IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30439

KJD, LLC,

Appellant,

v.

CITY OF TEA,

Appellee.

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

THE HONORABLE JOHN PEKAS
Circuit Court Judge

APPELLANT'S BRIEF

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Jurisdictional Statement

The City of Tea approved a special assessment against KJD, LLC, and others on October 4, 2021. KJD timely appealed to the circuit court under SDCL §§ 9-43-96 and 16-6-10 on October 19, 2021. KJD now appeals the circuit court's Judgment dated and filed July 27, 2023 (App. at 1), which affirmed the special assessment. This Court has jurisdiction under SDCL § 15-26A-4.

Statement of Legal Issues

1. By statute, when a municipality takes or damages private property for a public improvement, benefits that accrue to the property and result from the improvement must be considered by the jury and deducted from condemnation damages. The City admitted that the project in this case did not confer any benefit on KJD that should be deducted from condemnation damages. Does this admission preclude the City from claiming the project did benefit KJD for purposes of levying a special assessment?

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   SDCL § 31-19-17
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Statement of the Case

The City of Tea approved a plan to improve and expand Gateway Boulevard, the City's main corridor and connection to Interstate 29. To further the Project, in June 2020, the City authorized condemnation actions against owners of property abutting Gateway Boulevard, including KJD, LLC. The City also approved special assessments against many abutting properties, again including KJD, alleging that they received special benefits from the project.

On October 19, 2021, KJD appealed the special assessment to circuit court while the condemnation action was still pending (the parties recently agreed to settle the condemnation action). KJD argued that the special assessment amounts to an unconstitutional taking both as a matter of law and as a matter of fact. The circuit court, the Honorable John Pekas, held a hearing on July 20, 2023. Ruling from the bench, the court denied KJD's request to invalidate the special assessment and to enjoin the City from collecting it. (App. at 22–23.) Judgment was entered on July 27, 2023. (App. at 1.) The court did not issue a written opinion or factual findings and legal conclusions.

On August 25, 2023, KJD appealed to this Court under SDCL § 15-26A-4.

Statement of the Facts

This appeal relates to the City of Tea's improvement of Gateway Boulevard, also known as County Road 106, the City's main corridor and connection to Interstate 29, from a two-lane county road to a four-lane highway (the Project). KJD owns property along Gateway Boulevard and affected by the Project. On June 1, 2020, after attempting to acquire property for Phase 2 of the Project, the City of Tea passed a resolution

authorizing condemnation actions against KJD and others. The City filed a petition of condemnation against KJD on June 11, 2020.[1]

Before initiating the condemnation action against KJD, the City employed Shaykett Appraisal Co. to appraise KJD's property. (R. at 47.) The City admits that Shaykett's report, dated March 26, 2020, did not conclude that KJD's property received any special benefit from the Project. (R. at 117.) The City also admits that the report did not conclude that the Project increased the market value of KJD's property. (R. at 118.) In fact, the report concluded that KJD's property suffered a net loss in value of $89,000 because of the Project (R. at 53). Nor did the report conclude that the Project would change the highest and best use of KJD's property. (R. at 77.) And consistent with Shaykett's report, the City admits that the Project did not specially benefit KJD's property within the meaning of SDCL § 21-35-17, which requires that a condemnation award be reduced by the value of special benefits a property receives from a municipal improvement. (R. at 118.)

Other than Shaykett's appraisal, the City did not conduct *any* other investigation into the financial effect of the Project on the value of KJD's property. The City admits it did not obtain any other appraisals, reports, or other valuation opinions based on market value. (R. at 119.) Nor did the City obtain any appraisals, reports, or other valuation opinions based on valuation methods other than a market analysis.

On April 5, 2021, undeterred by its lack of evidence, the City passed Resolution 21-04-04, "Resolution of Necessity," to justify special assessments against

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[1] The condemnation action was filed in the circuit court as *City of Tea v. KJD, LLC*, 41 CIV. 20-000367 (Lincoln Cnty., 2d Jud. Cir.). The parties entered into a settlement agreement in December 2023, pursuant to which the case will be dismissed.

numerous parcels. (R. at 379; App. at 29–30.) The City stated the same conclusory, nonspecific "findings" *for each parcel* affected by the Project:

> The project will make the property abutting the project a better place in which to conduct business.
>
> The property will only be assessed the costs for the special benefit of the improvements.
>
> The adjacent property will receive a special benefit by changing the properties [sic] highest and best use from rural in character to urban.
>
> The improvement will provide easier access to the abutting properties.
>
> The improvements will provide a special benefit to the assessed properties by improving and enhancing the aesthetics and safety, thus enhancing the value, use, and enjoyment of the property.
>
> The improvements will enhance the market value of the properties abutting the improvement.
>
> The property abutting the improvements receive a special benefit above and beyond that benefit enjoyed by the general public.
>
> That the value of the special benefit equals or exceeds the special assessment.
>
> Failure to assess property abutting the improvements would result in a windfall to the property owners.

(*Id.*) On October 4, 2021, the City passed Resolution 21-10-18, "Resolution Approving Special Assessment Roll," which approved special assessments against 33 parcels. (R. at 6.) Reflecting the City's failure to investigate and obtain valuation opinions, Resolution 21-04-04 does not include any findings quantifying the *value* of these alleged benefits. (R. at 379; App. at 29–30.) Instead, the City admits that it based the special assessment solely on the *cost* of the Project and the linear feet of KJD's property abutting Gateway Boulevard. (R. at 115.) For KJD's property, the City allocated $91.00 of costs per linear foot for 677.18 linear feet of frontage, for a total assessment of $61,623.38. (R. at 7.)

KJD retained DAL Appraisal & Land Services to appraise the property in connection with the condemnation case. (R. at 168.) Consistent with Shaykett's appraisal, DAL's appraisal explicitly concluded that "there are no special benefits accruing to the Remainder property after the taking. The CR106 project provides general benefits to the neighborhood and community at large." (R. at 301.) The report concluded that KJD's property suffered a net loss in value of $275,611.12. (R. at 172.)

On October 19, 2021, KJD appealed the special assessment to the circuit court, asking the court to declare the special assessment unconstitutional and to enjoin the City from collecting it. (R. at 1.) KJD argued that the special assessment was unconstitutional because it allocated the cost of the Project based on the linear feet of abutting properties rather than according to the value of any special benefits. KJD also argued that as a matter of law, the City's findings were insufficient to support the special assessment because the City did not make any findings quantifying the value of the alleged special benefits to KJD's property. KJD further argued that the City could not pursue the alleged special benefits via assessment after declining to do so as a reduction of condemnation damages. And finally, as a factual matter, KJD challenged the City's conclusory claim that the Project specially benefited KJD.

After KJD and the City submitted briefs and supporting documents, the circuit court held a hearing on July 20, 2023, to hear the parties' arguments. (App. at 2.) The court considered the merits of the appeal based solely on the parties' arguments and written submissions. (App at 13.)[2] The court did not conduct a trial or any other fact-

[2] At the July 20, 2023 hearing, the City argued for the first time that a trial should be held. (App. at 4–5.) KJD responded that a trial was not necessary because the relevant

finding inquiry, nor did the court hear witness testimony. Ruling from the bench, the court affirmed the special assessment. (App. at 22–23.) The court did not address KJD's legal arguments regarding the constitutionality of the City's method of calculating the special assessment, the City's failure to make findings quantifying the alleged benefits, or the availability of the special assessment in light of the City's decision not to seek a reduction from condemnation damages for alleged benefits. (*Id.*) Instead, the court addressed only KJD's factual argument that the City's conclusory claim that the Project specially benefited KJD's property is disputed by all valuation evidence in the record. (*Id.*) The court did not enter any separate factual findings or legal conclusions, but in its July 27, 2023 judgment, the court simply concluded that KJD "failed to prove by clear and convincing evidence that the City of Tea's findings in support of its assessment are not correct." (R. at 397; App. at 1.)

Argument

This Court should declare the City's special assessment against KJD unconstitutional and direct the circuit court to enjoin the City from collecting the assessment. Both this Court and the Supreme Court of the United States have long held that when a municipality specially assesses a tax on private property for a special benefit conferred by a public project, such assessment ceases to be a legitimate use of the taxing power and becomes an unconstitutional taking of property to the extent the assessment exceeds the value of that benefit. Consequently, a special assessment that is not based on the *value* of the alleged benefit and instead simply allocates some or all of the *cost* of the

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disputes were questions of law and not of fact, and the circuit court agreed. (App. at 8, 12–13.) The City did not appeal that decision.

public project is unconstitutional. Moreover, because the City subjected KJD's property to separate condemnation proceedings relating to the Project, South Dakota law requires that the value of any special benefit to KJD's property conferred by the Project must be included in the calculation of just compensation in the condemnation case, and KJD cannot be separately assessed. The circuit court erred by failing to address these legal arguments. Finally, the circuit court's conclusion that KJD did not meet its burden of persuasion on the fact question whether the Project specially benefited KJD in the first place is erroneous.

1. Legal Standards.

KJD argues that the City's special assessment amounts to an unconstitutional taking because it exceeds the value of any alleged benefit KJD received from the project. "The constitutional analysis of special assessments stems from the constitutional provisions prohibiting the government from taking private property without just compensation." *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 10, 784 N.W.2d 499, 504. And the question "whether government conduct constitutes a taking" is a "question of constitutional law" that this Court "review[s] de novo." *Schliem v. State ex rel. Dep't of Transp.*, 2016 S.D. 90, ¶ 10, 888 N.W.2d 217, 222–23. Therefore, KJD's legal arguments under constitutional and statutory provisions are reviewed de novo.

On questions of fact, "this Court defers to the circuit court, as fact finder, to determine the credibility of witnesses and the weight to be given their testimony." *Hubbard*, 2010 S.D. 55, ¶ 26, 784 N.W.2d at 511. In this case, the circuit court did not hear testimony, did not make credibility determinations, and did not enter factual findings, so the only factual findings at issue in this appeal are the City's. "When a

special assessment is challenged in circuit court, a city's findings are presumed correct." *Id.* ¶ 16, 784 N.W.2d at 506. But this presumption does not attach to "ambiguous and conclusory" assertions masquerading as factual determinations. *Id.* ¶ 27, 784 N.W.2d at 511. And even legitimate findings can be overcome by "weighty evidence." *Id.* ¶ 16, 784 N.W.2d at 506–07.

2. The City's special assessment is unconstitutional.

The South Dakota Legislature has authorized a municipality to "make assessments for local improvements on property adjoining or benefiting from the improvements[.]" SDCL § 9-43-76. Even so, a municipality may not take private property for public use without just compensation. U.S. Const. amend. V; S.D. Const. art. VI, § 13. Under these provisions, an assessment is constitutional only to the extent that the property owner receives a special benefit of value equal to or greater than that of the assessment:

> The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.

Vill. of Norwood v. Baker, 172 U.S. 269, 280 (1898). Therefore, if an assessment exceeds the value of the special benefit, then the assessment "is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.* at 279.

Implicit in this constitutional limitation is the requirement that an assessment must be "*measured* or limited by the special benefits accruing to the property." *Hubbard*, 2010 S.D. 55, ¶ 17, 784 N.W.2d at 507 (emphasis added) (quoting *Baker*, 172 U.S.

at 294). A special benefit is one "*above and beyond* or *differing from* the benefit enjoyed by the general public." *Id.* ¶ 14, 784 N.W.2d at 505. As stated by this Court, "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement." *State Hwy. Comm'n ex rel. State v. Emry*, 244 N.W.2d 91, 96 (S.D. 1976). If a public improvement "involve[s] both general and local benefits[,]" then "only part of the cost of the project can be assessed against the adjacent property owners, and the rest is funded by the city." *Hubbard*, ¶ 12, 784 N.W.2d at 505. "[S]pecial benefits must 'be actual, physical and material and not merely speculative or conjectural[,]'" *id.* ¶ 15, 784 N.W.2d at 506 (quoting *Ruel v. City of Rapid City*, 167 N.W.2d 541, 545 (S.D. 1969)); they must be "quantifiable" and not "ambiguous and conclusory[,]" *id.* ¶ 27, 784 N.W.2d at 511. "One obvious indicator that property receives a special benefit is if the public project enhances its market value[,]" but sometimes other valuation methods may be appropriate. *Id.* ¶ 15, 784 N.W.2d at 506. Regardless of the valuation method employed, a municipality must quantify the special benefit, as the municipality cannot simply "assume[] the benefits equal[] [or exceed] the cost." *Id.* ¶ 27, 784 N.W.2d at 511. If an exact value is too difficult to calculate, then it must be "estimated with a fair degree of exactness." *Id.* ¶ 15, 784 N.W.2d at 506 (quoting *Hawley v. City of Hot Springs*, 276 N.W.2d 704, 706 (S.D. 1979)).

a. As a matter of law, the Project did not confer a special benefit on KJD.

South Dakota law requires that "[i]n *all* cases of taking or damaging private property by a municipal corporation, the jury *shall* take into consideration the benefits which may accrue to the owner thereof as the result of the proposed improvement."

SDCL § 21-35-17 (emphasis added). The Legislature included the same mandatory directive not only in SDCL Title 21, "Judicial Remedies," but also in SDCL Title 31, "Highways and Bridges." SDCL § 31-19-17 ("In *all* cases of taking or damaging property, the jury *shall* take into consideration the benefits which may accrue to the owner thereof as the result of the proposed improvement." (emphasis added)). The Legislature's use of the word *shall* in these statutes "manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL § 2-14-2.1. And a municipality cannot both deduct a special benefit from condemnation damages and charge the landowner a special assessment. 14 *McQuillin Mun. Corp.* § 38:50 (3d ed.) ("[I]f in making the award of damages the benefits accruing to the property were considered and allowed, such property cannot again be assessed."), Westlaw (database updated July 2022); 3 Julius L. Sackman, *Nichols on Eminent Domain* § 8A.02[7] at 8A-55 to -56 (3rd ed. Rel. 142-6/2021) ("Allowing both a set off of benefits and payment of a special assessment would require the condemnee to pay twice for the same special benefits."). Therefore, because special benefits *must* be pursued in the condemnation action and cannot be pursued by both condemnation and special assessment, it necessarily follows that a municipality cannot decline to pursue special benefits as a deduction from condemnation damages but then pursue them via special assessment.

These provisions show a strong legislative preference for resolving condemnation damages and special benefits together, which avoids multiple lawsuits, thereby conserving judicial resources and providing finality to affected property owners. These provisions also show a legislative preference for requiring a municipality to prove—with evidence—the value of alleged benefits to a jury in a trial on damages rather than

avoiding that burden of proof by issuing a special assessment and simply declaring via resolution that the unspecified value of the alleged benefits equals or exceeds the assessment, as happened in this case.

In its condemnation case against KJD, the City declined to seek a deduction from condemnation damages for special benefits as required under SDCL §§ 21-35-17 and 31-19-17. As the City admitted in a response to KJD's requests for admissions in the present case, the reason the City did not seek a deduction under SDCL § 21-35-17 is that "the Project improvements do not benefit the Property within the meaning of SDCL § 21-35-17." (R. at 118.) But the City qualified its admission and argued to the circuit court that the term *special benefit* has different meanings in condemnation and special-assessment cases. (*Id.*)

The City's attempted distinction fails both on the plain language of SDCL § 21-35-17 as well as under this Court's decisions. SDCL § 21-35-17 applies broadly to any "benefits" that "result [from] the proposed improvement." A "special *benefit*" is necessarily a "*benefit.*" Therefore, SDCL § 21-35-17 would apply to any special benefit on which the City could premise a special assessment, and the City's admission that the Project did not give KJD a "benefit" forecloses the claim that the Project gave KJD a "special benefit."

Moreover, this Court applies the same meaning of *special benefit* in both condemnation and special-assessment contexts. *Compare Hubbard*, 2010 S.D. 55, ¶ 14, 784 N.W.2d at 505–06 (defining special benefits in context of a special assessment as "a benefit *above and beyond* or *differing from* the benefit enjoyed by the general public"), *with Emry*, 244 N.W.2d at 96 (defining special benefits in context of SDCL §§ 21-35-17

and 31-19-17 as "different in kind" from those enjoyed by the general public). Again, this is because "[t]he constitutional analysis of special assessments stems from the constitutional provisions prohibiting the government from taking private property without just compensation." *Hubbard*, 2010 S.D. 55, ¶ 10, 784 N.W.2d at 504. In other words, if the powers of taxation and condemnation were neighbors, the value of a special benefit would be the border between them, serving to identify special assessments that stray from the realm of taxation and into that of condemnation,

The City's admission that the Project did not benefit KJD should be controlling. "Any matter admitted under [SDCL § 15-6-36] is conclusively established unless the court on motion permits withdrawal or amendment of the admission." SDCL § 15-6-36(b).[3] The admission was not withdrawn or amended. Therefore, the City's admission conclusively establishes that the Project did not benefit—specially or otherwise—KJD, and the assessment is necessarily unconstitutional.

The circuit court did not address the effect of SDCL §§ 21-35-17 and 31-19-17 on the City's special assessment.

b. The City did not distinguish between special and general benefits.

A special assessment must be based on special benefits. As stated by this Court, "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement." *Emry*, 244 N.W.2d at 96.

> Under this rule the benefits which may be taken into consideration are not those which may inure to the community in general or to the public in

[3] To clarify, KJD relies on the City's admission in the present action (R. at 118) and not on the City's similar admission in the condemnation action.

> common, but must be those benefits which inure to the owner as to the part of the property not taken proximately resulting from the improvement and which are of such a nature as to increase the market value of that part of the property not taken.

Id. at 95. If a public improvement "involve[s] both general and local benefits[,]" then "only part of the cost of the project can be assessed against the adjacent property owners, and the rest is funded by the city." *Hubbard*, ¶ 12, 784 N.W.2d at 505.

The City's special assessment does not identify any *special* benefits to KJD's property. The City's enumerated findings—that the Project will make the property a better place to conduct business, will provide easier access, and will enhance aesthetics and safety—are not benefits specific to KJD's property as distinguished from all other properties affected by the Project. *See Emry,* 244 N.W.2d at 96.

The circuit court did not test the City's findings against the definition of a special benefit.

c. The City did not quantify the value of the alleged special benefit.

The assessment is also unconstitutional because the City never quantified—and did not even estimate—the value of the alleged benefits. Resolution 21-04-04 makes the conclusory claim that "the value of the special benefit equals or exceeds the special assessment." (R. at 379; App. at 29.) But as discussed above, the Resolution is entirely devoid of any findings quantifying the value of the alleged special benefits. (*Id.*) And the City admits that it did not obtain *any* appraisals, reports, or other valuation opinions regarding the value of the alleged benefits. (R. at 119.) Without findings quantifying the value of the alleged benefits, the assessment could not have been "measured or limited by" their value as constitutionally required. *See Baker*, 172 U.S. at 294; *Hubbard*,

2010 S.D. 55, ¶ 17, 784 N.W.2d at 507. Consequently, the assessment is unconstitutional. The City cannot simply assume that the value of the alleged benefits exceeds the special assessment. *Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511. ("The City's qualification of the benefits, however, was ambiguous and conclusory in that the City *assumed* the benefits equaled the cost." (emphasis added)).

The resulting and necessary legal conclusion that the City violated the U.S. and South Dakota Constitutions by not measuring or limiting the assessment by the *value* of the alleged special benefits (a conclusion the circuit court did not make) is confirmed by the City's admission that it instead calculated the assessment by allocating the *cost* of the Project to abutting properties according to their linear feet. (R. at 115.) But as KJD argued to the circuit court, this Court definitively rejected by-the-foot cost allocation in *Hubbard*. Like the present case, *Hubbard* "involved reconstructing and resurfacing streets, replacing sewer [and water] mains, and replacing portions of curb, gutter, and driveways." *Id.* ¶ 2, 784 N.W.2d at 502. The City of Pierre "assessed each [abutting] lot the per linear foot cost for curb and gutter replacement and per square foot cost for driveway replacement." *Id.* ¶ 5, 784 N.W.2d at 502. Multiple property owners appealed the assessments, which a circuit court held were unconstitutional, and the City of Pierre appealed. On appeal, this Court concluded that "[t]he City's quantification of the benefits … was ambiguous and conclusory in that the City assumed the benefits equaled the cost." *Id.* ¶ 27, 784 N.W.2d at 511. This Court therefore affirmed, reiterating that "[a] municipality's power to impose special assessments is limited by the constitutional requirement that the project confer a special benefit on the assessed property[.]" *Id.* ¶ 13, 784 N.W.2d at 505.

The circuit court did not address the parallels between this case and *Hubbard*, which are so strong that this case could be decided on *Hubbard* alone. Both cases "involve[] reconstructing and resurfacing streets, replacing sewer [and water] mains, and replacing portions of curb, gutter, and driveways." *Hubbard*, 2010 S.D. 55, ¶ 2, 784 N.W.2d at 502. Both cases involve a special assessment reflecting a by-the-foot allocation of costs rather than value of alleged benefits. *Id.* ¶ 8, 784 N.W.2d at 503. Both cases involve a municipality simply assuming the value of benefits equaled or exceeded the assessment. *Id.* ¶ 27, 784 N.W.2d at 511. And, consequently, in both cases the special assessment is unconstitutional. *Id.*

3. The evidence does not show that the Project specially benefitted KJD's property.

Finally, even if this Court determined that the City's admission is not controlling and that the assessment conforms to constitutional and statutory law, this Court should reverse on the facts. The City's "finding" that the value of the alleged benefits equals or exceeds the assessment is ambiguous and conclusory, unsupported by record evidence, and therefore not entitled to a presumption of correctness. And even if it were entitled to such a presumption, that presumption is overcome by *all* valuation evidence in the record, which supports the conclusion that the Project did not specially benefit KJD's property.

a. The City's conclusory claim is not entitled to a presumption of correctness.

To support its conclusory claim that the Project specially benefited KJD, at the July 20, 2023 hearing before the circuit court, the City relied entirely on its answer to KJD's Interrogatory 21. That interrogatory and the City's answer are as follows:

> **Interrogatory 21**: Explain the relationship between the Property's enhanced market value due to the Project and the amount specially assessed, i.e., $61,623.
>
> **Answer**: The special assessment to the Property for the adjacent roadway and utility improvements is based on the equivalent cost (in the project's construction year dollars) to construct a local city street with standard sized municipal utilities, which would be a required cost of any property within the city limits. Similar costs are regularly incurred by developers of property within the city limits and the increase in fair market value due to installation of a local city street and utility infrastructure is consistently reflected in the increased post-development sales prices.

(R. at 115–16; App. at 27–28.) The City's attorney argued:

> But let me comment on in response to this continued comment that the City did nothing to try and measure whether there was a benefit. That's not accurate. There is evidence provided and actually filed by the appellant in our interrogatory answers. Interrogatory answer #21 states what the methodology was, and the basis for it. That that the City went, and they determined that they were going to charge one-eighth of the *cost*, the $91 rather than the 800 and some dollars because in their experience what they had seen in their community was when developers put in similar type improvements that they saw an increased market value at a similar rate. That is a, ah, that's a methodology, that's a factual consideration and that's all that's required.

(App. at 19–20 (emphasis added).) This argument was the sole basis for the circuit court's decision:

> I understand that some of the argument of [KJD] indicating that there are conclusory statements made in the resolution, however, with the interrogatory [21] that was read into the record of course by [the City], I believe that there is a basis for that, and because of that I do think that in looking at the presumption, the presumption has not been overcome, and so the presumption means that the resolution is valid on its face….

(App. at 23.)

The City's "finding" cannot be presumed correct. As discussed above and explained in *Hubbard*, by-the-foot cost allocation is not a legitimate method of calculating an assessment under the U.S. and South Dakota Constitutions. The *cost* of a

public project is simply not relevant either to the question whether a property has received a special benefit or to calculating the *value* thereof. By ignoring this distinction, the circuit court validated factual findings that do not differ from those rejected as insufficient in *Hubbard*.

Moreover, the City failed to introduce *any* evidence into the record supporting its claim that "the increase in fair market value due to installation of a local city street and utility infrastructure is consistently reflected in the increased post-development sales prices." (R. at 116.) The City has not identified these other developers, these other public projects, or these other properties and their supposedly increased market values. Even after KJD requested that the City produce "all appraisal reports or other valuation opinions establishing that the Project enhances the market value of the Property," the City responded simply: "N/A." (R. at 119.) In other words, there is no evidence supporting the City's claim that other properties have received an increased market value from other projects and that consequently, KJD's property was likely to enjoy a similar benefit.

There is a word for accepting something as true without evidence or proof: *assumption*. An assumption differs from a presumption. "The connotative distinction between the words is that *presumptions* are more strongly inferential and more probably authoritative than mere *assumptions*, which are usually more hypothetical." *Bryan Garner's Modern English Usage, assumption; presumption* (4th ed. 2016). The City's assumption that the Project conferred greater market value on KJD's property than the amount of the assessment is not entitled to a presumption of correctness. *See Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511.

b. All valuation evidence in the record indicates that the Project did not specially benefit KJD.

Even if the City's methodology by assumption were presumed correct, it would be rebutted in this case because there is "weighty evidence" to overcome it. *All* evidence of valuation in the record supports the conclusion that the Project did not specially benefit KJD's property.

First, as discussed above, is the City's contrary admission that the Project did not benefit KJD's property within the meaning of SDCL §§ 21-35-17 and 31-19-17. (R. at 118.) The City cannot concede that the Project *did not* benefit KJD for purposes of calculating condemnation damages yet maintain that the Project *did* specially benefit KJD for purposes of a special assessment.

Second, while the City repeatedly claims that the benefits to KJD's property were "readily apparent and obvious" (R. at 109–15), both professional appraisers who appraised KJD's property disagree with the City. The City admits its own appraiser did not conclude that the Project specially benefited KJD. (R. at 117.) The City admits its appraiser did not conclude that the Project enhanced the market value of KJD's property. (R. at 118.) And the City admits its appraiser concluded the Project did not change the highest and best use of KJD's property. (R. at 119.) KJD's appraiser affirmatively concluded that KJD did *not* specially benefit from the Project. (R. at 301.) And both appraisers agree that the market value of KJD's property *decreased* because of the Project. (R. at 53, 172.) If an increase in market value is an "obvious indicator that property receives a special benefit[,]" *Hubbard*, 2010 S.D. 55, ¶ 15, 784 N.W.2d at 506, then a decrease in market value indicates either that there was no special benefit or that

the value of that benefit was less than the loss in value inflicted by the partial taking. Either way, without an increase in value, there is nothing to specially assess.

Conclusion

The City has assessed KJD for the value of general benefits that it did not show affected the property's value. Even if a special assessment were permissible, the City's admission in this case that the Project did not specially benefit KJD's property is controlling and means there is no basis for the special assessment. The assessment is further unconstitutional because of the City's failure to quantify the value of the alleged special benefit. The City's "finding" that the value of the alleged special benefits equals or exceeds the special assessment is nothing more than an assumption, which is unconstitutional and not entitled to a presumption of correctness. *Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511. And even if it were presumptively correct, the professional opinions of two appraisers, the City's admission that KJD did not specially benefit from the Project, and the City's lack of supporting evidence is "weighty evidence" that rebuts the City's conclusory claim. This Court should reverse the circuit court's decision and direct that court to enjoin the City from collecting the special assessment.

Dated this 7th day of December, 2023.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 5,636 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 7th day of December, 2023.

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Certificate of Service

I hereby certify that on the 7th day of December, 2023, a true and correct copy of the foregoing Appellant's Brief and Appendix was electronically filed via the Odyssey File & Serve system, which will automatically send email notification of the same to the following:

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Appendix

1. Judgment (July 27, 2023)..... APP. 1

2. Transcript of Appellate Hearing (July 20, 2023)..... APP. 2 – 25

3. City's Answer to KJD's Interrogatory 21..... APP. 26 – 28

4. Resolution 21-04-04..... APP. 29 – 30

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF LINCOLN	)	SECOND JUDICIAL CIRCUIT

KJD, LLC, Appellant, v. CITY OF TEA, SOUTH DAKOTA, Appellee.	41CIV21-000563 **JUDGMENT**

A hearing was held in the above-captioned matter on July 20, 2023, at 1:30 p.m., the Honorable John Pekas presiding. Appellant KJD, LLC was represented by James Moore. Appellee City of Tea was represented by Clint Sargent. At the request of Appellant, the Court considered the merits of the appeal based on the written filings of the parties.

After reviewing the record and considering the arguments of counsel, the Court finds and concludes that Appellant has failed to prove by clear and convincing evidence that the City of Tea's findings in support of its assessment are not correct.

Now, therefore,

IT IS HEREBY ADJUDGED AND DECREED that Appellant KJD, LLC's appeal is DENIED.

7/27/2023 10:59:07 AM

HON. JOHN PEKAS
Circuit Court Judge

Attest:
Baker, Teresa
Clerk/Deputy

STATE OF SOUTH DAKOTA) COPY IN CIRCUIT COURT

COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

****

KJD, LLC,
APPELLANT,

v. APPELLATE HEARING

CITY OF TEA, SOUTH DAKOTA.
APPELLEE. 41CIV.21-000563

****

BEFORE: The Honorable **John Pekas**
Circuit Court Judge
Second Judicial Circuit
Canton, South Dakota.
July 20, 2023

APPEARANCES: Mr. James E. Moore
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For the Appellant;

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For the Appellee.

THE COURT: All right. Well, let's go ahead then and go on the record. This is for 41CIV.21-563. It's KJD, LLC versus A City of Tea, South Dakota, and we're here on the appeal that was filed by KJD, LLC. And, thank you, gentlemen, for the briefing that was done. It really helps out the court and it frames the issue and with that being said I'm ready to proceed and so it's your appeal, Mr. Moore, and so I might for the purpose of the record, please, note your appearances.

MR. MOORE: Thank you, Your Honor. James Moore on behalf of KJD, LLC.

MR. SARGENT: Clint Sargent appearing for City of Tea, South Dakota, Your Honor.

THE COURT: Thank you. And, ah, ah, it's your appeal. So, I'm going to turn it over to you, of course, ah, Mr. Moore, and you can begin whenever you're ready, Sir.

MR. MOORE: So, I think we should start with the procedural issue that Mr. Sargent raised with me when I got here this afternoon, Your Honor.

THE COURT: All right.

MR. MOORE: My understanding of the process is that we're here essentially on a motion for summary judgment in the context of the appeal process for which there is no clearly established procedure in South Dakota law. My view is that the relevant facts are undisputed and that the City's proof,

um, evidence that was done before the special assessment was imposed is legally insufficient to meet the standard required for it to be constitutional.

We briefed that and completed the briefing. Mr. Sargent says today that he essentially thinks we need a trial in this case and that the case is not properly before the court for disposition today.

So, I don't want to speak for you, Clint, but we may as well address this issue at the outset.

MR. SARGENT: Thank you.

THE COURT: Thank you. Yeah, go ahead, Mr. Sargent.

MR. SARGENT: Judge, and, and I talked to Mr. Moore about this because I don't want to sandbag anybody, but just a little bit of the procedure, you know the appellant's counsel contacted me and said, hey, I'd like to set up a briefing schedule for this, proposed a briefing schedule, fine, that was accepted. There wasn't really any discussion of, is this going to be a summary judgment motion, what is it going to be, nor did I know exactly what would be in those briefs. And, sure, so I agreed to that, um, and no doubt did I agree to that, and we really haven't had any discussion about the matter since then. As the case has developed, um, I've realized you know what the burdens are, what the case law is, and I don't really feel it's my job to tell the appellant the proper way to go about perfecting its appeal, but, again,

trying to be collegial and, and, um, fair. I wanted to point out that given the, the, the, the appeal and the posture the way it is, we clearly have factual disputes. And we have admissibility of evidence disputes, um, and as I read *Hubbard*, which is the, the main case on this topic, and the case most relied upon by the appellant, that case clearly shows that they had an extensive court trial in that case. You know as I read it, the appellant called five or six witnesses. The city called three or four witnesses, and then the, the trial court had to go through and make certain findings and then apply them in a certain way. And so I'm not saying that KJD has waived its rights or anything today. I, I'm just saying that I do not believe that given the factual disputes that the court can decide this case. Because my position as we sit here right now is that it wasn't filed as a summary judgment motion. So, that procedure wasn't followed.

I haven't stipulated to any evidence. I mean Mr. Moore did put evidence in the record through a, um, affidavit but that hasn't been offered. Objections haven't been heard. It hasn't been received, um, and so again, I just wanted to state it at the forefront that I object to the appraisals being received into evidence without a more extensive foundation showing that they're relevant, and they're based on evaluation that would be relevant to the court's

consideration of this matter as opposed to a condemnation case.

Um, I, if you see in my interrogatory answers that Mr. Moore filed, I objected on the grounds, but I think that there's a different definition of special benefit in the condemnation case versus this case. I also in our brief we brought up the scope of the project rule.

So, again, for all of those reasons, um, I would hate for us to do all of this, and then me be standing in front of the Supreme Court you know saying I think the procedure was screwed up. We didn't get a proper evidentiary hearing. The court you know accepted facts without doing what judges do before they accept facts. So, that's why I raised the issue.

THE COURT: Well, Gentlemen, I've got broad shoulders, and you can both point your fingers at me when you go to the Supreme Court. Okay. No worries on that. I am interested though you know we do have the condemnation case, 41CIV20-367, which is currently running independent of this particular action, and from what I could glean from the filing is that really this is a, ah, I don't want to call it an administrative appeal, but it's a challenge to the resolution that was adopted by the City of Tea regarding the, ah, ah, assessment. The assessment that was done in this particular project, and really, you're challenging what the City of Tea did as the City of Tea through their resolution.

Is that what we're here on, Mr. Moore?

MR. MOORE: Yes, Your Honor. And the way the case proceeded from my view, we served written discovery on the City and basically said, tell us what you did to determine whether there were special benefits to this property. Um, and Interrogatory #6 had described the methodology used by the City to determine the special benefit to the property. And the answer came back objection the term methodology is vague, ambiguous, and subject to multiple interpretations. Without waiving said objection, no special methodology was utilized to determine special benefits to the property. The direct benefits received by the property as a result of the project were readily apparent and obvious.

So, as I read the discovery answers that were provided by the City, the City made no effort to quantify the special benefit to KJD's property before it imposed the special assessment.

And I understand Mr. Sargent's procedural argument in the context of this appeal. I would note that the *Hubbard* case is, is different because it was started as a declaratory judgment action, and so the rules of civil procedure applied there and, and they ended up with a trial in that case.

We could have proceeded in this case to present testimony to the court.

THE COURT: Right.

MR. MOORE: Based on factual disputes, but my position is that there are no factual disputes here because the City simply didn't undertake what was necessary to determine whether there's a special benefit to the property. The findings that the city included in its resolution essentially say in conclusionary fashion all of these things indicate there's a benefit to the property, but that isn't the end of the question. Then the question is --

THE COURT: Mr. Moore, you're getting way into your argument here, but, ah, I'm just more interested in, ah, whether or not you view that the, ah, ah, action currently pending this afternoon is really about the resolution that was adopted for the City of Tea.

MR. MOORE: Absolutely.

THE COURT: All right. And, ah, you're not, you're not mixing in to the condemnation action. You want to keep that separate; is that correct?

MR. MOORE: Yes. Except, except, Your Honor, that, that there were appraisals done of KJD's property by both sides.

THE COURT: I got that.

MR. MOORE: In connection with the condemnation case, and neither appraiser found that there was a special benefit. Now, the City raises a legal argument about whether that is sufficient and admissible. My ultimate response to that in the context of procedural argument that Mr. Sargent just made

is it still doesn't matter because the City has no evidence of a quantifiable, um, ah, special benefit to the property.

THE COURT: All right. I, I understand where, where you're getting. Well, where I'm at is that, ah, if, if a locale -- local government, or whether it's a county government, or, ah, some other subdivision that the state takes action, ah, I do believe that there's a provision to allow for the Circuit Court to go ahead and to do a De Novo review of that action that was taken, and, ah, we could go ahead and have a, have a full hearing, ah, with the rules of evidence applying because I want to, I can't say it's a De Novo review. There's a recent, not so recent now, but about five years ago the South Dakota Supreme Court adopted a review of whether or not a particular action relating to, I believe it was land use ordinances, conditional use permits, whether any changes such as that at a local level was, ah, prospective or retrospective, and there were different burdens that the circuit court had to apply to those particular actions taken by local governments, and that was in a context of, of taking these matters up before the Circuit Court and for us to do a review and, of course, ah, that's kind of where I'm at on this particular issue as well because really what we're dealing with is and, and it's limited in scope with the point that I understand you're just challenging the action of the City of Tea in the resolution

that was adopted; is that correct?

MR. MOORE: As it applies to this property.

THE COURT: Yes.

MR. MOORE: Correct.

THE COURT: Yes. Okay. And, um, Mr. Sargent, what's your position on that?

MR. SARGENT: Well, if I may, I just like to respond to the comment, the, the interrogatory that was read into the record.

THE COURT: Sure, go ahead.

MR. SARGENT: Wasn't, wasn't a complete reading of that answer. The interrogatory went on to say that the cost of the benefits provided to the property far exceeded the amount of the special assessments, see answers to Interrogatory #22 and 23, where it said, that the square foot cost of the improvements cost $834 per square foot, and the assessments only $91 per square foot. So, that is part of the methodology that we provided $834 worth of improvement and only charged $91.

The Interrogatory goes on to say that the benefits provided to the property have consistently increased the market values of other properties within the city limits see answer to Interrogatory #21. And in that interrogatory it recites that the special assessment to the property for the adjacent roadway and the utility improvements is based on the

equivalent cost and the project's construction year dollars to construct a local city street with standard sized municipal utilities which would be a required cost of any property within the city limits. Similar costs are regularly incurred by developers and property -- of property within the city limits and increase market value due to installation of a local city street and utility infrastructures is consistently reflected in the increased post-development sales price.

So, I bring that all up just to point out that there was a methodology. It wasn't some special methodology for this particular property, but the City of Tea has a methodology. They went through it and so that, that's the basis, um, for it, the factual disputes. And the big point is that *Hubbard* has set forth the burden here.

THE COURT: Right.

MR. SARGENT: But there I don't agree that it's De Nova review because there's a presumption that what the city did was correct, and only --

THE COURT: Right.

MR. SARGENT: -- if the appellant proves by clear and convincing evidence that it wasn't, um, is the court to not find for the City. Um, so again the, I believe the burden's on the appellant to bring in evidence to rebut the presumption, and the only way that you can bring in evidence

to rebut a presumption is to have evidence, and, um, there isn't any in the record at this point.

THE COURT: Well, humor me, ah, we have -- both of you have cited to information that has come in from what I believe is from 41CIV.20-367, and that's in the condemnation case. Ah, I'm interested with this benefit through consolidation and to merge those together so you're not bringing in separate items from discovery related to that case in to this case?

MR. SARGENT: If I can comment?

THE COURT: Sure.

MR. SARGENT: They absolutely need to stay separate.

THE COURT: Stay separate.

MR. SARGENT: Because they're totally different decisions. One's a court trial. One's a jury trial, um, and that's part of my point is that commingling them is wrong.

THE COURT: Okay.

MR. SARGENT: Ah, and you would have evidence that it is admissible in one case that's not admissible in another case.

THE COURT: Thank you. All right. And what's your position on that, Mr. Moore?

MR. MOORE: Yeah. I, I disagree with the conclusion but not the rationale. I agree that they -- that they're separate proceedings. I disagree that that evidence of the appraisals is not admissible in this proceeding. The, ah, at

the end of the day, Your Honor, my position is that what the City, whether what the City did is constitutional is primarily a legal matter not a factual one. We know what the City did. It assessed, um, based on a per lineal cost basis.

THE COURT: Um-hum.

MR. MOORE: And that's what *Hubbard* says you can't do. That's what *Hubbard* says doesn't satisfy the constitution. So, we can have a trial in this case. We can have the city folks come testify. We can have the appraisers testify. We can have my client testify, and at the end of the day, it won't change the facts of what the City actually did and whether that is legally sufficient to satisfy the constitution as the Supreme Court explained it in the *Hubbard* case, isn't going to change. So, I think the issue is ripe for the court's consideration.

THE COURT: All right. Thank you. Well, what I'd like to do is to go forward with the case today, and, ah, I'm going to go ahead and at least, at least at this point, rule that I think it's proper for us to go ahead and to consider the briefing that was done. And I'm going to find that at least at this juncture that the procedural requirements have been met, and so if that helps.

So, in your objection at this point, Mr., ah, Mr. Sargent's noted for the record, so you've got that preserved. Okay. And so with that being said, Mr. Moore, are you ready?

MR. MOORE: Yes, thank you, Your Honor. So, I think the starting point for the court is the principle that a special assessment without evidence establishing a special benefit to the property can result in an unconstitutional taking to the extent that the amount of the assessment exceeds the, the amount of the special benefit. In other words, there must be a special benefit above and beyond the general benefit to the public from the project. That's a constitutional requirement not a statutory requirement. It comes from both the state and the federal constitutions. Um, and for that reason, um, a municipality has to show that the benefit exceeds the amount of the assessment, and it has to make findings to that effect.

The teaching of the *Hubbard* case, um, and in the *Hubbard* case, the City of Pierre acted under the statute that was in effect at the time, which was 9-45-30, which, um, which it was argued did not require a showing of special benefits. And the Supreme Court said, yeah, you're right the statute doesn't require that and that's unconstitutional because you have to make this comparison. This evidentiary comparison between the special benefit and, um, and the amount of the assessment. And part of the, the analysis that the Supreme Court relied on and in that case is that a by the foot cost allocation does not satisfy the constitution, and you have to distinguish the value of the special benefit to the property

from the cost of the improvements as allocated to the property on a by the foot basis.

The Supreme Court held in in *Hubbard* that that's what the City of Pierre did that it was legally sufficient so that the city could not simply rely on the statute to allocate cost per square foot and besides that, um, the methodology that it employed did not satisfy the constitutional requirement to avoid a taking.

The aftermath of that is that the legislature amended the statute, and the current statute is 9-43-78, which requires that the municipality making a special assessment determine the amount of the benefit, but, um, the statute also allows, um, for project costs to be the basis for the determination of that benefit.

And part of our argument in this case, Your Honor, is the statute is still constitutionally infirm because it does not require that the city determine that the amount of the special benefit, um, exceeds the amount of the assessment.

So, it's one thing to say there's evidence that this property is benefited, um, it's another thing to say how that benefit actually affects the value of the property, and does it exceed, um, the, the assessment that was imposed. And if you don't make that comparison there's no way to answer the constitutional question.

Again, based on the facts here, Your Honor, it's our

position that the City did not conduct any specific valuations related to the property for purposes of determining, um, the -- whether there were special benefits to the property as a result of the, um, the road project.

The findings that the City made are essentially, are essentially conclusions, and even if you accept them on an evidentiary basis, um, you're left with the problem that they show a benefit to the property, but not the amount of the benefit. And without knowing the amount of the benefit, without quantifying that, there's no way to compare the benefit to the assessment. And without doing that you can't answer the constitutional question.

So, um, at, at the end of the day, Your Honor, and this is consistent with what I argued earlier, the City's findings are insufficient as a matter of law. What the City did, and this is in the interrogatory answers that Mr. Sargent referred to in paragraphs twenty-two and twenty-three, is it allocated the cost of the project on a per lineal foot basis and said, well, we think the project cost far more than we're assessing, therefore, um, we've satisfied our constitutional obligation. I think that's foreclosed as a matter of law by the *Hubbard* case. And, again, the, the cost of the project does not establish the value of the benefit to the property assuming that there is a benefit.

And, um, I think as we argued on page three of our reply

brief, um, if a municipality fails to investigate the value of alleged special benefits then it is impossible for the municipality to, and this is a quotation from *Hubbard*, "Measure or limit the assessment by the special benefits occurring to the property". And in a nutshell, Your Honor, that's the, that's the crux of the case on appeal, that what the city did in, in reliance on the current statute, is it took the cost of the project, it allocated it. It said, we're assessing for less than the, than the total that is attributable to each property on a per lineal foot basis, and, therefore, we can say that, um, that the assessment does not exceed the value of the benefit. And *Hubbard* simply says that's legally insufficient. You have to measure the benefit to the property from the project. You can't do that by simply allocating the cost of the project, and there's no evidence in this case that the City made any effort to quantify the special benefit to the, to the property.

So, even if you disregard the appraiser's opinions in this case, which I don't think you should do, or are required to do, there's still no evidence that the City undertook any evidentiary analysis of the value of the benefit to the property that is not tied to the cost of the project, and that's legally insufficient.

It's a legal argument at the end of the day, Your Honor, that what they did is procedurally improper and does not

satisfy the constitution, and that's my argument.

THE COURT: Thank you. And I'm going to turn it over now to you, Mr. Sargent.

MR. SARGENT: So, Judge, I'll, I'll start with repeating the burden.

THE COURT: Right.

MR. SARGENT: The City's findings are presumed correct, and so its evidence needs to come forward that they were wrong, all right. I disagree with Mr. Moore's statement that there, there needs to be some specific valuation. Ah, in essence what he's saying that any time that there's an assessment now that a city or county government needs to do an appraisal by or a lot-by-lot appraisal. I mean that's that's really what he's saying, that if you don't break it down to an exact dollar amount then you're constitutionally infirm. That's not what *Hubbard* says. Ah, even if you look at paragraph fifteen in *Hubbard*, halfway down the paragraph it states, "This court has said that the special benefits must be actual, physical, and material, and not merely speculative or conjecture."

Well, the, the benefits that have been identified by the City both in their findings as well in our interrogatory answers, they're, they're actual physical and material, and I won't repeat them because I know that the court's read 'um.

Um, now the next sentence says, "Even so, this court has

recognized that an exact and actual monetary benefit to the property may be difficult to measure, and at most can only be estimated with a fair degree of exactness." So, it doesn't require specific amounts, it just needs some degree of exactness.

One, the paragraph goes on, "One obvious indicator that property receives a special benefit is if the public project enhances the market value." But that's just one. Future prospects and reasonable expectations of the future use may be another indicator. Other courts have found a special benefit when the property realized aesthetic enhancement.

So, again, the, the court is laying out in *Hubbard* that you don't, it doesn't have to be an increase in market value to satisfy. So, consequently, not picking an exact increase in market value isn't, can't be required if, if it's not required to reach your ultimate conclusion.

But let me comment on in response to this continued comment that the City did nothing to try and measure whether there was a benefit. That's not accurate. There is evidence provided and actually filed by the appellant in our interrogatory answers. Interrogatory answer #21 states what the methodology was, and the basis for it. That that the City went, and they determined that they were going to charge one-eighth of the cost, the $91 rather than the 800 and some dollars because in their experience what they had seen in

their community was when developers put in similar type improvements that they saw an increased market value at a similar rate. That is a, ah, that's a methodology, that's a factual consideration and that's all that's required. Right. We're, city councils aren't like judges, right. They don't have to have a trial about every single property when they're, when they're doing an assessment, that would break down the whole legislative process, right. They just have to have a basis, and, and it has to be not arbitrary, not capricious, it has to be a foundation, and they have said that they have one, and there's no evidence that's been presented to this court that they didn't do that. That that was flawed, that it was incorrect, that, that, that, that methodology and that conclusion is wrong.

And so I'm going to stop there and say that based on the burdens on the appellant, the standards of reviews set by the Supreme Court and the burdens of proof, as well as the how the court is to determine these things, I submit that the appellant has not met their burden and their appeal should be denied.

THE COURT: All right. Thank you, Mr., Mr. Sargent. And, ah, reply, Mr. Moore.

MR. MOORE: So, what we agree on, Your Honor, is that under paragraph twenty-one the City says what it did is made an assessment based on the cost of the project. And *Hubbard*

says that's not how you do it. You can't do it that way. You have to determine the value of the benefit apart from the cost. And the City can't simply assume that the value of the benefit equals or exceeds the cost of the project. Again, that's paragraph twenty-seven from *Hubbard*. This is a quotation, "The city's quantification of the benefits however was ambiguous and conclusory in that the City assumed the benefits equaled the cost." Again, Your Honor, there is no evidence in this case of the value of the benefit and how it relates to the cost of the project allocated to the property on a per lineal foot basis. And, ah, we simply disagree about, about the conclusion to be reached from the evidence in the case.

Mr. Sargent says it's our burden to overcome the presumption and we failed to do that. My argument is that the evidence that City has presented is legally insufficient to establish that it complied with its constitutional requirements as explained in *Hubbard*, ah, and that's why I think it would be unnecessary to, to have a trial and to consider additional evidence in this case. I think the record establishes that the assessment is constitutionally infirmed because there is no evidence that the value, that the amount of the assessment, um, ah, is less than the benefit to the property quantified by the City, because that's a determination the City did not make, other than

with respect to cost.

THE COURT: Thank you. All right. Well, what I'd like to do is to go back and in relationship to the statute that was of course cited originally, ah, and then of course amended in 9 -- SDCL 9-43-78, which was amended. Ah, my understanding is that that was an attempt on the part of the legislature to bring the old statute up to what *Hubbard* would require as a constitutional change as directed by, I believe, ah, U.S. Supreme Court authority, and because of that we had to take a different tact when it came to this particular resolution regarding the assessment.

And I do find that it's rationally related to a legitimate governmental purpose which is of course the City of Tea trying to do a special assessment. With that being said there has to be constitutionality and, ah, from the application of the new statute, ah, and its, ah, reviewing of *Hubbard*, and the concerns related to it. I understand the position of, of course, Mr. Moore.

In looking at the answer that was articulated and argued by Mr. Sargent regarding Interrogatory answer #21, and the methodology used regarding the one-eighth and the $91 that they've seen being applied inconsistent with, ah, with it being consistent with their experience with developers and the improvement and the increase in the market value and similar, ah, similar rates, that is an articulation of what

would be, what this court would consider to be a factual determination.

I understand that some of the argument of Mr. Moore indicating that there are conclusory statements made in the resolution, however, with the interrogatory that was read into the record of course by Mr. Sargent, I believe that there is a basis for that, and because of that I do think that in looking at the presumption, the presumption has not been overcome, and so the presumption means that the resolution is valid on its face, and so because of that I have to deny the request to go ahead and have this resolution remanded back to the City of Tea for factual findings and a declaration of its unconstitutionality.

And so at this point I'm going to ask you, Mr. Sargent, to prepare an order accordingly. And, ah, I think all your issues, Mr. Moore, have been preserved. Ah, so you can make your record and take it up if you need to do that.

Is there anything else you'd like to add?

MR. MOORE: No.

THE COURT: For your record?

MR. MOORE: Nope, thank you, Your Honor.

THE COURT: Okay. All right. Thank you. And so I'll let you prepare that, Mr. Sargent, and we'll proceed from there. Okay.

MR. SARGENT: Thank you, Your Honor.

THE COURT: All right. Thank you. And once again I do appreciate-appreciate the briefing, and I really appreciate the argument. Once again you both have just done what this court considers to be a stellar job.

MR. MOORE: Thank you, Judge.

THE COURT: Thank you.

(Proceedings concluded at 2:03 p.m.)

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

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 23, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 23rd day of October, 2023.

/s/ Roxane R. Osborn
Roxane R. Osborn
Court Recorder
Notary Public - South Dakota
My commission expires: May 9, 2024

STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
KJD, LLC Appellant, v. CITY OF TEA, SOUTH DAKOTA. Appellee.	41CIV20-000367 **APPELLEE'S ANSWERS TO APPELLANT'S INTERROGATORIES, REQUESTS FOR ADMISSIONS, AND REQUESTS FOR PRODUCTION OF DOCUMENTS (FIRST SET)**

1. State the full name and the current address, phone number, and occupation of the person answering these interrogatories.

ANSWER: Dan Zulkosky, City Administrator, City of Tea

2. Identify each person providing or furnishing any information you relied on in preparing answers to these interrogatories, and identify the answers with respect to which you received assistance.

ANSWER: The following individuals all provided information in answering these discovery requests:

Clint Sargent, Attorney for City of Tea
Todd Meierhenry, Attorney for City of Tea
John Lawler, Mayor, City of Tea
Dan Zulkosky, City Administrator, City of Tea
Dawn Murphy, City Finance Officer, City of Tea
Ben Scholtz, HDR

3. What special benefit, if any, does the City of Tea allege that the property located at 27108 470th Avenue in Tea, SD, (the "Property") received or will receive as a result of the Gateway Boulevard Reconstruction Project (the "Project")?

EXHIBIT 2

19. Identify any appraisals or other valuation opinions the City obtained supporting the proposition that the Project improvements will enhance the market value of the Property.

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

20. State the total value of the alleged special benefit to the Property as determined by an appraiser or other valuation expert, and identify the appraisal or other valuation or expert on whose testimony the City relies.

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

21. Explain the relationship between the Property's enhanced market value due to the Project and the amount specially assessed, i.e., $61,623.

ANSWER: **The special assessment to the Property for the adjacent roadway and utility improvements is based on the equivalent cost (in the project's construction year dollars) to construct a local city street with standard sized municipal utilities, which would be a required cost of any property within the city limits. Similar costs are regularly incurred by developers of property within the city limits and the increase in fair market value due to installation of a local city street and utility**

EXHIBIT 2

infrastructure is consistently reflected in the increased post-development sales prices.

22. In the Resolution, the City's special assessment of $61,623 reflects $91.00 per foot over the Property's approximately 677 feet of frontage. State the facts supporting this calculation, the methodology by which it was determined, and the name, address, and title of each person the City relied on for the calculation and methodology.

ANSWER: **Refer to details included in Land Owner Handout Annexation and Assessment FAQ sheet and details in the last bullet on the first page of the City of Tea's Resolution 21-03-03 respective to assessment rates applicable to properties listed in Exhibit D. Typical assessment rates were reduced for the Project as a result of contributions to the Project by Lincoln County and the Project's receipt of some funding from a federal BUILD grant.**

Front footage length was determined by reviewing the Property's platted boundaries with recorded information in the Lincoln County Register of Deed's office. Assessment for front footage is only applied where complete roadway improvements are implemented adjacent to a property and does not include the length of any transitions to other adjacent infrastructure.

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

23. State the total cost of improving the Property's 677 feet of frontage. State the facts supporting this calculation, the methodology by which it was determined, and the name, address, and title of each person the City relied on for the calculation and methodology.

ANSWER: **Total Cost to improve the property's assessable front frontage is approximately $564,702. This cost was determined by dividing the total project length (approximately 7,640 feet) by the total project cost, less the costs of landscaping, fencing, sanitary sewer, and structures ($13,989,102 - $279,332 - $18,223 - $855,982 - $90,147 = $12,745,418) equating to approximately $1,668 per foot (divided by 2 for each ½ of the roadway equals $834 per foot) and multiplying by**

EXHIBIT 2

CITY OF TEA
RESOLUTION 21-04-04
RESOLUTION OF NECESSITY

WHEREAS, The City of Tea has proposed Resolution of Necessity #21-03-03 for improvements to Lincoln County Highway 106 aka Gateway Boulevard and Katie Rd; and

WHEREAS, the City of Tea has published and mailed said notices as required by South Dakota Codified Laws; and

WHEREAS, the City has considered the character of the improvements, the situation, the surrounding conditions, and whether the substantial benefits to be derived from the improvements are local or general in their nature; and

WHEREAS, the City has calculated the portion of the improvements which confers a local special benefit and the general benefit and advantage on the property of the whole community.

NOW THEREFORE BE IT RESOLVED that the City finds the following:

- The project will make the property abutting the project a better place in which to conduct business.
- The property will only be assessed the costs for the special benefit of the improvements.
- The adjacent property will receive a special benefit by changing the properties highest and best use from rural in character to urban.
- The improvement will provide easier access to the abutting properties.
- The improvements will provide a special benefit to the assessed properties by improving and enhancing the aesthetics and safety, thus enhancing the value, use, and enjoyment of the property.
- The improvements will enhance the market value of the properties abutting the improvement.
- The property abutting the improvements receive a special benefit above and beyond that benefit enjoyed by the general public.
- That the value of the special benefit equals or exceeds the special assessment
- Failure to assess property abutting the improvements would result in a windfall to the property owners.

AND WHEREAS, the City of Tea is ready to proceed with the project and again declare the necessity to make the improvements;

NOW THEREFORE BE IT RESOLVED by the City Council of the City of Tea, South Dakota, at a regular meeting thereof held in the meeting room of the City Council in the City of Tea that the convenience and necessity has risen to for the complete reconstruction of Lincoln County Highway 106 (CR106) aka Gateway Boulevard/271st Street beginning approximately 130 feet east of Heritage Parkway and continuing approximately 7,385 feet (1.4 miles) to the intersection with the Exit 73 interchange at Interstate 29 and utility improvements on 191.90 ft of Katie Rd by the following:

- Asphalt surfacing removals, widening the existing roadway to provide additional lanes, installation of utilities (water main, sanitary sewer, sanitary sewer force main casing pipe, and storm sewer), installation of curb & gutter, sidewalks & shared-use path, gravel roadway base, concrete and asphalt surfacing, traffic signals, street lighting, landscaping, and irrigation systems.

BE IT FURTHER RESOLVED that the material to be used in the project shall be according to plans and specifications prepared by engineers for the City of Tea, and on file in the office of the Municipal Finance Officer and open to public inspection and incorporated hereby.

EXHIBIT 2

BE IT FURTHER RESOLVED that:

- the cost of $68.50 per foot (street $38.50, Water $14.00 & Sewer $16.00) shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit A
- the cost of $52.50 (street $38.50, Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit B
- the cost of $107.00 (street $77.00, Water $14.00 & Sewer $16.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit C;
- the cost of $91.00 (Street $77.00 and Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit D;
- the cost of $52.50 (Street $38.50 and Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit E;
- the cost of $38.50 (street only) per foot shall be assessed against all accessible lots and tract of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit F.

The total estimated cost of the Project is $16,000,000.00 and that part thereof will be financed by special assessments. The City of Tea will pay the "over size" costs of $14,945,000.00. The total cost shall include the contract price and all engineering, inspection, publication, fiscal, legal and all other expenses incidental thereto.

BE IT FURTHER RESOLVED that the assessments for the properties marked on Exhibits "A & B" will be divided into fifteen (15) equal annual installments, which shall be payable under Plan One, collection by the County Treasurer, as set forth in SDCL §9-43-102, et seq., and that all deferred installments shall bear interest at such rate of one (1) percent per annum.

BE IT FURTHER RESOLVED that the assessment for the properties marked as Exhibits "C" shall be delayed, without interest, and to be paid in full at such time as the property is annexed within the City limits of Tea.

BE IT FURTHER RESOVLED that the assessments for the property marked as Exhibit D shall be delayed, without interest, and to be paid in full at such time the property is annexed into the city limits and a development plan is filed.

BE IT FURTHER RESOLVED that the assessment for the property marked as Exhibit E shall be delayed, without interest, and to be paid in full at such time as a development plan is filed.

BE IT FURTHER RESOLVED that the contractors who undertake to perform the work of construction herein provided for shall be paid in cash from City surplus, the sale of Special Assessment Bonds, Sales Tax Revenue Bonds and a Federal Highway Administration Build Grant.

Dated this 5th day of April, 2021

John M. Lawler, Mayor

ATTEST:

Dawn R. Murphy, Finance Officer

CITY OF TEA CORPORATE SEAL SOUTH DAKOTA

EXHIBIT 2

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30439

KJD, LLC,
Plaintiff and Appellee,
v.
CITY OF TEA,
Defendant and Appellant.

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

The Honorable John Pekas
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed on the 25th day of August, 2023

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JURISDICTIONAL STATEMENT

This is an appeal of a Judgment filed on July 27, 2023, which affirmed the City of Tea's special assessment against KJD, LLC, and others, on October 4, 2021. (CR 397; App. 1). On August 25, 2023, Plaintiff/Appellant KJD, LLC, filed a Notice of Appeal. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1) (appeal from final judgment as a matter of right).[1]

STATEMENT OF THE ISSUES

I. The City of Tea's Special Assessment is Constitutional

Hubbard v. City of Pierre, 2010 SD 55, 784 N.W.2d 499

Hawley v. City of Hot Springs, 276 N.W.2d 704 (S.D. 1979)

II. KJD, LLC Failed to Overcome the Presumption that the City of Tea's Special Assessment Findings are Correct

SDCL § 16-5-36(b)

Hubbard v. City of Pierre, 2010 SD 55, 784 N.W.2d 499

Hawley v. City of Hot Springs, 276 N.W.2d 704 (S.D. 1979)

United States v. Reynolds, 397 U.S. 14 (1970)

III. The City of Tea's "Price Per Foot" Assessment is Constitutional

SDCL § 9-43-78

Hubbard v. City of Pierre, 2010 SD 55, 784 N.W.2d 499

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "App." designates the Appellant's Appendix; (3) "Appx." designates the Appellee's Appendix; (4) "HT" designates the transcript for the July 20, 2023, circuit court appellate hearing.

STATEMENT OF THE CASE

On April 5, 2021, the City of Tea issued Resolution 21-04-04 Resolution of Necessity, which imposed a special assessment upon landowners who received a special benefit from improvements made to Lincoln County Highway 106. Appx. 4-10. On October 19, 2021, KJD, LLC, appealed the City of Tea's special assessment to the Second Judicial Circuit. On November 2, 2021, the City of Tea filed a Response to Notice of Appeal. C.R. 10.

> COMES NOW City of Tea, by and through its attorneys of record, Meierhenry Sargent LLP, and states in response to KJD, LLC's Notice of Appeal that all statutory and constitutional requirements for its special assessment have been followed and respectfully requests that KJD, LLC's appeal be denied and dismissed upon the merits.

C.R. 10.

On May 12, 2023, the Second Judicial Circuit Judge John Pekas filed a Scheduling Order which established an appellate briefing schedule and set argument on the appeal's merits for July 20, 2023. C.R. 13.

KJD, LLC's appeal re: the City of Tea's special assessment commenced on July 20, 2023. Before engaging in argument on the merits, the matter's procedural posture, including the separate condemnation action, was addressed. KJD, LLC confirmed the following:

- KJD, LLC's appeal is a challenge to what the City of Tea did, by way of resolution, in imposing the special assessment. HT. 5:23-6:2;
- KJD, LLC could have utilized the procedure outlined in *Hubbard*, and presented testimony to the court. HT. 6:18-25;

- KJD, LLC's decided not to follow *Hubbard*'s procedure because it is KJD, LLC's position that the appeal does not involve factual disputes. HT. 6:23-7:4;
- The condemnation action (41CIV.20-367) is a separate proceeding. HT. 11:3-24;
- The matter before the Court on July 20, 2023, was ripe for consideration. HT. 11:22-12:15.

The Court ruled that it was proper for the action to proceed, that the procedural requirements were met, and that it was proper for the Court to consider the briefing submitted and arguments of counsel. HT. 12:16-22. Argument was thereafter presented by both sides.

The Honorable John Pekas affirmed the City of Tea's 2021 special assessment, concluding that "Appellant has failed to prove by clear and convincing evidence that the City of Tea's findings in support of its assessment are not correct." C.R. 397. The Judgment was filed on July 27, 2023. C.R. 397. Notice of Entry was filed on July 28, 2023. C.R. 398.

KJD, LLC filed its Notice of Appeal to the South Dakota Supreme Court on August 25, 2023. C.R. 401.

STATEMENT OF THE FACTS

In March 2021, the City of Tea proposed Resolution of Necessity #21-03-03 for improvements to Lincoln County Highway 106 a/k/a Gateway Boulevard and Katie Road. On April 5, 2021, the City of Tea issued Resolution #21-04-04 Resolution of Necessity, declaring that the City considered the improvements' character, whether the improvements were local or general, the portion of the improvements that would confer a local benefit versus a general benefit to the community, and made nine separate findings of special benefits conferred upon the property abutting the project. C.R. 379-380; Appx. 4-5.

WHEREAS, the City has considered the character of the improvements, the situation, the surrounding conditions, and whether the substantial benefits to be derived from the improvements are local or general in their nature; and

WHEREAS, the City has calculated the portion of the improvements which confers a local special benefit and the general benefit and advantage on the property of the whole community.

NOW THEREFORE BE IT RESOLVED that the City finds the following:

- The project will make the property abutting the project a better place in which to conduct business.
- The property will only be assessed the costs for the special benefit of the improvements.
- The adjacent property will receive a special benefit by changing the properties highest and best use from rural in character to urban.
- The improvement will provide easier access to the abutting properties.
- The improvements will provide a special benefit to the assessed properties by improving and enhancing the aesthetics and safety, thus enhancing the value, use, and enjoyment of the property.
- The improvements will enhance the market value of the properties abutting the improvement.
- The property abutting the improvements receive a special benefit above and beyond that benefit enjoyed by the general public.
- That the value of the special benefit equals or exceeds the special assessment
- Failure to assess property abutting the improvements would result in a windfall to the property owners.

AND WHEREAS, the City of Tea is ready to proceed with the project and again declare the necessity to make the improvements;

C.R. 379; Appx. 4.

The City assessed different costs per foot for abutting landowners depending upon their tracts of land and which improvements were conferring special benefits upon the particular abutting property.

BE IT FURTHER RESOLVED that:

- the cost of $68.50 per foot (street $38.50, Water $14.00 & Sewer $16.00) shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit A
- the cost of $52.50 (street $38.50, Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit B
- the cost of $107.00 (street $77.00, Water $14.00 & Sewer $16.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit C;
- the cost of $91.00 (Street $77.00 and Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit D;
- the cost of $52.50 (Street $38.50 and Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit E;
- the cost of $38.50 (street only) per foot shall be assessed against all accessible lots and tract of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit F.

C.R. 380; Appx 5.

KJD, LLC's tract was assessed at $107.00 per foot. C.R. 382; Appx. 7.

STANDARD OF REVIEW

Factual findings are reviewed under the clearly erroneous standard. *Rabenberg v. Rigney*, 1999 SD 71, ¶ 4, 597 N.W.2d 424, 425 (citing *In re Estate of O'Keefe*, 1998 SD 92, ¶ 7, 583 N.W.2d 138, 139).

> On review, this Court defers to the circuit court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony. On appeal, "[t]he question is not whether this Court would have made the same findings the circuit court did, but whether on the entire evidence, 'we are left with a definite and firm conviction that a mistake

> has been committed.' " This Court has said: "[t]he credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and we give due regard to the trial court's opportunity to observe the witnesses and examine the evidence."

Hubbard v. City of Pierre, 2010 SD 55, ¶ 26, 784 N.W.2d 499, 511.

ARGUMENT

I. City of Tea's April 2021 Special Assessment Resolution is Constitutional; Circuit Court's July 2023 Judgment Should be Affirmed

[I]f a local public improvement confers a special benefit on private property, a special assessment can be constitutionally imposed if the assessment does not exceed the benefit received. *Hubbard v. City of Pierre*, 2010 SD 55, ¶ 10, 784 N.W.2d 499, 504.

> A public improvement is considered local if it benefits "adjacent property, as distinguished from benefits diffused throughout the municipality." The classification as a local improvement depends on the character and nature of the improvement. We have said, "[t]he primary purpose of the improvement is largely determinative and classification depends 'upon the nature of the improvement and whether the substantial benefits to be derived are local or general in their nature.'" If the project is general in nature, the cost cannot be assessed against adjacent property. If the project is local in nature, the cost can be assessed against the adjacent property but only if the property receives a special benefit. Whether a project is local or whether property receives a special benefit are factual inquiries. Subject to court review, a city's decision to impose a special assessment should be founded on those inquiries.

Id. ¶ 11, 784 N.W.2d at 504–05 (internal citations omitted).

"Determining whether a project confers special benefits requires a *finding* that the assessed property receives a benefit *above and beyond* or *differing from* the benefit enjoyed by the general public." *Hubbard v. City of Pierre*, 2010 SD 55, ¶ 14, 784 N.W.2d 499, 505 (emphasis in original and supplied). "*Hawley* recognized that '[s]pecial assessments can be sustained only upon the theory that the property assessed receive some special benefit from the improvement differing from the benefit that the general

public enjoys." *Id.* (*Hawley v. City of Hot Springs*, 276 N.W.2d 705, (S.D. 1979)). Special benefits must "be actual physical and material, and not merely speculative or conjectural." *Id.* (quoting *Ruel v. Rapid City*, 167 N.W.2d 541, 545 (S.D. 1969)).

Importantly, however, the South Dakota Supreme Court has also "recognized that an 'exact and actual monetary benefit' to property may 'be difficult to measure and at most can only be estimated with a fair degree of exactness.'" *Id.* ¶ 15, 784 N.W.2d at 605. Although an "obvious indicator" that a property has received a specifical benefit is increased market value, the South Dakota Supreme Court noted in *Hubbard* that "[f]uture prospects and reasonable expectations of future use" and "aesthetic enhancement" have also been recognized as special benefits. *Id.* ¶ 15, 784 N.W.2d at 506 (citing *Town of Tiburon v. Bonander*, 103 Cal.Rptr.3d 485 (2009); *City of Winter Springs v. State*, 776 So.2d 255 (Fla. 2001); *Des Moines Union Ry. Co. v. City of Des Moines*, 459 N.W.2d 271 (Iowa 1990)).

City of Tea, Resolution #21-04-04, Resolution of Necessity enunciated multiple findings regarding special benefits conferred upon the abutting property owners, including a "better place in which to conduct business," "changing the properties highest and best use from rural character to urban," "easier access to the abutting properties," "improving and enhancing the aesthetics and safety, thus enhancing the value, use, and enjoyment of the property," and "enhance the market value." C.R. 379; Appx. 4; *Hubbard*, ¶¶ 14- 15, 784 N.W.2d at 505-06. Amidst the articulated special benefits, City of Tea, Resolution #21-04-04, Resolution of Necessity also provided that the "property abutting the improvements receive a special benefit above and beyond that benefit enjoyed by the general public," "that the value of the special benefit equals or exceeds the

special assessment," that the property "will only be assessed the costs for the special benefit of the improvements," and that without the special assessment the improvements would "result in a windfall to the property owners." Appx. 4; *Hubbard*, ¶ 14, 784 N.W.2d at 505.

The City's discovery responses in this matter confirmed the Resolution's pronouncement that it "considered the character of the improvements, the situation, the surrounding conditions, and whether the substantial benefits to be derived from the improvements are local or general in their nature" in imposing a special assessment. C.R. 379; Appx. 4.

3. **What special benefit, if any, does the City of Tea allege that the property located at 27108 470th Avenue in Tea, SD, (the "Property") received or will receive as a result of the Gateway Boulevard Reconstruction Project (the "Project")?**

ANSWER: **The Property has or will receive the following benefits from the Project:**

The rural county road abutting the Property will be replaced with an urbanized multi-lane municipal roadway. The new roadway will include additional lanes of travel, curb and gutter, street lighting, sidewalks, access control, a municipal water main and improved drainage conveyance.

Curb and gutter will make the Property safer by creating a barrier that keeps vehicle traffic within the roadway and off of the Property. Curb and gutter will improve drainage conveyance. Curb and gutter will enhance the aesthetics of the Property.

Street lighting and sidewalks will enhance the aesthetics of the Property and make the Property safer for its current and future customers, suppliers and employees.

Adding lanes of travel to the roadway abutting the Property and access control in the vicinity of the Property via a median and traffic signal will reduce congestion, improve traffic flow and improve safety for current and future customers, suppliers and employees while traveling to and from the Property and while being present on the Property.

The municipal water main will provide fire protection with the installation of fire hydrants, which will improve safety, as well as, potentially lower casualty insurance rates. The municipal water main will provide access to increased water volumes that are desirable for future development.

Drainage conveyance will be improved by improved grading of the Property's frontage and addition of improved drainage facilities in proximity to the Property.

Appx. 11-12.

The City's discovery responses also confirmed the methodology employed in determining the assessed amount. Appx. 11-26.

II. Circuit Court Properly Dismissed KJD, LLC's Appeal for Failure to Overcome Presumption

"When a special assessment is challenged in circuit court, a city's findings are presumed correct." *Hubbard v. City of Pierre*, 2010 SD 55, ¶ 16, 784 N.W.2d 499, 506 (citing *Hawley v. City of Hot Springs*, 276 N.W.2d 704, 706 (S.D. 1979)). It is the property owner challenging the special assessment that "has the burden of going forward with evidence sufficient to overcome the presumption" as well as the ultimate burden of persuasion. *Id.* "In the context of rebutting special assessments, this Court has required 'weighty evidence' in that it should be 'strong, direct, clear and positive.'" *Hubbard*, ¶16,

784 NW.2d at 506-06 (quoting *Hawley*, 276 N.W.2d at 705)). "[M]ere assertions, implausible contentions, and frivolous avowals will not avail to defeat a presumption." *Id.*

During the July 2023 Hearing, KJD, LLC didn't call any witnesses to testify and didn't offer any evidence into the record that challenged the City of Tea's methodology in finding special benefits conferred upon KJD, LLC. Although KJD, LLC repeatedly cited *Hubbard* and asserted its reliance thereon, KJD, LLC, opted not to follow the special assessment challenge procedure outlined in *Hubbard.* The City of Tea, on the record, vocalized its concern regarding KJD, LLC's procedural position. HT. 6:18-7:4. KJD, LLC maintained that it was intentionally not following *Hubbard*'s procedure because KJD, LLC deemed there to be no factual disputes and that, as is, the matter was ripe for the trial court's appellate consideration. *Id.*

> ATTORNEY JAMES MOORE: ...And the way the case proceeded from my view, we served written discovery on the City and basically said, tell us what you did to determine whether there were special benefits to this property. Um, and Interrogatory #6 had described the methodology used by the City to determine the special benefit to the property. And the answer came back objection the term methodology is vague, ambiguous, and subject to multiple interpretations. Without waiving said objection, no special methodology was utilized to determine special benefits to the property. The direct benefits received by the property as a result of the project were readily apparent and obvious.
>
> So, as I read the discovery answers that were provided by the City, the City made no effort to quantify the special benefit to KJD's property before it imposed the special assessment.
>
> And I understand Mr. Sargent's procedural argument in the context of this appeal. I would note that the *Hubard* case is different because it was started as a declaratory judgment action, and so the rules of civil procedure applied there and, and they ended up with a trial in that case.
>
> We could have proceeded in this case to present testimony to the court.

THE COURT: Right.

ATTORNEY JAMES MOORE: Based on factual disputes, but my position is that there are no factual disputes here because the City simply didn't undertake what was necessary to determine whether there's a special benefit to the property. The findings that the city included in its resolution essentially say in conclusionary fashion all of these things indicate there's a benefit to the property, but that isn't the end of the question.

HT. 6:2-7:8.

The interrogatory referred to and read by KJD, LLC in support of its position was not read in full.

ATTORNEY CLINT SARGENT: ...The interrogatory went on to say that the cost of the benefits provided to the property far exceeded the amount of the special assessments, see answers to Interrogatory #22 and 23, where it said, that the square foot cost of the improvements cost $834 per square foot, and the assessments only $91 per square foot. So, that is part of the methodology that we provided $834 worth of improvement and only charged $91.

The Interrogatory goes on to say that the benefits provided to the property have consistently increased the market values of the other properties within the city limits see answer to Interrogatory #21. And in that interrogatory it recites that the special assessment to the property for the adjacent roadway and the utility improvements is based on the equivalent cost and the project's construction year dollars to construct a local city street with standard sized municipal utilities which would be a required cost of any property within the city limits. Similar costs are regularly incurred by developers and property – of property within the city limits and increase market value due to installation of a local city street and utility infrastructure is consistently reflected in the increased post-development sales price.

So, I bring that all up just to point out that there was a methodology. It wasn't some special methodology for this particular property, but the City of Tea has a methodology. They went through it and so that, that's the basis, um, for it, the factual disputes.

HT. 9:12-10:14

Despite the *Hubbard* Court's explicit requirement for "weighty evidence" that is "strong, direct, clear and positive" to rebut the presumption, KJD, LLC pointed only to discovery responses in the separate condemnation action (41CIV20-367). HT. 7:18-8:2.

> ATTORNEY JAMES MOORE: Again, based on the facts here, Your Honor, it's our position that the city did not conduct any specific valuations related to the property for purposes of determining, um, the – whether there were special benefits to the property as a result of the, um, the road project.
>
> The findings that the City made are essentially, are essentially conclusions, and even if you accept them on an evidentiary basis, um, you're left with the problem that they show a benefit to the property, but not the amount of the benefit. And without knowing the amount of the benefit, without quantifying that, there's no way to compare the benefit to the assessment. And without doing that you can't answer the constitutional questions.
>
> So, um, at, at the end of the day, Your Honor, and this is consistent, with what I argued earlier, the City's findings are insufficient as a matter of law. What the City did, and this is in the interrogatory answers that Mr. Sargent referred to in paragraphs twenty-two and twenty-three, is it allocated the cost of the project on a per lineal foot basis and said, well, we think, the project cost far more than we're assessing, therefore, um, we've satisfied our constitutional obligation. I think that's foreclosed as a matter of law by the *Hubbard* case. And, again, the cost of the project does not establish the value of the benefit to the property assuming that there is a benefit.
>
> ...
>
> You have to measure the benefit to the property from the project. You can't do that by simply allocating the cost of the project, and there's no evidence in this case that the City made any effort to quantify the special benefit to the, to the property.
>
> So, even if you disregard the appraiser's opinions in this case, which I don't think you should do, or are required to do, there's still no evidence that the City undertook any evidentiary analysis of the value of the benefit to the property that is not tied to the cost of the project, and that's legally insufficient.

HT. 14:25-16:23.

The City of Tea reminded the Court that its findings are presumed correct and that it was KJD, LLC's burden to bring forward contrary evidence. HT. 17:7-9. The City then

walked the Circuit Court through the *Hubbard* analysis and its parallel application in the April 2021 Resolution. HT. 17:16-18:16.

> ATTORNEY CLINT SARGENT: But let me comment on in response to this continued comment that the City did nothing to try and measure whether there was a benefit. That's not accurate. There is evidence provided and actually filed by the appellant in our interrogatory answers. Interrogatory answer #21 states what the methodology was, and the basis for it. That, that the City went, and they determined that they were going to charge one-eighth of the cost, the $91 rather than the 800 and some dollars because in their experience what they had seen in their community was when developers put in similar type improvements that they saw an increased market value at a similar rate. That is a, ah, that's a methodology, that's a factual consideration and that's all that's required. Right. We're, city councils aren't like judges, right. They don't have to have a trial about every single property when they're, when they're doing an assessment, that would break down the whole legislative process, right. They just have to have a basis, and, and it has to be not arbitrary, not capricious, it has to be a foundation, and they have one, and there's no evidence that's been presented to this court that they didn't do that. That that was flawed, that it was incorrect, that, that, that methodology and that conclusion is wrong.

HT. 18:17-19:24.

Consistent with both *Hubbard* and *Hawley*, the trial court properly ruled that KJD, LLC did not overcome the presumption.

> THE COURT: In looking at the answer that was articulated and argued by Mr. Sargent regarding Interrogatory answer #21, and the methodology used regarding the one-eighth and the $91 that they've seen being applied inconsistent with, a, with it being consistent with their experience with developers and the improvement and the increase in the market value and similar, ah, similar rates, that is an articulation of what would be, what this court would consider to be a factual determination.
>
> I understand that some of the argument of Mr. Moore indicating that there are conclusory statements made in the resolution, however with the interrogatory that was read into the record of course by Mr. Sargent, I believe that there is a basis for that, and because of that I do think that in looking at the presumption, the presumption has not been overcome, and so the presumption means that the resolution is valid on its face, and so because of that I have to deny the request to go ahead and have this resolution remanded back to the City of Tea for factual findings and a declaration of its unconstitutionality.

HT. 21:19-22:13.

KJD's refusal to acknowledge, much less evidentiarily challenge, the articulated benefits conferred upon KJD, all of which is spelled out in the Resolutions' text and the exchanged discovery, doesn't invalidate the City's analysis, nor the special benefits. Appellant's assertion that the absence of "specific valuations" renders the special assessment unconstitutional ignores both *Hubbard* and *Hawley*. "To determine special benefits solely on the basis of the increase in the current market value results in too inflexible a standard by which to judge the special benefits accruing to the affected property." *Hawley v. City of Hot Springs*, 276 N.W.2d 705, 706 (S.D. 1979). Although the City of Tea's specific findings included enhanced property value and change from highest and best use from rural to urban, such are only two of the nine findings of special benefits conferred upon abutting property owners.

KJD, LLC's "mere assertions, implausible contentions, and frivolous avowals" do not and cannot overcome the presumption. *Hubbard*, ¶ 16, 784 N.W.2d at 505-06. At a minimum, KJD's eyes wide shut approach underscores the specificity and procedural adherence employed by the City of Tea.

Absence of evidence provided by KJD, LLC does not rob the Circuit Court of its fact-finder role. This Court must defer to the lower court's factual determination that KJD, LLC failed to "prove by clear and convincing evidence that the City of Tea's findings in support of its assessment are not correct" and affirm the trial court's Judgment. C.R. 397.

III. SDCL § 15-6-36(b) Prohibits Discovery Responses from Condemnation Action 41CIV20-387 From Consideration; "Scope of the Project Rule" Prohibits Condemnation Appraisals

On appeal, KJD, LLC points this Honorable Court to SDCL § 15-6-36(b) - asserting that the City of Tea's admission re: no special benefits in the condemnation action conclusively establishes there can be no special benefit to KJD, LLC in this separate matter. Appellant's Brief, pg. 12. Declaring, as a result, "the [City of Tea's] assessment is necessarily unconstitutional." Appellant's Brief, pg. 12.

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of § 15-6-16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining his action or defense on the merits. *Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.*

SDCL § 15-6-36(b) (emphasis supplied).

Nowhere in KJD, LLC's Appellant's Brief does it include SDCL § 15-6-36(b)'s full statutory language. Nor is the last sentence mentioned, acknowledged, or analyzed. The City of Tea's admission in the condemnation action is statutorily prohibited from consideration in this, or any other, matter. SDCL §15-6-36(b).

There is a distinct difference between statutory interpretation and statutory subterfuge. The latter is sanctionable.

In addition to SDCL § 15-6-36(b)'s admissions limitation, the "scope of the project/project influence," which recognizes that specific rules of valuations are placed upon the parties and appraisers in eminent domain cases, also restricted admissions from the condemnation action from being considered in this matter.

The federal uniform policy on real property acquisition practices dictates that any "increase or decrease in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired ... will be disregarded in determining the compensation for the property." 42 U.S.C. § 4651(3). Moreover, the South Dakota Supreme Court has adopted the scope of the project test as set forth in *United States v. Reynolds,* 397 U.S. 14 (1970). "The *Reynolds* test states: '[I]f the "lands were probably within the scope of the project from the time the Government was committed to it" no enhancement in value attributable to the project is to be considered in awarding compensation.'" *City of Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 42, 588 N.W.2d 904, 912–13 (quoting *Reynolds*, 397 U.S. at 21). Thus, our state and federal rules governing valuation of property for condemnation purposes prohibit the consideration of enhanced value to all property in the vicinity of the City's improvement when appraising the property.

Due to the scope of the project/project influence rule, it would have been improper for the trial court to consider the eminent domain appraisals. However, given that KJD, LLC never offered them as evidence at the July 2023 Hearing, any further characterization of the appraisals as "weighty evidence" improperly ignored by the trial court is misplaced.

Just as the City of Tea's admissions and appraisals from the condemnation action had no place in the Circuit Court appeal, they also have no place here. KJD, LLC chose to offer no evidence to rebut the presumption that the City of Tea's special tax assessment was constitutional. As a result, the Circuit Court's ruling that KJD, LLC failed to provide clear and convincing evidence to meet its burden and overcome the presumption should be affirmed.

IV. Circuit Court Correctly Confirmed "Price-Per-Foot" Special Assessment's Constitutionality

> After investigation by the governing body to determine the amount of benefit from construction of the local improvement to the lots and tracts fronting or abutting the improvement, the amount to be assessed against each lot for any local improvement for which special assessments are to be levied may be determined by dividing the total cost of the improvement by the number of feet fronting or abutting the improvement, and the quotient may be assessed per front foot upon the property fronting or abutting the improvement. If any of the property assessed is outside of municipal boundaries, the amount levied and assessed may not be collected unless the property has been annexed into the municipality.

SDCL § 9-43-78.

After it memorialized the special benefits conferred upon KJD, LLC and other property owners, the Resolution categorized each tract based upon its receipt of certain services and locations before assessing a price per foot. Appx.4-9. The City's discovery answers and discussion at the Hearing further illustrated the City's employed methodology and the City's special benefits determination. HT. 18:17-19:24; Appx. 11-26.

Despite Appellant's assertions to the contrary, nothing in the plain reading of the statute or its supporting case law supports defining "amount" as "market valuation" when applied to benefits. The "price-per-foot" special assessment employed by the City of Tea is constitutionally and statutorily permissible. *Hubbard*, ¶ 13, 784 N.W.2d at 505; SDCL

§ 9-43-78. The Circuit Court's conclusion that the City of Tea's "price per foot" special assessment was constitutional and valid should be affirmed.

V. Conclusion

As the challenging property owner, KJD, LLC bore the burden to bring forth evidence to overcome the presumption that the City's special benefits findings in Resolution #21-04-04, Resolution of Necessity were correct. No such evidence, weighty or otherwise, was proffered by KJD, LLC. "Mere assertions, implausible contentions, and frivolous avowals" are insufficient to overcome the presumption. *Hubbard*, ¶ 1, 784 N.W.2d at 505-06. Consistent with *Hubbard*, the Circuit Court properly declared that KJD, LLC did not overcome the presumption. The Circuit Court's ruling that the City of Tea's Resolution #21-04-04, Resolution of Necessity was constitutional – including the "price per foot" allocation – should be afforded complete deference by this Court. *Hubbard*, ¶ 26, 784 N.W.2d at 511.

Appellee respectfully requests that this Court affirm the Circuit Court's Judgment and deny all relief sought by Appellant.

Respectfully submitted this 19th day of January, 2024.

Clint Sargent
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellee's Brief and all appendices were filed online and served upon:

James E. Moore
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On this 19th day of January, 2024.

Raleigh Hansman

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,373 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 19th day of January, 2024.

Raleigh Hansman

MEIERHENRY SARGENT LLP

APPENDIX

Tab 1 - 2023-06-22 Affidavit of Clint Sargent with Exhibit A – *City of Tea Resolution #21-04-04, Resolution of Necessity*.....Appx. 1-10

Tab 2 - Appellee's Answers to Appellant's Interrogatories, requests for Admissions, and Requests for Production of Documents (First Set)....Appx. 11-26

Tab 1

STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
KJD, LLC, Appellant, v. CITY OF TEA, SOUTH DAKOTA, Appellee.	41CIV21-000563 **AFFIDAVIT OF CLINT SARGENT**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Clint Sargent, being first duly sworn, deposes and says as follows:

1. I am the attorney for the City of Tea, South Dakota. I have personal knowledge of the facts stated in this affidavit.
2. Attached as Exhibit A is a true and correct copy of City of Tea, Resolution #21-04-04, Resolution of Necessity.

Dated this 22nd day of June 2023.

Clint Sargent
MEIERHENRY SARGENT LLP
315 South Phillips Avenue
Sioux Falls, SD 57104-6318
(605) 336-3075
clint@meirhenrylaw.com

Subscribed and sworn to before me this 22nd day of June, 2023.

Notary Public – South Dakota
My commission expires: 09-11-2024

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon:

James Moore
Woods, Fuller, Shultz & Smith P.C.
james.moore@woodsfuller.com

Dated this 22nd day of June 2023.

Meierhenry Sargent LLP

/s/ Clint Sargent
Clint Sargent
clint@meierhenrylaw.com
315 South Phillips Avenue
Sioux Falls, SD 57104

Exhibit A

CITY OF TEA
RESOLUTION 21-04-04
RESOLUTION OF NECESSITY

WHEREAS, The City of Tea has proposed Resolution of Necessity #21-03-03 for improvements to Lincoln County Highway 106 aka Gateway Boulevard and Katie Rd; and

WHEREAS, the City of Tea has published and mailed said notices as required by South Dakota Codified Laws; and

WHEREAS, the City has considered the character of the improvements, the situation, the surrounding conditions, and whether the substantial benefits to be derived from the improvements are local or general in their nature; and

WHEREAS, the City has calculated the portion of the improvements which confers a local special benefit and the general benefit and advantage on the property of the whole community.

NOW THEREFORE BE IT RESOLVED that the City finds the following:

- The project will make the property abutting the project a better place in which to conduct business.
- The property will only be assessed the costs for the special benefit of the improvements.
- The adjacent property will receive a special benefit by changing the properties highest and best use from rural in character to urban.
- The improvement will provide easier access to the abutting properties.
- The improvements will provide a special benefit to the assessed properties by improving and enhancing the aesthetics and safety, thus enhancing the value, use, and enjoyment of the property.
- The improvements will enhance the market value of the properties abutting the improvement.
- The property abutting the improvements receive a special benefit above and beyond that benefit enjoyed by the general public.
- That the value of the special benefit equals or exceeds the special assessment
- Failure to assess property abutting the improvements would result in a windfall to the property owners.

AND WHEREAS, the City of Tea is ready to proceed with the project and again declare the necessity to make the improvements;

NOW THEREFORE BE IT RESOLVED by the City Council of the City of Tea, South Dakota, at a regular meeting thereof held in the meeting room of the City Council in the City of Tea that the convenience and necessity has risen to for the complete reconstruction of Lincoln County Highway 106 (CR106) aka Gateway Boulevard/271st Street beginning approximately 130 feet east of Heritage Parkway and continuing approximately 7,385 feet (1.4 miles) to the intersection with the Exit 73 interchange at Interstate 29 and utility improvements on 191.90 ft of Katie Rd by the following:

- Asphalt surfacing removals, widening the existing roadway to provide additional lanes, installation of utilities (water main, sanitary sewer, sanitary sewer force main casing pipe, and storm sewer), installation of curb & gutter, sidewalks & shared-use path, gravel roadway base, concrete and asphalt surfacing, traffic signals, street lighting, landscaping, and irrigation systems.

BE IT FURTHER RESOLVED that the material to be used in the project shall be according to plans and specifications prepared by engineers for the City of Tea, and on file in the office of the Municipal Finance Officer and open to public inspection and incorporated hereby.

BE IT FURTHER RESOLVED that:

- the cost of $68.50 per foot (street $38.50, Water $14.00 & Sewer $16.00) shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit A
- the cost of $52.50 (street $38.50, Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit B
- the cost of $107.00 (street $77.00, Water $14.00 & Sewer $16.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit C;
- the cost of $91.00 (Street $77.00 and Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit D;
- the cost of $52.50 (Street $38.50 and Water $14.00) per foot shall be assessed against all assessable lots and tracts of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit E;
- the cost of $38.50 (street only) per foot shall be assessed against all accessible lots and tract of land fronting or abutting thereon to each of such lots or tracts listed on Exhibit F.

The total estimated cost of the Project is $16,000,000.00 and that part thereof will be financed by special assessments. The City of Tea will pay the "over size" costs of $14,945,000.00. The total cost shall include the contract price and all engineering, inspection, publication, fiscal, legal and all other expenses incidental thereto.

BE IT FURTHER RESOLVED that the assessments for the properties marked on Exhibits "A & B" will be divided into fifteen (15) equal annual installments, which shall be payable under Plan One, collection by the County Treasurer, as set forth in SDCL §9-43-102, et seq., and that all deferred installments shall bear interest at such rate of one (1) percent per annum.

BE IT FURTHER RESOLVED that the assessment for the properties marked as Exhibits "C" shall be delayed, without interest, and to be paid in full at such time as the property is annexed within the City limits of Tea.

BE IT FURTHER RESOVLED that the assessments for the property marked as Exhibit D shall be delayed, without interest, and to be paid in full at such time the property is annexed into the city limits and a development plan is filed.

BE IT FURTHER RESOLVED that the assessment for the property marked as Exhibit E shall be delayed, without interest, and to be paid in full at such time as a development plan is filed.

BE IT FURTHER RESOLVED that the contractors who undertake to perform the work of construction herein provided for shall be paid in cash from City surplus, the sale of Special Assessment Bonds, Sales Tax Revenue Bonds and a Federal Highway Administration Build Grant.

Dated this 5th day of April, 2021

John M. Lawler, Mayor

ATTEST:

Dawn R. Murphy, Finance Officer

CITY OF TEA CORPORATE SEAL SOUTH DAKOTA

EXHIBIT A (ANNEXED. STREET, WATER & SEWER $68.50 PER FOOT)	
Donald F. Seubert and Jeanne A. Seubert, Trustees of the Donald F. Seubert Living Trust	Lot B, Town of Bucksnort in the SW1/4 of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Alcoba, LLC	Lot 1C in Block 5 Kerslake 2nd Addition in the South Half of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Keith R.E. Johnson & A Lane, LLC	The West 150 feet of Lot 1, Block 1 of Kerslake Second Addition in the South Half of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Heirigs Properties, LLC	Tract A of Lot 1, Block 1 of Kerslake 2nd Addition in the S1/2 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
JB IV, LLC	The W1/2 of Lot 1A in Block 2 of Kerslake Addition in the W1/2 SE1/4 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
JB IV, LLC	The E1/2 of Lot 1A in Block 2 of Kerslake Addition in the W1/2 SE1/4 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Eric & Jane Juhl	The West 95 feet of Lot 1 and the East One-half (E1/2) of Lot 2, Block 1, Kerslake Addition in the West One-half (W1/2) of the Southeast Quarter (SE1/4) of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Eric & Jane Juhl	Lot 1, except the West 95 feet thereof, Block 1, Kerslake Addition in the West Half of the Southeast Quarter of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Judith H Kuzeppa and Michael Kuzeppa	Kerslake Tract 1 in the W1/2 SE1/4 of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Richard Peters & Roxanne Peters	Lot 2 of the Subdivision of Tract 1A, except the North 280 feet thereof, of the Southwest Industrial Park in the E1/2 SE1/4 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Rima R. Hanna Trust	The South Half of Tract 1B, Southwest Industrial Park in the E1/2 SE1/4 of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.

Janice L Margeson	Tract 11 of Southwest Industrial Park in the E1/2 SE1/4 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Pearl Creek Investment, LLC	Tract 10 of Southwest Industrial Park in the E1/2 SE1/4 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.

EXHIBIT B (ANNEXED, STREET & WATER $52.50 PER FOOT)	
Patrick Sweetman	Muellers Tract 1 in the NE1/4 of Section 25, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Nielson Development, LLC	An unplatted portion of the NW1/4 of Section 25, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota. Said Lot H1 containing **9180 sq. ft., more or less.
Sundowner Investments, L.L.C.	Tract 2 of Bakker Landing 1st Addition in Government Lots 1 and 2 of the Northwest Quarter and in Government Lots 1 and 2 in the Southwest Quarter of Section 19, Township 100 North, Range 50 West of the 5th P.M., Lincoln County, South Dakota.

EXHIBIT C (NOT ANNEXED, STREET, WATER, SEWER, DELAYED $107.00 PER FOOT)	
Douglas A. Putnam	Lot 1 of Income Addition in the NW1/4 of Section 25, – Township 100 North, – Range 51 West of the 5th Principal Meridian, Lincoln County, South Dakota.
Gerry Goldammer	Tract 1 of Income Addition in the NW1/4 of Section 25, – Township 100 North, – Range 51 West of the 5th PM, Lincoln County, South Dakota.
Ennis Lund	The W1/2 of Lot 2, Block 1, Kerslake Addition in the W1/2 of SE1/4 of Section 24, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.
KJD, LLC	Tract 36, except Lot A in Sky Haven Heights Addition in the NW1/4 of Section 30, Township 100 North, Range 50 West of the 5th P.M., Lincoln County, South Dakota.
G.P. Enterprises, Inc.	Lot 1 of Tract 18 in Sky Haven Heights in the NW1/4 of Section 30, Township 100 North, Range 50 West of the 5th P.M., Lincoln County, South Dakota.
G.P. Enterprises, Inc.	Lot 2, except Lot H2 in Lot 2, of Tract 18 of Sky Haven Heights in the Northwest Quarter of Section 30, Township 100 North, Range 50 West of the 5th P.M., Lincoln County, South Dakota.

G.P. Enterprises, Inc.	Lot 17A and 17B of the Subdivision of Tract 17 of Sky Haven Heights in the NW1/4 of Section 30, – Township 100 North, – Range 50 West of the 5th P.M., Lincoln County, South Dakota.
David Welch & Kimberly Welch	Lot A, Town of Bucksnort in the SW1/4 of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Lincoln County	Airport Tract 1A of Sky Haven Heights in the NW1/4 of Section 30, Township 100 North, Range 50 West of the 5th P.M., Lincoln County, South Dakota.

EXHIBIT D (NOT ANNEXED, STREET, WATER, DELAYED $91.00 PER FOOT)	
Ricky Mueller	The West 1,557 feet of the NE1/4 of Section 25, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.

EXHIBIT E (ANNEXED STREET AND WATER/DELAYED $52.50 PER FOOT)	
Ronald Mueller	East 1,083 feet of the NE1/4 of Section 25, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota except Mueller Tract 1 thereof.

EXHIBIT F (ANNEXED STREET ONLY $38.50 PER FOOT)	
OCH Leasing, L.L.C.	Lot 5, Block 1 of Gateway Park Addition to the City of Tea, Lincoln County, South Dakota.
Tea Hospitality, L.L.C.	Lot 1, Block 1 of Gateway Park Addition to the City of Tea, Lincoln County, South Dakota.
Olsen Commercial Holdings, L.L.C.	Tract 1 of Jongeling's Addition, except Lot 1 and 5 in Gateway Park Addition in the Northwest Quarter of Section 25, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
East River Electric Power Cooperative, Inc.	The Westerly 50 Feet of BNSF Railway Company's (fka Great Northern Railway Company) 100 Foot Wide Sioux Falls to Irene, South Dakota Branch Line Right Of Way, now discontinued, located upon, over and across the SW 1/4 of Section 24, Township 100 North Range 51 West & Lot 12 in Block 5 of Kerslake's 2nd Addition in the S1/2 of Section 24, T100N, R51W of the 5th P.M., Lincoln County, South Dakota.

G.P. Enterprises, Inc.	Lot 17A and 17B of the Subdivision of Tract 17 of Sky Haven Heights in the NW1/4 of Section 30, – Township 100 North, – Range 50 West of the 5th P.M., Lincoln County, South Dakota.
David Welch & Kimberly Welch	Lot A, Town of Bucksnort in the SW1/4 of Section 24, Township 100 North, Range 51 West of the 5th P.M., Lincoln County, South Dakota.
Lincoln County	Airport Tract 1A of Sky Haven Heights in the NW1/4 of Section 30, Township 100 North, Range 50 West of the 5th P.M., Lincoln County, South Dakota.

EXHIBIT D (NOT ANNEXED, STREET, WATER, DELAYED $91.00 PER FOOT)	
Ricky Mueller	The West 1,557 feet of the NE1/4 of Section 25, – Township 100 North, – Range 51 West of the 5th P.M., Lincoln County, South Dakota.

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City of Tea
Regular Meeting
April 5, 2021

A regular meeting of the Tea City Council was held at Tea City Hall on April 5, 2021 at 7:00 p.m.

Mayor John Lawler called the meeting to order at 7:00 pm, with the following members present: Jim Erck, Sidney Munson, Casey Voelker, Chuck Ortmeier and Joe Weis. Also present: Finance Officer Dawn Murphy, Planning & Zoning Administrator Kevin Nissen and City Administrator Dan Zulkosky.

AGENDA. MOTION 21-39. MOTION by Weis, seconded by Ortmeier to approve the April 5, 2021 agenda. All members voted AYE.

CONSENT AGENDA. MOTION 21-40. MOTION by Munson, seconded by Erck to approve the following consent agenda items:

1) Approval of March 15, 2021 Minutes
2) Approval of March 15 Local Review Board Minutes
3) Approval of April 5, 2021 Claims (claims will be listed at the end of the minutes)
4) Approval of Police Officer Vance Siemonsma's resignation/retirement effective April 1, 2021

All members voted AYE.

There were no public comments.

PUBLIC HEARING. Mayor Lawler opened the public hearing for Proposed Resolution of Necessity 21-03-03, Gateway Boulevard Special Assessments. City Administrator Dan Zulkosky reviewed changes made to the proposed resolution. Property owners Gerry Goldhammer, Doug Putnam and James Moore representing KJD LLC were present to object to the special assessment.

RESOLUTION 21-04-04. MOTION 21-41. MOTION by Munson, seconded by Voelker to approve the Resolution of Necessity 21-04-04 Gateway Boulevard Project with the amendments as discussed and removing Jongeling Tract 4 due to it not being listed on the proposed resolution. All members voted AYE. The resolution will be published separately.

BUILDING PERMIT. Keven presented a building permit for a new car wash at 800 Gateway Lane. **MOTION 21-42. MOTION** by Erck, seconded by Munson to approve Building Permit #21-52 for Impact Construction/Advanced Auto Sa Car Wash to construct a car wash at 800 Gateway Lane. All members voted AYE.

2ND READING OF ORDINANCE 285. The council held the second reading of Ordinance 285. **MOTION 21-43. MOTION** by Voelker, seconded by Weis to approve and adopt Ordinance 285, An Ordinance of the City of Tea, SD Rezoning Ma's and Pa's Addition, Legally Known as Lots 1, 1A, 2, 2A, 3 and 3A, Block 1 Ma's and Pa's Addition in the City of Tea from Ag-Agriculture to R1-Residential District and Amending the Official Zoning Map of the City of Tea. All members voted AYE. The ordinance will be published separately.

PAY APPLICATION. MOTION 21-44. MOTION by Weis, seconded by Ortmeier to approve pay application #7, $57,600.00 to Maguire Iron for the 85th St. Elevated Water Storage Tank Project. All members voted AYE.

MOTION 21-45. MOTION by Weis, seconded by Ortmeier to adjourn at 7:42 pm. All members voted AYE.

John M. Lawler, Mayor

ATTEST:

Dawn R. Murphy, Finance Officer
Published once at the approximate cost of $_____.

CITY OF TEA CORPORATE SEAL SOUTH DAKOTA

Tab 2

STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
KJD, LLC Appellant, v. CITY OF TEA, SOUTH DAKOTA. Appellee.	41CIV20-000367 **APPELLEE'S ANSWERS TO APPELLANT'S INTERROGATORIES, REQUESTS FOR ADMISSIONS, AND REQUESTS FOR PRODUCTION OF DOCUMENTS (FIRST SET)**

1. State the full name and the current address, phone number, and occupation of the person answering these interrogatories.

ANSWER: Dan Zulkosky, City Administrator, City of Tea

2. Identify each person providing or furnishing any information you relied on in preparing answers to these interrogatories, and identify the answers with respect to which you received assistance.

ANSWER: The following individuals all provided information in answering these discovery requests:

Clint Sargent, Attorney for City of Tea
Todd Meierhenry, Attorney for City of Tea
John Lawler, Mayor, City of Tea
Dan Zulkosky, City Administrator, City of Tea
Dawn Murphy, City Finance Officer, City of Tea
Ben Scholtz, HDR

3. What special benefit, if any, does the City of Tea allege that the property located at 27108 470th Avenue in Tea, SD, (the "Property") received or will receive as a result of the Gateway Boulevard Reconstruction Project (the "Project")?

ANSWER: **The Property has or will receive the following benefits from the Project:**

The rural county road abutting the Property will be replaced with an urbanized multi-lane municipal roadway. The new roadway will include additional lanes of travel, curb and gutter, street lighting, sidewalks, access control, a municipal water main and improved drainage conveyance.

Curb and gutter will make the Property safer by creating a barrier that keeps vehicle traffic within the roadway and off of the Property. Curb and gutter will improve drainage conveyance. Curb and gutter will enhance the aesthetics of the Property.

Street lighting and sidewalks will enhance the aesthetics of the Property and make the Property safer for its current and future customers, suppliers and employees.

Adding lanes of travel to the roadway abutting the Property and access control in the vicinity of the Property via a median and traffic signal will reduce congestion, improve traffic flow and improve safety for current and future customers, suppliers and employees while traveling to and from the Property and while being present on the Property.

The municipal water main will provide fire protection with the installation of fire hydrants, which will improve safety, as well as, potentially lower casualty insurance rates. The municipal water main will provide access to increased water volumes that are desirable for future development.

Drainage conveyance will be improved by improved grading of the Property's frontage and addition of improved drainage facilities in proximity to the Property.

4. Identify by name, address, and title each person involved in any investigation the City conducted into whether the Project will specially benefit the Property.

ANSWER: **Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.**

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

5. State the date the investigation was started and when it concluded.

ANSWER: **Preliminary design for the project corridor (Phases 1&2) was initiated between the City of Tea and HDR, Inc. in April 2015. (Phase 1 of the corridor was located west of Heritage Parkway, Phase 2 of the corridor is located east of Heritage Parkway). Final Design for Phase 1 began in August 2016 and was completed in November 2017. Phase 1 was constructed in (February – November) 2018. Final Design for Phase 2 began in June 2019 and was completed in November 2020. Phase 2 began construction in March 2021 and is currently ongoing.**

6. Describe the methodology used by the City to determine the special benefit to the Property.

ANSWER: **Objection. The term "methodology" is vague, ambiguous and subject to multiple interpretations. Without waiving said objection, no special "methodology" was utilized to determine special benefits to the property. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

7. Identify by name, address, and title, the person who drafted the City of Tea Resolution 21-03-03 (the "Resolution").

ANSWER: **City Attorney Todd Meierhenry in consultation with City Finance Officer Dawn Murphy, City Administrator Dan Zulkosky, and Mayor John Lawler.**

8. In the Resolution, the City found: "The project will make the property abutting the project a better place in which to conduct business." Describe the evidence on which the City based this finding, and identify by name, address, and title each person with knowledge supporting the finding.

ANSWER: **See Answer to Interrogatory 3 regarding benefits to the Property.**

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

9. In the Resolution, the City found: "The adjacent property will receive a special benefit by changing the properties [sic] highest and best use from rural in character to urban." Describe the evidence on which the City based this finding, and identify by name, address, and title each person with knowledge supporting the finding.

ANSWER: **See Answer to Interrogatory 3 regarding benefits to the Property.**

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

10. Did the City calculate the value of the Property's allegedly changed highest and best use? If so, what is that value, and how did the City calculate it?

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

11. In the Resolution, the City found: "The improvement will provide easier access to the abutting properties." Describe the evidence on which the City based this finding, and identify by name, address, and title each person with knowledge supporting the finding.

ANSWER: **See Answer to Interrogatory 3 regarding benefits to the Property.**

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

12. Describe the evidence, and identify by name, address, and title each witness that support the finding referred to in interrogatory number 11 with respect to the Property.

ANSWER: **See Answer to Interrogatory 3 regarding benefits to the Property.**

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

13. Did the City calculate the value of the Property's allegedly improved access? If so, what is that value, and how did the City calculate it?

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

14. In the Resolution, the City found: "The improvements will provide a special benefit to the assessed properties by improving and enhancing the aesthetics and safety . . . ." Describe the evidence on which the City based this finding, and identify by name, address, and title each person with knowledge supporting this finding.

ANSWER: **See Answer to Interrogatory 3 regarding benefits to the Property.**

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

15. Did the City calculate the value of the Property's allegedly enhanced aesthetics and safety? If so, what is that value, and how did the City calculate it?

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

16. In the Resolution, the City found: "The improvements will enhance the market value of the properties abutting the improvement." Describe the evidence on which the City based this finding, and identify by name, address, and title each person with knowledge supporting this finding.

ANSWER: **See Answer to Interrogatory 3 regarding benefits to the Property.**

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

City Finance Officer Dawn Murphy
City Administrator Dan Zulkosky

Mayor John Lawler

City Attorney Todd Meierhenry

Members of the Tea City Council

It is within the general knowledge and experience of the aforementioned persons based on their various business experiences and knowledge obtained through public service that properties abutting and accessing an urbanized multi-lane municipal roadway with curb and gutter, street lighting, sidewalks, access control, municipal water mains and urban drainage conveyances have a higher fair market value than properties abutting rural county roads.

17. Describe what investigation, if any, the City conducted into the Property's pre-Project market value.

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

18. Describe what investigation, if any, the City conducted into the Property's anticipated post-Project market value.

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

19. Identify any appraisals or other valuation opinions the City obtained supporting the proposition that the Project improvements will enhance the market value of the Property.

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

20. State the total value of the alleged special benefit to the Property as determined by an appraiser or other valuation expert, and identify the appraisal or other valuation or expert on whose testimony the City relies.

ANSWER: **The City did not conduct any specific valuations related to the Property for special assessment purposes. The direct benefits received by the Property as a result of the Project (See Answer to Interrogatory No. 3) were readily apparent and obvious. The cost of the benefits provided to the Property far exceeded the amount of the special assessment to the Property. (See Answers to Interrogatory No. 22 & 23). The benefits provided to the Property have consistently increased the market values of other properties within the city limits. (See Answer to Interrogatory No. 21).**

21. Explain the relationship between the Property's enhanced market value due to the Project and the amount specially assessed, i.e., $61,623.

ANSWER: **The special assessment to the Property for the adjacent roadway and utility improvements is based on the equivalent cost (in the project's construction year dollars) to construct a local city street with standard sized municipal utilities, which would be a required cost of any property within the city limits. Similar costs are regularly incurred by developers of property within the city limits and the increase in fair market value due to installation of a local city street and utility**

infrastructure is consistently reflected in the increased post-development sales prices.

22. In the Resolution, the City's special assessment of $61,623 reflects $91.00 per foot over the Property's approximately 677 feet of frontage. State the facts supporting this calculation, the methodology by which it was determined, and the name, address, and title of each person the City relied on for the calculation and methodology.

ANSWER: **Refer to details included in Land Owner Handout Annexation and Assessment FAQ sheet and details in the last bullet on the first page of the City of Tea's Resolution 21-03-03 respective to assessment rates applicable to properties listed in Exhibit D. Typical assessment rates were reduced for the Project as a result of contributions to the Project by Lincoln County and the Project's receipt of some funding from a federal BUILD grant.**

Front footage length was determined by reviewing the Property's platted boundaries with recorded information in the Lincoln County Register of Deed's office. Assessment for front footage is only applied where complete roadway improvements are implemented adjacent to a property and does not include the length of any transitions to other adjacent infrastructure.

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

23. State the total cost of improving the Property's 677 feet of frontage. State the facts supporting this calculation, the methodology by which it was determined, and the name, address, and title of each person the City relied on for the calculation and methodology.

ANSWER: **Total Cost to improve the property's assessable front frontage is approximately $564,702. This cost was determined by dividing the total project length (approximately 7,640 feet) by the total project cost, less the costs of landscaping, fencing, sanitary sewer, and structures ($13,989,102 - $279,332 - $18,223 - $855,982 - $90,147 = $12,745,418) equating to approximately $1,668 per foot (divided by 2 for each ½ of the roadway equals $834 per foot) and multiplying by**

the property's assessed front footage of 677 feet. The awarded project bid amount was used to determine these costs.

$834 per foot of infrastructure is being installed adjacent to the Property with an assessment of only $91 per foot.

Jason Kjenstad & Ben Scholtz (HDR Engineering, Inc. 101 S. Phillips Avenue, Suite 401 Sioux Falls, SD 57104) contracted Engineer of record for the City of Tea.

REQUESTS FOR ADMISSIONS

Appellant requests Appellee, pursuant to SDCL § 15-6-36(a), to admit to the truth of the following statements:

1. That the appraisal report that the City of Tea obtained from Travis Shaykett dated March 26, 2020, for the Property does not indicate any special benefit to the Property from the Project.

ANSWER: Objection. The appraisal by Travis Shaykett dated March 26, 2020, was done for condemnation purposes. Benefits derived from a project may only be considered in certain rare circumstances when valuing the just compensation owed as a result of a condemnation. The South Dakota Supreme Court has defined the term "benefits" within the meaning of SDCL §§ 21-35-17 and 31-19-17 as follows: "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement and that, though the benefits to various landowners affected may differ in degree, it is not the degree of benefit that controls." *State Highway Comm'n on Behalf of State v. Emry*, 90 S.D. 587, 596–97, 244 N.W.2d 91, 96 (1976). Special benefits for assessment purposes may be the same for all landowners affected by the project and may exist even if there is no exact or actual monetary benefit. *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 15, 784 N.W.2d 499, 506. Without waiving and subject to the foregoing objection, City admits Shaykett did not indicate any special benefit to the Property in his appraisal report.

2. That the appraisal report that the City of Tea obtained from Travis Shaykett dated March 26, 2020, for the Property does not indicate that the Project enhances the market value of the Property after completion of the Project.

ANSWER: Objection. The appraisal by Travis Shaykett dated March 26, 2020, was done for condemnation purposes. Benefits derived from a project may only be considered in certain rare circumstances when valuing the just compensation owed as a result of a condemnation. The South Dakota Supreme Court has defined the term "benefits" within the meaning of SDCL §§ 21-35-17 and 31-19-17 as follows: "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement and that, though the benefits to various landowners affected may differ in degree, it is not the degree of benefit that controls." *State Highway Comm'n on Behalf of State v. Emry*, 90 S.D. 587, 596–97, 244 N.W.2d 91, 96 (1976). Special benefits for assessment purposes may be the same for all landowners affected by the project and may exist even if there is no exact or actual monetary benefit. *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 15, 784 N.W.2d 499, 506. Without waiving and subject to the foregoing objection, City admits Shaykett's appraisal report does not indicate that the Project enhances the market value of the Property.

3. That the City of Tea stated in answers to interrogatories in *City of Tea, South Dakota v. KJD, LLC*, 41Civ. 20-000367 (Lincoln County, 2d Jud. Cir.), that the Project improvements do not benefit the Property within the meaning of SDCL § 21-35-17.

ANSWER: Objection. The South Dakota Supreme Court has defined the term "benefits" within the meaning of SDCL §§ 21-35-17 and 31-19-17 as follows: "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement and that, though the benefits to various landowners affected may differ in degree, it is not the degree of benefit that controls." *State Highway Comm'n on Behalf of State v. Emry*, 90 S.D. 587, 596–97, 244 N.W.2d 91, 96 (1976). Special benefits for assessment purposes may be the same for all landowners affected by the project and may exist even if there is no exact and actual monetary benefit. *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 15, 784 N.W.2d 499, 506. Without waiving and subject to the foregoing objection, City admits that the Project improvements do not benefit the Property within the meaning of SDCL § 21-35-17.

4. That the appraisal report that the City of Tea obtained from Travis Shaykett dated March 26, 2020, indicates that the highest and best use of the Property is the same before and after the Project.

ANSWER: Objection. The appraisal by Travis Shaykett dated March 26, 2020, was done for condemnation purposes. Benefits derived from a project may only be considered in certain rare circumstances when valuing the just compensation owed as a result of a condemnation. The South Dakota Supreme Court has defined the term "benefits" within the meaning of SDCL §§ 21-35-17 and 31-19-17 as follows: "for benefits to be deemed special, the benefit to the remaining property must be different in kind from that of any other owner involved in the highway improvement and that, though the benefits to various landowners affected may differ in degree, it is not the degree of benefit that controls." *State Highway Comm'n on Behalf of State v. Emry*, 90 S.D. 587, 596–97, 244 N.W.2d 91, 96 (1976). Special benefits for assessment purposes may be the same for all landowners affected by the project and may exist even if there is no exact or actual monetary benefit. *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 15, 784 N.W.2d 499, 506. Without waiving and subject to the foregoing objection, City admits Shaykett's appraisal report indicates that the highest and best use of the Property is the same before and after the Project.

REQUESTS FOR PRODUCTION

1. All documents supporting the special assessment of $61,623 against the Property.

RESPONSE: See documents produced herewith bates stamped TEA 0001-0045 and spreadsheet titled Assessment Estimate_CR106 (Gateway Blvd)_Phase 2.

2. All appraisal reports or other valuation opinions establishing that the Project enhances the market value of the Property.

RESPONSE: N/A

3. All documents created or relied on by the City in its investigation determining that the Project specially benefits the Property.

RESPONSE: See documents produced herewith bates stamped TEA 0001-0045 and spreadsheet titled Assessment Estimate_CR106 (Gateway Blvd)_Phase 2.

4. All communications with any abutting landowner whose property is affected by the Project explaining the calculation and determination of any special benefit to that landowner's property from the Project.

RESPONSE: See documents produced herewith bates stamped TEA 0001-0045 and spreadsheet titled Assessment Estimate_CR106 (Gateway Blvd)_Phase 2.

5. All non-privileged meeting notes, memoranda, or internal communications related to the creation of the assessment roll.

RESPONSE: See documents produced herewith bates stamped TEA 0001-0045 and spreadsheet titled Assessment Estimate_CR106 (Gateway Blvd)_Phase 2 and audio recording of April 5, 2021.

(remainder of page intentionally left blank)

Dated this 31 day of January, 2022.

Dan Zulkosky
City Administrator, City of Tea

Subscribed and sworn before me
this 31 day of January, 2022.

Notary Public – South Dakota
My Commission Expires: 6/3/25

KEVIN L. NISSEN
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

As to Objections.

Dated this 31st day of January, 2022.

/s/ Clint Sargent
Clint Sargent
MEIERHENRY SARGENT LLP
315 South Phillips Avenue
Sioux Falls, SD 57104-6318
(605) 336-3075
clint@meierhenrylaw.com

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served via Odyssey File and Serve upon:

James Moore
james.moore@woodsfuller.com

Dated this 31st day of January, 2022.

/s/ Clint Sargent
Clint Sargent
MEIERHENRY SARGENT LLP
315 South Phillips Avenue
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30439

KJD, LLC,

Appellant,

v.

CITY OF TEA,

Appellee.

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

THE HONORABLE JOHN PEKAS
Circuit Court Judge

APPELLANT'S REPLY BRIEF

James E. Moore
Christopher A. Dabney
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Attorneys for Appellee

Notice of Appeal Filed August 25, 2023

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Argument 1

1. SDCL § 15-6-36(b) does not preclude consideration of the City's admissions made in this case, which establish that there is no special benefit on which to premise the special assessment. 2

2. The City's failure to pursue any benefit as a reduction to condemnation damages means that as a matter of law there is no special benefit on which to premise the special assessment. 5

3. The City's "findings" are insufficient as a matter of law because the City did not quantify the value of the alleged special benefit. 6

4. Even if the City's conclusory assertions were legitimate factual findings entitled to a presumption of correctness, they are unsupported by any—and opposed by all—valuation evidence in the record. 8

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Argument

In its opening brief, Appellant KJD, LLC, argued as a matter of law that the City of Tea's special assessment is unconstitutional because: (1) the City admitted that the Project does not benefit KJD within the meaning of SDCL § 21-35-17 (Appellant's Br. at 9–12); (2) under SDCL §§ 21-35-17 and 31-19-17, the City's failure to seek a reduction of condemnation damages for an alleged special benefit means there is no special benefit (*id.*); (3) in making its assessment, the City failed to distinguish between special and general benefits (*id.* at 12–13); (4) the City did not quantify the value of the alleged special benefit (*id.* at 13–15); and (5) the Project did not specially benefit KJD because the City's claim that KJD received a special benefit is conclusory and therefore not entitled to a presumption of correctness (*id.* at 15–17). In addition, KJD argued as a matter of fact that no valuation evidence in the record—including the City's appraiser's opinion—indicates that KJD received a special benefit. (*Id.* at 18–19.)

The City does not respond to most of KJD's arguments. Instead, misstating KJD's argument based on the City's admission in this case as relying on the City's similar admission in the condemnation action, the City asks this Court to disregard its admission under SDCL § 15-6-36(b). The City further argues that it is not required to quantify the value of the alleged benefit; the City maintains that the special assessment is constitutional based solely on the same conclusory, nonspecific "findings" it applied to over thirty other properties. (*Id.* at 6–9.) And the City asks the Court to ignore the only valuation evidence in the record—the reports from the City's and KJD's appraisers—based on the inapplicable scope-of-the-project rule. (*Id.* at 15–17.)

The City's failure to respond to KJD's legal arguments, especially those involving SDCL §§ 21-35-17 and 31-19-17, should be dispositive. But there are also problems

with the arguments the City does make. First, the City's invocation of SDCL § 15-6-36(b) is disingenuous because KJD unambiguously relies on the City's admissions from this special-assessment action—not from the condemnation action. Second, the City's claim that it is not required to quantify the value of the alleged special benefit is a misreading of cases that do not so hold but rather state that the quantification need only be a reasonable estimate. Finally, the scope-of-the-project rule, which is a valuation rule that limits *increasing* a condemnation award in certain circumstances, does not apply to—let alone bar—*reducing* a condemnation award for a special benefit.

1. SDCL § 15-6-36(b) does not preclude consideration of the City's admissions made in this case, which establish that there is no special benefit on which to premise the special assessment.

In this case, the City admitted "that the Project improvements do not benefit the Property within the meaning of SDCL § 21-35-17." (R. at 118.) That statute broadly requires that "[i]n all cases of taking or damaging private property by a municipal corporation, the jury shall take into consideration the benefits which may accrue to the owner thereof as the result of the proposed improvement." SDCL § 21-35-17; SDCL § 31-19-17 (same). The only objection the City made in admitting that the Project did not benefit KJD was the suggestion that the term *special benefit* has different meanings in the contexts of condemnation and special assessment. (R. at 118.)

As this Court has noted, "[t]he constitutional analysis of special assessments stems from the constitutional provisions prohibiting the government from taking private property without just compensation." *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 10, 784 N.W.2d 499, 504. It is unsurprising, therefore, that the definition of *special benefit* used in both types of cases is the same. The benefits contemplated by SDCL §§ 21-35-17

and 31-19-17 are "special benefits," which means a benefit that is "different in kind" and not merely degree from any benefit enjoyed by other affected property owners, the "community in general," or the "public in common." *State Hwy. Comm'n ex rel. State v. Emry*, 244 N.W.2d 91, 95–96 (S.D. 1976) (quoting *State Hwy. Comm'n v. Bloom*, 93 N.W.2d 572, 576–77 (S.D. 1958)). Likewise, the Court defines *special benefit* in special-assessment cases as one "differing from the benefit that the general public enjoys." *Hawley v. City of Hot Springs*, 276 N.W.2d 704, 705 (S.D. 1979). In either context, a property owner may be charged for a benefit only if it results from the public project and is unique to the owner's property.

The City's brief does not mention SDCL §§ 21-35-17 and 31-19-17, let alone offer meaningful analysis of them or a response to the City's argument based on them. Nor does the City offer any argument or authority to support the novel theory that the term *special benefit* means different things in the closely related contexts of condemnation and special assessment. The City has abandoned the only qualification it made to its admission that the Project did not benefit KJD.

Instead of responding to KJD's arguments, the City instead attempts to avoid its admission. Invoking SDCL § 15-6-36(b), the City faults KJD for not quoting that statute in its entirety. (Appellee's Br. at 15.) The statute states:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of § 15-6-16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

SDCL § 15-6-36(b). Emphasizing the last sentence, the City argues that its "admission in the *condemnation* action is statutorily prohibited from consideration in this, or any other, matter," and that the City's "statutory subterfuge" is sanctionable. (Appellee's Br. at 15 (emphasis added).)

KJD did not quote the last sentence of SDCL § 15-6-36(b) because it is not relevant. KJD does not rely on the City's admissions from the condemnation action, but on the City's admissions in this assessment action. KJD's brief cites the City's *assessment*-action admissions at least twelve times, including four times for the specific admission at issue here. (Appellant's Br. at 3–4, 11–14, 18.) Each of these citations clearly references the Electronic Record at 107–22, which is the location of "Appellee's Answers to Appellant's Interrogatories, Requests for Admissions, and Requests for Production of Documents (First Set)" in this *assessment* action. Many of these citations are introduced textually by descriptive phrases like: "As the City admitted in a response to KJD's requests for admission *in the present case* …." (Appellant's Br. at 11 (emphasis added).) And if this were not sufficient for the City to understand which admissions were at issue, KJD's brief specifically disclaimed reliance on the City's condemnation-action admissions:

> To clarify, KJD relies on the City's admission in the present action (R. at 118) and not on the City's similar admission in the condemnation action.

(Appellant's Br. at 12 n.3.) The City's argument is contrary to the record and inexplicable.

In this assessment action, KJD submitted requests for admissions. In this assessment action, the City responded by admitting, among other things, that the Project

did not benefit KJD within the meaning of SDCL § 21-35-17. In this assessment action, the City had every opportunity to object. And in this assessment action, the City had every opportunity to withdraw or amend its admissions. Had the City declined to answer, objected in some meaningful way, or withdrew or amended its admissions, KJD would have deposed or called to testify witnesses like the City's officials and appraiser to establish, for example, that the City did not seek a reduction of condemnation damages for alleged special benefits. In this assessment action, then, KJD's requests and the City's admissions served the purpose of Rule 36(b), which is "to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry." 8B Wright & Miller, Fed. Prac. & Proc. Civ. § 2252 (3d ed.), Westlaw (updated Apr. 2023). The City faults KJD for using the procedural rules as designed.

The City's admission in this assessment action that the Project did not benefit KJD within the meaning of SDCL § 21-35-17 is "conclusively established." SDCL § 15-6-36(b). Because a special assessment that is not based on a special benefit is necessarily unconstitutional, *Hubbard*, 2010 S.D. 55, ¶ 9, 784 N.W.2d at 504, the City's admission is dispositive.

2. The City's failure to pursue any benefit as a reduction to condemnation damages means that as a matter of law there is no special benefit on which to premise the special assessment.

Distinct from but related to the City's admission that the Project did not benefit KJD, the City's failure to pursue the alleged special benefit as a reduction of condemnation damages is itself sufficient to establish that there is no special benefit as a matter of law. As explained above, South Dakota law requires that "[i]n *all* cases of

taking or damaging private property by a municipal corporation, the jury *shall* take into consideration the benefits which may accrue to the owner thereof as the result of the proposed improvement." SDCL § 21-35-17 (emphasis added); SDCL § 31-19-17 (same). Again, the "benefits" contemplated by SDCL §§ 21-35-17 and 31-19-17 are "special benefits." *Emry*, 244 N.W.2d at 95–96; *Bloom*, 93 N.W.2d at 576–77. The word *shall* in these statutes "manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL § 2-14-2.1. Therefore, because the City subjected KJD's property to condemnation, these statutes require the City to prove—with evidence—the value of the alleged benefits to a jury in a trial on damages. The City does not have discretion to ignore this legislative mandate and decline to pursue special benefits as a reduction to condemnation damages. Because the City declined to pursue any special benefits as a reduction to condemnation damages, as a matter of law there is no special benefit on which to premise the special assessment. Because a special assessment that is not based on a special benefit is necessarily unconstitutional, *Hubbard*, 2010 S.D. 55, ¶ 9, 784 N.W.2d at 504, the City's failure to pursue the alleged special benefit as a reduction to condemnation damages is dispositive.

3. The City's "findings" are insufficient as a matter of law because the City did not quantify the value of the alleged special benefit.

As a starting point, the City acknowledges that a special assessment is constitutional only "if the assessment does not exceed the benefit received." (Appellee's Br. at 6 (quoting *Hubbard*, 2010 S.D. 55, ¶ 10, 784 N.W.2d at 504).) But the City insists it satisfied this calculus through its Resolution 21-04-04. (*Id.* at 7–9.) The Resolution contains generalized "findings" that the City used to justify special assessments against

KJD and more than 30 other properties. The Resolution's nonspecific, conclusory claims assert that these properties received "special benefits" like:

> a "better place in which to conduct business," "changing the properties [sic] highest and best use from rural in character to urban," "easier access to the abutting properties," "improving and enhancing the aesthetics and safety, thus enhancing the value, use, and enjoyment of the property," and "enhance the market value."

(*Id.* at 7; R. at 379.) But the Resolution places no value on any of these alleged benefits. So the City's position is that it does not know what the benefits are worth, it just knows—somehow—that they are worth more than the special assessment.

The City's view is unsupported and incorrect. A municipality does have some flexibility in quantifying the value of an alleged benefit. While an increase in market value is an "obvious indicator that property receives a special benefit[,]" sometimes other valuation methods may be appropriate. *Hubbard*, 2010 S.D. 55, ¶ 15, 784 N.W.2d at 506. And if an exact value is too difficult for a municipality to calculate, it must still "estimate[] [the value] with a fair degree of exactness." *Id.* (quoting *Hawley*, 276 N.W.2d at 706). But this does not imply that a municipality has the option to estimate with *less* than a fair degree of exactness—let alone the option to skip the estimation altogether, using *no* valuation method. Indeed, a special benefit exists only to the extent it provides an "increased value to the property." *Ruel v. Rapid City*, 167 N.W.2d 541, 546 (S.D. 1969). The City mistakes flexibility in quantifying the alleged special benefit as license to forego quantifying altogether. A municipality cannot assume, as the City did here, that the value of an alleged special benefit equals or exceeds the special assessment. *Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511. The City's failure to quantify the alleged special benefit is dispositive.

4. Even if the City's conclusory assertions were legitimate factual findings entitled to a presumption of correctness, they are unsupported by any—and opposed by all—valuation evidence in the record.

Although a municipality's legitimate factual findings are entitled to a presumption of correctness, that presumption does not extend to "ambiguous and conclusory" assertions masquerading as factual determinations. *Id.* ¶¶ 16, 27, 784 N.W.2d at 506, 511.

Resolution 21-04-04 provides nothing but ambiguous and conclusory assertions. The best example of this is the Resolution's remarkable "finding" that "[t]he improvements will enhance the market value of the properties abutting the improvement." (R. at 379.) Yet, with respect to KJD's property, the City admits it did not investigate the property's pre-Project market value. (R. at 114 (Interrogatory 17).) The City admits it did not investigate the property's post-Project market value. (*Id.* (Interrogatory 18).) The City admits it did not obtain *any* appraisals or other valuation opinions supporting its claim that the Project enhanced the market value of the property. (R. at 115 (Interrogatory 19).) The City admits the appraisal it did obtain does not indicate the Project enhanced the market value of the property. (R. at 118 (Admission 2).) And the City has failed to identify *any* other evidence to support its claim. The City's "finding" that the Project will enhance the market value of KJD's property is a conclusion not based on any evidence. This conclusory finding, which assumes that the benefits equaled the cost, is not entitled to a presumption of correctness. *See Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511.

The other conclusory assertions on which the City relies are similarly unsupported and not entitled to a presumption of correctness. The City has failed to identify any

evidence supporting the claims that the Project made KJD's property a "better place in which to conduct business," that it "chang[ed] the properties [sic] highest and best use," that it provides "easier access," or that it improves "aesthetics and safety." (R. at 379.) Like the City's market-value claim, the highest-and-best-use claim is undermined by the City's admitted failure to obtain a favorable appraisal. Some of these claims are subjective and inherently ambiguous, like being a "better place to conduct business." Easier access and improved aesthetics and safety benefit the public generally and not KJD specially. *See Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511. And establishing these as special benefits would require evidence that the pre-Project configuration of KJD's property was somehow inadequate for KJD's purposes. *See id.* ¶¶ 24–27, 784 N.W.2d at 509–11 (affirming lower court's conclusion that where new curb and gutter did not increase market value of abutting property, it was a general benefit to the public and not a special benefit to the property owner); *Ruel*, 167 N.W.2d at 546 (discussing favorably case holding that business could not be specially assessed for new parking lot when previous lot provided adequate parking space for the business). And most importantly, the City admits that it did not even attempt to quantify the value of any of these alleged benefits. (R. at 111–15 (Interrogatories 10, 13, 15, 17–20).) None of these conclusory claims should be presumed correct.

But even if the City's conclusory claims were considered legitimate factual findings, they can be overcome by "weighty evidence." *Hubbard*, 2010 S.D. 55, ¶ 16, 784 N.W.2d at 506–07. The City did not employ *any* valuation method or obtain *any* valuation opinion from an expert. (R. at 115.) On the other hand, the City admits its own appraiser concluded that the Project did not confer any special benefits on KJD's

property. (R. at 117.) The City admits its appraiser did not conclude that the Project enhanced the market value of KJD's property. (R. at 118.) And the City admits its appraiser concluded that the Project did not change the highest and best use of KJD's property. (R. at 119.) KJD's appraiser also concluded that KJD did *not* specially benefit from the Project. (R. at 301.) The valuation opinions of two professional appraisers are "weighty evidence"—especially when compared to the City's total dearth of evidence to the contrary. The circuit court did not address any of these points.

Attempting to avoid two unfavorable appraisals, the City argues that the "scope of the project/project influence" rule prohibits consideration of the appraisals. (Appellee's Br. at 15–16.) According to the City, "our state and federal rules governing valuation of property for condemnation purposes prohibit the consideration of enhanced value to all property in the vicinity of the City's improvement when appraising the property." (Appellee's Br. at 16.) Thus, the City concludes the appraisals should be disregarded. (*Id.*)

The City relies solely on dicta from *City of Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 42, 588 N.W.2d 904, 912, where this Court endorsed the scope-of-the-project rule as stated in *United States v. Miller*, 317 U.S. 369 (1943), and *United States v. Reynolds*, 397 U.S. 14 (1970). In *Miller*, the U.S. Supreme Court said:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because

> adjacent lands not immediately taken increased in value due to the projected improvement.

Johnson, 1999 S.D. 16, ¶ 42, 588 N.W.2d at 912 (quoting *Miller*, 317 U.S. at 376–77). And in *Reynolds*, the U.S. Supreme Court said: "If the 'lands were probably within the scope of the project from the time the Government was committed to it' no enhancement in value attributable to the project is to be considered in awarding compensation." *Johnson*, 1999 S.D. 16, ¶ 42, 588 N.W.2d at 912 (quoting *Reynolds*, 397 U.S. at 21). This Court offered no further elaboration on this rule in *Johnson* because the Court's comments were offered as limited guidance on remand for an issue presented but not decided on appeal because of the Court's resolution of other issues. *Id.* ¶ 41, 588 N.W.2d at 912.

This valuation rule has no application here. The rule "prohibits a landowner from asserting a claim for increased compensation as a result of increasing land values after the taking has been *announced*." *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 60, 709 N.W.2d 824, 840 (emphasis added). Its purpose is to prevent the condemnor from paying for increases in the value of real property occurring after a public improvement is announced but before the date of valuation (the date of taking), caused by the public improvement for which the property, or a portion of it, is being taken. *See Miller*, 317 U.S. at 377. The rule helps ensure that a property owner "receive[s] the value of what he has been deprived of, *and no more*." *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (emphasis added). In *Miller*, for example, the U.S. Supreme Court invoked the rule when land developers turned "largely uncleared brush land" into a town "built up for business and residential purposes" after the announcement of a public-improvement project but before the government commenced eminent-domain proceedings. 317 U.S.

at 371. This is not an issue in the present case. There is no evidence that the value of KJD's property had increased *before* the taking because potential buyers were willing to pay more for the property due to the Project.

What the scope-of-the-project rule does *not* prohibit is the *reduction or offset* of an award of just compensation when there are special benefits. Contrary to the City's argument, the *Miller* case explicitly holds that "if the taking has in fact benefited the remainder the benefit may be set off against the value of the land taken." *Id.* at 376. Special benefits affect the value of the property *after* the taking. This has been the law for well over a century:

> [W]hen part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. *When the part not taken is ... specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.*

Bauman, 167 U.S. at 574 (emphasis added). Likewise in South Dakota, the value of special benefits offsets an award of damages in the case of a partial taking. *See, e.g., Hall v. State ex rel. S.D. Dep't of Transp.*, 2011 S.D. 70, ¶ 1, 806 N.W.2d 217, 219 (recognizing that in a partial taking, the "special benefit" of direct access to Interstate 90 "mitigated the severance damages for the property not taken").

Moreover, as discussed above, two controlling South Dakota statutes demand consideration of special benefits in calculating just compensation. "In all cases of taking or damaging private property by a municipal corporation, the jury shall take into consideration the benefits which may accrue to the owner thereof as the result of the proposed improvement." SDCL § 21-35-17. "In all cases of taking or damaging property, the jury shall take into consideration the benefits which may accrue to the

owner thereof as the result of the proposed improvement." SDCL § 31-19-17. Based on these statutes, this Court has already rejected the argument that "benefits cannot be considered at all" in a partial taking. *Emry*, 244 N.W.2d at 95 n.2.

The City's claim that "[d]ue to the scope of the project/project influence rule, it would have been improper for the trial court to consider the eminent domain appraisals" is incorrect. (Appellee's Br. at 16.) The law *requires* that an award of just compensation include a reduction for the value of alleged special benefits. SDCL §§ 21-35-17, 31-19-17. This Court and the Supreme Court of the United States recognize this. *E.g.*, *Miller*, 317 U.S. at 376; *Emry*, 244 N.W.2d at 95 n.2.

As a single-sentence afterthought, the City also claims the appraisals should be disregarded because according to the City, "KJD, LLC never offered them as evidence at the July 2023 Hearing[.]" (Appellee's Br. at 16.) But KJD offered the appraisals as evidence by filing them with the circuit court as Exhibits 1 and 3 to the Affidavit of James E. Moore. (R. at 45.) At the hearing, the City explicitly recognized the appraisals as having been received into evidence: "I just wanted to state it at the forefront that I object to the appraisals being *received into evidence* without a more extensive foundation showing that they're relevant …." (Appellant's Br. at App. 5 (emphasis added).) The appraisals could not have been received into evidence without having first been offered as evidence. And the sole basis for the City's objection was the erroneous view that the term *special benefit* means different things in the contexts of condemnation and special assessment. (*Id.* at App. 5–6.) As explained previously, not only is the City's view incorrect, the City abandoned that argument in this appeal.

Even if the appraisals were excluded, the City made a number of admissions in this special-assessment action that encapsulate the relevant conclusions of the appraisers. The City admits that its appraiser "did not indicate any special benefit to the Property in his appraisal report." (R. at 117.) The City admits that its appraiser's "report does not indicate that the Project enhances the market value of the Property." (R. at 118.) The City admits that its appraiser's "report indicates that the highest and best use of the Property is the same before and after the Project." (R. at 119.) And when KJD asked the City to produce "[a]ll appraisal reports or other valuation opinions establishing that the Project enhances the market value of the Property[,]" the City responded: "N/A." (R. at 119.) So even if the reports themselves were excluded from consideration, their impact adverse to the City's assessment would be undiminished.

The City's conclusory claims are not entitled to a presumption of correctness. But even if they were, the two appraisals are weighty evidence compared to the City's total lack of evidence.

Conclusion

This case involves a constitutional question—whether the City's special assessment exacts a taking or whether it is a valid exercise of the City's power to tax—with far-reaching implications.[1] The circuit court did not wrestle with this question but

[1] In this instance alone, the City levied special assessments on over 30 properties. At the hearing, the City's attorney argued that it would be too difficult to adequately investigate the value of alleged benefits in every case:

> We're, city councils aren't like judges, right. They don't have to have a trial about every single property when they're, when they're doing an assessment, that would break down the whole legislative process, right. They just have to have a basis, and, and it has to be not arbitrary, not capricious, it has to be a foundation ….

chose instead to rely solely for its decision on an evidentiary presumption that does not apply here. In the end, the City offered no evidence to quantify any special benefit to KJD's property from the Project. The City admits that it calculated the special assessment by simply dividing the *cost* of the Project over the front feet of the abutting properties (R. at 115–16) even though this Court has explicitly rejected by-the-foot cost allocation. *Hubbard*, 2010 S.D. 55, ¶ 27, 784 N.W.2d at 511. If the judgment in this case stands, any governmental entity may thwart both the decision in *Hubbard* and the South Dakota Constitution in the same way that the City of Tea did here.

KJD respectfully requests that the judgment be reversed and the City enjoined from collecting the special assessment levied against its property.

Dated this 16th day of February, 2024.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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(Appellant's Br. at App. 20.) This is incorrect. *Every* special assessment must be supported by at least an estimate to a fair degree of exactness of the value of the alleged special benefit. *Hubbard*, 2010 S.D. 55, ¶ 15, 784 N.W.2d at 506. And in the case of a partial taking, the City is required to prove the value of an alleged special benefit in a jury trial. SDCL §§ 21-35-17, 31-19-17. The City is not permitted to violate the constitutional rights of property owners en masse simply because *not* violating those rights would be inconvenient.

Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 4,717 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 16th day of February, 2024.

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Certificate of Service

I hereby certify that on the 16th day of February, 2024, a true and correct copy of the foregoing Appellant's Reply Brief was electronically filed via the Odyssey File & Serve system, which will automatically send email notification of the same to the following:

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VIA ODYSSEY FILE & SERVE
Ms. Shirley Jameson-Fergel
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Re: #30439, KJD, LLC v. City of Tea

Dear Ms. Jameson-Fergel:

I am counsel of record for Appellant, KJD, LLC, in the above-referenced matter. Appellant's Reply Brief was filed today via Odyssey File & Serve. Shortly after filing, I noticed an error in our brief and am writing to correct the error in the record.

The error in Appellant's Reply Brief is on top of page 4 as follows:

"and that the City's "statutory subterfuge" is sanctionable."

The corrected text is as follows:

"and that KJD's "statutory subterfuge" is sanctionable."

Please let me know if you have any questions. Thak you for your assistance.

Yours very truly,

WOODS, FULLER, SHULTZ & SMITH P.C.

James E. Moore

cc: Clint Sargent
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