirety of Lot 14. In 1948, Mr. Kirby conveyed the eastern half of Lot 14 (currently the Bierschenk’s half) to Emily Goode. The conveyance in 1948 to Ms. Goode is when an initial 16’ access easement was created with a 4’ utility easement. The easement was created by a warranty deed and states as follows:

[T]ogether with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot 14, beginning at point 164.04 feet South of the North west corner or said Lot 14, and together [sic] with a perpetual easement four (4) feet wide for a water pipe line, beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line of the West Half of Lot 14. This conveyance is made upon the following express stipulations, which are fully understood by the grantee: Only one family private dwelling, with or without attached garage, having a value of not less than \$1500.00 may be placed upon the above described [sic] land, this is not to apply to necessary outbuildings such as sheds, barns, and chicken coops. It is understood and agreed that this restriction is for the benefit of the grantae [sic] and also for the benefit of all the property and premises located on said Lot 14.

In 1958, H.W. Kirby passed away and the western half of Lot 14 (currently the Parcel's and Mr. Bosch's half) was devised to Harold Hartshorn (without a division into its current subdivision of Lot 14A and Lot 14B). In 2004, the western half was platted. The 2004 plat expressly noted an easement. The terms of the easement were a "25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT." The 2004 plat was accepted by the City of Belle Fourche on June 21, 2004, and signed by the record owner, Guy Ferris.

Furthermore, in 2008 the eastern half (the Bierschenk's half) of Lot 14 was platted and signed by the owner of record Kenneth and Linda Gabert. The 2008 platting recognizes by depiction (but does not expressly state) a 25' access easement. The City of Belle Fourche expressly accepted the plat on June 16, 2008.

STANDARD OF REVIEW

A grant of summary judgment is proper if the pleadings, depositions, answers and interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SDCL 15-6-56(c); *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶¶ 8-9, 817 N.W.2d 395, 398-99. Summary judgment is not the proper method to dispose of factual questions. *Id.* This

Court determines whether summary judgment is proper by reviewing whether the moving party has “clearly demonstrate[ed] an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. “A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that ‘a reasonable jury could return a verdict for the non-moving party’.” *SD State Cement Plant Comm’n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, ¶ 9, 616 N.W.2d 397, 400–01 (quoting *Weiss v. Van Norman*, 1997 S.D. 40, ¶ 11, n.2, 562 N.W.2d 113, 116 (internal citations omitted)) (emphasis added).

“All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party.” *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444. “Yet, the party challenging summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.” *Id.* Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial.” *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762. “Summary judgment [] should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy.” *Berbos v. Krage*, 2008 S.D. 68, 15, 754 N.W.2d 432, 436 (quoting *Richard v. Lenz*, 539 N.W.2d 80,83 (S.D. 1995)). “If undisputed facts fail to establish each required element in a cause of action, summary judgment is proper.” *McKie v. Huntley*, 2000 S.D. 160, ¶ 17 (citing *Groseth Int’l Inc. v. Tenneco Inc.*, 410 N.W.2d 159, 169 (S.D. 1987)).

ANALYSIS

Prior to November 2004, Guy Ferris owned the entire eastern portion of Lot 14.¹ The western portion of Lot 14 included both future Lots 14A and 14B.² June 2004, Guy Ferris platted the eastern portion of Lot 14 into Lot 14A and Lot 14B.³ November 2004 Guy Ferris sold Lot 14B to Wendy Preszler (a/k/a Wendy Parcel—Plaintiff).⁴

Summary judgment requires that all material facts necessary to find for the moving party must be undisputed. Additionally, the party that is moving for summary judgment must be entitled to such judgment as a matter of such that the law as applied to the undisputed facts would satisfy the legal requirement to a judgement in the movants favor. The Court does not make any findings of facts, rather, makes a finding as to what facts are undisputed, (i.e., would not need to be proved at trial) and are material to the outcome of the case. Subsequently, the Court will then consider the undisputed facts considering the law and determine if the law as applied to the undisputed facts would render it appropriate to dispose of the claim through summary judgment.

An easement may be created by a plat.⁵ However, the owner of the servient and dominant estate may be not the same person.⁶ If one attempts to create an easement upon their own land “the purported interest is a nullity” because an easement is “a nonpossessory interest in the land of *another*.”⁷

¹ Factually presented by Plaintiff’s statement of material facts (“SMF”) as to which there is no genuine issue ¶ 6. The Defendant does not dispute Plaintiff’s SMF ¶ 6 but expressly admits ¶ 6 in Defendant’s SMF ¶ 6.

² *Id.*

³ *Id.*

⁴ Factually presented by Plaintiff’s statement of material facts (“SMF”) as to which there is no genuine issue ¶ 12. The Defendant does not dispute Plaintiff’s SMF ¶ 12 but expressly admits ¶ 12 in Defendant’s SMF ¶ 12.

⁵ A conclusion of law. *Kokesh v. Running*, 652 N.W.2d 790, 793 (S.D.2002).

⁶ SDCL § 43-13-6 “A servitude thereon cannot be held by the owner of the servient tenement. A servitude is extinguished by the vesting of the right to servitude and the right to the servient tenement in the same person.”

⁷ The Law of Easements & Licenses in Land § 3:11 (emphasis added).

1. Whether there is an easement.

Thus, when Mr. Guy Ferris attempted to create a 25' easement on his land for the benefit of Lot 14A (i.e., himself) his interest in his own land would be a nullity rendering a sale of such land to Wendy Preszler not subject to a 25' easement along the southern portion of Lot 14B. However, because such creation of an easement includes another aside from himself—namely the public—through the dedication, the entire easement does not fail. However, Mr. Bosch does not possess a 25' easement for the benefit of his dominate estate because the nonpossessory interest in land was created while there was unity of ownership extinguishing such interest at the time of purported creation.

2. What are the terms of the easement.

The issue now turns to what are the terms of the easement. The scope of an easement “is determined by the terms of the grant.”⁸ The easement was created by Guy Ferris via a grant when he platted the eastern portion of Lot 14 in 2004.⁹ The easement expressly stated, “25' ACCESS EASEMENT FOR LOT 14A DEDICATED THIS PLAT.”¹⁰ As stated above, the portion of the easement provided to benefit Lot 14A is void as a matter of law. The easement could now be read as “ACCESS EASEMENT ... DEDICATED THIS PLAT.”

The South Dakota Supreme Court ruled that the legal connotation of the word dedicated is generally to mean “devotion of property to a public use.”¹¹ Additionally, “Black’s Law Dictionary defines ‘dedicate’ as [‘][t]o appropriate and set apart one’s private property to some public use, as to make a private way public by acts evincing an intention to do so.[.]”¹² In *Bergin*

⁸ SDCL § 43-13-5

⁹ Factually presented by Plaintiff’s statement of material facts (“SMF”) as to which there is no genuine issue ¶ 8. The Defendant does not dispute Plaintiff’s SMF ¶ 8 but expressly admits ¶ 8 in Defendant’s SMF ¶ 8.

¹⁰ Factually presented by Plaintiff’s statement of material facts (“SMF”) as to which there is no genuine issue ¶ 10. The Defendant does not dispute Plaintiff’s SMF ¶ 10 but expressly admits ¶ 10 in Defendant’s SMF ¶ 10.

¹¹ *Bergin v. Bistodeau*, 645 N.W.2d 252, 255 (citing *Tinaglia v. Itzes*, 257 N.W.2d 724, 720 (S.D.1977)).

¹² *Id.* at 256 (citing Black’s Law Dictionary 412 (6th ed 1990)).

v. Bistodeau, the Supreme Court addressed an issue that is very similar to the case here.¹³ In *Bergin*, the petitioner argues that the respondent’s phrasing in the plat accepted by Hill City was inadequate to dedicate something to public use.¹⁴ However, the Supreme Court found that the word “dedicated” is a term of art which indicates an *intent to dedicate some piece of land to public use*.¹⁵ The Supreme Court went even further to say that it would be “redundant” to insert “public use” as a modifier to “dedicated” in order to satisfy SDCL § 11-3-12¹⁶ in dedicating land to public use.¹⁷

Here, the same issue is presented by the Defendant—Parcels. The Parcels are contending that such phrasing in the 2004 Plat required additional modification such as “for public use” to satisfy SDCL § 11-3-12; such contention is incorrect as a matter of law. The 2004 Plat expressly states “dedicated this plat.” Considering the Supreme Court’s definition of the word “dedicated” the 2004 Plat should be read as “ACCESS EASEMENT DEDICATED [for public use] THIS PLAT.”

Therefore, the 2004 Plat properly indicates an unambiguous intent by Guy Ferris to offer a 25’ easement along the southern portion of Lot 14B as an access easement for public use.

3. Whether the easement was accepted by the public (i.e., the City of Belle Fourche).

The issue then turns to whether the City of Belle Fourche (“City”) has accepted the offer to dedicate. As the Defendants argues correctly, the “[t]he mere filing of a plat without public acceptance does not vest fee simple title to streets and alleys...it is simply an offer to dedicate.”¹⁸

¹³ *Bergin*, 645 N.W.2d 252.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Statute authorizing private land being offered for public use

¹⁷ *Bergin*, 645 N.W.2d 256.

¹⁸ *City of Belle Fourche v. Dittman*, 325 N.W.2d 309, 312 (S.D.1982).

However, the Defendants' argument that the City has failed to accept such dedication is without merit. The Defendant contends that there is a legal distinction between "approval" of a plat and "acceptance" of an offer to dedicate.¹⁹ The Defendants does not offer any supporting legal authority to reach such a legal conclusion.²⁰ Rather, the Supreme Court offers clarity in the *Bergin* case. In *Bergin*, the Supreme Court expressly affirmed that Hill City accepted the offer to dedicate the easement.

[Hill] City accepted [the] offer of a dedicated easement [...] by formal resolution [...]. This resolution stated: "I, [...] Acting Finance Officer of Hill City, do hereby certify that at an official meeting held on [...], the Common Council of Hill City did by resolution approve the [...] plat. [...]. **Therefore, there was an intent to dedicate and an acceptance by City.**"²¹

Here, the similarity is extraordinarily close. The 2004 Plat was approved the City of Belle Fourche on June 21, 2004. The Resolution of the Common Council of Belle Fourche states,

Be it resolved that the City of Belle Fourche Common Council, having viewed this plat and having received a recommendation from the Belle Fourche Planning Commission does hereby approve this plat. Resolution adopted by unanimous vote of the Belle Fourche Common Council.²²

Thus, considering the Supreme Court's clear indication that acceptance of a plat with an offer to dedicate a piece of land to public use in conjunction with a formal approval by a city

¹⁹ *Brief In Resistance To Motion For Summary Judgment Page 4.*

²⁰ *Id.*

²¹ *Bergin v. Bistodeau*, 645 N.W.2d 252, 256 (emphasis added).

²² *Affidavit of John Burke Exhibit 4.*

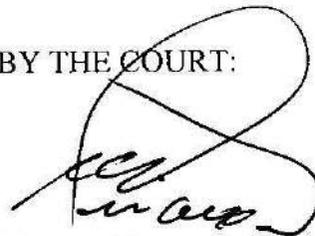
common council indicates that SDCL § 11-3-12 has been satisfied—as a matter of law—the 2004 Plat approved by the City of Belle Fourche Common Council has been approved and the 25' easement running along the southern portion of Lot 14B is dedicated to the public. The above-named parties have all the rights and duties that are provided by an easement dedicated to public use.

CONCLUSION

Therefore, the Plaintiff's motion for summary judgment is **GRANTED** in whole on the issue of whether a twenty-five (25') side easement dedicated to public use exists across Defendants' Lot 14B.

Dated this 20th day of November, 2023.

BY THE COURT:



Michael W. Day
Presiding Circuit Court Judge

FILED

NOV 20 2023

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

BY _____

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

09CIV23-000067

Plaintiffs,

vs.

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH,

Defendants.

The above-captioned matter came before the Court on September 25, 2023 on *Plaintiffs' Motion for Summary Judgment*. John W. Burke appeared on behalf of Plaintiffs Merle and Anita Bierschenk; Jordan D. Bordewyk appeared on behalf of Defendants Richard and Wendy Parcel; and Defendant William W. Bosch appeared personally. The Court having examined all the pleadings, files, and records herein, and having heard and considered the arguments of counsel, concludes, as a matter of law, that a twenty-five feet (25') wide easement dedicated to use by the public exists across Lot 14B of Prairie View Addition to the City of Belle Fourche, South Dakota in the location depicted in the *Plat of Lots 14A and 14B (Recorded in Doc. No. 2004-2400)*, a copy of which is attached hereto. Therefore, it is hereby:

ORDERED that, in accordance with the Court's *Memorandum of Decision in Re: Plaintiffs' Motion for Summary Judgment*, which is incorporated herein by this reference, *Plaintiffs' Motion for Summary Judgment* is GRANTED. **3/21/2024 2:03:23 PM**

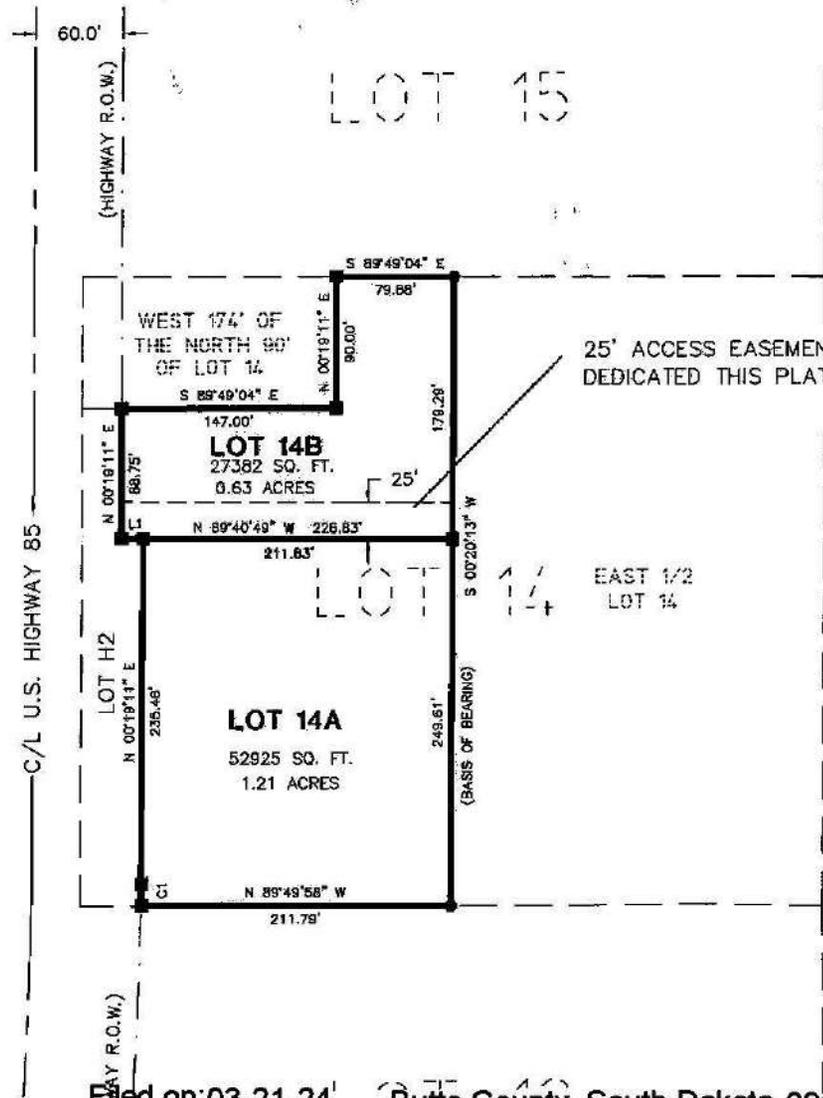
Attest:
Adams, Denise
Clerk/Deputy



BY THE COURT:

Honorable Michael W. Day
Fourth Circuit Court Judge

2004-2400 PLAT OF LOTS 14A AND 14B,
 A SUBDIVISION OF THE WEST 1/2 OF LOT 14 EXCEPT THE WEST 174' OF THE NORTH 90' OF LOT 14,
 AND EXCEPT LOT H2, LOCATED IN THE PRAIRIE VIEW ADDITION TO THE CITY OF BELLE FOURCHE,
 ALL LOCATED IN THE SE1/4 NE1/4 SECTION 3, T.8N., R.2E., B.H.M.,
 BUTTE COUNTY, SOUTH DAKOTA.



25' ACCESS EASEMENT FOR LOT 14A
 DEDICATED THIS PLAT

NOTES:

1. ANNEXATION MAP FOR THE WEST HALF LOT 14 PREVIOUSLY RECORDED AS DOCUMENT #97-115.
2. PLAT OF LOT H2-LOT 14-SE4NE4 3-8-2 PREVIOUSLY RECORDED IN PLAT BOOK 6 PAGE 162.
3. A 5' UTILITY EASEMENT IS HEREBY DEDICATED ALONG THE INTERIOR OF ALL FRONT, SIDE AND REAR LOT LINES UNLESS OTHERWISE SHOWN.



● INDICATES FOUND REBAR & CAP LS 2166

■ INDICATES REBAR & CAP SET THIS SURVEY LS-5088

APP 11



LOT 13

LINE	BEARING	DISTANCE			
L1	N 89°40'49" W	15.00'			
CURVE	ARC LENGTH	DELTA ANGLE	RADIUS	CHORD LENGTH	CHORD BEARING
C1	14.71'	00°17'12"	2940.00'	14.71'	S 00°27'47" W

SURVEYOR CERTIFICATE

I, Randy L. Deibert, P.O. Box 408, Spearfish, S.D., being a Registered Land Surveyor in the State of South Dakota, #5086, do hereby certify that at the request of the owner and under my supervision, I have caused to be surveyed and platted the property shown and described hereon. I also certify that this plat is true and correct to the best of my knowledge and belief. This survey does not constitute a title search to determine ownership or easements of record. I further state that I did not obtain the signatures for the certificates other than the Surveyor Certificate. In witness whereof, I have hereunto set my hand and seal dated this 16th day of June, 2004.

Randy L. Deibert
Randy L. Deibert R.L.S. 5086

OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
State of South Dakota
County of Butte

I, Allison Jensen ~~deputy~~ Director of Equalization, hereby certify that I have received a copy of this plat.

Allison Jensen ~~deputy~~
County Director of Equalization

OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte

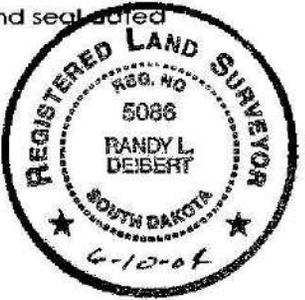
Filed for record this 16th day of June, 2004,
at 1:00 p.m., M. T. and recorded in Book _____
of Plats on page _____ File Document _____

Butte County Register of Deeds

CERTIFICATE OF OWNERSHIP
State of South Dakota
County of Butte

County of Butte do hereby certify that I/We are the owners of the property shown and described hereon, that we do approve this plat as hereon shown and that development of this property shall conform to all existing applicable zoning, subdivision, erosion and sediment control regulations.

OWNER ADDRESS



Register of Deeds
Butte County, South Dakota
Recorded October 19, 2004
at 12:50 P M
Doc# 2004-2400
Book PB15 Page(s) 135
Fee 10.00
By Janet J. Walker
Register of Deeds



APPROVAL OF HIGHWAY AUTHORITY
State of South Dakota, County of Butte

The location of the proposed access roads abutting the county or state highway as shown hereon, is Hereby approved. Any change in the proposed access shall require additional approval. Note: The only allowed access to Lot 14A will be relocation of existing access from Lot 14B

HIGHWAY AUTHORITY: By State

CERTIFICATE OF TREASURER:
State of South Dakota, County of Butte

I, Dee Schuldie County Treasurer of Butte County certify that all taxes and special assessments which are liens upon the herein platted property, registered to this Owner hereon as shown by receipts of my office have been paid.

Date: Sept 30, 2004
Dee Schuldie
Butte County Treasurer



OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte

I, Terry Waltersstorf City Engineer for the City of Belle Fourche, do hereby certify that I have approved this plat with respect to the duties of my office and that I have received a copy of said plat for the City files.

Terry Waltersstorf
Belle Fourche City Engineer

RESOLUTION OF THE COMMON COUNCIL:
State of South Dakota
County of Butte

Be it resolved that the City of Belle Fourche Common Council, having viewed this plat and having received a recommendation from the Belle Fourche Planning Commission, does hereby approve this plat. Resolution adopted by unanimous vote of the Belle Fourche Common Council this 21 day of June, 2004.

Gloria J. Schneider
Gloria J. Schneider, Mayor



OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
State of South Dakota
County of Butte

I, Allison Jensen Deputy Director of
Equalization, hereby certify that I have
received a copy of this plat.

Allison Jensen Deputy
County Director of Equalization

OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte

Filed for record this 10th day of Sept, 2004,
at 10:00 a.m., M. T. and recorded in Book _____
of Plats on page _____ File Document _____

Butte County Register of Deeds

CERTIFICATE OF OWNERSHIP
State of South Dakota
County of Butte

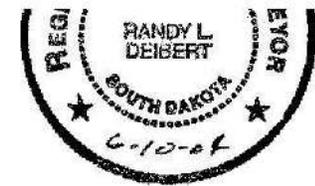
Constance, do hereby certify that I/We
are the owners of the property shown and described hereon,
that we do approve this plat as hereon shown and that
development of this property shall conform to all existing
applicable zoning, subdivision, erosion and sediment
control regulations.

OWNER	ADDRESS
<u>Guy M. Forrie</u>	<u>1103 Rue Spaulding St</u>
<u>G. M. Forrie</u>	

ACKNOWLEDGMENT OF OWNERSHIP:
State of South Dakota
County of Butte

On this 20th day of Sept, 2004, before me
a Notary Public, personally appeared
Guy M. Forrie known to me to be the person(s)
described in the foregoing instrument and acknowledged
to me that they executed the same.

My commission expires: _____
Helen Stearns
Notary Public



Register of Deeds
Butte County, South Dakota
Recorded October 19, 2004
at 12:50 P M
Doc# 2004-2400
Book PB15 Page(s) 135
Fee 10.00
By Randy L. Deibert
Register of Deeds



certify that all taxes and special assessments which are liens upon
the herein platted property, registered to this
Owner hereon as shown by receipts of my office have been paid.

Date: Sept 30, 2004
Dee Schuldies
Butte County Treasurer



OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte

I, Temple Welterhoff, City Engineer for the City of
Fourche, do hereby certify that I have approved this
plat with respect to the duties of my office and that
I have received a copy of said plat for the City files.

Temple Welterhoff
Belle Fourche City Engineer

RESOLUTION OF THE COMMON COUNCIL:
State of South Dakota
County of Butte

Be it resolved that the City of Belle Fourche Common
Council, having viewed this plat and having received a
recommendation from the Belle Fourche Planning Commission,
does hereby approve this plat. Resolution adopted by
unanimous vote of the Belle Fourche Common Council
this 21 day of June, 2004.

Maria DeLaneria John White
City Finance Officer Mayor



RECOMMENDATION OF THE CITY OF
BELLE FOURCHE PLANNING COMM.:
State of South Dakota
County of Butte

This plat is hereby recommended for approval to the City
of Belle Fourche Common Council this 15 day of June
2004.

ATTEST: _____
Secretary
John White
Chairman



STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

09CIV-000067

23-

Plaintiffs,

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH, Co-Trustee of the William and Margaret Bosch Family Trust dated July 17, 2023,

Defendants.

A hearing was held on August 12, 2024. The Court having considered the testimony of the witnesses, having reviewed the exhibits admitted and post-hearing submissions¹ and having reviewed the entire file content; and good cause having been shown; now makes and enters the following Findings of Fact and Conclusions of Law.²

FINDINGS OF FACT

1. Any finding of fact more appropriately labeled as a conclusion of law, or vice versa, is to be considered as such for purposes of the record.
2. The Court incorporates the entirety of the testimony and evidence admitted during

¹ The matter was deemed fully submitted to the Court on August 29, 2024.

² Per the agreement of counsel and this Court's *Order Regarding Motions and the Parties' Submission of Post-Hearing Proposed Findings of Fact and Conclusions of Law*, the parties agreed to submit simultaneous proposed Findings of Fact and Conclusions of Law, with each party's submission deemed an objection to the opposing party's proposed findings of fact and conclusions of law. Therefore, there is no need for either party to file and serve objections to the opposing party's proposed findings of fact and conclusions of law.

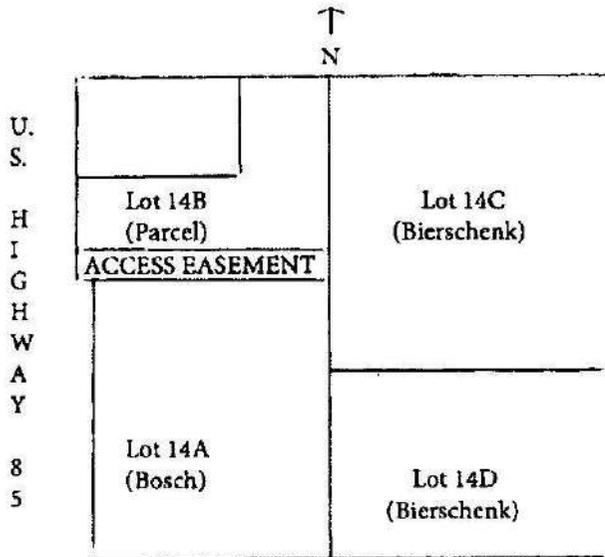
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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

the hearing held on August 12, 2024, as well as the prior submissions of the parties. John W. Burke appeared on behalf of Plaintiff Bierschenks at the hearing; Jordan D. Bordewyk appeared on behalf of Defendants Richard and Wendy Parcel (collectively “Defendant Parcels”); and William W. Bosch appeared personally without counsel and did not present any evidence or argument.

3. This action concerns the existence and scope of an easement across property owned by Defendants Richard and Wendy Parcel (collectively “Defendant Parcels”).

4. Plaintiff Bierschenks own Lot 14C of the Prairie View Addition to the City of Belle Fourche. The Defendants own adjacent Lots to the west of Lot 14C. Defendant Parcels own Lot 14B and Defendant William and Margaret Bosch Family Trust dated July 17, 2023 (“Defendant Bosch Trust”) owns Lot 14A.

5. The easement in dispute affords access to Lot 14C (owned by Plaintiff Bierschenks) from U.S. Highway 85 (“Highway 85”). The easement and the adjacent lots are generally depicted (not to scale) as follows:



6. This Court previously ruled on Plaintiff Bierschenks' claim regarding a twenty-five feet (25') wide easement by plat. *See Order Granting Plaintiffs' Motion for Summary Judgment (03/21/24)*. Therefore, the issues before the Court concern the existence and scope of a separate easement by written grant (Count 1) and Plaintiff Bierschenks' claim for injunctive relief (Count 2).

7. The parties' Lots (Lots 14A, 14B, 14C, and 14D) were originally part of a larger, approximately five-acre tract described as Lot 14 in Section 3, Township 8 North, Range 2, E.B.H.M. *Exhibit 1 (McDonald/Kirby Warranty Deed); Exhibit 2*.

8. In 1946, the entirety of Lot 14 was owned by a single owner, H.W. Kirby. *Id.*

9. In 1948, H.W. Kirby transferred the east half of Lot 14 to Emily B. Goode. *Exhibit 1 (Kirby/Goode Warranty Deed)*. The pertinent conveyance language of the *Warranty Deed* provided as follows:

The East Half (E½) of Lot Fourteen (14) Section Three (3) Township Eight (8)

North, of Range Two (2), E.B.H.M., as the same is platted and recorded in Plat Book 4, page 13, Register of Deeds office, Butte County, South Dakota., together with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen, beginning at a point 164.04 feet South of the Northwest corner or [sic] said Lot 14, on Highway 85, and continuing due east across the West half of Lot 14 to the east line of the West Half of said Lot 14, and together [sic] with a perpetual easement four (4) feet wide for a water pipe line [sic], beginning at a point 180.04 feet south of the Northwest corner of said Lot 14, and continuing due east across the West Half of Lot 14 to the east line on the West Half of Lot 14.

Id.

10. The 16' road right-of-way easement ("Easement") and 4' water pipeline easement initially set forth in the *Kirby/Goode Warranty Deed* were restated in several subsequent deeds.

Exhibit 1.

11. Defendant Richard Parcel admitted that a 16' Easement exists by virtue of the *Kirby/Goode Warranty Deed*, and further admitted that Plaintiff Bierschenks have the right to use the 16' Easement. *Transcript at 46, 65. See also Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts at ¶ 18 ("In response to SMF #18, Defendants admit that Plaintiffs have right to use of the sixteen foot access easement, but subject to the stipulations laid out in response to SMF #4 above."); Answer of Richard D. Parcel and Wendy Parcel at ¶ 6 ("Defendants Parcel have never contended that Plaintiffs did not have the right to use of the Access Easement.")*. Defendant Parcels disagree, however, as to the scope of the Easement and/or the purposes for which it may be used. *Id. at 46-47.*

12. Defendant Richard Parcel admitted that prior to Defendant Wendy Parcel's purchase of Lot 14B, they were aware that there was a 16' easement across the

property for the benefit of the east half of Lot 14. *Transcript at 50.*

13. Defendant Parcels agree that the north boundary of the Easement begins at 164.04 feet south of the northwest corner of Lot 14. *Transcript at 65.*

14. Although there is disagreement as to whether the entirety of the Easement falls within Defendant Parcels' property (Lot 14B), Defendant Parcels agree that the Easement is located in the southern portion of their property (Lot 14B). *Transcript at 65.*

15. Defendant Richard Parcel agreed that the Easement was present long before his wife (Defendant Wendy Parcel) purchased the property in 2004, that it is graveled, and that it has "always" looked like the path depicted in Exhibit 4. *Transcript at 61-62.*

16. The Plaintiffs purchased the property from a sheriff's sale. After purchasing Lot 14C in 2015, Plaintiff Merle Bierschenk typically accessed Lot 14C from Highway 85 by using the Easement. *Transcript at 12.*

17. Defendant Richard Parcel has a practice of parking his pickup in the Easement (as depicted in Exhibits 4, 6, 9, and 10) and has parked in the same manner for years. *Exhibit 4; Transcript at 21-22, 41, 66; Defendant's Exhibit C.* At times other vehicles or equipment have been parked directly in front of his pickup, including a pickup and a car-hauling trailer. *Transcript at 53, 54-55; Exhibits 5, 6, 12.*

18. Because Defendant Richard Parcel's pickup is parked in the path, Plaintiff Merle Bierschenk has had to drive around the pickup by proceeding on the right (or south) side of the pickup. *Transcript at 12-13.*

19. Due to the frequency that Plaintiff Merle Bierschenk and other users of the

Easement were forced to drive around Defendant Richard Parcel's pickup, a trail that deviates to the south of the Easement is now visible. *Transcript at 13; Exhibits 4, 6, 9, 10.*

20. Although he initially disagreed, Defendant Richard Parcel admitted that driving around his pickup results in users of the path having to drive onto the north edge of Defendant Bosch Trust's property (Lot 14A). *Transcript at 53, 54, 58* (“[R]ight now you have to go to the south and over a little bit on Mr. Bosch's property the way people are doing it now, agreed? Agreed.”).

21. At some point after Plaintiff Merle Bierschenk began using the Easement, Defendant Richard Parcel stopped him and informed him that “he didn't want [Plaintiff Merle Bierschenk's druggie employees using th[e] easement.” *Transcript at 13.*

22. On another occasion, Defendant Richard Parcel again stopped Plaintiff Merle Bierschenk as he was using the Easement and told Plaintiff Merle Bierschenk that he was not supposed to be using it. *Transcript at 13-14.* Defendant Wendy Parcel joined in the encounter and the parties had a heated debate. *Id.* Plaintiff Merle Bierschenk ultimately called the police, who instructed him to not use the path until the matter was resolved in court. *Id.*

23. At some point, Defendant Parcels installed a two-wire fence on the east end of the Easement at the property line separating Defendant Parcels' property (Lot 14B) and Plaintiff Bierschenks' property (Lot 14C). *Transcript at 14-15.*

24. In July of 2021, Plaintiff Bierschenks' attorney wrote a letter to Defendant Richard Parcel explaining why Plaintiff Bierschenks believed they had the legal right to

use the Easement and requesting that Defendant Parcels remove the wire fence. *Exhibit 11.*

25. Defendant Richard Parcel admitted that he removed the wire fence after receiving the letter from Plaintiff Bierschenks' attorney and Plaintiff Merle Bierschenk returned to using the Easement. *Transcript at 16, 59.*

26. In connection with Plaintiff Bierschenks' construction of two open-faced storage units on Lot 14C, they hired Joe Couch to haul gravel to Lot 14C. *Transcript at 18.*

27. Mr. Couch initially used the Easement to gain access Plaintiff Bierschenks' property (Lot 14C); however, after he was confronted by Defendant Richard Parcel, he would not drive through the Easement because he did not want to get involved in the dispute. *Transcript at 18-19.*

28. In addition to requiring users of the Easement to have to travel several feet onto the north edge of Defendant Bosch Trust's property (Lot 14A), the location of Defendant Richard Parcel's pickup makes it more difficult for users of the Path pulling a trailer to enter the easement from Highway 85. *Transcript at 19.*

29. The parties agree that the property pin for the property line separating Defendant Parcels' property (Lot 14B) and Defendant Bosch Trust's property (Lot 14A) is located immediately on the right (south side) of the power pole located in the foreground of Exhibit 4. *Transcript at 38, 43, 51-52.*

30. Defendant Richard Parcel admitted that he continued to park his pickup in the same location in the Easement even after this Court confirmed the existence of the

separate 25' easement by plat in November of 2023. *Transcript at 60-61.*

31. Defendant Richard Parcel admitted that the distance between the right (or south side) of his pickup (where it is typically parked) and his dumpster is approximately 17'. *Transcript at 63.* However, he also admitted that the dumpster is situated on Defendant Bosch Trust's property (Lot 14A). *Transcript at 52, 55-56.*

32. Certain of Defendant Richard Parcel's testimony was not credible. For example, although he later admitted that driving around his pickup requires users of the Easement to drive onto a portion of Defendant Bosch Trust's property (Lot 14A), he initially testified that it did not. *Transcript at 53, 54, 58 ("[R]ight now you have to go to the south and over a little bit on Mr. Bosch's property the way people are doing it now, agreed? Agreed.").* Next, although he initially testified that he recognized a red dumpster depicted in Exhibit 12 and testified that the dumpster was his, he later testified that the red dumpster was never situated where it was located in the photograph. *Transcript 52-53, 57.* Also, he testified that Defendant Parcel's dumpster, which is situated on Defendant Bosch Trust's property (Lot 14A) "never" moves. *Transcript at 56.* Finally, he testified that he could not park his pickup farther to the south due to ruts in the Easement, and when asked if he could park farther to the south if the ruts were filled in, he stated: "I don't know." *Transcript at 72-73.*

57. The Parcels reside on their Lot 14B. The Plaintiffs do not reside on their Lot 14C.

CONCLUSIONS OF LAW

Easement by written grant.

1. The Court had jurisdiction over the parties and subject matter. Venue is proper.

2. “An easement is a property interest in land owned by or in the possession of another, which entitles the easement owner to a limited use or enjoyment of the land in which the interest exists.” *Ehlebracht v. Crowned Ridge Wind II, LLC*, 2022 S.D. 19, ¶ 33, 972 N.W.2d 477, 488 (quoting *Picardi v. Zimmiond*, 2004 S.D. 125, ¶ 16, 689 N.W.2d 886, 890).
3. Generally, easements are created in three different ways: (1) by written grants; (2) pursuant to a plat; or (3) by force of law. *Id.* (quoting *Kokesh v. Running*, 2002 S.D. 126, ¶ 12, 652 N.W.2d 790, 793). Examples of easements created “by force of law” would include implied easements (i.e., easements by necessity and easements implied from prior use) and prescriptive easements. See *Springer v. Cahoy*, 2012 S.D. 32, ¶ 7, 814 N.W.2d 131, 133 (discussing implied easements); *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. 12, ¶ 7, 657 N.W.2d 300, 304 (discussing prescriptive easements).
4. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired. *SDCL 43-13-5*. With regard to an easement granted in a written instrument, the terms and extent of the easement “are ascertained either by the ‘words clearly expressed, or by just and sound construction’ of the easement document.” *DeHaven v. Hall*, 2008 S.D. 57, ¶ 15, 753 N.W.2d 429, 435 (quoting *Picardi v. Zimmiond*, (*Picardi II*), 2005 S.D. 24, ¶ 20, 693 N.W.2d 656, 662)).
5. The Court “look[s] first to the language of the grant itself to discover the extent and nature of the easement agreement and its terms.” *Id.* The Court then gives “terms their plain and ordinary meaning” and “utilize[s] no additional interpretation in the absence of ambiguity.” *Id.* “If the terms of the agreement are specific in nature, the terms are ‘decisive of the limits of

the easement.” *Id.* According to the South Dakota Supreme Court, “[it] will not resolve disputes over unambiguous language by resorting to what the parties might have included in a contract.”

Id.

6. “[C]lear language is necessary to create either a condition subsequent or precedent.” *Id.* (quoting *City of Huron v. Wilcox*, 17 S.D. 625, 628, 98 N.W. 88, 89 (1904)).

“Forfeitures and conditions subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention . . . to that effect.” *Id.*

7. Once an easement is created, it “runs with the land.” SDCL 43-25-30 provides as follows:

A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

SDCL 43-25-30. See also Wildwood Ass'n v. Harley Taylor, Inc., 2003 S.D. 98, ¶ 20, 668 N.W.2d 296, 303 (“An easement appurtenant runs with the land and serves the dominant estate.”).

8. Here, the *Kirby/Goode Warranty Deed* created two easements by written grant: (1) a 16’ wide easement for road right-of-way; and (2) a 4’ wide easement for a water pipeline.

9. As stated in the *Kirby/Goode Warranty Deed*, the 16’ Easement for road right-of-way begins at a point 164.04’ south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C).

10. The 4' water pipeline easement begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line on the west half of Lot 14 (i.e., the property line of Lot 14C).

11. With regard to the extent and nature of the 16' Easement, the plain and ordinary meaning of the language of the grant itself—as set forth in the *McDonald/Kirby Warranty Deed*—makes clear that the Easement was intended to be perpetual in nature and to provide road right-of-way for vehicular travel.

12. The pertinent language contains no restriction limiting the manner or type of travel for which the Easement may be used.

13. The provision conveying the Easement contains no language limiting or restricting its use to that necessary for a single one-family private dwelling. The easement language in this case is in stark contrast to the easement considered in Picardi v. Zimmiond, 2005 S.D. 24, 693 N.W.2d 656. In that case, the easement specifically provided: “This easement shall be used for access to one single family residence located upon the Picardi property.” *Picardi, 2005 at ¶ 2, 693 N.W.2d at 650*. The South Dakota Supreme Court held that “the language of the easement document” was “clear, definite and certain in its purpose and scope,” and that it “limit[ed] the Picardi’s scope of use “for access to one single family residence located upon the Picardi property.” *Picardi, 2005 at ¶ 23, 693 N.W.2d at 663*.

14. Although the *McDonald/Kirby Warranty Deed* provides elsewhere in that only a single one-family dwelling may be placed upon the East Half of Lot 14, that restriction concerned the use of the East Half of Lot 14 consistent with SDCL Chapter 11-5, not the Easement. “[C]lear language is necessary to create either a condition subsequent or

precedent.” *Id.* (quoting *City of Huron v. Wilcox*, 17 S.D. 625, 628, 98 N.W. 88, 89 (1904)). Here, the *McDonald/ Kirby Warranty Deed* does not contain clear language conditioning the use of the Easement upon a single one-family dwelling existing upon on the East Half. “Forfeitures and conditions subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention . . . to that effect.” *Id.* Further, the final time that the single one-family dwelling restriction on East Half of Lot 14 was included in a conveyance document was in 1961. *Exhibit 1 (Myers/Myers Affidavit)*. Thus, the restriction ceased existing years ago. See SDCL 11-5-4 (“The restrictions authorized by §§11-5-1 and 11-5-2 continue in force for a period as may be prescribed in a declaration or contract but not exceeding forty years from the date of such declaration or contract.”). Prior to amendment of the statute in 2021, such restrictions were only valid for 25 years. *Id.*

15. While Defendant Parcels may have preferred that the Easement be limited to use necessary for a single one-family dwelling, this Court “will not resolve disputes over unambiguous language by resorting to what the parties might have included in a contract.” *Id.* *DeHaven v. Hall*, 2008 S.D. 57, ¶ 15, 753 N.W.2d 429, 435 (citing *Wessington Springs Educ. Ass’n v. Wessington Springs School Dist. #36-2*, 467 N.W.2d 101, 104 (S.D. 1991)).

16. “The grant of an easement does not dispossess the landowner;” rather, “the owner of the servient tenement retains all the incidents of ownership in the easement.” *Picardi II*, 2005 S.D. at ¶ 25, 693 N.W.2d at 663. However, the servient tenement may not substantially interfere with the dominant owner’s reasonable use of the easement. “In the absence of contrary language in the easement, a servient owner may reasonably use that portion of its real property subject to an egress, ingress, and roadway easement for its own purposes up to the point where such uses

substantially interfere with the dominant owner's reasonable use of the easement." *DeHaven v. Hall*, 2008 S.D. 57, ¶ 31, 753 N.W.2d 429, 439-40 (*Picardi II*, 2005 S.D. at ¶ 30, 693 N.W.2d at 665)).

17. Although the Easement was recorded and Defendant Parcels admit its existence, giving them actual notice, they additionally had constructive notice of the Easement prior to purchasing Lot 14B due to having observed it. *Transcript at 50*. See *Johnson v. Radle*, 2008 S.D. 23, ¶ 16, 747 N.W.2d 644, 651 ("If facts are sufficient to put a purchaser of a title or lien upon inquiry of any adverse right or equity of a third party, his want of diligence in making such inquiry is equivalent to a want of good faith.").

Injunctive Relief.

18. SDCL 21-8-14 provides as follows:

Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

- (1) Where pecuniary compensation would not afford adequate relief;
- (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
- (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
- (4) Where the obligation arises from a trust.

SDCL 21-8-14.

19. The four basic factors to be considered are as follows:

- (1) Did the party to be enjoined cause the damage?
- (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law?
- (3) Is the party to be enjoined acting in bad faith or is its injury-causing behavior an "innocent mistake"?
- (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party"?

Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418 (internal citations omitted).

20. ““A suit for injunction is inherently an equitable action.”” *Sherburn*, 1999 S.D. at ¶ 18, 593 N.W.2d at 418 (quoting *Knodel v. Kassel Township*, 1998 S.D. 73, ¶ 8, 581 N.W.2d 504, 507).

21. The decision to grant a permanent injunction rests in the discretion of the trial court. *Sherburn v. Patterson Farms, Inc.*, 1999 S.D. 47, ¶ 17, 593 N.W.2d 414, 418 (citing *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472, 475 (S.D. 1991)). In contrast, “[w]hether the facts of a particular case meet the[] statutory prerequisites [of SDCL 21-8-14] is a question of law. *Magner v. Brinkman*, 2016 S.D. 50, ¶ 19, 883 N.W.2d 74, 83 (citing *Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 4, 620 N.W.2d 198, 200).

22. An injunction will be granted if the elements thereof are proven by a preponderance of the evidence. *Brookings Mall, Inc. v. Captain Ahab's, Ltd.*, 300 N.W.2d 259, 264 (S.D. 1980).

23. In this case, SDCL 21-8-14(1), (2), and (3) each authorize the entry of a permanent injunction.

24. With regard to SDCL 21-8-14(1), pecuniary compensation would not afford adequate relief. Monetary compensation generally does not offer adequate relief in an encroachment case and this case is no exception. An award of money will not afford adequate relief to Plaintiff Bierschenks for the inability to fully use the Easement; the Easement is unique in that it affords direct access to Highway 85. In the words of the South Dakota Supreme Court: “Because ‘no one should be permitted to take land of another merely because he is willing to pay

a market price for it[.]’ monetary compensation generally does not offer adequate relief in encroachment cases.” *Hedlund v. River Bluff Estate, LLC*, 2018 S.D. 20, ¶¶ 16-17, 908 N.W.2d 766, 772 (*Hoffman v. Bob L., Inc.*, 2016 S.D. 94, ¶ 10, 888 N.W.2d 569, 573). “[A] trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction.” *Magner v. Brinkman*, 2016 S.D. 50, ¶ 22, 883 N.W.2d 74, 84 (citing *Beatty v. Smith*, 14 S.D. 24, 84 N.W. 208, 211 (1900)). See also *Ladson v. BPM Corp.*, 2004 S.D. 74, ¶ 20, 681 N.W.2d 863, 869 (upholding permanent injunction barring BPM Corporation from keeping livestock on land adjacent to the plaintiff’s property since, “[w]ithout a permanent injunction, it is likely that [the plaintiff] will be forced to bring an unknown number of future lawsuits to address his pecuniary losses caused by BPM’s livestock.”).

25. With regard to SDCL 21-8-14(2), it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. As Plaintiff Merle Bierschenk testified, one would not know where to start in terms of determining monetary compensation. It would be extremely difficult, if not impossible: (i) to assign a monetary value to Defendant Parcels’ obstructing the Easement since it will not be known whether Defendant Richard Parcel will park his pickup in the Easement seven days a week in the future, or four days a week; how many years he may continue to do so; and, when he does so, the extent to which the Easement will be obstructed since that is dependent on where Defendant Parcels park their vehicles; (ii) to know whether and how many potential renters are lost because the he/she drove by the storage units and viewed the difficulty of access and therefore elected to store their vehicle/ equipment elsewhere; (iii) to know whether and how many existing renters cease renting from Plaintiff

Bierschenks due to difficulty of access. *Transcript at 29-30.*

26. For the reasons described above, an injunction is necessary to prevent a multiplicity of judicial proceedings.

27. The four basic factors required to be considered by the Court when evaluating the propriety of an injunction support the issuance of an injunction.

28. First, because it is Defendant Parcels that are obstructing the use of the Easement, the parties to be enjoined caused—and are continuing to cause—the damage. *Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418.*

29. Second, irreparable harm will result without an injunction because there is a lack of an adequate and complete remedy at law. *Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418.* “Harm is irreparable ‘where it cannot be readily, adequately, and completely compensated with money.’” *Magner v. Brinkman, 2016 S.D. 50, ¶ 21, 883 N.W.2d 74, 83 (quoting Strong v. Atlas Hydraulics, Inc., 2014 S.D. 69, ¶ 17, 855 N.W.2d 133, 140 (quoting Knodel, 1998 S.D. 73, ¶ 13, 581 N.W.2d at 509))*. As discussed above, given that the conduct in question concerns the obstruction of the right to use an easement for access to property, and the fact that it would be extremely difficult, if not impossible, to fix monetary compensation as relief, the harm “cannot be readily, adequately, and completely compensated with money.” *Id.*

30. Third, Defendant Parcels’ obstruction of the Easement is not an innocent mistake and, at times, may be viewed as acting in bad faith. *Sherburn, 1999 S.D. at ¶ 17, 593 N.W.2d at 418.* Defendant Richard Parcel admitted to the existence of the 16’ Easement and admitted that Plaintiff Bierschenks have the right to use the 16’ Easement. *Transcript at 46, 65.* Nevertheless, Defendant Richard Parcel continued to park in the Easement, including after this Court

confirmed the existence of the separate 25' easement by plat in November of 2023. *Transcript at 60-61*. In addition, at some point, Defendant Parcels installed a two-wire fence on the east end of the Easement at the property line separating Defendant Parcels' property (Lot 14B) and Plaintiff Bierschenks' property (Lot 14C). *Transcript at 14-15*.

31. In balancing the equities, because there are other places on their property (Lot 14B) where they can park their vehicles, Defendant Parcels will not suffer a hardship by being enjoined from parking in the Easement, and certainly will not suffer a hardship that is disproportionate to the benefit to be gained by Plaintiff Bierschenks' being able to use the Easement without obstruction. *Transcript at 26-27*. Defendant Richard Parcel admitted that there were other places to park their vehicles, but testified that it could not be done "very easily" due to "crap" on their property that would have to be moved. Having to move such personal property is not a hardship. Defendant Richard Parcel also admitted that when they go on vacation they park Defendant Wendy Parcel's car in front of their large steel garage ("shop"), and not in the path of the Easement. *Transcript at 73*.

32. Defendant Parcels are substantially interfering with Plaintiff Bierschenks' (the dominant owners') reasonable use of both the 16' Easement and the previously confirmed 25' easement by plat. *Exhibits 6, 7*.

33. With regard to the 16' Easement, because the north boundary of the 16' Easement is located 164.04' south of the northwest corner of Lot 14, the south boundary is located 180.04' south of the northwest corner of Lot 14 (i.e., $164.04' + 16' = 180.04'$). Based upon the 2004 *Plat of Lots 14A and 14B*, the distance from the northwest corner of Lot 14 to the southwest corner of Lot 14B is approximately 178.75' ($88.75' + 90.00' =$

178.75'). *Exhibit 2*. As a result, approximately 14.71' of the Easement lies on Defendant Parcels' property (Lot 14B) and approximately 1.29' of the Easement lies on Defendant Bosch Trust's property (Lot 14A). Defendant Richard Parcel testified that his pickup is approximately 7' wide. *Transcript at 55*. Thus, where it is typically parked, his pickup obstructs at least half of that portion of the Easement located on Defendant Parcels' property (Lot 14B)—i.e., 7' of the 14.71'. *See also Exhibits 4, 6, 9, and 10*.

34. With respect to the 25' easement by plat, Defendant Richard Parcel's own testimony confirms that Defendant Parcels are substantially interfering with Plaintiff Bierschenks' use. The *2004 Plat of Lots 14A and 14B* reflects that the entirety of the 25' easement is located on Defendant Parcels' property (Lot 14B). *Exhibit 2*. Defendant Richard Parcel testified that the distance between the right (or south side) of his pickup where it is typically parked to Defendant Parcels' dumpster is approximately 17'. *Transcript at 62-63*. However, he also admitted that the dumpster is situated on Defendant Bosch Trust's property (Lot 14A). *Transcript at 52, 55-56*. Taken together, these distances total approximately 24' (7' + 17' = 24'). Thus, even when measured from the dumpster—which is actually situated on Defendant Bosch Trust's property (Lot 14A)—Defendant Parcels are obstructing approximately one-third of the 25' easement by plat. However, as just noted, the 25' easement by plat does not extend onto Defendant Bosch Trust's property (Lot 14A). *Exhibit 2*.

35. Defendant Parcels' substantial interference with Plaintiff Bierschenks' reasonable use of the Easement is further evidenced by the fact that Defendant Parcels' conduct requires Plaintiff Merle Bierschenk and others to drive several feet onto—and

effectively trespass on—the north edge of Defendant Bosch Trust’s property (Lot 14A). While there presently is not a fence on the north edge of Defendant Bosch Trust’s property (Lot 14A), that may not always be the case. Defendant Parcels’ conduct is not ameliorated by the fact that the absence of such a fence today allows travel onto the north edge of Defendant Bosch Trust’s property (Lot 14A).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and the Court having examined all the pleadings, files, and records herein, and being otherwise advised in the premises, it is hereby:

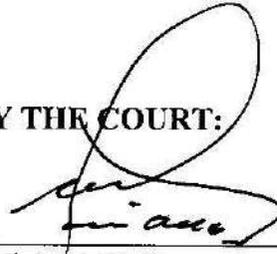
ORDERED as follows:

- (1) Title to a sixteen (16) feet wide easement across Lot 14B and Lot 14B (the servient estates) for road right-of-way and a four (4) feet wide easement for a water pipeline are quieted in favor of Lot 14C (the dominant estate).
- (2) The sixteen (16) feet wide easement begins at a point 164.04’ south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C).
- (3) The four (4) feet wide easement for a water pipeline begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line on the west half of Lot 14 (i.e., the property line of Lot 14C).
- (4) The Defendants are enjoined from obstructing, partially obstructing, and/or otherwise interfering with the use of (i) the sixteen (16) feet wide road right-of-

way easement and the four (4) feet wide water pipeline easement, both by grant, and (ii) the twenty-five (25) feet wide easement by plat previously recognized by the Court in its *Order Granting Plaintiffs' Motion for Summary Judgment* (03/21/24).

Dated this 4th day of September 2024.

BY THE COURT:



Michael W. Day
Fourth Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



FILED

SEP 04 2024

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

09CIV23-000067

Plaintiffs,

**AMENDED ORDER RE:
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

vs.

**RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH,
Co-Trustee of the William and Margaret Bosch Family Trust dated July 17, 2023,**

Defendants.

A hearing was held on August 12, 2024. The Court having considered the testimony of the witnesses, having reviewed the exhibits admitted and post-hearing submissions,¹ and having reviewed the entire file content; and good cause having been shown, the Court made and entered its *Findings of Fact, Conclusions of Law, and Order* on September 4, 2024.

Based on the Court's Findings of Fact and Conclusions of Law as set forth in its *Findings of Fact, Conclusions of Law, and Order* dated September 4, 2024, and the Court having examined all the pleadings, files, and records herein, and being otherwise advised in the premises, it is hereby:

ORDERED as follows:

- (1) Title to a sixteen (16) feet wide easement across Lot 14B and Lot 14A (the servient estates) for road right-of-way and a four (4) feet wide easement for a

¹ The matter was deemed fully submitted to the Court on August 29, 2024.

water pipeline are quieted in favor of Lot 14C (the dominant estate).

- (2) The sixteen (16) feet wide easement begins at a point 164.04 feet south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C).
- (3) The four (4) feet wide easement for a water pipeline begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line on the west half of Lot 14 (i.e., the property line of Lot 14C).
- (4) The Defendants are enjoined from obstructing, partially obstructing, and/or otherwise interfering with the use of (i) the sixteen (16) feet wide road right-of-way easement and the four (4) feet wide water pipeline easement, both by grant, and (ii) the twenty-five (25) feet wide easement by plat previously recognized by the Court in its *Order Granting Plaintiffs' Motion for Summary Judgment* (03/21/24).

BY THE COURT: 9/16/2024 7:28:14 AM



Honorable Mike Day
Fourth Circuit Court Judge

Attest:
Jensen, Alana
Clerk/Deputy



STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

MERLE G. BIERSCHENK and ANITA J. BIERSCHENK,

Plaintiffs,

vs.

RICHARD D. PARCEL, WENDY PARCEL and WILLIAM W. BOSCH, Co-Trustee of the William and Margaret Bosch Family Trust dated July 17, 2023,

Defendants.

09CIV23-000067

JUDGMENT

On March 21, 2024 the Court entered an *Order Granting Plaintiffs' Motion for Summary Judgment* regarding an easement by plat. On September 16, 2024, after hearing evidence and entering findings of fact and conclusions of law, the Court entered an *Amended Order Re: Findings of Fact and Conclusions of Law* regarding express easements and the Plaintiffs' request for injunctive relief. The claims having been fully adjudicated, judgment is hereby entered in favor of the Plaintiffs, and against the Defendants, as follows. It is hereby:

ORDERED, ADJUDGED and DECREED that title to a sixteen feet (16') wide easement for road right-of-way and a four feet (4') wide easement for a water pipeline across:

Lot 14B of Prairie View Addition to the City of Belle Fourche, Butte County, South Dakota, according to the plat recorded in the Office of the Butte County Register of Deeds as Document No. 2004-2400 and

Lot 14A of Prairie View Addition to the City of Belle Fourche, Butte County, South Dakota, according to the plat recorded in the Office of the Butte County Register of Deeds as Document No. 2004-2400

(the servient estates) is quieted in favor of:

Lot 14C of Prairie View Addition to the City of Belle Fourche, Butte County, South Dakota, according to the plat recorded in the Office of the Butte County Register of Deeds as Document No. 2008-1325.

(the dominant tenement). The sixteen feet (16') wide easement begins at a point 164.04 feet south of the northwest corner of Lot 14, and continues due east across the west half of Lot 14 to the east line of the west half of said Lot 14 (i.e., the property line of Lot 14C). The four feet (4') wide easement for a water pipeline begins at a point 180.04 feet south of the northwest corner of Lot 14 and continues due east across the west half of Lot 14 to the east line of the west half of Lot 14 (i.e., the property line of Lot 14C).

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a twenty-five feet (25') wide easement dedicated to use by the public exists across:

Lot 14B of Prairie View Addition to the City of Belle Fourche, Butte County, South Dakota, according to the plat recorded in the Office of the Butte County Register of Deeds as Document No. 2004-2400

in the location depicted in the attached *Plat of Lots 14A and 14B (Recorded in Doc. No. 2004-2400)* identified as a "25' ACCESS EASEMENT"

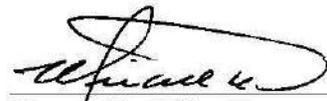
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants are enjoined from obstructing, partially obstructing, and/or otherwise interfering with the use of (i) the sixteen feet (16') wide road right-of-way easement and the four feet (4') wide water pipeline easement, both by grant, and (ii) the twenty-five feet (25') wide easement by plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Butte County Register of Deeds is hereby authorized and directed to record a copy of this *Judgment* in the chain of title of the above-described properties.

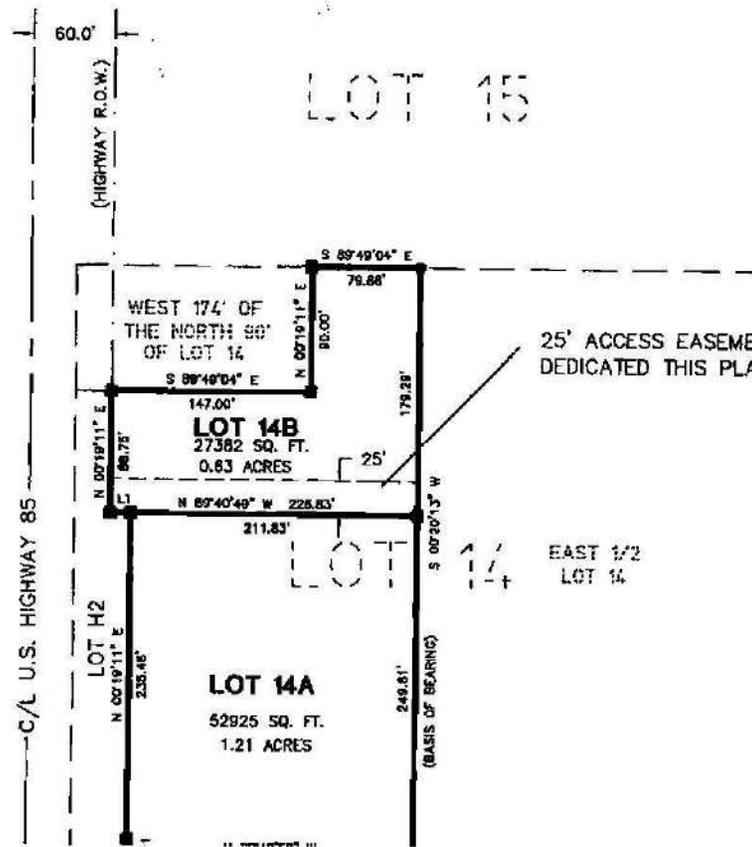
BY THE COURT: 10/9/2024 1:31:05 PM

Attest:
Jensen, Alana
Clerk/Deputy




Honorable Mike Day
Fourth Circuit Court Judge

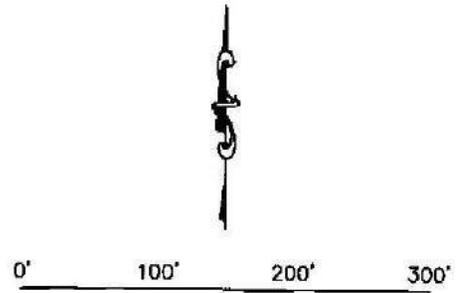
2004-2400 PLAT OF LOTS 14A AND 14B,
 A SUBDIVISION OF THE WEST 1/2 OF LOT 14 EXCEPT THE WEST 174' OF THE NORTH 90' OF LOT 14,
 AND EXCEPT LOT H2, LOCATED IN THE PRAIRIE VIEW ADDITION TO THE CITY OF BELLE FOURCHE,
 ALL LOCATED IN THE SE1/4 NE1/4 SECTION 3, T.8N., R.2E., B.H.M.,
 BUTTE COUNTY, SOUTH DAKOTA.

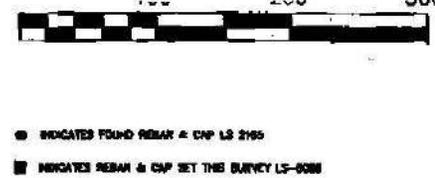
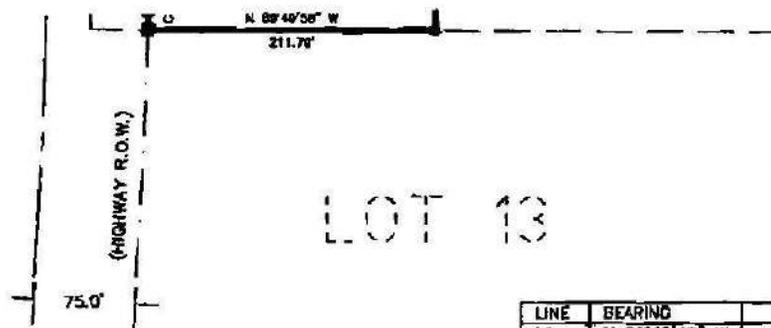


25' ACCESS EASEMENT FOR LOT 14A
 DEDICATED THIS PLAT

NOTES:

1. ANNEXATION MAP FOR THE WEST HALF LOT 14 PREVIOUSLY RECORDED AS DOCUMENT #97-115.
2. PLAT OF LOT H2-LOT 14-SE4ME4 3-8-2 PREVIOUSLY RECORDED IN PLAT BOOK 6 PAGE 162.
3. A 5' UTILITY EASEMENT IS HEREBY DEDICATED ALONG THE INTERIOR OF ALL FRONT, SIDE AND REAR LOT LINES UNLESS OTHERWISE SHOWN.





LINE	BEARING	DISTANCE			
L1	N 89°40'49\" W	15.00'			
CURVE	ARC LENGTH	DELTA ANGLE	RADIUS	CHORD LENGTH	CHORD BEARING
C1	14.71'	00°17'12\"	2840.00'	14.71'	S 00°27'47\" W

SURVEYOR CERTIFICATE

I, Randy L. Deibert, P.O. Box 408, Spearfish, S.D., being a Registered Land Surveyor in the State of South Dakota, #5086, do hereby certify that at the request of the owner and under my supervision, I have caused to be surveyed and platted the property shown and described hereon. I also certify that this plat is true and correct to the best of my knowledge and belief. This survey does not constitute a title search to determine ownership or easements of record. I further state that I did not obtain the signatures for the certificates other than the Surveyor Certificate. In witness whereof, I have hereunto set my hand and seal dated this 19th day of June, 2004.

[Signature]
Randy L. Deibert R.L.S. 5086

OFFICE OF COUNTY DIRECTOR OF EQUALIZATION
State of South Dakota
County of Butte

I, Allison Jensen ~~deputy~~ Director of Equalization, hereby certify that I have received a copy of this plat.

[Signature]
Allison Jensen ~~deputy~~
County Director of Equalization

OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte



Register of Deeds
Butte County, South Dakota
Recorded October 19, 2004
at 12:50 P M
Doc# 2004-2400
Book PB15 Page(s) 135
Fee 10.00

APPROVAL OF HIGHWAY AUTHORITY
State of South Dakota, County of Butte

The location of the proposed access roads abutting the county or state highway as shown hereon, is Hereby approved. Any change in the proposed access shall require additional approval. *Note: The only allowed access to Lot 14A will be relocation of existing access from Lot 14B*
HIGHWAY AUTHORITY *[Signature]*

CERTIFICATE OF TREASURER:
State of South Dakota, County of Butte

I, Alan Schuldies, County Treasurer of Butte County certify that all taxes and special assessments which are liens upon the herein platted property, registered to this Owner hereon as shown by receipts of my office have been paid.

Date: Sept 20, 2004
[Signature]
Butte County Treasurer



OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte

I, Terry Welterstaedt, City Engineer for the City of Fourche, do hereby certify that I have approved this plat with respect to the duties of my office and that



OFFICE OF REGISTER OF DEEDS
State of South Dakota
County of Butte

Filed for record this 30 day of Sept, 2004,
at 10:00 a.m., M. T. and recorded in Book _____
of Plats on page _____ File Document _____

at 12:50 P M
Doc# 2004-2400
Book P 815 Page(s) 135
Fee 10.00
By Paul A. Walk
Register of Deeds



Butte County Register of Deeds

CERTIFICATE OF OWNERSHIP
State of South Dakota
County of Butte

Guy Ferris do hereby certify that I/We
are the owners of the property shown and described hereon,
that we do approve this plat as hereon shown and that
development of this property shall conform to all existing
applicable zoning, subdivision, erosion and sediment
control regulations.

OWNER	ADDRESS
<u>Guy M. Ferris</u>	<u>1103 Jonas, Spearfish SD</u>
<u>J. M. Ferris</u>	<u>87783</u>

ACKNOWLEDGMENT OF OWNERSHIP:
State of South Dakota
County of Butte

On this 30th day of Sept, 2004, before me
a Notary Public, personally appeared
Guy M. Ferris known to me to be the person(s)
described in the foregoing instrument and acknowledged
to me that they executed the same.

My commission expires: 9/20/05
Heidi Stearns
Notary Public



PREPARED BY: BLACK HILLS SURVEYING, INC., P.O. BOX 408, SPEARFISH, SD 57783 605-642-8133

OFFICE OF THE CITY ENGINEER
State of South Dakota
County of Butte

I, Terry Wattershoff City Engineer for the City of
Fourche, do hereby certify that I have approved this
plat with respect to the duties of my office and that
I have received a copy of said plat for the City files.

Terry Wattershoff
Belle Fourche City Engineer



RESOLUTION OF THE COMMON COUNCIL:
State of South Dakota
County of Butte

Be it resolved that the City of Belle Fourche Common
Council, having viewed this plat and having received a
recommendation from the Belle Fourche Planning Commission,
does hereby approve this plat. Resolution adopted by
unanimous vote of the Belle Fourche Common Council
this 21 day of June, 2004.

Gloria J. Lander Todd Keller
City Finance Officer Mayor



RECOMMENDATION OF THE CITY OF
BELLE FOURCHE PLANNING COMM.:
State of South Dakota
County of Butte

This plat is hereby recommended for approval to the City
of Belle Fourche Common Council this 15 day of June
2004.

ATTEST: _____
Secretary
[Signature]
Chairman

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 30889

MERLE G. BIERSCHENK AND ANITA J.
BIERSCHENK,
Plaintiffs/ Appellees,

vs.

RICHARD D. PARCEL and WENDY PARCEL,
Defendant and Appellant,

and

WILLIAM BOSCH, CO-TRUSTEE OF THE
WILLIAM AND MARGARET BOSCH
FAMILY TRUST DATED JULY 17, 2023,
Defendants/ Appellees.

Appeal from the Circuit Court, Fourth Judicial Circuit
Butte County, South Dakota

The Honorable Michael Day

APPELLANT'S REPLY BRIEF

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Spearfish, SD 57783
Pro Se Appellee

NOTICE OF APPEAL WAS FILED NOVEMBER 6, 2024

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SUMMARY

The trial court made erroneous findings regarding the scope of the 16 foot easement created in 1948. The deed creating the easement clearly restricts the use of the easement and the dominant tenement to one private family dwelling. With regards to the 25 foot easement created by the 2004 plat, the trial court incorrectly determined this was a public easement. This determination is contrary to the plain language contained on the plat. The trial court's declaration of the existence of a public easement was also improper as the City of Belle Fourche, an indispensable party, was not made a party to this action.

ARGUMENT

1. The limiting language in the 1948 warranty deed restricts both the use of the property and the easement.

Bierschenks contend that stipulations in the 1948 deed do not restrict use of the easement but only use of the west half of the property. This ignores the relevant phrasing in the deed that identifies the west half of the lot to be transferred, and the easement across the east half, as one conveyance. "H.W. Kirby... grants, conveys, and warrants to Emily B. Goodwin... The East Half (E1/2) of Lot Fourteen (14)... together with a perpetual easement, for road right of way, sixteen (16) feet wide across the West Half of Lot Fourteen" SR. 231. The deed continues "**this conveyance** is made upon the following express stipulations..." *Id.* (**emphasis added**). The easement is part of the

conveyance subject to the express stipulation limiting use to one single family residence.

The fact the 1948 deed denotes the easement as “perpetual” does not negate the limitations placed on the scope of the easement. The easement is perpetual in time as long as the use of that easement fits within the limited scope intended by the grantee.

2. Guy Ferris’ intent in creating the 25 foot access easement was to ensure his access to Lot 14 A.

In their brief, Biershenks’ state “[f]inally, it is illogical to conclude that the City would specify a 25’ wide access easement where a 16’ wide ‘road right of way’ easement existed for decades’ but then not permit the owner of the east half of Lot 14 to use the easement.” *Appellees’ Brief, p. 20*. There is nothing in the record to indicate the City “specified” this easement. The 2004 plat was created by Guy Ferris, the then owner of the west half of Lot 14 in anticipation of selling a portion of the west half to the Parcels. SR 68, *Affidavit of Richard Parcel, §3-4*. The plat divided the western half of Lot 14 into Lot 14B to the north, and Lot 14A to the south. *Id.* Ferris included the 25 foot easement across the southern portion of Lot 14B in order to ensure maintained access to the Highway for Lot 14A, *Id. at ¶6*. What is illogical, is why Guy Ferris would create a 25 foot public access easement to the east half of Lot 14 when there was already an express easement created by the 1948 deed providing access to the east half.

The notation on the 2004 plat from the Highway Authority approving the location of the access road notes that “The only allowed access to Lot 14A will be relocation of existing access from Lot 14B”. *Id.* at ¶ 7; SR 252, Ex. 2. This, along with the plain language describing the access easement evidences that its purpose was to provide access to Lot 14A, not a general public access.

3. Bierschenks’ request in their Motion for Summary

Judgment that the trial court declare the existence of a 25 foot wide public easement was not properly pled or before the trial court.

Parcels do not claim that the Complaint did not allege the creation of an easement via the 2004 plat. The Bierschenks’ Complaint does allege that an express easement was created by both the 1948 warrant deed and the 2004 Plat. SR 2, ¶34-35. The issue arises in the demand for judgment made in the Complaint. The Complaint demands judgment, pursuant to SDCL §21-1-41, quieting title in the easement in favor of Lots 14C and Lot 14D (owned by the Bierschenks) SR 2, ¶34. Recognizing that South Dakota adheres to the rule of notice pleading, nothing in that Complaint could have put Parcels on notice that Bierschenks intended to claim the existence of a public easement (under SDCL § 11-3-12) as they did in their Motion for Summary Judgment. Bierschenks complain that Parcels did not allege the City was an indispensable party in their Answer. *Appellees’ Brief, p. 24, fn11.* That is

because the Complaint did not indicate Bierschenks intended to pursue a claim that would make the city an indispensable party.

Bierschenks cite to *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.* 2014 S.D. 59, ¶ n.6, 852 N.W. 2d 434, 439 for the proposition that a complaint does not have to outline each separate cause of action in order to raise those issues on appeal. *Appellees' Brief*, p. 23-24. This matter is distinguishable. In *East Side Lutheran Church*, the causes of action raised on appeal were at least consistent with those contained in the complaint, that being additional design or construction defects by the defendant that lead to damages to the property in question. 2014 S.D. 59, 852 N.W. 2d 434, 439. Here the cause of action and claim for relief requested at summary judgment, declaration of a public easement, was contrary to the claim for relief contained in the Complaint, quieting title to an easement in favor of one party.

4. The City of Belle Fourche is an indispensable party.

Bierschenks contend the Parcels reliance on this Court's rulings in *Busselman v. Egge*, 205 SD 38, 864 N.W.2d 786, *Thieman v. Bohman*, 2002 S.D. 52, 645 N.W.2d 260, and *Smith v. Albrecht*, 361 N.W.2d 626 (S.D. 1985), for the claim th City of Belle Fourche is an indispensable party, is misplaced *Appellees' Brief* p. 26. Bierschenks contend those cases are distinguishable because they concern whether there has been dedication of a "road" for public

use, rather than dedication of an “easement” for public use. *Id.* This claimed distinction is either non-existent or irrelevant.

Assuming for the sake of argument that the 25 foot access easement was a public dedication under SDCL 11-3-12, the City was an indispensable party whether or not the access easement was described as a road. In the *Thieman* decision, this Court found the trial court’s conclusion of law that “the City of Winner is not an indispensable party” was erroneous 2002 S.D. ¶ 14, 645 N.W.2d at 263. “If the relief sought were based on a private easement between the parties instead of a public easement, alley or road, the conclusion of law would have been correct. However, as indicated, that is not the situation here. The trial court erred in its determination.” *Id.* (emphasis added). This language would indicate that the Court’s ultimate holding, that the appropriate governmental entity is an indispensable party, applies whether the dedicated land is described as an easement or road.

Furthermore, it is disingenuous for the Bierschenks to claim the access easement is not a road. Bierschenks note in their brief that “[t]he Highway Authority wanted it clear that the 25’ wide easement was the only means of access to Lot 14A from Highway 85.” *Appellees’ Brief*, p. 28. Bierschenks cannot claim that the access easement is the only way of accessing Lot 14A from the adjoining highway, but is not itself a road. Merle Bierschenk also testified that it is his intent that his customers use the easement to reach

storage units where they would store recreational vehicles. MH 29: 1-3; 31: 5-19. This obviously contemplates use of the access easement as a road.

"Where a plat of a town or city is made out and recorded, and lots are made and designated thereon with spaces left which fairly indicate that they are set apart to the public, the spaces thus indicated are presumptively streets." *Atlas Lumber Co. v. Quirk*, 28 S.D. 643, 647, 135 N.W. 172, 174 (1912) citing *Elliott on Roads and Streets 3d Ed.*, Sec. 21.

The applicability of SDCL § 15-6-19(a) to whether the City is an indispensable party is clearly laid out in this Court's decisions in *Smith v. Albrecht*, 361 N.W.2d 626 (S.D. 1985), *Thieman v. Bohman*, 2002 S.D. 52, 645 N.W.2d 260, and *J.K. Dean, Inc. v. KSD, Inc.*, 2005 S.D. 127, ¶ 20, 709 N.W.2d 22, 26. Relying on that precedent, the *Busselman* court stated:

Here, however, the circuit court did not just determine that the plat had been "approved" or "partially accepted": the court found the service road had been "accepted" as a right-of-way for public use. Under *Smith*, *Thieman*, and *J.K. Dean*, an acceptance determination may, as a practical matter, impair or impede the appropriate public entities' ability to adequately protect its interests. See SDCL 15-6-19(a)(2)(i). Additionally, even if the governmental entity is not an indispensable party within the meaning of SDCL 15-6-19(a)(2)(i), the governmental entity is an indispensable party under SDCL 15-6-19(a)(2)(ii). The circuit court's determination that the service road was a dedicated right-of-way for public use may, in future litigation involving the appropriate public entity, leave *Busselman* and *Egges* "subject to a substantial risk of incurring ... inconsistent obligations by reason of [the public entity's] claimed interest."

Busselman v. Egge, 2015 SD at ¶10, 864 N.W.2d at 790.

Under SDCL § 15-6-19(a) and the case law cited above, the City of Belle Fourche is an indispensable party to Bierschenks claim that the 25 foot easement had been dedicated for public use.

CONCLUSION

For the foregoing reasons, and the argument and authority set for in their Appellants' Brief, the Parcels respectfully request this court vacate the trial court's judgment and remand this matter for further proceedings.

Respectfully submitted this 7th day of March, 2025.

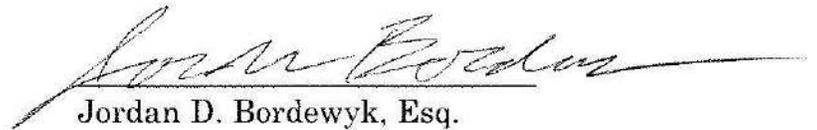
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Attorneys for the Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to S.D.C.L. § 15-26A-66, the foregoing brief is typed in proportionally spaced typeface in Century Schoolbook style font 12 point, does not exceed twenty pages, and does not exceed the word limit. The word processor used to prepare this brief indicated that there are no more than 1,673 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.



Jordan D. Bordewyk, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2025, a true and correct copy of Appellant's Reply Brief was served electronically through Odyssey

File and Serve upon:

upon:

John W. Burke
Thomas Braun Bernard & Burke, LLP
jburke@tb3law.com

And upon the following party by first class mail, postage prepaid:

William W. Bosch
Co-Trustee of the William and Margaret Bosch Family Trust
1825 Country Oak Lane
Spearfish, SD 57783


Jordan D. Bordewyk, Esq.