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September 25, 2015

HAND DELIVERED

Ms. Diane M. Fremgen
Clerk of Court of Appeals
Post Office Box 1688
Madison, WI 53701

Re: *Chan Lee and C. Lee Development LLC v. DOT*
Appeal No. 14AP2304

RECEIVED
SEP 25 2015
CLERK OF SUPREME COURT
OF WISCONSIN

Dear Ms. Fremgen:

Enclosed please find eleven copies of the Petition for Review and Appendix of Defendant-Appellant-Petitioner in the above-referenced case.

The extra copy is for date stamping by your office and subsequent return to me.

By copy of this letter, three copies of this Petition for Review and Appendix is being mailed today to all counsel of record.

Thank you for your consideration in this matter.

Sincerely,

Maura FJ Whelan
Assistant Attorney General
State Bar #1027974

MFJW:mlk

cc: Attorney Charles P. Graupner

STATE OF WISCONSIN
IN SUPREME COURT

No. 2014AP2304

CHAN LEE and C. LEE
DEVELOPMENT, LLC,

Plaintiff-Respondent,

v.

STATE OF WISCONSIN
DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant-Petitioner.

FILED
SEP 25 2015
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OF WISCONSIN

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
ISSUE PRESENTED.....	3
STATEMENT OF RULE 809.62(1) CRITERIA.....	3
STATEMENT OF FACTS.....	6
ARGUMENT.....	16
The driveway between USH 18 and Lee's property is not an irrevocable compensable property right but a temporary driveway connection to USH 18 subject to permitting and revocation by DOT.	16
A. DOT has authority over the state trunk highway system; as part of that authority, it may issue driveway permits and revoke those permits.....	17
B. The driveway connection from Lee's property to USH 18 has been subject to the driveway permitting statute since 1966.	20
1. The State Highway Commission paid just compensation to the Fuchses for their access rights to USH 18, who thereafter held only "two residential access points" subject to the Commission's powers of revocation.....	20
2. The exchange of deeds between the subsequent owner, Western, and DOT did	

	Page
not expand the legal status of the Fuchses' access to USH 18.	22
3. Lee acquired only what his predecessors had: a revocable permissive access point or driveway connection to USH 18.	31
CONCLUSION.....	34

Page

TABLE OF AUTHORITIES

Cases

<i>118th St. Kenosha, LLC v. Wis. Dep't of Transp.</i> , 2014 WI 125, 856 N.W.2d 486	19
<i>AKG Real Estate, LLC v. Kosterman</i> , 2006 WI 106, 296 Wis. 2d 1	31
<i>Bear v. Kenosha Cty.</i> , 22 Wis. 2d 92, 125 N.W.2d 375 (1963)	5, 18, 20
<i>Blakely's Matterhorn, Inc.</i> , 90 Wis. 2d 118, 279 N.W.2d 499 (Ct. App. 1979).....	24
<i>Brennan v. New Richmond Reg'l Airport Comm'n</i> , 2012 WI 98, 343 Wis. 2d 320	19
<i>Capital Inv. v. Whitehall Packing Co.</i> , 91 Wis. 2d 178, 280 N.W.2d 254 (1979)	30
<i>Carlson v. Taylor</i> , 41 Wis. 2d 685, 165 N.W.2d 178 (1969)	31
<i>Coliseum Builders, Inc. v. Kennedy</i> , 502 N.Y.S.2d 281 (N.Y. App. Div. 1986)	19, 22, 32
<i>Dairyland Greyhound Park, Inc. v. Doyle</i> , 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408	27, 29
<i>Dep't of Transp. v. Gunnels</i> , 340 S.E.2d 12 (Ga. 1986).....	19

	Page
<i>Drovers' Deposit Nat. Bank v. Tichenor,</i> 156 Wis. 251, 145 N. W. 777 (1914)	24
<i>Eberle v. Dane Cty. Bd. of Adjustment,</i> 227 Wis. 2d 609 (1999)	13
<i>Hartford Union High Sch. v. City of Hartford,</i> 51 Wis. 2d 591, 187 N.W.2d 849 (1971)	13
<i>J&E Investment LLC v. Div. Of Hearings & Appeals,</i> 2013 WI App 90, 349 Wis. 2d 497, 835 N.W.2d 271	5, passim
<i>J.K.S. Realty, LLC v. City of Nashua,</i> 55 A.3d 941 (N.H. 2012)	19
<i>Kernz v. J.L. French Corp.,</i> 2003 WI App 140, 266 Wis. 2d 124	24
<i>Lake Bluff Hous. Partners v. City of S. Milwaukee,</i> 197 Wis. 2d 157, 540 N.W.2d 189 (1995)	13
<i>McKenna v. State Highway Comm'n,</i> 28 Wis. 2d 179, 135 N.W.2d 827 (1965)	19, 29, 30
<i>Narloch v. Dep't of Transp.,</i> 115 Wis. 2d 419 (1983)	5, passim
<i>Nat'l Auto Truckstops, Inc. v. Dep't of Transp.,</i> 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198	17
<i>Nick v. State Highway Comm'n,</i> 13 Wis. 2d 511, 109 N.W.2d 71 (1961)	22
<i>Rice v. Reich,</i> 51 Wis. 2d 205, 186 N.W.2d 269 (1971)	24

	Page
<i>Schneider v. State (Div. of Hwys.),</i> 51 Wis. 2d 458, 187 N.W.2d 172 (1971)	19
<i>Schwartz v. Evangelical Deaconess Soc'y,</i> 46 Wis. 2d 432 (1970).....	32
<i>State Hwy. & Transp. Comm'r v. Parr,</i> 230 S.E.2d 253 (Va. 1976).....	19
<i>State v. Laven,</i> 270 Wis. 524, 71 N.W.2d 287 (1955)	27
<i>Traeger v. Traeger,</i> 35 Wis. 2d 708, 151 N.W.2d 681 (1967)	24
 <u>Statutes</u>	
Wis. Stat. § 32.05(7)	21
Wis. Stat. § 32.09(6)	21
Wis. Stat. § 32.09(6)(b).....	10, 19, 32
Wis. Stat. § 32.09(6g)	32
Wis. Stat. § 82.07(2)	10
Wis. Stat. § 84.01.....	17
Wis. Stat. § 84.09.....	17
Wis. Stat. § 84.09(1)	17, 21
Wis. Stat. § 84.09(2)	8, 9, 17, 21
Wis. Stat. § 86.07(2)	1, passim
Wis. Stat. § 86.073.....	1, passim

	Page
Wis. Stat. § 101.12.....	13
Wis. Stat. § 236.34.....	12
Wis. Stat. § 236.34(3)	13, 28
Wis. Stat. § 706.10.....	23
Wis. Stat. § 809.23(3)	4

Regulations

Wis. Admin. Code § Trans 231.02(4).....	18
Wis. Admin. Code § Trans 233.02 (note).....	10
Wis. Admin. Code § Trans 233.04(7).....	10
Wis. Admin. Code § Trans 233.05(3).....	10
Wis. Admin. Code § Trans 233.05(4).....	10

Other Authorities

23 Am. Jur. 2d Deeds § 50 (2013).....	31
26 Am. Jur. 2d Eminent Domain §§ 256-57 (2006)	19

The Wisconsin Department of Transportation petitions for review of *Chan Lee and C. Lee Development LLC v. State of Wisconsin Department of Transportation*, Case No. 2011AP2304 (Wis. Ct. App. Dist. II August 26, 2015) (publication not recommended), which affirmed a judgment of the Waukesha County Circuit Court. A copy of the court of appeals' opinion is included in petitioner's appendix (Pet'r App. 001-009).

STATEMENT OF THE CASE

This case arises from the administrative revocation of a driveway permit pursuant to Wis. Stat. §§ 86.07(2)-86.073.¹

Chan Lee and C. Lee Development, LLC (collectively, "Lee") own commercial property in the City of Waukesha. The property has a driveway access point connecting it to USH 18. Several written documents in the chain of title clearly state that Lee's right to the driveway access point is subject to the permitting authority of the State of Wisconsin Department of Transportation (DOT) under Wis. Stat. § 86.07(2).

In 2013, pursuant to its statutory authority, DOT revoked Lee's driveway permit. Lee filed a civil action against DOT. He sought a declaratory judgment that DOT had granted the driveway access point to Lee's predecessor

¹ All references to the Wisconsin Statutes are to the 2013-2014 version unless otherwise indicated.

in interest by an irrevocable quitclaim deed in 1983, not through a revocable highway access permit (R. 1:8). Accordingly, Lee contended, DOT could deprive him of his driveway connection through eminent domain proceedings only (*id.*).

The circuit court granted summary judgment to Lee (R. 20; Pet'r App. 010-011). The court declared that the "existing driveway access point" was "a valid property right . . . pursuant to an irrevocable quitclaim deed . . . not a revocable permit" (R. 20:1; Pet'r App. 010). The court held that, before it may close the access point, DOT must follow eminent domain procedures including the payment of just compensation (R. 20:2; Pet'r App. 011).

DOT appealed. The court of appeals affirmed. Like the circuit court, it ruled that DOT had conveyed the driveway access point to Lee's predecessor in interest in 1983. The court concluded that the 1983 deed conveyed DOT's entire property interest because it was entitled a "quitclaim deed" and that the deed included no language indicating that the previous owner's right was limited in any way. The court ignored the repeated references to § 86.07(2) in the property's chain of title.

ISSUE PRESENTED

Under Wisconsin law, driveway connections between private property and state trunk highways are subject to the permitting and revocation authority of DOT. 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. After Lee purchased the property, DOT notified him that it was revoking the driveway permit for safety reasons. Does Lee have an irrevocable compensable property right to the driveway or a temporary driveway connection subject to permitting and revocation by DOT?

The circuit court held that Lee has an irrevocable compensable property right to the driveway and that DOT may remove the driveway only upon payment of just compensation. The court of appeals agreed.

STATEMENT OF RULE 809.62(1) CRITERIA

This case warrants review by this Court. It satisfies two of the exemplary criteria set forth in Wis. Stat. § (Rule) 809.62(1).

First, a decision by this court "will help develop, clarify or harmonize the law." Wis. Stat. § (Rule) 809.62(1)(c). The issue presented is not entirely novel, but its "resolution

. . . will have statewide impact.” *Id.* at 809.62(1)(c)2. Moreover, it “is likely to recur unless resolved by the supreme court.” *Id.* at 809.62(1)(c)3.

Thousands of driveways all over Wisconsin are subject to DOT’s permitting and revocation authority. DOT regulates these driveway access points to promote safety on the highways. For decades, DOT has exercised its permitting and revocation authority in accordance with Wis. Stat. §§ 86.07(2), 86.073 and Wis. Admin. Code ch. Trans 231. In this case, DOT revoked Lee’s driveway access point pursuant to its statutory and regulatory authority. In addition to being fully consistent with that authority, the revocation was fully consistent with DOT’s agreements with the prior owners of Lee’s property. DOT has entered into agreements like those governing the Lee property with thousands of other landowners.

The court of appeals’ opinion in this case ignored DOT’s statutory and regulatory authority. It also ignored the long history of DOT’s agreements with the prior owners of Lee’s property, and misconstrued the facts it did consider. The opinion is unpublished, unsigned, unciteable, and has no precedential value. *See* Wis. Stat. § 809.23(3). Nevertheless, if the decision stands uncorrected, other property owners may use it in an effort to obstruct DOT’s statutory revocation authority. Indeed, the opinion is likely to be relied on by litigants in future cases.

Meanwhile, DOT is now uncertain how to proceed in its regulation of driveway connections between private property and state trunk highways. Should DOT question the legal effect of written agreements it has with thousands of property owners? Or should it disregard the analysis of a non-precedential court of appeals opinion it believes to be wrong on the law?

For these reasons, this Court should grant this petition to correct the legal errors in the court of appeals opinion. The issue has “statewide impact” and “is likely to recur” without “clarify[ication]” by this Court. Wis. Stat. § (Rule) 809.62(1)(c).

Second, the court of appeals’ decision conflicts with other controlling precedents of this court. See Wis. Stat. § (Rule) 809.62(1)(d). Those precedents are *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.

For all these reasons, DOT requests this Court to grant this petition for review.

STATEMENT OF FACTS

◀The property.

The general characteristics of the Lee property are undisputed. Lee owns and operates a business, JK Lee Black Belt Academy, located at 1851 East Moreland Boulevard and United States Highway (USH) 18 in the City of Waukesha (R. 1:3; 13:5). Included below is an aerial Google Earth photograph of Lee's property (outlined in red) (R. 14:2-3, 7; Pet'r App. 029-030). As shown, the property includes one building and a parking lot with between twenty and thirty parking spaces. The property has three driveway entrances. One enters the north side of the parking lot from USH 18; the other two enter on the south side from Paramount Drive (R. 14:4; Pet'r App. 031). USH 18 and Paramount Drive are connected to one another by Gateway Drive and other surface streets (*id.*).



The USH 18 driveway connection is the subject of the present controversy. This driveway connects Lee's property to the roadway for the use of vehicles traveling eastbound on USH 18. For these vehicles, the driveway provides "right-in, ingress-only access to the Lee parking lot" (R. 14:4; Pet'r App. 031). Because the driveway is angled to facilitate right-in entry from the eastbound lane, vehicles traveling westbound cannot use this entrance. Instead, they must turn left on Gateway Drive and left again on Paramount Drive and use one of the driveways on the south side of the property to enter the parking lot (*id.*). Because the USH 18 driveway is ingress-only, all vehicles leaving the Lee property must use one of the Paramount Drive driveways to exit (*id.*).

In 2009, DOT announced a project involving the reconstruction of USH 18 from Manhattan Drive in Waukesha to Interstate 94 (R. 1:5; 13:6). As part of that project, Lee's USH 18 driveway connection will be removed because DOT has determined that it must be closed for safety reasons (R. 1:5; 8:9-10). That has not yet occurred (R. 14:4; Pet'r App. 031). If and when that driveway is closed, the two driveway entrances to Lee's property on Paramount Drive will remain open (*id.*). The USH 18 driveway "apron" or "throat" (the section of the driveway immediately adjacent to the street) is located in the USH 18 right-of-way (owned by DOT), and is beyond Lee's property boundary (*id.*) Therefore, when the time comes to close the driveway, DOT will not need to enter Lee's property to do the work; it will be completed on highway right-of-way owned by DOT (*id.*).

History of the USH 18 driveway.

In 1965, the parcel of real estate that now includes Lee's property was owned by William and Marjorie Fuchs (R. 14:15; Pet'r App. 038).

The State Highway Commission of Wisconsin (DOT's predecessor) acquired fee title to a portion of the Fuchs land as the result of condemnation proceedings

under Wis. Stat. § 84.09(2) (R. 14:15; Pet'r App. 038).² The Commission acquired the land from the Fuchses by condemnation "pursuant to a relocation order of the State Highway Commission of Wisconsin . . . for the improvement of U.S. Highway 18 in Waukesha County" (R. 14:15; Pet'r App. 038).

In an Award of Damages recorded by the Waukesha County Register of Deeds³ on January 6, 1966 (hereinafter, "1966 Award"), the Fuchses were compensated \$2725 in damages for the taking (R. 14:16; Pet'r App. 039). In addition to the specifically described "tract of land," the Commission acquired:

all existing future or potential common law or statutory easements or rights of access between the right of way of the highway, currently designated as United States Highway 18 and all of the abutting remaining real property of the owner, whether acquired by separate conveyance or otherwise, where the following real estate abuts on the said highway:

That land of the owner in the westerly 177.53 feet of said southwest one-quarter of the northeast one-quarter.

Except the right of access to said highway from abutting lands by means of two residential access points on the south side of the highway pursuant to the provisions of Section 86.07(2), Wisconsin Statutes. Said access points to be used for

²The 1965-1966 version of Wis. Stat. § 84.109(2) is substantially the same as the current text.

³All property documents cited in this brief were recorded by the Waukesha County Register of Deeds.

residential purposes only; such right to continue so long as used for said purposes.

(R. 14:15; Pet'r App. 038). The 1966 Award payment covered the acquisition of the Fuchses' existing and future access rights to USH 18, except as reserved in the Award. See Wis. Stat. § 32.09(6)(b).⁴

The Commission acquired all rights of access onto the property from USH 18, but excepted "two residential access points" or driveway connections⁵ (*id.*). This exception had two important qualifiers. First, the access points were "to be used for *residential* purposes only" and would continue only "so long as used for said purposes" (*id.*) (emphasis added). Second, the access points were to be used "pursuant to the provisions" of Wis. Stat. § 86.07(2),⁶ the driveway permitting statute (*id.*).

The property was used for residential purposes for several years. By 1983, it had been acquired by Western

⁴The text of Wis. Stat. § 32.09(6)(b) has not changed since the 1965-1966 version of the Wisconsin Statutes.

⁵The 1966 Award uses the term "access point" to describe the point at which a driveway crosses over the right-of-way into the state trunk highway. The Wis. Admin. Code ch. Trans now uses the term "connection" to describe this point. See, e.g., Wis. Admin. Code §§ Trans 233.02 (note), 233.04(7), 233.05(3), (4); see also Wisconsin Department of Transportation Website, *Doing Business*, <http://www.dot.wisconsin.gov/business/rules/property-permits.htm> (last visited September 25, 2015). This brief will use both terms.

⁶The text of Wis. Stat. § 82.07(2) has not changed since the 1965-1966 version of the Wisconsin Statutes.

Development, a “limited partnership” (R. 8:4; Pet’r App. 026). Western wanted to subdivide the property and change its use from residential to commercial (R. 14:8-11, 16:3-4; Pet’r App. 034-037). The 1966 Award presented an obstacle to this goal because of its prohibition against the use of the USH 18 residential driveways for commercial purposes. To remove this impediment, Western entered into a “deed swap” with DOT, consisting of two “quitclaim deeds” recorded on May 13, 1983 (R. 8:4-5; Pet’r App. 026-027). The deeds described themselves as “INDENTURE[S]” (*id.*).

In the first deed, signed on March 3, 1983, DOT gave Western “[t]he right to one private driveway” pursuant to Wis. Stat. § 86.07(2) (R. 8:4; Pet’r App. 026). More specifically, it “authorize[d] one private driveway in lieu of the two residential access points” permitted under the 1966 Award:

The right to one private driveway, to be constructed pursuant to the provisions of Section 86.07(2), Wisconsin Statutes, between USH 18 and the lands of the grantees located on the southerly side of said USH 18, in the southwest one-quarter of the northeast one-quarter of Section 36, T7N, R19E, City of Waukesha. Said private driveway is subject to all local zoning ordinances and restrictions.

The purpose of this instrument is to authorize one private driveway in lieu of the two residential access points reserved to the grantees in that certain instrument recorded in Volume 1037 of Deeds, page 133 as Document No. 653195 in the office of the Waukesha County Register of Deeds, which access points will be released by granters [sic] by deed.

(*Id.*). This deed, like the 1966 Award, specifically incorporated the provisions of Wis. Stat. § 86.07(2), the driveway permitting statute (*id.*).

In the second deed, signed on April 29, 1983, Western surrendered to DOT all existing access rights between USH 18 and Western's property—including the two residential driveway entries—but reserved to itself “one private driveway granted” by DOT in the March 3 deed:

All right of title or interest the grantors may have in any right of access between USH 18 and the lands of the owners located in the southerly side of said USH 18 in the southwest one-quarter of the northwest one quarter [sic] Section 36, T7N, R19E, City of Waukesha.

The purpose of this instrument is to release the grantor's rights of access to the two residential access points allowed in that certain instrument as recorded in Volume 1037 of Deeds, page 133, as Document No. 653195 in the office of the Waukesha County Register of Deeds, but reserve to the grantors one private driveway granted to them by a quit claim deed signed March 3, 1983.

(R. 8:5; Pet'r App. 027).

On November 4, 1983, six months after these deeds were registered, a certified survey map (CSM 4430) of Western's property was prepared, approved, and registered (R. 14:8-10; Pet'r App. 034-036). CSM 4430 was created at Western's “direction” (R. 14:9; Pet'r App. 035). A CSM is the map of record of a land division produced in accordance with Wis. Stat. § 236.34. Once a CSM is recorded, the parcels of land described on it “shall be, for all purposes, including

assessment, taxation, devise, descent and conveyance . . . described by reference to” the CSM. Wis. Stat. § 236.34(3).⁷ CSM 4430 noted that “[v]ehicular ingress from U.S.H. ‘18’ to Lot 1 is permitted but vehicular egress to U.S.H. ‘18’ is prohibited” (R. 14:8; Pet’r App. 034). By recording CSM 4430, Western “effectively agreed” to this description. *Eberle v. Dane Cty. Bd. of Adjustment*, 227 Wis. 2d 609, 613, 595 N.W.2d 730 (1999).

Shortly after CSM 4430 was registered, a site plan for the commercial redevelopment of the property was submitted to and conditionally approved by the State Department of Industry, Labor and Human Relations (DILHR) on December 5, 1983 (R. 14:11; Pet’r App. 037). DILHR’s approval of the site plan was required by the law then in effect.⁸ Regarding the proposed USH 18 driveway entrance, the plan notes:

THIS DRIVEWAY WILL BE TERMINATED
AND THE AREA RESTORED TO ITS
ORIGINAL CONDITION WHEN PARAMOUNT
DRIVE IS EXTENDED.

⁷The text of Wis. Stat. § 236.34(3) is unchanged since 2001, when the Starks conveyed the land to Lee.

⁸See Wis. Stat. § 101.12 (1981-1982); Wis. Admin. Code § Ind 50.12 (“Plan examination and approval.”) (December 1981); see also *Lake Bluff Hous. Partners v. City of S. Milw.*, 197 Wis. 2d 157, 164, 540 N.W.2d 189 (1995); *Hartford Union High Sch. v. City of Hartford*, 51 Wis. 2d 591, 597, 187 N.W.2d 849 (1971).

(R. 14:11; Pet'r App. 037). Comparison of the 1983 site plan with the photograph displayed on page 7 shows that the property was eventually developed in accordance with the plan.

By 1990, Paramount Drive had been extended to the East-Side Bypass, which runs south from USH 18 (R. 14:13, 22). By 2010, Paramount Drive had been extended to East Main Street in Waukesha (R. 14:14). Thus, the extension of Paramount Drive referred to in the 1983 site plan is now complete (R. 14:11; Pet'r App. 037).

Lee acquired the property from Robert and Karen Stark by a 2001 warranty deed (R. 14:17; Pet'r App. 040). He took it “[t]ogether with all and singular the hereditaments and appurtenances thereunto belonging” (R. 14:17, 8:53-55; Pet'r App. 040). The description of the property in the deed explicitly referred to and thereby incorporated by reference CSM 4430 (R. 14:17; Pet'r App. 040).

In 2008, DOT received an Access Management Plan (AMP) recommending that USH 18 be improved in accordance with three criteria: established access management principles, safety, and highway operations (R. 13:6-7, 14:5). After considering these recommendations and conducting its own review, DOT adopted a plan for the reconstruction of the highway consistent with the AMP (*id.*). The project included the removal of several driveway

entrances in the affected area, including Lee's (*id.*). The removal of Lee's driveway was deemed necessary to improve the safety of travel on USH 18 in that area (R. 13:7-9).

DOT issued a formal driveway revocation notice to Lee on January 30, 2013 (R. 8:28). Lee filed a civil complaint in the Waukesha County Circuit Court against DOT seeking a declaration that the driveway connection was "granted by irrevocable quit claim deed not a revocable driveway access permit"; and a finding that DOT "has taken" Lee's rights without compensation (R. 1:9).

Ultimately, the circuit court granted Lee summary judgment on his declaratory judgment claim (R. 20; 26:6-7; Pet'r App. 010-011). It declared that Lee held the "existing driveway access point . . . pursuant to an irrevocable quit claim deed . . . not a revocable permit" (R. 20:1; Pet'r App. 010). Accordingly, the court held, if DOT wishes to "acquire or close" the driveway, it must do so using the eminent domain provisions of Wis. Stat. ch. 32 (R. 20:2; Pet'r App. 011).

DOT appealed. The court of appeals was persuaded that the 1983 deed conveyed to Lee's predecessor in interest "an irrevocable compensable property right" for two reasons (Pet'r App. 008). First, the 1983 deed was entitled a "quitclaim deed," which meant that "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" (*id.*). Second, "the language in

[the deed] 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" (*id.*). Therefore, the court of appeals affirmed the judgment of the circuit court.

DOT now petitions for review.

ARGUMENT

The driveway between USH 18 and Lee's property is not an irrevocable compensable property right but a temporary driveway connection to USH 18 subject to permitting and revocation by DOT.

Summary judgment should have been granted in DOT's favor because Lee does not have a compensable property right here. The driveway connection from Lee's parking lot to USH 18 is pursuant to a revocable permit under Wis. Stat. § 86.07(2). The State Highway Commission acquired the entire property interest in the right-of-way between Lee's property and USH 18 in 1966, through an Award of Damages that resolved its condemnation proceedings against the property. Once that compensation was paid to the Fuchs, all they had left were "two residential access points" pursuant to a revocable permit. The 1983 exchange of deeds between DOT and

Western, the property owner after the Fuchses, did not alter that result. Lee has no property right that the previous property owners lacked.

A. DOT has authority over the state trunk highway system; as part of that authority, it may issue driveway permits and revoke those permits.

DOT has authority over and responsibility for the state trunk highway system (which includes roads designated "USH"). See Wis. Stat. § 84.01. That authority empowers it to acquire certain lands through condemnation. Driveway connections between state trunk highways and private property are subject to permitting and the revocation of such permits by DOT.

DOT may acquire "any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways," and "interests in lands in and about and along and leading to any or all of the same." Wis. Stat. § 84.09(1). Section 84.09 governs DOT's acquisition of rights of access between private property and state trunk highways. See *Nat'l Auto Truckstops, Inc. v. Dep't of Transp.*, 2003 WI 95, ¶¶ 4, 15, 263 Wis. 2d 649, 665 N.W.2d 198. If any of these "needed lands or interests therein cannot be purchased expeditiously for a price deemed reasonable by the department, the department may acquire the same by condemnation under ch. 32." Wis. Stat. § 84.09(2).

Land situated between roadways and private property is subject to the permitting provisions of Wis. Stat. § 86.07(2), § 86.073, and Wis. Admin. Code § Trans 231. Section 86.07(2) clearly states that “[n]o person shall make any . . . alteration in any highway or in any manner disturb any highway . . . without a permit therefor.” Thus, “any person whose property abuts a state trunk highway must obtain a permit from the Department prior to installing any driveway access between the property and the driveway.” *Narloch v. Dep’t of Transp.*, 115 Wis. 2d 419, 429, 340 N.W.2d 542 (1983); *accord Bear v. Kenosha Cty.*, 22 Wis. 2d 92, 96, 125 N.W.2d 375 (1963); *J&E Invs. LLC v. Div. Of Hearings & Appeals*, 2013 WI App 90, ¶ 15, 349 Wis. 2d 497, 835 N.W.2d 271; Wis. Admin. Code § Trans 231.01(1).

Section 86.073, which spells out the process DOT must follow to revoke a driveway permit, “plainly allow[s] the DOT to revoke a permit issued under Wis. Stat. § 86.07(2).” *J&E*, 349 Wis. 2d 497, ¶ 18. Moreover, in issuing a permit, DOT

reserves the right to make such changes, additions, repairs and relocations within statutory limits to the driveway or its appurtenances on the right of way as may at any time be considered necessary to permit the relocation, reconstruction, widening, and maintaining of the highway or to provide proper protection to life and property on or adjacent to the highway.

Wis. Admin. Code § Trans 231.02(4).

Under certain circumstances, “[d]eprivation or restriction of existing right of access to highway from abutting land” requires the payment of just compensation. Wis. Stat. § 32.09(6)(b); *see also Narloch*, 115 Wis. 2d at 430. However, once the government pays a property owner just compensation for such a taking, a later owner may not seek compensation for it “because, in effect, the subject property would then be twice redressed for the same detriment.” *Coliseum Builders, Inc. v. Kennedy*, 502 N.Y.S.2d 281, 282 (N.Y. App. Div. 1986); *see also Dep’t of Transp. v. Gunnels*, 340 S.E.2d 12 (Ga. 1986); *J.K.S. Realty, LLC v. City of Nashua*, 55 A.3d 941, 945 (N.H. 2012); *State Hwy. & Transp. Comm’r v. Parr*, 230 S.E.2d 253, 256 (Va. 1976); 26 Am. Jur. 2d *Eminent Domain* §§ 256-57 (2006). It should be obvious that “[t]he government cannot ‘take’ private property from a person if the person does not have an interest in the property.” *Brennan v. New Richmond Reg’l Airport Comm’n*, 2012 WI 98, ¶ 62, 343 Wis. 2d 320, 816 N.W.2d 291.

“The control of access to our highways is a proper exercise of [the State’s] police power.” *McKenna v. State Highway Comm’n*, 28 Wis. 2d 179, 186, 135 N.W.2d 827 (1965); *accord 118th St. Kenosha, LLC v. Wis. Dep’t of Transp.*, 2014 WI 125, ¶ 31, 856 N.W.2d 486; *Schneider v. State (Div. of Hwys.)*, 51 Wis. 2d 458, 462, 187 N.W.2d 172 (1971). Section 86.07(2) “regulates access in the interests of

public safety and convenience.” *Bear*, 22 Wis. 2d at 96; *accord Narloch*, 115 Wis. 2d at 432. Accordingly, “a highway permit may be conditioned on rules as necessary for the ‘preservation of highways’ and ‘the safety of the public.’” *J&E*, 349 Wis. 2d 497, ¶ 15; *see also* Wis. Admin. Code § Trans 231.03(2). The applicable statutes allow DOT to revoke driveway permits for safety reasons. *See J&E*, 349 Wis. 2d 497, ¶ 18.

B. The driveway connection from Lee’s property to USH 18 has been subject to the driveway permitting statute since 1966.

1. The State Highway Commission paid just compensation to the Fuchses for their access rights to USH 18, who thereafter held only “two residential access points” subject to the Commission’s powers of revocation.

The 1966 Award paid just compensation to the Fuchses and reserved to them two highway access points, or driveway connections (R. 14:16; Pet’r App. 039). *See supra* at 9-10. The Fuchses did not have a compensable property right in those driveway connections. On the contrary, the access points they retained were explicitly subject to the revocable driveway permitting statute, Wis. Stat. § 86.07(2) (R. 14:16; Pet’r App. 039).

The Award described the interest acquired by the Commission as “all existing future or potential common law or statutory easements or rights of access between the right

of way of the highway, currently designated as United States Highway 18 and all of the abutting remaining real property of the owner” (R. 14:16; Pet’r App. 039). In other words, the Commission acquired from the Fuchses all their existing and future interests in the border area between their property and the highway, including access rights. This acquisition was consistent with and pursuant to the Commission’s statutory authority “to acquire any such lands or interests therein for any transportation related purpose.” Wis. Stat. § 84.09(1). As it was required to by law, the Commission paid the Fuchses just compensation for this acquisition. *See Narloch*, 115 Wis. 2d at 430.

Narloch is instructive. *Narloch* involved an acquisition like the one here: as part of a land taking for the relocation of a state trunk highway, DOT acquired all existing and future highway access rights but reserved to the owners “specific access points” (subject to § 86.07(2) permitting) between their property and the highway. *Id.* at 424, 426-27. The award of damages in *Narloch* used the exact same language used in the Fuchses’ 1966 Award. Construing that language, the court held that DOT had legally acquired all rights of access to the highway, and that the property owners were entitled to compensation for that acquisition under Wis. Stat. § 32.05(7), § 32.09(6), and § 84.09(2). Once that compensation was paid, the property owners

retained only the reserved right to a driveway revocable under § 86.07(2) and § 86.073. *See id.* at 432.

DOT paid just compensation to the Fuchses for the acquisition of their access rights in the 1966 Award (R. 14:16; Pet'r App. 039). That compensation cannot be paid a second time. *See Coliseum Builders*, 502 N.Y.S.2d at 282. DOT's reservation of two residential access points to the Fuchses in the 1966 Award did not change DOT's ownership interest in all of the access areas between USH 18 and the property. The 1966 Award only left the Fuchses two permissive driveway connections subject to § 86.07(2). Nothing more.

2. The exchange of deeds between the subsequent owner, Western, and DOT did not expand the legal status of the Fuchses' access to USH 18.

The Fuchses later transferred their property to Western, and, in 1983, DOT and Western executed an exchange of deeds. That exchange could not and did not enlarge what the Fuchses had held: two revocable, permissive access points to USH 18 subject to § 86.07(2).

A new property owner takes the property "subject to the existing control" held by the former owner. *Nick v. State Highway Comm'n*, 13 Wis. 2d 511, 515, 109 N.W.2d 71 (1961). Western thus acquired only two permissive residential driveway connections or access points, because that was all the Fuchses had. To enable Western to

convert the property to commercial use, DOT agreed to alter certain characteristics of the driveway connections. In the 1983 deed swap, DOT and Western agreed (1) to reduce the number of USH 18 access points from two to one, and (2) to remove the “residential purposes” only restriction from the access points. *See supra* at 11-12.

The court of appeals’ entire analysis of this case rested on the fact that the 1983 deeds between Western and DOT were titled “quitclaim deeds.” Pet’r-App. 008. It cites the quitclaim deed statute, which provides that “[a] quitclaim deed shall pass all of the interest in or appurtenant to the land described which the grantor could lawfully convey, but shall not warrant or imply the existence, quantity or quality of any such interest.” Wis. Stat. § 706.10. Because DOT used the term “quitclaim deed,” the court concluded that DOT gave Western (and thus Lee) an irrevocable property right to a USH 18 driveway.

But neither the title of the documents nor the language of the statute supports this conclusion because they are silent about the content or extent of the interests transferred between the parties. In contrast, the language of the deeds and the circumstances of their execution show that DOT gave Western nothing more than a temporary right to a driveway connection subject to the driveway permitting statute.

The title of an instrument is not dispositive. “[I]t is well settled that the name which parties give to an agreement does not control the interpretation of it.” *Rice v. Reich*, 51 Wis. 2d 205, 208, 186 N.W.2d 269 (1971). “The nature of the instrument should determine its character, rather than the name which the parties applied to it.” *Drovers’ Deposit Nat. Bank v. Tichenor*, 156 Wis. 251, 255, 145 N. W. 777 (1914). Regardless of the title used, “the court must look to the essential nature of the agreement to determine its effect.” *C. R. Stocks, Inc. v. Blakely’s Matterhorn, Inc.*, 90 Wis. 2d 118, 279 N.W.2d 499 (Ct. App. 1979).

Here, the intent and mutual understanding of the parties to the quitclaim deeds and what they actually accomplished are not ambiguous. The intent of the parties is determined by the words used, the object of the deeds, and the circumstances of their execution. See *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶ 9, 266 Wis. 2d 124, 667 N.W.2d 751; *Traeger v. Traeger*, 35 Wis. 2d 708, 712-14, 151 N.W.2d 681 (1967). Examination of the language, object, and circumstances of the deeds in this case reveals unambiguously that Lee has nothing more than a permitted, revocable driveway connection to USH 18.

DOT and Western did not agree to change the legal status of the property’s access to USH 18 in any way. The deeds did nothing to alter the fact that DOT, *not*

Western, was (and is) the owner of “all existing future or potential common law or statutory easements or rights of access between the right of way of the highway . . . and all of the remaining real property of the owner” (R. 14:16; Pet’r App. 039). Significantly, *Western* described the interest it was ceding to DOT in the broadest possible terms: “All right of title or interest the grantors may have in any right of access between USH 18 and the lands of the owners” (R. 8:5; Pet’r App. 027). In its deed, DOT made clear that all it was doing was *trading* the two old access points for one new driveway connection: “The purpose of this instrument is to authorize *one private driveway in lieu of the two residential access points*” granted to the Fuchses in 1966 (R. 8:4; Pet’r App. 026) (emphasis added).

Each of the 1983 deeds explained that it was an “INDENTURE” (R. 8:4-5; Pet’r App. 026-027). An “indenture” is “[a] deed to which two or more persons are parties, and in which these enter into *reciprocal and corresponding* grants or obligations towards each other” *Black’s Law Dictionary* 693 (5th ed. 1979) (emphasis added).⁹ That term fits the language of the deeds and the circumstances of this exchange perfectly. With the deeds, DOT and *Western* exchanged similar but distinct interests.

⁹There are many editions of *Black’s Law Dictionary*. The edition cited here was the current edition at the time the quitclaim deeds were executed.

DOT's deed stated that the parties were trading the two old access points for one new driveway connection: "one private driveway in lieu of the two residential access points" (R. 8:4; Pet'r App. 026). Western's deed stated that the purpose of the indentures was to "release" its "rights of access to the two residential access points" from the Fuchses' 1966 Award but "reserve" to Western "one private driveway granted to them" by the reciprocal and corresponding deed from DOT (R. 8:5; Pet'r App. 027).

The indentures make sense only if they exchanged "reciprocal and corresponding grants or obligations." There is no question that the Fuchses had only a permissive right to the two USH 18 access points. *See supra* at 20-22. Therefore, that's all Western had to trade. It would have been remarkable indeed if DOT had agreed to give Western a compensable property interest in exchange for Western's release of the two access points—subject to permit and revocation—it got from the Fuchses. The reciprocal and corresponding exchange of driveway access points was the sole issue addressed in these deeds.

Like the 1966 Award, the 1983 deed swap explicitly referenced § 86.07(2) in describing Western's connection to USH 18 (R. 8:4; Pet'r App. 026). Even if it had not, the statute would have defined and limited Western's interest in the driveway because "the laws which subsist at the time and place of the making of a contract . . . enter into and form

a part of it, as if they were expressly referred to or incorporated in its terms.” *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 60, 295 Wis. 2d 1, 719 N.W.2d 408 (citation omitted). Under § 86.07(2), any person whose property abuts a state trunk highway must obtain a permit from DOT prior to installing a driveway between the property and the driveway. *J&E*, 349 Wis. 2d 497, ¶ 15. Western’s new driveway was subject to that permitting requirement as a matter of law and as a matter of contractual agreement. Accordingly, it was also subject to revocation under Wis. Stat. § 86.073. *See id.* ¶ 19.

In addition to citing § 86.07(2), the deeds employed language indicating that Western would be permitted to enjoy the driveway on DOT’s sufferance and according to DOT’s terms. The DOT deed says that “[t]he purpose of this instrument is to *authorize* one private driveway” (R. 8:4; Pet’r App. 026) (emphasis added). “[T]o permit’ and ‘to authorize’ are synonymous.” *State v. Laven*, 270 Wis. 524, 529, 71 N.W.2d 287 (1955); *see also Black’s Law Dictionary* 1255 (9th ed. 2009) (“permit” means to “consent to formally” or to “allow or admit of”); *id.* at 153 (“authorize” means to “give legal authority; to empower” or to “formally approve; to sanction”). Western’s deed, referring to the 1966 Award, states that “the two residential access points [were] *allowed* in that certain instrument” (R. 8:5; Pet’r App. 027) (emphasis added). To allow is “[t]o let do or happen; permit.”

The American Heritage Dictionary of the English Language 48 (5th ed. 2011). This language is not consistent with property transfer; it is consistent with regulatory permitting.

This interpretation of the parties' understanding of the deeds is confirmed by two documents created within seven months of the recording of the deeds. A certified survey map is the formal, legally binding description of the property. See Wis. Stat. § 236.34(3). CSM 4430, created at Western's direction and recorded by Western, noted that "[v]ehicular ingress from U.S.H. '18' is *permitted* but vehicular egress to U.S.H. '18' is *prohibited*" (R. 14:8; Pet'r App. 034) (emphasis added). CSM 4430 use of the terms "permitted" and "prohibited" to describe the limitations on Western's enjoyment of the driveway is significant. The choice of that language would have been incongruous if, as Lee contends, the 1983 deeds gave Western an irrevocable property right to that driveway.

Shortly after the registration of CSM 4430, a site plan for the commercial redevelopment of the property was submitted to DILHR for its approval (R. 14:11; Pet'r App. 037). See *supra* at 13-14. That document reveals that the permissive driveway connection Western obtained in the deed swap was not only revocable but temporary, and that the parties knew that. With an arrow pointing to the site of the USH 18 driveway entrance, the plan states that

“this driveway will be terminated and the area restored to its original condition when Paramount Drive is extended” (R. 14:11; Pet’r App. 037) (capitalization removed). DILHR approved Western’s redevelopment plan with the understanding that the USH 18 driveway would be removed once certain conditions were met without further legal action by DOT. The site plan “indicated that the USH 18 driveway was intended to be temporary in nature and would be removed when Paramount Drive was extended to the parcel” (R. 13:6). That time has come: the extension of Paramount Drive has been completed. *See supra* at 14.

Western’s single commercial driveway to USH 18 was, like the Fuchses’ two residential driveways, unambiguously subject to the permitting requirements of § 86.07(2). The contrary conclusion of the courts below conflicts with both the parties’ agreement and the law in effect at the time of contracting. Furthermore, their interpretation of the 1983 deeds leads to an unconstitutional result.

As a matter of constitutional law, DOT cannot “bargain or contract away its police powers.” *McKenna*, 28 Wis. 2d at 185-86. If DOT agreed to “limit the exercise of [the State’s] police power” in those deeds, the contract was “invalid ab initio.” *Dairyland*, 295 Wis. 2d 1, ¶ 261 (Prosser, J., concurring in part, dissenting in part) (citation omitted). The suggestion that DOT abandoned its public-safety responsibility to regulate driveway access

between state trunk highways and private property in the 1983 deeds is incredible and unreasonable. *See Capital Inv. v. Whitehall Packing Co.*, 91 Wis. 2d 178, 193, 280 N.W.2d 254 (1979) (court should avoid “unusual and extraordinary” construction of contract) (citation omitted).

In *McKenna*, an owner brought an inverse condemnation action seeking compensation for the removal of his property’s direct access to a road after it was designated a controlled-access highway. 28 Wis. 2d at 181. *McKenna* argued that documents exchanged between him and the State Highway Commission created a contract, whereby the State “agreed to a grant of permanent access” from his property to the beltline. *Id.* at 185. The court easily rejected that argument:

It appears that no contractual relationship in fact existed. Even had there been one, it is a recognized rule of constitutional law that neither a state nor its agencies can bargain or contract away its police power. As we have said repeatedly the control of access to our highways is a proper exercise of that power.

Id. Here, as in *McKenna*, there is no contract bargaining away DOT’s police power. All of the applicable documents in Lee’s title record expressly reserve DOT’s regulatory authority under Wis. Stat. § 86.07(2). But if the agreement between DOT and Western did say what Lee claims it did, it would be unconstitutional and unenforceable.

By refusing to acknowledge that the driveway connection created by the 1983 deeds is subject to § 86.07(2), the courts below failed to apply the law in effect at the time the deeds were signed, ignored the plain language of the deeds, CSM 4430, and the DILHR site plan, and reached an unconstitutional result.

3. Lee acquired only what his predecessors had: a revocable permissive access point or driveway connection to USH 18.

When Lee acquired the property in 2001, he took it subject to the provisions in the 1983 deed swap (as informed by the 1966 Award), CSM 4430, and the DILHR site plan (R. 8:53-55; 14:17).

A “buyer of real property is expected to determine the rights of the land he is about to purchase.” *AKG Real Estate, LLC v. Kosterman*, 2006 WI 106, ¶ 45, 296 Wis. 2d 1, 717 N.W.2d 835; *see also Carlson v. Taylor*, 41 Wis. 2d 685, 695-96, 165 N.W.2d 178 (1969); 23 Am. Jur. 2d *Deeds* § 50 (2013). Where a property is subject to § 86.07(2) and § 86.073, a buyer is “bound” by those statutes when he takes ownership of the property. *J&E*, 349 Wis. 2d 497, ¶ 19. Here, Lee’s 2001 deed from the Starks explicitly referenced CSM 4430 and thereby acknowledged that its description of the property—including its declaration that the USH 18 driveway connection is subject to permit—was accurate (R. 14:17; Pet’r App. 040).

Lee acquired a limited permissive interest in the USH 18 driveway—the same interest possessed by the Fuchses and Western. The circuit court erroneously described Lee’s interest in the driveway as an “easement” (R. 26:6; Pet’r App. 017).¹⁰ An easement is a non-possessory property right in the land of another. *See, e.g., Schwartz v. Evangelical Deaconess Soc’y*, 46 Wis. 2d 432, 438-39, 175 N.W.2d 225 (1970). What Lee has instead is a temporary license to use the driveway subject to § 86.07(2) and § 86.073. *See id.* A license subject to revocation under § 86.07(2) is not a compensable property interest, as an easement or otherwise. Lee acquired only this revocable permitted interest, not an irrevocable compensable property interest.

The property now owned by Lee was compensated for the loss of its USH 18 access rights in the 1966 Award. Lee cannot be further paid for this taking fifty years after the State Highway Commission compensated the Fuchses. If the circuit court’s judgment in this case is allowed to stand and DOT is required to pay for this single taking a second time, “the subject property would . . . be twice redressed for the same detriment.” *Coliseum Builders*, 502 N.Y.S.2d at 282. It is absurd to suggest that DOT would have agreed

¹⁰A “right of access to highway from abutting land” and an “easement” are treated as distinct categories in the eminent domain statute. Wis. Stat. § 32.09(6)(b), (6g).

in 1983 to give Western a new compensable property interest when it had already paid the Fuchses for the acquisition of that same interest twenty years earlier. DOT cannot buy what it already owns.

The court of appeals' decision reaching the opposite conclusion was wrong and should be reversed. Like the circuit court, the court of appeals misconstrued the legal relationship between the parties and granted relief to Lee he is not entitled to. The State Highway Commission paid the Fuchses just compensation in 1966 when it acquired their "rights of access" to USH 18 (R. 14:16; Pet'r App. 039). Subsequently, neither they nor any subsequent owner, including Lee, ever possessed anything more than a revocable permitted interest in the driveway connections subject to DOT's statutory authority to revoke that permission. That is the interest Lee got when he acquired the property in 2001.

CONCLUSION

For the reasons offered in this petition, this court should grant review of the court of appeals' decision, reverse it, and remand to the circuit court with instructions to grant summary judgment to DOT.

Date this 25th day of September, 2015.

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CERTIFICATION

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (d) and 809.62(4) for a petition for review brief and appendix produced with a proportional serif font. The length of this brief is 7,350 words.

Date this 25th day of September, 2015.



MAURA FJ WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT.
§ (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. §§ (Rule) 809.19(12) and 809.62(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 25th day of September, 2015.



MAURA FJ WHELAN
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the finding or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record for an understanding of the petition.

I further certify that if this petition for review is taken from appeal of a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of September, 2015.


MAURA FJ WHELAN
Assistant Attorney General

