

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 27557

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**Carylyle Schliem and Farmers State Bank of Canton,**  
Plaintiffs and Appellants,

v.

**State of South Dakota, acting by and through the Department  
of Transportation and the South Dakota Transportation  
Commission,**  
Defendant and Appellee.

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

The Honorable Larry Long  
Circuit Court Judge

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APPELLANTS' BRIEF

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Notice of Appeal filed on the 26th day of August, 2015

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## **JURISDICTIONAL STATEMENT**

The trial court entered a judgment on July 31, 2015 by use of SDCL § 15-6-56(b), Summary Judgment. The State had filed a motion to dismiss for failure to state a claim which the trial court converted to a summary judgment.

The notice of appeal was filed and served on August 26, 2015. The notice of appeal was within thirty days of the judgment.

## **STANDARD OF REVIEW**

The standard of review of a grant of summary judgment is well settled.

Applications of the Constitution are reviewed under the de novo standard of review. SDCL § 15-6-56(b) and *Deadwood Stage Run, LLC v. South Dakota Dept. of Revenue*, 2014 S.D. 90, 857 N.W.2d 606.

*Hall II*, 2011 S.D. 70 § 8, explained “This Court reviews a grant of summary judgment 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.” *DRD Enterprises, LLC v. Flickema*, 2010 S.D. 88, ¶ 10, 791 N.W.2d 180, 183-184.

Summary judgment is an extreme remedy, to be granted only when the truth is clear. Reasonable doubts touching upon the existence of a genuine issue of material fact should be resolved against the movant. *Toben v. Jeske*, 2006 SD 57 ¶ 16. A material fact is one that would impact the outcome of a case under governing substantive law applicable to a claim or defense at issue. *A-GE Corp. v. State*, 2006 SD 66, ¶ 16.

## **LEGAL ISSUES**

- I. Did the trial court undertake the proper analysis required of an inverse condemnation claim rooted in the State and Federal Constitutions.**

The trial court did not complete a proper analysis and granted summary judgment.

*Rupert v. City of Rapid City*, 827 N.W.2d 55, 61 (S.D. 2013);

*Hurley v. State* 143 N.W.2d 722, 725 (S.D. 1966);

*Hall v. State Ex Rel SD Dept. of Transportation*, 2006 S.D. 24, 312 N.W.2d 22

(Hall I).

*Hall v. State Ex Rel SD Dept. of Transportation*, 2011 S.D. 70, 806 N.W.2d 217

(Hall II).

Article VI, Section 13 South Dakota Constitution.

**II. Did the Trial Court err by granting summary judgment in favor of the State based on a limited record with conflicting facts?**

The trial court granted summary judgment upon conflicting facts.

*Hall v. State Ex Rel SD Dept. of Transportation*, 2006 S.D. 24, 312 N.W.2d 22

(Hall I).

*Hall v. State Ex Rel SD Dept. of Transportation*, 2011 S.D. 70, 806 N.W.2d 217

(Hall II).

*DRD Enterprises, LLC v. Flickema*, 2010 S.D. 88, 791 N.W.2d 180.

*Deadwood Stage Run, LLC v. South Dakota Dept. of Revenue*, 2014 S.D. 90, 857

N.W.2d 606.

Article VI, Section 13 South Dakota Constitution.

## STATEMENT OF THE CASE

Landowner brought an inverse condemnation against the State under Article VI, Section 13 of the South Dakota Constitution. *SR 3*, ¶ 15.

The State filed a motion to dismiss an inverse condemnation action for failure to state a claim. SDCL § 15-6-12(b)(5). The motion was converted to a motion for summary judgment by the State. SDCL § 15-6-56(b).

The State claimed immunity for damages from the effects of a highway project upon landowner's real estate. The Honorable Larry Long, Circuit Court Judge, granted summary judgment. The trial court held that no "property right" had been invaded. The trial court also found that "diminishment in value, standing alone, is insufficient to qualify as 'damage'". Appx. 1.

The landowners alleged the highway project caused damage to real estate:

- a) by destroying commercial access;
- b) prevented the right of assemblage;
- c) prevented financially feasible improvement to the real estate's drainage;
- d) prevented financially feasible improvement to curb, gutter, and street;
- e) destroyed the right to develop the property to its highest and best use;
- f) left the property with unreasonable access;
- g) the damage was not suffered by the public generally.

The trial court's legal analysis did not comport with the requirements set forth by this Court in *Hall v. SDDOT*, 2006 S.D. 24, 712 N.W.2d 22 and other cases.

The case should be reversed in order that the trial court hears facts, applies the proper legal analysis, and writes reviewable findings of fact and conclusions of law upon this serious Constitution claim by a South Dakota landowner.

### **FACTS OF THE CASE**

Mr. Schliem's property lies within Northside Gardens Addition in Sioux Falls. This addition's access to Cliff Avenue was taken by the State's project to change a long standing interchange to Interstate 90. Following years of protest by landowners, the State took all commercial and reasonable access to Northside Gardens Addition.

The facts in this case are all from affidavits and testimony in other cases involving Northside Gardens. No depositions were taken. All of the State's evidence is contained in Appendix 3 and 4.

Carlyle Schliem purchased Lots 13 and 14, Northside Gardens Addition to the City of Sioux Falls roughly 25 years ago. His expectations of the property were as a place of residence, business, and as a potential investment. Mr. Schliem purchased the property because of its proximity to Interstate 90 and Cliff Avenue. *Settled Record 60, Affidavit of Schliem, paragraph 2.*





*Overhead image of Northside Gardens before the project with Schliem Property outlined.*

The DOT constructed Project Number P 2115 (39) (hereinafter “the project”) in 2013 and 2014; however planning for the project began many years earlier. *SR 140, exs. 7 and 8*. Concerns by landowners began in 2008 of the effects of the project on real estate in Northside Gardens. *SR 140, Ex. 7 (240:5-7)* Property owners in Northside Gardens lobbied and negotiated to eliminate aspects of the project that would be detrimental to a well-established plan to develop Northside Gardens into a premier commercial development with the crown jewel being a \$7 million Kelly Inn Hotel. *Id.* Kelly Inn owned lots 2, 3, 4, 16 and part of 17. *SR 140, ex. 3*. The plan of the adjoining property owners was to commercially develop the entire addition. *SR 140, exs. 7 and 8*.

The State project was multifaceted, but one of the most controversial parts was the closure of the intersection at Cliff Avenue and E. 63<sup>rd</sup> St. This closure would destroy the Kelly Inn project by eliminating all commercially viable access to the property along 63<sup>rd</sup> St. from Cliff Avenue. *SR 140, ex. 7*. In February of 2012, the State announced it would be closing the intersection at Cliff and E. 63<sup>rd</sup> despite years of lobbying efforts by landowners and city leaders to convince DOT to change its plans. *SR 140, exs. 7 and 8*.

Landowner's property value was seriously diminished as a result of the project. Landowner hired Dan Mueller, expert appraiser, to conduct an appraisal of the property before and after the date of damage, June 12, 2012. *SR 140 Ex. 6, Dan Mueller's Summary Appraisal Report*. Mr. Mueller concluded that before the date of damaging (i.e. before the project) the Schliem Property had a fair market value of \$464,800.00. The property had a highest and best use of commercial development. Mr. Mueller then found that in the after condition, the fair market value of the property had diminished to \$151,000.00. He opined the property now has a highest and best use as industrial property and had lost its assemblage rights. Mr. Mueller concluded the Schliem property had diminished in value by \$313,800.00. *Id at 58*.

Unrelated to this litigation, Mr. Schliem's lender ordered two appraisals from Mr. Greg Kaschmitter. One was completed before the project and one after. *SR 60, Exs. 1 and 2*. These appraisals were done for bank purposes without litigation in mind. The first appraisal completed on December 23, 2009 valued the Schliem property at \$271,100.00. *Id at 1*. The 2009 appraisal found the highest and best use of the Schliem property was commercial property in part because the site was adjacent to a new commercial development to the west (the Kelly Inn development). *Id at 13*. Farmers State Bank

again hired Kaschmitter Appraisals to appraise the Schliem property in January of 2014. *SR 60, ex. 2*. This appraisal was conducted after the majority of the highway project had been completed. The appraisal determined the value of the Schliem property to be \$105,000.00. *Id.* The value was based in part on the fact that the property no longer offered “any real commercial exposure or good accessibility.” *Id. at 15*. In short, the State’s project destroyed 100% of the commercial accessibility which was worth approximately \$165,000. The State offered no evidence that contradicted the appraisal evidence.

DOT’s project also damaged other real estate in Northside Gardens. In 2012, DOT purchased the Kelly Inn Property, Lots 2, 3, 4, 16, and 17 of Northside Gardens, in lieu of condemnation based upon an appraisal by John Schmick. *SR 140, exs. 3 and 4*. Mr. Schmick determined “the taking of the right of access across the front of Lot 2 has no measurable impact on the subject” (*Id. at 46*); however, the closure of the intersection at Cliff and E. 63<sup>rd</sup> St. left the Kelly Inn property with “no economically viable access sufficient to support development of the land.” *Id. at 41*. Mr. Schmick determined DOT’s project diminished the fair market value of Lots 2, 3, 4, 16, and 17 by \$395,000.00, and the Kelly Inn was compensated for those losses. *SR 140, ex. 2 and 3*.

Northside Gardens Lots 5, 6, 7, 8, and 15 (hereinafter “Miller-Walsh property”) has been litigated and also suffered damage caused by the project. In *State of South Dakota, by and through its Department of Transportation v. Robert Miller and Thomas Walsh* S.D. Second Circuit Civ. 12-1860, a jury found as a matter of law that damage occurred to those Northside Garden lots.

The purchase in lieu of condemnation of the Kelly Inn's property by SDDOT caused a decrease in fair market value of the Schliem property. *SR 140, Exs. 1 and 6*. Schliem's property was a part of an assemblage of premier commercial properties at the intersection of an interstate highway and one of the busiest streets in Sioux Falls. *SR 140, ex. 1*. Its highest and best use as a part of that assemblage has been destroyed by the State's project. The State's appraiser (Schmick), the landowner's appraiser (Mueller) and a neutral appraiser (Kaschmitter) all agreed the project unreasonably diminished access to Northside Gardens and destroyed all feasible assemblage rights. *Id.*

## **ARGUMENT**

- I. A trial court must use the proper constitutional analysis when considering the government's motion for summary judgement –The trial court did not.**
  - a. *Hurley* and *Hall I* provide the proper analysis for determining when an exercise of the police power requires just compensation.**

The State was successful in this case by labeling components of a government road project as non-compensable exercises of the police power. Labeling is an incomplete and improper analysis of an inverse condemnation claim. DOT argued cases in which this Court found limitations on access to be reasonable uses of the police power and thus non-compensable exercises of the police power. In each case cited by DOT, this Court provided a fact specific analysis of the exercise of the police power and its effect on the subject property. Those cases were decided under the specific facts of each case.

A quick review of Judge Long's memorandum decision reflects no consideration was given to reasonableness of the exercise of the police power or its effect on the landowner's property. Without the proper constitutional analysis required by this Court,

Judge Long erred in granting summary judgment by accepting the State's labeling techniques.

**b. *Hall* I sought to brighten the line between police power and compensable damaging.**

Police regulations must be reasonable. *Hurley v. State* 143 N.W.2d 722, 725 (S.D. 1966). It is important to recognize “it is difficult to determine with exactitude when regulation under the police power ends and a compensable taking of property begins.” *Id.* However, “the distinction is not whether it is a valid exercise of the police power, but whether or not the property itself is taken or damaged.” *Id.*

In *Hall v. State ex rel. South Dakota Dept. of Transp.*, 712 N.W.2d 22, (S.D. 2006), the Supreme Court wrestled with the blurry line between an exercise of the police power and a constitutional taking or damaging. The *Hall* Court discussed at length two South Dakota cases relevant to this issue, *Hurley v. State of South Dakota*, 143 N.W.2d 163, and *Darnall v. State*, 79 S.D. 59, 108 N.W.2d 201. Both cases, although reaching different ultimate conclusions as to compensation, stand for the edict that the exercise of the police power must be analyzed for reasonableness in an inverse condemnation case involving changes in access.

The present case is brought under both the State and Federal Constitutions. *SR 3*. This Court as well as the U.S. Supreme Court has cautioned against labeling certain exercises of the police power as compensable or non-compensable. There is “no magic formula [that] enables a court to judge, in every case, whether a given government interference with property is a taking.” *Rupert v. City of Rapid City*, 827 N.W.2d 55, 61 (S.D. 2013) *Ark. Game & Fish Comm’n v. United States*, 133 S.Ct. 511, 516, 184

L.Ed.2d 417 (2012). Instead, the viability of a takings claim is dependent upon “situation specific factual inquiries.” *Id.* The South Dakota Supreme Court cases relevant to the issues present in this case stress the importance of a thorough analysis of the facts rather than a rush to judgment.

*Darnall v. State*, 79 S.D. 59 (1961) concerned access to the newly built Interstate 90. Before Interstate 90 was built, the Darnalls enjoyed direct access to Highway 79. Of course they had no access to the interstate, as the road did not exist. The Darnalls’ “only complaint was that they did not have direct and immediate access to the *new* Interstate Highway.” *Emphasis supplied. Darnall* at 67. The *Darnall* Court held “circuitry of travel is not compensable damage *under these circumstances.*” *Emphasis supplied. Id.* The Court deemed the construction of the new interstate a lawful exercise of the police power, because access to the existing abutting roadway was not “unreasonably diminished or interfered with.” *Id.* The Darnalls had no Interstate access to be diminished, as Interstate 90 was a new road. The Darnalls’ only complaint was that drivers who once traveled Highway 79 in front of their business were now more likely to take the new interstate. Based on the facts of that case, this Court held the construction of the Interstate was a reasonable exercise of the police power.

*Hurley v. State*, 82 S.D. 156 (1966) concerned access to an existing roadway, West Boulevard in Rapid City. The State built a steel barrier between the Hurley’s service station and West Boulevard, leaving the owner with access to their property on the south side only. Like the Darnalls, the Hurleys brought a claim against the State for inverse condemnation. In analyzing the Hurleys’ takings claim, the Court noted that the proper exercise of the police power must be reasonable and cannot be arbitrary. *Hurley* at 163.

The Court considered whether access had been destroyed or materially impaired. *Id.* The facts as determined by an appointed Referee were that before the State's project, the highest, best and most profitable use of the Hurleys' property was for a service station with a fair market value of \$30,000. *Id.* at 160. After the project, the property was no longer usable as a service station and had a fair market value of \$10,000. *Id.* Based on the facts of that case, this Court held the State's actions were compensable because the plaintiff's right of access was substantially impaired and their damages were peculiar. *Hall I*, at 29.

**c. *Hall I* handed down a stern warning against rushing to judgment and failing to consider reasonableness of the change in accessibility.**

*Hall I*, 2006 S.D. 24, was the review of a Summary Judgment decision by the lower court. *Hall I* concerned the alteration of access to an existing network of roads, i.e. Ellsworth Road and Interstate 90. The State's project closed the on-ramp from Ellsworth Road to Interstate 90. Before the project, the Halls had direct access to Ellsworth Road which connected to Interstate 90 via the interchange. After the project, the direct access to Ellsworth Road was unchanged, but accessibility to Interstate 90 was still legally available, but no longer commercially viable as travelers on the Interstate would be required to travel several miles out of their way to reach the convenience store.

In its analysis in *Hall*, this Court compared and contrasted *Darnall* and *Hurley* and concluded that although the cases reached different results, the same principles applied to each. The Court reconciled the different outcomes by stating:

Without a clear delineation, the relationship between the rights of the property owner and the rights of the state *must be considered in light of the facts of each case*. Therefore, in each case, the "relative rights of the public and private interests must be considered and the reasonableness of

the regulation and the degree of its interference with private property determined. *Emphasis supplied. Hall I* at 29 citing in part *Hurley* at 163.

The Court went on to provide three specific considerations the trial court must make before determining whether an exercise of the police power gives rise to a taking or damaging.

1. One consideration when assessing the landowner's interest is the extent to which the landowner's access is diminished. *Hall I*, 2006 S.D. 24 at 30.
2. Additionally, consideration must be given to the reasonableness of the exercise of the state's police power. *Id.*
3. Another consideration is whether the landowner's damages are different in kind and not merely in degree from that experienced by the general public. *Id.*

The Court determined "it is clear from the record that the parties rushed to summary judgment," and cautioned "This hurried effort was ill advised." "The owner's complaint specifically challenged the loss of reasonable and convenient access to I-90, yet that particular issue was not addressed by the trial court's summary judgment decision." *Id.*

Landowner's Complaint in this matter alleged the State had destroyed his right to reasonable access to the highway system. SR 3, ¶7. Judge Long's memorandum decision does not make any conclusions regarding the extent of the diminishment of access, whether the exercise of the police power was reasonable, or whether the injury complained of was peculiar to Landowner's property. *Appx. I.*



**II. Based on the evidence submitted by the State, it was impossible for the trial court to perform the requisite legal analysis.**

An alleged inverse condemnation must be considered in the light of the facts of each case. Here the State has provided only 6 pages of evidence to support its motion. The State's evidence includes 3 maps of the area attached to a 3 page Affidavit of Mark Lieferman (Appx 4), and 20 Undisputed Material Facts (Appx. 3). Based on this extremely limited record the trial court has no basis to rush to judgment. The State's evidence did not provide sufficient facts to determine or support a finding of reasonableness necessary to grant summary judgment.

**a. The State failed to provide evidence for the trial court to analyze "reasonable access."**

The State's Statement of Undisputed Material Facts (Appx. 3) and the Affidavit of Mark Lieferman (Appx. 4) are the only documents containing evidence the State filed in support of its Motion. Part of the proper analysis under *Hall I* requires the trial court find the diminishment in access caused by the project was not unreasonable. The State's Undisputed Material Facts simply describes the physical aspects of the property. Appx. 3, SR 37, ¶'s 8-20. Mr. Lieferman's affidavit also broadly describes the project and measurements concerning access. Appx 4.

The State provided no definitive evidence that the replacement access is reasonable. By its own admission, the State has provided the property with access by building the 63<sup>rd</sup> Street Extension. Appx. 4. However, no sworn evidence supports a finding of reasonable access. The Hurley's property was left with legal access to Omaha

Street in Rapid City after the State's project, however, the court ruled based on the facts of that case that access had been unreasonably impaired. *Hurley* 82 S.D. at 159.

There are facts in dispute concerning the issue of the reasonableness of the replacement access. The State's scant Undisputed Material Facts leave some inference that the property was left with reasonable access. Landowner disputed the weak assertion.

The States Undisputed Fact 17 reads:

After the project, drivers wishing to access properties on 63<sup>rd</sup> Street will likely come from 60<sup>th</sup> Street, travel north on National Avenue or Gulby Avenue, and then proceed west down 63<sup>rd</sup> Street to their destination. (SR 37).

Landowner responded to this fact as follows:

Admit that is a legal alternative access constructed by DOT following its closure of the intersection at 63<sup>rd</sup> and Cliff. After the closure of the intersection, drivers attempting to reach the properties also use routes across the Perkins Restaurant property (Lot 19) to reach E. 63<sup>rd</sup> St. or use Wayland Avenue from 60<sup>th</sup> or 61<sup>st</sup>. Neither these nor any alternative built by the State provides a reasonable replacement access. *Affidavit of Healy, ex. 2. Summary Appraisal Report of John Schmick p. 41. Affidavit of Healy, ex. , I Summary Appraisal Report of Dan Mueller.*

State's Undisputed Fact 18:

After the Project, drivers coming from the east on 60<sup>th</sup> Street will likely travel about 1,500 feet less to reach the Property.

State's Undisputed Fact 19:

After the Project, drivers coming from the west on 60<sup>th</sup> Street or the south on Cliff Avenue will likely travel about 1,100 feet more to reach the Property.

State's Undisputed Fact 20:

After the project, drivers coming from the north on Cliff Avenue will likely travel about 3,050 feet farther to reach the Property.

Landowner's response to State's Undisputed Facts 18, 19, and 20:

Admit but deny the alternative routes provide reasonable access which is why the fair market value of the properties has diminished significantly. *Affidavit of Healy,*

*ex. 2. Summary Appraisal Report of John Schmick p. 41. Affidavit of Healy, ex. ,1 Summary Appraisal Report of Dan Mueller.*

These disputed facts prohibit summary judgment.

The first inquiry for reviewing the trial court's summary judgment decision should be whether the material facts are undisputed. *Hall* 2006 S.D. at ¶9. A material fact is one that would impact the outcome of a case under governing substantive law applicable to a claim or defense at issue. *A-GE Corp. v. State*, 2006 SD 66, ¶ 16. Under *Hall I*, reasonableness of the remaining access is material to a taking or damaging conclusion by the trial court.

Judge Long entered no findings of fact in this case. His analysis lacked any determination of reasonableness or unreasonableness of the replacement access. His memorandum provided no undisputed material facts to dismiss the evidence of material damage to the property caused by the loss of assemblage rights. Appx. 1.

**b. The state provided no evidence that its exercise of the police power was reasonable.**

The trial court could not consider reasonableness of the exercise of the police power because the state provided no evidence on the point. All the evidence in the record proves unreasonableness. This Court in *Hall* provided guidance as to what facts would make an exercise unreasonable.

[The state] cannot, under the guise of the police power, impose unreasonable or arbitrary regulations which go beyond that power, and in effect deprive a person of his property within the purview of the law of eminent domain, as by depriving the owner of all profitable use of the property not per se injurious or pernicious, restricting the lawful uses to which the property can be put and destroying its value, permanently so restricting the use of the property that it cannot be used for any reasonable

purpose, or completely destroying the beneficial interest of the owner. *Id* citing *Hurley*.

The State has provided no evidence to establish that the project has not damaged the lawful uses to which the property can be put and destroying its value. To the contrary, Landowner has presented serious evidence that the project has done exactly what *Hurley* and *Hall* prohibit.

In *Hurley*, the Court held that a 66% reduction in fair market value due to the change in access was evidence of unreasonableness. *Hurley supra*.

The Schliem property was diminished in value significantly as a result of the project. Mr. Mueller concluded that before and after DOT's project, the Schliem property had diminished in value by \$313,800.00, or 67.5%. *Id at 58*. Kaschmitter found a 61% diminishment in value caused by the project. (SR 60). That damage is attributable largely to destruction of commercially viable access to the subject property and loss of assemblage rights. *Id*.

The State offered no damage evidence that contradicts Plaintiff's claim of unique damage.

Mr. Schmick's appraisal of the Kelly Inn property and the Jury's verdict in *State v. Miller and Walsh* are also evidence of the unreasonable access and harm to assemblage rights caused by the closure of the intersection. Mr. Schmick, as the State's appraiser, wrote on page 41 of his summary appraisal report of Northside Gardens Lots 2, 3, 4, 16 and 17:

The taking of right of access will also close the 63<sup>rd</sup> St. Connection to Cliff Avenue. As a result, the subject will be left with no economically viable access sufficient to support development of the land. Legal access is still available from some smaller county roads through a residential area to the east. In essence, the subject will have physical and legal access but

lose the opportunity to the upgraded East 63<sup>rd</sup> Street to city standards sufficient to develop the land.

Landowner's facts in this case show that the fair market value of his property was diminished severely by the project and that the cause of that diminishment was the impairment of access and the destruction of its highest and best use. These facts contest that the exercise of the police power was reasonable as to its effect on Landowner's property.

The State presented no evidence that the value had not been significantly diminished or the potential use of the property had not been severely limited. Therefore facts existed in record that the exercise of the police power was unreasonable under *Hurley and Hall I*. The existence of these facts should have prevented summary judgment in favor of the state.

**c. The State presented no evidence that the damages complained of were not peculiar to Landowner's property.**

The reasonableness of the State's action is clearly in dispute. What was not in dispute at the time of the Summary Judgment hearing was that landowner had sustained considerable damage as a result of the State's project. Landowner's damage is to real estate which is a unique piece of property. The State offered no evidence that the property had not been damaged, but rather focused on immunity arguments.

In his letter decision Judge Long wrote "It is perhaps true that the value of the property has been diminished as the result of the project, but I find that such diminishment in value, standing alone, is insufficient to qualify as "damage" sufficient to allow compensation to be awarded from DOT." *Appx. 1, p. 4*. This statement by the trial court which finds the necessary elements proving the State liable for a constitutional

damaging is simply an error of law. This error is caused by the trial court's failure to properly analyze the specific facts as this Court has directed.

Plaintiff's proved that their property was damaged by the State's project. The State provided no contradictory evidence on this point and no evidence that other real estate had been similarly damaged by the project. This case should be returned to the trial court.

**d. North Dakota has considered similar closures.**

The South Dakota Constitution, Art. VI, § 13, and the North Dakota Constitution, Art. 1, § 16 each protect private property against taking and damaging at the hands of the government.

"Mere inconvenience of travel does not constitute substantial impairment of access. The issue of remaining access is to be determined on the basis of reasonableness, adequacy and commercial practicability. *Union Elevator & Warehouse Company, Inc. v. State of Washington, by and through the Dept. of Transp.* 980 P2d. 779 (1999). North Dakota has recognized that the loss of traffic, loss of business, and circuity of travel are not themselves compensable, however, they are evidence of reasonableness of remaining access. *Cady v. North Dakota Dept. of Transp.*, 472 N.W.2d 467 (N.D. 1991).

There are no written South Dakota decisions directly on the issue of whether the closure of a street intersection can lead to the requirement of just compensation; however our Supreme Court has found our constitutional protections must be broadly construed. *Hurley* at 729. North Dakota has precedent on the issue. In *Guerard v. State of North Dakota*, 220 N.W.2d 525 (N.D. 1974), the owner of property abutting a street which was

made into a cul-de-sac by closing one end of the street brought an inverse condemnation action despite the fact that their property was 175 feet from the closed intersection.

The State of North Dakota made similar immunity arguments to those DOT is making in the present case, arguing that 1.) the police power allows the State to damage property without requiring just compensation and 2.) the Owner was foreclosed from bringing a claim from inverse condemnation because the lot at issue did not abut the closed intersection. *Id* at 526-527. The North Dakota Supreme Court rejected these arguments and held that where property was left in a cul-de-sac, as the Schliem property has been, the owner is not foreclosed from recovery if he or she can prove peculiar damage. *Id* at 528. The *Guerard* Court did not rule that the damage was or was not compensable; however, it did rule that summary judgment on the issue of liability was improper if based solely on the “police power” and “abutting” arguments of the State. *Id* at 528. The law would be well served if South Dakota joins its sister state on this Constitutional issue.

## **CONCLUSION**

The trial court’s judgment should be reversed and the case returned for trial. The trial court should be instructed to enter findings of fact and conclusions of law together with an explanation of the decision sufficient for meaningful review by this Court.

Respectfully submitted this 18th day of November, 2015.

MEIERHENRY SARGENT LLP

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

### **CERTIFICATE OF SERVICE**

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

Karla Engle  
South Dakota Department of Transportation  
700 East Broadway Avenue  
Pierre, SD 57501

On this 18th day of November, 2016.

MEIERHENRY SARGENT LLP

/s/ Mark V. Meierhenry



## **CERTIFICATE OF COMPLIANCE**

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,619 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 18th day of November, 2016.

MEIERHENRY SARGENT LLP

/s/ Mark V. Meierhenry\_\_\_\_\_

## **APPENDIX**

Tab 1 - Honorable Larry Long's Memorandum Decision, dated July 23, 2015	
.....	Appx. 1-5
Tab 2 - Final Judgment .....	Appx. 6
Tab 3 - State of South Dakota's Statement of Undisputed Material Facts	
.....	Appx. 7-9
Tab 4 - Affidavit of Mark Leiferman .....	Appx. 10-15
Tab 5 - Response to State of South Dakota's Statement of Undisputed	
Material Facts .....	Appx. 16-19
Tab 6 - Defendant State of South Dakota's Motion for Summary Judgment	
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.....	Appx. 20-21

**CIRCUIT COURT OF SOUTH DAKOTA  
SECOND JUDICIAL CIRCUIT  
LINCOLN & MINNEHAHA COUNTIES**

425 North Dakota Avenue  
Sioux Falls, SD 57104-2471

**CIRCUIT JUDGES**

Lawrence E. Long, Presiding Judge  
Joseph Neiles  
Bradley G. Zell  
Patricia C. Riepel  
Douglas E. Hoffman  
Robin J. Houwman  
Mark E. Salter  
Susan M. Sabers  
Joni M. Cutler  
John R. Pekas

**COURT ADMINISTRATOR**

Karl E. Thoennes III

Telephone: 605-367-5920

Fax: 605-367-5979

Website: [ujs.sd.gov/Second\\_Circuit](http://ujs.sd.gov/Second_Circuit)

July 23, 2015

Karla Engle  
SD Department of Transportation  
700 East Broadway  
Pierre, SD 57501

Mark Meierhenry  
315 S. Phillips Ave.  
Sioux Falls, SD 57104

RE: Schliem and Farmers State Bank v. South Dakota DOT  
CIV 14-2147  
Cross Motions for Summary Judgment

Dear Counsel:

This case is before the Court on cross motions for Summary Judgment. Those motions were heard on June 26, 2015. After considering the arguments and submissions of counsel, and the contents of the file, I find the following facts to be undisputed:

**FACTS**

Plaintiffs are the owner and mortgage holder, respectively, of Lots 13 and 14 of North Side Gardens in the SW1/4SW1/4 of Section 27, Township 102 North, Range 49 West of the 5<sup>th</sup> P.M.,

Minnehaha County, S.D. (hereafter "the Property"). The Property is located on the south side of 63<sup>rd</sup> Street North (hereafter 63<sup>rd</sup> Street), Sioux Falls, about 748 feet east of the intersection of 63<sup>rd</sup> Street with Cliff Avenue. The Property is abutted by 63<sup>rd</sup> Street on the north and Wayland Avenue on the east.

In 2013 and 2014 Defendant S.D. Department of Transportation (hereafter DOT) reconstructed a portion of Interstate 90 and a nearby portion of S.D. Highway 115, a/k/a North Cliff Ave, (hereafter "Cliff Avenue") in Minnehaha County, S.D. This work was done pursuant to DOT project No. IM 0909(80)397 and Project No. P 2115(39) in Minnehaha County, S.D. (hereafter the "Project"). The Project is substantially completed.

Prior to the commencement of the Project, 63<sup>rd</sup> Street intersected with Cliff Avenue about 66 feet south of the Interstate 90 east-bound on-ramp. 63<sup>rd</sup> Street extended east from Cliff Avenue and dead-ended at a point about 1262 feet east of Cliff Avenue. About 300 feet east of the dead-end point, 63<sup>rd</sup> Street resumed and intersected with National Avenue and Gulby Avenue. Before the Project, the only reliable method of access to the Property was via 63<sup>rd</sup> Street at Cliff Avenue because Wayland Avenue is a 17 feet wide unimproved road and is often impassable.

As part of the Project, DOT closed 63<sup>rd</sup> Street at its intersection with Cliff Avenue. The purpose of the closure was to prohibit traffic from entering Cliff Avenue from 63<sup>rd</sup> Street in order to improve traffic movement on Cliff Avenue and on the nearby interstate ramp. DOT also built an asphalt extension of 63<sup>rd</sup> Street from its dead-end point east of Cliff Avenue to 63<sup>rd</sup> Street at its intersection with National Avenue, thereby connecting 63<sup>rd</sup> Street from its pre-construction dead-end to its intersection with National Avenue. As a result, after the Project, access to the Property is gained via 60<sup>th</sup> Street to either National Avenue or Gulby Avenue to 63<sup>rd</sup> Street North. The additional travel distance to the Property is about ½ mile over the pre-construction route.

Before the Project, the Property was situated on a dead-end street accessed via Cliff Avenue to 63<sup>rd</sup> Street. After the Project, the Property remains situated on a dead-end street accessed via National or Gulby Avenue to 63<sup>rd</sup> Street.

As part of the Project, DOT purchased Lots 2, 3, 4, 16, 17, and part of 18 of Northside Gardens from Kelly Inns, Inc. Also, as part of the Project, the owners of Lots 5, 6, 7, 8, and 15 of Northside Gardens have been awarded compensation by a jury as

the result of a permanent highway easement and temporary easement imposed on the referenced property.

As part of the Project, DOT has not purchased any rights of way, temporary easements, or other property rights from the owners of the Property. DOT has not made any offers to the owners of the Property in connection with any purchase of any rights to the Property. Plaintiffs have not identified any peculiar damage to the Property they have suffered as the result of the Project, other than diminished value.

#### DISCUSSION

Plaintiffs' claims are rooted in the South Dakota Constitution.

"This Court has previously determined that South Dakota's Constitution provides greater protection for its citizens than the United States Constitution because "our Constitution requires that the government compensate a property owner not only when a taking has occurred, but also when private property has been 'damaged.'" KRIER 709 NW2d at 846. Thus, "where no part of an owner's land is taken [,] but because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable . . ."

RUPERT V. CITY OF RAPID CITY, 827 NW2d 55, 60-61.

The "damage" described above is generally known as "consequential damage". However, not all "consequential damage" is compensable. The South Dakota Supreme Court has identified those types of consequential damage which are compensable.

". . . In KRIER V. DELL RAPIDS TOWNSHIP, this Court recognized that in order for a plaintiff to recover under the consequential damages rule, he or she must prove that 'the consequential injury is peculiar to [their] land and not of a kind suffered by the public as a whole.' (cite omitted) Further, the plaintiff's injury 'must be different in kind and not merely in degree from that experienced by the general public.' (cite omitted) Nevertheless, there is 'no magic formula [that] enables a court to judge, in every case, whether a given government interference with property is a taking. (cite omitted) Instead, the viability of a takings claim is dependent upon 'situation-specific factual inquiries.'" RUPERT 827 NW2d at 61.

The South Dakota Supreme Court has held that the owner of land abutting a street subject to a DOT project has certain rights in the street distinct from the general public. The abutting

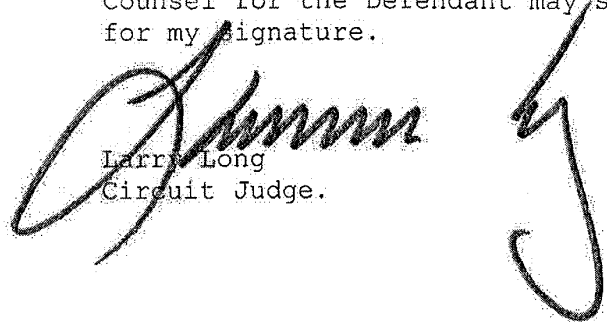
landowner's rights include, among other things, reasonable (but not absolute) access, ingress, and egress to the abutting street. The test seems to be: "If, after the construction of a public improvement an abutting landowner continues to have reasonable access to his property, he has no compensable complaint. But if the right of access is destroyed or materially impaired, the damages are compensable if the injury sustained is peculiar to the owner's land and not of a kind suffered by the public generally." See HURLEY V. STATE, 143 NW2d 722 at 724-5. In this case the Plaintiffs' right of access has not been "substantially" impaired.

DARNALL V. STATE 108 NW2d 201, is a rare South Dakota case addressing inverse condemnation claims of land owners whose properties did not abut a DOT street project. Darnall owned a café, cabins, and a filling station on the west side of First Street in Piedmont, S.D. First Street was, at the time, also designated as U.S. Highway 14 and State Highway 79. DOT constructed Interstate 90 east of Piedmont. All of the construction of I-90 was completed east of the Highway 14/79 right of way, except that I-90 occupied a portion of the ditch on the east side of the Highway 14/79. No part of the traveled portion of Highway 14/79 was disturbed by the DOT project. DOT did, however, install a curb and gutter between Highway 14/79 and I-90 to prohibit Highway 14/79 traffic from entering I-90 and to prohibit I-90 traffic from entering highway 14/79, except at two interchanges, one about a mile north and another about a mile south of the Darnall property. The SD Supreme Court reversed a monetary award in favor of the Plaintiffs. The Court pointed out that "curbs or median strips dividing a street or highway which prevent motorists from crossing it . . . except by a more circuitous route, have been approved and held not to be basis for an award of damages." The court also observed: "A property right must be invaded before compensation is allowed. No such invasion appears here." DARNALL at 206, 207.

Plaintiff argues that the "damage" in this case is to the title to the land. I disagree. I see nothing in the record which could be fairly termed to be a "cloud" on the title to the Property, at least as the result of the DOT Project. I do not find a "property right" in the Property that has been invaded as the result of the Project. It is perhaps true that the value of the Property has been diminished as the result of the Project, but I find that such diminishment in value, standing alone, is insufficient to qualify as "damage" sufficient to allow compensation to be awarded from DOT.

Summary Judgment for the Defendant is Granted.

Counsel for the Defendant may submit the appropriate documents  
for my signature.

A handwritten signature in black ink, appearing to read "Larry Long", followed by a large, stylized flourish or checkmark-like symbol.

Larry Long  
Circuit Judge.



IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

Case No.: Civ. 14-2147

**VS.**

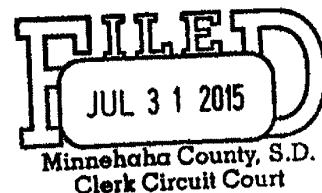
## FINAL JUDGMENT

**Defendant.**

Dated this 31st day of July, 2015.

Hon. LARRY LONG  
PRESIDING CIRCUIT COURT JUDGE

By: Kari Dunn Hall  
(SEAL)



IN CIRCUIT COURT  
SECOND JUDICIAL CIRCUIT

CARLYLE SCHLIEM  
AND FARMERS STATE BANK  
OF CANTON,

Plaintiff(s),

VS.

Case No.: Civ. 14-2147

# STATE OF SOUTH DAKOTA'S STATEMENT OF UNDISPUTED MATERIAL FACTS

THE STATE OF SOUTH DAKOTA, Acting  
by and through the Department of  
Transportation and the South Dakota  
Transportation Commission,  
Defendant.

Defendant State of South Dakota identifies the following undisputed material facts in support of its motion to dismiss, with prejudice, for failure to state a claim upon which relief may be granted.

1. In 2013 and 2014, DOT constructed Project No. IM 0909(80)397 and Project No. P 2115(39) in Minnehaha County, South Dakota (collectively “the Project”). *Affidavit of Mark Leiferman at 1, ¶¶ 3 and 4.*
2. The Project has been substantially completed. *Id.*
3. DOT did not purchase any right of way, temporary easements, or other property rights from the owners of Lots 13 and 14 of North Side Gardens in the SW1/4 SW1/4 of Section 27, Township 102 North, Range 49 West of the 5<sup>th</sup> P.M., Minnehaha County, South Dakota (“the Property”). *Id. at ¶5.*
4. The only streets abutting the Property are 63<sup>rd</sup> Street to the north and Wayland Avenue to the east. *Id. at ¶6.*
5. The segment of 63<sup>rd</sup> Street that abuts the Property is a dirt and gravel road. *Id.*
6. Wayland Avenue is a seventeen-foot-wide dirt road that is sometimes impassable. *Id.*
7. Before the Project, East 63<sup>rd</sup> Street North (“63<sup>rd</sup> Street”) intersected with Cliff Avenue and then extended eastward, ending in a dead-end approximately 1,282 feet away from the intersection. *Id. at 2, ¶7.*

8. Before the Project, 63<sup>rd</sup> Street resumed roughly 300 feet east of this dead-end to intersect with National Avenue and Gulby Avenue. *Id.*
9. Both before and after the Project, National Avenue and Gulby Avenue intersect with East 60<sup>th</sup> Street North ("60<sup>th</sup> Street"), a busy thoroughfare in Sioux Falls. *Id.*
10. Before the Project, the intersection of Cliff Avenue and 63<sup>rd</sup> Street was less than 100 feet from the eastbound on-ramp to Interstate 90. *Id.* at ¶8.
11. The proximity of this intersection to the on-ramp hindered efficient traffic movements on Cliff Avenue and the interstate ramp. *Id.*
12. As part of the Project, DOT built an asphalt extension of 63<sup>rd</sup> Street. *Id.* at ¶9.
13. After the Project, the segment of 63<sup>rd</sup> Street that previously intersected with Cliff Avenue now extends eastward to intersect with National Avenue. *Id.* at ¶9.
14. After the extension of 63<sup>rd</sup> Street was completed, DOT closed the intersection of Cliff Avenue and 63<sup>rd</sup> Street.
15. Now, 63<sup>rd</sup> Street dead-ends just before reaching Cliff Avenue. *Id.*
16. Prior to the Project, drivers wishing to access properties on 63<sup>rd</sup> Street likely came from Cliff Avenue, turned east onto 63<sup>rd</sup> Street at the Cliff Avenue/63<sup>rd</sup> Street intersection, and then proceeded east down 63<sup>rd</sup> Street to their destination. *Id.* at ¶10.
17. After the Project, drivers wishing to access properties along 63<sup>rd</sup> Street will likely come from 60<sup>th</sup> Street, travel north on National Avenue or Gulby Avenue, and then proceed west down 63<sup>rd</sup> Street to their destination. *Id.* at ¶11.
18. After the Project, drivers coming from the east on 60<sup>th</sup> Street will likely travel about 1,500 feet less to reach the Property. *Id.* at ¶12.
19. After the Project, drivers coming from the west on 60<sup>th</sup> Street or the south on Cliff Avenue will likely travel about 1,100 feet more to reach the Property. *Id.* at ¶13.
20. After the Project, drivers coming from the north on Cliff Avenue will likely travel about 3,050 feet farther to reach the Property. *Id.* at ¶14.

Dated this 19<sup>th</sup> day of February, 2015.

STATE OF SOUTH DAKOTA  
MARTY JACKLEY, ATTORNEY GENERAL



Karla Engle  
Special Assistant attorney General  
South Dakota Department of Transportation  
Office of Legal Counsel  
700 East Broadway Avenue  
Pierre, SD 57501-2586  
(605) 773-3262

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 19, 2015, a true and correct copy of the foregoing *Defendant State of South Dakota's Statement of Undisputed Material Facts* was mailed by first class mail, postage prepaid to:

Mark Meierhenry  
Clint Sargent  
Christopher Healy  
Meierhenry Sargent, LLP  
315 South Phillips Avenue  
Sioux Falls SD 57104

Larry Nelson  
Frieberg, Nelson & Ask  
P.O. Box 38  
Canton SD 57103.

Dated this 19<sup>th</sup> day of February, 2015.



Karla L. Engle  
Special Assistant Attorney General

STATE OF SOUTH DAKOTA )  
 )  
COUNTY OF MINNEHAHA )

IN CIRCUIT COURT  
  
SECOND JUDICIAL CIRCUIT

CARLYLE SCHLIEM  
AND FARMERS STATE BANK  
OF CANTON,

Plaintiff(s),

vs.

THE STATE OF SOUTH DAKOTA, Acting  
by and through the Department of  
Transportation and the South Dakota  
Transportation Commission,  
Defendant.

Case No.: Civ. 14-2147

**AFFIDAVIT OF MARK  
LEIFERMAN**

Mark Leiferman being first duly sworn upon oath, deposes and states as follows:

1. I have been employed by the South Dakota Department of Transportation ("DOT") since January 23, 1989. From December 9, 2005 to the present, I have been the chief road design engineer for DOT.
2. My job duties include managing the design and plan preparation for DOT highway projects.
3. As part of my job, I managed the design and plan preparation of the DOT project known as Project No. IM 0909(80)397 and Project No. P 2115(39) in Minnehaha County, South Dakota (collectively "the Project"). The Project involved reconstruction of a portion of Interstate 90 and South Dakota Highway 115, which is also known as North Cliff Avenue ("Cliff Avenue").
4. DOT constructed the Project in 2013 and 2014. Construction of the Project is substantially completed.
5. DOT did not purchase any right of way, temporary easements, or other property rights from the owners of Lots 13 and 14 of North Side Gardens in the SW1/4 SW1/4 of Section 27, Township 102 North, Range 49 West of the 5<sup>th</sup> P.M., Minnehaha County, South Dakota ("the Property").
6. The only streets abutting the Property are 63<sup>rd</sup> Street to the north and Wayland Avenue to the east. The segment of 63<sup>rd</sup> Street that abuts the Property is a dirt and gravel road. Wayland Avenue is a seventeen-foot-wide dirt road that is sometimes impassable.

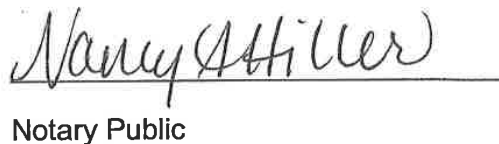
7. Before the Project, East 63<sup>rd</sup> Street North ("63<sup>rd</sup> Street") intersected with Cliff Avenue and then extended eastward, ending in a dead-end approximately 1,282 feet away from the intersection. Before the Project, 63<sup>rd</sup> Street resumed roughly 300 feet east of this dead-end to intersect with National Avenue and Gulby Avenue. Both before and after the Project, National Avenue and Gulby Avenue intersect with East 60<sup>th</sup> Street North ("60<sup>th</sup> Street"), a busy thoroughfare in Sioux Falls.
8. Before the Project, the intersection of Cliff Avenue and 63<sup>rd</sup> Street was less than 100 feet from the eastbound on-ramp to Interstate 90. The proximity of this intersection to the on-ramp hindered efficient traffic movements on Cliff Avenue and the interstate ramp.
9. As part of the Project, DOT built an asphalt extension of 63<sup>rd</sup> Street. After the Project, the segment of 63<sup>rd</sup> Street that previously intersected with Cliff Avenue now extends eastward to intersect with National Avenue. After the extension of 63<sup>rd</sup> Street was completed, DOT closed the intersection of Cliff Avenue and 63<sup>rd</sup> Street. 63<sup>rd</sup> Street now dead-ends just before Cliff Avenue.
10. Prior to the Project, drivers wishing to access properties on 63<sup>rd</sup> Street likely came from Cliff Avenue, turned east onto 63<sup>rd</sup> Street at the Cliff Avenue/63<sup>rd</sup> Street intersection, and then proceeded east down 63<sup>rd</sup> Street to their destination.
11. Upon completion of the Project, drivers wishing to access properties along 63<sup>rd</sup> Street will likely come from 60<sup>th</sup> Street, travel north on National Avenue or Gulby Avenue, and then proceed west down 63<sup>rd</sup> Street to their destination.
12. After the project is built, drivers coming from the east on 60<sup>th</sup> Street will likely travel about 1,500 feet less to reach the Property.
13. After the project is built, drivers coming from the west on 60<sup>th</sup> Street or the south on Cliff Avenue will likely travel about 1,100 feet more to reach the Property.
14. After the project is built, drivers coming from the north on Cliff Avenue will likely travel about 3,050 feet farther to reach the Property.
15. Attached as **Exhibit A** to this Affidavit is an aerial photograph of the neighborhood that lies southeast of the Cliff Avenue/Interstate 90 interchange in and near Sioux Falls, South Dakota. Under my supervision and at my direction, my engineering staff has labeled some of the streets in the photograph with their street names. Also under my supervision and at my direction, my engineering staff has drawn the approximate boundaries of the Property. **Exhibit A** accurately depicts the general layout of streets in relation to the Property prior to DOT's construction of the Project.

16. Attached as **Exhibit B** to this Affidavit is another aerial photograph of the neighborhood that lies southeast of the Cliff Avenue/Interstate 90 interchange in and near Sioux Falls, South Dakota. Under my supervision and at my direction, my engineering staff has accurately labeled this photograph with the approximate distances between various points depicted in the photograph.
17. Attached as **Exhibit C** to this Affidavit is another aerial photograph of the neighborhood that lies southeast of the Cliff Avenue/Interstate 90 interchange in and near Sioux Falls, South Dakota. Under my supervision and at my direction, my engineering staff has superimposed DOT's plans for the Project relating to the closure of the Cliff Avenue /63<sup>rd</sup> Street intersection and the extension of 63<sup>rd</sup> Street. **Exhibit C** accurately depicts the changes DOT made to 63<sup>rd</sup> Street as part of the Project.

Dated this 17<sup>th</sup> day of September, 2014.

  
Mark Leiferman

Subscribed and sworn to before me, a notary public, this 17<sup>th</sup> day of September, 2014.

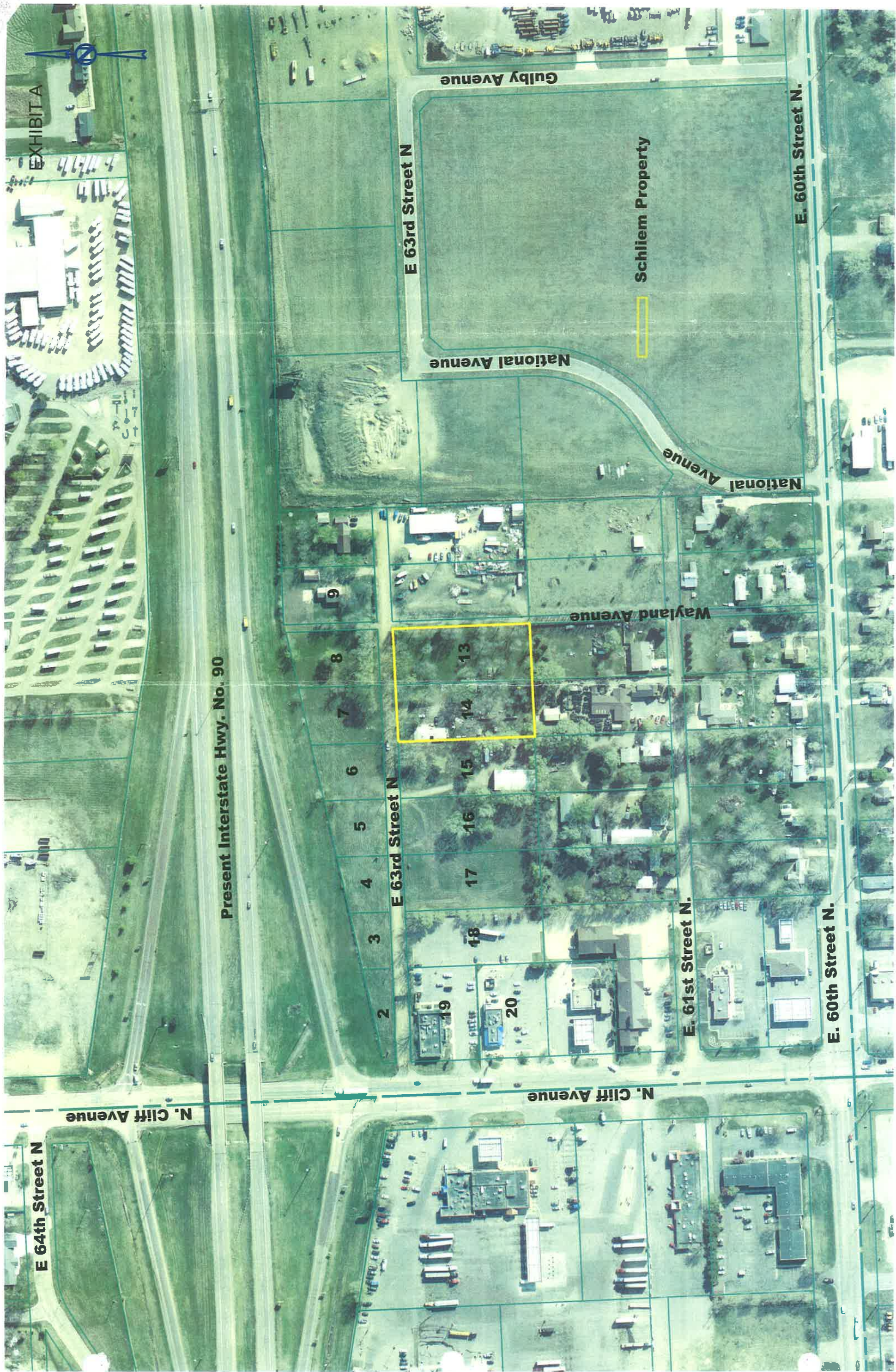
  
Nancy Atiller

Notary Public

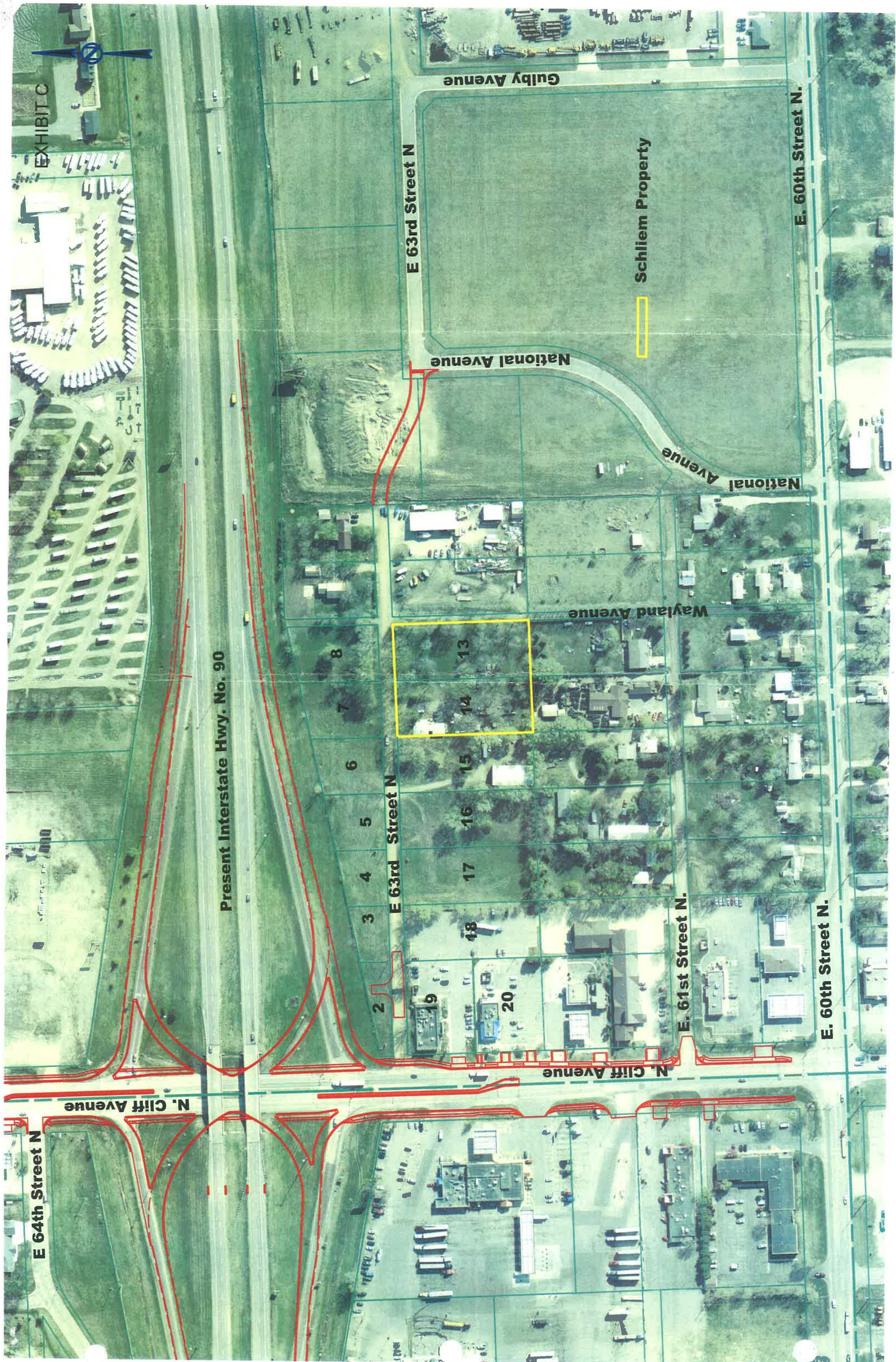
My commission expires: 2-25-19

[SEAL]

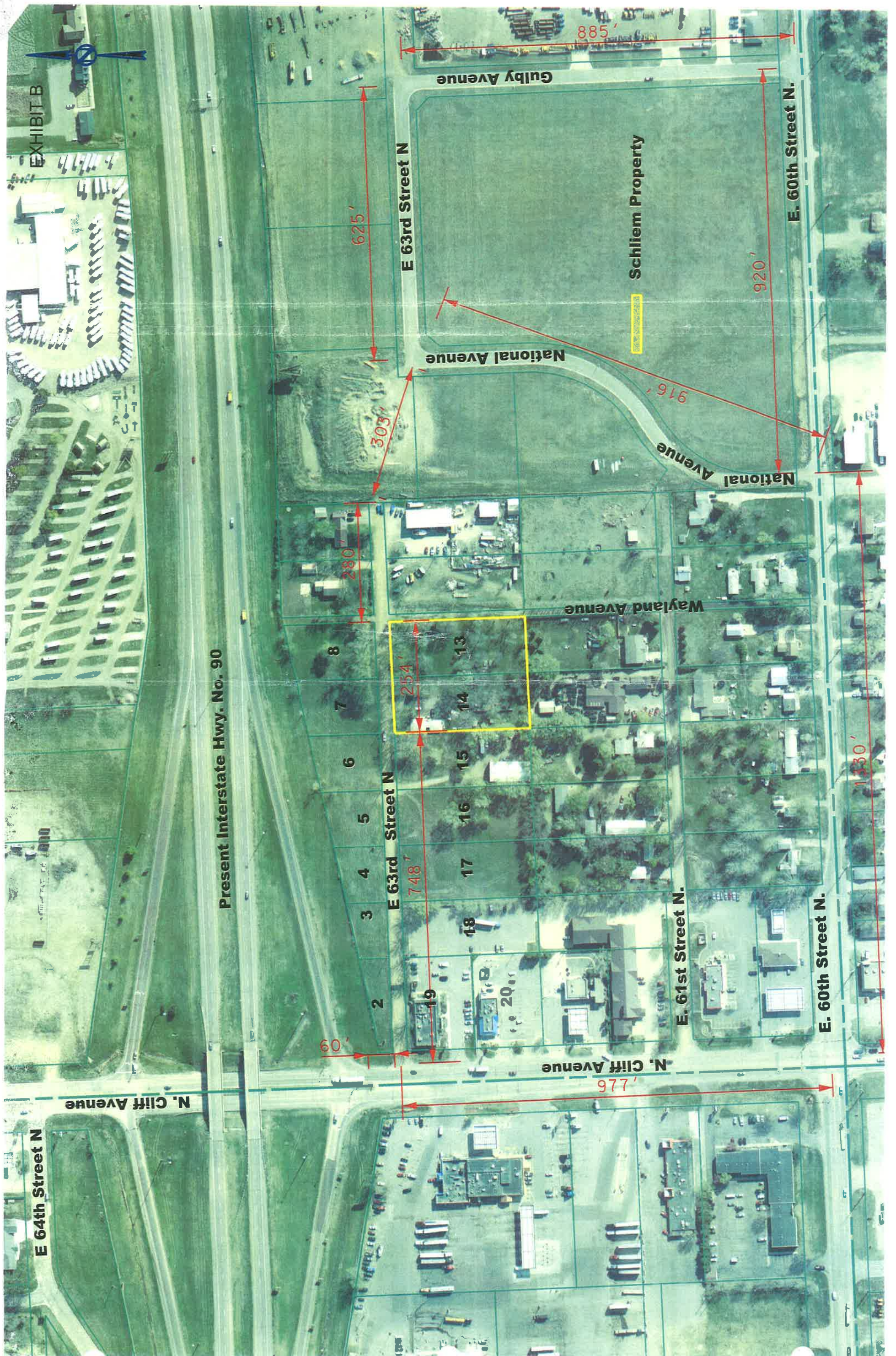














STATE OF SOUTH DAKOTA       )  
  :SS  
COUNTY OF MINNEHAHA       )

IN CIRCUIT COURT  
  
SECOND JUDICIAL CIRCUIT

CARLYLE SCHLIEM AND FARMERS  
STATE BANK OF CANTON,

Plaintiffs,

v.

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

Defendant.

Civ. 14-2147

**RESPONSE TO STATE OF SOUTH  
DAKOTA'S STATEMENT OF  
UNDISPUTED MATERIAL FACTS**

[¶1.] 1. Undisputed other than phases of the project which extended beyond the time table mentioned. *Affidavit of Christopher Healy, exs. 7 and 8.*

[¶2.] 2. Undisputed that the project as designed has been completed, however, many aspects of the project have created problems that still must be fixed. *See pleadings in Len and Cathy Dose v. State of South Dakota, Civ. 14-2605.*

[¶3.] 3. Admit.

[¶4.] 4. Admit.

[¶5.] 5. Admit.

[¶6.] 6. Admit.

[¶7.] 7. Admit.

[¶8.] 8. Admit.

[¶9.] 9. Deny that 60<sup>th</sup> Street North at the points referenced in Mr. Lieferman's

Affidavit constitutes a busy thoroughfare in Sioux Falls, especially in relation to the other thoroughfares at issue in this case, Interstate 90 and Cliff Avenue. Certainly it is not busy enough for any of the appraisers cited in this case including DOT's appraiser Mr. Schmick to consider it a reasonable alternative for commercial access. *Affidavit of Carlyle Schliem, exs. 1 and 2, Affidavit of Healy, exs. 1, 2, and 7 pages 240-243).*

[¶10.] 10. Admit.

[¶11.] 11. Admit.

[¶12.] 12. Admit.

[¶13.] 13. Admit.

[¶14.] 14. Admit.

[¶15.] 15. Admit.

[¶16.] 16. Admit with the addition that absent the State's action, 63<sup>rd</sup> Street in its present form would have been redesigned and upgraded to facilitate even better access to development in Northside Gardens. *Affidavit of Healy, ex. 7 (237:3-5) (258:16-25).*

[¶17.] 17. Admit that is a legal alternative access constructed by DOT following its closure of the intersection at 63<sup>rd</sup> and Cliff. After the closure of the intersection, drivers attempting to reach the properties also use routes across the Perkins Restaurant property (Lot 19) to reach E. 63<sup>rd</sup> St. or use Wayland Avenue from 60<sup>th</sup> or 61<sup>st</sup>. Neither these nor any alternative built by the State provides a reasonable

replacement access. *Affidavit of Healy, ex. 2. Summary Appraisal Report of John Schmick p. 41. Affidavit of Healy, ex. ,1 Summary Appraisal Report of Dan Mueller.*

[¶18.] Admit but deny the alternative routes provide reasonable access which is why the fair market value of the properties has diminished significantly. *Affidavit of Healy, ex. 2. Summary Appraisal Report of John Schmick p. 41. Affidavit of Healy, ex. ,1 Summary Appraisal Report of Dan Mueller.*

[¶19.] Admit but deny alternative routes provide reasonable access which is why the fair market value of the properties has diminished significantly. *Affidavit of Healy, ex. 2 Summary Appraisal Report of John Schmick p. 41; Affidavit of Healy, ex. ,1 Summary Appraisal Report of Dan Mueller.*

[¶20.] Admit but deny alternative routes provide reasonable access which is why the fair market value of the properties has diminished significantly. *Affidavit of Healy, ex. 2 Summary Appraisal Report of John Schmick p. 41; Affidavit of Healy, ex.1 Summary Appraisal Report of Dan Mueller.*

Dated this 16<sup>th</sup> day of June, 2015.

MEIERHENRY SARGENT LLP

By: /s/ Christopher Healy

Mark V. Meierhenry

*mark@meierhenrylaw.com*

Clint Sargent

*clint@meierhenrylaw.com*

Christopher Healy

*chris@meierhenrylaw.com*

315 South Phillips Avenue

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the foregoing Response to State of South Dakota's Statement of Undisputed Material Facts was served via Odyssey File and Serve to:

Karla Engle  
Special Assistant Attorney General  
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On this 16<sup>th</sup> day of June, 2015.

MEIERHENRY SARGENT LLP

/s/ Christopher Healy

For the Firm

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#16

STATE OF SOUTH DAKOTA)  
COUNTY OF MINNEHAHA ) :SS

IN CIRCUIT COURT  
SECOND JUDICIAL CIRCUIT

CARLYLE SCHLIEM  
AND FARMERS STATE BANK  
OF CANTON,

Plaintiff(s),

vs.

Case No.: Civ. 14-2147

DEFENDANT STATE OF  
SOUTH DAKOTA'S MOTION  
FOR SUMMARY JUDGMENT

THE STATE OF SOUTH DAKOTA, Acting  
by and through the Department of  
Transportation and the South Dakota  
Transportation Commission,  
Defendant.

Defendant State of South Dakota ("State") moves this Court for summary judgment, pursuant to SDCL 15-6-56(c) on the grounds that Plaintiffs Schliem and Farmer's State Bank of Canton have not suffered a compensable taking or damaging of private property nor a violation of due process as a result of the State's closure of a public highway intersection located approximately 748 feet away from their real property.

This motion is made and based on all pleadings filed in this action, including *State of South Dakota's Statement of Undisputed Material Facts* filed with this motion. This motion is supported by *Defendant State of South Dakota's Brief in Support of Motion to Dismiss* and *Defendant State of South Dakota's Reply Brief in Support of Motion to Dismiss*, which were previously filed in this action and which contemplated the court treating its original motion to dismiss as one for summary judgment.

Dated this 19th day of February, 2015.

STATE OF SOUTH DAKOTA

Marty J. Jackley  
Attorney General

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 19<sup>th</sup> day of February, 2015, a true and correct copy of the foregoing *Defendant State of South Dakota's Motion for Summary Judgment* was mailed by first class mail, postage prepaid to:

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Dated this 19<sup>th</sup> day of February, 2015.

  
Karla L. Engle  
Special Assistant Attorney General



IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

Appeal No. 27557

---

**Carlyle Schliem and Farmers State Bank of Canton,**  
Plaintiffs and Appellants,

v.

**State of South Dakota, acting by and through the Department of Transportation  
and the South Dakota Transportation Commission,**  
Defendant and Appellee.

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

The Honorable Larry Long  
Presiding Circuit Court Judge

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APPELLEE'S BRIEF

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Notice of Appeal was filed on the 26th day of August, 2015

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## **PRELIMINARY STATEMENT**

Throughout this brief, Plaintiffs and Appellants Carlyle Schliem and Farmers State Bank of Canton are referred to collectively as “Landowner.” Defendant and Appellee State of South Dakota is referred to as the “State.” The settled record is denoted “SR.” Materials included in the Appendix will be denoted as “Appx.” followed by the tab number and page number.

## **JURISDICTIONAL STATEMENT**

The State accepts Landowner’s jurisdictional statement.

## **STATEMENT OF THE ISSUES**

The legal issues raised by Landowner are re-stated as follows:

**Issue 1.** Did the trial court properly apply the consequential injury test, instead of a “reasonableness” standard, when determining whether closure of a public highway intersection 748 feet from Landowner’s real property was a compensable taking or damaging of private property?

The trial court applied the proper standard when it applied the consequential injury test.

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

*Hall v. State ex rel. South Dakota Dept. of Transp.*, 2006 S.D. 24, 712 N.W.2d 22 (S.D. 2006) (“Hall I”)

*Hall v. State ex rel. South Dakota Dept. of Transp.*, 2011 S.D. 70, 806 N.W.2d 217 (“Hall II”)

*Rupert v. City of Rapid City*, 2013 S.D. 13, 827 N.W.2d 55

**Issue 2.** Did the trial court properly grant summary judgment on Landowner’s inverse condemnation claim where the State built a new highway segment leading to Landowner’s property and then closed a public highway intersection located 748 feet away from Landowner’s property?

The trial court granted summary judgment because the change in the access route to Landowner's Property was not a compensable taking or damaging of private property.

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

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

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

*State Highway Commission v. Bloom*, 77 S.D. 452, 93 N.W.2d 572 (1958)

### **STATEMENT OF THE CASE**

Landowner's statement of the case is inaccurate, because it is incomplete. In addition to an inverse condemnation claim, Landowner also asserted a violation of due process rights. *SR 4*. The State filed a motion for summary judgment on both constitutional claims. *Landowner's Appx. Tab 6 at 20-21*. The Court issued summary judgment in favor of the State "on all issues raised in the Plaintiff's Complaint." *Landowner's Appx. Tab 2 at 6*. In this appeal, Landowner offers argument and authority relating to the inverse condemnation claim, but offers no challenge to the grant of summary judgment on the due process claim.

The State objects to the last three paragraphs of Landowner's statement of the case, because they constitute argument rather than a procedural history of the case.

### **STATEMENT OF THE FACTS**

In 2013 and 2014, the State reconstructed Cliff Avenue (also known as South Dakota Highway 115) and its interchange with Interstate 90. *Landowner's Appx. Tab 4 at 10*. Appellant Schliem owns real property ("the Property") southeast of the interchange. *Landowner's Appx. Tab 4 at 13*. Appellant Farmers State Bank of Canton holds a mortgage on the Property. *SR 3*. The Property consists of Lots 13 and 14 of North Side

Gardens and contains a residence. *Id.* The Property sits immediately south of 63<sup>rd</sup> Street and west of Wayland Avenue. *Landowner's Appx. Tab 4 at 13.* The Property does not abut Cliff Avenue or Interstate 90. *Landowner's Appx. Tab 4 at 13.*

An aerial photo, showing the Property before the State's project, is attached to this Brief at Appendix Tab A. The photo shows the Property outlined in yellow and also shows the pre-project street system, including the Cliff Avenue/63<sup>rd</sup> Street intersection. *Id.* The Cliff Avenue/63<sup>rd</sup> Street intersection was located about 748 feet west of the Property. *Landowner's Appx. Tab 4 at 15.*

Before the State's project, drivers wishing to access the Property came from Cliff Avenue, turned east onto 63<sup>rd</sup> Street at the Cliff Avenue/63<sup>rd</sup> Street intersection, and then drove about 748 feet down 63<sup>rd</sup> Street to the Property. *Landowner's Appx. Tab 4 at 11.* Before the State's project, 63<sup>rd</sup> Street was a narrow gravel road that intersected with Cliff Avenue and extended roughly 1,282 feet, ending in a cul-de-sac about 280 feet east of the Property. *Landowner's Appx. Tab 4 at 10, 15.* An aerial photo taken before the State's project, showing distance measurements between the Property and various points, is attached at Appendix Tab B.

Before and after the State's project, Wayland Avenue intersects with 63<sup>rd</sup> Street at the boundary between the Property and the neighbor to the east. *Landowner's Appx. Tab 4 at 13.* Wayland Avenue is a narrow dirt road that is sometimes not passable. *Id. at 10.* Because of its poor condition, travelers likely do not use Wayland Avenue to access the Property. *Id. at 10-11.*

The State did not acquire any highway right of way, temporary easements, or other property rights from Landowner to construct its project. *Landowner's Appx. Tab 4*

at 10. As part of its project, the State built a 300-foot asphalt extension of 63<sup>rd</sup> Street to connect with another segment of 63<sup>rd</sup> Street to the east. *Id.* at 11, 14. Once this extension was built, the segment of 63<sup>rd</sup> Street that runs along the Property became connected with National Avenue. *Id.* National Avenue runs in a southerly direction from 63<sup>rd</sup> Street to East 60<sup>th</sup> Street North (“60<sup>th</sup> Street”). *Id.* at 14. Another north-south road further to the east, Gulby Avenue, also connects 63<sup>rd</sup> Street and 60<sup>th</sup> Street. *Id.* The State’s Appendix Tab C contains an aerial photo with the location of the new 63<sup>rd</sup> Street extension superimposed.

After the State built this extension of 63<sup>rd</sup> Street, the State closed the Cliff Avenue/63<sup>rd</sup> Street intersection. *Landowner’s Appx. Tab 4 at 11.* The State closed the intersection because it hindered efficient traffic movements on Cliff Avenue and the interstate ramp. *Id.*

Both before and after the State’s project, the only direct ingress and egress to Landowner’s Property is via 63<sup>rd</sup> Street. *Id.* at 11, 14; *State’s Appx. Tab A at 1 and Tab C at 3.* Because of the State’s closure of the Cliff Avenue/63<sup>rd</sup> Street intersection, drivers wishing to access the Property have to take a new route to reach 63<sup>rd</sup> Street after the project. *Landowner’s Appx. Tab 4 at 11 and 14.* Rather than coming from Cliff Avenue and turning east onto 63<sup>rd</sup> Street at the former intersection, drivers now come from 60<sup>th</sup> Street and travel north on National Avenue or Gulby Avenue, then turn west onto 63<sup>rd</sup> Street. *Id.*

This new route caused a change in travel distances to the Property. *Id.* at 11. Drivers coming from the east on 60<sup>th</sup> Street will likely travel about 1,500 feet less to reach the Property. *Id.* For drivers coming from the west on 60<sup>th</sup> Street or the south on



Cliff Avenue, they will likely travel about 1,100 feet farther to reach the Property. *Id.* Finally, drivers coming from the north on Cliff Avenue will likely travel about 3,050 feet farther to reach the Property. *Id.*

After the project was substantially built, Landowner filed a summons and complaint alleging the closure of the Cliff Avenue/63<sup>rd</sup> Street intersection was a compensable damaging of Landowner's Property under the takings clauses of the state and federal constitutions and the due process clause of the federal constitution. *SR 1, 4.* The State filed a motion to dismiss, which was later converted to a motion for summary judgment. *SR 8; 49.* The State contended Landowners had no private property right in the Cliff Avenue/63<sup>rd</sup> Street intersection and therefore no viable claim for compensation due to the closure of that intersection and the resulting re-routing of traffic.

Landowner filed a cross-motion for summary judgment. In support of the motion, Landowner submitted an appraisal report completed several years before the State's project that set the value of the Property, if the residence and garage were razed, at \$271,100. *SR 61-62, 65.* Landowner submitted another appraisal report completed several months after the 63<sup>rd</sup> Street extension was built and the Cliff Avenue/63<sup>rd</sup> Street intersection was closed. *SR 100.* That appraisal set the value of the Property, with the residential improvements, at \$105,000. *SR 62, 94.* Landowner also obtained an appraisal by Dan Mueller that valued the Property before and after the State's project. *SR 147.* This appraisal concluded the State's project diminished the Property's value by \$313,800. According to this appraisal, the change in the access route to the Property changed the highest and best use of the property from commercial to industrial development, causing a sharp decline in land value. *Id.* Landowner argued the difference in valuations before

and after the State's project proved there was a compensable damaging of the Property due to the closure of the Cliff Avenue/63<sup>rd</sup> Street intersection and the resulting re-routing of traffic to the Property. *SR 410-411*.

The trial court held a hearing on the parties' cross-motions for summary judgment. *Landowner's Appx. Tab 1 at 1*. After the hearing, the court granted the State's motion and denied the Landowner's motion. *Id. at Tab 2*. Landowner brought this appeal, urging reversal on two grounds. *Appellant's Brief at 1-2*. First, Landowner claims the trial court applied the wrong legal analysis in determining whether the State took or damaged Landowner's private property when the State closed a public highway intersection located 748 feet away from Landowner's real property. *Id. at 1*. According to Landowner, the proper legal analysis is whether the closure of this distant intersection was reasonable. *Id.* Second, Landowner claims the trial court incorrectly granted summary judgment because there were conflicting material facts. *Id. at 2*. Neither argument is valid.

## **ARGUMENT**

### **ISSUE 1.**

**The trial court properly applied the consequential injury test, instead of a "reasonableness" standard, when determining whether closure of a public highway intersection 748 feet from Landowner's real property was a compensable taking or damaging of private property.**

#### **A. The Standard of Review**

The taking or damaging of a private property right is an essential element of a claim for compensation under the state and federal constitutions. U.S. Const. amend. V. ("...nor shall private property be taken for public use, without just compensation."); S.D.

Const. Article VI, § 13 (“Private property shall not be taken for public use, or damaged, without just compensation....”). The question of whether there has been a taking or damaging of private property is a question of law for the court, not a jury, to decide.

*Rupert v. City of Rapid City*, 2013 SD 13, ¶ 29, 827 NW2d 55, 67. Whether or not the trial court used the correct legal standard in making its determination is a question of law. See *Highmark Federal Credit Union v. Wells Fargo Financial SD Inc.*, 2012 S.D. 38, ¶ 6, 814 N.W.2d 814. Legal questions are reviewed de novo. *In re Woodruff*, 1997 S.D. 95, ¶ 9, 567 N.W.2d 226, 228.

**B. *Hurley* and *Hall I* involved changes in access to abutting streets and therefore do not support a compensable taking or damaging occurred when the State changed access to a highway that does not abut Landowner’s Property.**

Landowner asserts that the State’s decision to close the Cliff Avenue/63<sup>rd</sup> Street intersection “must be analyzed for reasonableness” to determine whether the property was taken or damaged. *Appellant’s Brief* at 9. According to Landowners, the test for compensability is whether Landowner’s property still enjoys reasonable access to Cliff Avenue. *Id.* To support this “reasonableness” standard for non-abutting property, Landowner cites to two inverse condemnation cases – *Hurley v. State*, 143 N.W.2d 722 (S.D. 1966), and *Hall v. State ex rel. Dept. of Transp.*, 712 N.W.2d 22 (S.D. 2006) (“*Hall I*”). Landowner fails to acknowledge a key distinction between the Property and the lands involved in *Hurley* and *Hall I* – the Property does not abut Cliff Avenue and therefore cannot claim a right of reasonable access to that street.

In *Hurley*, the plaintiffs owned a corner property that abutted both West Boulevard and Omaha Street. *Hurley*, 143 N.W.2d at 724. The State converted West Boulevard from a conventional street into part of Interstate 90, a controlled access

highway. *Id.* As part of the construction of the interstate, the State erected a steel barrier along the entire east side of the plaintiffs' lot, preventing all direct access from plaintiffs' property to the abutting West Boulevard. *Id.* Plaintiffs filed an inverse condemnation lawsuit, claiming their right to reasonable access was taken or damaged when the State closed off all access to an abutting street. *Id.* at 723. This Court agreed, concluding that an owner has a right of reasonable access to an *abutting* street that cannot be obstructed or materially impaired without payment of just compensation. *Id.* at 725. The Court wrote:

It is universally recognized that an owner of land *abutting* on a conventional street or highway has certain private rights in the street or highway distinct from that of the general public. Right of access is one of these private property rights which cannot be taken for public use or materially impaired without compensation. This has long been the settled law of this state....This right of the *abutting* owner is a peculiar, distinct and separate right from that of the general public to use such street as a public highway. It includes, not only the rights of the general public, but the further right to the street for light and air, access, ingress, and egress, at all times, subject only to the easement of the public and the rights of the municipality. This right to an unobstructed street *in front of his premises* for light and air, access, ingress, and egress, belong to an *abutting* owner, constitutes the most valuable part of the property, especially in crowded thoroughfares and on business streets, and without these rights the property, in many instances, would be greatly diminished in value. These rights, therefore, constitute property that cannot be taken for public use, except upon payment of just compensation.

*Id.* at 724 (citations and quotations omitted)(italics added). Significantly, the *Hurley* Court determined property owners have a right of reasonable access to streets abutting their property and that right cannot be destroyed or materially impaired without compensation.

If, after the construction of a public improvement an *abutting* landowner continues to have reasonable access to his property, he has no compensable complaint. But if the right of access is destroyed or materially impaired, the damages are compensable if the injury sustained

is peculiar to the owner's land and not of a kind suffered by the public generally.

*Id.* at 726. The Court concluded that because the State had taken plaintiff's free, open and unobstructed access to the abutting West Boulevard, "[t]heir damages were different in kind and not merely in degree from that experienced by the general public and their private property right of access was taken in the constitutional sense requiring compensation be paid therefor." *Id.* at 726.

*Hurley* stands for the proposition that real property owners have a right of reasonable access to an abutting street that cannot be destroyed or materially impaired without just compensation. Here, Landowner complains that his free and easy access to Cliff Avenue was lost when the State closed the Cliff Avenue intersection, but Landowner had no right of reasonable access to that non-abutting street. The trial court correctly considered *Hurley* and concluded that case offered Landowner no basis for proving a right to compensation. *Landowner's Appx. Tab 1 at 3-4.*

Landowner's reliance on *Hall I* is similarly misplaced. In *Hall I*, the owner's property abutted Interstate 90 and Ellsworth Road. *Hall I*, 712 N.W.2d at 24. The owners filed an inverse condemnation suit when the State closed the interstate interchange that abutted their property. *Id.* The interchange provided a direct connection between Interstate 90 and Ellsworth Road. *Id.* The closure of the interchange resulted in a far more circuitous route to the property from the abutting interstate highway. *Id.* The trial court granted summary judgment to the State on the grounds the owners had no right to complain about the diversion of interstate traffic away from their property. *Id.* at 30. The Court in *Hall I* criticized the trial court and the parties for focusing solely on whether the owners had a property right in passing traffic, and failing to address whether the

owner had a right of reasonable access to the abutting interstate highway. *Id.* The Court quoted extensively from *Hurley*, with its emphasis on an owner's rights of reasonable access to an abutting street. *Id.* at 28-29. The Court then reversed and remanded because there was not adequate evidence in the record to determine whether the owner held a right of reasonable access to the abutting interstate highway that was taken or damaged when the State closed the interchange. *Id.* at 30.

The issue that led to reversal in *Hall I* is completely absent in this case. Unlike the property in *Hall I*, Landowner's Property does not abut Cliff Avenue and therefore does not enjoy a right of reasonable access to that non-abutting street. The trial court correctly determined that a reasonableness standard, which applies to abutting lands, did not apply to Landowner's loss of a short access route to a non-abutting street.

**C. The trial court properly determined the consequential injury rule was the appropriate test for determining whether a private property right was taken or damaged when the State closed the Cliff Avenue/63<sup>rd</sup> Street intersection.**

It is undisputed that the State did not physically invade any part of Landowner's Property when it built its highway project. But even when government action results in no physical invasion of an owner's land, South Dakota allows an owner to recover compensation if the consequential injury test is satisfied.

This basic rule has long been recognized in South Dakota, i.e. even though no part of private property is physically taken the landowner is entitled to compensation under the taking and damaging clause of our constitution (§ 13, Art. VI) when the construction of a public improvement causes damage to property '*if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole.*'"

*Hurley*, 143 N.W.2d at 725 (italics added). The owner's injury "must be different in kind and not merely in degree from that experienced by the general public."

*Krier v. Dell Rapids Township*, 2006 S.D. 10, ¶26, 709 N.W.2d 841, 848 (quoting *Hurley*, 143 N.W.2d at 726).

The trial court concluded this test applied to Landowner's inverse condemnation claim. *Landowner's Appx. Tab 1 at 3*. Contrary to Landowner's assertion, the court's decision to apply this test is consistent with the *Hurley* and *Hall* cases relied on by Landowner. In *Hurley*, the court concluded the owner suffered a peculiar injury, different in kind from that experienced by the general public, when the State erected a barrier completely preventing any direct access between the owner's land and the abutting street. *Hurley*, 143 N.W.2d at 726. The *Hurley* Court reasoned that an property owner has distinct and special rights in an abutting street that are peculiarly injured, in a way different from the burden borne by the public, when the State closes off access to that street. *Id.* In the second appeal of the *Hall* case, *Hall v. South Dakota Dept. of Transp.*, 2011 S.D. 70, ¶34, 806 N.W.2d 217, 229-230, the Court applied the consequential injury test to determine if the State's closing of the I-90/Ellsworth Road interchange caused a compensable taking or damaging of the abutting owner's property. This Court determined the test was satisfied, because the State had originally used the interchange to mitigate damages caused by the original construction of the interstate. *Id.* The Court reasoned that once the State removed that mitigating feature, the abutting owners sustained a peculiar injury that was different from the injury sustained by the public as a result of the lost interchange. *Id.*

The trial court's use of the consequential injury test is supported not only by cases cited by Landowner, but also by other inverse condemnation cases

considered by this Court. In *Krier v. Dell Rapids Township*, 2006 S.D. 10, ¶28, 709 N.W.2d 841, 848, this Court determined the owner did not suffer a peculiar injury different from that suffered by the general public when the township converted the surface of the abutting highway from asphalt to gravel, resulting in increased dust and dirt on the owner's property. The Court reasoned everyone in the neighborhood was inconvenienced by the change in the road surface, so no special injury had been sustained by the owner. *Id.* In *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶17, 827 N.W.2d 55, 65, this Court concluded the consequential injury test was met where the city used a street de-icer that invaded the owners' land and killed their trees. The Court ruled the destruction of the owners' trees was an injury to the owners' land that was different from any injury sustained by the public due to the de-icer. *Id.*, see also *Darnall v. State*, 79 S.D. 59, 67, 108 N.W. 2d 201, 205 (1961) (ruling circuitry of travel to and from non-abutting interstate highway is not compensable damage, because it is a burden shared by all the traveling public).

Consistent with this case law, the trial court properly considered the consequential injury rule when deciding whether there had been a constitutional taking or damaging of Landowner's Property.

## ISSUE 2.

**The trial court properly granted summary judgment on Landowner's inverse condemnation claim where the State built a new highway segment leading to Landowner's property and then closed a public highway intersection located over 748 feet away from Landowner's property.**



#### **A. The Standard of Review.**

Landowner has correctly identified the standard of review, but has neglected to acknowledge its obligation in resisting summary judgment. “We require those resisting summary judgment [to] show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.” *Morris Family v. South Dakota Dept. of Transp.*, 2014 S.D. 97, ¶17 (modification in original)(citations and quotations omitted). “The non-moving party opposing a motion for summary judgment must present specific facts which demonstrate the existence of genuine, material issues for trial; mere allegations are not sufficient to preclude summary judgment.” *Mackintosh v. Carter*, 451 N.W.2d 285 (S.D. 1990) (citing *Laber v. Koch*, 383 N.W.2d 490 (S.D. 1986)). “Finally, on appeal, affirmance of a summary judgment is proper if there exists any basis which would support the trial court’s ruling.” *Id.* (citing *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989)).

#### **B. The trial court correctly concluded that Landowner does not have a right of reasonable access to Cliff Avenue.**

Landowner claims the new access route to Landowner’s Property is not “reasonable access.” *Appellee’s Brief at 13*. Specifically, Landowner complains about the loss of a shorter access route to and from Cliff Avenue. As the trial court observed, however, property owners have rights of reasonable access to conventional streets that *abut* their property. *Landowner’s Appx. Tab 1 at 3-4*. These rights are special and distinct from the rights of the general public to use the road. *Id.* “When a conventional highway is established, an *abutting* owner has a right separate and distinct from that of the general public to its use. This includes the right of access, ingress and egress to the highway subject only to the easement of the public.” *Darnall v. State*, 108 N.W.2d 201,

204 (S.D. 1961)(italics added); *see also Hurley*, 82 S.D. at 161, 143 N.W.2d at 725 (1966) (citing *State Hwy. Comm'n v. Bloom*, 77 S.D. 452, 461, 93 N.W.2d 572, 577 (1958)).

In this case, it is undisputed that Landowner's Property does not abut Cliff Avenue. *State of South Dakota's Statement of Undisputed Material Facts ¶4*, *Landowner's Appx. Tab 3 at 7*; *Response to State of South Dakota's Statement of Undisputed Material Facts ¶4*, *Landowner's Appx. Tab 5 at 16*. Landowner's Property is 748 feet east of the Cliff Avenue intersection with 63<sup>rd</sup> Street. *Exhibit C to Affidavit of Mark Leiferman*, *Landowner's Appx. Tab 4 at 14*. Because of this, the trial court correctly concluded that Landowner could not claim the same rights of reasonable access to Cliff Avenue that inure to owners of land abutting that street.

In argument to the trial court, Landowner relied on a passage in *State Highway Commission v. Bloom*, 93 N.W.2d 577 (S.D. 1958) to claim Landowner had a right of reasonable access to Cliff Avenue. Landowner quoted the section of *Bloom* which states that a property owner's right of access includes not only access to the abutting street, but also "extends sufficiently beyond his own premises as to insure him reasonable facilities for connection with those highways in which he has no special rights." *Bloom*, 93 N.W.2d at 579. According to Landowner, this passage from *Bloom* meant Landowner holds special rights of access to Cliff Avenue that were taken when the State closed the intersection.

Landowner misconstrues *Bloom*. The quoted section simply ensures that an owner's abutting street connects with the larger street system. Otherwise, the government could entirely land-lock an owner's property by leaving an owner's direct

access to the abutting street undisturbed, while closing all intersections connecting the abutting street with the rest of the street system. That is the outcome the State avoided when it built the 63<sup>rd</sup> Street extension, which connected Landowner's property to the street system to the east. If the State had simply closed the 63<sup>rd</sup> Street/Cliff Avenue intersection, without first building the street extension, Landowner's property would have been essentially land-locked. The only other street connecting with 63<sup>rd</sup> Street is Wayland Avenue, an extremely narrow and often impassable dirt road. To avoid land-locking the property, the State extended 63<sup>rd</sup> Street to connect with another segment of 63<sup>rd</sup> Street, which in turn connects with two other streets and the larger street system. Rather than running afoul of *Bloom*, the State complied with the dictates of that case, by ensuring the segment of 63<sup>rd</sup> Street abutting Landowners' property still connected with the larger street system. Accordingly, Landowners suffered no special or distinct injury when the State closed the Cliff Avenue intersection.

Landowners' assertion, that an owner can collect compensation even when he has suffered the same injury as the general public, is also not supported by the rationale laid out in the *Bloom* opinion. The Court determined an owner has a right to access his land, which is "a right resting upon the ownership of the subject property and connected with and appurtenant to such subject property, and is, therefore, a property right. *It is a special private right entirely distinct from the public right[.]*" *Bloom*, 93 N.W.2d at 578-579 (quoting *Hyde*, 136 N.W. at 99) (emphasis added). The *Bloom* Court then concluded that this distinct private right had been infringed when the interstate highway prevented Bloom from accessing all of his property as he had before the highway was built. Because of the interstate highway, it would be "more difficult and expensive if not

impossible” to move cattle back and forth from the ranch land north of the interstate to the ranch land south of the interstate. *Id.* at 579. Although added labor, expense and inconvenience could not be collected as a separate item of damage, the Court concluded these additional burdens on his property could be considered in awarding compensation for the reduced value of the remaining land. *Id.*

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

**C. Landowner’s right of reasonable access to 63<sup>rd</sup> Street was not taken or damaged by the State.**

Although Landowner has a right of reasonable access to the abutting 63<sup>rd</sup> Street, that right was not infringed by the State’s project. The evidence was undisputed that Landowner’s direct access between the Property and 63<sup>rd</sup> Street was unchanged. *Exhibit A and C to Affidavit of Mark Leiferman, Landowner’s Appx Tab 4 at 13-14.* The evidence was also undisputed that the State built an asphalt extension of 63<sup>rd</sup> Street and this extended street allowed motorists to reach the Property via Gulby or National Avenue. *State of South Dakota’s Statement of Undisputed Material Facts ¶¶12-13, 17-20, Landowner’s Appx. Tab 3 at 8; Response to State of South Dakota’s Statement of*

*Undisputed Material Facts*, ¶12-13, 17-20, *Landowner's Appx. Tab 5 at 17-18*. In response to the State's motion for summary judgment, Landowner offered no evidence that this access route was blocked or unusable. Instead, Landowner asserted that the Property's diminished land value after the State's project proves that the new access route is not reasonable. *Response to State of South Dakota's Statement of Undisputed Material Facts* ¶ 17-20, *Landowner's Appx. Tab 5 at 17-18*. Proof of damage does not prove the legal injury necessary to recover compensation. "Not all damages to property effect a taking." 2A *Nichols on Eminent Domain* § 6.01[11] at 6-21 (Matthew Bender, 3rd ed. 2013).

The acquisition and use of land by a governmental body possessing the power of eminent domain frequently impacts adjacent (or neighboring) properties. The impact may result in a limitation on economic uses, a change in accessibility, and/or a diminution in value. Nevertheless, as a general rule, in the absence of a physical invasion which ousts the owner from full or partial possession or a total deprivation of beneficial use, mere damage to property (or property value) does not constitute a taking.

*Id.*

South Dakota has refused to allow compensation for mere diversion of travel, even when the State's re-routing of traffic causes a sharp decrease in land value. In *State v. Henrikson*, 548 N.W.2d 806 (S.D. 1996), property owners sought damages for diminished land value due to the State's construction of a median in the street abutting their property. Although the owners still had direct access to the abutting street, the median prevented left turns into or out of the owner's property. *Id.* at ¶4. Despite the testimony of the owners that the median greatly decreased their land's value, this Court concluded any damages resulting from the median were not compensable. *Id.*

Landowner cites to a Washington Appeals Court case, *Union Elevator & Warehouse Company, Inc. v. State of Washington*, 980 P.2d 779 (Wash. Ct. App. 1999) for the proposition that a non-abutting landowner can claim compensation for closure of a distant highway intersection. But in the *Union Elevator* case, unlike the instant case, the owner submitted evidence that the only remaining access route to the owner's property was not merely circuitous, but unusable. *Id.* at 783. According to two witnesses, the remaining route contained sharp turns and steep slopes that could not be negotiated by grain trucks headed to the grain elevator on owner's property. One witness testified that the route was so difficult for his truck drivers to maneuver that it was "essentially like having no access whatsoever." *Id.* The other witness opined that the route was actually dangerous for grain haulers because of multiple 90 degree turns. *Id.* The court observed the owner had met its burden to show "more than mere inconvenience at having to travel a further distance to its business facility." *Id.* The court reversed the award of summary judgment because there was evidence of a "total loss of safe, reasonable and adequate access" causing special damages "different in kind from that sustained by the general public." *Id.*

In contrast to the owner in *Union Elevator*, Landowner submitted no evidence that the new access route to the Property was obstructed, dangerous, or unusable. Once the State submitted evidence that an alternate access route had been provided, Landowner had the burden of coming forward with evidence to show that there was "no means of safe, reasonable, and adequate access." *Williams Place, LLC v. State of Washington*, 348 P.3d 797, 815 (Wash. Ct. App. 2015). Because Landowner failed to meet this burden, summary judgment should stand.

**D. Landowners cannot escape the requirements of the consequential injury rule, which do not allow compensation for loss of a distant highway intersection.**

The trial court correctly determined that the closure of the intersection was not a peculiar injury to Landowner's property that was different in kind from the injury suffered by the general public. The trial court relied on this Court's opinion in *Darnall v. State*, 108 N.W.2d 201 (SD 1961), where the Court rejected an owner's claim for compensation due to lack of access to a nearby, but not abutting, roadway. In *Darnall*, the Darnalls owned a café, cabins and gas pump along a state highway. They sought compensation because a new interstate highway was built without a direct connection to the existing highway that fronted their property. *Id.* at 202. A curb and sidewalk separated this abutting highway from the interstate, preventing traffic from the abutting highway from entering the interstate and preventing traffic from the interstate from entering the abutting highway, except at two interchanges nearly a mile north and south of the Darnalls' property. *Id.* As a result, interstate traffic had a long circuitous route to reach the Darnalls' land. *Id.* Meanwhile, direct access from the Darnalls' property to the abutting highway remained unchanged. *Id.*

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

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

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

*Darnall*, 108 NW2d at 206 (citations omitted).

In this case, the State constructed a curb across the former Cliff Avenue/63<sup>rd</sup> Street intersection that prevented motorists from making a direct turn off Cliff Avenue onto 63<sup>rd</sup> Street. As the trial court observed, every member of the public, not just Landowner, was deprived of this intersection and forced to travel a more circuitous route to reach the Property and other lots in the same 63<sup>rd</sup> Street neighborhood. Although Landowners claim their diminished property value far exceeds the fuel costs and lost time incurred by motorists generally, Landowners' injury is only different in degree, not in kind. The source of their monetary losses derives from the same injury suffered by the public – the loss of a shorter route from Cliff Avenue to 63<sup>rd</sup> Street. Because Landowners' injury is the same as that suffered by the public, Landowners cannot collect compensation for the State's re-routing of traffic.



South Dakota's refusal to allow compensation for mere diversion of travel is not an anomalous result. Other courts have also distinguished between "general rights, which [landowners] have in common with the public, and special rights, which they hold by virtue of their ownership of this property. In order to constitute a taking or damaging of their property, it is the special rights that must have been violated." *Georgia Dept. of Transportation v. Bae*, 738 S.E.2d 682, 683 (Ga. Ct. App. 2013) (citing *Tift County v. Smith*, 131 S.E.2d 527 (Ga. 1963)). Intersection closures, that cause circuitry of travel but do not affect an owner's direct access to the abutting street, are routinely treated as a non-compensable. *South Carolina State Highway Department v. Carodale Associates*, 235 S.E. 2d 127, 129 (S.C. 1977); *Salvation Army v. Ohio Dept. of Transportation*, 2005 WL 1252545 (Ohio Ct. App. 2005) (closure of intersection abutting property, which caused patrons to travel circuitous access route of 1.25 miles to reach property, was not compensable because losing an intersection of two public roads is an inconvenience shared with the general public); *Georgia Dept. of Transportation v. Durpo*, 469 SE2d 404 (Ga. App. 1996) ("If the property owner has the same access to the public road or highway which abuts his property, as he did before the road closing, then his damage is not special....Circuitry of travel and the inconvenience caused by traffic flow and traffic patterns are not compensable as takings."); *Courteaus, Inc. v. State*, 268 N.W.2d 65 (Minn. 1978) ("Those who are not abutting owners have no right to damages merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route."); *Illinois v. Greenwell*, 359 N.E.2d 780, 784 (Ill. App. Ct. 1977) (disallowing compensation for closure of road one-quarter mile east of property because direct access to road was unchanged and circuitry of travel is not compensable); *Warren v.*

*Iowa State Highway Commission*, 93 N.W.2d 60, 67-68 (Iowa 1958) (ruling business owners may find themselves left in a by-water of commerce when the route of a highway is changed so the main flow of traffic is diverted, but this gives them no claim for damages against the highway authority which diverted the traffic).

**E. North Dakota case law supports the trial court’s application of the consequential injury rule and the trial court’s refusal to allow recovery for mere diversion of travel.**

Landowner urges this Court to consider the North Dakota case of *Guerard v. State of North Dakota*, 220 N.W.2d 525, (N.D. 1974), a case which actually supports the State’s position. In *Guerard*, an owner sought compensation when his property’s direct access to an abutting street was unchanged, but the State closed the street’s intersection with a busy highway a short distance away from his property. The trial court granted summary judgment on the grounds that the owner had no compensable rights to the intersecting street, because his property did not abut that street. On appeal, the North Dakota Supreme Court remanded for further proceedings, on the grounds that the trial court should have applied the consequential injury test to determine whether the government’s actions were compensable. The *Guerard* Court wrote:

We start with the basic proposition that some actions of governmental agencies, which incidentally affect private property, do not give rise to a right to damages. Such actions are sometimes described as being within the police power of the State.

...

We hold that where the landowner owns property left in a cul-de-sac, he is not foreclosed from recovery solely because his property does not abut upon the improvement. He may be foreclosed from recovery if his damage is of a kind sustained by the public generally (even though it may be greater in degree) or of a kind contemplated by the parties at the time of the dedication of the street, or if damages were waived, or perhaps for other reasons. These matters are open for determination upon remand.

...

This opinion is not intended to reverse the general rule that an improvement which merely requires a circuitry of travel to reach a point previously reached more directly does not create a compensable right to recover on the part of the owner of the property so reached. Diversion of public traffic does not create a right to compensation. *Jamestown Plumbing & Heating Co. v. City of Jamestown*, 164 N.W.2d 355 (N.D.1969).

*Guerard*, 220 N.W.2d at 527-529.

The *Guerard* case reaffirms the State's position that Landowner must meet the requirements of the consequential injury test. Landowner must show a special injury, different in kind and not merely in degree from that suffered by the public, in order to secure a right to compensation. Furthermore, under *Guerard*, mere circuitry of travel is not compensable. Because Landowner has failed to prove any injury other than a more circuitous access route to his property, the *Guerard* case does nothing to save Landowner's case from summary judgment.

**F. An appraiser's assessment of damages to a property abutting Cliff Avenue does not justify compensation for Landowner's Property.**

The State hired an appraiser to estimate damages owed to Kelly Inns Ltd, an owner of land that abuts Cliff Avenue. This appraiser concluded that the State's acquisition of access control across that property's Cliff Avenue frontage, coupled with the closing of the Cliff Avenue/63<sup>rd</sup> Street intersection, would eliminate the owner's ability to establish a direct, upgraded street connection between the owner's abutting land and Cliff Avenue. *Exhibit 2 to Affidavit of Christopher Healy, SR 275 and 293*.

Landowner argues that the assessment of damages to land abutting Cliff Avenue proves Landowner should receive compensation as well. Again, Landowner chooses to ignore the rule in South Dakota that properties abutting a conventional street have a right of reasonable access to that street that must be compensated when destroyed or materially

impaired by the State. In contrast, Landowner's Property does not abut Cliff Avenue and therefore cannot claim special rights of access to that non-abutting street.

**G. This Court is not bound by a trial court's decision in another case, where the trial court allowed compensation for circuity of travel due to the closure of the Cliff Avenue intersection.**

Landowner points out that the trial court in a neighboring case allowed compensation for diminished land value due to the State's closure of the Cliff Avenue intersection, even though the intersection was nearly 500 feet from the neighbors' property. *See State v. Miller et al, Appeal No.27198*. According to Landowner, the trial court's decision in that case should sway this Court to allow compensation for Landowner.

This Court is not bound by the decision of a trial court. *SDCL 15-26A-12*. Furthermore, the State has appealed the trial court's decision and argued, as here, that the neighbors are not entitled to compensation for the circuity of travel caused by the closed Cliff Avenue intersection. *See Appellant's Brief in State v. Miller, et al, Appeal No. 27198*. This Court has not yet issued a decision in that appeal. Because the trial court's decision is not final binding precedent, Landowner's argument should be rejected.

**H. A mere possibility does not equate to a right to compensation.**

Landowner claims they qualify for compensation because they might have used their property as "assemblage" with other properties at some point in the future. According to Landowners once the State bought property that was going to be developed for a Kelly Inn hotel, Landowner lost the possibility of selling the Property for this or some other commercial development.

To support a claim for compensation, Landowner must show interference with a right that existed as of the date of taking. *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 102 (S.D. 1994) (“The fair market value of property is to be determined at the time of the taking.”). Landowner has not established any private property rights to the land previously owned by Kelly Inn. Hence, the State did not interfere with a private property right when it bought the Kelly Inn land in connection with the State’s project. Furthermore, elements of damage in condemnation must not be remote, speculative, or uncertain; they must be direct and proximate, and not such as are merely possible. *Nebraska Elec. Generation & Transmission Coop., Inc. v. Tinant*, 90 S.D. 284, 291-292, 241 N.W.2d 134, 138 (1976). Landowner’s hope that his property might be purchased for some future development is not a private property right that was taken when the State closed a neighborhood intersection.

**I. Landowner’s due process claim must fail.**

Landowner’s complaint included a claim for violation of due process and the trial court granted summary judgment on this claim as well as Landowner’s inverse condemnation claim. *SR 4*. Landowner’s brief makes no mention of a due process violation and offers no argument for reversing the grant of summary judgment on this issue. Any challenge to the trial court’s ruling is therefore waived. *See SDCL 15-26A-60(6)* (requiring the argument section of the appellant’s brief to contain “the contentions of the party with respect to the issues presented, the reasons therefore, and the citations to the authorities relied on.”); *see also State v. Fool Bull*, 2009 S.D. 36, ¶ 46, 766 N.W.2d 159, 169 (ruling that appellant waived an issue because he neither argued the issue nor cited any authority in his appellate brief).

There is also no substantive basis for reversing the trial court's ruling on the due process issue. To prove a viable due process claim, Landowner must show deprivation of a protected property or liberty interest without due process. *Morris Family LLC v. South Dakota Dept. of Transportation*, 2014 S.D. 97, ¶26, 857 N.W.2d 865, 873. "To have a protected right under due process, persons must possess more than a one-sided expectance. They must have a legal 'entitlement'" *Id.* at ¶25 (quoting *Bergee v. S.D. Bd. Of Pardons & Paroles*, 2000 S.D. 35, ¶8, 608 N.W.2d 636, 640). Landowner cannot show a property interest that was damaged or taken by the State when it closed the Cliff Avenue/63<sup>rd</sup> Street intersection. Nor can Landowner point to any statute or other independent source giving it a legitimate claim to entitlement to the Cliff Avenue/63<sup>rd</sup> Street intersection. Since Landowner can show no legal entitlement to the intersection, no process was due when the intersection was closed. *See Morris Family LLC*, 2014 S.D. 97, ¶27, 857 N.W.2d at 873.

Before the State's project, Landowner had a shorter route from the Property to Cliff Avenue's busy thoroughfare. After the project, the Property lies in a cul-de-sac that no longer allows Landowner to travel directly west to Cliff Avenue. Instead, Landowner will exit the Property onto 63<sup>rd</sup> Street as always, but then will have to travel east and south before reaching 60<sup>th</sup> Street North and then Cliff Avenue. The shorter route to Cliff Avenue is lost, but Landowner's immediate access to the abutting 63<sup>rd</sup> Street is unchanged. Since Landowner maintained direct access to the abutting street and received a new connection to the larger street system, the trial court correctly concluded that a private property right had not been infringed. Landowner's injury is no different than the inconvenience the public will experience when a favored route of travel is replaced with a

more circuitous route. Because Landowner was unable to show the special injury required by the consequential injury rule, the trial court properly disposed of Landowner's complaint by summary judgment.

### **CONCLUSION**

There is a legally significant difference between a vested private property right of access to an abutting street and an attenuated complaint about losing a more convenient route of travel. The former is a special injury to a private property right. The latter is damage without legal injury and therefore non-compensable.

The undisputed facts, coupled with legal precedent, prove Landowner suffered no taking or damaging of a private property right when the State closed a distant public highway intersection and provided Landowner with a new access route to the Property. Because the infringement of a private property right is a necessary element of any inverse condemnation or due process claim, the trial court correctly granted summary judgment to the State.

The State respectfully asks this Court to affirm the summary judgment issued by the trial court.

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## CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b), I certify this *Appellee's Brief* complies with the type volume limitations set out in said statute. This brief was prepared in Times New Roman style using Microsoft Word, and contains 7,802 words, and 40,329 characters (without spaces), excluding the cover, table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, appendix, and any certificates of counsel. I have relied on the word and character count of the word processing program to prepare this Certificate.

Dated this 21st day of January, 2016.

STATE OF SOUTH DAKOTA  
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## CERTIFICATE OF SERVICE

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

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STATE OF SOUTH DAKOTA

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**STATE’S APPENDIX**

Tab A – Aerial Photo Showing Property Before Project.....State’s Appx. 1

Tab B – Aerial Photo with Distances.....State’s Appx. 2

Tab C – Aerial Photo with Project Plans Superimposed .....State’s Appx. 3





E 64th Street N

N. Cliff Avenue

Present Interstate Hwy. No. 90

E 63rd Street N

E 63rd Street N

N. Cliff Avenue

E 61st Street N.

E. 60th Street N.

Wayland Avenue

National Avenue

National Avenue

Gulby Avenue

Schliem Property

E. 60th Street N.





E 64th Street N

N. Cliff Avenue

Present Interstate Hwy. No. 90



2 3 4 5 6 7 8

E 63rd Street N

19 18 17 16 15 14 13

N. Cliff Avenue

E. 61st Street N.

Wayland Avenue

E. 60th Street N.

National Avenue

Gulby Avenue

Schliem Property

E. 60th Street N.

1330' State's Appx. 2

977'

748'

254'

280'

303'

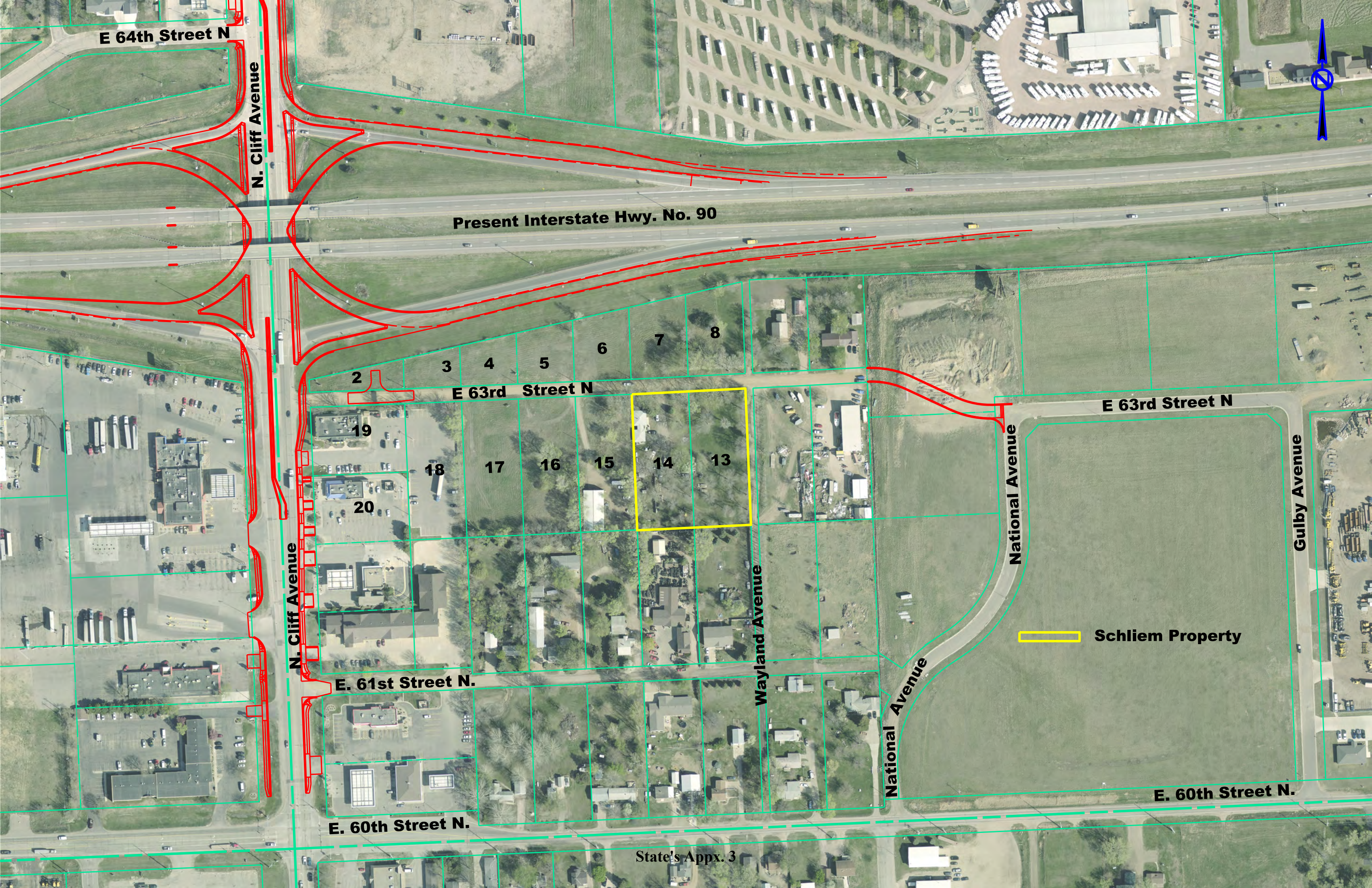
625'

916'

920'

885'





E 64th Street N

N. Cliff Avenue

Present Interstate Hwy. No. 90

2

3

4

5

6

7

8

E 63rd Street N

19

18

17

16

15

14

13

20

N. Cliff Avenue

E. 61st Street N.

Wayland Avenue

National Avenue

E 63rd Street N

Gulby Avenue

Schliem Property

E. 60th Street N.

E. 60th Street N.



IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

Appeal No. 27557

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**Carlyle Schliem and Farmers State Bank of Canton,**  
Plaintiffs and Appellants,

v.

**State of South Dakota, acting by and through the Department  
of Transportation and the South Dakota Transportation  
Commission,**  
Defendant and Appellee.

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

The Honorable Larry Long  
Circuit Court Judge

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Notice of Appeal filed on the 26th day of August, 2015

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## REPLY ARGUMENT

### **I. Landowner is entitled to constitutional protections and analysis even though his property does not “abut” the 63<sup>rd</sup> Street – Cliff Avenue intersection.**

#### **a. Introduction**

This Court has previously declared that South Dakota’s constitution provides greater protection for its citizens than the United States Constitution because our Constitution requires that the government compensate a property owner not only when a taking has occurred, but also when private property has been damaged. *Rupert v. City of Rapid City*, 827 N.W.2d 55, 60, citing *Krier v. Dell Rapids Twp.* 2006 S.D. 10. As the summary judgment record presently stands the uncontested evidence was the fair market value of the Schliem property was diminished \$313,000 as a result the State’s highway project. *SR 140*, ex. 6, p. 58. The uncontested evidence was the project changed the highest and best use of the Schliem property from high-end commercial real estate to low-grade industrial real estate and it was uncontested that only a few properties suffered these types of injuries as a result of the State’s project. *Id.* and (*SR 140*, *SR 60*).

This brief will discuss the rules and tests created by the Court to guide compensability and will demonstrate why the facts of this case require further analysis by the trial court. However, just compensation is a right guaranteed by the South Dakota Constitution for property taken or damaged by the sovereign. *South Dakota Const.*, Art. VI, Sec. 13. While the State argues vehemently against any duty to compensate Landowner for his apparent damage, the underlying intent of the damaging clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the public. *Hall v. State Ex Rel SD Dept. of Transportation*,

806 N.W.2d 217, 230 (S.D. 2011). The Court has written “the tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes.” *Rupert*, 827 N.W.2d at 60 quoting *Bakke v. State*, 744 P.2d 655, 657. The State’s position promotes the sacrifice of Mr. Schliem’s property for the greater good in direct opposition to the underlying intent of the damaging clause and the teachings of this Court.

**b. Landowner had a legal interest in the intersection at Cliff Avenue and 63<sup>rd</sup> Street.**

The State’s contention that Schliem did not have a property right in the intersection of East 63<sup>rd</sup> Street and Cliff Avenue is incorrect. *Appellee’s Brief*, p. 14. It is undisputed that a landowner has a right to reasonable access to the abutting roadway. *Hurley v. State*, 143 N.W.2d 722 (S.D. 1966), *Darnall v. State*, 108 N.W.2d 201 (S.D. 1961), *State Highway Commission v. Bloom* 93 N.W.2d 572, (S.D. 1958). This right is appurtenant to private property ownership, is in fact property, and cannot be taken or damaged without just compensation. *Id.* This right has been referred to by Courts from other states as an easement because the right lawfully entitles a landowner to ingress and egress to and from their property.

In South Dakota, this right or easement does not end at ones property line, but extends as far as necessary to ensure connection with the greater network of roadways.

*Bloom* 93 N.W.2d 572, (S.D. 1958). The *Bloom* Court held:

[Access] is a special private right entirely distinct from the public right, and is one that pertains, not only to the part of the highway abutting the owner’s land, but extends sufficiently beyond his own premises as to

insure reasonable facilities for connection with those highways in which he has no special rights. *Id.* at 578.

The State construes this passage to mean simply that a landowner's abutting street must connect with the larger street system. *Appellee's Brief*, p. 14. Landowner agrees in part with this analysis, however the analysis is incomplete.

Mr. Schliem's only legal connection to the greater network of streets prior to the project was via the intersection at 63<sup>rd</sup> Street and Cliff Avenue. *Affidavit of Carlyle Schliem*, ¶5. By the States own admission, "before the Project, East 63<sup>rd</sup> Street North (63<sup>rd</sup> Street") intersected with Cliff avenue and then extended eastward, ending in a *dead-end* approximately 1,282 feet away from the intersection..." (*emphasis supplied*) *Affidavit of Mark Lieferman*, at ¶7. The State described the Mr. Schliem's access prior to the project as "drivers wishing to access properties along 63<sup>rd</sup> Street likely came from Cliff Avenue, turned east onto 63<sup>rd</sup> Street at the Cliff Avenue/63<sup>rd</sup> Street intersection, and then proceeded east down 63<sup>rd</sup> Street to their destination." *Id.* at ¶10. Wayland Avenue to the east of the Schliem property is marked labeled as a right-of-way, but it is not suitable for vehicular traffic. The State describes Wayland Avenue as "a seventeen-foot-wide dirt road that is sometimes impassable." *Id.* at ¶ 6.

*Bloom* establishes that Schliem was legally entitled to ingress and egress via the 63<sup>rd</sup> Street/Cliff Avenue intersection prior to the project. The State is correct that *Bloom* insures that the abutting street connects with the larger street system. However, the State misses that this connection or access is a "special private right entirely distinct from the public right." *Bloom* at 578. Therefore, Schliem's right to use the intersection prior to its closure by the State was a special private property right.

**c. The State's change to Schliem's access was an interference with a recognized property right.**

The State admits that it built the 63<sup>rd</sup> street extension to the east to avoid land locking the Schliem property. *Appellee's Brief*, p. 15. However, *Bloom* does more than simply require replacement access. *Bloom* defines the right of access as existing from the property line and extending as far as necessary to insure reasonable facilities with the network of streets; "further than this his property rights do not extend." *Bloom* at 578. The State is incorrect to draw the line on the right to access at the property line. As *Bloom* established, that right extends beyond the property line but is not infinite.

Under the *Bloom* definition, the access Schliem had to Cliff Avenue before the project was in fact a private property right. When an access right is interfered with, *Darnall*, *Hurley*, and both *Hall I and II* require the change in access be scrutinized for reasonableness. *Hall v. State Ex Rel South Dakota Dept. of Transp.*, 712 N.W.2d 22, (S.D. 2006) (Hall I), *Hall v. State Ex Rel SD Dept. of Transportation*, 806 N.W.2d 217 (S.D. 2011) (Hall II), *See Appellant's original brief*. Landowner is not advocating that the Court deviate from any established law or test.

**d. Landowner presented evidence that the replacement access was unreasonable.**

The reasonableness of the replacement access was in dispute at the time Summary Judgment was made; however, the trial court did not consider the opposing evidence on that issue because it did not find a "property right" in the Schliem property that had been invaded as a result of the DOT project. *Appellant's Brief*, Appx. Tab 1, p. 4.

Landowner testified by affidavit prior to the Summary Judgment hearing that the closure of the intersection at 63<sup>rd</sup> St. and Cliff Avenue “drastically impair[ed] the access to my property from the greater network of roads...” *Affidavit of Schliem*, ¶ 9. He also stated the State’s actions destroyed the highest and best use of his property and cost him hundreds of thousands of dollars. *Id.* at ¶ 13 and 14. Four appraisals were placed in the record to support these statements. The State submitted the *Affidavit of Mark Lieferman* which included travel distances to differentiate between the before and after access scenarios.

The State was successful in arguing blanket immunity for the closure of the intersection. However, this case involves interference with a recognized private property right, and a specific judicial exercise required to determine if the right to compensation exists. The reasonableness analysis that is required was handed down in *Darnall and Hurley*, and is discussed on Pages 9 through 12 of Appellant’s original brief. Additional considerations required to be given in a change of access case were established in *Hall I*, 2006 S.D. at 29, and are also listed in Appellants original brief on page 12. Because Landowner’s special private right to access via the 63<sup>rd</sup> Street/ Cliff Avenue intersection was taken and replaced with the 63<sup>rd</sup> Street extension, the case should be remanded for consideration of the adequacy and reasonableness of the access after DOT’s project.

**e. Applying a reasonableness standard to access changes does not abandon the consequential damages rule or peculiar injury test.**

If this case is remanded to the trial court, Landowner will have the burden of proving that his access has been materially impaired, that his real estate has been

damaged by the State's project, and that the injury is peculiar and not of a kind suffered by the public as a whole. It is the "basic rule" of South Dakota that the damaging clause of our Constitution protects property owners who have been damaged by the state, if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public. *Hurley*, 143 N.W.2d at 725. The injury must be in different in kind and not merely in degree. *Krier v. Dell Rapids Township*, 709 N.W.2d 842, 848 (S.D. 2006).

Both the injury and the damage suffered by Schliem are peculiar to those few properties located along 63<sup>rd</sup> Street.<sup>1</sup> The properties that used the 63<sup>rd</sup> Street/Cliff Avenue intersection before the State's project each had a "special private right entirely distinct from the public right" in that interchange. Subsequently, those properties that lost their legally protected access rights are also the properties whose highest and best uses were destroyed and fair market values crushed by the State's project. (SR 140, Exs. 6 and 7)(SR 60, Exs. 1 and 2). All of these properties, with the exception of the Kelly Inn, were not offered compensation for the taking of their access, and were expected to accept the destruction of their access and property values for the benefit of the public. Such an expectation violates the underlying intent of the damaging clause in our State constitution, to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of public projects. *Hall v. State Ex Rel SD Dept. of Transportation*, 806 N.W.2d 217 (S.D. 2011).

There is ample evidence in the record to establish the peculiarity of the injury and the consequential damage of the State's project; however, Landowner was not given an

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<sup>1</sup> Northside Gardens prior to the State's project contained 19 lots with 6 property owners.

opportunity to prove his case because the trial court's analysis was incomplete. This case should be remanded for further proceedings.

**II. The U.S. Supreme Court rejects blanket exemptions to the 5<sup>th</sup> Amendment, and instead requires complete factual analysis for takings claims.**

The State is advocating for immunity for the closure of intersections in lieu of a situation-specific factual inquiry. Such a rule would create an arbitrary and artificial barrier to constitutional protections. *Hall I* established definitively that a particular judicial exercise is required when a change in access leads to damaging claims. This Court in *Rupert* held that “there is no magic formula that enables a court to judge, in every case, whether a given governmental interference with property is a taking; instead, the viability of a taking claim is dependent on a situation-specific factual inquiry.”

*Rupert v. City of Rapid City*, 827 N.W.2d 55, 61 citing *Arkansas Game and Fish Com's v. U.S.*, 133 S.Ct. 511.

*Arkansas Game and Fish* was a federal inverse condemnation case on appeal to the United States Supreme Court from the Court of Federal Claims. The Court of Federal Claims had dismissed the claim brought by the Arkansas Game and Fish Commission against the United States for the destruction of 18 million board feet of timber caused by flood control activities of the U.S. Army Corps of Engineers.

In *Arkansas Game and Fish, Com'n*, the United States had relied heavily in its brief and oral argument on a prior case, *Sanguinetti v. United States*, 44 S.Ct. 264, 264 U.S. 146, in which the Court ruled a flood that was temporary in duration was not compensable based on the facts presented. The United States argued in *Arkansas Game and Fish* that the claimant could not collect under any circumstances, because its claim

was also based on a temporary flooding. *Arkansas Game and Fish Com's* 133 S.Ct. at 519. The Court rejected this contention, holding “no decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.” *Id.* The Court went on to state it has “rejected similar arguments when deployed to urge blanket exemptions from the Fifth Amendment's instruction.” *Id.* at 514. Instead, the Court reaffirmed that takings claims turn on situation-specific factual inquiries. *Citing Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646.

It is incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by prior decisions. *Id.* at 521. The State is inviting the Court to create a blanket exemption from the damage clause in order to shelter the State from having to pay for severe damage it has caused to private property. Landowner respectfully urges the Court to reject that invitation and remand this case for a situation-specific factual inquiry.

**f. Compensability only extends as far as the sphere of peculiar damage.**

Landowner anticipates that the State will argue payment of just compensation in this case would open the floodgates to claims brought by other aggrieved property owners. However, the burden of proof is extraordinarily high for establishing an inverse condemnation claim. Should the Court remand for the proper analysis, not only will Landowner be required to prove that his access has been materially impaired by the project, but also that the property sustained damage as a direct result of the project, and the damage was peculiar to the owner's property and not of a kind suffered by the public as a whole. *Bloom* at 278.



The *Arkansas Game and Fish Com'n* Court categorized the United States argument for creating a blanket exemption as an “in for a penny, in for a pound genre.” The United States argued in its brief “every passing flood attributable to the government’s operation of a flood-control project, no matter how brief,” might qualify as a compensable taking. *Id.* As Justice Ginsburg pointed out, “time and time again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government’s ability to act in the public interest.” Citing *United States v. Causby*, 66 S.Ct.1062, 328 U.S. 256. She went on to roundly reject this contention writing: “the sky did not fall after *Causby*, and today’s modest decision augurs no deluge of takings liability.” There has been one inverse condemnation case to the U.S. Supreme Court since *Arkansas Game and Fish Com’n* in 2012. *Horne v. Department of Agriculture*, 133 S.Ct. 2053.

## CONCLUSION

The trial court failed to recognize a private property right had been infringed by the State and did not perform the full analysis for establishing an inverse condemnation claim. The trial court’s judgment should be reversed and the case should be remanded for further review.

Respectfully submitted this 8th day of February, 2016.

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### **CERTIFICATE OF SERVICE**

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

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On this 8th day of February, 2016.

MEIERHENRY SARGENT LLP

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### **CERTIFICATE OF COMPLIANCE**

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 2,575 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 8th day of February, 2016.

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