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December 30, 2004

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**VIA HAND DELIVERY**

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Rapid City Growth Management Department  
300 6<sup>th</sup> Street  
Rapid City, SD

Ms. Vicki L. Fisher  
Rapid City Growth Management Department  
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**RECEIVED**  
**DEC 30 2004**  
Rapid City Growth  
Management Department

Re: Proposed Red Rock Meadows Subdivision  
Preliminary Plat No. 04PL165

Dear Ms. Elkins and Ms. Fisher:

We write this letter on behalf of Selador Ranches, Inc. ("Selador") to place of record Selador's objection to the above-referenced plat to the extent it seeks to vacate portions of the north-south section line highway between Sections 28 and 29, Township 1 North, Range 7 East of the Black Hills Meridian, Pennington County. As you are aware, Selador owns approximately 1,840 acres in three sections abutting Sections 28 and 29, and the north-south section line provides the only direct legal access to the southeast quarter of Selador's property.

General background concerning section-line highways:

SDCL 31-18-1 provides that:

There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.

The predecessor of this statute was originally passed by the territorial legislature in response to a grant by Congress that "the right of way for the construction of highways over

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public lands not reserved for public use, is hereby granted.” Rev. St. U.S. § 2477, later 43 U.S.C. § 932. The object of the grant by Congress was to enable citizens and residents of the states and territories where public lands belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. *Wells v. Pennington County*, 48 N.W. 305, 306 (S.D. 1891). The act of Congress giving the right-of-way for the construction of highways over public lands, and the territorial law declaring all such lines, as far as practicable, to be public highways, and designating such highways to be 66 feet wide, are notice to all persons filing on public lands subsequent to the passage of these laws that they take them subject to the right-of-way for highway purposes. *Id.* at 307.

In a later case, *Lawrence v. Ewert*, 114 N.W. 709 (S.D. 1908), the South Dakota Supreme Court, in construing the same statutes, further stated that:

The expression “all section lines shall be and are hereby declared public highways as far as practicable” was evidently intended to make every section line in the then territory and now state a highway over which the people of the state would have an easement and right-of-way subject to the qualifications therein contained for the purpose of passing from one section of the state to another. Declaring section lines “public highways” means that they are roads which every citizen has a right to use. . . . It will thus be seen that the term “public highway” means more than a right of way over which a public highway may be established, and that it is a passage or road which “every citizen has a right to use.” The legislature evidently intended that the term “highway” as used in the Law of 1871 should have the ordinary meaning, and that section lines throughout the territory as far as practicable, and not interfering with the then existing highways in the settled portions of the territory, should be open to the use of the public, and no actions of boards of county commissioners or supervisors of townships is required to establish or open such highways as are practicable on section lines. Highways so established by the legislative authorities cannot lawfully be obstructed by private citizens until changed or vacated in the manner provided by law.

*Id.* 710.

In response to an argument in *Lawrence* that section line highways had to be specifically located, the Supreme Court said that:

Had the legislature contemplated any such proviso as that contended for, it would have inserted it in the section at the time of the enactment of the law. The Act of 1871 containing the one provision making all section lines highways has

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remained upon the statute book of this state for nearly 40 years without amendment or material change, and for this court now to insert, by judicial construction into the section, limitations and qualifications not found therein or made by amendment thereto, would, it seems to us, violate the spirit and intention of the legislature, as well as its language, and give to the act a meaning entirely different from that intended by the legislature, and by such construction practically prevent the people from enjoying the benefits of one of the most important and beneficial acts that was ever enacted by our territorial legislature.

*Id.* at 711. (Emphasis added).

Section line highways are open by operation of law and cannot be vacated or relocated absent lawful action by the appropriate governmental unit. *Thormodsgard v. Wayne Township Bd.*, 310 N.W.2d 157 (S.D. 1981). The appropriate governing board must act affirmatively to vacate or abandon a section line right-of-way. *Id.* An unimproved section line is nevertheless a “street, road or highway” for purposes of a township’s duty of maintenance. *Douville v. Christensen*, 641 N.W.2d 651, 654. No affirmative action is necessary to open a section line for public use and the general public’s right to pass, by foot or otherwise, is not diminished merely because the appropriate governing board is not required to improve every section line for vehicular travel. Section lines, by operation of law, are open to passage by the general public. *Id.* at 655.

Procedure for vacation of highways:

As can be seen, section line highways are an important benefit to the general public of the state. They are, however, subject to vacation. SDCL 31-18-3 provides in part that:

The board of county commissioners may vacate or change the location of any section-line highway within its county and the board of supervisors of an organized township may vacate or change the location of any section-line highway within its township, as provided in this title, but neither board may vacate or change any portion of the state trunk highway system or any highway constructed by state or federal aid or any highway within the limits of a municipal corporation, nor may a board of supervisors vacate or change any portion of the county highway system. In addition, no board of county commissioners or board of supervisors may vacate a section-line highway which provides access to public lands. This section does not prohibit the closing of a section-line highway to vehicular traffic if the highway is unsafe for vehicular traffic. For the purposes of this section, public land does not include any school and public lands.

(Emphasis added).

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SDCL ch. 31-3 provides the standard for vacating highways. SDCL 31-3-6 provides that upon receiving a petition from the appropriate number of voters,

[T]he board of supervisors of the township or the board of county commissioners wherein the highway is located or is proposed to be located may, except as provided in §§ 31-3-12 and 31-3-44, vacate, change or locate any highway located or to be used within the township or county, if the public interest will be better served by the proposed vacating, changing or locating of the highway.

(Emphasis added).

Here, the section line highway in question, between Section 28 and Section 29 of Township 1 North, Range 7 East, Pennington County, is within the municipal boundaries of Rapid City. Accordingly, the City of Rapid City, by and through its Common Council, would be the governing body having authority to vacate the section line. *See, e.g., Bd. of Commissioners of Spink County v. Chicago, M. & St. P. Ry. Co.*, 132 N.W.675 (S.D. 1911). While the state's power in respect to the vacation of streets is plenary, and such power may be delegated to subordinate governmental agencies, the agency to which such power is delegated must exercise it in substantial compliance with the procedure prescribed and only to the extent authorized by law. *Mackrill's Addition to the City of Wall*, 179 N.W.2d 268, 270 (S.D. 1970). Actions in excess of statutory authorized procedures are of no effect as being beyond the power of the municipality. *Id.*

The proper statutory procedure for vacation of a street or highway within a municipality is set forth in SDCL 9-45-7, *et seq.* *Mackrill's Addition*, 179 N.W.2d at 269. SDCL 9-45-7 provides that:

No street, alley, or public ground, or part thereof, shall be vacated by the governing body except upon the petition and consent in writing of all of the owners of the property adjoining the part of the street, alley, or public ground to be vacated. Such petition shall set forth the facts and the reasons for such vacation, accompanied by a plat of such street, alley, or public ground proposed to be vacated, and shall be verified by the oath of one or more of the petitioners, provided, in the event all the land subject to the proposed petition to vacate is located on the land of a landowner, the petition of the landowner shall be sufficient.

Subsequent to filing of the petition referred to in SDCL 9-45-7, the governing board, if it deems it expedient that the matter should be proceeded with, shall order the petition to be filed with the auditor or clerk, who is to give notice by publication once each week for at least two successive

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weeks to the effect that the petition has been filed and stating in brief its object, and that the petition will be heard and considered by the governing body on a day specified not less than ten days from the last publication of the notice. SDCL 9-45-8. At the time and place appointed, the governing body or committee shall investigate and consider the matter and shall hear the evidence and testimony of the parties interested. The governing body, after hearing the same or upon the report of such committee favoring the granting of such petition, may declare by resolution passed by a two-thirds vote of all the members such street, alley or public ground vacated. SDCL 9-45-9.

Clearly, the correct statutory procedure for vacating a street or highway within a municipality, which would include a section line highway, is that set forth in SDCL 9-45-7, *et seq.* The Supreme Court's decision in *City of Sioux Falls v. Hone Family Trust*, 554 N.W.2d 825 (S.D. 1996), holding that approval of a plat or acceptance of a plat by the City of Sioux Falls without showing the section line easement vacates the section line has been called seriously into doubt by later opinions in *Millard v. City of Sioux Falls*, 589 N.W.2d 217 (S.D. 1999) and *Wildwood Ass'n v. Taylor*, 668 N.W.2d 296 (S.D. 2003).

#### Standard for vacation of highways:

Although the municipal street vacation statute does not contain the public interest standard for vacation as is contained in the county vacation statute quoted above, the public interest standard has been adopted by case law. In *City of Colome v. Von Seggern Bros. & Ludden*, 228 N.W. 800 (S.D. 1930), the issue was whether the City of Colome could compel the removal of defendant's lumberyard which had been built on a previously vacated alley. In deciding that the city could compel the removal, the South Dakota Supreme Court said that:

The governing body of a municipality has no power or authority to vacate the public streets for a purely private purpose, or for the purpose of giving the exclusive use of the street to private individuals for their use in strictly private business. "A city has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public, and cannot vacate a street for the benefit of a purely private interest, although it receives a consideration therefor." 44 C.J. 898, where it is said: "No matter how patriotic the motive, or how lawful the council believes the vacation to be, a city council cannot vacate a street to serve a purely private use." *People v. Corn Products Refining Co.*, 286 Ill. 226, 121 N.E. 574.

The answer set up no purpose for the vacation of the street and alley in the instant case, except for the convenience and benefit of respondent. Respondent's contention, that it was a public benefit for it to put in and operate a lumberyard in the city, would clearly apply to every business enterprise launched in a

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community, and would justify the giving away of portions of streets or public parks to private individuals, whenever the city council could be induced to neglect or betray the public interest.

*Id.* at 801. (Emphasis added). *See also, Roby v. Mitchell*, 382 N.W.2d 37 (S.D. 1986) (Resolution vacating street reciting public interests and purposes served by vacation, including elimination of police problems, traffic control problems, and health, safety, and maintenance considerations is not an abuse of discretion).

Finally, in *Kreider v. Yarosh*, 217 N.W. 640 (S.D. 1928), the issue was whether adjoining landowners whose property was separated by a section line could acquiesce to the boundaries of a highway which was not upon the true section line. In holding that the landowners' acquiescence could not change the location of the section line highway, the Supreme Court said that: "We are cited to no provision in the code which permits section line highways to be changed by agreement of adjoining landowners. In such changes, the public is an interested third party, whose acquiescence in such an agreement is essential to make it binding upon it." *Id.* at 643. (Emphasis added).

Selador's standing to object to vacation of section-line highway:

With respect to standing to contest any vacation of the section line, it's clear that Selador would have such standing. Initially, the section line highway proposed to be vacated provides straight access to its property. In *Keogan v. Bergh*, 348 N.W.2d 462 (S.D. 1984), an appeal from a judgment denying a reopening of two section line highways, the South Dakota Supreme Court, in determining that the trial court erred in concluding that two of the petitioners who had requested the reopening of two section line highways did not have standing, said that:

The trial court determined that appellants did not have a claim of right or privilege to location of the proposed highways. Supposedly, having no claim of right, appellants were not "aggrieved" persons and, therefore, had no standing to appeal the Board's decision. We disagree. Appellants did indeed suffer denial of a claim of right by having the two section line highways remain vacated. The Board's decision denies them the right to the shortest, most direct access to their farm property. Because of the highway closing, they and their tenants are denied direct ingress and egress to farmland, and must take a circular route in order to move farm equipment and machinery.

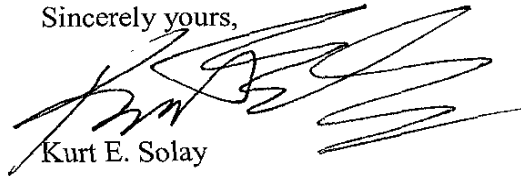
*Id.* at 463-464. (Emphasis added). Furthermore, as demonstrated in *Douville v. Christensen*, 641 N.W.2d 651, cited above, any member of the general public has a right to use section lines and has standing to require the governing authority to clear the section line of obstructions.

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Conclusion:

Based on all the above, again, Selador places of record its objection to the above-referenced plat to the extent it is intended to vacate any portion of the north-south section line between Sections 28 and 29. It's clear, based on the above authorities, that such a vacation cannot be done by platting of properties; rather, the statutory procedure in SDCL 9-45-7, *et seq.* must be followed. Furthermore, it is clear that the public is an interested third party, without whose consent such a vacation cannot be legally accomplished. The section-line highway cannot be vacated for a purely private purpose, but rather, vacation must be in the general public's interest.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Kurt E. Solay', written over a horizontal line.

Kurt E. Solay

KES:bjr

cc Kevin Buntrock via telefax (718-4710) and U. S. Mail