IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27176

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

v.

JB Enterprises, Inc.,
Defendant and Appellant.

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

The Honorable Susan Sabers
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed on the 13th day of August, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Publications

Session Laws

JURISDICTIONAL STATEMENT

This is an appeal from a grant of summary judgment for the State in a condemnation action. Summary Judgment was granted on July 9, 2014 by letter decision and notice of entry of judgment was given July 31, 2014.

This appeal is from the Circuit Court, Minnehaha County, Second Judicial Circuit. The Honorable Judge Susan Sabers was presiding.

Notice of appeal was filed on August 12, 2014.

LEGAL ISSUE

1. Does the Declaration of Taking Act also known as "Quick-Take Condemnation" permit the State to abandon the taking of the right to control access after a Declaration of Taking?
   - The Trial Court held it could.

     State of South Dakota, Acting by and Through the Department of Transportation v. Richey Motor Company, Inc., 270 N.W.2d 48 (S.D. 1978).

     Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945).

     Hall v. State, Ex Rel South Dakota Dept. of Transp., 2006 S.D. 24, § 17 712 N.W.2d.
2. If the Trial Court was correct by permitting the abandonment of a "quick-take", was summary judgment appropriate?
   - The Trial Court granted summary judgment.

     State of South Dakota, Acting by and Through the Department of Transportation v. Richey Motor Company, Inc., 270 N.W.2d 48 (S.D. 1978).

     Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945).

Hall v. State, Ex Rel South Dakota Dept. of Transp., 2006 S.D. 24, § 17 712 N.W.2d.

STATEMENT OF THE CASE

This is a "quick take" condemnation action brought under the South Dakota Declaration of Taking Act. The taking was part of the reconstruction of the Cliff Avenue and I-90 Intersection, Sioux Falls. On May 15, 2012, JB Enterprises, Inc. (Landowner) admitted service of a Summons, Petition (SR 2), Declaration of Taking (SR 9), Notice of Declaration of Taking (SR 30) and Deposit in Court of Estimated Compensation Pursuant to Declaration of Taking in Condemnation. SR 31.

On May 22, 2012, the Landowner filed a motion that stated in part "The Defendant does not contest the taking under SDCL §21-35-10.1" SR 36. Subsequently, the Landowner filed a "Waiver of Right to Contest Taking" on June 13, 2012 which referenced SDCL § 21-35-10.1. SR 40.

The State paid into the Clerk of Minnehaha County's Trust Account at the time of filing the Notice of Declaration of Taking the sum of One Million One Hundred Twenty Thousand Five Hundred and Eighty Dollars ($1,120,580.00) under SDCL § 31-19-4. SR 33.

The State filed a motion to amend its petition months later which was granted. SR 62. The State filed the amended petition on February 19, 2013. The State did not attempt to amend its Declaration of taking nor has it ever amended the original Notice of Declaration of Taking.

On February 7, 2014, Landowner filed a "Motion to Declare Date of Taking" which was noticed for April 28, 2014. The State filed a Motion for Summary Judgment

on April 14, 2014. Both motions were heard on April 28, 2014. The State's Motion for Summary Judgment on April 14, 2014 was for the reason that "DOT has not taken or damaged any compensable property interest of Defendant JB Enterprises, Inc."

On June 19, 2014, the Trial Court granted the Landowner's motion holding that the "taking" took place on June 12, 2012 upon the service and filing of "Waiver of Right to Contest Taking." SR 40.

On June 19, 2014, the Trial Court granted the State's Motion for Summary Judgment holding that no damage occurred as a result of the taking. (Memo Decision SR 570).

The Trial Court permitted the State to abandon its taking of the right to control all access along the property's western boundary despite a statute and Supreme Court authority prohibiting the State's abandonment of a "quick take" of property.

STATEMENT OF THE FACTS

In 1990, Robert Miller and Joni Miller, husband and wife, purchased a Perkins Restaurant near the intersection of Cliff Avenue and Interstate 90. SR 327. The Perkins sits on Lot 19 and a portion of Lot 18 in the North Side Gardens Addition to the City of Sioux Falls. SR 34. The Lots are bordered on the west by Cliff Avenue and the north by E. 63rd Street. SR 34. The property enjoyed full access to both streets.SR 327. The Millers successfully owned and operated the Cliff Avenue Perkins for over 20 years. SR 327. The Millers became aware of a South Dakota Department of Transportation (hereinafter "DOT") highway project in the spring of 2006 that would re-configure the entire intersection of Cliff Avenue and Interstate 90, including the east-bound on-ramp that adjoined a portion of Lot 19. *Id.*

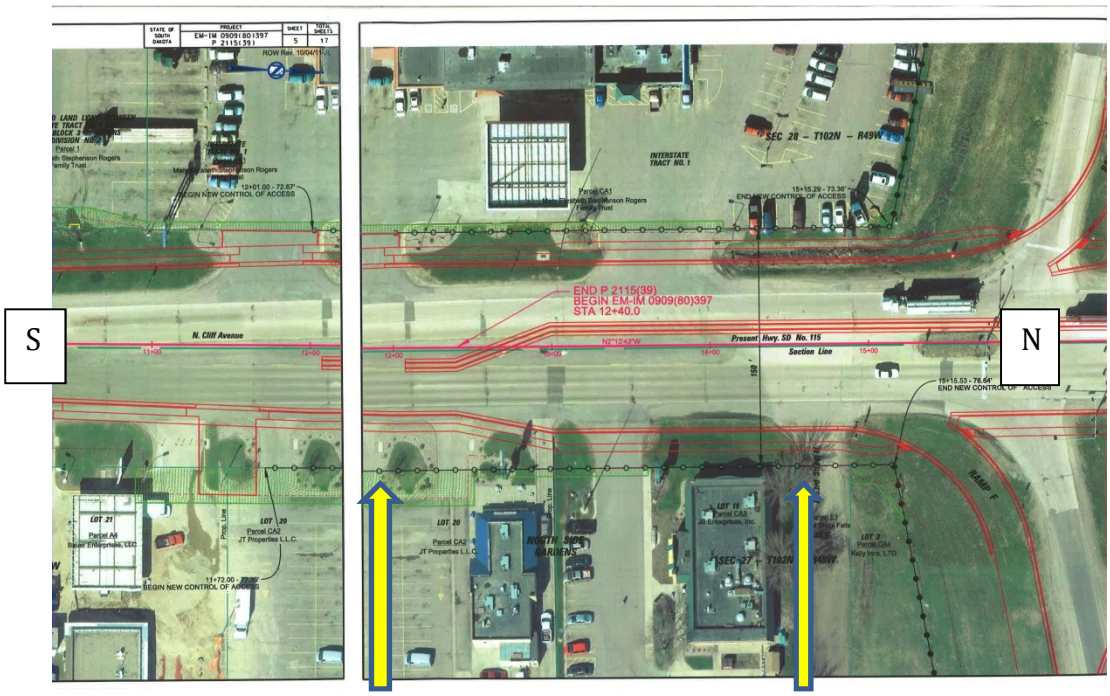
The original discussions of the project included plans to close the intersection at Cliff Avenue and E. 63rd St. (which served as an access for Perkins), install a median in Cliff Avenue, and take the right to control Perkins's direct access to Cliff Avenue. SR 327. Mr. and Mrs. Miller were aware that any one of these three actions would force them out of business. The Millers, along with other property owners in North Side Gardens, hired a consultant to engage in negotiations with the DOT and the City of Sioux Falls. The Millers attempted to work with the City of Sioux Falls and the DOT. SR 327. The Millers hoped the project could be constructed in a manner that would not take access to Cliff Avenue which would kill their business. The Millers spent over three years prior to the Declaration of Taking attempting to reduce potential damage to their business. SR 315.

The real estate at issue was favored with direct access to Cliff Avenue before the taking. Lot 19 had a cut or driveway onto Cliff Avenue which accessed traffic traveling South and North. Lots 19 and 18 had direct access onto 63rd Street and 63rd Street opened directly onto Cliff Avenue.

Before the taking, traffic flowed freely between Cliff Avenue and Lots 18 and 19.

In February of 2011, Robert Miller was notified by the State of the worst possible outcome. The State was taking the right to control all access along the property's western boundary. SR 327. All access from Perkins to Cliff Avenue would be taken. The State Transportation Commission adopted resolution 2012-04.01 on April 10, 2012, that declared it necessary for the DOT to condemn:

> "…the control of access of that portion of Project No. IM 0909(80)397 which lies within Lot 19, except the West 42 feed of said Lot 19, of North Side Gardens, in the SW1/4 SW1/4 of Section 27, Township 102 North, Range 49 West of the 5th P.M., Minnehaha County, South Dakota."



Note: Complete access control along western boundary illustrated with circled lines (–0—0—0—0—0). See Appx. 61 Tab 11.

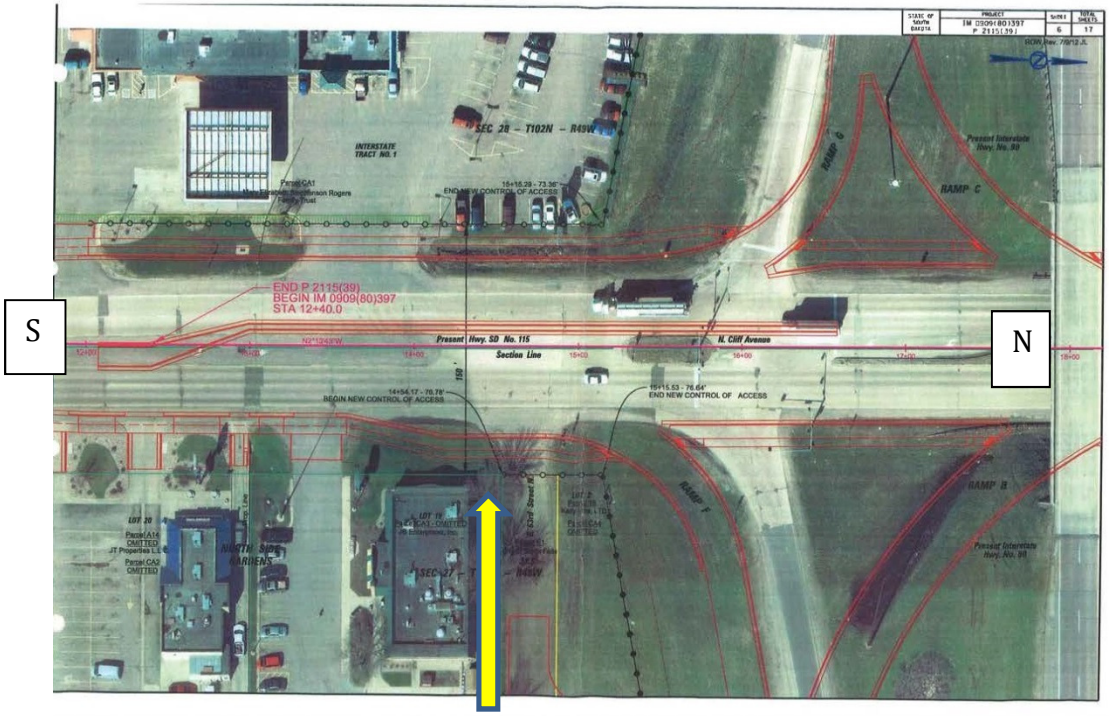
That resolution was amended by resolution 2012-04.08 on April 26, 2012 to include the authority to take control of access to Lot 18 as well. SR 2.

On May 2, 2012, the DOT acted on the resolutions and exercised its Constitutional power of eminent domain pursuant § 31-19-3. SR 2. Following the "quick-take" procedures, the State filed a Summons, Petition, Declaration of Taking, Notice of Declaration of Taking, and $1,120,580.00 cash based upon an appraisal of the loss of all access to Cliff Avenue with the Minnehaha County Clerk of Courts. SR 34.

The DOT had exercised its statutory authority under SDCL §31-19-23 by filing a Declaration of Taking which also incorporated the resolutions of the Highway Commission. The notice, in part, read as follows:

> …title to said lands be vested in the State of South Dakota and such lands are deemed to be condemned and taken for the use of the State of South Dakota and the right to just compensation for same has vested in the persons entitled thereto. SR 30.

On June 12, 2012, JB Properties, LLC filed a "Waiver of Right to Contest Taking" under SDCL § 21-35-10.1. SR 40. On February 19, 2013, the State executed an Amended Petition that attached amended plans but no other documents. SR 77.



Note: Access control along western boundary illustrated with circled lines (–0—0—0—0—0—0) has been removed and ends at 63rd Street. See Appx. 62 Tab 12.

The State claims the Amended Petition abandons the taking of the right to control all access to Cliff Avenue from Landowner's property. SR 94. The State claims it abandoned the taking and no damage occurred. *Id.*

Following the amendment of the petition, both parties proceeded with the eminent domain litigation. The Depositions of four separate people knowledgeable in operating successful Perkins Franchises supported the Miller's belief that the DOT's project would destroy the business located on Lots 18 and 19. SR 43, 45, 47, and 49. The highest use of the property is commercial but the property had no high commercial value after the

taking. SR 327. On February 7, 2014, Defendants filed a "Motion to Declare Date of Taking". SR 86. In response to the Defendant's Motion, the State filed a Motion for Summary Judgment on April 14, 2014 for the reason that "DOT has not taken or damaged any compensable property interest of Defendant JB Enterprises, Inc." SR 94.

Both Motions were heard on April 28, 2014, at the Minnehaha County Courthouse, Hon. Susan Sabers presiding. SR 163. Evidence was presented on the Motions, and Landowners were allowed to supplement the record with additional evidence on consequential damages. SR 480 and SR 327. The DOT also presented additional evidence. SR 477. In a letter ruling on June 19, 2014, the Trial Court granted both parties motions. SR 570. The Trial Court effectively ruled that the State could abandon the taking of the right to control access. *Id.* The Millers to this point have had no jury trial to determine just compensation. SR.

STANDARD OF REVIEW

I. Questions of Law are Reviewed De Novo

Questions requiring application of a legal standard are reviewed as are questions of law – de novo. *Voeltz v. John Morrell and Co.*, 1997 S.D. 69, 564 N.W.2d 315; *Phillips Bros. Inc. v. Nelson's Oil and Gas, Inc.*, 508 N.W.2d 885, 888 (S.D. 1993).

II. Alleged Violations of Constitutional Rights are Reviewed De Novo

An alleged violation of a constitutional right is "an issue of law to be reviewed under the de novo standard of review." *Benson v. State,* 2006 S.D. 8, 710 N.W.2d 131.

III. Summary Judgment Standard

The standard of review for summary judgment is well established:

> In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the

> absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Lamp v. First Nat'l Bank of Garretson, 496 N.W.2d 581, 583 (S.D.1993) (citation omitted).

ARGUMENT

This case will decide whether the right to control access is a property right that enjoys constitutional protections equal to the property rights of possession, use, and exclusion of others. If it is, then under SDCL Chapters 31-19 and 21-35 and this Court's precedent, the taking of the right to control access may not be abandoned by the State.

I. History of "Quick-Take"

The "quick-take" procedure is a statutory method of taking property before its value is determined and paid. It is a legal device that aids the Government to assemble numerous tracts of land without litigation. The procedure was created in South Dakota by Chapter 195, 1963 Session Laws. The South Dakota law is patterned after the United States' "Declaration of Taking Act" 40 U.S.C. § 3114, formerly 40 U.S.C. § 258a. The purpose of the Federal and South Dakota Act is to acquire immediate possession and ownership of landowner's property. *See Nichols on Eminent Domain*, 3rd Edition, Vol. 6A, Chapter 27.08. (See Appendix 54-60 to brief to compare Acts).

II. Federal Judicial Review of Declaration of Taking Act by the United States Supreme Court

"The filing of the declaration of taking and the making of the deposit vests both title and possession in the federal government." *Nichols, supra,* § 27.08(1)(b), p. 27-39. When the government has filed a declaration of taking and made a deposit, the government becomes *irrevocably* committed to pay the ultimate award. *Nichols, supra,* § 27.08(1)(b), p. 27-41.

The United States Supreme Court in *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631 (1945) made clear that the government's use of the "Declaration of Taking Act" creates an *irrevocable* commitment to take the title described in the Declaration of Taking and pay just compensation. The Act indicates "a purpose to make the transfer of title irrevocable upon the filing of the declaration and making the deposit." *Catlin*, 324 U.S. p. 242.

In *St. Cloud v. Leapley*, this Court set forth the proper statutory construction standards. "…[W]e look to federal courts for guidance in interpretation of a state statute that is similar to a federal law…" *St. Could v. Leapley*, 521 N.W.2d 118, 122 (S.D. 1994). S*ee Dakota Industries, Inc. v. Cabela's Com. Inc*., 2009 S.D. 39, § 17, 766 N.W.2d 510.

III. Eighth Circuit Court of Appeal

The Eighth Circuit Court of Appeals in two cases held that title *irrevocably* vests in the government when a Declaration of Taking is implemented. The Court wrote "We hold, therefore, upon filing the declaration of taking and making the deposit of the estimated compensation in 1960, title vested immediately in the government." *U.S. v. Herring*, 750 F.2d 669, 671 (8th Cir. 1984), citing: *United States v. Dow*, 357 U.S. 17, 21, 22 78 S. Ct. 1039 (1958); *Covered Wagon Inc.*, 369 F.2d 629 at 33 (8th Cir. 1966).

In the *Covered Wagon, Inc. v. Commissioner of Internal Revenue*, 369 F.2d 629 (8th Cir. 1966), the Court wrote:

> It is well settled that when property is acquired by the Federal Government in condemnation proceedings, the Federal Declaration of Taking Act (Act of February 26, 1931, c. 307, 46 Stat. 1421 §§ 1-4-40 U.S. 1958 Ed. § 258a-258d is applicable. Significantly, for our purpose, § 1 of said Act provides in relevant part that:
>
> 'Upon the filing of said declaration of taking and of the deposit in the court ***of the amount of the estimated compensation stated in said declaration, title to the said lands***shall be deemed to be condemned and taken for the use of the United State, and the right to just compensation for the same shall vest in the persons entitled thereto***.'
>
> Thus the statute is clear to the effect that the United States became the owner of the condemned realty on July 6, 1956, when it instituted condemnation proceedings in the United States District Court, by filing its Declaration of Taking and depositing the amount of estimated compensation for the property into the registry of the court. *United State v. 1,060.92 Acres of Land, More or Less, in Miller County, State of Arkansas*, 215 F.Supp. 811 (D.C.Ark. 1963); U*nited State v. Certain Parcels of Land in Price Georges County, Md.*, 40 F.Supp. 436 (D.C.Md. 1941).

The Court of Claims in *Travis v. United States*, 287 F2d 916, 152 Ct. Cl. 739 DC Cir. (1961) sums up the interpretation of the Federal Act succinctly at 287 F.2d p. 919 (omitting citations): "It has been repeatedly held that under the statute [Declaration of Taking Act] title to the realty vests in the United States immediately upon the filing of a declaration of taking and payment into the court of estimated compensation." "At the same time, the right to immediately receive the estimated compensation vests in the landowner." *Id.*

The federal interpretation of the Declaration of Taking Act upon which the South Dakota statute was copied is that the property interest taken is *irrevocable*.

IV. Abandonment of the Declaration of Taking Under Federal Law

Every federal case annotated under 40 U.S.C. § 3114 declares that upon a Declaration of Taking and deposit the government's estimated compensation; the government's right to abandon or reduce the extent of the taking ends. The taking described in the Declaration of Taking is final and cannot be amended nor abandoned. *U.S. v. Sunset Cemetery Co.*, 132 F.2d 163 (7th Cir. 1942).

V. South Dakota's Declaration of Taking Act

The 1963 South Dakota Session Law Chapter 195, Declaration of Taking Act, has been codified in two parts of the code and are similar to 40 U.S.C. § 3114(b). The control of access highway statutes, Chapter 31-8, are part of the history of South Dakota's acceptance and today's reliance on Federal Funding for highways. Beginning with the participation in the Federal Interstate Highway System, South Dakota has enacted laws the Federal Government requires to obtain highway funds. *See* SDCL § 5-2-18, adopting the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, noted in *Rapid City v. Baron*, 227 N.W.2d 617 (S.D. 1975); Federal Highway Beautification Act, SDCL § 31-19, *Hogen v. South Dakota State Bd. Of Transportation*, 245 N.W.2d 493 (S.D. 1976); Refusal to Follow Federal Mandates – Loss of Federal Funds, *S.D. Trucking Ass'n v. South Dakota Dept. of Transp*., 305 N.W.2d 682 (S.D. 1981); S*outh Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793 (1987), 21 year old drinking age and highway funds.

SDCL § 31-19-24, SDCL § 21-35-25, and 40 U.S.C. 3114 provide the same rights to landowners. SDCL § 21-35-25 states:

> Title to the property interest specified in the declaration shall vest in the petitioner and the property interest shall be deemed condemned and taken for the use of the petitioner. The right to just compensation for the property interest shall vest in the persons

> entitled thereto either on the date the decision is rendered at the hearing provided in § 21-35-10.1 or the date the hearing is waived.

SDCL § 31-19-24 states:

> Title to the lands in such estate or interest therein as is specified in the declaration described in § 31-19-23 shall vest in the State of South Dakota or the municipality, and the land shall be deemed to be condemned and taken for the use of the State of South Dakota or the municipality, and the right to just compensation for the same shall vest in the persons entitled thereto either on the date the decision is rendered at the hearing provided in § 31-19-10.1 or the date the hearing is waived.

40 U.S.C. 3114 (b) states:

> Vesting of title – On filing the declaration of taking and depositing in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration—
>
> (1) Title to the estate or interest specified in the declaration vests in the Government;
> (2) The land is condemned and taken for the use of the Government; and
> (3) The right to just compensation for the land vests in the persons entitled to the compensation.

Prior to the passage of South Dakota's Declaration of Taking Act, the State did not have a constitutional method of acquiring immediate possession of a landowner's property. A review of Chapter 113 of the 1939 Session Laws provides no method to "quick-take" property nor did those session laws now codified in SDCL § 21-35.

VI. South Dakota Case law Construing the State's Declaration of Taking Act

This Court in *State of South Dakota, Acting by and Through the Department of Transportation v. Richey Motors Company, Inc.*, 270 N.W.2d 48 (S.D. 1978) held that the State, after a "quick take", may not "divest itself" or abandon any [property] interest taken by the filing of the declaration of taking." *Id.* at 51.

Chief Justice Wollman wrote this Court's adoption of the same interpretation of the South Dakota "Declaration of Taking Act" as the United States Supreme Court's interpretation of the Federal Act. Justice Wollman clearly stated that the State did not attempt to "divest itself of or abandon any interest taken by the filing of the declaration of taking because in this Court's view it cannot." *Richey Motors*, p. 51, footnote 4. *See also U.S. v. Dow,* 375 U.S. 17, 78 S. Ct. 1039 (1958). The Court held that the project's actual construction of the project within the easement taken may be changed by an amendment of the project plans, but interest taken may not change.

Reference to *Sutherland*, Statutes and Statutory Construction, Sixth Edition, Vol. 2B, § 51.06 reflects the correctness of this Court's adoption of the same interpretation of South Dakota's Declaration of Taking Act as the United States Supreme Court's explanation of the federal Declaration of Taking Act.

Sutherland, at pages 263-265, explains the wisdom of similar construction:

> If the legislature adopts a statute already in effect in another state under circumstances which indicate that it had the statute of the other state in mind when it enacted the new law, the foreign statute is relevant in constructing the domestic one. Decisions from other states construing similar statutes are likewise considered helpful as persuasive precedents, although not controlling. Conversely, enactment of legislation which is different from that which is common in other states for the same subject manifests a legislative purpose to accomplish different legal results than those which obtain in other states.
>
> State and federal statutes may be in pari materia, and if so, should construed together, for it may be presumed that the legislature had existing federal statutes relating to the same subject matter in mind when enacting the statute being construed.
>
> ***

Generally, "…our State Constitution provides its landowners more protection against a taking of their property than the United States Constitution." (omitted citations) *Benson v. State*, 2006 S.D. 8, § 42, 701 N.W.2d 131. This is not a case to lower the standards by placing a strained interpretation of SDCL § 31-19-35 or overruling prior to precedent by permitting the State to abandon its Declaration of Taking.

The Legislature's desire to protect landowners is further detailed in SDCL § 31-19-35 which was referred to by Justice Wollman in *Richey Motors*:

> A proceeding to condemn land for public use may not be abandoned after filing of declaration of taking, so as to deprive an owner whose property had been taken of his constitutional right to have damages assessed and paid in money.

Although usually the Courts are a landowner's only protector of constitutional rights, here the Legislature removes the government's power to take and give back when the government makes use of the "quick take" tool.

VII. The Declaration of Taking of JB Enterprises, Inc. Property

The State used the force of the Declaration of Taking Act, SDCL § 31-19 to take Landowners' property. Appx. 9-19. The pertinent parts of the Declaration (SR 34) are as follows:

> 1. He (Darin Bergquist) is the duly appointed Secretary of the Department of Transportation for the Department of Transportation, State of South Dakota.
>
> ***
>
> 4. Pursuant to the authority of SDCL 31-19, and pursuant to express authority of the South Dakota Transportation Commission, Resolution No. 2012-04.01, dated April 10, 2012, and Resolution No. 2012-04.08, dated April 26, 2012, and upon deposit of estimated just compensation:
>
> The Secretary of the Department of Transportation of the State of South Dakota hereby declares acquired, subject to the provisions of SDCL 31-19-24, for the use of the State of South Dakota the parcel or parcels of land described in the attached Exhibit A.

> A. These lands are to be acquired under the authority of SDCL 31-19 and the South Dakota Transportation Commission Resolution No. 2012-04.01, dated April 10, 2012, and Resolution No. 2012-04-08, dated April 26, 2012 for a public use described as use for highway purposes;
>
> B. The lands hereby acquired are described in Exhibit A, attached hereto and by reference made a part hereof.

Found at SR 34. Appendix 9-19, Tab 2.

The pertinent part of Exhibit A reads:

> Parcel CA3
>
> Description of the *control of access* of that portion of Project No. IM 0909(80)397 which lies within the West 115.5 feet of Lot 18 and all of Lot 19, except the West 42 feet of said Lot 19, of North Side Gardens in the SW1/2 SW1/4 of Section 27, Township 102 North, range 49 West of the 5th P.M., Minnehaha County, South Dakota.
>
> It is hereby declared necessary, to obtain said *control of access*, by condemnation and the Transportation Commission of the State of South Dakota does hereby authorize and request the Attorney General of the State of South Dakota to institute proceedings for condemnation of said above described land including *control of access* for highway purposes, and if necessary, file a Declaration of taking in accordance with the provisions of SDCL 31-19 and amendments thereto.

Found at SR 34. Appendix 9-19, Tab 2 (emphasis supplied).

The State deposited $1,120,580.00 with its condemnation action. On June 12, 2012, the Landowner filed a "Waiver of Right to Contest Taking" under SDCL § 21-35-10.1 or SDCL § 31-19-10.1. SR 40. The title to the "control of access" passed irrevocably to the State.

The effect of the Declaration of Taking under Resolution No. 2012-04.08, April 26, 2012 was to divest JB Enterprises of all control of access and actual access to Cliff Avenue from its Lots 18 and 19 of Northside Gardens. The State has owned the right

since June 12, 2012 and still owns the right. The State has not actually closed the driveway. It has closed 63rd Street and moved the traveled street right to the Perkins building by tearing up the greenway. The State owns power to cut off all access from Lots 18 and 19 to Cliff Avenue at any moment. The Trial Court was confused on this vital issue by the State's legal filings which mislead the Court.

This Court reviews De Novo the effect of the Declaration of Taking, the deposit of $1,120,580.00 cash and the waiver of the right to contest the taking.

These are matters of law. However, statute and the Constitution require a jury trial in order to assess the just compensation for the taking and damaging of landowner's property rights. SDCL § 31-19-24 states that "…the right to just compensation for [the estate or interest therein as is specified in the declaration] shall vest in the persons entitled thereto either on the date the decision is rendered at the hearing provided in §31-19-10.1 or the date the hearing is waived." SDCL § 31-19-33 further explains "After the right to compensation has vested pursuant to §31-19-24, the condemnation action in which the declaration of taking has been filed shall go to trial and just compensation shall be ascertained and awarded." §31-19-32 states "The owner or any person in interest shall have a jury trial, unless jury trial is waived, to determine their damages…"

The constitutional right to a jury trial on damages was reaffirmed in *Hurley v. State,* 143 N.W.2d 722, 729 (SD 1966) wherein the Court Stated:

> In the absence of an adequate remedy which can be invoked by condemnees whose private property has been taken or damaged by the state without compensation §13, Art. VI of our Constitution is deemed to be self-executing. In such cases the aggrieved landowner has a common law action in circuit court where his constitutional right to trial by jury may be asserted. This conclusion was forecast in Searle v. City of Lead, 10 S.D. 312, 73 N.W. 101, 39 L.R.A. 345, wherein this court observed that 'The

> provisions of the constitution are not limited to a change of grade once established, but are general, and include all damages to private property for public use.

To date, the Appellant has been denied its statutory and Constitutional right to a jury trial on just compensation.

VIII. Status of the Real Estate on June 12, 2012

The State obtained total "control of access" on June 12, 2012. Although it later claims to have abandoned or amended its Declaration of Taking, state law prohibits such attempts and it has never amended the Declaration of Taking.

SDCL § 31-19-24 was referenced in the Declaration of Taking signed by Darin Bergquist, the Secretary of Transportation, which incorporated a Resolution signed by Richard Gregerson, Chairman of the Transportation Commission. The statute could not be more clear. These, the highest officials of the State Transportation Department, took the steps to own "Title to the lands in such estate or interest as is specified in the declaration (and)…shall vest in the State of South Dakota…" SR 34. Appendix 20, Tab 3.

No partial amendment of a petition by an attorney for the Plaintiff divests the Landowners' statutory, federal, and state constitutional rights.

IX. Control of Access is a Property Right

The right to control access to a public highway or from a particular parcel of land is property. The "right to control access" may be owned and is therefore property. This Court has previously stated:

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

> land, but extends sufficiently beyond his own premises as to insure him reasonable facilities for connection with those highways in which he had no special rights.

State Highway Comm'n v. Bloom, 77 S.D. 452, 463, 93 N.W.2d 572, 578-79 (1958).

The State urged and convinced the Trial Court that it could and did abandon that part of the Declaration of taking "to obtain said control of access, by condemnation". SR 570, Exhibit A. The Trial Court noted the DOT's summary judgment argument as "DOT argues no actual taking occurred…" TC Opinion p. 3, SR 570. The Court then recasts the DOT argument as "DOT's position is that there is no compensable taking occurred on the facts of this case." TC Opinion p. 3, SR 570.

The Trial court did not understand that the State had taken the property described as the right to control access. The State, ignoring the law, argued that it had "restored" the taken property by amending its Petition in violation of SDCL § 31-19-35. The description of the taking in the Declaration of Taking, creates a property record that records that the Landowner has lost the right of access to Cliff Avenue from Lots 18 and 19.

"Control of access" is defined in SDCL § 31-8-1. It divests the Landowner of all property rights to access the highway that the real estate abuts. The "…abutting land…(has) no right or easement or only a controlled right or easement of access, light, air or view by reason of the fact that their property abuts upon such controlled-access facility or any other reason." SDCL § 31-8-1.

The Trial Court held that "the right of access to Cliff Avenue was never taken from JB Enterprises." TC Opinion p. 9, SR 570. This holding is simply wrong and leads to the improper grant of summary judgment.

The Trial Court ignored the teaching of *State of South Dakota, Acting by and Through the Department of Transportation, v. Richey Motors Company, Inc.*, 270 N.W.2d

48 (S.D. 1978). *Richey* concerned the refusal of the trial judge to permit evidence that the State changed its building plans in an attempt to reduce consequential damage. The Supreme Court observed, "as we view the record, however, the State did not seek to divest itself of or abandon any interest taken by the filing of the declaration of taking." *Richey I*, *supra*, p. 51. The Court went on to say "The amendment sought did not alter the State's interest in, nor the amount of, the property taken." *Richey,* p. 51.

The plans were altered to permit better drainage across the Richey Motors' land but the estate in the property was not amended. The *Richey Motors* case concerns consequential damages possibly reduced because of the construction on the fee taken. The case makes clear that the interest taken was not altered by the amendment of plans.

The Court has held in *Richey Motors* that the State may not abandon a "quick-take" and a statute of the State, SDCL § 31-19-35, prevents such an action.

Assuming for the purpose of this argument the Court permits the State to revoke the taking, the summary judgment was still in error.

X. Temporary Taking

There can be no doubt that the State took and possessed a property right of Defendant from June 12, 2012 until the Trial Court's decision of June 19, 2014 or until the amended petition was filed. A temporary taking is recognized as requiring just compensation under both State, *SDDS v. State*, 2002 S.D. 90, 650 N.W.2d 1, and federal, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S. Ct. 1434, 1437 (1945), constitutions.

For 24 months, the right of access was vested in the State of South Dakota. The landowner at the very least must be permitted a trial to determine what damages the taking caused.

XI. Permanent Taking

The exercise of the police power by eminent domain must be reasonable.

The Court in *Hall v. State*, *Ex Rel South Dakota Dept. of Transp.*, 2006 S.D. 24, § 17 712 N.W.2d 22, 29 stated: "…the proper exercise of police power must be reasonable and cannot be arbitrary."

Further, a unanimous Court in *Hall*, 2006 S,D, 24 § 19 stated:

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

Evidence in the record, by the affidavit of the owner and deposition testimony of knowledgeable witness reflects more than sufficient evidence to require a trial. Affidavit of Rober L. Miller, SR 327; Deposition of Dave Hanson, SR 45; Deposition of Pete Correll, SR 47.

Mr. Hanson, an owner of eight Perkins franchises, appeared by video deposition. He was asked about the amended petition (not the original Declaration of Taking) which permitted access from Perkins to Cliff Avenue but closed 63rd Street. He was asked as a willing buyer:

> Q: Is the change in highway design in front of this Perkins on North Cliff going to damage the property?
>
> A: Absolutely.

Hanson Deposition, p. 25.

> Q: Would you be a future purchaser or consider purchasing this franchise after the change in the road design?
>
> A: No.

Hanson Deposition p. 13.

Pat Correll, the operator of eleven Perkins franchises testified:

> Q: As a purchaser – potential purchaser and knowledgeable about Perkins franchises, would this change (amended petition) in the highway affect your interest were you in the market to buy a franchise in Sioux Falls?
>
> A: Yes.

Correll Deposition, p. 21, line 22.

> Q: …would you make an offer to buy this property with the idea of running it as a Perkins franchise?
>
> A; No, I would not.

Correll Deposition, p. 24, line 3.

The North Dakota Court has held that the loss of business is evidence of unreasonableness of access. *Filler v. City of Minot*, 281 N.W.2d 237 (N.D. 1979). The business has lost money each month since the project began. SR 327. When a profitable business turns to loss, a jury may find the legal cause the unreasonableness of access.

Robert Winters, Vice President of Development, Perkins testified that the amended petition left doubt that the franchise would follow a sale of the real estate. Winters deposition, p. 17:21-25.

Robert Miller's affidavit submits the following contested facts:

> 34. The value of the property and business before the project was approximately $2,600,000 and after the State's project is approximately $200,000. SR 327.

An owner of property may give his value of property. *State v. Henrikson*, 1996 S.D. 62, 548 N.W.2d 806. The evidence that the project under the unlawful amended petition still caused $2,400,000 of damage together with evidence from knowledgeable potential buyers and the evidence that the business has lost money since the project began is evidence that defeats summary judgment ruling that no damage existed.

CONCLUSION

The Defendant-Appellant requests that the Trial Court's grant of summary judgment be reversed; second, that the Trial Court be ordered to conduct a just compensation jury trial on the taking described in the Declaration of Taking; third, that the Trial Court's finding of the taking occurred on June 12, 2012 be affirmed and that the right to a jury trial on just compensation, vested on June 12, 2012.

Further, that the Landowner be awarded its costs on appeal.

Respectfully submitted this 13th day of November, 2014.

MEIERHENRY SARGENT, LLP

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CERTIFICATE OF SERVICE

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

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On this 13th day of November, 2014.

MEIERHENRY SARGENT, LLP

By: */s/Mark V. Meierhenry*

CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 5,968 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.

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27176

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

v.

JB Enterprises, Inc.,
Defendant and Appellant.

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

The Honorable Susan Sabers
Circuit Court Judge

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Notice of Appeal filed on the 13th day of August, 2014

27176 27181

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

Appellee State of South Dakota ("the State") accepts the jurisdictional statement of the Appellant JB Enterprises, Inc. ("Landowner") with one modification and one addition. Landowner filed its notice of appeal on August 13, 2014, not August 12. The State filed a notice of review on August 25, 2014.

STATEMENT OF THE ISSUES

1. Did the parties agree to eliminate the taking of a temporary easement and access control over Landowner's private property?

The trial court ruled Landowners did not agree to eliminate the State's taking and that a taking occurred on June 12, 2012.

SDCL 31-19-37.

SDCL 31-19-24.

State Dept. of Transp. v. Richey Motor Company, Inc., 270 N.W.2d 48 (S.D. 1978).

2. Was summary judgment properly granted to the State, because the State did not cause any compensable taking or damaging of Landowner's private property?

The trial court granted summary judgment to the State on the grounds that while a taking occurred, the taking was not compensable.

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

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

Krier v. Dell Rapids Township, 2006 S.D. 10, 709 N.W.2d 841.

STATEMENT OF THE CASE

The State accepts Landowner's Statement of the Case, except for the last two paragraphs. In the second to the last paragraph, Landowner asserts the trial court found there was no damage to the Landowner. The trial court actually granted summary judgment to the State based on the legal conclusion that there had been no compensable taking or damaging of Landowner's private property. *Settled Record ("SR") 546-547.* In the last paragraph, Landowner offers legal argument, rather than a brief statement of the trial court's disposition of the case.

STATEMENT OF THE FACTS

The State planned to reconstruct Interstate 90 at its interchange with Highway 115, which is also known as Cliff Avenue. *Affidavit of Mark Leiferman at 1, SR 160-161 (State's Appx. 27, Tab 3).* Landowner owns a Perkins Restaurant on real property a short distance south of this interchange ("the Property"). *SR 160-161 (State's Appx. 27-28, Tab 3).* The Property abuts Cliff Avenue and 63rd Street in Sioux Falls, South Dakota. *SR 161 (State's Appx. 28, Tab 3).* Before the State's highway project, ingress and egress to and from the Property was via an approach along 63rd Street and a curb cut along Cliff Avenue. *Id.*

As part of the State's highway project, the State planned to close the Cliff Avenue/63rd Street intersection and eliminate the Property's only approach to Cliff Avenue by acquiring all direct access rights between the Property and Cliff Avenue. *Exhibits A and B to Declaration of Taking, SR 12-22 (Landowner's Appx. 12-19).* As Landowner asserts in its brief, Landowner vocally opposed the State's original highway design. *Landowner's Appellate Brief at 4.*

On May 2, 2012, the State filed a condemnation petition and declaration of taking seeking to acquire a temporary construction easement and all direct access rights between the Property and the abutting Cliff Avenue. *Declaration of Taking at 1-2, SR 9-10; Petition, SR2.* Under the State's original highway design, the Property would lose its only direct approach to Cliff Avenue. *Ibid.* As part of the original filing, the State deposited money with the court to cover the State's estimate of the compensation owed for the temporary construction easement and the loss of all direct access rights to Cliff Avenue. *Deposit in Court of Estimated Compensation, SR 31.* Other aspects of the State's project, which the State viewed as non-compensable, included construction of a median in Cliff Avenue, closure of the Cliff Avenue/63rd Street intersection abutting the northwest corner of the Property, and building a right turn lane in existing right of way along the Property. *Exhibit B to Declaration of Taking, SR 16-22 (Landowner's Appx. 16-19); Amended Petition, SR 77-79 (Landowner's Appx. 22-34).*

After the condemnation action was served, Landowner filed a motion to release the court deposit and noticed a hearing on the motion for the end of the month, May 30, 2012. *Motion to Release Deposit, SR 36.* Five days before the scheduled hearing, the State proposed to make one more attempt to obtain approval from the Federal Highway Administration, which was partially funding the project, to allow Landowner to retain its access rights to Cliff Avenue. *SR 169 (State's Appx. 3, Tab 1).* The same day, counsel for Landowner wrote to the Court asking that the requested hearing be cancelled. *Id.* By way of explanation, Landowner's counsel told the Court:

> I received a call from Karla Engle this morning. She reports that the State and the Federal Highway Authorities are discussing changes that may affect the scope of the taking in this case. In light of those

> discussions, which may seriously change the scope of the taking, I agreed to postpone the motion should the Court approve.
>
> ...I therefore request the hearing scheduled for May 30, 2012 at 11:00 a.m. be cancelled.

Id. The Court cancelled the hearing. *SR 170 (State's Appx. 4, Tab 1).*

On June 12, 2012, Landowner's counsel mailed to the State a Waiver of Right to Contest Taking, stating "Defendant waives its right to contest the necessity of the taking." *Waiver of Right to Contest Taking at 1-2, SR 40-41.* That same day, however, the State sent an e-mail to Landowner's counsel, which read in pertinent part:

> ...Our last meeting with the feds was very encouraging – by that I mean they seemed willing to consider forgoing the need to acquire control of access across the Perkins property and allow the current entrance to remain in place. There is a very real chance that we won't need any easements or access rights at all from your clients. We followed up on the meeting with a written request and are awaiting a written response.

SR 171 (State's Appx. 5, Tab 1).

Landowner's counsel responded by acknowledging the parties' intent to change what would be taken by the State. Landowner's counsel wrote:

> It will reduce the damage to the property but by how much remains to be seen. *We will wait another week and then expect to waive the hearing and begin the case.* I have no faith the US will change its mind after three years of discussions on these very issues.

Id. (italics added). Significantly, Landowner's counsel said the State would have an additional week to pursue the proposed changes in the project plans before Landowner would waive the hearing on the right to contest the taking. In response, the State's counsel reported being "cautiously optimistic" that FHWA would endorse the changed construction plans and then inquired what claims Landowners would assert if the easement and control of access were eliminated from the project:

> If the control of access and temporary easement are eliminated, what property right will have been taken or damaged by the State? Will you be claiming damages due to the construction of a median or on some other theory?

Id. Landowner's counsel did not respond to this inquiry. *Id.*

On June 19, 2012, within the one-week deadline established by Landowner, the State's counsel informed counsel for Landowner that the proposed plan changes were approved:

> I'm writing with what I hope is good news for your clients. Today we received written confirmation from FHWA that it would approve changes in the plans on the Cliff Avenue Project. Our Road Design Office is working hard on the revised plans – I'll send them out to you as soon as I get them. As to the Perkins Property, DOT will not be eliminating the current access approach to the Perkins property. And DOT will not be acquiring control of access rights across the property. Because the access will remain in place, my understanding is that DOT will not be needing any temporary easement either – but I do want to see that confirmed in the revised plans....The plans will still require that the Cliff Avenue/63rd Avenue intersection be eliminated.....Once we both have the revised plans in hand, perhaps we can talk about how the pending Perkins case should be handled.

SR 172 (State's Appx. 6, Tab 1).

After receiving the e-mail, Landowner's counsel acknowledged that the State would be allowed to amend its present condemnation filing to incorporate the revised plans. Furthermore, while refusing to concede there was no taking under the revised plans, Landowner's counsel agreed that the taking of the Property had been reduced by elimination of access control:

> I will await the next set of plans which will amend the present State filing on the Perkin's site. I assume the taking of the Walsh-Miller case goes on? I doubt that the damage to my clients' property is eliminated perhaps in gravity but not entirely.

SR 174 (State's Appx. 8, Tab 1).

On July 17, 2012, the State sent Landowners' counsel revised project plan sheets relating to the Property, and reported "the plans reflect no taking of any easements or access rights across the Property's frontage." *SR 176 (State's Appx. 10, Tab 1).* Ten days later, the State sent Landowner's counsel a full set of right of way and grading plans for the project. *SR 178 (State's Appx. 12, Tab 1).* In addition, the State's counsel suggested that dismissal of the condemnation action was appropriate, given the revised plans:

> I am also enclosing a stipulation and draft order of dismissal for your consideration. I believe dismissal is appropriate for several reasons. First, DOT is no longer affecting the access point or taking a temporary easement. Second, although you appear to be claiming that the closing of 63rd also affects a taking or damaging of the Perkins property, you appear to be making that claim in the separate case involving the vacant Miller and Walsh parcels that abut the I-90 ramp. Continuing the separate Perkins case appears to be a redundancy.

Id. (State's Appx. 12, Tab 1).

Landowner's counsel did not execute the stipulation, and sought to push forward with discovery. In response to Landowner's request to schedule a deposition on short notice, the State's counsel made the following inquiry:

> ...I want to be clear on what you claim the taking or damaging is to your clients' properties. DOT has agreed not to close the approach leading to the Perkins property. Are your clients willing to stipulate to that plan change? If so, are you claiming the Perkins property is still damaged, and if so, what actions do you claim cause the damage to the Perkins property?

SR 179 (State's Appx. 13, Tab 1).

The next day, the State's counsel sent a letter to Landowner's counsel summarizing their conversation the day before:

> We also talked about DOT's change in the plans relating to the approach on the Perkins property. DOT originally planned to eliminate the direct access approach between the Perkins property and Cliff Avenue. DOT ultimately changed the plans to allow this direct approach to remain. I inquired if you were opposing that plan change or in some way attempting

> to argue that DOT should be prohibited from changing the nature of the taking by allowing the access. You explained your client is not opposing the plan change or attempting to prevent DOT from making that change at this point. Rather, your client believes that DOT's construction of a median and elimination of 63rd Avenue has damaged the property, and it is those actions that form the basis of your client's continuing claims. DOT does not believe the median closure of closure of 63rd pose compensable claims, so it is those issues that now form the dispute between our clients.

SR 181-182 (State's Appx. 15-16, Tab 1).

Landowner took the deposition of Robert J. Winters the next day. *SR 126.* Winters testified about the effects the planned median in Cliff Avenue would have on the value of the Property. *Depo. of Robert J. Winters at 21-24, SR 131.* Specifically, he testified that the median would destroy the value of the Property and its usability for a Perkins Restaurant because of the loss of left turns into and out of the Property via Cliff Avenue. *Id.* Winters offered no testimony about loss of all direct access rights to Cliff Avenue or how that loss might affect the value of the Property. Nor did Winters offer any testimony about losses due to a temporary construction easement. Winters' testimony focused on how the median would impact ingress and egress to and from the Property via Cliff Avenue. *Id.*

The following month, the State served a motion for leave to file an amended petition. *SR 62, 66.* Included with the motion was a copy of the proposed amended petition. *SR 63.* Unlike the original petition, the proposed petition did not claim any portion of the Property was necessary for the construction of the project. *Id.* The new petition incorporated the revised construction plans, which allowed the direct access approach between the Property and Cliff Avenue to remain in place. *Id.* The revised plans did not include any temporary construction easement or any acquisition of access control across the Property frontage. *Id.* And rather than seeking to condemn any

property rights of Landowner as set forth in the original petition, the new petition asked the Court to rule "whether construction of the project *in accordance with the revised plans* will effect a compensable taking or damaging of Defendant's property." *SR 64 (Landowner's Appx. 23).*

The State's memorandum in support of its motion to amend the petition clearly stated the intent to eliminate access control across the Property's frontage.

> The plans attached to the original petition sought to acquire control of access all along the frontage between Defendant's property and Cliff Avenue. Those plans also eliminated the existing direct access between Defendant's property and Cliff Avenue. The revised plans, which are incorporated into the amended petition, *no longer seek to acquire control of access along the property.* The revised plans also allow the current direct access approach, connecting Defendant's property to Cliff Avenue, to remain in place.

SR 475 (State's Appx. 33, Tab 4). (Italics added).

In December 2012, Landowners took the video depositions of several other witnesses for trial. *SR 102, 112.* Each of these witnesses testified with reference to the new plans, not the original plans that would have eliminated all access between the Property and Cliff Avenue. *Depo. of Dave Hanson at 12-13, SR 104-105; Depo. of Pat Correll at 20-21, SR 116-117.* These witnesses complained that DOT's construction of the median and a right turn lane in existing highway right of way would adversely impact the use and value of the Property. *Id; ibid.* None of Landowner's witnesses testified about loss of all direct access to Cliff Avenue.

Also in December, 2012, the State made a small change in the project plans to better facilitate U-turns at the end of the highway median. *Plaintiff's Amended Motion for Leave to File an Amended Petition, SR 68.* The State filed an Amended Motion for Leave to File an Amended Petition, incorporating these slightly modified plans in the

proposed amended petition. *Id.* A hearing on the motion was noticed for February 14, 2013. *SR 72.*

Landowners never filed any objections or response to the original motion or amended motion, and Landowner's counsel appeared at the hearing and affirmatively informed the Court there were no objections to the amendment of the condemnation pleadings. *Transcript of Motion Hearing, SR 459 (State's Appx. 19, Tab 2).*

The Court entered an order allowing the amendment to the condemnation petition as proposed by the State. *SR 74.* The State filed the amended petition and Landowner admitted service of the amended petition on February 25, 2013. *SR 80.* The amended petition did not reference any taking of a temporary easement or access control. *SR 77-79 (Landowner's Appx. 23).* The amended petition incorporated the revised plans, which showed no easement or access control across the Property. *Id.* In fact, the amended petition did not assert any taking or damaging of Landowner's property. Instead, the petition asked the trial court to determine whether construction of the project in accordance with the revised plans would cause any taking or damaging of Defendant's property. *SR 78 (Landowner's Appx. 23).*

The State substantially completed its highway project during the 2013 construction season. *SR 160 (State's Appx. 27, Tab 3).* Before and after the project, the Property has the same direct access approach between the Property and Cliff Avenue. *SR 161 (State's Appx. 28, Tab 3).* The State also did not use any temporary easement on Landowners' Property. *SR 77-78.*

After construction of the project was mostly completed, Landowners filed a motion asking the Court to rule that the original pleadings and plans govern this case and

that the State took all access rights to Cliff Avenue on June 12, 2012, when Perkins mailed a waiver of the right to challenge the necessity of any taking. *SR 86.* The State responded by moving for summary judgment, arguing that the parties had agreed to eliminate the taking of access control and, under the amended pleadings and plans, the State did not cause a compensable taking or damaging of the Property. *SR 94.* The Court granted summary judgment to the State, concluding there was no compensable taking or damaging of the Property. *SR 580-581.*

STANDARD OF REVIEW

The taking or damaging of a private property right is an essential element of any claim for compensation under the state and federal constitutions. U.S. Const. amend. V. ("...nor shall private property be taken for public use, without just compensation."); S.D. Const. Article VI, § 13 ("Private property shall not be taken for public use, or damaged, without just compensation...."). The question of whether there has been a taking or damaging of private property is a question of law for the court, not a jury, to decide. *Rupert v. City of Rapid City,* 2013 SD 13, ¶ 29, 827 NW2d 55, 67. Questions of law are reviewed *de novo. In re Woodruff,* 1997 S.D. 95, ¶ 9, 567 N.W.2d 226, 228. Furthermore, an alleged violation of a constitutional right is "an issue of law to be reviewed under the *de novo* standard of review." *Id.* (quoting *Benson v. State,* 2006 S.D. 8, ¶ 39, 710 N.W.2d 131, 145).

Landowner correctly summarizes the standard of review for summary judgment.

ARGUMENT

ISSUE 1.

Did the parties agree to eliminate the taking of the temporary easement and access control over Landowner's private property?

a. Under state law, the parties can agree to exclude property taken through a declaration of taking or otherwise.

Landowner contends that once the State files a declaration of taking, the scope or nature of the taking cannot change. This assertion is wrong. The law specifically authorizes the State to stipulate or agree to exclude any property, in whole or in part, from a taking that will or has occurred.

> In any condemnation proceeding instituted by or on behalf of the State of South Dakota, the attorney general may stipulate or agree upon behalf of the State of South Dakota to exclude any property or part thereof, or any interest therein, *that may have been, or may be, taken* by or on behalf of the State of South Dakota by declaration of taking or otherwise. In the case of a municipality, the municipality's attorney or other duly authorized representative may take the action provided in this section.

SDCL 31-19-37 (italics added).

The above statute empowers the State to cooperate with landowners in reducing or eliminating an actual or proposed taking. That is precisely what happened here. The State approached Landowner about making one more attempt to get federal authorization to change the plans and pleadings and eliminate the State's acquisition of all access rights across the property's Cliff Avenue frontage. *SR 169 (State's Appx. 3, Tab 1).* In response, Landowner specifically asked the Court to hold off on releasing the court deposit, because the plan changes the State was willing to pursue "may seriously change the scope of the taking." *Id.* Then Landowner took a series of steps to facilitate the elimination of the taking. First, on June 12, 2012, Landowner's counsel represented in writing that DOT would be allowed more time to pursue the plan changes before Perkins would waive any hearing on necessity and begin the case. *SR 171 (State's Appx. 5, Tab 1).* Coincidentally, this is the date Landowner now claims that it waived necessity and

the access rights were irrevocably taken. Second, after the proposed plan changes were approved, Landowner repeatedly acknowledged that the taking and damaging of the property had changed. *SR 171-172 (State's Appx. 5-6, Tab 1).* Third, when the State moved to amend the pleadings, Landowner filed no written objections and affirmatively represented at hearing that it had no objections, thereby agreeing to the amendment and the resulting elimination of access control. *SR 458 (State's Appx. 19, Tab 2).* Fourth, the amended petition agreed to by Landowner asked the Court to determine whether, under the revised plans, a compensable taking or damaging of Perkins' property had even occurred. *SR 77-78 (Landowner's Appx 23).* Finally, Landowner proceeded to prepare its case, specifically complaining about loss of indirect access due to the median and closure of an intersection, while continuing to enjoy the same curb cut to Cliff Avenue after the project as before. *SR 104-105, 116-117, 131, 161, 181.*

Landowner cannot credibly claim the State acted unilaterally in making the changes to the plans and pleadings. Landowner agreed to the plan changes and the amended pleadings, and cannot now insist on a taking that Landowner worked with the State and the Court to avoid.

b. Landowner neglects to inform the Court about federal law that also allows the parties to agree to reduce or eliminate a taking.

Landowner cites to a federal statute and federal case law for the proposition that title vests irrevocably in the government once a declaration of taking is filed. Landowner's reliance on federal law is misplaced for several reasons. First, the federal statute cited by Landowner, 40 U.S.C. § 3114, sets the procedure for condemnation "by and in the name of the United States and under the authority of the Federal Government."

Since this condemnation action was brought by the State and not the federal government, this federal procedural law does not apply.

Second, Landowner fails to acknowledge that federal law, like our state law, allows the parties to agree to reduce or eliminate a taking after the filing of a declaration of taking.

> In any condemnation proceeding brought by or on behalf of the Federal Government, the Attorney General may stipulate or agree on behalf of the Government to exclude any part of the property, or any interest in the property, taken by or on behalf of the Government by a declaration of taking or otherwise.

40 U.S.C. § 3117.

None of the federal case law cited by Landowner involves the interpretation of this federal law or the effect of the parties' agreement to reduce or eliminate a taking. Consequently, none of the federal case law cited by Landowner has any application to this case.

c. The *Richey* case provides no support for Landowner's efforts to force a taking of complete access rights.

Landowner relies on *State Dept. of Transp. v. Richey Motor Co., Inc.*, 270 N.W.2d 48, for the proposition that the filing of the declaration irrevocably vested title in the State. Landowner's reliance is misplaced, because (1) the law concerning vesting of title has changed; and (2) title never vested in the State, even under the current law.

At the time of the *Richey* case, SDCL 31-19-24 vested title in DOT upon the mere filing of the declaration of taking. *Richey,* 270 N.W.2d at 50 (citing SDCL 31-19-24 prior to its amendment by S.D. Sess. L. ch. 184, Section 4). Under the current version of SDCL 31-19-24, title does not vest in DOT until: (1) the date of the decision on the hearing regarding the necessity of the taking; or (2) the date the hearing is waived.

> Title to the lands in such estate or interest therein as is specified in the declaration described in §31-19-23 shall vest in the State of South Dakota or the municipality, and the land shall be deemed to be condemned and taken for the use of the State of South Dakota or the municipality, and the right to just compensation for the same shall vest in the persons entitled thereto either on the date the decision is rendered at the hearing provided in §31-19-10.1 or the date the hearing is waived.

SDCL 31-19-24. So, Landowner's continued assertion that title vests upon the filing of the declaration of taking does not comport with the current law, which requires a hearing or valid waiver of that hearing.

Even under the current law, however, no taking occurred. It is undisputed there was never any hearing on the necessity of the taking. Landowner claims, however, that it waived the necessity hearing and vested title in the State when Landowner served the *Waiver of Right to Contest Taking* on June 12, 2012. But the very same day the waiver was served, Landowner disavowed that waiver and allowed the State additional time to bring about the requested plan changes. Landowner's counsel specifically informed the State: "We will wait another week and then expect to waive the hearing and begin the case." *SR 171 (State's Appx. 5, Tab 1).* Within that week period, the State managed to obtain federal approval to change the project plans and eliminate the taking of access control across the Property, the very plan changes that Landowner wanted. Landowner then agreed to the amendment of the condemnation pleadings, incorporating the revised plans and eliminating the taking of access control across the Property's Cliff Avenue frontage. There never was any taking of access from Landowner, so Landowner's effort to establish a complete taking of access control should be flatly denied.

The Court's analysis in *Richey* actually supports the State's position. In *Richey,* the State sought to amend a declaration of taking by attaching revised plans that would

include an asphalt crossing over a drainage way. Without the crossing, the State's highway project would have bisected the owner's property and isolated one part of the property from another. The trial court disallowed the unilateral amendment on the grounds the taking was complete when the declaration of taking was filed and the State had no right to amend the pleadings after that time.[1] In overruling the trial court, the South Dakota Supreme Court observed that the State's amendment did not seek to divest the State of any interest that had already been taken. *Richey,* 270 N.W.2d at 51. Instead, the Court reasoned that the State had merely amended the plans so they accurately reflected the situation that would exist when the highway construction project was complete. *Id.* at 51.

The same analysis in *Richey* applies to this case. At the time the State amended its pleadings, no taking had occurred. Landowner had specifically allowed the State additional time to pursue plan changes and incorporate those plan changes into the amended pleadings. Consequently, the amended plans do not reflect an effort to unilaterally abandon or divest the State of an interest already acquired, because no interest had been acquired by the State. Furthermore, the amendment of the condemnation pleadings was a bilateral effort to minimize the impact of this project on Landowner's private property. Landowner actively supported and participated in this effort by asking the Court to postpone the scheduled hearing, accommodating the State's requests for additional time to pursue the plan changes, and acquiescing in the amendment of the pleadings. Finally, the amendment to the plans and the pleadings reflects what was actually constructed. As the Richey Court observed: "[Landowners]

1 As noted above, the trial court was considering the law in place at the time, which vested title in the State at the time the declaration of taking was filed.

are entitled to just compensation based upon the actual situation, not to speculative compensation based upon a hypothetical situation." *Id.* at 51.

The *Richey* Court refused to embrace a result that would yield a windfall to the property owner. The reasoning behind the Court's decision resonates in the context of this case:

> Other jurisdictions have held that courts may properly allow amendments to condemnation papers to reflect construction plan changes that indicate a lessening of consequential damage to the remainder....The reasoning of these cases is that the state owes a duty to the public to attempt to minimize the expenditure of public funds for the acquisition of property for public improvements. Particularly where the State or one of its political subdivisions is the condemnor, the public interest is involved as well as the interest of the owner of the property sought to be taken, and the owner ought not be allowed a windfall where he is not entitled to it.
>
> *Richey,* 270 N.W.2d at 50 *(citations and quotations omitted).*

Landowner seeks the outcome that the *Richey* court specifically rejected – allowing an owner a windfall to which he is not entitled. As a result of negotiations between the parties immediately after the filing of this condemnation action, Landowner has the exact same direct access to Cliff Avenue that it always had. Landowner should not be allowed to dial back its own actions and collect money for a taking that the State specifically helped it avoid.

d. The State did not unilaterally abandon a taking.

In an effort to force the taking of access across their Property, Landowner points to SDCL 31-19-35, which states:

> A proceeding to condemn land for public use may not be abandoned after filing of declaration of taking, so as to deprive an owner whose property had been taken of his constitutional right to have damages assessed and paid in money.

This statute does not apply, because when the State amended its pleadings no taking had occurred. Landowner had specifically allowed the State additional time to obtain approval for plan changes Landowner wanted. The amended petition and plans do not reflect an effort to abandon or unilaterally divest the State of an interest already acquired, because no interest had been acquired by the State and the amendment of the condemnation pleadings was a bilateral effort to minimize the impact of this project on Landowner's private property. Landowner joined in this effort, by asking the Court to postpone the scheduled hearing, accommodating the State's requests for additional time to pursue the plan changes, and acquiescing in the amendment of the pleadings. Finally, the amendment to the plans and the pleadings reflects what was actually constructed. Landowner enjoys the same access and other property rights that Landowner enjoyed before the project. Landowner should not collect compensation for a taking that never occurred and that the parties worked together to avoid.

ISSUE 2.

Was summary judgment properly granted to the State, because the State did not cause any compensable taking or damaging of Landowner's private property?

Under both the State's original and amended pleadings and plans, the State was making three important changes near the Property. First, the State constructed a median preventing left turns to or from the curb cut located along the Property's Cliff Avenue frontage. *SR 161-162 (State's Appx. 28-29, Tab 3).* Second, the State replaced one public highway intersection with another. Specifically, the State constructed an extension of 63rd Street to connect with National Avenue to the east, which in turn connects to the larger street system. *SR 162 (State's Appx. 29, Tab 3).* Once that new street extension and intersection was built, the State then closed the intersection of Cliff

Avenue and 63rd Street. *Id.* Third, the State constructed a right turn lane in existing right-of-way abutting a portion of the Property's Cliff Avenue frontage. *Id.*

Before and after the project, Landowner has the same curb cut for access to Cliff Avenue and the same access approach to 63rd Street. *SR 161 (State's Appx. 28, Tab 3).* The only change relating to access arises from: (1) the State's construction of a median in existing Cliff Avenue right of way, which prevents left-hand turns into and out of the Property via Cliff Avenue; and (2) DOT's closure of the public highway intersection of Cliff Avenue and 63rd Street.

Landowners' witnesses testified that the value and usability of the Property was adversely affected by DOT's closure of the Cliff Avenue/63rd Street intersection, construction of the median in Cliff Avenue, and construction of the right turn lane in existing right of way along the Property's frontage. *SR 104-105, 116-117, 131.* In the context of its motion for summary judgment, the State accepted as true all of Landowner's assertions about the adverse impacts of these construction activities.

The trial court granted summary judgment, because construction of the median, closure of the intersection, and construction of the turn lane did not, as a matter of law, cause a compensable taking or damaging of Landowners' Property. *SR 580-581.*

a. Landowner cannot claim compensation for closure of the Cliff Avenue/63rd Street intersection.

South Dakota law recognizes that owners have a reasonable right of access to streets abutting their property. "When a conventional highway is established, an abutting owner has a right separate and distinct from that of the general public to its use. This includes the right of access, ingress and egress to the highway subject only to the easement of the public." *Darnall v. State,* 108 NW2d 201, 204 (SD 1961). *See also*

Hurley v. State, 143 NW2d 722, 726 (SD 1966) (ruling State's installation of barriers prohibiting access from owner's land to an abutting street was a compensable loss). In this case, Landowner has the same direct access to Cliff Avenue and 63rd Street both before and after the State's project. Landowner has not suffered any loss of access rights to abutting streets.

Landowner's real complaint is not about access but about the connections between public streets. The South Dakota Supreme Court has previously rejected an owner's claim for compensation due to the lack of a connection between one roadway and another. In *Darnall v. State,* 108 NW2d 201 (S.D. 1961), the Darnalls owned a café, cabins and gas pump along a state highway. They sought compensation because a new interstate highway was built without a direct connection to the existing highway that fronted their property. *Id.* at 202. A curb and sidewalk separated this abutting highway from the interstate, preventing traffic from the abutting highway from entering the interstate and preventing traffic from the interstate from entering the abutting highway, except at two interchanges nearly a mile north and south of the Darnalls' property. *Id.* As a result, interstate traffic had a long circuitous route to reach the Darnalls' land. *Id.* Meanwhile, direct access from the Darnalls' property to the abutting highway remained unchanged. *Id.*

In disallowing the Darnalls' claim for compensation, the Court reasoned that property owners cannot claim a right to dictate the layout of the street system or insist on ready access to the traffic that travels upon it. "The construction of a highway past a place of business gives owners no vested right to insist that it remain there as a changeless road in a changing world…; no legal damage results though the traffic may be

diverted by authorities and incidental loss result. A highway may be relocated either by marking or construction which would direct traffic some distance away from a business mainly dependent on it." *Id.* at 205 (*citations omitted*). Drawing a distinction between a compensable taking and the non-compensable exercise of police power, the Court identified a litany of governmental actions which may divert traffic but result in no compensable taking or damaging of private property.

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

Darnall, 108 NW2d at 206 (citations omitted).

In this case, DOT is taking the precise action the *Darnall* court reasoned was not a compensable taking – installing a curb preventing movements from one roadway to another. Landowners' direct access to 63rd Street and Cliff Avenue is unchanged. Any resulting reduction in land values "is due to diversion of traffic, a lawful exercise of the police power and there can be no recovery." *Id. at 207.*

Even when government action results in no physical invasion, a property owner can recover compensation "if he or she can prove 'the consequential injury is peculiar to [their] land and not of a kind suffered by the public as a whole.'" *Krier v. Dell Rapids Township,* 2006 SD 10 2006 S.D. 10, ¶ 26, 709 N.W.2d at 847-48 (alteration in original) (quoting *Bloom*, 77 S.D. at 461, 93 N.W.2d at 577). The plaintiff's injury "must be

different in kind and not merely in degree from that experienced by the general public." Id. ¶ 26, 709 N.W.2d at 848 (quoting Hurley v. State, 82 S.D. 156, 163, 143 N.W.2d 722, 726 (1966)).

Our Supreme Court has previously ruled that this "special injury" test is not met when the government merely diverts traffic. In *State v. Henrikson,* 1996 S.D. 62, 548 N.W.2d 806, the State took 5.29 acres of land out of a privately-owned tract totaling 55.15 acres in order to build an interstate interchange. After the project, the owners' property had only one curb cut to the abutting street instead of two and the street abutting the owners' property included a median that prevented left-hand turns into the property. *Id.* at ¶ 4. Initially, the trial court prohibited testimony regarding the median. *Id.* Later, however, over the objection of the State, the court allowed witnesses to testify about diminished land values resulting not only from the loss of curb cuts to the abutting street, but also from the construction of the median. *Id.* at ¶¶ 12-14. The State appealed the jury's verdict, arguing the verdict was tainted because it included compensation for construction of the median, which was non-compensable. The Supreme Court agreed and remanded the case for a new trial. *Id.* at ¶ 21. Applying the special injury test, the Court identified numerous governmental restrictions that may result in a more circuitous route of travel but do not form the basis for compensation, including highway relocations, prohibitions against left and U turns, and construction of curbs and medians. *Henrikson,* 1996 S.D. 62, at ¶ 8 (citing *Darnall*, 79 S.D. at 68-69, 108 N.W. 2d at 206). Relying on *Darnall* as precedent, the court concluded that construction of a median was the exercise of police power and not a compensable taking, and the trial court committed reversible

error when it failed to strike testimony about how the median diminished property values. *Id.* at ¶¶ 10, 20-21.

The Court's opinion in *Henrikson* refutes a myriad of arguments from Landowners. First, governmental actions that restrict or re-direct the flow of traffic, such as the closure of a public highway intersection, are "proper exercises of the police power of the state and not of the power of eminent domain." *See Henrikson,* 1996 S.D. 62, 548 N.W.2d 806 (quoting *Darnall,* 79 S.D. at 68-69, 108 N.W.2d at 206). As a result, Landowners could not receive compensation for losses resulting from mere diversion of travel.

Second, the "before and after" method of assessing damages in an eminent domain case does not mean that Landowner can collect compensation for every aspect of a State highway project. Traffic restrictions, such as the construction of a median or the closure of an intersection, may cause more circuitous travel and impact Landowner's property values, but Landowners could not collect any compensation for those losses.

Third, under the special injury test, Landowner must show it has suffered a peculiar injury to its land, different in kind and not merely in degree from the injury suffered by the public. In this case, Landowner suffers the same inconvenience as other members of the public, who have also lost the connection between Cliff Avenue and 63rd Street. Landowner owns no right to dictate where or whether public streets will intersect and cannot receive compensation when the government decides to divert traffic by closing one intersection and creating another.

The Supreme Court of Georgia has also adopted the "special injury" test and has applied that test to several cases like this one. *Metropolitan Atlanta Rapid Transit*

Authority v. Fountain, 352 S.E. 2d 781 (Ga. 1987); *Dept. of Transportation v. Whitehead,* 317 S.E.2d 542 (Ga. 1984). In each case, the court denied compensation for closure of an intersection where direct access to the abutting highways and ultimately the larger street system remained intact. *Ibid.; Id.* The Georgia court reasoned: "[T]his alteration of the traffic flow and the resulting inconvenience was non-compensable since this action of the DOT did not amount to a taking of private property rights but instead damaged [the landowner] in a general sense, common to that suffered by other members of the traveling public." *Fountain,* 352 S.E.2d at 783.

Landowner's claim is virtually identical to the claims of these other disappointed litigants. Before the State's project, Landowner enjoyed the use of an intersection directly connecting Cliff Avenue and 63rd Street. After the project, Landowner and the general public will have a more circuitous route of travel between Cliff Avenue and 63rd Street. The short route connecting 63rd Street and Cliff Avenue is lost, but Landowner's immediate access to each of these abutting streets is unchanged. Landowner's injury is no different than the inconvenience its neighbors and other members of the public will experience when a favored route of travel is replaced with a more circuitous route. Unable to show any special injury distinct from the burden borne by the public in general, Landowner suffered no compensable taking and summary judgment was warranted.

b. Landowner cannot claim compensation for the diminished value of its Property due to DOT's construction of a median in Cliff Avenue.

It is undisputed that, as part of its project, DOT constructed a median in Cliff Avenue adjacent to the Property frontage and extending roughly an additional 95 feet south of the Property frontage. The median prevents direct left turns between the Property and Cliff Avenue. *SR 161-162.* Cliff Avenue travelers coming from the north

may U-turn at the end of the median to reach the Property, adding a travel distance of about 250 feet. *SR 162.* Cliff Avenue travelers coming from the south will still access the Property as easily as before the construction of the median, because right turns will remain available to these travelers. *Id.* Northbound travelers exiting the Property will be unaffected by the median, but southbound motorists leaving the Property will have to turn north and then may U-turn at the I-90, adding a distance of approximately 600 feet to their journey. *Id.*

Construction of the median cannot, as a matter of law, result in any claim for compensation by Landowner. As discussed above, this Court has previously ruled that construction of a median and the resulting circuitous route is not a compensable taking, because it does not result in special injury unique to the property owner and different in kind from the injury suffered by the general public. *State v. Henrikson*, 1996 SD 62, ¶ 10 and ¶ 21.

Like South Dakota, courts across this nation have disallowed compensation for damages caused by medians. *Iron Gate Partners, L.L.C. v State Dept. of Transp.*, 27 P.3d 1259, 1262 (Wash. Ct. App. 2001) (concluding the installation of a median, even without notice to an affected property owner and without evidence of accidents, did not result in compensable damages); *Harte v. Dartmouth,* 702 N.E.2d 29 (Mass. Ct. App. 1998) (holding that installation of a median barrier requiring a two-mile detour to reach owner's property was not a compensable impairment of access); *County of Anoka v Blaine Building Corporation,* 566 NW2d 331, 334 (Minn. 1997) (ruling that the dividing of a roadway by median strips could not be compensated, because the property owner lost traffic access in one direction but still retained access in the other.); *Merit Oil of New*

Hampshire, Inc. v State, 461 A.2d 96, 97 (N.H. 1983) (ruling construction of a median did not deprive owner of access to general street system or change actual entranceway to property, so resulting change in traffic patterns was not compensable); *Hadwin v Mayor and Alderman of City of Savannah,* 143 S.E. 2d 734, 735 (Ga. 1965) (holding that the inconvenient circuity of travel caused by a median was not compensable); *Painter v. State, Dept. of Roads,* 131 N.W.2d 587, 590 (Nev. 1964) ("The general rule is that an abutting landowner has no vested interest in the flow of traffic past his premises and that any damages sustained because of a diversion of traffic is not compensable."); *Department of Public Works and Bldgs. v. Maddox,* 173 N.E.2d 448, 451 (Ill. 1961) (stating "[t]here can be no question" that the construction of median strips is a proper exercise of police power and not the power of eminent domain). *See also Hayutin v. Colorado*, 485 P.2d 896 (Colo. 1970); *Jacobson v. State,* 244 A.2d 419 (Me. 1968); *State v. Ensley*, 164 N.W.2d 342 (Ind. 1960); *Muse v. Mississippi State Highway Comm.,* 103 So.2d 839 (Miss. 1958); *Langley Shopping Center, Inc. v. State Roads Comm.,* 131 A.2d 690 (Md. 1957); *Holman v. State,* 217 P.2d 448 (Cal. Ct. App. 1950).

Under binding legal authority in this State and the weight of persuasive authority elsewhere, Landowner cannot claim a compensable loss of access rights due to the construction of a median in Cliff Avenue which diverts traffic away from Landowner's door. Having failed to show the taking or damaging of a private property right through the construction of a median, summary judgment against Landowner was justified.

c. Landowner cannot claim a compensable taking or damaging due to construction of a right turn lane in existing highway right of way.

By deed dated June 8, 1959, the State acquired a highway easement to a forty-two-foot-wide strip of land abutting the Property. *Affidavit of Joel Gengler, SR 145;*

Exhibit E to Affidavit of Joel Gengler. Although the deed purports to be a warranty deed, at the time of the conveyance, the State could only obtain an easement for highway purposes in land acquired as highway right-of-way. *Cuka v. State,* 80 S.D. 232, 236-237, 122 N.W.2d 83, 85; *1986 S.D. Sess. L. ch. 238, Section 1.*

As part of its current highway project, the State constructed a right turn lane in the existing 42-foot-wide right of way abutting the Property. *SR 162.* The purpose of the turn lane is to increase efficiency and safety of traffic movements onto the eastbound on-ramp for Interstate 90. *Id.* Landowner complains that the construction of the turn lane in existing highway right of way results in traffic being closer to its restaurant. *SR 116-117.* According to Landowner's witnesses, the loss of some of the greenbelt in front of the Property will make the property less pleasing and the close proximity of traffic to the restaurant windows will scare customers, leading to diminished property value. *Id., SR 131.*

But to collect compensation in this case, Landowner must show the State has infringed on a private property right. Because the State owns an easement in the right of way for highway purposes, and construction of an additional traveling lane is a highway purpose, the State has not infringed on any private property right held by Landowners. *Reisenauer v. State Dept. of Highways,* 813 P2d 375, 379 (Idaho Ct. App. 1991) (ruling that construction of a passing lane in existing right of way did not change the character of the government's use for highway purposes and therefore did not result in a compensable taking, even though the roadway moved closer to the owner's land). *See also Krier v. Dell Rapids Township,* 2006 SD 10, 709 N.W.2d 841 (disallowing compensation for

accumulation of dust and dirt after township's resurfacing of an existing black top road to gravel).

Even if construction of an additional driving lane exceeded the permissible uses of the existing right of way, a claim that is flatly denied, Landowner would still have no standing to complain. Under Landowner's deed for the Property, Landowner acquired "all of Lot Nineteen (19), except the West 42 Feet." *SR 148.* Landowner does not own any interest in the 42-foot-wide right of way previously acquired by the State. Under the express language of Landowner's deed, the right of way was excluded from the conveyance.

Because Landowner has no private property right in the abutting highway right of way, the State did not take any private property right held by Landowner when the State used the existing right of way for highway purposes. Landowner's injury is no different than those of the general public, because Landowner holds no special rights to the abutting highway right of way.

Furthermore, like the unsuccessful litigant in *Krier v. Dell Rapids Township,* 2006 SD 10, 709 N.W.2d 841, Landowner has confused damage with injury. In *Krier,* a property owner complained when the township resurfaced an existing black top road to gravel. *Id. at* ¶ *6.* The owner asserted that dust and dirt accumulated on his property after the road surface was changed. *Id.* The owner invoked the special injury test, arguing that while no part of the owner's land was taken, his property suffered compensable damage because of a consequential injury peculiar to his land and not of a kind suffered by the public as whole. *Id. at* ¶*27.*

This Court rejected the owner's claim, noting that the injury to the owner's property was not unique from that suffered by his neighbors. *Id. at* ¶*28.* Because the owner failed to produce evidence of a separate and distinct injury, he could not recover. *Id.*

The same analysis applies to defeat Landowner's claim. Landowner argues that the addition of a turning lane in existing right of way damages Landowner uniquely. But the general public suffers the same injury. As part of the project, the State constructed a sidewalk between the turning lane and Landowner's Property. Pedestrians using the sidewalk will be exposed to the same lack of green space and the same traffic using the turn lane. In fact, pedestrians will be closer to the traffic than the patrons in Landowner's restaurant. Because pedestrians will experience the same detriment claimed by Landowner, Landowner fails to identify an injury different in kind or degree than the injury suffered by the general public due to the additional turn lane. Having failed to show a peculiar injury, different in kind and not merely in degree from that suffered by the general public, Landowner cannot recover compensation.

CONCLUSION

Landowner claims the State unilaterally abandoned the taking of access control and a temporary easement, but Landowner's representations to the trial court and opposing counsel demonstrate a cooperative effort between the parties to reduce the impact of the State's project on Landowner's Property. Landowner actively lobbied the State to change its project design to allow Landowner to keep a direct access approach to Cliff Avenue. Landowner represented it would refrain from acting on the State's declaration of taking to allow the State time to revise its plans and amend its pleadings to

eliminate access control. The State was successful in obtaining federal approval to change the project plans, and the State amended the condemnation pleadings with the acquiescence of Landowner and the approval of the trial court. Throughout that process, the parties repeatedly acknowledged that the amendment of the plans and pleadings would mean Landowner's direct access rights to Cliff Avenue would remain intact. Instead, the parties argued over whether the State's amended pleadings still effected a compensable taking of Landowner's private property due to the new median, closed public intersection, and new right turning lane. The State built its highway project, installing direct access from Cliff Avenue to the Property in the same location and to the same width as before the project. Now that the State has substantially completed construction and the State has installed the access approach Landowner wanted to keep, Landowner has changed its mind and wants to force the State to take the very access rights that both parties agreed to preserve for Landowner. Landowner should not be allowed to back-track and force a taking that never occurred. Nor should the law be interpreted to prevent the government and landowners from working together to reduce the impact a project will have on landowners' properties.

Under the State's amended condemnation petition, Landowner suffered no compensable taking or damaging of its property. The State's elimination of a public highway intersection, construction of a median in existing right of way, and construction of a new driving lane in existing right of way, does not infringe on any private property rights. When the State regulates traffic flow, the State is exercising its police power, not its power of eminent domain. Highway authorities do not infringe on private property rights when they make decisions about where public highways will intersect, whether left

turns will be allowed, and whether turning and through traffic should be separated. The trial court properly granted summary judgment to the State, because the undisputed facts, coupled with legal precedent, Landowner has suffered no compensable taking or damaging of a private property right.

The State asks this Court to affirm the trail court's grant of summary judgment to the State. The State also asks that it be awarded its costs on appeal.

Respectfully submitted this 31st day of December, 2014.

STATE OF SOUTH DAKOTA
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CERTIFICATE OF SERVICE

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

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On this 31st day of December, 2014.

STATE OF SOUTH DAKOTA

By: 
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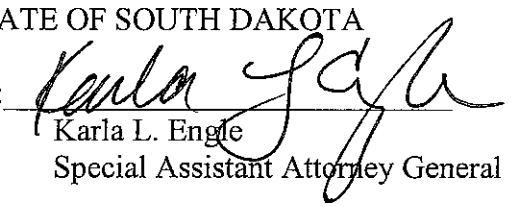
CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b), I certify this *Appellee's Brief* complies with the type volume limitations set out in said statute. This brief was prepared using Microsoft Word, and contains 9,037 words from the Jurisdictional Statement through the Conclusion. I have relied on the word count of the word processing program to prepare this Certificate.

STATE OF SOUTH DAKOTA

By: 
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27176

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

v.

JB Enterprises, Inc.,
Defendant and Appellant.

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

The Honorable Susan Sabers
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on the 13th day of August, 2014

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

REPLY ARGUMENT

I. Judge Sabers correctly ruled factually and as a matter of law that the parties never stipulated to permit the State to divest itself of the right to control access.

a. In considering the facts in a light most favorable to the State, the trial court found a property interest had vested.

It is an undisputed fact that JB Enterprises properly filed a Waiver of Right to Contest Taking with the Minnehaha County Clerk of Courts on June 13, 2012 dated June 12, 2012. The trial court ruled on June 19, 2014 that "by the express terms of the statute, title vested at the time JB Enterprises filed its waiver." (SR 570, *Memo Decision of Judge Sabers, p. 3*). "The statutes at issue show that a taking occurred here, on the date urged by Defendant." *Id.*

The State incorrectly argued in response to JB's Motion to Declare the Date of Taking that JB's failure to object to the State's Motion for Leave to File An Amended Petition was a stipulation to return the right of control of access back to JB. To this argument, the trial court wrote, "while neither stipulating to the amendment, nor waiving its right to seek compensation for the taking, JB Enterprises offered no objection at the hearing on DOT's amendment." *Id.* JB argued "its failure to oppose DOT's motion to amend its petition is not a waiver of its right to just compensation for the taking. The Court agrees." *Id.*

The State also incorrectly argued that a string of email and letter correspondences containing negotiations between the attorneys for both parties amounted to a stipulation to return the vested property interest. To this

contention, the trial court wrote, "When DOT asked JB Enterprises to stipulate to the dismissal of the condemnation action setting forth its position that there was no taking effected under the revised plans, JB Enterprises declined to agree to the dismissal. Instead, JB Enterprises continued to seek damages for the taking it believed it had suffered. (SR 570, *Memo Decision of Judge Sabers, p. 2.*) The trial court found no stipulation existed between JB and the State. *Id.*

It should be mentioned that since JB submitted its original Appellate Brief, this Court has again ruled "the right of access is one of those private property rights and, therefore, cannot be taken for public use or materially impaired without compensation." *Morris Family, LLC v. South Dakota Dept. of Transportation,* 2014 S.D. 97, ¶16.

The right of access has been taken by the State. As Judge Sabers wrote,

> "DOT argues that no taking actually occurred, given the amended plans and the final result of the project where JB retains its access and DOT obtained no easements. The Court disagrees; the statutes at issue show that a taking occurred here on the date urged by Defendant." SR 570.

The right to compensation vests in the landowner at the time the property is taken. *SDCL 31-19-24.* Compensation should be fixed by a jury. *SDCL 31-19-32.* South Dakota law instructs the measure of damages in this case should have been the difference in the fair market value of JB's property before the taking, and the fair market value after.

b. The trial court correctly found that the right of control of access remains within the ownership of the State.

Judge Saber's memorandum decision found that JB never stipulated to allow the State to divest itself of the right to control access and the record clearly supports that finding. The parties had negotiated for several months over several aspects of the project. The right to control access was only one facet of the project that would destroy JB's business. As Judge Saber's pointed out in her decision, "The changes sought by JB Enterprises were significantly broader than that and included, among other things, the prevention of both the median and the closure of the intersection" [at 63rd St. and Cliff Avenue]. (SR 570, *Memo Decision of Judge Sabers, p. 2.*)

On November 30, 2012, the State filed a Motion for Leave to File Amended Petition and the matter was heard on February 14, 2013. "While neither stipulating to the amendment, nor waiving its right to seek compensation for the taking, JB Enterprises offered no objection at the hearing on DOT's amendment." (SR 570, *Memo Decision of Judge Sabers, p. 2.*) The record reflects that JB did not object out of professional courtesy and recognized South Dakota's longstanding acknowledgement of freedom to amend pleadings.

The State provided no evidence that an actual stipulation or agreement existed between the parties. A stipulation was requested by the State and a draft

was mailed to JB's attorneys on July 27, 2012. JB did not stipulate to any dismissal and continued to seek damages for the taking.[1]

No written stipulation was executed. No stipulation was ever made on the record. The lack of an actual stipulation required the trial court to interpret a patchwork of communications between the lawyers to determine whether one was implied. The record clearly supports the trial court's ruling that no stipulation or agreement was made and therefore the Waiver of the Right to Contest Taking signed on June 12, 2012 controls. A taking occurred, a real property vested in the State, and the constitutional right to just compensation vested in JB on that same date.

II. Summary Judgment was improper because there was evidence in the record that JB suffered damage.

a. A landowner is guaranteed a jury trial on damages after a partial taking has occurred.

The trial court improperly ruled and the State continues to incorrectly argue that certain facets of the State highway project are not to be considered in a damage determination for JB.

South Dakota takings jurisprudence recognizes three distinct types of takings. The first is a taking of an entire property in fee. Article 6, Section 13 of the South Dakota Constitution, requires the condemned landowner receive just compensation for his or her property taken for a public use. The commonly

[1] A Motion to Modify Record Pursuant to SDCL §15-26A-56 was filed by Appellants on January 27, 2015. This modification adds facts that are material to the issue of stipulation.

accepted method of determining just compensation is the highest fair market value of the property at its highest, best, and most profitable use. *South Dakota Pattern Jury Instruction- Civil 50-90-10 and 50-90-50.*

The second type of condemnation case is a partial taking. A partial taking occurs when a portion of an owner's land is condemned for public use, but the remainder of the parcel continues to vest with the landowner. Partial takings have been recognized in South Dakota since *Schuler v. Board of Sup'rs of Lincon Tp.,* 81 N.W. 890, (S.D. 1900). Partial takings require the landowner recover just compensation for the property taken and compensation for damage to the remainder of the parcel. *State Highway Commission v. Bloom,* 93 N.W.2d 572, 578 (S.D. 1958). Damage to the remainder is recoverable to the landowner "even though the consequential damage is of a kind suffered by the public in common." *Id.*

South Dakota law also recognizes damaging cases under Article 6, Section 13 of the South Dakota Constitution. These are also referred to as inverse condemnation cases. One type of inverse condemnation case is when no part of an owner's land is taken, but because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable. *Krier v. Dell Rapids Tp.,* 709 N.W.2d 841 (S.D. 2006). Damaging cases have been recognized in South Dakota since *Searle v. City of Lead,* 73 N.W. 101 (S.D. 1987), our State's seminal inverse condemnation case. Inverse condemnation requires the injury to be peculiar to the owners land and not of a kind suffered by the public as a whole. *Rupert v. City of Rapid City,* 827 N.W.2d 55 (S.D. 2013).

The trial court properly ruled the right to control access was taken and now is vested in the State. The record reflects that the remaining property rights in the parcel continue to vest with JB. By definition this is a partial takings case. Once this conclusion of law is made, the matter must proceed to trial where the question for the jury should be what amount of money will compensate the party for the loss sustained by reason of the [highway project]. *State Highway Commission v. Bloom*, 93 N.W.2d 572, 578 (S.D. 1958). Damages include compensation for the taking as well as damages caused to the remaining parcel. *Id.* JB is entitled to compensation for all damage sustained as a result of the State's action.

The proper measure of damages in partial takings case is the difference between the fair market value of the parcel before the taking and the fair market value of what remains after the taking. *State Highway Commission v. Hayes Estate,* 140 N.W.2d 680, 684 (S.D. 1966).

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

State Highway Commission v. Hayes Estate, 140 N.W.2d 680, 684 (S.D. 1966).

Once the conclusion of law was made that a portion of JB's property was taken, this case should have proceeded as a partial takings case with a jury being left to fix just compensation for the right to control access, and consequential damages to the remainder of JB's property.

b. The record shows the State's taking has caused damage to JB's property.

The evidence before the trial court was that the right of control of access was, by the estimate of the State's expert appraiser, $1,120,000.00. (SR 191, *Affidavit of Christopher Healy Ex. 2, Summary Appraisal Report of John Schmick,* p. 80). The State hired appraiser John Schmick to estimate the compensation owed to JB as a result of the State's project. Mr. Schmick describes the State's taking of JB's property as follows:

> The taking of right of access is intended to comply with federal highway standards on distances from federal highway entrance/exit ramps. In this case, that means that the entire front of the subject's 152.5 feet of street frontage will lost the right of access. In addition, the taking of right of access will also close the 63rd Street connection to Cliff Avenue. As a result, the subject will be left with insufficient access for the subject improvements to be economically viable as a full service restaurant. Legal access is still available from some smaller county roads through a residential area to the east. More importantly is that access after the taking is not reasonable for commercial use.

Schmick Summary Appraisal Report, p. 57. (SR 191).

Mr. Schmick values JB's access at $1,120,000.00 and describes what remains of JB's property after the taking as an "uneconomic remnant" which is a parcel of property that remains after a partial acquisition that has little or no utility

to the owner. *Schmick Summary Appraisal Report,* p. 57. (SR 191). The fact that the State's offer was not accepted by JB and that the case was proceeding toward a trial on just compensation is evidence that the amount of just compensation owed was in dispute. (SR 40, 45, 47, 49) Mr. Schmick's estimated total compensation, $1,120,580.00, (this includes $580.00 for temporary easement and disruption) remains deposited with the Minnehaha County Clerk of Courts. (SR 33).

There is evidence in the record that the value of JB's access was disputed, but was worth at least $1,120,000.00. JB has a vested right to a jury trial to ascertain the rightful amount of just compensation.

c. The record shows the State's project has inflicted consequential damage to JB's remaining property.

South Dakota's earliest partial takings case, *Schuler,* 81 N.W. 890, (S.D. 1900), set the precedent for how certain facets of a government's project may considered for purposes of calculating consequential damages. The jury can:

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

The Court went on to say,

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

The condemnor's contention that allowing these factors of damage as evidence was judicial error was found by the Court to be "not tenable." *Id.* This remains the law of South Dakota in partial takings cases.

The Affidavit of Robert Miller (an owner of JB) (SR 327) placed squarely in the record several elements of damage that have been inflicted upon JB's property by the construction of the State's highway project. These factors include the taking of JB's access, the construction of a median in Cliff Avenue, the closure of the intersection at Cliff Avenue and E. 63rd St., the construction of an interstate on-ramp just feet from the Perkins Restaurant that sits on the parcel, and several other effects of these government actions that damage JB's remaining parcel. The factors of damage in the record and argued by the State to be non-compensable are clearly factors of damage that "legitimately bear upon the market value of the [property] before and after the taking and those factors which would ordinarily influence a prospective purchaser in negotiating for the property." *Hayes Estate,* 140 N.W.2d 680, 684 (S.D. 1966).

There is evidence in the record that the value of JB's property has diminished significantly from before the partial taking. The amount it has been diminished is disputed. The law of South Dakota entitles the owner of land partially taken to be compensated for the total diminution in value of the property. The Court should reverse the trial court's grant of Summary Judgment in this matter and remand to the circuit court for a trial on just compensation.

CONCLUSION

The Defendant-Appellant requests that the trial court's grant of summary judgment be reversed; second, that the Trial Court be ordered to conduct a just compensation jury trial on the taking described in the Declaration of Taking; third, that the Trial Court's finding of the taking occurred on June 12, 2012 be affirmed and that the right to a jury trial on just compensation, vested on June 12, 2012.

Respectfully submitted this 2nd day of February, 2015.

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REQUEST FOR ORAL ARGUMENT

Oral Argument is respectfully requested.

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Certificate of Service

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

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On this 2nd day of February, 2015.

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Certificate of Compliance

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 2,552 words from the Reply Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

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