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October 9, 2015

Via Federal Express

Diane Fremgen
Clerk of the Supreme Court
and Court of Appeals
110 East Main Street
Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: Chan Lee and C. Lee Development, LLC v. State of Wisconsin DOT
Appeal No: 14-AP-2304

Dear Clerk:

Enclosed please find the original and twelve copies of Plaintiffs-Respondents Chan Lee and C. Lee Development, LLC's Response in Opposition to Petition for Review in the above-referenced matter. Please file same and return the file-stamped copies in the envelope provided. Pursuant to Wis. Stat. §809.19(12), the brief has also been electronically filed.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Thomas A. Janczewski

CPG/kmb

Enclosures
cc: Maura F.J. Whelan, Esq. (w/encl., via Federal Express)
Mr. Chan Lee (w/encl, via U.S. mail)

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP2304

CHAN LEE and C. LEE DEVELOPMENT, LLC,

Plaintiffs-Respondents,

v.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant-Petitioner.

PLAINTIFFS-RESPONDENTS CHAN LEE AND C. LEE DEVELOPMENT, LLC'S RESPONSE IN OPPOSITION TO PETITION FOR REVIEW OF DEFENDANT-PETITIONER STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION

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INTRODUCTION

The Supreme Court should deny the Wisconsin Department of Transportation's ("DOT") Petition for Review because the non-precedential Court of Appeals decision is unlikely to have any application outside the unique facts of this case. That is, this case turned on the existence of a deed granted by DOT to the prior owners of property now owned by Respondent C. Lee Development LLC ("Lee"). The non-precedential Court of Appeals decision is narrowly confined to situations in which DOT has conferred driveway access rights by deed and does not touch upon DOT's rights to revoke ordinary driveway access permits.

Towards that end, DOT's petition does not allege that DOT has ***ever*** conferred deeded driveway access to any other property owner. Even if DOT had from time to time granted deeded driveway access, in order for the legal issue presented in the petition to ever arise again, DOT would also need to attempt to take (or "revoke") those property rights. This is the first case—published or unpublished—where this "perfect

storm" of events has arisen. There is no basis to suspect another case like this one will ever arise.

DOT's arguments that the non-precedential Court of Appeals decision somehow "conflicts" with prior controlling case law is unavailing because no prior case law cited by DOT addressed deeded driveway access rights. In fact, the word "deed" does not appear anywhere in any of those cases. For the reasons more fully set forth below, the Supreme Court should deny the petition.

ARGUMENT

I. DOT HAS FRAMED A "STRAWMAN" STATEMENT OF THE ISSUE PRESENTED.

DOT's question presented is a "strawman." Specifically, DOT frames the issue thusly: "Lee's property has a driveway to USH 18 that is subject to DOT's permitting and revocation authority as a matter of law. That fact is reflected in the explicit terms of the 1983 deed executed between DOT and a prior owner." Pet. at 3. One of the issues decided by the Court of Appeals was whether the deed "explicitly" reserved for DOT a right of revocation. The Court of Appeals held that it did not: "[a]s the drafting party,

the DOT had the power to choose the words of the deed and ***explicitly make the driveway connection subject to permitting and revocation. It chose not to***, and we will not rewrite the deed for it." *Chan Lee. and C. Lee Development LLC v. State of Wisconsin Department of Transportation*, Case No. 2011AP2304, ¶ 21 (Wis. Ct. App. Dist. II August 26, 2015) (publication not recommended) (hereinafter "Decision"). Indeed, the Court of Appeals decision suggests that had the deed "explicitly" reserved for DOT the right of revocation this case may have come out differently.

If DOT wanted the Court to review the question "whether" the deed "explicitly" reserved for DOT a right of revocation, it should have squarely presented that issue to the Court. DOT did not. Instead, DOT asks this Court assume that the 1983 deed "explicitly" reserved for DOT a right of revocation, contrary to the Court of Appeals holding.

II. DISCRETIONARY REVIEW IS NOT WARRANTED IN THIS CASE BECAUSE THE PETITION DOES NOT INVOKE THE INSTITUTIONAL RESPONSIBILTIES OF THE SUPREME COURT.

A. Review Is Not Warranted Under Section 809.62 (1)(c)2 and 3 Because This Is a Unique Case and the Non-Precedential Court of Appeals Decision Was Narrowly Crafted Such That the Decision is Unlikely to Have Any Future Application.

"When a matter is brought to the Supreme Court for review, the court's principal criterion in granting or denying review is not whether the matter was correctly decided or justice done in the lower court, but whether the matter is one that should trigger the institutional responsibilities of the Supreme Court." Supreme Court Internal Operating Procedures, § II. The Court should deny the petition because although DOT disagrees with the holding in the non-precedential Court of Appeals decision, mere disagreement or disappointment is insufficient. The petition does not trigger the institutional responsibilities of the Supreme Court.

DOT argues that granting its petition "will help develop, clarify or harmonize the law" because the "resolution of [the legal issues presented] will have statewide

impact" and are "likely to recur." Pet. at 2–3 (citing WIS. STAT. § 809.62(1)(c)2–3.) DOT, however, has failed to show that the decision will have any application outside the very unique facts of this case.

Contrary to DOT's petition, this case is not a run-of-the-mill permit revocation matter. The critical fact here was that DOT and the prior owner of the property entered into a bargained-for exchange of deeds in 1983, and DOT granted deeded driveway access to the property at issue. As the Court of Appeals explained:

> Reviewing the ***deed*** at issue, we are persuaded that it conveys to Lee an irrevocable compensable property right for two reasons. First, the ***deed*** is recorded as a ***quit claim deed***, and ***quit claim deeds*** "pass all of the interest in or appurtenant to the land described which the grantor could lawfully convey…." WIS. STAT. § 706.10(4). Thus, whatever ownership rights the DOT possessed in the driveway connection in 1983 were conveyed to the previous owner of the property by virtue of this legal instrument.
>
> Second, even if we were to look past the title of the ***deed***, the language in it conveys "the right" to the private driveway and does not identify any condition, reservation, exception, or contingency upon which the owner's access is encumbered, limited, or extinguished. See WIS. STAT. § 706.02(1)(c) explicitly make the driveway connection subject to permitting and revocation. It chose not to, and we will not

> rewrite the ***deed*** for it. As the drafting party, the DOT had the power to choose the words of the ***deed*** and explicitly make the driveway connection subject to permitting and revocation. It chose not to, and we will not rewrite the ***deed*** for it.

Decision at ¶¶ 21–22 (emphasis added). This case is about whether DOT must exercise its eminent domain powers to take back a deed which it bargained for.

Towards that end, there is nothing in the petition—or anywhere in the record—suggesting that DOT has ever made widespread practice of granting deeded driveway access rights to property owners. Based upon the record, and the narrow, common sense, and careful holding in the Court of Appeals decision, the non-precedential Court of Appeals decision is unlikely to have any application in the future. Indeed, even though DOT has regulated driveway access for many decades, there are no published or unpublished cases in which this idiosyncratic fact-pattern has arisen. The non-precedential Court of Appeals decision appears to affect one—and only one—property owner.

DOT argues that unless the Supreme Court steps in and reverses the non-precedential Court of Appeals decision, Wisconsin law will somehow be left unsettled in a manner

that could have broad application going forward. To support its petition, DOT states, in a purposefully vague manner, that "DOT has entered into agreements like those governing the Lee property with thousands of other landowners." Pet. at 4. The non-precedential opinion is not about "agreements," it is about ***deeds***. Certainly if DOT had, in fact, granted thousands of deeds conferring driveway access rights, its petition would say so.

What DOT apparently means by "agreements" is that DOT has granted thousands of ***permits*** to property owners. In DOT's view, there is no difference between a "permit" and "deeded driveway access." The trial court held that there is a difference: a permit is revocable and deeded driveway access is irrevocable unless DOT pays just compensation to the property owner. The Court of Appeals agreed.

The non-precedential Court of Appeals decision does not—in any way—affect DOT's rights to revoke an ordinary permit. Thus, DOT's concerns about how "to proceed in its regulation of driveway connections between private property and state trunk highways" are unfounded. In fact, the non-precedential decision creates absolute clarity and

predictability with a simple to understand, simple to apply rule based on basic property principles: if DOT has granted deeded driveway access to a property owner, it must pay just compensation to take away that access. If DOT has granted an ordinary permit, DOT may revoke the permit in accordance with the statutes. This is a simple, common-sense, and predictable rule. There is no reason to create a new body of law governing "when a deed is a deed and when a deed is actually a permit." If the goal is to create predictability and avoid litigable issues in the future, the rule applied by the Court of Appeals—although non-precedential—best accomplishes that objective.

Revisiting this simple rule would create the very uncertainty over which DOT frets. "[T]he very purpose of the recording statutes [is] to ensure a clear and certain system of property conveyance." *Assocs. Fin. Servs. Co. of Wis. v. Brown*, 2002 WI App 300, ¶ 14, 258 Wis. 2d 915, 656 N.W.2d 56 (citing *Kordecki v. Rizzo*, 106 Wis. 2d 713, 718-19, 317 N.W.2d 479 (1982)). If some deeds within the property records can be construed as a "permit" thirty years after the fact, how could real estate buyers and sellers

understand exactly what they are buying and selling? How could a lender understand the value of its collateral? As much as any other area of the law, clarity and predictability is necessary when evaluating property rights. The Court of Appeals decision offers both. DOT has not presented any argument worthy of injecting murkiness and unpredictability into the law of property.

Nor can the non-precedential Court of Appeals decision be interpreted as restricting the State's exercise of its police powers as DOT implies. Pet. At 19-20. The question is not—and never was—whether DOT can regulate driveway access in the interest of public safety. It certainly can. Rather, the non-precedential Court of Appeals decision held that even though DOT granted deeded driveway access, "that does not mean that it cannot reacquire them. However, to do so, it will have to commence eminent domain proceedings and pay just compensation." Decision ¶ 22. Neither the police power nor the public safety is at risk. The non-precedential Court of Appeals decision unequivocally says so. The Court should deny the petition.

B. The Court of Appeals Decision Does Not Conflict With Controlling Precedent

DOT argues that the Court of Appeals decision somehow conflicts with "other controlling precedents of this court." Pet. at 5. Specifically, DOT argues that the Court of Appeals decision conflicts with *Narloch v. Department of Transportation*, 115 Wis. 2d 419, 429, 340 N.W.2d 542 (1983); *Bear v. Kenosha County*, 22 Wis. 2d 92, 96, 125 N.W.2d 375 (1963); and *J&E Investment LLC v. Division Of Hearings & Appeals*, 2013 WI App 90, 349 Wis. 2d 497, 835 N.W.2d 271. This is wrong. A simple text search of those opinions shows that the word "deed" never appears once in any of them. The Court of Appeals decision stands for the very modest proposition that when DOT grants a property owner deeded access rights it cannot "revoke" that deed unless the deed explicitly so provides or unless DOT pays just compensation to the property owner. Contrary to DOT's argument, there are no cases inconsistent with the non-precedential Court of Appeal's decision. DOT's petition should be denied.

CONCLUSION

For the foregoing reasons, the Supreme Court should deny the petition.

Dated this 9th day of October, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response Brief conforms to the rules contained in §809.19(8)(b) and (d) and §809.62(4)for a Response in Opposition to Petition for Review and produced with a proportional font. The length of this Response is 1,877 words.

Dated this 9th day of October, 2015.

Thomas A. Janczewski, SBN 1066346

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Response in Opposition to Petition for Review, excluding the supplemental appendix, which complies with the requirements of Wis. Stat. §§809.19(12) and 809.42(4)(b).

I further certify that:

This electronic Response in Opposition to Petition for Review is identical in content and format to the printed form of the Response in Opposition to Petition for Review filed as of this date.

A copy of this certificate has been served with the paper copies of this Response in Opposition to Petition for Review filed with the Court and served on all opposing parties.

Dated this 9th day of October, 2015.

Thomas A. Janczewski, SBN 1066346

CERTIFICATE OF SERVICE

I, Thomas J. Janczewski, being first duly sworn on oath, certify that on the 9th day of October, 2015, I served a copy of the Response in Opposition to Petition for Review upon the individual, via Federal listed below:

Maura F.J. Whelan
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707

Thomas A. Janczewski, SBN 1066346

Subscribed and sworn to before me
this 9th day of October, 2015.

Notary Public, State of Wisconsin
My Commission expires: 1/11/16

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