

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONTRACTOR ENTERPRISE, INC.,  
a West Virginia corporation,

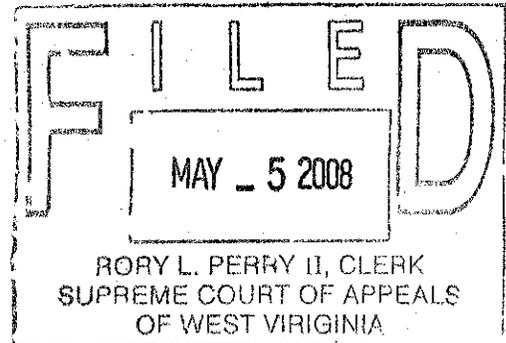
Appellant,

v.

33869  
No. 072814

WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION OF  
HIGHWAYS,

Appellee.



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BRIEF OF APPELLEE, WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, DIVISION OF HIGHWAYS

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## STATEMENT OF FACTS

As noted in the Order at issue in this appeal, the underlying action is an eminent domain proceeding taking certain property owned by the Appellant, Contractor Enterprise, Inc. (hereinafter "CEI"), for use in the construction of a portion of W.Va. Route 10 in Logan County. This public road construction project (hereinafter, the "Project"), was originally advertised for bidding purposes in 2006. The lowest bid, from Heeter Construction, Inc., totaled \$21,773,608.89. (2-12-07 Hearing tr. at 29-30; Defendant's Exhibit 10 at 001-1). The Engineer's Estimate, the estimated cost of the Project, as developed by the Engineering Division of the Division of Highways (hereinafter "DOH") was \$14,004,453.80. (2-12-07 Hearing tr. at 46; Defendant's Exhibit 10 at 001-1). Utilizing the standards set forth in a document entitled the "DD-711 Guidance for Evaluation of Contractor's Bids" (2-12-07 Hearing tr. at 22-25; Plaintiff's Exhibit A) (hereinafter "DD-711"), the DOH determined that the bidding process was not competitive pursuant to the standard set forth in Section 30.1 of the DD-711. Thereafter, in accordance with the provisions of Section 40.1 of the DD-711, the Engineer's Estimate was examined in detail and revised, to determine if the Project could be awarded to the low bidder despite the fact that the low bid was significantly higher than the Engineer's Estimate. (2-12-07 Hearing tr. at 48-49). However, the revised Engineer's Estimate was \$16,857,039.80, a figure well below the lowest bid. (2-12-07 Hearing tr. at 49). Upon reviewing the bidding process and further analyzing the characteristics of the Project, the DOH determined that the bids should be refused, and the Project rebid. (2-12-07 Hearing tr. at 76-78). Ultimately the DOH concluded that the bidding process and the Project's cost were unusually dependent upon the availability of

an adequate waste site (2-12-07 Hearing tr. at 6-7, 63-65), and that the property best suited for use as a waste site to serve the Project was the property owned by CEI. (2-12-07 Hearing tr. at 7-14, 64-65).

The citations above to portions of the record refer primarily to the hearing testimony of Greg Bailey, the Director of the Engineering Division of the DOH (2-12-07 Hearing tr. at 5-6), and it should be noted that Mr. Bailey's testimony presents the reasoning of the DOH in determining that a waste material site should be acquired to serve the public road project at issue, as well as the determination that the property at issue is the best choice for such a site. Mr. Bailey's testimony also shows that the DOH followed the appropriate process in analyzing the Project bids and that the federal agencies involved with the project concurred with the actions of the DOH, including the designation of the property at issue as a potential, rather than a mandatory, waste site. (2-12-07 Hearing tr. at 74-75).

Although, as stated by the Appellant, the DOH routinely utilizes a publication entitled "Standard Specifications Roads and Bridges" (the "Standard Specifications Book"), the actual language of the section at issue flatly contradicts the Appellant's argument. As quoted by the Appellant itself (Appellant's Brief at 6, citation to Exhibit 5), Section 207.6.3 of the Standard Specifications reads, in pertinent part, as follows: "The Contractor shall locate and furnish all sites for the disposition of waste and surplus material, **except those sites shown on the Plans.**" (Standard Specifications at 111, emphasis added). The waste site at issue falls within the exception as a site shown on the Project plans.

Finally, Mr. Bailey also testified in rebuttal to the testimony of Mr. VanKirk, noting that in various road construction projects, the DOH had designated potential or mandatory waste sites

and borrow sites, rather than leave these matters solely to the contractor. (2-12-07 Hearing tr. at 16-22). The DOH believes that the facts noted above are needed in order to fully evaluate the arguments of the Appellant.

**POINTS AND AUTHORITIES RELIED UPON**

**I. The DOH has the statutory authority to condemn the property at issue under the applicable facts and circumstances.**

W. Va. Code § 54-1-2

W. Va. Code § 17-4-5

W. Va. Code § 17-2A-8(5)

W. Va. Code § 17-2A-17

W. Va. Code § 17-2A-17(f)

W. Va. Code § 17-4-5

*Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970)

*Potomac Valley Soil Conservation Dist. v. Wilkins*, 188 W.Va. 275, 423 S.E.2d 884 (1992).

*State ex rel. Keene v. Jordan*, 192 W.Va. 131, 451 S.E.2d 432 (1994)

*State ex rel Underwood v. Silverstein*, 167 W.Va. 121, 278 S.E.2d 886 (1981)

*State of West Virginia v. Professional Realty Co.*, 144 W.Va. 652, 110 S.E.2d 616 (1959)

*Thacker v. Ashland Oil Refining Co.*, 129 W.Va. 520, 41 S.E.2d 111 (1946)

**II. The Appellant attempts to rely on law that has no application to contemporary public road projects.**

W. Va. Code § 54-1-2

*Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W.Va. 262, 10 S.E. 405 (1889)

*Pittsburg, Wheeling & Ky. Ry. Co. v. Benwood Iron-Works*, 31 W.Va. 710, 8 S.E. 453 (1888)

*State of West Virginia v. Professional Realty Co.*, 144 W.Va. 652, 110 S.E.2d 616 (1959)

*Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005)

*Katz v. Dade County*, 367 So.2d 277 (Fla. Dist. Ct. App. 1979)

**III. Had the Circuit Court improperly shifted the burden of proof to the DOH, the DOH would still have prevailed.**

*Canal Authority v. Litzel*, 243 So.2d 135, 137 (Fla. 1970)

**IV. The Supremacy Clause of the United States Constitution has no application to this matter.**

W. Va. Code § 17-2A-17

## ARGUMENT

### **I. The DOH has the statutory authority to condemn the property at issue under the applicable facts and circumstances.**

Pursuant to W.Va. Code § 54-1-2, private property may be taken for public use, including the construction, maintenance, and operation of public roads. There is no dispute that W. Va. Route 10 is a public road, or that the project at issue involves the construction of a portion of that public road. Thus, private property that is taken for the construction of W. Va. Route 10 is taken for a public use in accordance with W.Va. Code § 54-1-2. “[O]nce the statutory power of eminent domain has been conferred upon an agency, a court’s inquiry into the scope of such power is limited solely to the question of whether it is to be exercised in order to provide a public service.” Syl. pt. 1, *Potomac Valley Soil Conservation Dist. v. Wilkins*, 188 W.Va. 275, 423 S.E.2d 884 (1992).

The Order at issue plainly states that there is a public necessity for one or more waste material sites to serve the road project at issue. There is no issue as to whether a waste material site will be needed to complete the Route 10 road project. Further, in determining that the property at issue should be taken to serve as such a site, the DOH was acting well within its statutory authority and discretion.

[I]t was the policy of the Legislature in the enactment of [Chapter 17 of the W.Va. Code] to provide a comprehensive and all-embracing system of statutory law, establishing a general state road system . . . and providing for and investing in the commission and commissioner the exclusive power over the construction, maintenance and control of said system[.]

*State ex rel. Keene v. Jordan*, 192 W.Va. 131, 133, 451 S.E.2d 432, 434 (1994) (quoting *Thacker v. Ashland Oil Refining Co.*, 129 W.Va. 520, 528, 41 S.E.2d 111, 115-16 (1946). Pursuant to W.Va. Code § 17-2A-8(5), the DOH is authorized to acquire lands and interests in lands “necessary and required for roads, rights-of-way, cuts, fills, drains, storage for equipment and materials and road construction and maintenance in general[.]” Pursuant to W.Va. Code § 17-4-5, the DOH is authorized to acquire property for “the purpose of constructing . . . any state road” and “for any other purpose authorized by any provision of [Chapter 17.]”

West Virginia Code § 17-2A-17 states that the DOH may acquire any interest in real property **deemed by the commissioner to be necessary for present or presently foreseeable state road purposes** by . . . right of eminent domain[.]” (Emphasis added.) Pursuant to W. Va. Code § 17-2A-17(f), the term “state road purposes” expressly includes “**waste material sites** and access roads to any such sites[.]” (Emphasis added.) “Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. Pt. 2, *State ex rel Underwood v. Silverstein*, 167 W.Va. 121, 278 S.E.2d 886 (1981); *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). It is thus plain that the DOH has the statutory authority and discretion to take property for use as a waste material site, regardless of general past practice.

This Court has previously recognized that the DOH has the discretion to determine when land is needed for road construction projects. “**The necessity for taking land for a state highway improvement project, and the amount of land reasonably necessary for that purpose, are matters within the sound discretion of the state road commissioner;** and such discretion will not be interfered with by the courts unless, in the exercise of such discretion, he

has acted capriciously, arbitrarily, fraudulently or in bad faith.” *State of West Virginia v. Professional Realty Co.*, 144 W.Va. 652, 652-53, 110 S.E.2d 616, 618 (1959) Syl. pt. 3 (emphasis added). It is the burden of the Appellant to show that the DOH acted improperly. “In the absence of evidence to the contrary, the state road commissioner will be presumed to have performed properly and in good faith duties imposed upon him by law.” *Id.*, Syl. pt. 5. The DOH need not make a specific showing of public necessity as the Appellant argues.

**II. The Appellant attempts to rely on law that has no application to contemporary public road projects.**

Generally, throughout its argument, the Appellant simply ignores the statutes and case law cited above. At the outset, it should be noted that the Appellant's characterization of the public necessity requirement is simply incorrect, as it appears to be based on nineteenth-century case law, e.g., *Pittsburg, Wheeling & Ky. Ry. Co. v. Benwood Iron-Works*, 31 W.Va. 710, 8 S.E. 453 (1888); *Fork Ridge Baptist Cemetery Ass'n v. Redd*, 33 W.Va. 262, 10 S.E. 405 (1889), that predates the establishment of the State Road Commission, now the Division of Highways, and the statutes that apply to the agency, i.e., Chapter 17 of the Code. As noted above, pursuant to Chapter 17, the DOH has the discretion to determine public necessity, and that discretion cannot be interfered with absent a showing by the Appellant that the DOH acted arbitrarily and capriciously, fraudulently, or in bad faith. Thus, the DOH need not make a particularized showing of public necessity for property intended for use as a waste material site serving a public road construction project. To the contrary, the burden of proof is on the Appellant to show that the selection of this property for use as a waste site was arbitrary and capricious. The Circuit Court correctly concluded that the burden had not been met.

To the extent that the Appellant argues that the issues raised by the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005) are relevant to this appeal, the Appellant ignores the fact that, in *Kelo*, the condemnor was taking the property in order to transfer it to a private party for economic development purposes. *Kelo*, 545 U.S. at 473-77, 125 S.Ct. at 2658-61. *Kelo* simply has no relevance to a traditional public works project, such as a public road. This distinguishing feature is made even more plain by the recent amendments to West Virginia Code § 54-1-2.

In 2006, in obvious response to the *Kelo* decision, § 54-1-2 was amended to read, in pertinent part, as follows:

... [I]n no event may "public use", for the purposes of this subdivision, be construed to mean the exercise of eminent domain **primarily for private economic development.**

For purposes of this subdivision, no private property may be taken by the State of West Virginia or its political subdivisions without the owner's consent when the **primary purpose of the taking is economic development that will ultimately result in the ownership or control of the property transferring to another private entity[.]**

W. Va. Code §54-1-2(a)(11) (West Supp. 2007) (emphasis added). Significantly, the portion of the statute relating to public roads remained unchanged. W. Va. Code §54-1-2(a)(1) (West Supp. 2007). The taking at issue is not a taking for a private use, nor is it a taking for the purpose of private economic development. The Legislature has spoken on the issues raised by *Kelo*, and it has not seen fit to alter the statutes that relate to takings for public road projects or the discretion of the DOH.

The Appellant's reliance on *Katz v. Dade County*, 367 So.2d 277 (Fla. Dist. Ct. App. 1979) is equally misplaced. Like *Kelo*, *Katz* is an urban renewal case that originates in a foreign

jurisdiction. It has no obvious relevance to West Virginia law relating to takings for public road purposes. The decision in *Katz* relies on the eminent domain statutes of the State of Florida, and related Florida case law, that require a showing of "reasonable necessity," but the Appellant provides no discussion to explain why this is relevant to the West Virginia statutes or case law applicable to the DOH. To a significant extent, the Appellant simply ignores West Virginia law. Unlike Florida law, West Virginia law does not require a showing of "reasonable necessity" by the DOH. To the contrary,

[t]he necessity for the taking is a matter left to the sound discretion of the agency exercising the power of eminent domain under the legislative authority, and the decision by it that a necessity exists will not be interfered with by the courts, unless the agency exercising the right "have acted capriciously, fraudulently, or in bad faith."

*State of West Virginia v. Professional Realty Co.*, 144 W.Va. 652, 658, 110 S.E.2d 616, 620-21 (1959) (citations omitted).

**III. Had the Circuit Court improperly shifted the burden of proof to the DOH, the DOH would still have prevailed.**

The Appellant does not argue that the lower court's factual findings are erroneous, but contends that the facts, as found by the Circuit Court, show that the actions of the DOH were arbitrary and capricious.<sup>1</sup> The lower court's reasoning might be summarized as follows: (1) the parties agree that the construction project at issue is for a public use, i.e., the construction of a public road; (2) the parties agree that the construction of this public road will require the use of one or more waste material sites for the permanent storage of waste material generated by excavation over the course of the project; (3) the DOH has chosen to acquire property for use as

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<sup>1</sup> In its Petition for Appeal, the Appellant stated that the Circuit Court's Order "accurately

a waste material site and to offer that property for the use of the contractor constructing the public road; (4) the DOH has the statutory authority to acquire property by eminent domain for presently foreseeable state road purposes; (5) the applicable statute expressly defines state road purposes to include provision for waste material sites and access roads to such sites; (6) the parties agree, expressly or implicitly, that the property condemned is a good site for the deposit of waste materials excavated during the course of the project<sup>2</sup>; and (6) there is no evidence of any other intended use for the property, other than use as a waste site serving the public road construction project, nor is there any evidence that the DOH intends to transfer the property to any private party for any use whatsoever following acquisition.

Although it is not specifically cited in the Order at issue, the lower court heard testimony, as referred to in more detail in the Statement of Facts, that the DOH, acting in accordance with its existing procedures and policies, had analyzed the initial bidding process for the Project when the low bid was found to be well in excess of the DOH estimate for the Project's cost. The lower court also heard testimony that the analysis showed that bidding was not competitive and the DOH then attempted to determine a reason for this problem. Ultimately, as the Circuit Court heard, the DOH determined that certain characteristics unique to the Project resulted in a lack of competition among the bidders. More specifically, the DOH concluded that economical and adequate waste material sites were not readily available, and that this problem was the primary cause of the lack of competition and high bids.

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recognizes the facts presented." (Petition at 14).

<sup>2</sup> The DOH believed that the property was clearly the best or optimal site, while CEI argued that other possible sites were equally good. Thus, there is no question that the property at issue makes a good waste site for the project.

As the lower court also heard, given the determination that there had been a lack of adequate competition and that the lowest bid was significantly higher than the expected cost, the DOH chose to address the problem by refusing the results of the initial bidding process, and rebidding the project after acquisition of the property that the DOH believed constituted the best location for use as a waste site. All of these actions were reasonable and within the discretion of the DOH. Taken as a whole, these actions constitute a thought-out and rational process aimed at ensuring that the public receives the benefit of the competitive bidding process. Under the relatively unique circumstances of this particular road project, these actions were reasonably calculated to achieve the lowest reasonable bid on behalf of the public. This is the same result as that normally achieved, as a general policy under more ordinary circumstances, by allowing the bidding contractors to identify and acquire their own waste sites.<sup>3</sup>

Thus, had it been required, the DOH made a sufficient showing of necessity for the taking, based on the results of the initial bidding process and its subsequent analysis of the bidding, and its analysis of the Project itself, in light of the initial bidding results. Under the applicable law, this showing was unnecessary. It was sufficient for the lower court's decision that the Appellant failed to show that the DOH had acted arbitrarily and capriciously, fraudulently, or contrary to law. The Appellant simply refuses to consider the actual process followed by the DOH in this particular matter. To the contrary, it focuses entirely on what is, and has historically been, the general policy in regard to acquisition of waste material sites, and fails to consider the facts and circumstances that made this particular situation unusual. It was not arbitrary and capricious for the DOH to depart from the routine practice in this matter. The

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<sup>3</sup> The general policy and the reasons for it were testified to by Mr. VanKirk.

actual process and procedure was reasonable and anchored in the same rationale that is always followed.

The Appellant argues as if the DOH must make a showing of public necessity for the use of the specific property at issue, as a waste site, to the extent that no other property could possibly serve as a waste site. This is the only rationale by which the Appellant's repeated emphasis on the availability of other property could be deemed relevant. This, in turn, means that the Appellant is arguing that the DOH has, for all practical purposes, no discretion in these circumstances. As set forth above, the Appellant's position flatly contradicts West Virginia statutes and case law on this issue. Even Florida law, as referred to in the *Katz* case cited by the Appellant, requires only what is termed "reasonable necessity," that allows for the agency's discretion. "When a condemning authority is faced with choosing one of many alternatives it exercises a sound discretion in making the choice. The very fact that there is a choice shows that no alternative can be absolutely necessary." *Canal Authority v. Litzel*, 243 So.2d 135, 137 (Fla. 1970). The Appellant appears to be arguing for the adoption of a new and untried standard that goes well beyond even the Florida standard, i.e., a standard of "absolute necessity," that would require this Court to overrule all applicable precedent and to ignore Chapter 17 of the Code. This is simply not the law.

The Appellant argues that the findings of fact set forth in the Order at issue are accurate but that the Circuit Court's legal conclusions are plainly wrong in view of these findings. (Appellant's Brief at 7.) The Appellant insists that the lower court's conclusion is erroneous based on the single fact that the property taken is described in the project plans as a potential waste site available for use as the contractor desires. (Appellant's Brief at 8.) This

characterization simply ignores the evidence that the DOH acted in a reasoned manner in order to ensure competitive bidding, and, further, ignores the DOH's reasonable determination that the site would undoubtedly be used if made available due to its many favorable characteristics. This same evidence provides a response to the Appellant's remaining list of purportedly arbitrary and capricious acts (Appellant's Brief at 8.)

**IV. The Supremacy Clause of the United States Constitution has no application to this matter.**

The Appellant invokes the Supremacy Clause of the United States Constitution and contends that the taking at issue is contrary to applicable federal highway regulations, noting that such regulations prohibit the specification of a mandatory waste site absent a particular finding. (Appellant's Brief at 9, 12-13). However, the Appellant also argues that the simple fact that the property is not being taken for a mandatory site renders the DOH's actions arbitrary and capricious or shows that there is no public necessity for the property. (Appellant's Brief at 8-9). The Appellant cannot rely on both arguments simultaneously, as the waste site is either mandatory or it is not.

Since the Order at issue specifically found that the site was not mandatory (Order at 6-7, ¶ 13), and the Appellant not only does not show that this finding was erroneous but bases a significant portion of its argument on the fact that the site was not mandatory, and because there is no evidence that suggests that the site was mandatory, or that the Federal Highway Administration (FHWA) believed that the site was mandatory, it seems at least reasonable to conclude that the site was not mandatory and that no federal regulation was violated.<sup>4</sup> Thus, the

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<sup>4</sup> The regulation at issue includes no absolute prohibition on the condemnation of property for use as a waste site, and it appears to focus on whether a mandatory site is the most economical. Given the

Supremacy Clause has no application to this matter. Further, although the Appellant cites certain cases in support of the general proposition that federal law may preempt state law under certain circumstances, it makes no attempt to explain how federal law might preempt the applicable state law under the circumstances of this case. By statute, as discussed above, the DOH is empowered to condemn property for use as a waste site, and the Appellant cites no federal law that restricts that power.

The lower court concluded, correctly, that the evidence presented by CEI was not sufficient to show that the DOH had acted arbitrarily, capriciously, fraudulently, in bad faith, or contrary to law. This should not be surprising, since the DOH did not reject the initial bid process on the basis of some unknown whim, but for specific articulable reasons: the excessively high winning bid and the lack of competitive bidding. As testified to by the Director of DOH's Engineering Division, these issues were determined pursuant to the existing standard, so there can be no reasonable objection on the grounds that existing policy was not followed. Having properly rejected the bids, the DOH analyzed the bidding in light of the specific characteristics of the project at issue. This process was not arbitrary and capricious, but undertaken in a rational effort to accomplish the well-understood purpose of the competitive bidding process required by statute.

The Circuit Court was correct in denying the Appellant's Motion to Dismiss, based upon its determination that, based upon the evidence presented at hearing, the taking at issue is, as a matter of law, a taking for a public use and within the statutory authority granted to the DOH to acquire property for state road purposes. Pursuant to West Virginia Code § 17-2A-17, the DOH

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actual basis for the DOH's actions in this matter, the actions of the DOH were at least consistent with the

has the discretion to acquire property by right of eminent domain, temporarily or permanently, for presently foreseeable state road purposes. Although the Appellant may disagree with the reasoning of the DOH in choosing to take the property at issue, that disagreement does not render the agency's actions arbitrary or capricious. To the extent that the Appellant argues that the actions of the DOH are contrary to federal highway regulations and its own publications, the Appellant is plainly and demonstrably wrong. The lower court concluded correctly that the DOH did not act in an arbitrary or capricious manner, and that the taking at issue is for a public use.

For these reasons, the Circuit Court correctly determined that the Appellant's motion to dismiss should be denied, and, therefore, the action of the Circuit Court should be affirmed.

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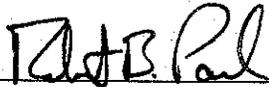
underlying purpose of the regulation, even though the regulation does not apply to an optional site.

**RELIEF PRAYED FOR**

Based upon the foregoing, the Appellee, West Virginia Department of Transportation, Division of Highways, respectfully requests that the Order of the Circuit Court of Logan County be affirmed.

WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION  
OF HIGHWAYS.

By Counsel



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No. 072814

WEST VIRGINIA DEPARTMENT  
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Appellee.

CERTIFICATE OF SERVICE

I, Robert B. Paul, counsel for the West Virginia Department of Transportation, Division of Highways, do hereby certify that I have this 5th day of May, 2008, served and true and accurate copy of the foregoing *Brief Of Appellee, West Virginia Department of Transportation, Division of Highways* by depositing a copy of the same in the regular U.S. mail, postage prepaid, to the following:

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