IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30888

LESLIE TURGEON and KAREN TURGEON,
Plaintiffs/Appellants,

vs.

CITY OF SPEARFISH, a municipal corporation,
Defendant/Appellee

APPELLANTS' BRIEF

Appeal from Circuit Court
Fourth Judicial Circuit,
Lawrence County, South Dakota,
The Honorable Michelle Comer, presiding

Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
516 5th Street, PO Box 1820
Rapid City, SD 57709-1820
(605) 342-2814
Attorneys for Plaintiffs/Appellants

Richard M. Williams
GUNDERSON, PALMER, NELSON &
ASHMORE, LLP
PO Box 8045
Rapid City, SD 57709
(605) 342-1078
Attorneys for Defendant/Appellee

Notice of Appeal filed November 7, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

PRELIMINARY STATEMENT

Throughout this Appellants' Brief, Appellants Leslie Turgeon and Karen Turgeon will be referenced as "Turgeons," and Appellee City of Spearfish, will be referenced as "City." The Settled Record will be referenced as "SR." Transcripts will be referenced as "TT" followed by the page and line number. Appellant's Appendix will be referenced as "Appx."

JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL § 15-26A-3 to consider the Order Granting City of Spearfish's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment and Judgment entered October 8, 2024, granting judgment in favor of City of Spearfish on the Complaint. Appx0002. Appellant filed a timely Notice of Appeal from the Judgment on November 7, 2024. SR362. The Judgment sought to be reviewed is appealable.

LEGAL ISSUES

I. Did City of Spearfish establish a right to judgment as a matter of law on Turgeons' Complaint?

Comment: The Circuit Court concluded that the City has not expressly or impliedly accepted Thoen Stone Road as a dedicated public right-of-way.

Most Relevant Authorities:

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

Miller v. Scholten, 273 N.W.2d 757 (S.D. 1979)

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

Tonsager v. Laqua, 2008 S.D. 54, 753 N.W.2d 394

II. Did the Circuit Court err in concluding the Turgeons had not established a right of access by adverse possession?

Comment: The Circuit Court declared it would not rule on the issue but signed the judgment declaring the Turgeons had not established adverse possession.

Most Relevant Authorities:

Schecher v. Shakstad Elec. & Mach. Works, Inc., 414 N.W.2d 303, 305 (S.D. 1987)

STATEMENT OF THE CASE

Turgeons commenced this action in Lawrence County seeking a judicial declaration that a road known as the Thoen Stone Road over property owned by the City of Spearfish was dedicated to the public and accepted. SR2. This action arose from a locked gate, denial of a building permit, and other obstructions to Turgeons' use of their property accessed by the Thoen Stone Road, and the Turgeons sought an injunction prohibiting the City from obstructing the Road or maintaining a locked gate. Appx0021. The City filed an Answer and asserted certain affirmative defenses. SR14; Appx0029.

After some discovery proceedings, Turgeons moved for summary judgment in their favor on the Complaint, and the City moved for summary judgment in its favor on the Complaint. SR20; SR61. On September 9, 2024, the parties presented motions for summary judgment before the Honorable Michelle Comer. Appx35. The City argued that it has not expressly accepted a dedication of Thoen Stone Road or acted upon Thoen Stone Road in a manner which justifies an inference of acceptance. SR72. Turgeons argued that the City accepted the dedication of Thoen Stone Road by numerous acts, including the agreements to accept property grants and maintain Thoen Stone Road, plats

approved by and submitted by the City, and historical use and maintenance. SR217. The parties disputed the nature and extent of the City's maintenance and the public's use of the Thoen Stone Road. SR270 at ¶¶ 33, 34, 41. The Circuit Court granted summary judgment to the City and denied Turgeons' motion. Appx0056, TT22:14-16.

The City presented an Order Granting City of Spearfish's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment and Judgment, which proclaimed to be a final judgment in favor of the City on Turgeons' claims. SR342. Judgment was entered on October 8, 2024. Appx01. Turgeons appealed from the Judgment by service and filing of a notice of appeal on November 7, 2024. SR362.

STATEMENT OF FACTS

This action relates to a road referred to as the "Thoen Stone Road" located at Spearfish, South Dakota. The documented evidence relevant to the legal status of this road begins on July 9, 1953. Then-owner of the land upon which a monument to the Thoen Stone was erected – Frank Thomson – granted an easement and right of way to the City of Spearfish "as joint tenants" to establish a historic marker and museum for the Thoen Stone for public display. SR176. The City signed the Easement agreement, and it was recorded with the Lawrence County Register of Deeds. SR42.

Eighteen years later, on November 30, 1971, Frank Thomson subdivided this land, Lot 37, and created Lot 37A, Lot 37B, and Lot 37C. SR173. The Plat of Subdivision of Lot 37 delineated a space for a40-foot stretch of land. SR47. In conjunction with the plat, Thomson conveyed Lot 37A to the City and contracted with the City in relation to the Thoen Stone Road. SR46. The contract required the City to exclusively use the land as a City Park and maintain the right of way for ingress and

egress over the existing roadway and to not fence the property. SR43. The 1971 Agreement further provided that if the City Park is abandoned, the right-of-way would revert to the grantor. SR43. The City signed this Agreement, and it was recorded with the Lawrence County Register of Deeds. SR44. One year later, Frank Thomson conveyed another lot to the City. SR48. In December of 1972, Thomson conveyed Lot 37C2 to the City. SR48. The 1972 deed and accompanying Agreement further provided that if the City failed to use the property for purposes of maintaining a road to access the Thoen Stone Monument road, the property would revert to the grantor. SR277. The City signed the Agreement with these terms and approved the accompanying plat, which was recorded with the Lawrence County Register of Deeds. SR49.

Since the 1980s, a gate had been placed over the Thoen stone Road. SR54-55, SR361. The owner of the Black Hills Passion Play, Josef Meier, bought the portion of land that had not been transferred to the City and remained privately owned. SR360. In recent years, the City has laid asphalt over the Thoen Stone Road. SR53. The City maintains a sign at the gate to the Road which states rules, including that the Thoen Stone Monument is "open to the public from dawn to dusk," and "public access through private property. Please stay on the road." SR52. In 2002, Johanna Meier Della Vecchia also gifted some other property to City of Spearfish "as long as the City (a) takes no action to remove the Thoen Stone monument from its present location...and continues maintenance of the present road and continues signage to the current Thoen Stoen." SR228.

On November 1, 2012, after Lot 37B changed hands, the status of Thoen Stone Road was revisited. At the City's request, Johanna Meier Della Vecchia and the City together platted Lots 37A-1, 37A-2, 37B-1, 37B-2, 37C2-Revised and Dedicated Public

Right-of-Way. SR50-51; Appx0025-26. This plat expressly dedicated the Thoen Stone Road as a public right-of-way. City of Spearfish, by its Mayor Jerry Krambeck, signed and certified the plat as owner. The City Finance Officer separately approved the plat as an administrative official.

Plaintiffs Leslie and Karen Turgeon are residents of Lawrence County, South Dakota and own real property located south of the Thoen Stone monument. SR56. To access their property, Turgeons must travel over Thoen Stone Road as the only access route. The City has locked the gate across Thoen Stone Road. SR54-55. The City provided Turgeons with a key, which occasionally fails and locks Turgeons out. SR. Although the City approved a building permit to Della Vecchia on August 19, 2014, for properties accessed by Thoen Stone Road, it also denied Turgeons' application for a building permit. SR30.

STANDARD OF REVIEW

On review of a summary judgment ruling, this Supreme Court gives no deference to the lower court's decision and reviews *de novo*. Nelson v. Garber, 2021 S.D. 32, ¶ 17, 960 N.W.2d 340, 345. The Supreme Court will determine "whether a genuine issue of material fact exists and whether the law was correctly applied." Bergin v. Bistodeau, 2002 S.D. 53, ¶ 11, 645 N.W.2d 252, 254 (citations omitted). The evidence must be viewed "most favorably to the nonmoving party." Tonsager v. Laqua, 2008 S.D. 54, ¶ 4, 753 N.W.2d 394, 396 n.1 (internal citations omitted). Then, without weighing the evidence, this Court decides whether the evidence supports the motion. Center of Life Church v. Nelson, 2018 S.D. 42, ¶ 18, 913 N.W.2d 105, 110 (citations omitted). This Court then determines "whether a genuine issue of material fact exists and whether the

law was correctly applied." Id. (quoting Jacobson, 2008 S.D. 19, ¶ 24, 746 N.W.2d at 745). On review of a circuit court's grant of summary judgment, this Court "will affirm only if all legal questions have been decided correctly." Advanced Recycling Sys., L.L.C. v. Se. Prop., Ltd., 2010 S.D. 70, ¶ 10, 787 N.W.2d 778, 783 (quoting Gehrts v. Batteen, 2001 S.D. 10, ¶ 4, 620 N.W.2d 775, 777).

ARGUMENT

I. The Circuit Court erred in granting summary judgment to City of Spearfish on Turgeons' Complaint.

The Circuit Court erred when it concluded the Thoen Stone Road had not been accepted as a dedicated public right-of-way and open to the public. The City of Spearfish was not entitled to judgment as a matter of law. This Court reviews whether the Circuit Court's correctly decided all legal questions when it granted summary judgment to the City. Advanced Recycling, 2010 S.D. 70, ¶ 10, 787 N.W.2d 778, 783 (quoting Gehrts, 2001 S.D. 10, ¶ 4, 620 N.W.2d at 777). The Circuit Court incorrectly decided legal questions about (A) Frank Thomson's dedication of Thoen Stone Road in July of 1953, (B) express acceptance of a dedication by property grants and by requesting and submitting a dedication by plat, and (C) implied acceptance of dedication by approval of building permits, use and expenditure of resources. On summary judgment, the

On the issue of express acceptance of a dedication, Turgeons and the City did not raise issues of fact. Disputes focused on the interpretation of documents. The Circuit Court should have granted Plaintiffs' motion for summary judgment on the documents before it. On the issue of implied dedication and acceptance, fact disputes were raised regarding the extent of the public use of the Road and the City's maintenance. The Circuit Court should have denied the City's motion for summary judgment.

A. The Thoen Stone Road was dedicated to public use by an easement agreement in July of 1953.

The Circuit Court incorrectly determined that the July 1953 Easement was not a dedication. In determining whether the Circuit Court erred in granting the City's motion for summary judgment, this Supreme Court should first consider whether the Circuit Court erred when it found the Thoen Stone Road was not dedicated to the public by the 1953 Easement.

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

Bergin, 2002 SD 53, ¶ 16, 645 N.W.2d at 255 (quoting Tinaglia v. Ittzes, 257 N.W.2d 724, 729 (S.D.1977). "It is settled law in this state that conduct on the part of an owner clearly expressive of an intention to dedicate usually amounts to a dedication if acted upon by the public in a manner which clearly justifies the inference of acceptance." City of Sioux Falls v. Murray, 470 N.W.2d 619, 620 (S.D. 1991). "An easement may be dedicated to public use if the owner clearly acts to dedicate the easement and the public entity accepts the dedication." Knight v. Madison, 2001 SD 120, ¶ 5, 634 N.W.2d 540, 542. Dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner that manifests an intention that the property dedicated shall be accepted and used presently or in the future. The intention of the owner to dedicate and acceptance thereof by the public are essential elements of a complete dedication.

City of Belle Fourche v. Dittman, 325 N.W.2d 309, 311 (S.D. 1982) (citing Tinaglia, 257 N.W.2d at 728–29).

City has argued that the 1953 Easement agreement is nothing more than an easement and does not achieve a dedication. The City argued and the Circuit Court concluded that the 1953 agreement contained a reversionary clause to Frank Thomson. Based on the language in the agreement, Frank Thomson clearly intended to permanently abandon the property for public use. In the 1953 Easement, Thomson noted that the right-of-way was "for the Thoen Stone for *public* display." SR176 (emphasis added). The agreement stated:

> [Thomson] does hereby Grant as Easement unto the [City of Spearfish and State Historical Society] jointly, as joint tenants, an Easement, Right-of-Way and privilege to establish a historic marker and Museum, including other Black Hills Historical events, for the Thoen Stone for public display, on the land near the City of Spearfish ...
> If at any time in the future, the Homestake Mining Company, or their successors in interest, should permit a suitable site to be selected on the spot were the Thoen Stone was originally found for display to the public, it is understood and agreed between the Parties hereto that the site herein granted and conveyed shall revert to the Party of the First Part, his heirs, executors, administrators and assigns.

SR176.

In this case, the provision for the site to revert to Thomson is not a qualification on the dedication but rather operates to provide the circumstances in which the public easement could be vacated. Thomson did not grant a term of years or otherwise limit the scope. If the property no longer served this public purpose, the right-of-way could be vacated. Every dedication necessarily includes the ability to vacate a public right-of-way according to law. This clause does not destroy Thomson's intent to dedicate. This Court has previously recognized a public dedication despite a clause in an agreement permitting

termination. In First Nw. Tr. Co. of S. Dakota v. Fam. Homes, Inc., 303 N.W.2d 352, 356 (S.D. 1981), this Court affirmed a finding that a termination clause did not avoid dedication. Similarly in this case, the donor's intent controls.

Furthermore, the characterization of Thoen Stone Road as an easement instead of a fee ownership interest does not avoid a dedication. Case law clarifies: "When the grantee of an easement is a public entity, such easement may grant rights to public use." Tonsager v. Laqua, 2008 S.D. 54, ¶ 9, 753 N.W.2d 394, 397. The South Dakota Supreme Court has time after time recognized an easement as dedicated to public use. See, e.g. id. ¶ 1; City of Huron v. Wilcox, 17 S.D. 625, 98 N.W. 88, 89 (1904) ("According to all the authorities, dedication is the deliberate act by which the owner of real property, without remuneration, devotes the fee *or an easement* therein to the use of the public.") (emphasis added). The 1953 Easement gave everyone who desires to use the Road a right-of-way. See Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366, 369 (S.D. 1978). This easement was more than a grant to the City for limited purposes of municipal functions and City agents. See Tonsager, 2008 S.D. 54, 753 N.W.2d at 398. This grant was not merely an easement for the City but a dedication to the public to use the Road. The Circuit Court erred in its conclusion, and the judgment should be reversed.

B. The City of Spearfish expressly accepted Thoen Stone Road as a public right-of-way by signed agreements.

Next, this Court should consider whether the Thoen Stone Road was expressly accepted by the City. This Court should also review the burden of proof on an issue of dedication and acceptance. In its ruling, the Circuit Court stated:

> Both the dedication and acceptance of a public highway must be shown by clear and convincing evidence. *Niemi v. Fredlund Twp.*, 2015 S.D. 62, ¶ 29,

> 867 N.W.2d 725, 732-733 (cleaned up); *City of Belle Fourche v. Dittman*, 325 N.W.2d 309, 311–12 (S.D. 1982)("[c]onduct on the part of the owner that is clearly expressive of an intention to dedicate usually amounts to dedication, if acted upon by the public in a manner which clearly justifies the inference of an acceptance.")(citations omitted).
> Plaintiffs have not shown, by clear and convincing evidence, that both a dedication and acceptance of TSR as a public highway, by the City, has occurred.
> If, upon review, the Supreme Court should find that clear and convincing evidence is not the appropriate standard, the Court alternatively finds that Plaintiffs have not shown, by a preponderance of evidence, that TSR was dedicated by the 1953 Easement, the 1971 Agreement, or the 1971 Plat, or that the City accepted any dedication of TSR by means of those documents. Further, the Court alternatively finds that, Plaintiffs have not shown, by a preponderance of the evidence, that the City accepted the dedication of Thoen Stone Road as shown on the 2012 Plat.

These conclusions are incorrect. This Supreme Court has held that clear and convincing evidence may be required to show acceptance *when a dedicated public right of way is inconsistent with record title.* See Niemi v. Fredlund Twp, 2015 S.D. 62, 867 N.W.2d 725, 732. Here, dedication is consistent with record title, and a preponderance of evidence showing acceptance would be sufficient proof.

In showing express acceptance, Turgeons offered a handful of documents in support. The City argued in support of its motion for summary judgment that the City never passed a resolution accepting Thoen Stone Road, and thus, Thoen Stone Road was not expressly accepted. The record clearly demonstrates, however, that the City's agreements and official acts expressly accepted the Thoen Stone Road. South Dakota does not require formal acceptance of a dedication. Tonsager, 2008 S.D. 54, ¶ 10, 753 N.W.2d at 398. The City, by its agreements, committed to keep and maintain the Thoen Stone Road for the public's benefit to access the Thoen Stone Monument located at the southern end of the road.

The November 30, 1971, agreement provides that the property "known as the Thoen Stone Land, is to be used by the City of Spearfish exclusively for use as a City Park." SR43. Further, Thomson granted a right-of-way to the Thoen Stone Land "over the existing roadway ... it being agreed that such right-of-way shall be maintained by the City." The plat contained a 40' space set apart and stretching the plat, presumably for a public street. See Selway Homeowners Ass'n v. Cummings, 2003 S.D. 11, ¶ 23, 657 N.W.2d 307, 314. The City's maintenance responsibilities extended from "the north line of Lot 37A ... to a point on the South line of Lot 37C." SR44. The City's obligation further prohibited the City from fencing Thoen Stone Road. Now, the City not only locks a gate on the Road but flaunts said gate as a tool to restrict public access. The City here – although voluntarily agreeing to the contract terms and accepting ownership of property under the contract – intentionally breaches its contract.

In December of 1972, the City bolstered its promise to maintain the Road. The City then accepted a grant of Lot 37C2, which is located at the north end of the Road in question and connected a public street, North St. Joseph Street, to Thoen Stone Road. SR48; SR121. Lot 37C contains part of the previously described Road. SR44. There is no debate that the City considers this portion of the Road to be dedicated and accepted as a public street. "The virtually unanimous rule is that if the public has accepted part of a street or alley it has accepted all of that street or alley." Haley v. City of Rapid City, 269 N.W.2d 398, 400 (S.D. 1978). By accepting Lot 37C as a public road, the City has accepted the dedication of Thoen Stone Road over Lot 37B and Lot 37A.

Most significantly, Turgeons demonstrated an express acceptance of a dedicated public right-of-way by plat. After the City took ownership of the south end (Lot 37A)

and north end (Lot 37C2) of Thoen Stone Road and agreed to maintain the Road for purposes of a public display of the monument, the City requested a plat of the lots and Thoen Stone Road. Johanna Meier Della Vecchia and the City submitted a plat which dedicated Thoen Stone Road. The 2012 Plat was signed the City as an owner of property. Mayor Jerry Krambeck's certification recites that the plat was made "at the City's request." This act alone is sufficient to evidence express acceptance. The City cannot effectively offer a right-of-way for dedication but also argue that it would not accept the offer. The Circuit Court erred in concluding the 1971, 1972, and 2014 agreements did not constitute express acceptance of a dedication, and the judgment should be reversed.

C. The City of Spearfish impliedly accepted Thoen Stone Road as a public right-of-way by permits, use and maintenance.

As explained by this Court, a public body can be shown to have accepted a dedicated public right-of-way by approval of a plat or expenditure of funds, among others. Nelson v. Garber, 2021 SD 32, n.6 (citing SDCL 11-3-12). Here, the City of Spearfish approved building permits for properties whose access is only by way of Thoen Stone Road. This is a significant acknowledgment by the City of a public right-of-way. SDCL § 11-6-38 governing building on unapproved streets, provides:

> From and after the time when the platting jurisdiction of any municipality has attached by the reason of the adoption of a major street plan as provided in § 11-6-26, no building permit may be issued for or no building may be erected on any lot within the territorial jurisdiction of the commissioners or council as provided in § 11-6-26 unless the street giving access to the lot upon which the building is proposed to be placed is accepted as opened as, or has otherwise received the legal status of, a public street prior to that time, or unless such street corresponds in its location and lines with a street shown on a recorded subdivision plat approved by the council ... .

First, in August of 2014, the City granted Johanna Della Vecchia and Mark Weber their application for a building permit. SR31. Then, the City denied the Turgeons their application for a building permit on grounds that "Thoen Stone Road has never been accepted or opened as a public street." SR30. Having already granted a building permit to Della Vecchia in August of 2014, the City acknowledged that the Thoen Stone Road was *accepted as opened*. By granting the building permit and taking the position that a building permit could only be granted where the property had access to an accepted public street, the City impliedly accepted the Thoen Stone Road as dedicated.

In addition, use of the Road demonstrates implied acceptance. South Dakota has adopted the rule that acceptance of dedication may be shown through use. South Dakota provides that "whenever any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law. SDCL § 31-3-1. While mere use by the public of a road shall not establish a public highway, the use of such land by the public as a street, with the knowledge of, and without objection by, the owner of the fee for a number of years, is evidence of such dedication. Nelson v. Garber, 2021 S.D. 32, ¶ 26, 960 N.W.2d 340, 346 (quoting Tonsager v. Laqua, 2008 S.D. 54, ¶ 9, 753 N.W.2d 394, 397).

Similar circumstances have come before this Court. In Miller v. Scholten, 273 N.W.2d 757 (S.D. 1979), the road at issue had existed for at least 65 years. Approximately 45 years after its original unimproved use, owners who accessed their properties by the road discussed the local public body to take over the road, and the

township paid to have the road graded and graveled. Thereafter, the township paid for maintaining the road. The owner had given the township permission to use and maintain the road. This Court then held that the road had been dedicated to the public and that the township had accepted the dedication by expending public funds for grading, graveling, and maintaining the road. Id. at 762 (citing Evans v. City of Brookings, 41 S.D. 225, 170 N.W. 133) ("[W]hat amounts to a dedication by implication depends upon the facts of the particular case, and no hard and fast rule can be laid down as a guide for the courts."). The Court in Scholten compared the case of Edmunds v. Plianos, 74 S.D. 260, 51 N.W.2d 701, in which the City payment for paving an intersection of a street and alley supported the finding that there had been an implied dedication and acceptance. Scholten, 273 N.W.2d 757 (citing Haley, 269 N.W.2d 398). The Court in Scholten also distinguished the case of Brusseau v. McBride, 245 N.W.2d 488, in which it found "no public body at any time had ever expended any public funds for construction, repair or maintenance of the road." Id. The Scholten case is factually similar to the case at hand, and the reasoning therein applies to this case.

This Court can look to other opinions to establish the threshold over which a road has been impliedly accepted. In Coester v. Waubay Twp, 2018 S.D. 24, 909 N.W.2d 709, this Court explained:

> From our review of the record, it does not appear the Township accepted responsibility over the roads. Theodore Wasilk, township supervisor, submitted an affidavit concurring with a statement in Petitioners' application that the "roads have een used for more than 50 years by the public generally, and were *accepted, controlled,* but not maintained as a public highway in Waubay Township, Day County, South Dakota, since initial platting[.]" (Emphasis added.) Yet Wasilk did not concede that the roads were accepted or controlled as public highways *by the Township*, and there is no evidence any other entity has maintained the roads as public highways. Further, Wasilk averred that the Township had "never accepted

> these roads into the township road system" or had ever performed "any repair or maintenance on those roads."

Id. ¶ 14 (emphasis in original). In Coester, the township had not performed any maintenance or expended any funds. The road was not impliedly dedicated and accepted. In Scholten, Edmunds, and Haley, the public body performed some maintenance or expended resources, and the roads in question were considered impliedly dedicated and accepted. As it relates to Thoen Stone Road, the City acknowledges that they have performed maintenance and expended public resources on the Road. It has laid asphalt. It placed the cattle guard. It mowed the ditches. It erected a sign. Since it has performed *any* maintenance, however slight, and expended funds on the Road, it has impliedly accepted a dedicated right-of-way.

In this case, based on the facts presented below, the Circuit Court erred in granting City of Spearfish's motion for summary judgment. As the movant, the City bore the burden but did not prove the absence of a material issue of fact as to whether the City had impliedly accepted a dedicated public right-of-way by use and maintenance. See SDCL § 15-6-56(c). The Circuit Court incorrectly determined the Thoen Stone Road had not been impliedly accepted. The City has expended funds and regulated portions of the Thoen Stone Road by erecting a gate and laying asphalt. The circuit court found in its Order that "The City provided limited maintenance on TSR commensurate with the maintenance of TSR for pedestrian access to a public park, but has further limited access by means of posted park hours, and has prevented unrestricted vehicular travel by means of a locked gate for over forty years." This finding is erroneous. No admissible evidence was presented that the City limits its maintenance to a pedestrian path for a public park. The City's own sign refers to the right-of-way as a "road" which is "open to the public

from dawn to dusk." The City cannot now claim the road upon which the City laid asphalt is not a maintained road but a pedestrian path for a park.

Turgeons further offered evidence that the Thoen Stone Road is used by the public almost daily. SR225 at ¶ 8. Frank Thomson reported that about 20,000 people visited the area every year. SR225 at ¶ 8. Utility companies, construction vehicles, logging trucks, and tourists have used the Thoen Stone Road. SR225 at ¶ 9; SR358. The City did not dispute the extensive public use before the circuit court. Statute defines "Public Highway" as "Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway." The City asserts that the Road is not open as a matter of right because the City gates it, and that the City can gate the Road because it is not open. The City's rationale fails, however, because the public has had a right to travel Thoen Stone Road as an open access route since dedication and acceptance in 1953. The City's unilateral locking of a gate does not negate the public's access as a matter of right.

The Circuit Court further erred in ignoring statutes – including SDCL § 11-6-38 and SDCL § 31-3-1 – and relying on the City's *post hoc* justification. The City granted a building permit to Della Vecchia and Mark Weber. Granting a building permit requires an access road. If the City had followed statute and its ordinance, it should have granted a building permit to Turgeons and acknowledged Thoen Stone Road as providing public access. Since 1953, the City used the properties, approved plats, granted building permits, entered into agreements, and maintained the Road with knowledge of the public right-of-way over the Road and for public use. Thoen Stone Road has been used by the public for more than twenty years and has been maintained by the City. Thus, the Circuit Court

erred when it determined the City had not impliedly accepted the Thoen Stone Road as a dedicated public right-of-way. The judgment should be reversed and remanded.

II. The Circuit Court erred in declaring that Turgeons had not established access rights by adverse possession.

At the hearing on the motions for summary judgment, the City further argued that Turgeons had not shown adverse possession rights. Plaintiffs had not pled prescriptive easement or adverse possession. SR2. The City had not pled an affirmative defense on adverse possession or a counterclaim to quiet title. SR14. The Circuit Court orally stated it would not address an adverse possession claim. TT22:2-6. The Order and Judgment, however, provided "Additionally, because the City used TSR under easements granted by Frank S. Thomson until the filing of the 2012 Plat, Plaintiffs cannot show use of TSR which was open, continuous, and against the right of the property owner, for the prescribed statutory period of twenty years." (citing Underhill v. Mattson, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352; SDCL 15-3-12; Travis v. Madden, 493 N.W.2d 717, 720 (S.D. 1992). Turgeons did not seek a declaration with regard to their prescriptive easement rights and filed an objection to the proposed Order. This objection was apparently ignored, and the judgment was entered in the same form as it was proposed.

This Court has explained the error in adjudicating an unpled issue. In Schecher v. Shakstad Elec. & Mach. Works, Inc., 414 N.W.2d 303 (S.D. 1987), this Court applied three tests for permitting an unpled affirmative defense under SDCL 15-6-15(b) (implied consent): "1. whether the opposing party will be prejudiced by the implied amendment of the pleadings, 2. whether the opposing party had a fair opportunity to litigate the issue, and 3. whether the opposing party could have offered any additional evidence if the case

had been tried on a different issue." Id. at 305 (citing Oesterling v. Oesterling, 354 N.W.2d 735, 737 (S.D. 1984). In Schecher, the Supreme Court found that the record failed to disclose how the affirmative defense was addressed by the trial court except for a reference in a trial response brief, mention of a letter, and the phrasing in the summary judgment order. Id.

This case is similar. The City's first argument on adverse possession arose in its Reply brief in support of summary judgment, which analogized adverse possession to SDCL 31-3-1. The Circuit Court properly declined to address the issue in its oral ruling but improperly executed the Judgment that adjudicated the issue. This overreaching part of the judgment prejudiced Turgeons. Turgeons' and their predecessors' use of the Thoen Stone Road and any adverse possession or prescriptive easement rights were not at issue in the present action, and Turgeons did not have a meaningful opportunity to defend the issue, which effectively corresponded to the City claiming quiet title. No such counterclaim was pled. Turgeons did not consent to the issue being tried. Therefore, the judgment should be reversed.

CONCLUSION

Based on the foregoing, City of Spearfish failed establish a right to summary judgment on Turgeons' claims, and the Circuit Court erred by concluding that the Thoen Stone Road was not accepted as a dedicated public right-of-way. The Circuit Court erred in granting City of Spearfish's motion for summary judgment. Furthermore, the Circuit Court abused its discretion by entering a Judgment in direct conflict with its oral ruling. Turgeons respectfully request this Court reverse the Judgment and remand to the Circuit Court for entry of findings of fact, conclusions of law, and judgment declaring the Thoen

Stone Road to be a public road.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

Dated this 26th day of December, 2024

Respectfully submitted,

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Appellants Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

CERTIFICATE OF SERVICE

Nathan R. Chicoine of DeMersseman Jensen Tellinghuisen & Huffman, LLP hereby certifies that on the 26th day of December, 2024, he served an electronic copy of the foregoing Appellant's Brief in the above-captioned action on the following:

Richard M. Williams
GUNDERSON, PALMER, NELSON &
ASHMORE, LLP
PO Box 8045
Rapid City, SD 57709
(605) 342-1078
Attorneys for Appellee

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Appellant Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). I certify that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief contains 5,367 words and 26,643 characters, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

DATED this 26th day of December, 2024.

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Appellant Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy via Odyssey File & Serve, and the original of the above and foregoing Appellant's Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

Clerk of the Supreme Court
State Capital Building
500 E. Capitol Avenue
Pierre, SD 57501

DATED this 26th day of December, 2024.

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Appellants Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

APPENDIX

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

LESLIE TURGEON and KAREN TURGEON, Plaintiffs, v. CITY OF SPEARFISH, a municipal corporation, Defendant.	)	40CIV23-000028 **ORDER GRANTING CITY OF SPEARFISH'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND JUDGMENT**

The above-entitled matter came before the Court on September 9, 2024, on cross motions for summary judgment, pursuant to SDCL § 15-6-56, filed by Plaintiffs, Leslie and Karen Turgeon ("Plaintiffs") and the City of Spearfish ("City"). Plaintiffs were personally present and represented by Nathan R. Chicoine, of DeMersseman, Jensen, Tellinghuisen & Huffman. The City was represented by Attorney Richard M. Williams, of Gunderson, Palmer, Nelson & Ashmore, LLP. The Parties agreed that the matter presented no dispute of material fact and was ripe for summary judgment.

The Court took judicial notice of the entire file, including all briefs and affidavits in the above-captioned matter, and hereby finds the following:

1. The Court hereby incorporates its oral ruling on the motions for summary judgment announced on September 9, 2024.
2. In order to create a public highway by dedication, "[t]here must be an unconditional offer by the grantor to create a public highway and there must be an unconditional acceptance by the appropriate public entity that it becomes one." *Selway Homeowners*

Ass'n v. Cummings, 2003 S.D. 11, ¶ 20, 657 N.W.2d 307, 313 (citing *Tinaglia v. Ittzes*, 257 N.W.2d 724, 728–729 (S.D.1977)).

3. The dedication of a public highway may be express or implied. *Nelson v. Garber*, 2021 S.D. 32, ¶ 24, 960 N.W.2d 340, 346.

4. Plaintiffs rely on a number of written documents, and certain actions on behalf of the City, to show dedication and acceptance of a road, known for the purposes of this litigation, as Thoen Stone Road ("TSR"). Those documents include the following:

   a. A document entitled "An Easement" entered into in 1953, by and among others, Frank S. Thomson and the City, recorded with the Lawrence County Register of Deeds in Book 321 page 124.

   b. An "Agreement" entered into by Frank S. Thomson and the City in 1971 filed with the Lawrence County Register of Deeds in Book 405 pages 298 and 299.

   c. A 1971 Plat that reads "Plat of Subdivision of Lot 37 Subdivision of the W1/2NW1/4 Section 15, T6N, R2E, BHM. Lawrence Co. South Dakota" recorded with the Lawrence County Register of Deeds in Plat Book 6 at pages 87 and 88.

   d. A Warranty Deed, signed by Frank S. Thomson, in 1972, granting Lot 37C to the City, recorded with the Lawrence County Register of Deeds in Book 406 page 74.

   e. A plat filed in 2012 providing a "70.00' Public-Right-Of-Way Dedicated This Plat" recorded with the Lawrence County Register of Deeds as document 2012-5296.

5. Easements allow the owner of the servient tenement to retain "all the incidents of ownership in the easement." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 25, 693 N.W.2d

656, 663. A dedication for a public highway, on the other hand, must "show a dedication, which is unequivocal and decisive, manifesting a positive and unmistakable intention, on the part of the owner, to permanently abandon his property to the specific public use." *Niemi v. Fredlund Twp.*, 2015 S.D. 62, ¶ 33, 867 N.W.2d at 734 (emphasis added) (internal quotations and additional citations omitted).

6. The 1953 Easement and the 1971 Agreement create simple easements and do not illustrate a dedication of TSR as a public highway. Both documents additionally contain a reversionary clause to the grantor, Frank S. Thomson.

7. The 1953 Easement and the 1971 Agreement do not "show a dedication," which is "unequivocal and decisive, manifesting a positive and unmistakable intention, on the part of the owner, to permanently abandon his property to the specific public use." *Niemi*, 2015 S.D. 62, ¶ 33, 867 N.W.2d 725, 734.

8. The 1971 Plat does not dedicate TSR as a public highway. As noted on the plat itself, it is a "Plat of Subdivision of Lot 37, Subdivision of the W1/2NW1/4 Section 15, T6N, R2E, BHM. Lawrence Co, South Dakota." The plat shows the location of the 1971 Easement, as described in the 1971 Agreement, but the 1971 Plat does not contain the necessary words to dedicate TSR as a public highway. *Selway Homeowners Ass'n*, 2003 S.D. 11, ¶¶ 18-25, 657 N.W.2d 307, 312-15; *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 11, 660 N.W.2d 637, 641.

9. The 1972 Warranty Deed transferring Lot 37C to the City does not include any portion of TSR.

10. Without a dedication, the City could not have accepted the easement for public use. *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 11, 660 N.W.2d 637, 641.

11. The 2012 Plat, however, is a clear dedication of TSR as a public highway.

12. The mere filing of the 2012 Plat, however, does not act as acceptance of TSR, by the City, as a public highway.

SDCL § 11-3-12 provides, in pertinent part:

> No governing body shall be required to open, improve, or maintain any such dedicated streets, alleys, ways, commons, or other public ground solely by virtue of having approved a plat or having partially accepted any such dedication, donation or grant.

And SDCL § 11-6-33, further provides:

> The approval of a plat by the council shall not be deemed to constitute or effect an acceptance by the municipality or public of the dedication of any street or other ground shown on the plat.

13. Notwithstanding the owner's intent to dedicate land to public use, there must also be an unconditional acceptance by the City of the dedication. *City of Belle Fourche v. Dittman*, 325 N.W.2d 309, 312 (S.D. 1982) ("Accordingly, the mere filing of a plat without public acceptance does not vest fee simple title to streets and alleys in appellee, rather it is simply an offer to dedicate."); *Selway Homeowners Ass'n v. Cummings*, 2003 S.D. 11, ¶ 20, 657 N.W.2d 307, 313.

14. Plaintiffs have introduced no facts showing TSR was expressly accepted by the City as a public highway.

15. The undisputed material facts do not show the City impliedly accepted TSR as a public highway.

16. "Public Highway" is defined by SDCL § 31-1-1 and provides, in part:

> Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway.

17. "Mere use by the public of any route of travel along or across public or private land...shall not operate to establish a public highway and no right shall inure to the public or any person by such use thereof." SDCL § 31-3-1.

18. "The right-of-way is public if everyone who desires may lawfully use the right-of-way. It is the right of travel by all the world, not the actual exercise of the right which constitutes a road a public highway." *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 369 (S.D. 1978).

19. The City provided limited maintenance on TSR commensurate with the maintenance of TSR for pedestrian access to a public park, but has further limited access by means of posted park hours, and has prevented unrestricted vehicular travel by means of a locked gate for over forty years.

20. As used in this instance, the existence of this gate, controlled by lock and key, across the roadway is "the antithesis of public use". *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 370 (S.D. 1978).

21. TSR has never been opened, maintained, or used as a public highway.

22. SDCL § 31-3-1 provides in relevant part:

> Whenever any road shall have been used, worked, and kept in repair *as a public highway* continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.
>
> (emphasis added).

23. SDCL § 31-3-1, in its very definition, requires that the road to be deemed a public highway "shall have been used, worked, and kept in repair as a *public highway* continuously for twenty years..." (emphasis added).

24. Plaintiffs have not shown that TSR was used, worked, or kept in repair as a public highway continuously for twenty years.

25. Additionally, because the City used TSR under easements granted by Frank S. Thomson until the filing of the 2012 Plat, Plaintiffs cannot show use of TSR which was open, continuous, and against the right of the property owner, for the prescribed statutory period of twenty years. *Underhill v. Mattson*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352 (citing SDCL 15–3–12); *Travis v. Madden*, 493 N.W.2d 717, 720 (S.D. 1992).

26. Both the dedication and acceptance of a public highway must be shown by clear and convincing evidence. *Niemi*, 2015 S.D. 62, ¶ 29, 867 N.W.2d 725, 732-733 (cleaned up); *City of Belle Fourche v. Dittman*, 325 N.W.2d 309, 311–12 (S.D. 1982)("[c]onduct on the part of the owner that is clearly expressive of an intention to dedicate usually amounts to dedication, if acted upon by the public in a manner which clearly justifies the inference of an acceptance.")(citations omitted).

27. Plaintiffs have not shown, by clear and convincing evidence, that both a dedication and acceptance of TSR as a public highway, by the City, has occurred.

28. If, upon review, the Supreme Court should find that clear and convincing evidence is not the appropriate standard, the Court alternatively finds that Plaintiffs have not shown, by a preponderance of evidence, that TSR was dedicated by the 1953 Easement, the 1971 Agreement, or the 1971 Plat, or that the City accepted any dedication of TSR by means of those documents. Further, the Court alternatively finds that, Plaintiffs have not shown, by a preponderance of the evidence, that the City accepted the dedication of Thoen Stone Road as shown on the 2012 Plat.

29. This Judgment is final, and appealable, as it renders judgment on all claims and relief in the above-captioned matter.

It is, therefore, HEREBY ORDERED, ADJUDGED, and DECREED that:

1. The City's Motion for Summary Judgment is GRANTED in favor of the City and against Plaintiffs on all Counts of the Complaint for Declaratory Judgment and Injunction on file in the above-captioned matter.
2. Plaintiffs' Motion for Summary Judgment is DENIED.
3. That the City is entitled to its costs and disbursements in the amount of §_____.

10/4/2024 4:18:47 PM

BY THE COURT:

Michelle Comer

The Honorable Michelle K. Comer
Circuit Court Judge

Attest: CAROL LATUSECK, CLERK
Nicolussi, Bree
Deputy

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

LESLIE TURGEON and KAREN TURGEON,	)	
Plaintiffs,	)	**STATEMENT OF UNDISPUTED MATERIAL FACTS**
v.	)	
CITY OF SPEARFISH, a municipal corporation,	)	
Defendant.	)	

COMES NOW Defendant, City of Spearfish (hereinafter the "City" or "Spearfish"), by and through Richard M. Williams, of Gunderson, Palmer, Nelson & Ashmore, LLP, their attorneys, and hereby submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment pursuant to SDCL § 15-6-56.

HISTORY OF RELEVANT REAL PROPERTY

1. On July 9, 1953, Frank S. Thomson granted an easement and right of way to the City, the Thoen Stone Committee, and William G. Robinson, Secretary of the State of South Dakota Historical Society on Thomson's property then-described as SW1/4NW1/4 of Sec. 15, T6N, R2E, BHM. Affidavit of Richard M. Williams ¶ 8, Exhibit 10.

2. The easement was described as:

> A knoll of ground containing about two acres, situated in the Southeasterly part of the SW1/4NW1/4 of Section 15, in Township 6, North of Range 2, East of the B.H.M., together with the gravelled [sic] road right-of-way (25 feet wide), leading to the top of the knoll of ground, and subject to the Homestake Mining Company's powerline right-of-way, and more particularly described as being bounded on the West by the West side of the

Filed: 8/12/2024 4:57 PM CST Lawrence County, South Dakota 40CIV23-000028

> Homestake Mining Company's powerline right-of-way, and on the South by the Ward's farm and on the Ease of the foot of the grassy hill and on the North by the gravelled [sic] road as now situated, thereon, together with the right of ingress and egress upon said above described land.

Id.

3. The purpose of the easement was to establish a historic marker and museum for the Thoen Stone near the City's land in Lawrence County, South Dakota. *Id.*

4. In 1971, Frank S. Thomson, via plat recorded with the Lawrence County Register of Deeds, subdivided Lot 37 of the W1/2NW1/4, Section 15, T6N, R2E, B.H.M., in Lawrence County, South Dakota. Affidavit of Richard M. Williams ¶ 6, Exhibit 4.

5. This plat created Lot 37A, Lot 37B, and Lot 37C of the W1/2NW1/4, Section 15, T6N, R2E, B.H.M., Lawerence County, South Dakota. *Id.*

6. Then, on November 30, 1971, Frank S. Thomson contracted with the City to convey the following real property to the City:

> Lot 37A, Subdivision of Lot 37, West One-Half of the Northwest Quarter, Section 15 Township 6 North, Range 2 East, B.H.M., Lawrence County, South Dakota, for the use and purpose of maintaining as a City Park.

Affidavit of Richard M. Williams ¶ 5, Exhibit 3 (hereinafter "the 1971 Agreement").

7. Lot 37A conveyed under the 1971 Agreement was known as the "Thoen Stone Land" and was to be used by the City exclusively as a City park "for the enjoyment and historical interest centered around the Thoen Stone" by the general public. *Id.*; *see also* Affidavit of Richard M. Williams ¶ 6, Exhibit 4 (showing the location of Lot 37A on the plat).

8. Under the 1971 Agreement, Frank S. Thomson granted the City a right-of-way for ingress and egress to the Thoen Stone over the existing roadway, now known as Thoen Stone Road, leading to the Thoen Stone described as follows:

> A Right-of-way 40 feet in width, the center line of which is described as follows: Beginning at a point on the north line of Lot 37A, which point bears North 80° East, 30 feet from the Northwest corner of said Lot 37A, thence North 16°, 58 minutes East 35.3 feet, thence North 60°, 56 minutes East 299.6 feet, thence South 87°, 36 minutes East 198.7 feet, thence North 8° 18 minutes East 106.3 feet, thence North 30°, 41 minutes West 121.3 feet, thence North 6°, 50 minutes West 352.6 feet, thence North 45°, 55 minutes East 189.9 feet, thence North 23°, 54 minutes East 225.0 feet to a point on the South line of Lot 37C, which point bears South 71°, 13 minutes East 394.0 feet from the Southwest corner of said Lot 37C.

Affidavit of Richard M. Williams ¶ 5, Exhibit 3.

9. The 1971 Agreement required the City to maintain the right of way for the purposes of a public park, and if it ceased use as a public park, the right of way would revert to Thomson. *Id.*

10. On December 6, 1972, Frank S. Thomson executed a warranty deed conveying to the City Lot 37C2, a Subdivision of Lot 37C, in the W1/2NW1/4 of Section 15, T6N, R2E, B.H.M., in Lawrence County, South Dakota. Affidavit of Richard M. Williams ¶ 9, Exhibit 11 (hereinafter "the 1972 Deed").

11. The purpose of the 1972 Deed was for the City to use and maintain a road to provide access to Thoen Stone Road. *Id.*

12. Finally, in 2012, the record owners of the relevant property in the W1/2NW1/4 of Section 15, T6N, R2E, B.H.M, in Lawrence County, South Dakota recorded with the Lawrence County Register of Deeds the Plat of Lots 37A-1, 37A-2, 37B-1, 37B-2, 37C-2 Revised and Dedicated Right-of-Way of the Thoen Stone Addition, City of Spearfish. Affidavit of Richard M. Williams ¶ 7, Exhibit 5 (hereinafter "the 2012 Plat").

13. The 2012 Plat sought to dedicate a 70-foot public right-of-way on Thoen Stone Road. *Id.*

PLAINTIFFS' PROPERTY AND ACCESS

14. Plaintiffs own real property in Lawrence County, South Dakota legally described as:

> The SW1/4SW1/4SW1/4SE1/4 and the N1/2SW1/4SW1/4SE1/4 and the NW1/4SW1/4SE1/4 and the SW1/4SE1/4NW1/4SE1/4 and the SE1/4SW1/4NW1/4SE1/4 and the SE1/4SE1/4SW1/4 and the SE1/4NE1/4SE1/4SW1/4 and the E1/2SW1/4SE1/4SW1/4 and the NW1/4NE1/4SW1/4SE1/4 of Section 16, Township 6 North, Range 2 East of the Black Hills Meridian, Lawrence County, South Dakota. Containing 42.5 acres more or less.

Affidavit of Richard M. Williams ¶ 4, Exhibit 2 at 4:18-25, 5:1-25, 6:1-2, 42 (Deposition Exhibit 1), 43 (Deposition Exhibit 2).

15. When Plaintiffs purchased their real property, they were on notice that they lacked a right of access to and from the land. *See* Affidavit of Richard M. Williams ¶ 3, Exhibit 1 at 6 ¶ 11 (Plaintiffs' Title Commitment Policy noting a lack of a right of access to and from the land and excluding any assurance of such right from coverage under title insurance policy).

16. Plaintiffs access their real property via Thoen Stone Road. Affidavit of Richard M. Williams ¶ 4, Exhibit 2 at 6:11-12.

17. The location of Plaintiffs' real property requires them to traverse parcels owned by Lookout Enterprises, the City, and Johanna Meier Della Vecchia to access their real property. *See id.* at 6-16.

18. Plaintiffs must go through two gates to access their property. *Id.* at 16:5-25.

19. One gate is located at the northern entrance to Thoen Stone Road. Affidavit of John Senden ¶ 4.

20. The other gate is located between the City's property on Lot 37A-1 and Lot 37A-2 and the Della Vecchia property. Affidavit of Richard M. Williams ¶ 4, Exhibit 2 at 16:5-19.

Filed: 8/12/2024 4:57 PM CST Lawrence County, South Dakota 40CIV23-000028

21. The gate at the northern entrance to Thoen Stone Road is at the center of this lawsuit. *See id.* at 17:6-17.

CITY COUNCIL MEETING MINUTES REGARDING THOEN STONE ROAD

22. On April 27, 1972, the Spearfish City Council voted to authorize the then-Mayor to enter into an agreement with Frank S. Thomson for the Thoen Stone Land to be used as a City park and for the enjoyment of the Thoen Stone monument. Affidavit of Michelle DeNeui ¶ 9, Exhibit 6.

23. On June 6, 1988, the Spearfish City Council received a request from Clint Garrett of the Black Hills Passion Play to provide a place for pedestrian traffic on Thoen Stone Road. The City Council voted to maintain the pedestrian path "in the least expensive manner until the Thoen Stone Committee makes its final recommendation to the full Council concerning the final location of the Thoen Stone." Affidavit of Michelle DeNeui ¶ 10, Exhibit 7 at 11.

24. On November 16, 1988, the Spearfish City Council denied a request "to overlay the entrance to the Thoen Stone[.]" Affidavit of Michelle DeNeui ¶ 11, Exhibit 8 at 2.

25. The document packet for the Spearfish City Council's August 15, 2016, meeting notes that Thoen Stone Road is a "public trail up to the Thoen Stone monument[.]" Affidavit of Michelle DeNeui ¶ 12, Exhibit 9 at 5.

26. There has been no formal action on behalf of the Spearfish City Council to open or maintain Thoen Stone as a public highway open to vehicular travel. Affidavit of Michelle DeNeui ¶¶ 13-14.

NATURE, USAGE, AND CITY MAINTENANCE OF THOEN STONE ROAD

27. Thoen Stone Road has a locked gate at its northern entrance preventing vehicular access by the general public. Affidavit of John Senden ¶ 4.

28. The gate has existed for at least forty (40) years. Affidavit of Mark Weber ¶ 10.

29. The City controls vehicle access to Thoen Stone Road and maintains the lock on the gate. Affidavit of John Senden ¶ 5.

30. The City allows pedestrian access to Thoen Stone Road by means of an opening next to the gate. Affidavit of John Senden ¶ 5.

31. The City issues keys to select individuals who own or operate adjacent parcels of land to which Thoen Stone Road provides access, allowing those individuals the ability to unlock the gate at the northern entrance of Thoen Stone Road to access their parcels. *Id.* ¶¶ 6-7; *see also* Affidavit of Mark Weber ¶¶ 14-15.

32. The City provided keys to Plaintiffs so they can access their parcels via Thoen Stone Road. Affidavit of John Senden ¶ 8.

33. Thoen Stone Road is used sparingly by the public, and it is not open to the general public for vehicular traffic. Affidavit of Mark Weber ¶¶ 12-13.

34. Thoen Stone Road is a gravel road. Affidavit of Mark Weber ¶ 8.

35. Thoen Stone Road has never been open to public vehicular use and has only been open to the public for pedestrian travel. Affidavit of Adam McMahon ¶ 5.

36. The City does not and never has considered Thoen Stone Road to be a public highway. Affidavit of Adam McMahon ¶ 5.

37. Thoen Stone Road has been maintained by the City solely as a minimal to no maintenance road for the purposes of maintaining the City park for the Thoen Stone monument. Affidavit of Adam McMahon ¶ 4; *see also* Affidavit of Mark Weber ¶ 11.

38. The City does not perform snow removal on Thoen Stone Road. Affidavit of Adam McMahon ¶ 6.

39. In 2021, the City placed millings on Thoen Stone Road to fill potholes and washouts to allow pedestrians to access the Thoen Stone Monument and to allow City maintenance crews access to the monument and park. Affidavit of Adam McMahon ¶ 7; Affidavit of Mark Weber ¶ 9.

40. The City once repaired the gate on the north entrance to Thoen Stone Road when it was damaged by a vehicle. Affidavit of Adam McMahon ¶ 8.

41. The only maintenance by the City with regard to Thoen Stone Road, to Plaintiffs' knowledge, is the placement of millings and mowing. Affidavit of Richard M. Williams ¶ 4, Exhibit 2 at 22:24-25, 23:1-5, 33:3-6.

42. Thoen Stone Road does not meet minimum width requirements to be considered a City street. Affidavit of Adam McMahon ¶ 10.

43. The surface of Thoen Stone Road is not a City-approved wearing surface. Affidavit of Adam McMahon. ¶ 11.

44. The grade of Thoen Stone Road is too steep to meet City standards. Affidavit of Adam McMahon ¶ 12.

45. Thoen Stone Road has a horizontal curve with a radius well below City requirements. Affidavit of Adam McMahon ¶ 13.

[SIGNATURE PAGE AND CERTIFICATE OF SERVICE FOLLOW]

Dated: August 12, 2024.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*

Richard M. Williams
Attorneys for Defendant City of Spearfish
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: rwilliams@gpna.com

0015

CERTIFICATE OF SERVICE

I hereby certify on August 12, 2024, I served a true and correct copy of **STATEMENT OF UNDISPUTED MATERIAL FACTS** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

Nathan R. Chicoine
Roger A. Tellinghuisen
DeMersseman Jensen Tellinghuisen & Huffman
P.O. Box 1820
Rapid City, SD 57709
Email: Nathan@demjen.com
roger@demjen.com
Attorneys for Plaintiffs

By: */s/ Richard M. Williams*
Richard M. Williams

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
LESLIE TURGEON and KAREN TURGEON,	)	40CIV23-28
Plaintiffs,	)	
vs.	)	**PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
CITY OF SPEARFISH, a municipal corporation,	)	
Defendant.	)	

Comes now Plaintiffs, by and through his counsel, Nathan R. Chicoine, and pursuant to SDCL 15-6-56(c), hereby respectfully submits this Statement of Material Facts in Support of their Motion for Summary Judgment.

1. Plaintiffs Leslie and Karen Turgeon are residents of Lawrence County, South Dakota and own the following described property located in Lawrence County to-wit:

> The SW1/4SW1/4SW1/4SE1/4 and the N1/2SW1/4SW1/4SE1/4 and the NW1/4SW1/4SE1/4 and the SW1/4SE1/4NW1/4SE1/4 and the SE1/4SW1/4NW1/4SE1/4 and the SE1/4SE1/4SW1/4 and the SW1/4NE1/4SE1/4SW1/4 and E1/2SW1/4SE1/4SW1/4 and the NW1/4NE1/4SW1/4SE1/4 of Section 16, Township 6 North, Range 2 East of the Black Hills Meridian, Lawrence County, South Dakota.

Plaintiffs Responses to Defendant's Requests for Production of Documents, TURGEON213.

2. Defendant City of Spearfish is a municipal corporation which owns the following described property in Lawrence County, South Dakota, to-wit:

> Lot 37A-1, Lot 37A-2, Lot 37C-2 and Dedicated Public Right of Way of the Thoen Stone Addition to the City of Spearfish, located in the W1/2NW1/4 of Section 15, T6N, R2E, B.H.M., Lawrence County, South Dakota as shown in Plat Doc. No. 2012-5296.

TURGEON006, TURGEON008.

Filed: 8/12/2024 11:59 PM CST Lawrence County, South Dakota 40CIV23-000028

3. On July 9, 1953, the City of Spearfish entered into an Easement with Frank S. Thomson whereby Thomson granted unto the City of Spearfish an Easement for the Thoen Stone for public display, together with the gravelled road right-of-way, with the right of ingress and egress. TURGEON002; SPEARFISH 001027.

4. On November 30, 1971, the City of Spearfish entered into an Agreement with Frank S. Thomson whereby Thomson granted to City of Spearfish a right-of-way for ingress and egress to Lot 37A over the existing roadway, it being agreed that such right-of-way shall be maintained by the City of Spearfish. TURGEON003-5; SPEARFISH 000279.

5. On November 30, 1971, Frank Thomson submitted a plat of subdivision of Lot 37, which provided a "right of way 40' wide to Thone Stone Tract." TURGEON007.

6. On December 5, 1972, Frank Thomson submitted a plat of subdivision of Lot 37C, which provided a "right of way 40' wide to Thone Stone Tract." TURGEON009.

7. On November 1, 2012, Johanna Meier Della Vecchia submitted a Plat of Lots 37A-1, 37A-2, 37B-1, 37B-2, 37C2-Revised and Dedicated Public Right-of-Way, which expressly dedicated the Thoen Stone Road as a public right-of-way. TURGEON031-32

8. City of Spearfish approved the 2012 plat. TURGEON031-32

9. City of Spearfish has laid asphalt over the Thoen Stone Road. TURGEON065.

10. City of Spearfish has placed a locked gate across the Thoen Stone Road. TURGEON066-67.

11. City of Spearfish has approved a building permit to Della Vecchia on August 19, 2024, for properties accessed by Thoen Stone Road. SPEARFISH 00254.

12. City of Spearfish has denied Plaintiffs' application for a building permit. SPEARFISH 000145.

13. City of Spearfish maintains a sign at the gate to the Road which states rules, including that the Thoen Stone Monument is "open to the public from dawn to dusk," and "public access through private property. Please stay on the road." TURGEON064.

Dated: August 12, 2024.

/s/ Nathan R. Chicoine

Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Plaintiffs
516 5th Street, P.O. Box 1820
Rapid City SD 57709-1820
(605) 342-2814
nathan@demjen.com

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, I served a true and correct copy of the foregoing **Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment** upon the person identified below by Odyssey File and Serve:

Richard Williams
Gunderson, Palmer, Nelson & Ashmore, LLP
rwilliams@gpna.com

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Plaintiffs
516 5th Street, P.O. Box 1820
Rapid City SD 57709-1820
(605) 342-2814
nathan@demjen.com

STATE OF SOUTH DAKOTA) SS. COUNTY OF LAWRENCE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
LESLIE TURGEON and KAREN TURGEON, Plaintiffs, vs. CITY OF SPEARFISH, a municipal corporation, Defendant.	)	40CIV23-_____ **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION**

COMES NOW Plaintiffs Leslie Turgeon and Karen Turgeon by and through their counsel of record, Nathan R. Chicoine and Roger A. Tellinghuisen, of DeMerrseman, Jensen, Tellinghuisen and Huffman, LLP, and for their cause of action seeking a Declaratory Judgment pursuant to SDCL 21-24 et seq. and an Injunction pursuant to SDCL 21-8 et seq. against the Defendant hereby state and allege as follows:

NATURE OF THE ACTION

1. This is an action for declaratory judgment to declare a road within the city limits of Spearfish as a public right-of-way and an injunction prohibiting the City of Spearfish from obstructing public access to such road through the means of a gate or other such obstruction. An order and judgment of this Court is necessary to resolve this controversy.

PARTIES

2. Plaintiffs Leslie and Karen Turgeon are residents of Lawrence County, South Dakota and own the following described property located in Lawrence County to-wit:

> SW¼SW¼SW¼SE¼ and N½SW¼SW¼SE¼ and NW¼SW¼SE¼ and SW¼SE¼NW¼SE¼ and SE¼SW¼NW¼SE¼ and SE¼SE¼SW¼ and SE¼NE¼SE¼SW¼ and E½SW¼SE¼SW¼ and NW¼NE¼SW¼SE¼ of Section 16, Township 6 North, Range 2 East of the Black Hills Meridian, Lawrence County, South Dakota.

Filed: 2/1/2023 5:44 PM CST Lawrence County, South Dakota 40CIV23-000028

3. Defendant City of Spearfish is a municipal corporation located within Lawrence County, South Dakota and organized under the laws of the State of South Dakota which owns the following described property in Lawrence County, South Dakota, to-wit:

> Lot 37A-1, Lot 37A-2, Lot 37C-2 and Dedicated Public Right of Way of the Thoen Stone Addition to the City of Spearfish, located in the W1/2NW1/4 of Section 15, T6N, R2E, B.H.M., Lawrence County, South Dakota as shown in Plat Doc. No. 2012-5296

JURISDICTION AND VENUE

4. This Court has jurisdiction to adjudicate this action and to grant the relief requested pursuant to the provisions under the South Dakota Uniform Declaratory Judgment Act, SDCL 21-24 et seq., and the provisions of SDCL 21-8 et seq. regarding injunctions.

FACTUAL ALLEGATIONS

5. A road known as the "Thoen Stone Road" is located upon the property of Defendant.

6. Plaintiffs must travel over the Thoen Stone Road to access their property.

7. The Thoen Stone Road was expressly dedicated as a public right-of-way by instrument since at least November 1, 2012. A true and correct copy of the plat is attached as Ex. A and incorporated herein.

8. Prior to the public dedication of the Thoen Stone Road in 2012, the Defendants had a contractual obligation to keep and maintain the Thoen Stone Road for the public's benefit to permit access to the Thoen Stone Monument located at the southern end of the road. The Defendants obligation further prohibited the Defendant from fencing such right-of-way. A true and correct copy of the Agreement is attached as Ex. B and incorporated herein.

9. Defendant has obstructed and continues to obstruct the Plaintiffs' and the public's use of the Thoen Stone Road by placing a locked gate across the road.

10. Prior to Defendant's placement of a padlock gate across the Thoen Stone Road, the public enjoyed use of the road to access the Thoen Stone Monument and properties beyond.

11. Defendant's obstruction of the Thoen Stone Road is without lawful authority.

12. Defendant has over the years and since the public dedication of the road in 2012 and prior, improved and maintained the road.

13. Defendant's improvements and maintenance and approval of plats evidence its acceptance of the public dedication of the road.

COUNT I – PUBLIC RIGHT-OF-WAY

14. Plaintiffs incorporate the allegations of paragraphs 1-13 above as if fully set forth herein.

15. The Thoen Stone Road has been and remains dedicated to the public use.

16. Defendant has accepted the Thoen Stone Road as a dedicated public right-of-way.

17. Plaintiffs have demanded that Defendant remove the gate obstructing use of the Thoen Stone Road, but Defendant has refused.

18. This Court is empowered under the Uniform Declaratory Judgment Act, SDCL 21-24 et seq., to declare the rights and obligations of the parties under the circumstances.

19. There is a genuine controversy between Plaintiffs and Defendant that involves their respective legal interests. The issues remain unresolved and require a speedy and effective determination of interest by the Court's Judgment.

COUNT II – INJUNCTION

20. Plaintiffs incorporate the allegations of paragraphs 1-19 above as if fully set forth herein.

21. Plaintiffs access to their property requires they use the Thoen Stone Road.

22. Defendant's obstruction of the Thoen Stone Road and prevention of the public's use of the Thoen Stone Road is without lawful authority.

23. Plaintiffs are entitled to remove any obstruction that interferes with their use.

24. Plaintiffs have no adequate remedy at law to prevent Defendant's unlawful obstruction of the Thoen Stone Road.

25. Pecuniary compensation will not afford Plaintiffs adequate relief.

WHERFORE, Plaintiffs pray request judgment as follows:

A. Declaring the Thoen Stone Road as described herein a public right-of-way;

B. For an Order requiring Defendant to remove any obstructions from the Thoen Stone Road that prevent the Plaintiffs and other members of the public's use of the right-of-way;

C. For a permanent injunction prohibiting Defendant placing or maintaining a gate across the Thoen Stone Road that obstructs or prevents the Plaintiffs and other members of the public from accessing and traveling upon the Thoen Stone Road;

D. For costs and disbursements and reasonable attorney's fees as allowed by South Dakota Law; and

E. Any and all other relief that the Court deems just and equitable.

Dated this 6th day of January, 2023.

Nathan R. Chicoine
Roger A. Tellinghuisen
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Plaintiffs
516 5th Street, P.O. Box 1820
Rapid City SD 57709
(605) 342-2814

DRAWING NUMBER 2012-5296

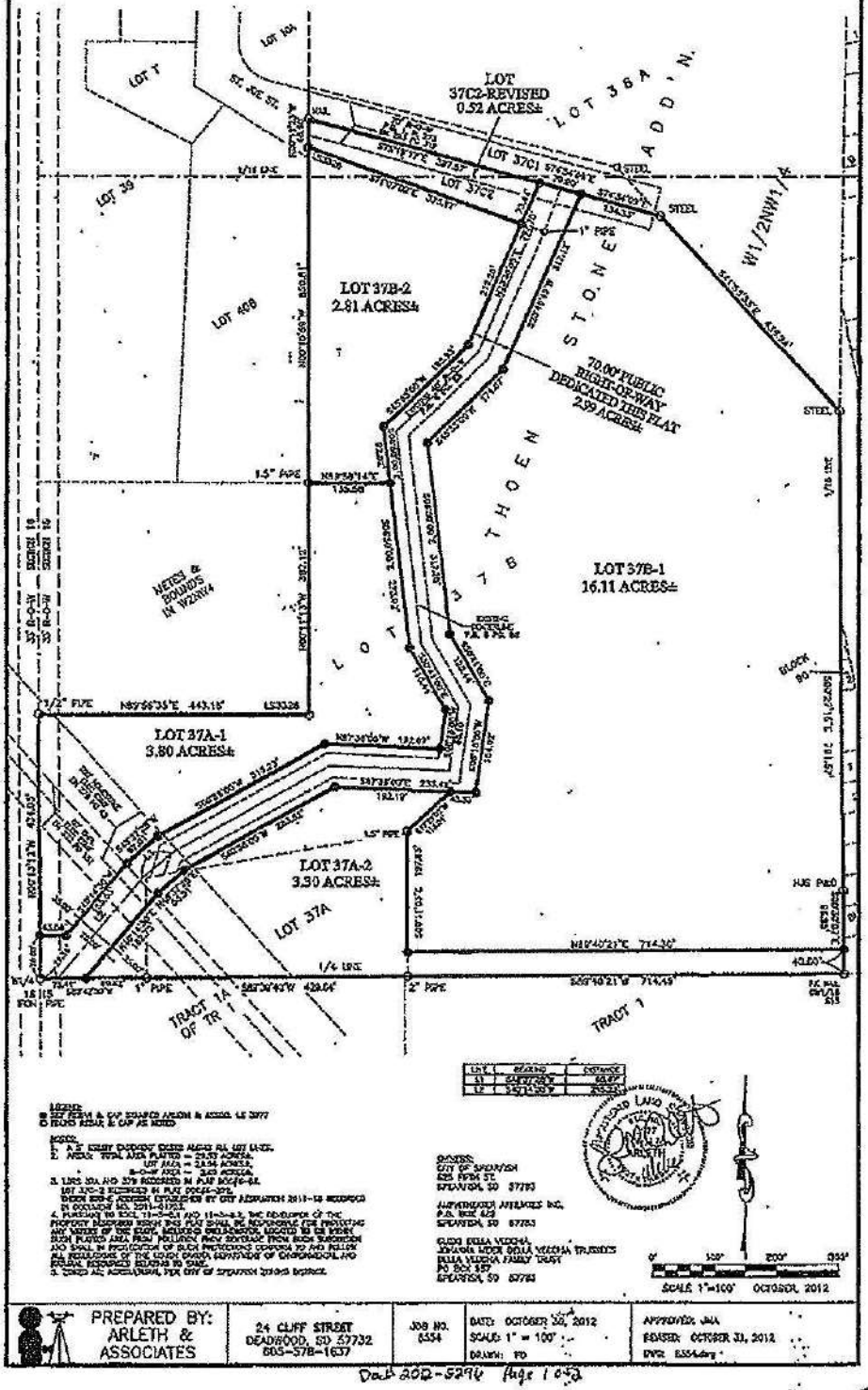
DRAWING NUMBER 2012-5296 1 of 2

For Affidavit see Doc# 2013-92

SHEET 1 OF 2

PLAT OF LOTS 37A-1, 37A-2, 37B-1, 37B-2, 37C2-REVISED AND DEDICATED PUBLIC RIGHT-OF-WAY OF THE THOEN STONE ADDITION, CITY OF SPEARFISH,

LOCATED IN THE W1/2NW1/4 OF SECTION 15, T6N, R2E, BHM, LAWRENCE COUNTY, SOUTH DAKOTA
FORMERLY LOTS 37A, 37B AND 37C OF THE THOEN STONE ADDITION, CITY OF SPEARFISH, LOCATED IN THE W1/2NW1/4 OF SECTION 15, T6N, R2E, BHM, LAWRENCE COUNTY, SOUTH DAKOTA



PREPARED BY: ARLETH & ASSOCIATES
24 CLIFF STREET DEADWOOD, SD 57732 605-578-1657
JOB NO. 5554
DATE: OCTOBER 30, 2012
SCALE: 1" = 100'
DRAWN: PD
APPROVED: JAA
REVISED: OCTOBER 31, 2012
DWG: 5554.dwg

Doc# 2012-5296 Page 1 of 2

EXHIBIT A

DRAWING NUMBER 2012-5296

DRAWING NUMBER 2012-5296 2 of 2

For Affidavit See Doc # 2013-92

SHEET 2 OF 2

PLAT OF LOTS 37A-1, 37A-2, 37B-1, 37B-2, 37C2-REVISED AND DEDICATED PUBLIC RIGHT-OF-WAY OF THE THORN STONE ADDITION, CITY OF SPEARFISH,

LOCATED IN THE W1/2NW1/4 OF SECTION 15, T6N, R2E, BHM, LAWRENCE COUNTY, SOUTH DAKOTA
FORMERLY LOTS 37A, 37B AND 37C OF THE THOEN STONE ADDITION, CITY OF SPEARFISH, LOCATED IN THE W1/2NW1/4 OF SECTION 15, T6N, R2E, BHM, LAWRENCE COUNTY, SOUTH DAKOTA

SURVEYOR'S CERTIFICATE
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
I, JOSHUA WHEELER, DO HEREBY CERTIFY THAT I AM A LICENSED LAND SURVEYOR IN THE STATE OF SOUTH DAKOTA. THAT AT THE REQUEST OF THE OWNERS I HAVE SURVEYED AND PLATTED THE PROPERTY SHOWN AND DESCRIBED HEREON, TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE PROPERTY WAS SURVEYED IN GENERAL CONFORMANCE WITH THE LAWS OF THE STATE OF SOUTH DAKOTA AND ACCEPTED METHODS AND PROCEDURES OF SURVEYING AT THE TIME OF SURVEY. THIS 1ST DAY OF NOV 2012.

SURVEYOR'S DEDICATION
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
I, JERRY KONRADS, MAYOR OF THE CITY OF SPEARFISH DO HEREBY CERTIFY THAT THE CITY OF SPEARFISH IS THE OWNER OF STREET AND ALLEY RIGHTS OF WAYS DEDICATED AS SHOWN ON THIS PLAT BY RESOLUTION 2012-34, AND THAT THIS PLAT WAS DONE AT THE CITY'S REQUEST FOR THE PURPOSES INDICATED HEREON, AND THAT THE CITY DOES HEREBY APPROVE THE WITHIN PLAT OF SAID LAND. I WILL FURTHER CERTIFY ON BEHALF OF THE CITY THAT DEVELOPMENT OF THIS LAND WILL CONFORM TO ALL EXISTING APPLICABLE ZONING, SUBDIVISION, EROSION AND SEDIMENT CONTROL REGULATIONS.

CITY OF SPEARFISH
625 FOUR STREET
SPEARFISH, SD 57783
BY: Dana A. Kramble
JERRY A. KRAMBLE, MAYOR

ACKNOWLEDGEMENT OF OWNER
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
ON THIS 1 DAY OF NOVEMBER, 20 12 BEFORE ME THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED JERRY A. KRAMBLE KNOWN TO ME TO BE THE PERSONS, DESCRIBED IN AND WHO EXECUTED THE FOREGOING CERTIFICATE.
MY COMMISSION EXPIRES 4/27/2018
NOTARY PUBLIC
SEAL

AFFIDAVIT OF OWNERSHIP
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
I, JOHANNA MEIER DELLA VEDOVA, PRESIDENT, DO HEREBY CERTIFY THAT JAMESTOWNER AFFILIATES, INC. IS THE OWNER OF THE PROPERTY SHOWN AND DESCRIBED HEREON. THAT I DO APPROVE THIS PLAT AS HEREON SHOWN AND THAT THE DEVELOPMENT OF THIS PROPERTY SHALL CONFORM TO ALL EXISTING APPLICABLE ZONING, SUBDIVISION, EROSION AND SEDIMENT CONTROL REGULATIONS.

JAMESTOWNER AFFILIATES, INC.
PO BOX 997
SPEARFISH, SD 57783
BY: Johanna Meier Della Vedova
JOHANNA MEIER DELLA VEDOVA, PRESIDENT

ACKNOWLEDGEMENT OF OWNER
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
ON THIS 1 DAY OF NOVEMBER, 20 12 BEFORE ME THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED JOHANNA MEIER DELLA VEDOVA KNOWN TO ME TO BE THE PERSONS, DESCRIBED IN AND WHO EXECUTED THE FOREGOING CERTIFICATE.
MY COMMISSION EXPIRES 4/27/2018
NOTARY PUBLIC
SEAL

CERTIFICATE OF OWNERSHIP
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
WE, GUIDO DELLA VEDOVA AND JOHANNA MEIER DELLA VEDOVA, TRUSTEES OF THE DELLA VEDOVA FAMILY TRUST, DO HEREBY CERTIFY THAT WE ARE THE OWNERS OF THE PROPERTY SHOWN AND DESCRIBED HEREON. THAT WE DO APPROVE THIS PLAT AS HEREON SHOWN AND THAT THE DEVELOPMENT OF THIS PROPERTY SHALL CONFORM TO ALL EXISTING APPLICABLE ZONING, SUBDIVISION, EROSION AND SEDIMENT CONTROL REGULATIONS.

GUIDO DELLA VEDOVA, TRUSTEE
JOHANNA MEIER DELLA VEDOVA, TRUSTEE
PO BOX 997
SPEARFISH, SD 57783
BY: Guido Della Vedova
GUIDO DELLA VEDOVA, TRUSTEE
BY: Johanna Meier Della Vedova
JOHANNA MEIER DELLA VEDOVA, TRUSTEE

ACKNOWLEDGEMENT OF OWNER
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
ON THIS 1 DAY OF NOVEMBER, 20 12 BEFORE ME THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED GUIDO DELLA VEDOVA AND JOHANNA MEIER DELLA VEDOVA KNOWN TO ME TO BE THE PERSONS, DESCRIBED IN AND WHO EXECUTED THE FOREGOING CERTIFICATE.
MY COMMISSION EXPIRES 4/27/2018
NOTARY PUBLIC
SEAL

APPROVAL OF THE ADMINISTRATIVE OFFICIAL
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
THIS PLAT IS APPROVED BY THE ADMINISTRATIVE OFFICIAL ON THIS 1ST DAY OF November, 20 12.
ADMINISTRATIVE OFFICIAL:
ATTEST: David H. Smith
FINANCE OFFICER

CERTIFICATE OF COUNTY TREASURER
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
I, Debora Trimble, LAWRENCE COUNTY TREASURER, DO HEREBY CERTIFY THAT THE 2011 TAXES WHICH ARE LIENS UPON THE LANDS PLATTED HEREON AS SHOWN BY THE RECORDS OF MY OFFICE, HAVE BEEN FULLY PAID.
LAWRENCE COUNTY TREASURER: Debora Trimble Deputy DATE 11-1-12

APPROVAL OF ACCESS BY STREET AUTHORITY
11/1/2012
DATE

OFFICE OF THE COUNTY DIRECTOR OF EQUALIZATION
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
I, [illegible] LAWRENCE COUNTY DIRECTOR OF EQUALIZATION, DO HEREBY CERTIFY THAT I HAVE RECEIVED A COPY OF THIS PLAT.
DATED THIS 1ST DAY OF November, 20 12
LAWRENCE COUNTY DIRECTOR OF EQUALIZATION

OFFICE OF THE REGISTER OF DEEDS
STATE OF SOUTH DAKOTA, COUNTY OF LAWRENCE
FILED FOR RECORD THIS 1st DAY OF November, 20 12, AT 2:36 O'CLOCK P.M. AND RECORDED IN DOCUMENT NUMBER 2012-5296
LAWRENCE COUNTY REGISTER OF DEEDS: Diane L. Greene Fee $60.00

PREPARED BY: ARLETH & ASSOCIATES	24 CLIFF STREET DEADWOOD, SD 57732 605-578-1657	JOB NO. 8334	DATE: OCTOBER 30, 2012 SCALE: 1" = 100' DRAWN: JD	APPROVED: JAA REVISED: OCTOBER 31, 2012 SURVEY: 8334.dwg

Doc#2013-5296 Page 2 of 2

Book 405 Page 238

AGREEMENT

THIS AGREEMENT made and entered into this 30th day of November, 1971, by and between FRANK S. THOMSON, a single man, of Spearfish, South Dakota, hereinafter referred to as Seller, and the CITY OF SPEARFISH, a Municipal Corporation, of Spearfish, Lawrence County, South Dakota, hereinafter referred to as Buyer

WITNESSETH:

For and in consideration of One Dollar and other valuable considerations, receipt of which is hereby acknowledged by the Seller, the Seller transfers unto the City of Spearfish the following described real estate under the following terms and conditions, to-wit:

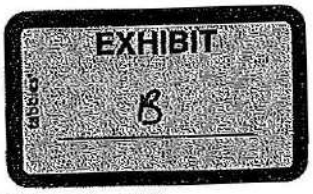
> Lot 37A, Subdivision of Lot 37 West One-Half of the Northwest Quarter, Section 15 Township 6 North, Range 2 East, B.H.M., Lawrence County, South Dakota, for the use and purpose of maintaining a City Park,

for the purposes and conditions hereinafter set forth, to-wit:

IT IS UNDERSTOOD AND AGREED that the above described property, known as the Thoen Stone Land, is to be used by the City of Spearfish exclusively for use as a City Park and for the enjoyment and historical interest centered around the Thoen Stone by the citizens and visitors to Spearfish, South Dakota.

IT IS UNDERSTOOD that said property is never to be commercialized in any way and in the event it is not developed or used as a City Park for these purposes or in the event the City should abandon same as a City Park, said land shall revert to the Seller, his heirs, executors or assigns.

IT IS FURTHER AGREED that to provide access to the above described property, the Seller hereby grants a right-of-way for ingress and egress to said property over the existing roadway, more particular described as follows, it being agreed that such right-of-way shall be maintained by the City of Spearfish, South Dakota, and shall not be fenced, and further if said City Park is abandoned by the City of Spearfish, said right-of-way shall revert to the Seller, his heirs,



executors or assigns, to-wit:

A Right-of-way 40 feet in width, the center line of which is described as follows: Beginning at a point on the north line of Lot 37A, which point bears North 80° East, 30 feet from the Northwest corner of said Lot 37A, thence North 16°, 58 minutes East 35.3 feet, thence North 80°, 58 minutes East 299.6 feet, thence South 87°, 36 minutes East 198.7 feet, thence North 8° 18 minutes East 106.3 feet, thence North 30°, 41 minutes West 121.3 feet, thence North 6°, 50 minutes West 352.6 feet, thence North 45°, 55 minutes East 189.9 feet, thence North 23°, 54 minutes East 225.0 feet to a point on the South line of Lot 37C, which point bears South 71°, 13 minutes East 394.0 feet from the Southwest corner of said Lot 37C.

IT IS FURTHER AGREED that whereas the following described real estate owned by the Seller is presently being used by the City and Joseph Meier of the Black Hills Passion Play for access to the Black Hills Passion Play and parking for the Black Hills Passion Play, the Seller hereby grants unto the City an easement for access and parking to the Black Hills Passion Play to the following described real property, to-wit:

- Lot 37C, Subdivision of Lot 37, West One-Half of the Northwest Quarter, Section 15, Township 6 North, Range 2 East, B.H.M., Lawrence County, South Dakota, containing 1.42 acres more or less,

with the understanding and agreement that should the same be abandoned for the uses described above, the same is reverted to the Seller, his heirs, executors and assigns.

Dated at Spearfish, Lawrence County, South Dakota, this 30th day of November, 1971.

Frank S. Thomson
Frank S. Thomson, Seller

CITY OF SPEARFISH

BY Donald E. Young
Donald E. Young, Mayor

Dan Harrington
Dan Harrington, Auditor

State of South Dakota)
: ss
County of Lawrence)

On this 30 day of November, 1971, before me, the undersigned notary

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
LESLIE TURGEON and KAREN TURGEON, Plaintiffs, v. CITY OF SPEARFISH, a municipal corporation, Defendant.	)	40CIV23-000028 **DEFENDANT'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION**

COMES NOW Defendant, City of Spearfish, South Dakota, a political subdivision of the State of South Dakota ("Spearfish" or the "City"), by and through its undersigned attorney of record, Richard M. Williams of Gunderson, Palmer, Nelson & Ashmore, LLP, answers the Complaint filed by Plaintiffs as follows:

a. Anything not specifically admitted herein regarding the Complaint is denied.

b. Plaintiffs failed to state a cause of action upon which relief can be granted. SDCL § 15-6-12(b)(5).

1. Paragraph 1 of the Complaint states a legal conclusion for which no response is necessary. To the extent a response is necessary, Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

2. With regard to paragraph 2 of the Complaint, Spearfish is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations regarding the ownership of the land described in paragraph 2.

3. With regard to paragraph 3 of the Complaint, Spearfish admits that the City is a municipal corporation organized under the laws of South Dakota. The City admits that it is title owner of certain property within the area described by the Plat recorded as Document Number

Filed: 2/27/2023 3:56 PM CST Lawrence County, South Dakota 40CIV23-000028

2012-5296. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

4. Paragraph 4 of the Complaint states a legal conclusion for which no response is necessary. To the extent a response is necessary, Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

5. Spearfish admits paragraph 5 of the Complaint.

6. Spearfish is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in paragraph 6 of the Complaint.

7. Spearfish admits that a plat is recorded as Document Number 2012-5296. The remainder of Paragraph 7 of the Complaint states a legal conclusion for which no response is necessary. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

8. As to paragraph 8, Spearfish admits that an Agreement was recorded in Book 405, Page 298. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street. Spearfish affirmatively asserts that Plaintiffs have no standing to have this Court interpret or enforce the Agreement recorded in Book 405, Page 298.

9. Spearfish denies paragraph 9.

10. Spearfish denies paragraph 10 to the extent it presumes a legal duty that would require Spearfish to open, improve, or maintain the referenced street. In addition, Spearfish did not place the padlock gate across Thoen Stone Road. The gate has been there before the right-of-way was platted in 2012. The public has access to Thoen Stone Road as pedestrians.

11. Spearfish denies paragraph 11.

12. Spearfish denies paragraph 12 to the extent it presumes a legal duty that would require Spearfish to open, improve, or maintain the referenced street.

13. Spearfish denies paragraph 13.

COUNT I – PUBLIC RIGHT-OF-WAY

14. Paragraph 14 reincorporates Plaintiffs paragraphs. Spearfish answers in the same manner as above. To the extent a response is necessary, Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

15. Paragraph 15 states a legal conclusion for which no response is necessary. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

16. Paragraph 16 states a legal conclusion for which no response is necessary. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

17. Spearfish denies that it has denied access to Plaintiffs.

18. Paragraph 18 states a legal conclusion for which no response is necessary. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

19. Paragraph 19 states a legal conclusion for which no response is necessary. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

COUNT II – INJUNCTION

20. Paragraph 20 reincorporates Plaintiffs paragraphs. Spearfish answers in the same manner as above. To the extent a response is necessary, Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

21. Spearfish denies that it has denied Plaintiffs' access.

22. Spearfish denies paragraph 22.

23. Spearfish denies paragraph 23.

24. Spearfish denies any interpretation that would require Spearfish to open, improve, or maintain the referenced street.

25. Spearfish denies that Plaintiffs are entitled to legal or equitable relief.

AFFIRMATIVE DEFENSES

With regard to affirmative defenses, Spearfish asserts the following:

1. The matter is non-justiciable and the Court is without subject matter jurisdiction to the extent Plaintiffs' demand seeks this Court to require the City to open, improve, or maintain the referenced street as those matters rest in the exclusive province of the City. SDCL § 15-6-12(b)(1); *Hostler v. Davison County Drainage Commission*, 2022 S.D. 24.

2. To the extent Plaintiffs' demand seeks this Court to require Spearfish to open, improve, or maintain the referenced street, because those matters rest in the exclusive province of the City, and contrary to State law, the Plaintiffs' demand is illegal.

3. Plaintiffs' claims are barred as Plaintiffs' claims constitute a collateral attack on decisions made by Spearfish.

4. Plaintiffs' claims are barred as Plaintiffs failed to exhaust administrative and judicial remedies.

Filed: 2/27/2023 3:56 PM CST Lawrence County, South Dakota 40CIV23-000028

5. Because Spearfish has not yet had an opportunity to conduct any discovery in this matter, and so as not to waive any other applicable affirmative defenses that may be shown to apply by future discovery in this matter, all defenses set forth in SDCL §§ 15-6-8(c) and 15-6-12(h) are incorporated herein by this reference.

6. Plaintiffs lack standing to assert any claims related to the Agreement.

7. Plaintiffs may not seek declaratory relief for an administrative decision of the City which is not subject to appeal or court review. *Hostler v. Davison County Drainage Commission*, 2022 S.D. 24.

8. Defendants reserve the right to amend this Answer to specifically plead any additional matters constituting an affirmative defense which discovery in this matter may show to be applicable.

WHEREFORE, the City requests judgment as follows:

1. Entry of Judgment declaring Plaintiffs are not entitled to the relief that is sought; and

2. That the Court grant Spearfish's costs and disbursements herein, and attorney's fees allowed by law; and

3. For such other and further relief as the Court deems just and equitable in this matter.

DEMAND FOR JURY TRIAL

Pursuant to SDCL §§ 15-6-38(b), 15-6-38(c), and SDCL § 21-24-9, the City hereby demands a jury trial on all issues so triable by right.

Dated: February 27, 2023.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*

Richard M. Williams
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Fax: (605) 342-9503
E-mail: rwilliams@gpna.com
Attorneys for defendant City of Spearfish

CERTIFICATE OF SERVICE

I hereby certify on February 27, 2023, I served a true and correct copy of **Defendant's Answer to Complaint for Declaratory Judgment and Injunction** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

Nathan R. Chicoine
Roger A. Tellinghuisen
DeMersseman Jensen Tellinghuisen & Huffman
P.O. Box 1820
Rapid City, SD 57709
Email: Nathan@demjen.com
roger@demjen.com

Attorneys for Plaintiffs

By: */s/ Richard M. Williams*
Richard M. Williams

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

LESLIE TURGEON and KAREN TURGEON,

Plaintiffs,

vs.

CITY OF SPEARFISH, a municipal corporation,

Defendant.

MOTIONS HEARING

Case No. 40CIV23-028

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
September 9th, 2024

APPEARANCES:

For the Plaintiffs: **MR. NATHAN R. CHICOINE**
DeMersseman, Jensen, Tellinghuisen & Huffman, LLP
P.O. Box 1820
Rapid City, SD 57709

For the Defendant: **MR. RICHARD M. WILLIAMS**
Gunderson, Palmer, Nelson & Ashmore, LLP
P.O. Box 8045
Rapid City, SD 57709

(WHEREUPON, the following proceedings were duly had:)

THE COURT: Good morning, this is the time and place set for hearing on summary judgment on both parties. In civil file 23-28. Leslie Turgeon, Karen Turgeon versus City of Spearfish. I have the plaintiffs personally present; I'm assuming Mr. Chicoine.

MR. CHICOINE: That's correct, Your Honor.

THE COURT: With Mr. Chicoine. And then I have Mr. Williams present on behalf of the City of Spearfish. You don't have anyone present today?

MR. WILLIAMS: I don't, Your Honor. By myself.

THE COURT: That's what I wanted to make sure for the record. The parties have moved for summary judgment. The court has read all the submittals. Mr. Chicoine, I will let you proceed.

MR. CHICOINE: Thank you, Your Honor. I will highlight some of the high points and rely on briefing for much of the rest. As the Court can gather, the simple issue before the Court is whether there has been an offer and acceptance of a public right-of-way over what's called Thoen Stone Road in Spearfish, South Dakota.

I think it is clear from the record that there has been both an expressed dedication and acceptance by the City as well as implied acceptance by the City over the

last 75 or so, give or take, years. Most recently, the -- I submitted some additional materials. Most recently the city planning commission has made this evident in their staff report on a neighbor's application for subdivision in which they -- the city planning commission staff acknowledged that the Thoen Stone Road was a dedicated public right-of-way and they also go on to state that the Thoen Stone Road is designated as a local road in the master transportation plan. The Court can see that on pages 2 and 3 of that, which I believe is labeled as Exhibit 16. I just bring that up because that is a little bit new to this case. But considering the facts, I know there are some -- the parties have disputed some of the facts in this case. Generally speaking, I don't think there's anything that's really a genuine dispute of fact.

The Turgeons rely heavily on the documents that are in play here and I don't think the parties dispute those. The Turgeons also rely on some historical use and some of those facts. Those are disputed and the Turgeons have raised some additional facts in that regard, but I don't believe there's a genuine dispute as to that. I will get to that in a minute.

But for those reasons, I believe this matter is right for summary judgment.

I think it is easiest if I go through historical and the -- I believe that the City ignores or disregards what I consider to be the initial express dedication and acceptance. That's a 1953 easement with the City of Spearfish and Frank Thomson. It's located, Exhibit 10 of actually Defendant's submittals on summary judgment. And this is an unequivocal dedication by Frank Thomson that the Thoen Stone Road be devoted to public use. There is no real qualification or conditions on that dedication and the City signed off on that easement agreement which demonstrates express exception.

Now, the City has argued that some of the documents provide for essentially a right of reversion in the grantor. The City has argued, well, that doesn't really constitute the dedication if there are some conditions and qualification on that grant.

I don't believe that that is the case. The Turgeons' position is that if there is some sort of a reversion in some of those grants, that they are invalid, and that for the City to argue that that that reversion isn't valid is essentially a defense if a grantor were to say we want this land back.

But those are only really contained in the 1971 and '72 agreements. The 1953 easement contains no condition on the dedication of that public right-of-way.

The City has, over the decades, accepted this Thoen Stone Road both expressly and by maintenance and use. And I think our state law is pretty clear that use alone cannot constitute acceptance of a public right-of-way. Furthermore, I think our state law has been made clear that acceptance of a plat by itself does not bind this city or the governing body to open and maintain a public right-of-way.

But this case contains both use and acceptance and approval of a plat and a number of other acts by the City that demonstrates unconditional acceptance.

The City looks at this case *Selway versus Cummings* and what we see in that case is a plat that indicates a future use right-of-way. The Supreme Court then found, indicated that that's not an unequivocal or unconditional dedication and there has been no acceptance by the governing body.

This case -- while that case provides some good law, the facts are distinct. We have, in this case, clear use of the word "public" and that Frank Thomson wanted the public to use the road. And we have acceptance by the City. The City has, I think, just by signing off on agreements, they have expressed they have accepted this dedicated public right-of-way. They have signed off on the 1953 easement. They signed off on

1971 maintenance agreement. Signed off on another 1972 agreement. They have accepted the grant of land over at Lookout Mountain, across the interstate, on the condition that they maintain the Thoen Stone Road in 2000. The City has put up a sign that says the road is open from dawn to dusk and that anyone who wants to use the road can contact the City of Spearfish. They have laid asphalt more than once, asphalt millings, on the road. And they have granted building permits for others to access their property by way of the road.

So all of these indicate that the City has taken this road and accepted this road as a public road but the City still wants to gate and maintain authority over who can access it.

I think that fact alone, Your Honor, should indicate that the City has accepted this road. The fact that they have gated it and they want to control who can use it -- if this were truly a private road, the City could not gate it. The City could not put up a gate and say certain people can and cannot use the road. They have expended funds on the road and they have allowed -- City has authorized city personnel to mow the road and lay asphalt millings.

So all these actions indicate the City has accepted this public right-of-way.

The defendants would like to press on the Court that there has been no resolution by the city council expressly declaring we accept this road. That is not a strict requirement. I will acknowledge that there does not appear to be anything in city records where the commission assembled and accepted the road. But the City, as a governing body, has acted unequivocally to accept this road by signing off on a number of agreements and by authorizing maintenance on this road.

I will just note that since 1953 and the acceptance of this road, the City has never passed any sort of a resolution that restrains use of the road to only pedestrian traffic. So there's nothing that says that vehicles cannot use the road. I think that is a unilateral restriction that the City has decided to impose to limit public use which is improper. The question is whether the public has a right to use it.

So based on the dedication and acceptance of the Thoen Stone Road, I think this Court should declare that it is an open, public road and that the City cannot maintain a gate that restricts access to the plaintifs' property. Thank you.

THE COURT: Thank you, Mr. Chicoine. Did you need to add something?

MR. CHICOINE: No, Your Honor.

THE COURT: Mr. Williams.

MR. WILLIAMS: Thank you, Your Honor. I don't know if you prefer to have me seated or standing.

THE COURT: Either way is fine.

MR. WILLIAMS: May it please the Court, Counsel. I think there is probably right in that we don't dispute the existence of the documents from '53 forward. But if you look at the documents starting in '53, what you have is from '53-'71, really we have an easement here. An easement is different from a dedication. An easement is not an intent on the part of the grantor to permanently divest himself of that property for a public use. In this case, a public highway.

The Court can take a look at those. I think it is a question of law, what those documents provide, because it is going to be a review of the four corners of those documents. And I think when we review those and you look at the law, there's been no dedication in those easements, the '53, the '71. So because there's no dedication, there can't be an acceptance. We need -- for a public dedication of a highway, we need a dedication that is clear and acceptance that is clear. Without one, we don't have the other.

So for those documents from the beginning, '53 and through '71, we don't have a dedication on the part of

Frank S. Thomson to dedicate Thoen Stone Road as a public highway. Even the plat, the '71 plat, that basically shows the location of the '71 easement, that plat doesn't contain dedication language. In fact, it doesn't even mention Thoen Stone Road. It shows it, but it is only a plat for those lots.

You kind of come down to saying, okay, we don't have a dedication until we get to 2012. The City doesn't dispute that the 2012 plat is an expressed dedication of a public right-of-way. But from 2012 we are missing the second half of the equation, the acceptance of the public highway by the City. And as Plaintiff has noted, there is no formal acceptance of Thoen Stone Road that can be found in any of the documents of the City.

Exhibit 16 to the latest affidavit was referenced by the plaintiffs briefly in their opening argument. I would submit if you read that, Your Honor, there's actually -- it is the opposite. That exhibit, frankly, shows that they haven't opened it as a public highway. In fact, they talk about the dangers of opening it as a public highway in that might harm the conservation easement that is out there.

If you look at that second page of Exhibit 16 under the staff review, they are discussing this problem

basically saying we don't want this to be a public highway and that was as late as August 20, 2024, that that report came out.

So then what do we really have. I mean, there's dispute about the maintenance and how much maintenance was done. Of course, they were maintaining the easements for the purpose of the easements from '53. It was an obligation they had under the easement to maintain a right-of-way for the use of a parcel of land as the Thoen Stone Monument. That's just how easements are. If you look at the *Zimmiond* case that we cited, that's the difference between an easement and dedication. In an easement, the owner retains all of the rights to that property over which the easement passes except allowing somebody to drive down that. A dedication is far different. A dedication is a permanent abandonment of that roadway for a public use, public highway.

So when you turn back the 2012 plat, okay, we clearly have a dedication. So now we are talking about acceptance. We all agree, as of today's date sitting here, that the filing of a plat itself isn't acceptance. The City must do something to, you know, illustrate that acceptance. And since there is no expressed acceptance here, we are talking about implied acceptance. How did

the City impliedly accept this? Well, there is some dispute about the amount of maintenance. We have the affidavit of Mark Weber. We have the affidavits of the road guy. We have got the affidavit of the Mayor, John Senden.

So the one thing we would dispute the amount of maintenance for this. We also say, look, this is maintaining it for access to the public park, basically the same way the easement was maintained over the years. If you are going to have access to a city park, there is a certain amount of maintenance the City is going to have to do. Every once in a while, they have to mow it. They will have to get vehicles down there for various purposes and for that they will have to have a roadway.

But to maintain this as a public highway is completely different, and the one thing that I think is key that, not in dispute, is for over 40 years there has been a gate on that northern end, I call the city side of Thoen Stone Road. That gate has been there for 40 years controlling access. There's no dispute that the City has limited it through the gate and only select individuals have received keys to pass through that.

If you look at the definition of a public highway, a public highway is a public roadway for vehicular travel that is unrestricted and basically as a matter of

right to the public. If you acknowledge that for 40 years the City has never opened the road for unrestricted public travel, simply that's the antithesis of what a public highway is. It has never been open for unrestricted travel for 40 years. Certainly not since the 2012 plat was put in place. That's undisputed. I think we can talk whether we dispute whether the maintenance is for an easement purpose or whatever else, the road has never been opened.

There a couple different statutes that talk about that. The main one we have got is SCDL 11-3-12. We talked about how this evolved over time. We even cited some of the old codes in there. Originally this was going to be deemed an acceptance. Now they specifically added a new paragraph or new clause at the end of it, no governing body should be required to open, improve, maintain any such dedicated streets, alleys, ways, commons or other public ground solely by virtue of having approved a plat or having partially accepted such dedication of ground. Here it is not -- it hasn't been opened. The one disputed thing we know -- undisputed thing, it has a gate on it. It has never been opened.

I really think that that's sort of -- if the Court wanted to grant summary judgment today, say, hey, what do we have that is not disputed, it would be grant in

favor of the City of Spearfish because, simply, everybody has acknowledged that it has they ever been opened for unrestricted vehicle travel.

We talked briefly about the other statute: The work continuously for 20 years. In our reply brief, we have this pretty well distilled down to what I have discussed today. In that, if you can't have -- basically the nature of an adverse possession, and you don't have anything even arguably adverse until the plat of 2012 because you are operating under an easement. Of course, easements are permissive.

So we just don't think there is any way to get here with the documents that we have and the Court can review and the undisputed fact. So I would ask this Court to grant summary judgment in favor of the City and happy to take any questions the Court might have.

THE COURT: Thank you. Mr. Chicoine, did you have any follow-up?

MR. CHICOINE: Yes, Your Honor, if I may.

First, I would just note, I think that considering the Thoen Stone Road as a private easement held by a governing body is misplaced. When a public body holds an easement, that is essentially a public right-of-way. There's nothing that would distinguish this as a private easement held by public body instead of just being a

public right-of-way. So I think a lot of the private easement laws and authority are inapplicable here.

I just want to correct one thing that Mr. Williams said. He indicated that there's no dispute or that the plaintiffs concede there has been no formal acceptance and that's simply not true. We acknowledge that there appears to be no resolution by the city council but we point to a handful of formal acts by the City that indicate a formal expressed acceptance of the Thoen Stone Road as public right-of-way.

Again, going back to 1953. In the 1953 easement agreement does expressly reference public use. So I think that, in itself, is a public dedication. The City says there is nothing in that 1953 easement or agreement that indicates public dedication, but it expressly talks about public use and using the Thoen Stone for public display and the road to access the Thoen Stone Monument.

On the issue of implied acceptance, the City kind of states that, well, we have done a little bit of maintenance and we have allowed a little bit of use. There's no real threshold that says you have got to meet a certain amount of maintenance or spend a certain amount of public dollars on z public right-of-way for it to be deemed public.

I think if the Court were to look at the case law,

particularly *Miller versus Scholten*, S-C-H-O-L-T-E-N, and that's at 273 N.W.2d 757. This case talks about the premise that any sort of expenditure of public funds indicates public acceptance. So by the City laying asphalt millings on the road, spending money on a gate, signage and mowing the Thoen Stone Road shows that the City has accepted Thoen Stone Road as a public road.

The last thing I just note: I haven't heard anything from the City about the inconsistency with issuing building permits. The Turgeons applied for a building permit and were denied on the grounds that the city attorney indicated they don't have access to a public street. The City of Spearfish, on the other hand, granted a building permit to Mark Weber, who is also a affiant in support of the defendant's motion for summary judgment, and to Johanna Della Vecchia to build a residential garage. And based on SCDL 11-6-38, which is cited in brief, no building permit may be issued unless such street corresponds in its location and aligns with streets shown on a recorded subdivision plat approved by the council or on a street plat made by the commission and adopted by the council or with a street located or accepted by the council.

So by granting a building permit, I think the City has acknowledged, yes, this is a public street and it

should be opened and accepted for public use. Thank you.

THE COURT: Thank you.

Mr. Williams, first of all, I will let you make any response after I ask these questions.

What about the building permit issue? I did read in your brief your explanation but if you would just articulate it.

MR. WILLIAMS: Certainly, Your Honor. And as the Court mentioned that it is in our brief, we believe there is a disjunctive "or" in there. Basically, to summarize that, it means that they -- under that statute 11-6-38, that there's two ways. One, you can have a public highway open or, two, you can simply have it shown on a plat. That's what we have in this case. It is shown on a plat. And when I think about city planning, I think about what's going on here? Why would that be a difference in the statute? You have this situation a lot of times where you have a preliminary plat that is being filed that shows, you know, what this might look like and then the City later maybe accepts the secondary plat. And then, as a result of this, if the developer has done everything up to city codes, they may adopt the highways and roads and everything then. You might see an acceptance of the City after that. But simply

showing the road on a plat doesn't make it a public highway. It does indicate -- seem to indicate by the statute you can get a building permit, however, rather than the disjunctive "or" of requiring it be a public road.

THE COURT: Thank you. Was there anything that you wanted to respond?

MR. WILLIAMS: I was going to talk about the building permit. We got that out of the way.

Maybe the burden of proof might be worth addressing briefly here. We think it is the plaintiffs' burden by clear and convincing evidence. And I cited the *Niemi* case for that where the Court finally -- I think they clarified that in *Niemi*, they made a point of saying said that. I think it goes to the *Dittman* case, *Dittman versus City of Bell Fourche*. I have a long excerpt in there. Normally I don't like to do that but it was a pretty good explanation of what is going on.

The Court can look at the documents and as matter of law from 1953 up until the dedication that was done by plat in 2012 and construe legal effect of those. We would suggest that they are not a dedication for the reasons we have discussed, and we don't believe there's been an acceptance of the City after the filing of the 2012 plat. Clearly a City can fence off a city park,

restrict access to a city park, and do maintenance on the city park. We have here -- we basically have got the Thoen Stone Road has been used as access to a city park, the Thoen Stone Monument. We believe that gate that has been there for -- for at least 40 years is the antithesis of a public highway because the definition of a public highway is, of course, open as a matter of right to the public for vehicular travel.

Certainly pedestrians can come through. There's a little side gate that they walk through, as noted earlier. There's a picture that shows how -- the restricted access. It shows the time of day that you can be down there, how clearly the gate in front of it is going to restrict vehicular travel. We think it is a gate to open the park. It is an access for maintenance of that park pursuant to those easements and, again, Your Honor, we ask for summary judgment in favor of Spearfish.

THE COURT: Thank you.

The Court has reviewed all of the submittals, including reading the case law supporting the briefing and the documents, the 1953 easement, 1971 plat, 1971 agreement and deed, the 1972 conveyance as well as the 2012 plat.

The Court does want to remark that both parties

have done an exceptional and thorough job of briefing and submitting their documents, which helps the Court in making a ruling today.

The Court does find that it is right for summary judgment because there are no genuine issues of material fact. I will set those forth.

The Court finds in order to create a public highway by dedication, there must be an unconditional offer by the grantor to create a public highway and an unconditional acceptance by the appropriate public entity that it become one.

That is the *Selway* case South Dakota 2003.

There is a distinction between an easement, which is a voluntary use of the land for a particular purpose, and a dedication of land as a public highway. The Court finds that that's by necessity. Easements allow the owner of the servient estate to return, quote, all incidents of ownership in the easement -- retain, not return, excuse me, end quote.

A dedication for a public highway on the other hand must show a dedication which is unequivocal and decisive manifesting a positive and unmistakable intention on the part of the owner to permanently abandon his property to public use. That's the *Niemi* case South Dakota 2015.

The 1953 easement is just it. It is just that. It

is an easement. The 1971 plat merely reflects the location of the easement. The 1971 agreement and deed are both subject to reversion and conditions. The 1972 conveyance is of Lot 37C which does not contain any portion of the Thoen Stone Road. Plus, it also contains a reversionary clause.

In none of those documents is there a mention of a public highway. None of these show an intent by the grantor, which is Frank Thomson in this case, to permanently abandon his plans for the use as a public highway. All of these documents, instead, evince an intent that the easement is provided to be used for the display of the Thoen Stone or a monument commemorating the Thoen Stone. In the event this does not occur, there is a reversionary right back to the grantor.

The 2012 plat, however, does show an unequivocal dedication of the Thoen Stone Road as a public highway. It specifically says to the public right-of-way dedicated this plat. The legal effect of the City accepting the plat is that it has been dedicated.

However, under South Dakota law that acceptance of the plat does not amount to TSR, in this case, Thoen Stone Road, being accepted as a public highway.

SCDL 11-3-12 in relevant part reads that no governing body shall be required to open, improve or

maintain any such dedicated street, alley, ways, commons or other public grounds solely by virtue of having approved a plat. Further, SCDL 11-6-33 goes on to state that the approval of a plat by the council shall not be deemed to constitute or effect an acceptance by the municipality or public of the dedication of any street or other ground shown on the plat.

Where the dedication has been shown as here by the 2012 plat, there must be expressed acceptance or implied acceptance. There has been no expressed acceptance by the City in any of the city records or documentations. The Court just refers back to its comments on the Court reviewed all of the documents submitted, and the Court does not find that there is any expressed acceptance of that as a road.

There has been no expressed acceptance by the City. There has been no implied acceptance as this right-of-way has had a locked gate for 40 years. It has not been open to unrestricted public travel. TSR has a gate which has been controlled by a lock and key.

The Supreme Court ruled it is the right of travel by all the world which constitutes a road a public highway. That's the *Frawley Ranch* case. In this case, it has not been opened for 40 years. You have to have a key to get in or -- so it is not just unrestricted

travel.

The Court, due to its ruling, does not need to reach the adverse possession claim -- as to the adverse possession claim under SCDL-31-3-1, which reads in pertinent part, a road shall have been used, worked and kept in repair as a public highway.

The City, again, has never opened TSR as a public highway so it has never worked it or kept it in repair as a public highway. It has done so only as maintaining the Thoen Stone Road as a park.

Moreover, the use by the City was permissive under the easement and so the Court does not reach the adverse possession claim.

The Court is going to grant the motion for summary judgment on behalf of the City. The Court is going do deny the Turgeons' request for summary judgment.

I would ask that, Mr. Williams, if you provide an order consistent with this decision and provide it to Mr. Chicoine so he can object and then submit it to the Court in Odyssey for signature.

Of course, you guys have the right to appeal my decision.

Anything further, Mr. Chicoine?

MR. CHICOINE: Not at the moment, Your Honor, no.

THE COURT: Mr. Williams?

MR. WILLIAMS: No, Your Honor.

THE COURT: Thank you. Court is in recess.

(Hearing concluded.)

STATE OF SOUTH DAKOTA)
) SS: CERTIFICATE
COUNTY OF LAWRENCE)

I, Jane M. Collignon, Certified Court Reporter and Notary Public in the State of South Dakota, Fourth Judicial Circuit, do hereby certify that I reported in machine shorthand the proceedings in the above-entitled matter and that Page 1 through 23, inclusive, are a true and correct copy, to the best of my ability, of my stenotype notes of said proceedings had before the HONORABLE MICHELLE COMER, Circuit Court Judge.

Dated at Deadwood, South Dakota, this 25th day of September, 2024.

/s/ Jane M. Collignon
JANE M. COLLIGNON, RPR, RMR, CRC, CRR

§ 154.067 RELATION TO ADJOINING STREET SYSTEM.

(A) A subdivision shall provide for the continuation of the principal streets existing in the adjoining subdivisions or of their proper projection when adjoining property is not subdivided, and such streets shall be of a width not less than the minimum requirements for streets set forth in the regulations of this chapter.

(B) Where the plat submitted covers only a part of the subdivider's tract, drawing of the prospective future street system of the entire tract shall be furnished and the street system of the part submitted shall be considered in light of conformity to the street system of the entire tract.

(C) Where a tract is subdivided into lots of an acre or more, the Planning Commission may require an arrangement of lots and streets such as to permit a later subdivision in conformity to the street requirements and other requirements contained in this chapter.

(Prior Code, § 15A-83) (Ord. 914, passed 2-19-2002)

§ 154.068 ACCESS.

The subdividing of the land shall be such as to provide each lot, by means of public street or way, with satisfactory access to an existing public street or to a thoroughfare as shown in the major street plan, or an official map.

(Prior Code, § 15A-84) (Ord. 914, passed 2-19-2002)

§ 154.069 STREET WIDTHS.

In order to provide for roads of suitable location, width and improvement to accommodate prospective traffic and afford satisfactory access to emergency services, snow removal, sanitation and road maintenance equipment and to coordinate roads so as to compose a convenient system and avoid undue hardships to adjoining properties, the following minimum design standards for roads are hereby required.

Minimum Design Standards; Residential Streets					
	Lane	*Rural*[1]	*Minor Residential*	*Major Residential**	*Low Density Residential*
Minimum Design Standards; Residential Streets					
	Lane	*Rural*[1]	*Minor Residential*	*Major Residential**	*Low Density Residential*
Curb/gutter (See Note 6.)	No	No	Yes	Yes	No
Design speed	15 mph	20 mph	20 mph	25 mph	30 mph
Parking	No	No	One side	Both sides	No
ROW width	40'	50'	50'	60'	60'
Sidewalk (5')	No	No	One side	Both sides	No
Traveled width	20'	24'**; 2' shoulders	29'	38'	

EXHIBIT 17

Minimum Design Standards; Arterial streets			
	Residential Collector	***Major Arterial***	***Minor Arterial***
Minimum Design Standards; Arterial streets			
	Residential Collector	***Major Arterial***	***Minor Arterial***
Curb/gutter	Yes	Yes	Yes
Design speed	25 mph	35 mph+	35 mph
Parking	Optional*	No	No
ROW width	60'	70'	60'
Sidewalk (5')	Both sides	Both sides	Both sides
Traveled width	40'	48' *	36' *
Volume (ADT)	Up to 3,000	Up to 5,000	Up to 3,000
*12' moving lanes		*Parking may or may not be allowed, on a case-by-case basis, upon recommendation by the Street Superintendent and Chief of Police.	

Minimum Design Standards; Industrial Roads	
Minimum Design Standards; Industrial Roads	
Curb/gutter (see Note 6.)	No
Design speed	30 mph
Parking	No
ROW width	60'
Sidewalk (5')	No
Traveled width	36', 2-ft. paved shoulders

NOTES:
1. Residential traveled street width is based on moving lanes of ten feet, parking lanes of nine feet.
2. Traveled width does not include gutter, when required. Gutter width is included in width of parking lanes.
3. Where required, sidewalk width shall be five feet, setback five feet from curb or edge of pavement. Wheelchair ramps shall be provided at all intersections.
4. ADT (average daily traffic) is based on ten trips per single-family residential dwelling unit, per day.
5. All streets shall be improved with a wearing surface approved by the city.
6. Curb/gutter is not required only when a drainage plan for surface water discharge has been approved by the Public Works Administrator.

(Prior Code, § 15A-85) (Ord. 914, passed 2-19-2002; Ord. 1165, passed 11-19-2012)

§ 154.070 STREET GRADES AND CONDITION.

(A) The grades of streets shall not exceed 10%, except under unavoidable conditions approved by the Planning Commission at the time of preliminary plat approval.

(B) All streets shall have at least a 0.3% grade.

(C) All streets shall be improved with a wearing surface approved by the city.

(Prior Code, § 15A-86) (Ord. 914, passed 2-19-2002)

§ 154.071 STREET CURVES.

Minimum centerlines of curvature, tangents, curb radiuses and sight distances shall be based on design speed as per the Institute of Transportation Engineers, *Traffic Engineering Handbook*, current edition.

(Prior Code, § 15A-87) (Ord. 914, passed 2-19-2002)

Appeal No. 30888

In the
Supreme Court of the State of South Dakota

LESLIE TURGEON and KAREN TURGEON,

Plaintiffs and Appellants

vs.

CITY OF SPEARFISH, a municipal corporation,

Defendant and Appellee

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

The Honorable Michelle K. Comer

Notice of Appeal filed November 7, 2024

BRIEF OF APPELLEE CITY OF SPEARFISH

Nathan R. Chicoine
DeMersseman Jensen
Tellinghuisen & Huffman, LLP
516 Fifth Street
P.O. Box 1820
Rapid City, SD 57709-1820
Telephone: (605) 342-2814
E-mail: nathan@demjen.com
Attorneys for Appellants, Leslie Turgeon and Karen Turgeon

Richard M. Williams
Aidan F. Goetzinger
Gunderson, Palmer, Nelson & Ashmore, LLP
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
E-mail: rwilliams@gpna.com
agoetzinger@gpna.com
Attorneys for Appellee, City of Spearfish

Filed: 2/25/2025 3:47 PM CST Supreme Court, State of South Dakota #30888

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

PRELIMINARY STATEMENT

Citations to the record will appear as "(CR ___)" with the page number from the Clerk's Appeal Index. Citations to Appellants' Appendix will appear as "(APP ___)" with the page number from the Appendix. Appellants, Leslie Turgeon and Karen Turgeon, shall be collectively referred to as "the Turgeons." Appellee, the City of Spearfish, shall be referred to as "Spearfish." Thoen Stone Road shall be referred to as "TSR."

JURISDICTIONAL STATEMENT

The Turgeons appeal from the Circuit Court's Order Granting Spearfish's Motion for Summary Judgment and Denying the Turgeons' Motion for Summary Judgment dated October 4, 2024. (CR 342-48; APP 0001-0007). The Circuit Court's Order dismissed the Turgeons' Complaint in its entirety. (CR 348; APP 0007). Spearfish filed a Notice of Entry of Order on October 8, 2024. (CR 349). The Turgeons timely filed a Notice of Appeal on November 7, 2024. (CR 362). This Court has jurisdiction over the Order Granting Spearfish's Motion for Summary Judgment and Denying the Turgeons' Motion for Summary Judgment pursuant to SDCL § 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether the Circuit Court erred when it determined that TSR had not been dedicated as a public highway prior to 2012?

The Circuit Court did not err. The undisputed material facts demonstrate that TSR had never been dedicated as a public highway prior to 2012. The transactional documents relied upon by the Turgeons do not demonstrate dedication, they merely demonstrate the use of TSR by Spearfish under an easement.

Niemi v. Fredlund Twp., 2015 S.D. 62, 867 N.W.2d 725
Tibbitts v. Anthem Holdings Corp., 2005 S.D. 26, 694 N.W.2d 41

Selway Homeowners Ass'n v. Cummings, 2003 S.D. 11, 657 N.W.2d 307
Bergin v. Bistodeau, 2002 S.D. 53, 645 N.W.2d 252

II. Whether the Circuit Court erred when it determined Spearfish never accepted the 2012 Plat's dedication of TSR as a public highway?

The Circuit Court did not err. The undisputed material facts demonstrate that, while the 2012 Plat dedicated TSR as a public highway, Spearfish never expressly nor impliedly accepted the dedication of TSR.

SDCL § 11-3-12
SDCL § 11-6-33
City of Belle Fourche v. Dittman, 325 N.W.2d 309 (S.D. 1982)
Frawley Ranches, Inc. v. Lasher, 270 N.W.2d 366 (S.D. 1978)

III. Whether the Circuit Court erred when it considered the elements of adverse possession?

The Circuit Court did not err. The Turgeons' reliance upon SDCL § 31-3-1 for the proposition that TSR had been dedicated and accepted as a public highway necessarily implicated the elements of adverse possession, requiring the Circuit Court to analyze those elements.

SDCL § 31-3-1
Bryant v. Butte Cnty., 457 N.W.2d 467 (S.D. 1990)
Smith v. Sponheim, 399 N.W.2d 899 (S.D. 1987)

STATEMENT OF THE CASE

The Turgeons filed a Complaint seeking a declaration that TSR had been dedicated as a public highway and accepted by Spearfish for that purpose, and seeking injunctive relief requiring Spearfish to remove any obstructions on TSR. (CR 2-54; APP 0021-0024). Spearfish and the Turgeons filed cross Motions for Summary Judgment. (CR 20; CR 61). Spearfish argued (1) TSR had not been dedicated prior to 2012 and (2) while TSR was dedicated as a public highway in 2012, Spearfish did not accept that dedication.

The Circuit Court, the Honorable Michelle Comer, granted Spearfish's Motion for Summary Judgment. (CR 342-48; APP 0001-0007). The Circuit Court determined (1) TSR was not dedicated as a public highway prior to 2012, and (2) while TSR was dedicated as a public highway in 2012, Spearfish did not expressly or impliedly accept the dedication of TSR. (CR 342-48; APP 0001-0007). The Circuit Court's Order granted Spearfish's Motion for Summary Judgment and denied Turgeon's Motion for Summary Judgment. The Turgeons now appeal from the Circuit Court's Order. (CR 362).

STATEMENT OF FACTS

I. INTRODUCTION

Located in Spearfish, South Dakota, the Thoen Stone Monument is a sandstone slab recounting the lore surrounding the discovery of gold in the Black Hills by Ezra Kind and his party in 1834. *See* Visit Spearfish, https://visitspearfish.com/things-to-do/thoen-stone (last visited February 18, 2025). The Thoen Stone Monument is located south of St. Joe Street on property adjacent to TSR. *See id.* (showing location of Thoen Stone Monument on interactive Google map within Visit Spearfish website). The Thoen Stone Monument and the land surrounding it are owned by Spearfish and utilized as a city park. The recorded history of TSR consists of easements, annexations, and plats. The legal status of TSR is the crux of this case.

II. HISTORY OF RELEVANT REAL PROPERTY

The Thoen Stone Monument's place in the lore of the Black Hills is due, in large part, to the efforts of longtime Spearfish resident, Frank S. Thomson. All of the relevant land transactions pertain to real property owned by Thomson in the NW1/4 of Section 15,

T6N, R2E, B.H.M. in Lawrence County, South Dakota. These transactions are detailed below.

A. The 1953 Easement

Beginning on July 9, 1953, Thomson granted an easement and right of way to Spearfish, the Thoen Stone Committee, and Secretary of the State of South Dakota Historical Society, William G. Robinson, on Thomson's property then-described as SW1/4NW1/4 of Section 15, T6N, R2E, B.H.M. ("the 1953 Easement"). (CR 63-64, ¶ 1; CR 176; CR 270, ¶ 1). Thomson described the easement as:

> A knoll of ground containing about two acres, situated in the Southwesterly part of the SW1/4NW1/4 of Section 15, in Township 6, North of Range 2, East of the B.H.M., together with the gravelled [sic] road right-of-way (25 feet wide), leading to the top of the knoll of ground, and subject to the Homestake Mining Company's powerline right-of-way, and more particularly described as being bounded on the West by the West side of the Homestake Mining Company's powerline right-of-way, and on the South by the Ward's farm and on the East of the foot of the grassy hill and on the North by the gravelled [sic] road as now situated, thereon, together with the right of ingress and egress upon said above described land.

(CR 63-64, ¶ 2; CR 176; CR 270, ¶ 2). Thomson granted the easement "to establish a historic marker and [m]useum" for public display of the Thoen Stone Monument near Spearfish's land in Lawrence County, South Dakota. (CR 64, ¶ 3; CR 176; CR 270 ¶ 3). The 1953 Easement granted the Thoen Stone Committee—not Spearfish—authority for the operations and control of the easement. (CR 176). Further, the 1953 Easement provided that the easement would revert to Thomson if the Homestake Mining Company later permitted the Thoen Stone Monument to be displayed closer to where it was originally discovered. *Id.*

B. The 1971 Plat

Several years later, in 1971, Thomson, via plat recorded with the Lawrence County Register of Deeds, subdivided Lot 37 of the W1/2NW1/4, Section 15, T6N, R2E, B.H.M., in Lawrence County, South Dakota ("the 1971 Plat"). (CR 64, ¶ 4; CR 173; CR 270, ¶ 4). The 1971 Plat created Lot 37A, Lot 37B, and Lot 37C of the W1/2NW1/4, Section 15, T6N, R2E, B.H.M., Lawerence County, South Dakota. (CR 64, ¶ 5; CR 173; CR 270, ¶ 5).

C. The 1971 Agreement

That same year, on November 30, 1971, Thomson contracted to convey the following real property to Spearfish:

> Lot 37A, Subdivision of Lot 37, West One-Half of the Northwest Quarter, Section 15 Township 6 North, Range 2 East, B.H.M., Lawrence County, South Dakota, for the use and purpose of maintaining a City Park.

(CR 64, ¶ 6; CR 170-72; CR 270, ¶ 6). This agreement between Thomson and Spearfish is referred to by the parties as the 1971 Agreement. The 1971 Agreement conveyed Lot 37A, known as the "Thoen Stone Land," to Spearfish and required Spearfish to use the Thoen Stone Land exclusively as a city park "for the enjoyment and historical interest centered around the Thoen Stone" by the general public. (CR 64, ¶ 7; CR 170; CR 270, ¶ 7).

Under the 1971 Agreement, Thomson granted Spearfish a right of way for ingress and egress to and from the Thoen Stone Land over the existing roadway, now known as TSR, leading to the Thoen Stone Land. (CR 64-65, ¶ 8; CR 170-71; CR 270, ¶ 8). The 1971 Agreement required Spearfish to maintain the right of way and prohibited fencing. (CR 170). If Spearfish ceased using the Thoen Stone Land as a city park, the right of way would revert to Thomson under the 1971 Agreement. *Id.*

Thomson executed a warranty deed conveying Lot 37A to Spearfish consistent with the 1971 Agreement. (CR 304).

D. The 1972 Deed

The following year, on December 6, 1972, Thomson executed a warranty deed conveying to Spearfish Lot 37C2, a Subdivision of Lot 37C, in the W1/2NW1/4 of Section 15, T6N, R2E, B.H.M., in Lawrence County, South Dakota ("the 1972 Deed"). (CR 65, ¶ 10; CR 177; CR 271, ¶ 10). Thomson deeded Lot 37C2 to Spearfish "for the use and purpose of maintaining a road to provide access to the Thoen Stone Monument road." (CR 65, ¶ 11; CR 177; CR 271, ¶ 11). Under the 1972 Deed, Lot 37C2 would revert to Thomson if Spearfish ceased using the property for purposes of maintaining a road to provide access to TSR. (CR 177). The road located on Lot 37C2 is not TSR; instead, it is St. Joe Street. (*See* CR 174 (2012 Plat showing location of Lot 37C2 and road thereon)).

E. The 2012 Plat

Forty years later, in 2012, the record owners of the relevant property in the W1/2NW1/4 of Section 15, T6N, R2E, B.H.M, in Lawrence County, South Dakota recorded with the Lawrence County Register of Deeds the Plat of Lots 37A-1, 37A-2, 37B-1, 37B-2, 37C-2 Revised and Dedicated Public Right-of-Way of the Thoen Stone Addition, City of Spearfish ("the 2012 Plat"). (CR 65, ¶ 12; CR 174-75; CR 271, ¶ 12.) The 2012 Plat sought to dedicate a 70-foot public right-of-way on TSR. (CR 65, ¶ 13; CR 174). Spearfish approved the 2012 Plat. (CR 175). Nothing in the 2012 Plat, however, demonstrates Spearfish's formal acceptance of the dedication of the public right of way on TSR. (*See* CR 174-75). The Spearfish City Council's meeting minutes

relevant to TSR do not reveal any formal action to open or maintain TSR as a public highway for public vehicular travel. (CR 67, ¶ 26; CR 178-79, ¶¶ 1-8, 13-14).

III. TURGEONS' PROPERTY AND ACCESS

The Turgeons own real property in Section 16, Township 6 North, Range 2 East of the Black Hills Meridian, Lawrence County, South Dakota. (CR 66, ¶ 14; CR 155-56; CR 271, ¶ 14). When the Turgeons purchased their real property, they were on notice that they lacked a right of access to and from the land. (CR 66, ¶ 15; CR 108, ¶ 11 (Turgeons' Title Commitment Policy noting lack of right of access to and from the land and excluding any assurance of such right from coverage under title insurance policy); *but see* CR 271, ¶ 15 (disputing that assurance of access was excluded under title insurance policy but stating the fact is not material)).

The Turgeons access their real property via TSR, requiring them to traverse parcels owned by Spearfish and other individuals and entities to reach their real property. (CR 66, ¶¶ 16-17; CR 119-29; CR 271-72, ¶¶ 16-17). The Turgeons must pass through two gates to access their property—one at the northern entrance to TSR and one located between Spearfish's property on Lot 37A-1 and Lot 37A-2 and Johanna Meier Della Vecchia's property. (CR 66, ¶¶ 18-20; CR 272, ¶¶ 18-20). The gate at the northern entrance of TSR is at the center of this dispute. (CR 67, ¶ 21; CR 272, ¶ 21).

IV. NATURE, USAGE, AND CITY MAINTENANCE OF TSR

TSR has a locked gate at its northern entrance preventing vehicular access by the general public. (CR 67, ¶ 27; CR 273, ¶ 27). The gate has existed for at least forty years. (CR 68, ¶ 28; CR 273, ¶ 28). TSR is used for pedestrian access, as evidenced by the minutes from the June 6, 1988 City Council meeting where the Council received a

request from Clint Garrett of the Black Hills Passion Play to provide a place for pedestrian traffic on TSR. (CR 67, ¶ 23; CR 68, ¶ 30; CR 182, 192; CR 272, ¶ 23; CR 273, ¶ 30). The City Council voted to maintain the pedestrian path "in the least expensive manner until the Thoen Stone Committee makes its final recommendation to the full Council concerning the final location of the Thoen Stone." (CR 67, ¶ 23; CR 192; CR 272, ¶ 23).

Because TSR is used as a pedestrian trail to access the city park and Thoen Stone Monument, Spearfish controls vehicle access to TSR and maintains the lock on the gate; Spearfish, however, allows pedestrian access to TSR and the Thoen Stone Monument by means of an opening next to the gate. (CR 68, ¶¶ 29-30; CR 273, ¶¶ 29-30). While TSR is not open to the general public for vehicular travel, Spearfish issues keys to select individuals, including the Turgeons, who own or operate adjacent parcels of land to which TSR provides access, allowing those individuals the ability to unlock the gate at the northern entrance of TSR to access their parcels. (CR 69, ¶¶ 31-33; CR 273-74, ¶¶ 31-33). According to the Turgeons, on some occasions, their key to the gate malfunctions, preventing the them from unlocking the gate. (CR 273, ¶ 31).

TSR is a gravel road used sparingly by the public, and it is not open to the general public for vehicular traffic. (CR 68, ¶¶ 33-34; CR 274, ¶¶ 33-34). TSR has never been open to public vehicular use and has only been open to the public for pedestrian travel. (CR 68, ¶ 35; CR 274, ¶ 35). Spearfish does not and never has considered TSR to be a public highway. (CR 68, ¶ 36; CR 274, ¶ 36). The Spearfish Public Works Department considers TSR to be a "public trail up to the Thoen Stone Monument." (CR 67, ¶ 25; CR 196, 200; CR 273, ¶ 25).

Further, Spearfish's maintenance of TSR has been minimal to non-existent. TSR has been maintained by Spearfish solely as a minimal to no maintenance road for the purposes of maintaining the city park for the Thoen Stone Monument. (CR 68, ¶ 37; CR 274, ¶ 37). Spearfish does not perform snow removal on TSR. (CR 68, ¶ 38; CR 274, ¶ 38). In 2021, Spearfish placed millings on TSR to fill potholes and washouts to allow pedestrians to access the Thoen Stone Monument within the city park. (CR 69, ¶ 39; CR 274, ¶ 39). Spearfish once repaired the gate at the northern entrance to TSR after a vehicle struck and damaged it. (CR 69, ¶ 40; CR 274, ¶ 40). Aside from placing millings one time, and maintaining the gate and signage for the city park, the only other maintenance of TSR by Spearfish that the Turgeons are aware of is mowing around the Thoen Stone Monument. (CR 69, ¶ 41; CR 274, ¶ 41). Spearfish City Council meeting minutes have demonstrated that Spearfish has rejected requests "to overlay the entrance to the Thoen Stone." (CR 67, ¶ 24; CR 193-94; CR 272, ¶ 24).

Finally, TSR does not meet Spearfish's requirements to be considered a public highway. TSR does not meet Spearfish's minimum width requirements as it is too narrow to be public highway. (CR 69, ¶ 42; CR 212-13, ¶¶ 1-3, 10; CR 274, ¶ 42). The gravel and milling surface is not a city-approved wearing surface. (CR 69, ¶ 43; CR 212-13, ¶¶ 1-3, 11; CR 274, ¶ 43). Further, the grade of TSR is too steep. (CR 69, ¶ 44; CR 212-13, ¶¶ 1-3, 12; CR 275, ¶ 44). Finally, TSR has a horizontal curve with a radius well below city requirements. (CR 69, ¶ 45; CR 212-13, ¶¶ 1-3, 13; CR 275, ¶ 45).

STANDARD OF REVIEW

A Circuit Court's order granting summary judgment is reviewed de novo. *Blanchard v. Mid-Century Ins. Co.*, 2019 S.D. 54, ¶ 16, 933 N.W.2d 631, 636. This

Court "determine[s] whether genuine issues of material fact exist and whether the law was applied correctly." *Id.* (quoting *W. Nat'l Mut. Ins. Co. v. Gateway Bldg. Sys., Inc.*, 2016 S.D. 85, ¶ 7, 887 N.W.2d 887, 890). While the evidence must be viewed most favorably to the nonmoving party, the nonmoving party must point to specific facts in the record demonstrating that a genuine dispute of material fact exists. *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 19, 921 N.W.2d 479, 486 (citation omitted). "Unsupported conclusions and speculative statements do not raise a genuine issue of fact." *Id.* (cleaned up) (quoting *Dakota Indus., Inc. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 20, 766 N.W.2d 510, 516). Finally, this Court will affirm if there is any legal basis to support the Circuit Court's decision. *Blanchard*, 2019 S.D. 54, ¶ 16, 933 N.W.2d at 636 (citation omitted).

ARGUMENT AND AUTHORITIES

The Circuit Court correctly granted Spearfish's Motion for Summary Judgment. In its Order Granting Spearfish's Motion for Summary Judgment and Denying the Turgeons' Motion for Summary Judgment, the Circuit Court found that there was no genuine dispute of material fact that Spearfish never accepted the dedication of TSR as a public highway. (*See* CR 342-48; APP 0001-0007). First, the Circuit Court ruled that TSR had never been dedicated prior to the filing of the 2012 Plat. (CR 342-44; APP 0001-0003). Second, the Circuit Court found that, while the 2012 Plat dedicated TSR as a public highway, Spearfish never accepted the dedication. CR 345-48; APP 0004-0007). The Circuit Court did not err in either of these findings.

As a threshold matter, the Turgeons question whether the burden of proof for dedication and acceptance in this matter should be clear and convincing evidence. Appellants' Br. at 9-10. The question is academic in this instance because the Circuit

Court found, in the alternative to clear and convincing evidence, the Turgeons had not shown by a preponderance of evidence that TSR was accepted by Spearfish. (CR 347, ¶¶ 27-28; APP 0006). Nonetheless, this Court's rulings show the clear and convincing standard for both dedication and acceptance of a public highway is correct.

This issue was decided by the Court when it determined that both statutory and common law dedications require acceptance in a manner which "clearly justifies" that conclusion. *See City of Belle Fourche v. Dittman*, 325 N.W.2d 309, 312 (S.D. 1982) (stating that "[c]onduct on the part of the owner that is *clearly expressive of an intention to dedicate* usually amounts to dedication, if acted upon by the public in a manner which *clearly justifies the inference of an acceptance*." (emphasis added) (citations omitted)).

In *Niemi v. Fredlund Twp*, the Court further expounded on the burden of showing acceptance by "clear and convincing evidence":

> It is true the Circuit Court did not use the words "by clear and convincing evidence" in regard to the Township's acceptance, but the evidence that the Township accepted the dedication is so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

2015 S.D. 62, ¶ 35, 867 N.W.2d 725, 734 (internal quotation and citations omitted). The Supreme Court's standard, in this instance, is consistent with that used by the Supreme Court of Pennsylvania. In *Appeal of Gaus*, the Court wrote: "[g]enerally, one who sets up the existence of a public highway has the burden of showing acceptance of the dedication by presenting clear and convincing evidence." *Appeal of Gaus*, 611 A.2d 696, 698 (1992) (citation omitted). Thus, in order to show acceptance of a public highway by Spearfish, and thereby imposing upon Spearfish the burdens of opening and maintaining it as such, dedication and acceptance must be shown by clear and convincing evidence.

I. THE CIRCUIT COURT CORRECTLY DETERMINED THERE WAS NO DEDICATION OF TSR AS A PUBLIC HIGHWAY PRIOR TO 2012.

The undisputed material facts demonstrate that TSR had never been dedicated as a public highway prior to the filing of the 2012 Plat. The Turgeons contend that the 1953 Easement dedicated TSR to Spearfish as a public highway. Appellants' Br. at 7-9. As demonstrated below, neither the 1953 Easement nor any other agreement with Thomson dedicated TSR as a public highway.

In order to create a public highway, by dedication, "there must be an unconditional offer by the grantor to create a public highway and there must be an unconditional acceptance by the appropriate public entity that it becomes one" *Selway Homeowners Ass'n v. Cummings*, 2003 S.D. 11, ¶ 20, 657 N.W.2d 307, 313 (citing *Tinaglia v. Ittzes*, 257 N.W.2d 724, 728-729 (S.D.1977)). This is a two-part requirement—dedication and acceptance. Dedication requires "the devotion of property to a public use by an unequivocal act of the owner that manifests and intention that the property dedicated shall be accepted and used presently or in the future." *Tinaglia*, 257 N.W.2d at 728.

There is a clear distinction between an easement, a voluntary *use* of the land for a particular purpose, and a dedication of land as a public highway. Easements allow the owner of the servient tenement to retain "all the incidents of ownership in the easement." *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 25, 693 N.W.2d 656, 663. A dedication for a public highway, on the other hand, must "show a dedication, which is unequivocal and decisive, manifesting a positive and unmistakable intention, on the part of the owner, to *permanently abandon his property* to the specific public use." *Niemi*, 2015 S.D. 62, ¶ 33, 867 N.W.2d at 734 (emphasis added) (quotatio and additional citations omitted). The

1953 Easement and other agreements entered into prior to the filing of the 2012 Plat do not show a dedication.

A. The 1953 Easement is not a dedication of TSR as a public highway.

The 1953 Easement between Frank S. Thomson and Spearfish, aptly entitled "Easement," granted only an "easement" and "right-of-way" on and over, the land then owned by Thomson for the display of, and access to, a piece of land intended for the public display of the Thoen Stone Monument. (CR 176). This Court has held "[w]here the term 'right of way' is used in a deed it usually indicates that only an easement or right of passage is being conveyed or reserved." *Tibbitts v. Anthem Holdings Corp.*, 2005 S.D. 26, ¶ 7, 694 N.W.2d 41, 44 (citations omitted). Although the 1953 Easement is not a deed, the effect of the term "right of way" remains applicable here.

The Turgeons confuse the grant of an easement, whether it be public or private, with the dedication of a public highway. Appellants' Br. at 7-9. As noted above, an easement grants the use of the property while the dedication of a public highway requires the property owner to permanently abandon his property to the public use. This distinction was clarified by this Court in *Selway Homeowners Ass'n* in 2003. *See Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 11, 660 N.W.2d 637, 641 (noting that *Selway Homeowners Ass'n* reiterated terms necessary for the dedication of a public road).

> Words contained in a plat such as "dedicated as a 66 foot public right-of-way," "public highway" or "public road" are obvious terminology that the road has been offered by the land owner to be dedicated as a public highway per SDCL 31-1-1. This definition makes equally clear that words in a plat such as "private road" or "private driveway" establish that *the owner of the realty retains full incidents of his or her ownership even though it may to some extent, be used for vehicular traffic as that owner deems fit.* The statute also contemplates the dedication and acceptance be in the present tense and not contingent upon some act in the future.

Selway Homeowners Ass'n, 2003 S.D. 11, ¶ 21, 657 N.W.2d at 313–14. (cleaned up) (emphasis added) (internal and external citations omitted).

The 1953 Easement was not a dedication by Thomson of TSR as a public highway because there was no intent by the grantor to permanently abandon his property for such use. Nor could the grant of this easement be expanded as such. This is because "[t]he extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." SDCL § 43-13-5. The following principle is implicit in SDCL § 43-13-5:

> the holder of a private easement has the right to limited use or enjoyment of the property only if it is consistent with the general use of the property by the owner, and neither the physical size *nor the purpose or use to which an easement may be put can be expanded or enlarged beyond the terms of the grant of the easement*.

Vander Heide v. Boke Ranch, Inc., 2007 S.D. 69, ¶ 45, 736 N.W.2d 824, 837 (emphasis added) (citation and internal quotations omitted). The Turgeons' citation to *Tonsager v. Laqua* supports this concept. Appellants' Br. at 9. In *Tonsager*, the Court found that a perpetual easement for the public use of a sanitary system continued to be available to the public for that same use. In doing so, the Court wrote, "[a]n easement's extent must be ascertained from the document itself: if its words are plain and unambiguous, the matter is concluded." *Tonsager v. Laqua*, 2008 S.D. 54, ¶ 6, 753 N.W.2d 394, 396 (quotation omitted). Spearfish does not dispute that the 1953 Easement allowed the limited use—both spatially and temporally—as specifically designated in that easement. But, as described above, the easement cannot be expanded to create a public highway and was not dedicated as such. Moreover, as described *infra*, the 1953 Easement was supplanted

by the 2012 Plat after Thomson's ownership of the land ended and the new owners requested platting of the land.

Here, the 1953 Easement was not a dedication of a public highway. It is undisputed that title to TSR remained in the grantor, Thomson. Further, the 1953 Easement granted the Thoen Stone Committee—not Spearfish—authority for the operation and control of the real property and right of way under the Easement. (CR 176). Finally, the 1953 Easement contained a reversionary clause that would cause the real property and right of way under the Easement to revert to Thomson if the Homestake Mining Company permitted the Thoen Stone Monument to be displayed closer to where the Thoen Stone was originally discovered.[1] *See id.* Thus, the 1953 Easement does not manifest "a positive and unmistakable intention" by Thomson to permanently abandon his property for the use of TSR as a public highway. *Niemi*, 2015 S.D. 62, ¶ 33, 867 N.W.2d at 734. The 1953 Easement's purpose was to establish a historic marker and museum for display of the Thoen Stone Monument. (CR 176). It did not propose to create a public highway, and the Turgeons cannot now seek to expand the purpose for which the 1953 Easement was created.

---

[1] Also unavailing is the Turgeon's citation to *First Northwestern Trust Co. of South Dakota* for the proposition that a reversionary interest can coexist with a dedication of a public highway. Appellants' Br. at 8-9. There was no reversionary interest in *First Northwestern Trust*. Rather, in order for the dedication to become effective under the trust instrument, the city had to take action to develop the property. *First Nw. Tr. Co. of S. Dakota v. Fam. Homes, Inc.*, 303 N.W.2d 352, 356 (S.D. 1981). Title was not transferred until the city preformed as set forth in the trust.

B. The 1971 Plat is not a dedication of TSR.

The 1971 Plat does not plat a public highway nor does it impose any restrictions upon Spearfish. Instead, the 1971 Plat reads "Plat of Subdivision of Lot 37, Subdivision of the W1/2NW1/4 Section 15, T6N, R2E, BHM. Lawrence Co. South Dakota." (CR 173). The very terms of the 1971 Plat only create the Lots 37A, 37B, and 37C. *Id.* Lot 37A would later be transferred to Spearfish by the 1971 Agreement and corresponding warranty deed. (*See id.* at 170-72; CR 304). There is absolutely no mention of the creation of a public highway. (*See* CR 173). Likewise, there is no language necessary to show a dedication of such as a public highway. *Selway Homeowners Ass'n*, 2003 S.D. 11, ¶¶ 18-25, 657 N.W.2d 307, 312-15. The access shown on the 1971 Plat merely illustrates the location of the easement in accordance with the 1971 Agreement's easement portion.

C. The 1971 Agreement is not a dedication of TSR.

The 1971 Agreement does not dedicate a public highway. The 1971 Agreement and corresponding warranty deed conveyed Lot 37A to Spearfish for the exclusive use as a city park for display of the Thoen Stone Monument. (CR 170; *see also* CR 304). If Spearfish failed to use Lot 37A as a city park, it would revert to Thomson. (CR 170). Further, the 1971 Agreement, much like the 1953 Easement, provides a "right-of-way for ingress and egress to said property over the existing roadway" to and from Lot 37A. *Id.* If Spearfish failed to use Lot 37A as a city park, the right of way would revert to Thomson. *Id.* The 1971 Agreement does not manifest "a positive and unmistakable intention" by Thomson to permanently abandon his property for the use of TSR as a public highway because it would revert to Thomson if Spearfish ceased using Lot 37A as

a city park. *Niemi*, 2015 S.D. 62, ¶ 33, 867 N.W.2d at 734. Thus, the 1971 Agreement is not a dedication of TSR as a public highway.

D. The 1972 Deed is not a dedication of TSR.

Finally, the 1972 Deed did not dedicate TSR as a public highway. The 1972 Deed conveyed Lot 37C2 to Spearfish "for the use and purpose of maintaining a road to provide access to the Thoen Stone Monument road." (CR 177). Citing *Haley v. City of Rapid City*, 269 N.W.2d 398, 400 (S.D. 1978), the Turgeons argue acceptance of North St. Joseph Street on Lot 37C2 is acceptance of TSR as a public highway. Appellants' Brief at 11. It is undisputed, however, that Lot 37C2 does not contain any portion of TSR; instead, the road located on Lot 37C2 is St. Joe Street.

(*See* CR 174 (2012 Plat showing location of Lot 37C2 and road thereon)).[2]

[2] This Beacon screenshot is inserted for illustrative purposes only and is not intended to reflect a document placed in the record below. The 2012 Plat showing St. Joe Street's location upon Lot 37C2 (CR 174) is a matter of record.

The deed was only necessary so that access could be maintained to TSR. As is a theme in Thomson's conveyances to Spearfish, the 1972 Deed contains a reversionary clause providing that Lot 37C2 would revert to Thomson if Spearfish failed to maintain the road on Lot 37C2 to provide access to TSR.

Spearfish's transactions with Thomson do not indicate that Thomson intended to permanently abandon his land for the use as a public highway. Unlike *Bergin v. Bistodeau*, where the plat contained the words "dedicated access easement," the word "dedication" is absent from these agreements. *See generally Bergin v. Bistodeau*, 2002 S.D. 53, ¶¶ 13, 18, 645 N.W.2d 252, 255-56 (discussing the import of the word "dedication"). Rather, the documents evince the opposite—Thomson provided an easement to be used for the display of the Thoen Stone or a monument commemorating the Thoen Stone. In the event that the land, or access to the same, was not used for the described purposes, it would revert to Thomson. These agreements do not "show a dedication," which is "unequivocal and decisive, manifesting a positive and unmistakable intention, on the part of the owner, to permanently abandon his property to the specific public use." *Niemi*, 2015 S.D. 62, ¶ 33, 867 N.W.2d at 734.

Had Thomson intended a dedication of TSR as a public highway, there would be no conditions on the use, words of dedication would have been used, and, by law, there could be no reversion. It cannot go without notice that the road described by Thomson did not travel past the northern boundary of Lot 37A, which was transferred to Spearfish. Under no conditions then, could TSR provide access to adjacent parcels of land, including the Turgeons' land. (*See* CR 173 (1971 Plat showing TSR only reaching the northern edge of Lot 37A); CR 66, ¶ 17 (noting Turgeons must cross property owned by

private land owners to access their property); CR 272, ¶ 17 (not disputing that Turgeons must traverse property owned by private land owners to access their property)). TSR was not dedicated by Thomson at all, let alone as a public highway to allow access to additional parcels of land, and such use would be contrary to the purpose of access to a city park to memorialize the Thoen Stone. Without a dedication, Spearfish could not accept TSR as a public highway. *Hofmeister*, 2003 S.D. 35, ¶ 11, 660 N.W.2d at 641. The Circuit Court correctly determined TSR had not been dedicated prior to the filing of the 2012 Plat. Thus, this Court should affirm the Circuit Court.

II. THE CIRCUIT COURT CORRECTLY DETERMINED SPEARFISH NEVER ACCEPTED THE 2012 PLAT'S DEDICATION OF TSR AS A PUBLIC HIGHWAY.

The undisputed material facts demonstrate that Spearfish never accepted the dedication of TSR as a public highway. As a threshold matter, the Turgeons contend that the 1971 Agreement and 1972 Deed evince Spearfish's acceptance of the 1953 Easement's dedication of TSR as a public highway. Appellants' Br. at 10-11. But, because the 1953 Easement was not a dedication of TSR, the 1971 Agreement and 1972 Deed are irrelevant to the issue of acceptance of TSR as a public highway. *See* Argument, *supra*, Section I.A. Spearfish acknowledges that the 2012 Plat, however, was a dedication of TSR as a public highway. As demonstrated below, there is no evidence in the record for the proposition that Spearfish expressly accepted the 2012 Plat's dedication. Further, Spearfish never impliedly accepted the 2012 Plat's dedication. Thus, this Court should affirm the Circuit Court.

A. Spearfish did not expressly accept the 2012 Plat's dedication of TSR as a public highway.

Spearfish does not dispute that the 2012 Plat dedicated TSR as a public highway. Until the filing of the 2012 Plat, Spearfish's use of TSR was by means of the above-described agreements with Frank S. Thomson. The 2012 Plat is, however, a clear dedication providing TSR is a "70.00' Public-Right-Of-Way Dedicated This Plat." (CR 174). The legal effect of approving this plat is that TSR has been dedicated as a public highway. Where dedication has been shown, acceptance of a public highway may be shown by express acceptance or by implied acceptance. *See Dittman*, 325 N.W.2d at 311 (S.D. 1982) ("While there appears to be a split of authority on the question of whether an acceptance is necessary in cases of statutory dedication where statutory approval is not required, we believe the better rule in this state is that an acceptance is necessary.").

Here, there is no evidence in the record that Spearfish has expressly accepted the 2012 Plat's dedication of TSR. The Turgeons rely entirely on Spearfish's request and approval of the 2012 Plat for the proposition that Spearfish accepted the dedication of TSR. Appellants' Br. at 11-12. The Turgeons' reliance on this fact is misplaced. South Dakota law is clear that approval of a plat does not amount to acceptance of any road dedicated within the plat. Under SDCL § 11-3-12,

> When the plat or map shall have been made out, certified, acknowledged, and recorded as provided in this chapter… shall be deemed a sufficient conveyance to vest the fee simple title of all such parcel or parcels of land as are therein expressed… The land intended to be used for the streets, alleys, ways, commons, or other public uses shall be held in trust to and for the uses and purposes expressed or intended. *No governing body shall be required to open, improve, or maintain any such dedicated streets, alleys, ways, commons, or other public ground solely by virtue of having approved a plat or having partially accepted any such dedication, donation or grant.*

(emphasis added). Further, SDCL § 11-6-33 provides "[t]he approval of a plat by the City Council shall not be deemed to constitute or effect an acceptance by the municipality or public of the dedication of any street or other ground shown on the plat." Thus, South Dakota law forecloses the Turgeons' argument that Spearfish's approval of the 2012 Plat constitutes acceptance of the dedication of TSR.

The evidence before the Circuit Court demonstrates that Spearfish never expressly accepted TSR as a public highway. The Spearfish City Council meeting minutes relevant to TSR reveal that there has been no formal action on behalf of the City Council to open or maintain TSR as a public highway for general vehicular travel. (CR 67, ¶ 26; CR 178-79, ¶¶ 1-8, 13-14). The Turgeons purported to dispute this statement of fact and objected to it on grounds that this stated a legal conclusion. (*See* CR 273, ¶ 26). This statement was supported by Spearfish's Finance Officer, Michelle DeNeui, who reviewed the City Council meeting minutes relevant to TSR. (CR 178-79). DeNeui's statement that there has been no formal action by the City Council to open TSR as a public highway is based on her review of those meeting minutes. (CR 179, ¶¶ 13-14). The Turgeons objected to this statement of undisputed material fact because they claim it is a legal conclusion. This is not a legal conclusion—it is a factual statement based on DeNeui's review of the City Council's meeting minutes. The Turgeons' objection is misplaced.

Further, the Turgeons attempted to dispute DeNeui's statement by contending that Spearfish has taken formal action to accept the dedication of TSR as a public road. (CR 273, ¶ 26). In support of their alleged dispute, the Turgeons cited generally to their Motion for Summary Judgment and supporting documents. *Id.* This is not a proper citation to the record—it leaves Spearfish and the Court to hazard a guess exactly what the Turgeons

contend disputes this statement of fact. *See* SDCL § 15-6-56(c) (requiring a party opposing summary judgment to respond to each paragraph of the moving party's statement of undisputed material facts with appropriate citations to the record to demonstrate a genuine dispute of material fact). If the Turgeons had a genuine dispute regarding this statement of fact, they should have cited something in the City Council's meeting minutes demonstrating formal acceptance and operation of TSR as a public highway. They did not. Because the Turgeons failed to properly dispute this statement of fact, it should be deemed undisputed. *See* SDCL § 15-6-56(c) ("All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.").

Ultimately, the undisputed material facts show that Spearfish did not expressly accept the 2012 Plat's dedication of TSR as a public highway. The Circuit Court did not err in this determination.

B. Spearfish did not impliedly accept TSR as a public highway.

The Circuit Court correctly determined Spearfish did not impliedly accept the dedication of TSR as a public highway. The undisputed material facts demonstrate that Spearfish did not impliedly accept the 2012 Plat's dedication of TSR; instead, Spearfish's actions regarding TSR are consistent with its obligation to operate a city park to commemorate the Thoen Stone.

1. *The locked gate at the northern entrance of TSR prevents general, vehicular access.*

The locked gate at the northern entrance of TSR is evidence that Spearfish has not impliedly accepted the 2012 Plat's dedication. The locked gate has operated to restrict general vehicular access to TSR for at least forty years. (CR 67-68, ¶¶ 27-28; CR 273, ¶¶

27-28). While the Turgeons purported to dispute that the locked gate prevented general vehicular access, (*see* CR 273, ¶¶ 27-28), this dispute is not genuine because the Turgeons acknowledge elsewhere in their responses to Spearfish's Statement of Undisputed Material Facts that Spearfish does in fact maintain a lock on the gate at the northern entrance of TSR that controls vehicular access to TSR. (*See* CR 273-74, ¶¶ 29, 31-32). Spearfish's undisputed use of a locked gate on the northern end of TSR is clear evidence that the road has not been opened for *unrestricted* vehicle travel, by the public, as required by statute in order to meet the definition of a "public highway." SDCL § 31-1-1 ("Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway."). "The right-of-way is public if everyone who desires may lawfully use the right-of-way. It is the right of travel by all the world, not the actual exercise of the right which constitutes a road a public highway." *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 369 (S.D. 1978). The gate, which is controlled by a lock and key, has been in place for over forty years, and ensures that TSR has not been opened for unrestricted vehicle access. (CR 67-68, ¶¶ 27-32). The existence of this gate, controlled by lock and key, across the roadway is "the antithesis of public use." *Frawley Ranches*, 270 N.W.2d at 370; *see also Bino v. City of Hurley*, 109 N.W.2d 544, 549 (Wis. 1961) ("the erection and maintenance of gates hereinbefore described, although sporadic, prevented any establishment of a highway by user during such period.").

2. *TSR is a pedestrian trail.*

The evidence in the record demonstrates that TSR has been open to the public as a pedestrian trail—not a public highway. The Turgeons contend "[n]o admissible evidence

was presented that the City limits its maintenance to a pedestrian path for a public park." Appellants' Br. at 15. Contrary to the Turgeons' meritless assertion, Spearfish provided ample evidence that TSR has been used by the general public exclusively as a pedestrian trail. In support of this proposition, Spearfish presented City Council meeting minutes, staff reports, and affidavits from Spearfish's Mayor, Public Works Director, and a longtime Spearfish resident with firsthand knowledge of the nature and usage of TSR. (CR 67-68, ¶¶ 23, 25, 30, 35, 37; CR 192, 196, 200; CR 207, ¶ 5; CR 210, ¶¶ 12-13; CR 212, ¶¶ 4-5). This was ample evidence for the Circuit Court to determine that TSR was used as a pedestrian trail—not a public highway.

3. *Spearfish's maintenance of TSR is consistent with its obligations to maintain a City park for display of the Thoen Stone Monument.*

Spearfish's minimal to non-existent maintenance of TSR supports the notion that Spearfish has not impliedly accepted the 2012 Plat's dedication of TSR. TSR has been maintained by Spearfish solely as a minimal to no maintenance road for the purposes of maintaining the city park for the Thoen Stone Monument. (CR 68, ¶ 37). The Turgeons did not dispute this fact before the Circuit Court. (CR 274, ¶ 37). It is also undisputed that Spearfish does not perform snow removal on TSR. (CR 68, ¶ 38; CR 274, ¶ 38). Spearfish's maintenance of TSR consists of: (1) placing millings once in 2021 to fill potholes and washouts to allow pedestrians to access to the Thoen Stone Monument; (2) maintaining the gate that actively prevents general vehicular access to TSR; (3) maintaining signage on the gate that indicates that TSR and the Thoen Stone Monument are only open for public pedestrian access "from dawn to dusk"; and (4) mowing around the Thoen Stone Monument. (CR 69, ¶¶ 39, 41; CR 163; CR 274, ¶¶ 39, 41). Spearfish has actively rejected steps to maintain TSR in a manner more consistent with a public

highway. (*See* CR 67, ¶ 24; CR 194). As the Circuit Court correctly noted, Spearfish's limited maintenance of TSR is consistent with its obligations to allow pedestrian access the City park and Thoen Stone Monument. (CR 346, ¶ 19; APP 0005, ¶19).

4. *The nature of TSR indicates lack of acceptance of the 2012 Plat's dedication.*

The very nature of TSR makes clear that Spearfish has not impliedly accepted the 2012 Plat's dedication of TSR as a public highway. TSR does not meet Spearfish's minimum width requirements as it is too narrow to be public highway. (CR 69, ¶ 42; CR 212-13, ¶¶ 1-3, 10; CR 274, ¶ 42). The gravel and milling surface is not a city-approved wearing surface. (CR 69, ¶ 43; CR 212-13, ¶¶ 1-3, 11; CR 274-75, ¶ 43). Further, the grade of TSR is too steep. (CR 69, ¶ 44; CR 212-13, ¶¶ 1-3, 12; CR 275, ¶ 44). Finally, TSR has a horizontal curve with a radius well below city requirements. (CR 69, ¶ 45; CR 212-13, ¶¶ 1-3, 13; CR 275, ¶ 45). While the Turgeons attempted to dispute these facts by pointing to the 2012 Plat, which shows TSR is supposed to be a 70-foot right of way, this dispute is not genuine because the 2012 Plat's representation of TSR is not the reality of TSR as evidenced Spearfish's Public Works Director's affidavit. (*See* CR 212-13). Taken together, these undisputed material facts demonstrate a lack of implied acceptance of TSR as a public highway.

5. *The Turgeons' arguments regarding implied acceptance are misplaced.*

The Turgeons contend there are several disputes of material fact that preclude summary judgment with regard to the issue of implied usage. The Turgeons are incorrect.

Initially, the Turgeons argue that because Spearfish granted a building permit to Della Vecchia, TSR must be a public road. Appellants' Br. at 12-13, 16-17. The

Turgeons cite SDCL § 11-6-38 for this proposition, relying on language of the statute stating "no building permit may be issued . . . unless the street giving access to the lot upon which the building is proposed to be placed is accepted as opened as, or has otherwise received the legal status of, a public street prior to that time[.]" But the Turgeons ignore the clause in SDCL § 11-6-38, which provides, "*or* unless such street corresponds in its location and lines with a street shown on a recorded subdivision plat approved by the council[.]" (emphasis added). The use of the word "or" in this statute is disjunctive and provides an alternative means of granting a building permit if the street giving access to the property "corresponds in its location and lines with a street shown on a recorded subdivision plat approved by the council." *See In re Est. of Flaws*, 2016 S.D. 61, ¶ 29, 885 N.W.2d 580, 588 (declaring the word "or" as disjunctive). It is undisputed that that the 2012 Plat shows the location of TSR which would provide direct access to the Della Vecchia property. (*See* CR 174). Because the clauses are disjunctive, it is not necessary that such road must also be "opened as" or has the "legal status of, a public street[,]" and the Turgeons' contention to the contrary is misguided.

It is likewise undisputed that TSR does not provide direct access to the Turgeons' land. (CR 66, ¶¶ 16-20; CR 271-72, ¶¶ 16-20). Instead, in addition to the use of TSR as shown on the 2012 Plat, the Turgeons must cross the land owned by Della Vecchia (CR 66, ¶ 17; CR 272, ¶ 17). The Turgeons' building permit was denied because the road on Della Vecchia's property was not accepted as opened nor was it shown on a recorded subdivision plat. Thus, the Turgeons cannot meet either option under SDCL § 11-6-38.

Even if the Turgeons' argument was to be considered, it merely calls into the question whether the building permit should have been issued, not whether TSR is a

public highway. Under the Turgeons' argument, the road must *first* be opened as or has the legal status of a public street before a building permit may be issued. It is undisputed that TSR was never formally accepted by Spearfish as a public highway. (CR 67, 68, ¶¶ 26, 36). And no Court has declared the legal status of TSR as a public highway. Thus, the fact that Spearfish previously issued building permits is irrelevant to the issue of implied acceptance.

Further, the Turgeons contend that they provided evidence to the Circuit Court that TSR is used by the public on a daily basis. Appellants' Br. at 16. As a threshold matter, the Turgeons' citation to the Affidavit of Alan Maas is entirely inappropriate and seeks to present facts to this Court that were not before the Circuit Court. The Turgeons cited to the Affidavit of Alan Maas for the proposition that tourist vans travel on TSR to visit the Thoen Stone Monument. (Appellants' Br. at 16; CR 358). This affidavit, however, was not filed by the Turgeons until November 7, 2024, which was almost one month after the Circuit Court's Order and the same day as the Turgeons filed their Notice of Appeal.[3] (*See* CR 342; CR 362). The Turgeons never sought to expand the record before the Circuit Court and never filed a motion for the Circuit Court to reconsider this affidavit. Even more troubling, the Turgeons failed to alert this Court to their untimely filing, and they cite to this affidavit as if it were considered by the Circuit Court. This Court should not consider the Affidavit of Alan Maas.

[3] The Turgeons also filed the Affidavit of Bonnie Mundhenke on the same day as they filed the Affidavit of Alan Maas. *See* CR 360. While it does not appear that the Turgeons cite to the Affidavit of Bonnie Mundhenke in their Brief, the Turgeons filed the affidavit in the Circuit Court after the Circuit Court had already issued its dispositive Order, and the same day the Turgeons filed their Notice of Appeal. It appears the Turgeons did this so that these two affidavits would be included in the Certified Record.

Aside from these after-the-fact affidavits, the Turgeons rely upon the Affidavit of Leslie and Karen Turgeon for the proposition that the public has used TSR on a daily basis. *See* Appellants' Br. at 16 (citing CR 225, ¶¶ 8-9). The Turgeons' affidavit does not create a genuine dispute of material fact for three reasons. First, the Turgeons aver that they "have observed the public using TSR as access to the monument and City property almost daily." (CR 225, ¶ 8). This statement does not create a genuine dispute because it does not specify that the public uses TSR as anything other than a pedestrian trail to access the city park and Thoen Stone Monument. Second, the Turgeons' affidavit relies upon an October 1972 article wherein Frank S. Thomson stated that "about 20,000 people per year visit the Thoen Stone area." *Id.* (citing CR 238). This article does not support the proposition that Spearfish impliedly accepted the dedication of TSR because (1) it predates the dedication of TSR as a public highway in 2012, so it is irrelevant to the issue of implied acceptance; and (2) it does not state that the visitors accessed the Thoen Stone Monument by vehicle over TSR. Third, the Turgeons state in their affidavit that they "have observed many vehicles using TSR, including utility companies, the fish hatchery, construction, logging trucks, and tourists." (CR 225, ¶ 9). This does not create a genuine dispute of material fact because Spearfish utilizes TSR to maintain the city park as required under its agreements with Thomson. Further, the mere use of TSR by the public does not mean that Spearfish accepted the dedication of TSR as a public highway. *See* SDCL § 31-3-1. While the public may, from time to time, have used TSR, Spearfish's placement of the gate at TSR's northern entrance illustrates Spearfish's lack of acceptance of the dedication because TSR is not open to the public as a matter of right.

See SDCL § 31-1-1 (noting that a highway must be open to the public as a matter of right for vehicular travel).

Next, the Turgeons' argument that maintenance of TSR demonstrates implied acceptance is misguided. A municipality may control and maintain City property for the use of a park. And the use of public property for a pedestrian trail, or for limited access related to that use, does not convert that access into a public highway as defined by SDCL § 31-1-1. Spearfish's authority to maintain public parks is provided by various statutes. *See* SDCL § 9-38-1 (city may maintain and regulate public parks); SDCL § 9-30-2 (city may regulate parks and regulate riding and driving on sidewalks); SDCL § 9-45-1 (authority to establish, open, widen, regulate openings, and control public grounds). Operating under its authority, Spearfish may regulate the use of TSR for pedestrian travel, including limiting the opening of public property to pedestrian traffic, and maintain the same, without opening TSR for unrestricted public vehicular travel.

In *Christensen v. City of Pocatello*, the Idaho Supreme Court summarized the general authority of municipalities and addressed whether city property could be opened only for pedestrian and bicycle traffic to the exclusion of motor vehicles. 124 P.3d 1008, 1014 (Idaho 2005). The court stated, "In other words, the City cannot, [plaintiffs] say, open Harper Road only for pedestrians and bicyclists; if the City opens the road at all, it must open it for every use—bikes, walkers, horses, roller skaters, runners, and motor vehicles. [Plaintiffs] are wrong." *Id.* The *Christensen* court ultimately held that the City of Pocatello had the authority to limit traffic on a city road. *Id.* at 1015.

Here, like in *Christensen*, Spearfish may open TSR for pedestrian traffic without allowing unrestricted public use of TSR by motor vehicles. The undisputed material facts

in this case illustrate that TSR has never been opened for unrestricted vehicle as a matter of right. (CR 67-68, ¶¶ 27-30, 33-36). Instead, TSR is utilized, and provided limited maintenance, for access to a City park, with signage and a locked gate enforcing these regulations. (CR 67-68, ¶¶ 27-30; CR 274, ¶ 41). It is also undisputed that access and maintenance has remained constrained by Spearfish even when additional maintenance or access has been requested. (CR 67, ¶ 24; CR 272, ¶ 24). It strains credulity to imply that *any* maintenance for such access transforms TSR into a public highway. While limited access is provided to select individuals by means of a key for the locked gate, the facts simply do not support any inference that TSR fits the definition of a public highway which provides, "[e]very way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway." SDCL § 31-1-1 (notably, the definition of Public Highway does not include use by pedestrian travel). TSR has not been opened for vehicular traffic, as a matter of right, to the general public. TSR is, therefore, not a public highway as defined by SDCL § 31-1-1.

Ultimately, the undisputed material facts demonstrate that Spearfish has not accepted the 2012 Plat's dedication of TSR as a public highway. Instead, Spearfish has taken affirmative steps to prevent general vehicular access to TSR. The Turgeons' reliance on untimely affidavits, along with their own affidavit, do not create a genuine issue of material fact. Thus, the Circuit Court correctly determined Spearfish never accepted the 2012 Plat's dedication of TSR, and this Court should affirm the Circuit Court.

III. THE CIRCUIT COURT CORRECTLY APPLIED SOUTH DAKOTA CODIFIED LAW § 31-3-1.

The Turgeons argued below that SDCL § 31-3-1 provides a basis to find that TSR is a public highway. (CR 219-220). The Turgeons, on appeal, argue the Court improperly addressed adverse possession. Appellants' Br. at 17-18. The Turgeons fail to recognize, however, that SDCL § 31-3-1 operates in the nature of adverse possession. SDCL § 31-3-1 states, in pertinent part:

> Whenever any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

In order for TSR to have been deemed legally dedicated as a public highway, SDCL § 31-3-1, requires that the highway "...shall have been used, worked, and kept in repair *as a public highway* continuously for twenty years." (emphasis added). Under SDCL § 31-3-1, the statutory creation of a public highway acts in the nature of adverse possession which requires use that is open, continuous, and contrary to the owner's permission. *Bryant v. Butte Cnty.*, 457 N.W.2d 467, 471 (S.D. 1990); *Smith v. Sponheim*, 399 N.W.2d 899, 903 (S.D. 1987).

In *Bryant*, the Court considered the Belle Fourche Irrigation District's argument that the County owned several bridges under SDCL § 31-3-1, by means of use and maintenance. In determining otherwise, the Court held the County could not possess the bridges because adverse possession cannot be used against the federal government. The Court wrote:

> We examine alternative one, that Butte County has accepted the bridges because of twenty years of work, use and repair of the bridges. SDCL 31-3-1. Butte County concedes that it has repaired the eight bridges in question and that the public has used these roads for the prescribed period; however,

> it contends that the federal government may not be deprived of property by adverse possession. We agree.

Bryant, 457 N.W.2d at 471. Adverse possession occurs when there is (1) an occupation that is (2) open and notorious, (3) continuous for the statutory period, and (4) under a claim of title exclusive of any other right. *Underhill v. Mattson*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352 (citing SDCL § 15-3-12). Prior to *Bryant*, the Court examined the application of SDCL § 31-3-1 but found the elements of adverse possession had been met. *Sponheim*, 399 N.W.2d at 903 (analyzing elements of adverse possession).

In cases of adverse possession, those claiming possession "…have the burden of establishing these elements by clear and convincing evidence." *Underhill*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352. Not only was there no acceptance of TSR as a public highway, the Turgeons cannot show that TSR has been used, under adverse conditions, for prescribed period of twenty years, as required by SDCL § 31-3-1, to show dedication as a public highway. The Turgeons cannot meet the statutory requirements because Spearfish permissively used TSR under the easements granted to Spearfish by Thomson. These easements illustrate a type of permissive use that eliminates the "hostile and adverse" requirement of adverse possession. *Travis v. Madden*, 493 N.W.2d 717, 720 (S.D. 1992). Thus, the Turgeons cannot meet the twenty-year prescriptive requirement under SDCL § 31-3-1 in order to create a public highway, and the Circuit Court properly considered this issue.

CONCLUSION

The Circuit Court correctly determined that TSR was not dedicated to Spearfish as a public highway prior to 2012. Without a dedication, Spearfish could not have accepted TSR as a public highway. Further, Spearfish performed no acts to demonstrate

acceptance of TSR as a public highway while the agreements with Frank S. Thomson were in place. Until the filing of the 2012 Plat, TSR remained an easement granted to Spearfish for access to the Thoen Stone Monument site. Spearfish's limited maintenance of the TSR easement was consistent with the grant of that easement to allow members of the public to access the Thoen Stone monument site by foot travel and to allow restricted access by vehicle. *DeHaven v. Hall*, 2008 S.D. 57, ¶ 23, 753 N.W.2d 429, 437 (easement holder has a limited duty to repair and maintain the easement). Under the easement, TSR was not open to unrestricted access by vehicle.

Even after the 2012 Plat, TSR was never open to unrestricted vehicle access by the public and Spearfish's limited maintenance activities do not demonstrate acceptance of TSR as a public highway. In addition to the dedication, for a public highway to be exist, "…there must be an unconditional acceptance by the appropriate public entity that it becomes one." *Niemi*, 2015 S.D. 62, ¶ 32, 867 N.W.2d at 733–34 (citation omitted). The undisputed material facts demonstrate that the City never accepted the 2012 Plat's dedication of TSR.

Based upon the foregoing, Spearfish respectfully requests this Court affirm the decision of the Circuit Court in all respects.

REQUEST FOR ORAL ARGUMENT

Spearfish respectfully requests oral argument in this case.

Dated: February 25, 2025.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*

Richard M. Williams
Aidan F. Goetzinger
Attorneys for City of Spearfish
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-9503
E-mail: rwilliams@gpna.com
agoetzinger@gpna.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellee, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 9.745 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellee. The original Brief for Appellee and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Richard M. Williams*
Richard M. Williams

CERTIFICATE OF SERVICE

I hereby certify on February 25, 2025, the **BRIEF OF APPELLEE CITY OF SPEARFISH** was filed through South Dakota Odyssey File and Serve and the original plus one copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
Pierre, SD 57501-5070

and the **BRIEF OF APPELLEE CITY OF SPEARFISH** was served by electronic mail and mailed by U.S. Mail to the following:

Nathan R. Chicoine
DeMersseman Jensen Tellinghuisen & Huffman, LLP
P.O. Box 1820
Rapid City, SD 57709
Attorneys for Appellants, Leslie Turgeon and Karen Turgeon

By: */s/ Richard M. Williams*
Richard M. Williams

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30888

LESLIE TURGEON and KAREN TURGEON,
Plaintiffs/Appellants,

vs.

CITY OF SPEARFISH, a municipal corporation,
Defendant/Appellee

APPELLANTS' REPLY BRIEF

Appeal from Circuit Court
Fourth Judicial Circuit,
Lawrence County, South Dakota,
The Honorable Michelle Comer, presiding

Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
516 5th Street, PO Box 1820
Rapid City, SD 57709-1820
(605) 342-2814
Attorneys for Plaintiffs/Appellants

Richard M. Williams
Aiden F. Goetzinger
GUNDERSON, PALMER, NELSON & ASHMORE, LLP
PO Box 8045
Rapid City, SD 57709
(605) 342-1078
Attorneys for Defendant/Appellee

Notice of Appeal filed November 7, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

Appellants Leslie Turgeon and Karen Turgeon respectfully request reversal of the Circuit Court's Order Granting City of Spearfish's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment and Judgment entered October 8, 2024. The City of Spearfish did not establish a right to judgment as a matter of law on Turgeons' Complaint. This Court is asked to review whether the City impliedly and expressly accepted Thoen Stone Road as a dedicated public right-of-way. A mountain of circumstances demonstrate the owners intending to dedicate and the City welcoming the public use. This Court should conclude that by numerous acts – including agreements to accept property grants and maintain Thoen Stone Road, plats approved by and requested by the City, and historical use and maintenance – justify an intent to dedicate and acceptance by the public. The summary judgment to City of Spearfish should be reversed.

FACTUAL BACKGROUND

On July 9, 1953, Frank Thomson granted an easement and right of way to the City of Spearfish for public display of a Thoen Stone historic marker. On November 30, 1971, Frank Thomson subdivided the property on which the Thoen Stone historic marker was located and conveyed Lot 37A to the City. The City agreed to exclusively use the land as a City Park and maintain the right of way for ingress and egress over the existing roadway and to not fence the property. In December of 1972, Thomson conveyed another parcel to the City with the City agreeing that if it failed to use the property for purposes of maintaining a road to access the Thoen Stone Monument, the property would revert to the grantor. The City thereafter laid asphalt over the Thoen Stone Road and erected a

sign at the gate to the Road which states "open to the public from dawn to dusk," and "public access through private property. Please stay on the road." On November 1, 2012, at the City's request, Johanna Meier Della Vecchia and the City together expressly dedicated by plat the Thoen Stone Road as a public right-of-way. Despite requesting the dedication, the City now claims the road has never been accepted as a public right-of-way and denied Turgeons' application for a building permit and has locked the Turgeons out from accessing their property on Thoen Stone Road.

The City raises discrepancies in its Appellee's Brief that should be clarified. The City claims that when the Turgeons purchased their real property, they were on notice that they lacked a right of access to and from their land. Not only is this statement factually incorrect, but it is also a deflection from the real issues in this case. Turgeons' state of mind does not have any relevance to the issues of dedication and acceptance. Nevertheless, when Turgeons purchased their parcel, Johanna Meier Della Vecchia swore by title affidavit that the property had legal access, and the Turgeons actually received title coverage for their access during this dispute. SR 224.

City also notes that the Turgeons must pass through two gates to access their property—one at the northern entrance to TSR and one located between Spearfish's property on Lot 37A-1 and Lot 37A-2 and Johanna Meier Della Vecchia's property. This is another deflection. Turgeons' rights beyond the Lot 37 properties are not at issue in this case. Turgeons are not obstructed by a locked gate on the Della Vecchia property, and whether Turgeons pass through a gate on the Della Vecchia property is not in any way relevant. Only the status of the road over Lot 37 need be reviewed.

City further states that the Thoen Stone road has never been open to public

vehicular use and has only been open to the public for pedestrian travel. History disagrees. Turgeons, on the other hand, presented substantial evidence that the Thoen Stone Road has been open to the public vehicular use. After Thomson opened the monument to the public in 1953, visitors flocked to see it. The newspaper reported 20,000 annual visitors. SR 238, SR 239. Many traveled by vehicle to the monument. SR 361. Passion Play attendees drove up the hill to see the monument. SR 361. A gate was not erected until the Meier family took ownership and tried to contain livestock. SR 360. Still, the road was open to the public. In the contemporary era, tour buses drive the road to the monument with visitors. The right-of-way which is throughout referenced as a "road" and not a pedestrian path, has historically been open to the public.

Lastly, the City claims that Spearfish's maintenance of Thoen Stone Road has been minimal to non-existent. The City's own recitation of facts clarifies that the local government body has performed maintenance. It cannot be said that no maintenance has been performed. City simply attempts to discount its maintenance as de minimis. City has placed asphalt at least twice. Turgeons stated that asphalt was laid on the Road prior to their purchase in 2017. SR 225, ¶ 5. Then, again, asphalt was laid in 2021. SR 212, ¶ 7. Placing asphalt on multiple occasions is more than non-existent. The City has performed maintenance on the Road.

ARGUMENT

Dedication after dedication after dedication and acceptance together with acceptance and further acceptance were disregarded and misinterpreted by the City and Circuit Court. The Circuit Court erroneously granted summary judgment to the City of Spearfish when it concluded the Thoen Stone Road had not been accepted as a dedicated

public right-of-way and open to the public. The City persuaded the Circuit Court to incorrectly conclude that the July 1953 grant was a private easement and insufficient dedication, that the 1971 and 1972 grants were ineffective dedications due to reverter clauses, that the 2012 dedication by plat would not be accepted until a municipal resolution passed, and that public use and maintenance were so minimal that they could not constitute implied acceptance. Thomson's intent has been overshadowed in the lower court. Case law does not require a specific magic spell but instead calls for a clear act of an intention to dedicate.

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

Bergin v. Bistodeau, 2002 SD 53, ¶ 16, 645 N.W.2d 252, 255 (quoting Tinaglia v. Ittzes, 257 N.W.2d 724, 729 (S.D.1977). Frank Thomson clearly intended the public to use the road. See Knight v. Madison, 2001 SD 120, ¶ 5, 634 N.W.2d 540, 542 ("An easement may be dedicated to public use if the owner clearly acts to dedicate the *easement* and the public entity accepts the dedication." (emphasis added)). In the 1953 Easement, Thomson noted that the right-of-way was "for the Thoen Stone for *public* display." SR 42. In the November 1971 Agreement, Thomson and the City of Spearfish agreed that the citizens and visitors of Spearfish would have ingress and egress to the Thoen Stone "over the existing *roadway*," which "shall not be fenced," and which consists of "A Right-of-way 40 feet in width." Prior to 2012, intent to dedicate was clear as early as 1953 and again in 1971. Thomson clearly intended a right-of-way for public use. The City of Spearfish

should not have been granted judgment as a matter of law.

A. July 1953 Easement grant to City of Spearfish for public use was a dedication.

Despite the 1953 Easement instrument's clear use of the term "public," City believes the document provides for a private right to a committee. Thomson intended the public to visit the Thoen Stone historic marker, and he and the City declared a public purpose for that reason. Although Thomson could have granted a private easement, such was not his intent and was not expressed in the grant. He wanted the public to access the marker. City, in its brief, discusses Selway Homeowners Ass'n v. Cummings, 2003 S.D. 11, 657 N.W.2d 307 (S.D. 1977) in arguing that an easement cannot be a public highway. Selway does not hold as City interprets the case. In Selway, this Court held that notation on a plat for a R.O.W. Future Use was insufficient to evidence a dedication. Because a right-of-way is not necessarily public, the distinction in Selway was not easement versus deed but rather public versus private. Id. ¶ 25. The determinative element missing in Selway was a *public* use as the easement was not granted to a public entity. In this case, Thomson expressed a public purpose and granted the . As required by Selway, words such as "public right-of-way" or "public highway" or "public road" obviously show an offer of dedication. Id. ¶ 21 (citing SDCL § 31-1-2 "Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway."). Thomson's 1953 Easement says just that: "[Thomson] does hereby Grant ... an Easement, Right-of-way ... for public display ... by the gravelled road . . . ." SR 176. The 1953 Easement opened the road to the public and constituted a sufficient dedication.

Furthermore, City argues that the public body's fee ownership is a necessary element for a dedicated highway. City defines an easement as conveying a right to use

property without granting all incidents of ownership. City proceeds to explain that a dedicated highway confers upon the public a right to use property. Clearly an easement, which grants the right to use property, can sufficiently dedicate a highway if it grants the right to use such property to the public. Easements are capable of operating as effective dedications if granted to the public. See Knight, 2001 S.D. 120, ¶ 5, 634 N.W.2d at 542 ("An *easement* may be dedicated to public use if the owner clearly acts to dedicate the *easement* and the public entity accepts the dedication.") (emphasis added). Thomson's dedication is not deficient simply because he retained ownership while opening the road to public use.

City states in its Appellee Brief that the 1953 Easement agreement granted an easement to the Thoen Stone Committee and not the City of Spearfish. This statement directly contradicts the Easement Agreement. The parties of the second part are identified therein as the City of Spearfish, Thoen Stone Committee, consisting of its members, and the State Historical Society. The agreement stated:

> THIS INDENTURE, Made this 9th day of July, 1953, by and between Frank S. Thomson, owner, Party of the First Part, and the City of Spearfish, a Municipal Corporation of Lawrence County, South Dakota, the Thoen Stone Committee, consisting of ...Chairman, ... Secretary and Treasurer, ...and Mayor of Spearfish, ... all of Spearfish P.O., Lawrence County, South Dakota, and ... Secretary of the State Historical Society, of Pierre, P.O., Hughes County, South Dakota, and their successors as Trustees, Parties of the Second Part, WITNESSETH:
> ... [T]he Party of the First Part does hereby Grant as Easement unto the Parties of the Second Part, jointly, as joint tenants, an Easement, Right-of-Way and privilege to establish a historic marker and Museum, including other Black Hills Historical events, for the Thoen Stone for public display, on the land near the City of Spearfish ...

SR 176. The Thoen Stone Committee one of a trio of grantees. The Mayor of the City of Spearfish signed the document as Party of the Second Part. The City is a grantee

thereunder. This agreement unequivocally manifested an intention by Thomson to devote the property to the City of Spearfish for public use. City of Belle Fourche v. Dittman, 325 N.W.2d 309, 311 (S.D. 1982) (citing Tinaglia, 257 N.W.2d at 728–29; Bergin, 2002 SD 53, ¶ 16, 645 N.W.2d at 255). The Circuit Court erred in its conclusion that the July 1953 Easement was not a dedication, and the judgment should be reversed.

B. The City expressly accepted Thoen Stone Road as a public right-of-way by the 1971 agreement, 1972 grant, and 2012 plat.

A preponderance of evidence shows that a dedication of Thoen Stone Road was expressly accepted by the City through the 1971 Agreement, the 1971 Plat, and the 2012 Plat. "[C]onduct on the part of the owner clearly expressive of an intention to dedicate usually amounts to a dedication if acted upon by the public in a manner which clearly justified the inference of acceptance." See City of Sioux Falls v. Murray, 470 N.W.2d 619, 620 (S.D. 1991). The November 30, 1971, agreement provides that the property "known as the Thoen Stone Land, is to be used by the City of Spearfish exclusively for use as a City Park." SR 43. The City now owned the land on which the monument was placed, and after subdividing, access to its park on 37A was redefined. The City agreed to maintain access to the Thoen Stone monument, agreed to not fence the property, and agree to perform maintenance, thereby acting upon Thomson's agreements in a manner which inferred acceptance.

In December of 1972, the City then accepted a grant of Lot 37C2, which is located at the north end of the Road in question and connected a public street, North St. Joseph Street, to Thoen Stone Road. SR48; SR121. Lot 37C contains part of the previously described Road. SR44. There is no debate that the City considers this portion

of the Road to be dedicated and accepted as a public street. Council minutes from April 1972 reflect that the City authorized the Mayor to contract with Thomson for public use of the Thoen Stone land. SR 170. A material clause of said contract recited its purpose was "maintaining a road to provide access to Thoen Stone Monument road" and that "said roadway shall be maintained by the City of Spearfish." SR277. When the City expressly accepted this part of the dedicated street, it has accepted the rest of that street. See Haley v. City of Rapid City, 269 N.W.2d 398, 400 (S.D. 1978). By accepting Lot 37C as a public road, the City has accepted the dedication of Thoen Stone Road over Lot 37B and Lot 37A.

The City attempts to distinguish its acceptance of Lot 37C2 as a public highway from the road over Lots 37A and 37B. City claims the accepted road is St. Joseph Street and is not part of Thoen Stone Road. The settled record reflects, however, that this portion of highway over Lot 37C2 derived from the same dedication. The plat in 1971 showed a 40-foot wide right-of-way connected to the termination of St Joseph Street at that time by way of Lot 37C. Nothing in the record shows how the City came to name this portion of highway, and the effort to name this portion with a label distinct from the road running farther south does not make the rest less of a highway. The entire road over Lot 37A, 37B, and 37C is necessary to access the Thoen Stone monument, and it was dedicated to the public for that purpose.

City fails to address the significance of the City requesting a plat of the lots and dedication of Thoen Stone Road. Johanna Meier Della Vecchia and the City submitted a plat which dedicated and expanded Thoen Stone Road. The 2012 Plat was signed by the City as an owner. Mayor Jerry Krambeck's certification recites that the plat was made

"at the City's request." The City accepted Thoen Stone Road as a public right-of-way when the City dedicated land to itself. City argues that nothing in the 2012 Plat demonstrates City's formal acceptance of the dedication of the public right-of-way on Thoen Stone Road. Yet, the Mayor signed the plat on behalf of the City as owner of Lot 37A and Lot 37C2 in a clearly formal act. While the City has apparently dodged direct acknowledgement of acceptance of the 2012 plat in an open council meeting and thereby avoided any minutes or resolution reflecting its action, its acceptance is still a formal act. The City assumes acceptance of a dedicated pubic right-of-way requires a municipal meeting vote, but such a manner of acceptance is not exclusive. Municipalities may accept dedicated streets by other official conduct which treats the right-of-way as dedicated to public use. The City has signed no less than five instruments and agreements reflecting the public purpose of the Thoen Stone Road or agreeing to maintain the Road for the public: (i) 1953 Easement, (ii) 1971 Agreement, (iii) 1972 plat, (iv) 2002 Covenants, and (v) the 2012 Plat. The 2012 plat is signed, verified, and acknowledged. Turgeons demonstrated an express acceptance of a dedicated public right-of-way by plat, and the judgment should be reversed.

C. The public used and the City maintained Thoen Stone Road.

As clarified herein, the City has laid asphalt on the Road multiple times. The circuit court found in its Order that "The City provided limited maintenance on TSR commensurate with the maintenance of TSR for pedestrian access to a public park, but has further limited access by means of posted park hours, and has prevented unrestricted vehicular travel by means of a locked gate for over forty years." This finding is erroneous. No admissible evidence was presented that the City limits its maintenance to

a pedestrian path for a public park. The City's own sign refers to the right-of-way as a "road" which is "open to the public from dawn to dusk." The City cannot now claim the road upon which the City laid asphalt is not a maintained road but a pedestrian path for a park. Turgeons further offered evidence that the Thoen Stone Road is used by the public almost daily. SR225 at ¶ 8. 20,000 people visited the area every year. SR225 at ¶ 8. Utility companies, construction vehicles, logging trucks, and tourists have used the Thoen Stone Road. SR225 at ¶ 9; SR358. Thus, the Circuit Court erred when it determined the City had not impliedly accepted the Thoen Stone Road as a dedicated public right-of-way. The judgment should be reversed and remanded.

CONCLUSION

Based on the foregoing, City of Spearfish should not have been summary judgment on Turgeons' claims, and the Circuit Court erred by concluding that the Thoen Stone Road was not accepted as a dedicated public right-of-way. Turgeons respectfully request this Court reverse the Judgment and remand to the Circuit Court for entry of findings of fact, conclusions of law, and judgment declaring the Thoen Stone Road to be a public road.

Dated this 27th day of March, 2025

Respectfully submitted,

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

CERTIFICATE OF SERVICE

Nathan R. Chicoine of DeMersseman Jensen Tellinghuisen & Huffman, LLP hereby certifies that on the 27th day of March, 2025, he served an electronic copy of the foregoing Appellant's Brief in the above-captioned action on the following:

Richard M. Williams
Aiden F. Goetzinger
GUNDERSON, PALMER, NELSON &
ASHMORE, LLP
PO Box 8045
Rapid City, SD 57709
(605) 342-1078
Attorneys for Appellee

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). I certify that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief contains 3,095 words and 15,196 characters, excluding the table of contents, table of cases, and any certificates of counsel.

DATED this 27th day of March, 2025.

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy via Odyssey File & Serve, and the original of the above and foregoing Appellant's Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

Clerk of the Supreme Court
State Capital Building
500 E. Capitol Avenue
Pierre, SD 57501

DATED this 27th day of March, 2025.

/s/ Nathan R. Chicoine
Nathan R. Chicoine
DEMERSSEMAN JENSEN
TELLINGHUISEN & HUFFMAN, LLP
Attorneys for Turgeons
516 5th Street; PO Box 1820
Rapid City, SD 57709
(605) 342-2814