06PL141 / 06SV054

COPY

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Civ. No. 01-919

WILDWOOD ASSOCIATION, a South Dakota not for profit corporation; John G. Spangler; John M. Weiss; Timothy L. Skinner and Donna L. Skinner; James A. Oswald and Helen I. Oswald; Daniel J. Finn, Jr. and Melinda K. Finn,

Plaintiffs,

vs.

THE CITY OF RAPID CITY, a Municipal Corporation; LEO HAMM FAMILY RANCH, L.L.C., a South Dakota Limited Liability Company; and HARLEY F. TAYLOR, INC., a South Dakota corporation and RED ROCK DEVELOPMENT COMPANY, LLC, a South Dakota Limited Liability Corporation,

Defendants.

STIPULATION TO AMEND DECLARATORY JUDGMENT

The parties in the above-captioned matter, by and through their respective counsel of record, hereby stipulate and agree that the Declaratory Judgment entered by the Court on July 9, 2002, shall be amended to comply with the South Dakota Supreme Court Decision dated August 6, 2003. A copy of the proposed Amended Declaratory Judgment is attached.

Dated this _____ day of August, 2003.

COSTELLO, PORTER, HILL, HEISTERKAMP,
BUSHNELL & CARPENTER

By: _____

Edward C. Carpenter
Attorneys for Plaintiffs
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

Dated this _____ day of August, 2003.

BANKS, JOHNSON, COLBATH, SUMNER
& KAPPELMAN, LLC

By: _____

Jerry D. Johnson
Attorneys for Defendants Leo Hamm Family Ranch, Pennie Lou Slovek, Kellie Sue Weisgram and Shellie Lynn Parker
P.O. Box 9007
Rapid City, SD 57709
(605) 341-2400

Dated this _____ day of August, 2003.

CITY OF RAPID CITY

By: _____

Mike Booher
Attorney for City of Rapid City
300 Sixth Street
Rapid City, SD 57701
(605) 394-4140

Dated this _____ day of August, 2003.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

By:_____

Terry G. Westergaard
Attorneys for Defendants Harley F. Taylor, Inc.
and Red Rock Development Company
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

WILDWOOD ASSOCIATION, a South Dakota not for profit corporation; John G. Spangler; John M. Weiss; Timothy L. Skinner and Donna L. Skinner; James A. Oswald and Helen I. Oswald; Daniel J. Finn, Jr. and Melinda K. Finn,

Plaintiffs,

vs.

THE CITY OF RAPID CITY, a Municipal Corporation; LEO HAMM FAMILY RANCH, L.L.C., a South Dakota Limited Liability Company; and HARLEY F. TAYLOR, INC., a South Dakota corporation and RED ROCK DEVELOPMENT COMPANY, LLC, a South Dakota Limited Liability Corporation,

Defendants.

Civ. No. 01-919

AMENDED
DECLARATORY JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law on file herein and the Supreme Court Decision dated August 6, 2003, it is hereby

ORDERED, ADJUDGED AND DECREED that the statutory section line right-of-way along the section line between Sections 21, T1N, R7E, B.H.M., and 28, T1N, R7E, B.H.M., Pennington County, South Dakota, as it abuts Lots 18 through 23, Block 3 of Wildwood Subdivision, the Plats for which are recorded at Book 15 at Page 250 of Plats and Book 17 at Page 30 of Plats, Pennington County Register of Deeds, has not been vacated;

IT IS FURTHER ORDERED that the 66' access easement indicated on Lot 23, Block 3 of the original Wildwood plat is a private in-gross easement, subject to the Wildwood Subdivision Restrictive Covenants and controlled by the owners of Lot 23 which have permitted private access for the use of Leo Hamm and his immediate family only and Harley Taylor and his immediate family only to the properties they own in Section 28 and Section 21, R7E, B.H.M., Pennington County, South Dakota;

IT IS FURTHER ORDERED that the City of Rapid City acted in bad faith and abused its discretion in entering into an agreement to condemn a public right-of-way across Lot 23, Block 3, Wildwood Subdivision, the Finn property;

IT IS FURTHER ORDERED that the condemnation action to condemn a 66' right-of-way across the Finn's property, Lot 23, Block 3 of Wildwood Subdivision was instituted in bad faith and as a result of an abuse of discretion and that there was no public necessity for the taking;

IT IS FURTHER ORDERED that the agreement on the part of the City of Rapid City to exercise its eminent domain power for the benefit of a private property owner as embodied in the Resolution of the Rapid City Common Council dated July 10, 2000, is contrary to law and void;

IT IS FURTHER ORDERED that the failure on the part of the City of Rapid City to give notice to Plaintiffs and a chance to be heard prior to entering into the agreement with Leo Hamm Family, LLC, to condemn an access for dedication of public right-of-way across Lot 23, Block 3 of Wildwood Subdivision as a private party's condition for annexation violated due process and the agreement as embodied in the Resolution of July 20, 2000, is void on that basis;

IT IS FURTHER ORDERED that the Wildwood Subdivision Restrictive Covenants to Run With the Land adopted and filed of record August 21, 1978 and renewed September 5, 2000,

against replatting or subdividing for the purpose of providing a road or easement to property outside of Wildwood Subdivision create a property interest in all residents of Wildwood Subdivision and Wildwood Association of which they cannot be deprived without due process;

IT IS FURTHER ORDERED that the City of Rapid City shall be and is hereby enjoined from attempting to create a public right-of-way to the section line right-of-way along the section line between Sections 21 and 28, T1N, R7E, B.H.M., Pennington County, South Dakota, from the Wildwood Subdivision; and

IT IS FURTHER ORDERED that the Cost Judgment provided for in the Declaratory Judgment is hereby vacated and that each party shall be responsible for their own costs and disbursements.

Dated this _____ day of _____, 2003.

BY THE COURT:

_____
Honorable James W. Anderson
Circuit Court Judge

ATTEST:

RANAE TRUMAN, CLERK

By: _____
Deputy

(SEAL)

CITY OF RAPID CITY,
a municipal corporation,
Appellant,
v.
DANIEL J. FINN, JR. and MELINDA K. FINN,
Appellees.
[2003 SD 97, 668 NW2d 324]

South Dakota Supreme Court
Appeal from the Seventh Judicial Circuit, Pennington County, SD
Hon. James W. Anderson, Judge
#22531—Affirmed

Adam Altman, City Attorney
Michael S. Booher, Assistant City Attorney, Rapid City, SD
Attorneys for Appellant.

Edward C. Carpenter, Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, Rapid City, SD
Attorneys for Appellees.

Argued Apr 29, 2003; Opinion Filed Aug 6, 2003

MEIERHENRY, Justice.

[¶1] The City of Rapid City (City) filed a petition against Daniel and Melinda Finn (Finn), owners of Lot 23, seeking to condemn a portion of Lot 23. An action for declaratory judgment had already been brought by Wildwood Association against the City, Leo Hamm Ranch, L.L.C., Harley Taylor, and Red Rock Development Co., L.L.C. to determine the status of the property the City wished to condemn and whether the section line had been vacated. The trial court combined the actions. In regard to the condemnation action, the trial court ruled against the City. The City appeals. We affirm.

FACTS

[¶2] Wildwood subdivision was platted in 1978 and 1979. Wildwood is bordered on the south by the section line that separates section 21 and 28 of Township 1 North, Range 7 East, Black Hills Meridian, Pennington County. Five lots lie north of the section line and are immediately

adjacent to it. The condemnation action concerned mainly Lot 23 owned by Daniel and Melinda Finn. Lot 23 is burdened with a sixty-six foot access easement. The access easement and the section line are known as Shooting Star Trail.

[¶3] The 1978 plat labeled a parcel of land across Lot 23 as "66' Access Easement." Sometime in 1985, Leo Hamm (Hamm) sought to purchase the access easement for the purpose of dedicating it to the public. When the City informed Hamm that he would be required to pave the easement, Hamm abandoned the idea. Approximately a year later, Hamm once again approached the City about the easement; the City informed him that in order to dedicate the easement as a public right-of-way, a drainage study was required. Hamm once again abandoned the idea.

[¶4] The City's decision to condemn Finn's property was prompted by a series of events beginning with discussions about the City providing municipal services to a development identified as Red Rock Estates. In order for the City to provide services to Red Rock Estates, the City would have to annex the development. Hamm's property lay between and adjacent to the City limits and Red Rock Estates. Because Red Rock Estates was not contiguous to the City, negotiations began with Hamm for his consent to annex his property. Hamm conditioned the voluntary annexation of his property on a number of demands. Ultimately, an agreement was struck with Hamm: (1) Red Rock Estates would pay Hamm $50,000, (2) the City would obtain, at its expense, a sixty-six foot easement from Wildwood to the section line, (3) the City would dedicate the easement as a public right-of-way, and (4) the City would grade the section-line road along the northern boundary of Hamm's property according to City specifications.

[¶5] Neither Finn nor Wildwood property owners were notified or included in the City's discussions with Hamm. In fact, Hamm specifically directed the City not to contact Daniel or Melinda Finn. It was not until approximately a year after the City initiated the agreement with Hamm that the residents of Wildwood became aware it.

[¶6] On July 10, 2000, the City passed a resolution incorporating the conditions of the Hamm agreement for annexing his property. On August 21, 2000 the City annexed Hamm's property. The City attempted to procure the access easement from Finn without success. On March 5, 2001, the City filed a petition for condemnation against Finn to obtain the access easement for public use. On September 19, 2001, the City adopted a resolution of necessity for the condemnation. The City determined that the sixty-six foot access easement was necessary to provide access to the section line in order to facilitate public travel.

[¶7] At trial, the trial court ruled in favor of Finn finding that the City had acted in bad faith and abused its discretion in filing a petition to condemn. The City appeals the following issues:

1. Whether the City's finding of necessity for condemnation of Finn's property was based on bad faith.

2. Whether the City's finding of necessity for condemnation of Finn's

property was an abuse of discretion.

STANDARD OF REVIEW

[¶8] The proper scope of review for condemnation appeals is a standard deferential to the municipal police power. City of Freeman v. Salis, 2001 SD 84, ¶8, 630 NW2d 699, 702. "[I]n municipal decision making, the scope of review is limited to whether a city acted unreasonably and arbitrarily." *Id.* (citing Evans v. King, 57 SD 109, 230 NW 848, 849 (1930); Ericksen v. City of Sioux Falls, 70 SD 40, 53, 14 NW2d 89, 95 (1944)). A city's resolution of necessity is entitled to substantial deference and should be reviewed under an abuse of discretion standard. *Id.*, ¶9. The trial court's findings of fact are reviewed under a clearly erroneous standard and questions of law as well as mixed questions of law and fact are reviewed *de novo*. *Id.*

DECISION

1. Whether the City's finding of necessity for condemnation of Finn's property was based on bad faith.

[¶9] The trial court found that the City acted in bad faith when it initiated a condemnation proceeding against Finn. The City contends that the condemnation resolution was valid and based on necessity. The City denies any basis of fraud, bad faith, or abuse of discretion. The property owner's right to challenge the City's taking is set forth in SDCL 21-35-10.1 which states:

> Within thirty days from the date the summons described in § 21-35-9 is served, the defendant may demand a hearing in circuit court on the petitioner's right to take. Failure to make such demand or to consent in writing to the taking, within the thirty-day period, shall constitute a waiver of the right to question the necessity of the taking. *The finding of necessity by the plaintiff, unless based upon fraud, bad faith or an abuse of discretion, shall be binding on all persons.*

(Emphasis added.)

[¶10] The City asserts that the trial court erred in determining that the condemnation proceeding was to further a private interest and that the City acted in bad faith. The City contends that the evidence established that it was in the public interest to condemn the access easement across Lot 23 in order to facilitate public travel.

[¶11] This Court has said that "[a] municipality acts in bad faith when it condemns land for a private scheme or for an improper reason, though the superficially stated purpose purports to be valid." *Salis*, 2001 SD 84, ¶12, 630 NW2d at 703. The use of eminent domain solely to benefit a private individual or individuals constitutes bad faith and the taking is void. Pheasant Ridge Associates Ltd. Partnership v. Burlington, 506 NE2d 1152, 1155 (Mass 1987) (citations omitted).

[¶12] In determining that the City acted in bad faith, the trial court relied on the following findings: (1) that the City made an agreement with Hamm to obtain the sixty-six foot access easement; (2) that no notice of the agreement between the City and Hamm was provided to the owners of Lots 18 through 23 or to Wildwood Association; (3) that an e-mail evidenced a deliberate decision not to contact Daniel and Melinda Finn; (4) that prior to this agreement, the City had demonstrated no interest in the property it ultimately sought to condemn; and (5) that the City, in an attempt to purchase Finn's property, made contradictory representations about the location of the access from Wildwood to Hamm's property and Red Rock Estates. In addition, the trial court found that the City failed to act in conformity with its usual practice of performing traffic studies, engineering studies and drainage studies before instituting a condemnation action. The trial court also based its decision on the City's failure to specifically identify the location of the sixty-six foot access to be condemned and the change of its location and width immediately before trial.

[¶13] At trial, the evidence established that for 20 years the City held the position that no roads extending into Wildwood subdivision should be built because of the geographical nature of the land. A 1978 staff report stated that "[a]fter investigation of future development potential and proposed road grades, it is the staff's recommendation that a collector system{fn1}(1) not be extended through this development." Several years prior to the condemnation proceeding, Hamm tried, on two separate occasions, to obtain the easement for dedication to public use. The City informed Hamm that in order to dedicate the easement across Lot 23 to public use, he would have to pave the easement and do drainages studies. On both occasions, Hamm abandoned his plan.

[¶14] It was not until Red Rock Estates began negotiating with Hamm that the City became interested in Finn's property. It was only after Hamm demanded that the City obtain the easement for public dedication that the City chose to acquire Finn's property. Despite the City's prior position that a collector system should not be extended through Wildwood, it decided to make a deal with Hamm to obtain the access easement for public use. In a letter dated April 7, 2000, the mayor acknowledged Hamm's demand and responded, "I am willing to pursue City acquisition and if necessary condemnation to acquire that land." At a public meeting held July 19, 2001, the mayor made it clear that the City would be condemning part of Lot 23 stating, "[t]he City has made the commitment to Leo Hamm and I fully intend to see that it's carried out."

[¶15] During the negotiations with Hamm, the City gave no notice to Finn or to the Wildwood property owners. In fact, information about the negotiations was purposely withheld from Finn. In an e-mail from Marcia Elkins (Elkins), City Planning Director, to the mayor, Elkins informed the mayor that Hamm did not want the City to approach Daniel and Melinda Finn at that time. On September 25, 2000, Bonnie Hughes (Hughes), Community Development Director for the City, sent a letter to Finn expressing the City's desire to obtain the access easement for dedication as a public right-of-way. Hughes made no mention of the deal with Hamm. Finn

called Hughes to inquire further about the future of the access easement. After speaking to two of the City's engineers, Hughes told Finn that the major street plan had been amended to show Wildwood Drive as a local street only—meaning access through the area for future development would not be allowed. The engineers also told Hughes that, in their opinion, it was a poor place to put a road and that the proper location would be farther south. In a letter dated March 23, 2000, Hughes again indicated to Finn the City's desire to purchase the property. Included in the letter was Hughes' assurance that the major street plan showed Wildwood as a local street only and that access through the area to future developments would not be allowed.

[¶16] The Wildwood residents first discovered that a road was being constructed from Red Rock in the direction of Shooting Star Trail in June of 2001. Again Finn called Hughes who assured Finn that any road coming in that direction would divert south and would join Sheridan Lake Road. In late June as the construction progressed further, another resident of Wildwood found construction workers putting stakes in his back yard as Hamm stood nearby watching. The resident went to the city engineers who informed him that no permits had been issued for road construction in that area. Without a permit the City was forced to stop construction. Despite the City's clear intention to build a road on Shooting Star Trail, the city engineers at a July 2, 2001 meeting still maintained that there were no plans to build a road on Shooting Star Trail. Apparently, the city engineers were not privy to the deal between Hamm and the City or that a road had, in fact, been planned. The agreement between Hamm and the City to build a road across Lot 23 to the section line had the appearance of a private agreement since neither the Wildwood residents nor the City's own engineering departments were notified.

[¶17] Additionally, the City failed to conform to its usual practices in condemning property. The City's Public Works Director admitted that the City usually conducts a preliminary engineering evaluation to determine the feasibility of a road at the proposed location. The City Project Manager agreed. Contrary to its normal procedure, the City condemned the property without determining whether a street would meet any of the required standards.

[¶18] Despite the City's contention that the condemnation of Finn's property was necessary to facilitate public travel, the evidence indicates otherwise. The main purpose of the condemnation was to fulfill the City's commitment to Hamm. The City's actions in furthering Hamm's private interest were improper. Based on the evidence, we cannot say that the trial court's findings of fact were clearly erroneous. Nor do we find the trial court erred in concluding that the condemnation action was instituted in bad faith.

2. Whether the City's finding of necessity for condemnation of Finn's property was an abuse of discretion.

[¶19] The trial court found that the City abused its discretion in finding necessity as a basis to condemn the Finn's property. "(M)uch latitude is given to the corporation vested with the right of acquiring property by eminent domain to determine the extent of the property necessary to be

taken... ." Basin Elec. Power Co-op. v. Payne, 298 NW2d 385, 388 (SD 1980) (citing Otter Tail Power Company v. Malme, 92 NW2d 514, 521 (ND 1958)). This Court has said, "[w]hen condemning authorities face competing considerations, they do not abuse their discretion if their choices are reasonable in light of logic and evidence." *Salis*, 2001 SD 84, ¶18, 630 NW2d at 704. "A choice to condemn must grossly violate fact and logic or be wholly arbitrary to support a finding of abuse of discretion." *Id.*

[¶20] The trial court found that the City abused its discretion in condemning Finn's property because there was no public necessity for the taking. The City claims that the condemnation was necessary to provide access to the section line and to facilitate public travel. As early as 1978, the City was aware of the difficulties it would face by building a road for ingress and egress from Wildwood to other developments. A 1978 staff report indicated that after investigation of development potential and proposed road grades, the engineer recommended that a collector system be developed from the north, Corral Drive, and from the south, Sheridan Lake Road. Knowing that a prior report recommended no extension of collector streets in Wildwood, the City proceeded with its plan to extend the street without conducting further studies to determine whether a road on the access easement was feasible. No geotechnical analysis, drainage studies, or traffic studies were conducted by the City. The City presented no roadway plans prior to condemning the property. Although the City had previously told Hamm that it required a drainage study in order to consider his request to dedicate the easement to the public, the City did no drainage study before condemning the property.

[¶21] Evidence at trial revealed that a road built on the condemned sixty-six foot easement could not meet City standards. The road would not meet standards because: (1) a street would create "double front" lots, (2) the proposed road would extend ten feet into Finn's home, and (3) the geographical terrain would not accommodate a road that would meet City standards. Two of the City Engineers indicated it was a poor place to put a road. Eventually, the City was forced to concede that a road could not be built to City standards within the sixty-six foot easement. The City Project Manager admitted that in order to construct a street that would meet City specifications, the street would have to be relocated and would encompass far more than the sixty-six foot access easement. Notwithstanding the road's relocation and widening, the street still may not meet the minimum standards.

[¶22] Based upon the evidence, we cannot say that the trial court's findings were clearly erroneous. Nor can we say that the trial court erred in concluding that the City abused its discretion in finding public necessity as a basis for the taking.

[¶23] We affirm.

[¶24] GILBERTSON, Chief Justice, and SABERS, and ZINTER, Justices, and SRSTKA, Circuit Judge, concur.

[¶25] SRSTKA, Circuit Judge, sitting for KONENKAMP, Justice, disqualified.

SRSTKA, Circuit Judge (concurring).

[¶26] I concur in the majority opinion in all respects. I add this opinion to comment on SDCL 21-35-10.1 and our affirming the use of that statute by the trial court to overturn a city's declaration of taking.

[¶27] At first blush our opinion appears to beat a retreat from the traditional deference given by the courts to the legislative branch of the government when it delegates the power of eminent domain. Basin Elec. Power Co-op v. Payne, 298 NW2d 385, 388 (SD 1980) (citing Otter Tail Power Company v. Malme, 92 NW2d 514, 521 (ND 1958).

[¶28] The Constitution of South Dakota, art VI, § 13, and art XVII, § 18, by implication if not direction, limit the use eminent domain to acquire property in the public interest.

[¶29] Article VI, § 13 reads in part: "Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the legislature and according to § 6 of this article."

[¶30] Article XVII, § 18, reads in part:

> Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.

[¶31] A brief historical review of the relationship between the judiciary and the legislative branch when it delegates the power eminent domain discloses that by the middle of the Twentieth Century, the courts had almost totally yielded overview of takings and ceded to the legislative branch the power to define what was taking for a public purpose.

[¶32] Although the determination of whether a use is public or not is said to be a judicial question, the courts have moved so far from the idea that actual use by an appreciable part of the public is a requisite to public purpose, toward a conclusion that if any public purpose is served public use is unnecessary, that it is almost correct to say that the question of whether a taking of land is for a public use is a legislative and not a judicial one *see* United States ex rel. T.V.A. v. Welch, 327 US 546 (1946). Thus, use of the condemnation power has been upheld where the purpose was to clear slums, beautify and area, construct low-cost housing, provide off-street parking and promote industrialization. Encyclopedia Britannica, 1963, Volume 8, *Eminent Domain* p 336.

[¶33] In South Dakota we concurred with this historical trend. In 1950 we held the following:

> The question of the existence of the necessity for exercising the right of eminent domain, where it is first shown that the use is public, is not open to judicial investigation and determination, but that the body having power to exercise the right of eminent domain is also invested with power to determine the existence of the necessity.

City of Bristol v. Horter, 73 SD 398, 403, 43 NW2d 543 (1950) (quoting Chicago, M. & St. P. R. Co. v. Mason, 23 SD 564, 122 NW 601, 603 (1909).

[¶34] A review of the code shows dozens of grants of eminent domain power. Municipalities can clear entire city blocks on a finding that the area is a slum or blighted area, for example. SDCL 11-8-50. Even recycling and waste management districts, SDCL 34A-16-16 and television translator districts, SDCL 49-32A-17 have the power of eminent domain.

[¶35] This is not the first case where a landowner challenged a taking under SDCL 21-35-10.1. The landowner in *Basin Elec. Power Co-op v. Payne, supra*, challenged the taking under the statute. The statute is relatively new in the eminent domain law only having been adopted in 1976 and amended in 1977. The pertinent parts of that statute read as follows:

> Within thirty days from the date the summons described in § 21-35-9 is served, the defendant may demand a hearing in circuit court on the petitioner's right to take. ... The finding of necessity by the plaintiff, unless based upon fraud, bad faith or an abuse of discretion, shall be binding on all persons.

[¶36] A reader of that statute might conclude that the legislature granted the courts new powers to review and perhaps, some might fear, micromanage condemnation proceedings. A review of the cases, however, teaches us that the legislature only codified the standards followed by the courts in eminent domain cases.

[¶37] In *City of Bristol v. Horter, supra*, at 73 SD 403, we recognized the right of the courts to review a taking on the basis of fraud, bad faith or abuse of discretion when we stated:

> In this case the purpose was public and the necessity was determined by the legally authorized municipal authority. It is not contended that the city is appropriating more land than is necessary for the use intended, and there is no claim of fraud, bad faith or abuse of discretion. Therefore the city's determination that the necessity for the taking exists is conclusive.

[¶38] We continued to recognize the residual power of the judiciary to examine takings noting that the entity delegated the condemnation power must strictly follow the requirements established by the legislature. Illinois Cent. R.R. Co. v. East Sioux Falls Quarry Company, 33 SD 63, 144 NW 724 (1913). Two quotations from that opinion show our thoughts in the use of and limitations on the eminent domain powers.

> Appellants declare, and we think correctly, that it devolves upon a party seeking, through delegated power, to exercise the right of eminent domain to show:
>
> (1) That such party is *within the class* to whom the power has been delegated.
>
> (2) That all *conditions precedent* have been complied with.
>
> (3) That the purpose for which the property is to be taken is one of the purposes *enumerated in the statute.*
>
> (4) That the property is to be taken for a *public use.*
>
> (5) That the particular property sought to be taken is *necessary* to the accomplishment of the public purpose intended.

144 NW at 724 and 725, and

> Has respondent complied with the statutory conditions precedent to the exercise of the power of eminent domain in this case? The power of eminent domain being a power which is possessed by a railway corporation solely by being delegated to such corporation by the sovereign power of the state, its existence depends upon a strict compliance with each and every condition prescribed by such sovereign power. (citations omitted).

144 NW at 726.

[¶39] As we can see from a cursory view of the cases, the statute really adds nothing to the power that the courts continued to reserve, although we might deduce that the legislature intended the judiciary to be more assertive in its review and less deferential to the condemning power.

[¶40] The bench and bar really have nothing to fear from this opinion. The opinion does not change the relationship among the entities using eminent domain and the judiciary when we examine the cases and compare them to the statute. The facts in this case are extreme and even absent the statute, SDCL 21-35-10.1, the trial judge was proper in overturning the city's actions.

Endnotes

1 (Popup - Footnote)

1. A street identified as a "collector" street means additional traffic from future developments could come through the neighborhood for ingress and egress.

WILDWOOD ASSOCIATION,
a South Dakota not for profit corporation;
John G. Spangler; John M. Weiss; Timothy L. Skinner
and Donna L. Skinner; James A. Oswald and Helen I. Oswald;
Daniel J. Finn, Jr. and Melinda Finn,
Plaintiffs and Appellees,
v.
HARLEY F. TAYLOR, INC.,
a South Dakota corporation
and Red Rock Development Company, LLC,
a South Dakota Limited Corporation,
Defendants and Appellants,

Leo Hamm Family Ranch, LLC,
a South Dakota Limited Liability Company;
Pennie Lou Slovek, Kellie Sue Weisgram, and Shellie Lynn Parker,
Defendants and Appellants,

The City of Rapid City,
a Municipal Corporation,
Defendant and Appellant.
[2003 SD 98, 668 NW2d 296]

South Dakota Supreme Court
Appeal from the Seventh Judicial Circuit, Pennington County, SD
Hon. James W. Anderson, Judge
#22538, #22539, #22540—Affirmed in part; Reversed in part

Edward C. Carpenter, Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, Rapid City, SD
Attorneys for Plaintiffs and Appellees.

Terry G. Westergaard, Bangs, McCullen, Butler, Foye & Simmons, Rapid City, SD
Attorneys for Appellants Harley F. Taylor and Red Rock Development Co.

Jerry D. Johnson, Banks, Johnson, Colbath & Kerr, Rapid City, SD
Attorneys for Appellants Leo Hamm Family Ranch, Pennie Lou Slovek,
Kellie Sue Weisgram, and Shellie Lynn Parker.

Adam Altman, City Attorney
Michael S. Booher, Assistant City Attorney, Rapid City, SD
Attorneys for Appellant City of Rapid City.

Argued Apr 29, 2003; Opinion Filed Aug 6, 2003

MEIERHENRY, Justice.

[¶1] Wildwood Association (Wildwood) brought an action seeking declaratory judgment and injunctive relief against City of Rapid City (City), Harley F. Taylor, Inc. (Taylor), Red Rock Development Co., LLC (Red Rock), Leo Hamm Ranch, LLC (Hamm), and Slovek, Weisgram and Parker, daughters of Leo Hamm (daughters) (collectively Defendants). Wildwood petitioned the court to determine if the section line had been vacated, if the access easement was public and if the easement was appurtenant. While this action was pending, the City filed a condemnation action to take the easement at issue.{fn1}(1) The trial court consolidated the actions for trial. Defendants appeal the trial court's findings (1) that the section line had been vacated, (2) that the access easement was a private easement and (3) that the private easement was for personal use. We reverse issue one and affirm issues two and three.

FACTS AND PROCEDURAL BACKGROUND

[¶2] Wildwood Subdivision was originally developed in 1977 and 1978. The actual plat of Wildwood was approved in 1978. The 1978 plat depicts a section line and the north thirty-three feet of the section line right-of-way between section 21 and section 28. The section line right-of-way between section 21 and section 28 was unimproved. The 1978 plat did not include any property south of the section line. The section line is the southern boundary to Wildwood lots 19, 20, 21, 22, and 23. The 1978 plat also indicates an access easement which runs across lot 23, which is owned by Daniel and Melinda Finn. The access easement and the section line highway are known as Shooting Star Trail.

[¶3] On May 21, 1979, Wildwood was re- platted. Lots 18, 19, 20, and 21 along with other additions to Wildwood were platted and approved by the Common Council of the City of Rapid City. Although Wildwood was not annexed into the City at this time, it was within the City's three-mile extra-territorial jurisdiction. On the 1979 plat, neither the north nor the south section line right-of-way was shown. When the City annexed the Wildwood subdivision in 1984, the annexation map indicated the entire area to be annexed but did not show the section line.

[¶4] The status of the section line and access easement became an issue when the City initiated a plan to annex Red Rock. In 1999, Red Rock began submitting development requests to the City. Red Rock proposed a 360- acre planned unit development. The development consisted of 280 single-family lots and 80 multi-family lots plus an 18-hole golf course. In order for the City

to provide municipal services including water and sewer to the development, Red Rock needed to be annexed. However, Red Rock was not contiguous to the City as required for annexation. To solve this problem, Red Rock approached Leo Hamm about annexing sixty acres of his property which adjoined Red Rock and the City. Ultimately an agreement was struck with Hamm in which Red Rock would pay him $50,000 in exchange for his acquiescence to annex sixty acres of his property. As part of the agreement, the City would grade the section-line road at issue along the northern boundary of Hamm's property to meet City specifications. Also the City agreed to acquire a public right-of-way across lot 23 from Wildwood to the section line road. On July 10, 2000, the City council passed a resolution indicating that it was in the public interest to annex the property. The City included in the resolution its intent to acquire the sixty-six foot wide easement on lot 23 and to dedicate the easement as a public right-of- way at the City's expense. The resolution also incorporated the City's promise to construct at least a twenty-eight foot roadway on the section line in accordance with City standards.

[¶5] The residents of Wildwood first became aware of the proposed section line road when the City began construction. Wildwood Association commenced a declaratory judgment action seeking to ascertain the legal status of the section line and access easement and requested injunctive relief. The trial court ruled in favor of Wildwood finding that the section line easement had been vacated and that the sixty- six foot access easement was a private easement personal to Hamm and Taylor. Red Rock, Taylor, Hamm and the City appeal raising the following issues:

1. Whether the section line was vacated by the appropriate governmental authority.

2. Whether the trial court erred in finding that the access easement was private.

3. Whether the trial court erred in finding that the access easement was personal only to Hamm and Taylor.

STANDARD OF REVIEW

[¶6] Findings of fact are reviewed under a clearly erroneous standard. City of Sioux Falls v. Hone Family Trust, 1996 SD 126, ¶6, 554 NW2d 825, 826. "Clear error means, 'after a review of all the evidence,' we are left with a definite and firm conviction that a mistake has been made." *Id.*; Fanning v. Iversen, 535 NW2d 770, 773 (SD 1995) (quoting Cordell v. Codington County, 526 NW2d 115, 116 (SD 1994)).

DECISION

1. Whether the section line was vacated by the appropriate governmental authority.

[¶7] Defendants claim that the section line easement was not vacated because there was no affirmative action by the appropriate governmental authority. The trial court found that the

section line was vacated by the Common Council of the City of Rapid City in connection with the approval of the 1978 plat and the subsequent annexation of the Wildwood Subdivision.

[¶8] Historically, the section line was established by congressional action. In 1866, Congress declared that: "'The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.'" Costain v. Turner County, 36 NW2d 382, 383 (SD 1949) (quoting § 8, Ch 262, 14 Stat 253, 43 USCA § 932). Thereafter the legislature of the Dakota Territory enacted Ch 33 SL 1870-1871 stating: "That hereafter all section lines in this Territory shall be and are hereby declared public highways as far as practicable ... ."{fn2}(2) Today SDCL 31-18-1 provides:

> 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.

Every section line shall be sixty-six feet wide with thirty-three feet on each side of the section line. SDCL 31-18-2.

[¶9] Neither party disputes that the 1978 plat clearly sets forth a section line and thirty-three feet section line easement dedicated to the public. However, the parties dispute whether the approval of the 1979 plat without the section line easement was sufficient governmental action to extinguish the section line easement. On the 1978 plat, lots 17-21 were drawn but not shown as platted. The 1979 plat depicted the lots as platted and clearly identified the section line running along the southern boundary of lots 19-21 but did not identify the section line easement. Wildwood claims that the approval of the 1979 plat vacated the section line easement shown on the 1978 plat.

[¶10] In order for a previously recorded plat to be vacated by filing a new plat, compliance with the statutory requirements set forth in SDCL Ch 11-3 is necessary. SDCL 11-3-20.2 provides:

> The new plat shall specifically describe all previous plats sought to be vacated including the book and page or document number of all existing plats in the register of deeds office. The new plat shall specifically state that all previous plats so listed are to be vacated in whole or in part. The new plat shall comply with the public highway provisions of § 11-3-17.

If a plat is filed and is intended to vacate a previous plat, the register of deeds shall write "vacated" across that portion of the plat so vacated and make reference on the plat to the volume and page number in which the instrument of vacation is located. SDCL 11-3-18. The 1979 plat is void of any marking vacating the 1978 plat. Furthermore, this Court recently stated in Hofmeister v. Sparks, that the filing of a new plat does not automatically vacate a prior plat. 2003 SD 35, ¶4, 660 NW2d 637, 639. Another case involving a dispute of whether a section line was vacated was

Millard v. City of Sioux Falls, 1999 SD 18, 589 NW2d 217. In *Millard*, the city and county approved a "plat" which did not show the section line easement. This Court determined that the section line easement still existed because the county had not previously taken steps to vacate it. *Id.* at ¶16. We held that the "section-line easement was created by operation of law and no affirmative action was taken to vacate it." *Id.* at ¶28. "[A]bsent annexation, specific affirmative action must be taken by an appropriate government authority to vacate a section-line right-of-way." *Id.* at ¶24. The mere approval of a plat by the county and city is not enough to vacate a section line. *Id.* at ¶16.

[¶11] Prior to the City's annexation, the County was the governmental entity with authority to vacate the section line. SDCL 31-18-3.{fn3}(3) Before a County can vacate a section line, the law requires that the Department of Transportation must grant approval. SDCL 31-3-19. Once approval is obtained from the Department of Transportation, any change shall be noted on the map of the county highway system in the office of the county auditor and on the map in the Department of Transportation. SDCL 31-12-2. Here, there is no evidence of county action to vacate the section line. Therefore, the section line easement was still in existence as depicted on the 1978 plat when the property was annexed by the City in 1984.

[¶12] Wildwood asserts that if the section line easement was not vacated prior to annexation, the City's annexation vacated it because the annexation map did not depict a section line right-of-way. The trial court, relying on *Hone*, determined that the City vacated the section line by annexing the property. 1996 SD 126, 554 NW2d 825. We find *Hone* distinguishable. In *Hone*, the City of Sioux Falls annexed Country Club Heights in 1952. *Id.* at ¶8. The Court found that prior to the annexation, the City of Sioux Falls had vacated the section line. *Id.* at ¶9. In the present case the section line was not vacated prior to the annexation proceeding.

[¶13] Although the annexation map does not show the section line easement, SDCL 9-4-11 only requires a "map" of the territory. It states:

> Whenever the limits of any municipality are changed by a resolution of the governing body or by a decree of court it shall be the duty of the mayor or the president of the board of trustees to cause an accurate map of such territory, together with a copy of the resolution or decree duly certified, to be recorded in the office of the register of deeds of the county or counties in which such territory is situated, and thereupon such territory shall become and be a part of such municipality or be excluded therefrom as the case may be.

The City submitted a map of the territory, it did not submit a "plat" of the territory to be annexed. Because the annexation map does not have the detail of a plat, the legal descriptions of the property annexed must be determined by examining the plat filed with the register of deeds for that parcel of property. Thus we must refer to the 1978 and 1979 plat which did not vacate the section line easement. Consequently, when Wildwood was annexed, the section line easement

was still in existence. The City could not have vacated the section line easement by annexing Wildwood since the easement was still portrayed on the relevant plat of the property in question.

[¶14] To vacate the section line at the time of annexation, there needed to be some affirmative action on the part of the City. In *Millard*, the Court held that when the property was annexed to the city, the city vacated the section line by the affirmative action of establishing a street where the section line had been. 1999 SD 18, ¶23, 589 NW2d at 220. In the present case, the City took no action from which to infer that it intended to vacate the section line. We reverse on issue one.

2. Whether the trial court erred in finding that the access easement was private.

[¶15] Defendants argue that the sixty-six foot easement running across lot 23 on the 1978 plat was impliedly dedicated to the public. The trial court found that the sixty-six foot access easement was a private easement. The question of whether an easement is private or public is a factual issue to be reviewed under a clearly erroneous standard. Kokesh v. Running, 2002 SD 126, ¶10, 652 NW2d 790, 793.

[¶16] A dedication may occur by express grant or by legal implication. Brown v. Bd. of County Comm'rs for Pennington County, 422 NW2d 440, 442 (SD 1988) (citation omitted). A dedication is implied where "it arises by operation of law from the owner's conduct and the facts and circumstances of the case." Tinaglia v. Ittzes, 257 NW2d 724, 729 (SD 1977) (quoting McQuillin, Municipal Corporations § 33.02 (3rd Rev.Ed.)). "[W]hat amounts to a dedication by implication depends upon the facts of the particular case, and no hard and fast rule can be laid down as a guide for the courts." Smith v. Sponheim, 399 NW2d 899, 902 (SD 1987) (quoting Evans v. City of Brookings, 41 SD 225, 229, 170 NW 133, 134 (1918) (citations omitted).

[¶17] Defendants contend that the dedication to the public is implied because the sixty-six foot easement connects the section line highway to Una-Del Drive and Wildwood, both dedicated public streets. Defendants rely on Atlas Lumber Co. v. Quirk, 28 SD 643, 135 NW 172 (1912). In *Atlas*, this Court determined that when an unmarked space on a plat extends from an existing dedicated public street, the unmarked portion is presumed also to be dedicated to public use.

> 'Naturally the presumption is that one who records a plat and marks upon it spaces that appear to form no part of any platted lots dedicates the land represented by the spaces thus excluded to a public use;' and where there is left on a plat spaces not designated as a street, but which follow the line of a river, or where they follow the line as apparent extensions of other streets already in existence, it is held to constitute a dedication as a street of the undesignated portion of the plat.

Id. at 174-75 (citations omitted). In Selway Homeowners Ass'n v. Cummings, 2003 SD 11, 657 NW2d 307, we determined that a right-of-way labeled 66' R.O.W. (Future Use) was not dedicated to the public. We held that the presumptions set forth in *Atlas* did not control as there

was "convincing proof of contrary intent by a grantor." *Id.* at ¶23. A careful analysis of the plat in *Selway*, indicated that the 'future use right-of-way' was not dedicated and was separate from the dedicated main road. *Id.*

[¶18] The presumptions in *Atlas* are inapplicable here as well. The plat clearly indicates that the sixty-six foot right-of-way was not dedicated to the public. The plat specifically lists Wildwood Drive, Alpine Court, Greenleaf Court and Vanishing Trail Court as dedicated public right-of-ways. The section line easement is dedicated to the public with specific language on the plat that states, "area dedicated to the public right-of-way." In contrast, the sixty-six foot access easement is not included in the list of roads dedicated to the public nor is there any language on the plat near the access easement suggesting that the access easement was dedicated to the public. Notably, the access easement is clearly distinguished from the dedicated public roads. It does not follow a line indicating an extension of already existing streets, and it is marked on the plat as part of lot 23. If it was dedicated for public use, the intention to dedicate had to be clear and may be shown by "deed, words, or acts." Sponheim, 399 NW2d at 901. Evidence at trial revealed that Hamm, one of the individuals who signed the 1978 plat, publicly stated that it was a "private easement" "set up for people who had property back there to access it." Around 1985, Hamm had tried to purchase the private easement from the owners of the lot in order to dedicate it for public use. Also, the city attorney at a public meeting made statements that "their research indicated it was a private easement."

[¶19] The evidence failed to establish that the sixty-six foot access easement across lot 23 was dedicated to the public. We affirm the trial court on issue two.

3. Whether the trial court erred in finding the access easement personal only to Hamm and Taylor.

[¶20] An easement may be created by written grants, pursuant to plats or by force of law. *Kokesh*, 2002 SD 126, ¶12, 652 NW2d at 793 (citing Knight v. Madison, 2001 SD 120, ¶6, 634 NW2d 540, 542; Cleveland v. Tinaglia, 1998 SD 91, ¶18, 582 NW2d 720, 724; Tan Corp. v. Johnson, 1996 SD 128, ¶13, 555 NW2d 613, 616). The servitude of an easement is controlled by the terms of the grant and nature of use. *Knight*, 2001 SD 120, ¶6, 634 NW2d at 542. "[N]either the physical size nor the purpose or use to which an easement may be put can be expanded or enlarged beyond the terms of the grant of the easement." *Id.*; *See* Townsend v. Yankton Super 8 Motel, 371 NW2d 162, 165-66 (SD 1985). An easement created by an express grant is controlled by the words of the grant, its physical size and the nature of use. *Knight*, 2001 SD 120, ¶6, 634 NW2d at 542. "The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement." SDCL 43-13-3. An easement appurtenant runs with the land and serves the dominant estate. 25 AmJur2d Easements and Licenses § 10 (updated 2003).

[¶21] In order to determine the nature and extent of the easement, we look to the terms of the

grant, the plat, and the nature of its use. When Ted Hamm, the original owner, transferred the property, the terms of the grant as expressed in the addendum to the 1977 purchase agreement, indicated that the seller wished to reserve and improve the easement.

> The buyers agree the seller may reserve on the above described property, a 66' easement starting at the SW corner of Una Del Drive, running southwesterly along the existing trail 150' to the south line of said Section 21.
>
> As further consideration, Buyers agree to allow Seller the use of Buyer's bulldozer to improve the above easement for a period not exceeding four (4) hours in duration at a time convenient to Buyers. Seller agrees to direct the operations of said work.

Although the addendum permitted the seller to reserve the easement, the warranty deed from Ted Hamm to Finn's predecessors made no reference to the easement nor did it specifically define a reservation to the seller. The 1978 plat showed the easement and labeled it a "66' access easement." None of the written instruments identify a dominant tenement to which the easement is appurtenant.

[¶22] Hamm asserts that the easement is appurtenant to all land west of Wildwood Subdivision. Taylor and Red Rock assert that the dominant tenement is west and south of the access easement. The party claiming the easement has the burden of proof. *Cf.* Thompson v. E.I.G. Palace Mall, LLC, 2003 SD 12, ¶14, 657 NW2d 300, 305 (to establish an easement by implication from prior use the burden of proof is on the claimant). Neither the addendum to the purchase agreement nor the original plat identifies a dominant tenement. Hamm, Taylor and Red Rock failed to identify the dominant estate beyond unsupported vague generalities. Additionally, the access easement was marked by a private drive sign and had a chain blocking its entrance indicating it was for personal use only. The trial court found that the use of the easement was limited to Leo Hamm and his immediate family and Harley Taylor and his immediate family only to access the properties they own in section 28 and section 21. Based on the evidence, we cannot say the trial court erred in finding that the sixty-six foot access easement was a private easement for personal use. We affirm the trial court on issue three.

[¶23] GILBERTSON, Chief Justice, and SABERS and ZINTER, Justices, and SRSTKA, Circuit Court Judge, concur.

[¶24] SRSTKA, Circuit Court Judge, sitting for KONENKAMP, Justice, disqualified.

Endnotes

1 (Popup - Footnote)

1. *See* **City of Rapid City v. Finn, 2003 SD 97.**

2 (Popup - Footnote)

2. *See* Arthur L. Rusch, *Douville v. Christensen: An Answer to the Issue of Township Responsibility for the Improvement of Section Line Rights of Way*, 48 SD L Rev 247 (2003) (discussing the existence of public roads along every section line and the issues of maintenance by the governing body).

3 (Popup - Footnote)

3. **SDCL 31-18-3** provides:

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.