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FEBRUARY 15, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of West Fargo, a political subdivision of the State of North Dakota,

Plaintiff and Appellee,

v.

Mark Alexander McAllister;

Defendant and Appellant,

and

Alerus Financial, N.A.; and all other persons unknown claiming an estate or interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, devisees, personal representatives, creditors or otherwise,

Defendants and Appellees.

Supreme Court No. 20210360

District Court No.
09-2018-CV-02940
(Cass County District Court)

Appeal from the Amended Judgment of Condemnation Entered on December 29, 2021, and Underlying Orders, Specifically Including, (A) Findings of Fact, Conclusions of Law, and Order Regarding Propriety and Necessity of Taking of Judge McCullough dated January 28, 2020, and (B) Order Granting Plaintiff's Motion in Limine and Supplemental Motion in Limine of Judge Bailey dated November 9, 2020

Cass County District Court, East Central Judicial District
Honorable Susan Bailey

APPELLEE'S BRIEF

Christopher M. McShane, ND ID #06207
OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078-0458
PHONE: 701-282-3249
E-MAIL: cmcshane@ohnstadlaw.com
Attorney for Appellee

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STATEMENT OF THE ISSUES

[¶1] Was the City of West Fargo authorized to use quick-take eminent domain procedures for Sewage Improvement Project No. 1308?

[¶2] Did the district court abuse its discretion by granting the City's motion in limine excluding testimony from trial that the taking impacted the property's conformance with setback requirements under West Fargo City Ordinances?

STATEMENT OF THE CASE

[¶3] This is an eminent domain case concerning the City of West Fargo's (the "City") sewage improvement district known as Sewage Improvement Project No. 1308 (the "Project"). After deeming it necessary to establish Sewage Improvement Project No. 1308, the City resolved that it was necessary to acquire certain property rights to proceed with the Project. (App. at 98.)

[¶4] The City commenced separate eminent domain actions against several property owners, including Defendant-Appellant Mark Alexander McAllister ("McAllister"). The cases were subsequently consolidated for all issues related to the propriety of the taking, but each case would be tried separately on the issue of compensation for the taking. (App. at 48.)

[¶5] After a court trial on the issue of the propriety of the taking, the district court ruled that the City was authorized to utilize quick-take eminent domain procedures to acquire the property rights at issue. (App. at 160.) As McAllister's case proceeded to trial on the issue of compensation, the City filed a motion in limine and supplemental motion in limine seeking to exclude testimony from trial that the taking caused the property at issue to become

nonconforming under the setback provisions of the West Fargo City Ordinances. (App. at 167, 217.) The district court granted the motions in limine. (App. at 258-261.)

[¶6] The parties subsequently stipulated to entry of judgment in the amount of the City's initial deposit, with McAllister reserving his right to appeal the district court's pretrial rulings and reserving his right to seek attorney's fees and costs. (App. at 262-65.) McAllister appealed from the stipulated judgment, but this Court did not address the merits of the appeal because the use of Rule 54(b) was improper when the issue of attorney's fees and costs has not been resolved. City of West Fargo v. McAllister, et al., 2021 ND 136, 962 N.W.2d 591.

[¶7] After the matter was remanded, McAllister made a motion for attorney's fees and costs. Judge Bailey issued an Order granting the motion for attorney's fees and costs. Doc. ID #319. Neither party has appealed the award of attorney's fees and costs. Instead, McAllister appealed from the Amended Judgment raising the same arguments raised in the previous appeal.

STATEMENT OF THE FACTS

[¶8] The City of West Fargo approved a resolution deeming it necessary to establish a sewer improvement district known as Sewer Improvement Project No. 1308. (App. at 96.) Sewer Improvement Project No. 1308 consists of sanitary sewer force mains, lift station upgrades, and other miscellaneous installations allowing for sanitary sewage to flow from the West Fargo lagoons to the Fargo sewage treatment plant. (App. at 98.) McAllister suggests the City passed this resolution in executive session, but this is not true. The City held an executive session to discuss what was at that point anticipated litigation.

Following the executive session, the City came into open session where a motion was made to adopt the resolution, and a vote was held in open session.

[¶9] The City resolved that it was necessary to acquire certain property rights over, across, and through specified private property in order to proceed with Sewer Improvement Project No. 1308. (Id.) It was necessary for the City to acquire a permanent right of way and temporary construction right of way over, across, and through the properties for the purposes of constructing, operating, and maintaining sanitary sewer force mains. (Id.)

[¶10] The City negotiated with landowners starting in January of 2018. Transcript of Trial on November 1, 2019; P. 115, ll. 23-25. When negotiations were not successful, the City utilized the power of eminent domain to acquire the necessary right of way to construct, operate, and maintain the sewage lines across property it was unable to acquire voluntarily. (App. at 14.) One of the properties over which the City needed to acquire these rights was owned by Defendant-Appellant McAllister. (Id.) The City appraised the compensation for the property rights obtained on McAllister's property at $36,000 and deposited that amount with the Cass County Clerk of Court. (App. at 16.) The City sought to consolidate the cases because the issues were the same for each of the properties and all of the landowners were represented by the same attorney. The landowners consented to the consolidation of the cases for purposes of determining if the immediate acquisition of the property necessary for Sewer Improvement Project No. 1308 was proper, but objected to the cases being consolidated for purposes of determining the just compensation due to each landowner for the property rights acquired by the City. (App. at 48.) The result was the entry of an order consolidating the cases for all issues concerning the necessity of the taking, but each case would be tried separately on the issue of compensation for the taking. (Id.)

[¶11] The landowners, including McAllister, jointly moved for partial summary judgment, arguing that the City could not take the property rights through quick-take procedures. (Index # 287.) A bench trial was held on the issues surrounding the necessity of the taking. After the trial, the district court in the consolidated action (Judge McCullough) issued an order denying the landowners' motion for partial summary judgment and ruling that the City's acquisition of the property rights via quick take was authorized. (Index # 108 and App. at 160.)

[¶12] As McAllister's case proceeded to trial on the issue of compensation, the City filed a motion in limine and supplemental motion in limine seeking to exclude testimony from trial that the taking caused Mr. McAllister's property to become nonconforming under West Fargo City Ordinances based on front yard setback requirements. (App. at 167, 217.) The district court in the McAllister compensation case (Judge Bailey) granted the motions, ruling as a matter of law that the sewer easement obtained by the City had no effect on the front yard setback requirements under the West Fargo City Ordinances and excluding testimony about setback nonconformity from trial. (Index #164 and App. at 258-61.)

[¶13] Based on the district court's ruling on the motions in limine, McAllister accepted the fact the jury's verdict as to compensation would be equal to the amount of the City's initial deposit, $36,000. (App. at 263.) The parties stipulated to entry of judgment in that amount, with McAllister reserving his right to appeal the district court's pretrial rulings. (App. at 262-65.) McAllister now appeals again, raising the same eight issues on appeal that were raised previously when the appeal was dismissed for improper use of Rule 54(b).

ARGUMENT

I. A mixed standard of review applies to McAllister's eight issues on appeal.

[¶14] McAllister argues that the City was not authorized to use quick-take eminent domain procedures for Sewer Improvement Project No. 1308. The City was authorized to utilize eminent domain under the plain language of North Dakota statutes. The Court's standard of review for statutory interpretation is well established:

> Statutory interpretation is a question of law and is fully reviewable on appeal. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1–02–02. Statutes are construed together to give effect to each word and phrase, and all parts of a statute must be construed to have meaning. N.D.C.C. § 1–02–07. If the language of a statute is clear and unambiguous, the language may not be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1–02–05.

Rocky Mountain Steel Foundations, Inc. v. Brockett Co., LLC, 2018 ND 96, ¶ 5, 909 N.W.2d 671 (quotation omitted).

[¶15] McAllister argues that this Court should reverse the district court's ruling on the City's motions in limine raised before the compensation trial. This Court reviews a district court's decision on a motion in limine for an abuse of discretion. Kost v. Kraft, 2014 ND 92, ¶ 9, 845 N.W.2d 889.

II. The City was authorized to use quick take for the Project.

[¶16] The City acquired the property rights necessary to construct, operate, and maintain the sewer pipelines from McAllister, and the other landowners, through eminent domain as authorized by N.D.C.C. § 40-22-05. The North Dakota legislature has granted cities the power to acquire a right of way necessary for a sewage project immediately upon deposit with the clerk of district court in the amount of the offer that the city has made to the

landowner to purchase the right of way. N.D.C.C. § 40-22-05. The ability to acquire immediate possession of the right of way necessary for a sewer pipe is authorized by Article I, § 16, of the North Dakota Constitution. McAllister argues that the term "right of way" as used in N.D.C.C. § 40-22-05 is limited to a highway right of way.

[¶17] The term "right of way" is not defined with respect to its use in N.D.C.C. § 40-22-05. McAllister points to the definition used by the North Dakota legislature in the title of the North Dakota Century Code governing the state highway system. Section 24-01-01.1(38), N.D.C.C., defines "right of way" as follows:

> "Right of way" means **a general term denoting land, property, or interest therein**, acquired for or devoted to highway purposes and shall include, but not be limited to publicly owned and controlled rest and recreation areas, sanitary facilities reasonably necessary to accommodate the traveling public, and tracts of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to the state highway system.

N.D.C.C. § 24-01-01.1(38) (emphasis added). It is not surprising a definition of right of way found within the "Highways, Bridges, and Ferries" title of the Code focuses on how right of way applies to the state highway system.

[¶18] McAllister repeatedly references the 1973 case Tormaschy v. Hjelle (Hjelle being the State Highway Commissioner for the State of North Dakota at the time). In Tormaschy, the Court was asked to determine if the property rights necessary to construct a sewage lagoon at a rest stop could be acquired by quick take. In reaching the conclusion a sewage lagoon can be constructed on "right of way," the Court noted the question was one of first impression and stated, "Not only have we not had prior occasion to interpret the term 'right of way' as used in Section 14 [now Section 16], but the history of that section sheds

little light on the intent of its framers as to the meaning of the term." Tormaschy v. Hjelle, 210 N.W.2d 100, 103 (N.D. 1973).

[¶19] The Tormaschy Court fell back on its rules of construction when it stated, "A rule of constitutional and statutory construction is that words are to be given their plain, ordinary and commonly understood meaning. Webster's Dictionary defines right-of-way as a 'right of passage over another person's ground'." Id at 102. In addition to using the plain meaning of the words in a statute, the Court is "guided by the rule that we interpret statutes in context and in relation to others on the same subject to give meaning to each without rendering one or the other useless." BASF Corp. v. Symington, 512 N.W.2d 692, 696 (N.D. 1994).

[¶20] Article I, § 14 (now section 16), as amended in 1956, is not the first time the term "right of way" was used in North Dakota. The term "right of way" was in the original Constitution of the State of North Dakota in 1889, which allowed appropriation of "right of way" for the use of private corporations. Article I, § 14, of the North Dakota Constitution of 1889.

[¶21] As noted in the 1890 United States Supreme Court case Sturr v. Beck from Dakota Territory, the law of the land at the time of the First Constitutional Convention of North Dakota was:

> Section 2339 of the Revised Statutes, which is in substance the ninth section of the act of congress of July 26, 1866, (14 St. 253,) provides: 'Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and **the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed**.

Sturr v. Beck, 133 U.S. 541, 550, 10 S. Ct. 350, 353, 33 L. Ed. 761 (1890) (emphasis added). As far back as 1866, "right of way" was the term used to describe the property rights necessary to construct, use, and maintain infrastructure for the conveyance of water.

[¶22] This Court has recognized the term "right of way" means different things in different contexts. When recently addressing the meaning of "right of way" in the context of a railroad, the Court recognized, "The phrase 'right of way' has two meanings when it is used in a railroad deed; it refers either to the strip of land upon which the track is laid or the legal right to use the strip of land. EOG Res., Inc. v. Soo Line R. Co., 2015 ND 187, ¶ 29, 867 N.W.2d 308.

[¶23] When reviewing N.D.C.C. § 40-22-05 to determine if "right of way" is a sufficient property right to construct, operate and maintain a sewer line independent of a road project, the Court must look at what is being granted by the statute and why. The sentence within N.D.C.C. § 40-22-05 granting the City the right to immediately posses the right of way necessary to construct, operate and maintain Sewer Improvement Project No. 1308 is as follows:

> The proceedings shall be instituted and prosecuted in accordance with the provisions of chapter 32-15, except that **when the interest sought to be acquired is a right of way** for the opening, laying out, widening, or enlargement of any street, highway, avenue, boulevard, or alley in the municipality, **or** for the **laying of any** main, **pipe**, ditch, canal, aqueduct, or flume **for conducting** water, storm water, or **sewage**, whether within or without the municipality, the municipality may make an offer to purchase the right of way and may deposit the amount of the offer with the clerk of the district court of the county wherein the right of way is located, **and may thereupon take possession of the right of way forthwith**.

N.D.C.C. § 40-22-05 (emphasis added).

[¶24] The legislature specifically granted cities the power to take immediate possession of right of way for the construction, operation, and maintenance of sewage projects. There is nothing in N.D.C.C. § 40-22-05 that requires the sewage project to be a component of a road project. The statute specifically separates road projects and sewage projects with the word "or." This Court follows a longstanding rule of statutory interpretation wherein it will "interpret statutes to give meaning and effect to every word, phrase, and sentence, and [will] not adopt a construction which would render part of the statute mere surplusage." State v. Buchholz, 2005 ND 30, ¶ 6, 692 N.W.2d 105. If McAllister's proposed definition of "right of way" is used—limiting the definition solely to highway purposes—much of N.D.C.C. § 40-22-05 would be rendered ineffective and mere surplusage because the statute specifically provides for acquiring a right of way for sewage projects. As conceded by McAllister (Appellant's Br. at p. 22, n.2), such an interpretation would also render ineffective and mere surplusage the immediate possession language found in the water resource district eminent domain statute, N.D.C.C. § 61-16.1-09(2), which gives water resource districts quick-take powers when acquiring a right of way for flood control and other water projects.[1]

[¶25] In place of McAllister's very limited definition of "right of way," the definition used by the North Dakota Supreme Court in EOG Resources recognizing the term

[1]Such a narrow interpretation of the term "right of way" would also strip water districts of the right to use quick take to acquire property rights necessary for "laying of any main, pipe, ditch, canal, aqueduct, or flume for conducting water, storm water or sewage." N.D.C.C. § 61-35-51. Limiting right of way to use only for a road would also eliminate the water commission's ability to use eminent domain. N.D.C.C. § 61-02-31. It would also eliminate the statutory authority to use quick take by the Western Area Water Supply Authority and the Garrison Diversion Conservancy District. N.D.C.C. § 61-40-05 and N.D.C.C. § 61-24.8-06.

"right of way" can mean a strip of land is more applicable when applied to the eminent domain powers specifically granted to cities by N.D.C.C. § 40-22-05. Right of way, as used in N.D.C.C. § 40-22-05, describes a strip of land necessary for a sewer project, and it describes the right to use the strip of land for that purpose.

[¶26] McAllister extends his argument about the definition of the term "right of way" to argue the City's Complaint did not comply with statutory requirements found in N.D.C.C. § 32-15-18 because the Complaint in this matter did not describe a road, nor did it include a description of where the road starts and where the road ends, accompanied by a map of the road. The Complaint included a legal description of the right of way being acquired across McAllister's property, and it included a map of the right of way being acquired. McAllister's argument the Complaint was insufficient is based on the false premise that a right of way is restricted to highway purposes, and for the foregoing reasons that argument is without merit.

[¶27] McAllister also argues that a temporary construction easement can never be a "right of way." Section 40-22-05, N.D.C.C., specifically allows a city to acquire whatever rights are necessary to construct a sewer project. It was necessary during construction to have the right to use the ditch between the road and the beginning of the permanent right of way easement. It is no longer necessary for the City to have the right to use the strip of land between the road and the permanent right of way easement. Now that construction is complete, the landowners can use that strip of land as they used it before. If the City sought a permanent easement over the strip of land between the road and the permanent right of way easement, the landowners would have complained that the City is taking more than is necessary to construct, operate, and maintain Sewer Improvement Project No. 1308. It was

necessary for the City to have the temporary right to cross that property, so it was appropriate for the City to acquire immediate possession of the temporary right upon deposit in accordance with N.D.C.C. § 40-22-05.

[¶28] McAllister argues that the City did not have the right to use the immediate possession provisions of N.D.C.C. § 40-22-05 for Sewer Improvement Project No. 1308 because the project had not been specially assessed at the time of the taking. This argument is based upon the language in N.D.C.C. § 40-22-05 indicating that the project for which immediate possession is being taken must be "authorized by this chapter," and the title of the chapter being "Improvements by Special Assessment Method."

[¶29] "Headnotes describing the title of a chapter of the code do not constitute any part of the statute and may not be used to determine legislative intent." Jorgenson v. Agway, Inc., 2001 ND 104, ¶8, 627 N.W.2d 391 (citing N.D.C.C. § 1-02-12). While Chapter 40-22 involves special assessments, it also encompasses other aspects of municipal government. For example, N.D.C.C. § 40-22-02 "Sewerage system - Establishment, maintenance, and alteration - Vote required" authorizes a municipality to establish a sewer system, but it does not mention special assessments. Furthermore, N.D.C.C. § 40-22-03 provides authorization for a city to acquire the necessary property for construction of the sewer system through grant, purchase, or **condemnation**. N.D.C.C. § 40-22-03.

[¶30] While providing the authority for cities to construct sewer systems—and to acquire the property rights necessary to do so—Chapter 40-22 is not intended to tie the hands of the municipality with respect to how the improvements are paid for. The chapter does not require a city to pay for a project authorized by the chapter with special assessments. Section 40-22-01, N.D.C.C., states, "Any municipality, upon complying with the provisions

of this chapter, **may** defray the expense of any or all of the following types of improvements by special assessments." N.D.C.C. § 40-22-01 (emphasis added). The section of the chapter specifically granting cities authority to obtain immediate possession of a right of way for sewage projects similarly states, "The municipality **may** levy special assessments to pay all or any part of the judgment and at the time of the next annual tax levy may levy a general tax for the payment of the part of the judgment as is not to be paid by special assessment." N.D.C.C. § 40-22-05 (emphasis added). "The word 'may' is usually used to imply permissive, optional or discretional, and not mandatory action or conduct." State v. Glaser, 2015 ND 31, ¶ 18, 858 N.W.2d 920 (internal quotation marks and citation omitted).

[¶31] A predecessor statute to N.D.C.C. § 40-22-01 said, "Any such city, village or town may pay the cost of purchasing, erecting, enlarging, improving, extending or leasing any such plant, system or line, or any part thereof, either by issuing special assessment warrants as hereinafter provided, or by issuing bonds of such municipality as hereinafter provided, or partly by such special assessment warrants and partly by such bonds." 1927 N.D. Sess. Laws ch. 197, § 4. In a case interpreting the 1927 session laws, the North Dakota Supreme Court said the statute "authorizing cities to pay the cost of purchasing or erecting certain public utilities by the issuance of special assessment warrants or bonds or by both warrants and bonds, does not thereby limit cities to the means thus provided in the acquisition or erection of public utilities." Lang v. City of Cavalier, 59 N.D. 75, 228 N.W. 819, 820 (1930). The fact that the statute says a municipality "may" defray the expense of a sewage system by special assessment does not mean that a municipality is required to do so.

[¶32] The legislature specifically provided cities flexibility in how projects are assessed when it enacted N.D.C.C. § 40-22-08. In N.D.C.C. § 40-22-08, the legislature allowed for the creation of improvement districts, but also went on to state, "Nothing herein, however, shall prevent a municipality from making and financing any improvement and levying special assessments therefor under any alternate procedure set forth in this title." N.D.C.C. § 40-22-08.

[¶33] Simply put, nothing in Chapter 40-22 requires a city to levy special assessments before utilizing the eminent domain powers authorized by the chapter.

[¶34] McAllister also argues that the City did not negotiate before commencing the eminent domain action. McAllister did not raise this issue before the district court in his Motion for Partial Summary Judgment. (Index # 287.) "It is well-settled that issues not raised in the district court may not be raised for the first time on appeal." Paulson v. Paulson, 2011 ND 159, ¶ 9, 801 N.W.2d 746. McAllister has therefore forfeited review of this issue on appeal. In addition to not raising the issue of negotiation in his summary judgment motion, he does not support his argument in this appeal in any way. His unsupported argument the City did not negotiate is contrary to the testimony of Pat Downs at the trial regarding the propriety of the taking. T.R. November 1, 2019, p.114, ll. 8-14.

[¶35] Despite numerous arguments to the contrary, the district court did not err when it concluded it was proper for the City to take immediate possession of the right of way necessary for the Project in accordance with the statutory authority granted to the City by N.D.C.C. § 40-22-05.

III. The district court did not abuse its discretion by granting the City's motions in limine.

[¶36] Although McAllister frames the motion in limine issue by alleging the district court deprived him of his right to testify about the value of his property in front of the jury, this is not the case. The district court granted the City's motion in limine on an evidentiary issue based on the legal question of whether the taking would cause McAllister's property to become nonconforming with the setback requirement under West Fargo City Ordinances. The district court did not prohibit McAllister from testifying about the value of his property. The district court simply made an evidentiary ruling, based on a question of law, excluding legally erroneous testimony from trial that the sanitary sewer easement obtained by the City impacted the front yard setback requirements in the West Fargo City Ordinances. (App. at 261.)

[¶37] The southern border of the McAllister Property is the section line. The McAllister Property is located on the north side of 19th Avenue North. For the McAllister Property, the Sanitary Sewer Easement is 35 feet in width, between 40 and 75 feet north of the south property line. A temporary construction easement was also acquired allowing access to the 40 foot-wide strip of land between the Sanitary Sewer Easement and the south property line.

[¶38] The Sanitary Sewer Easement and the Temporary Construction Easement were acquired in September of 2018, and the sanitary sewer line was installed in the fall of 2018. The sanitary sewer line was installed through the McAllister Property by boring under the surface of the property. At his deposition, the appraiser hired by McAllister confirmed

that you cannot tell there is a sanitary sewer line installed on the McAllister Property now that it has been installed. App. p. 373, ll. 17-20.

[¶39] Before the compensation trial, the City took McAllister's deposition and learned that McAllister claimed the Sanitary Sewer Easement caused McAllister's house to be nonconforming with West Fargo Ordinances. App. p. 419. McAllister's claim is based upon the belief the front yard setbacks for the McAllister Property begin at the northern edge of the Sanitary Sewer Easement. (Id.) The appraiser hired by McAllister based his opinion of value on the understanding the front yard setback for the McAllister Property is 75 feet from the north edge of the Sanitary Sewer Easement. App. p. 384.

[¶40] McAllister's beliefs are not legally accurate. As stated in the affidavit of the Director of Planning and Zoning for the City of West Fargo, the Sanitary Sewer Easement does not change the setback requirement for the McAllister Property. App. p. 228 (¶ 11). The City brought a motion in limine before the compensation trial to exclude any legally erroneous testimony that the sanitary sewer easement impacted the setback requirements under West Fargo City Ordinances. (App. at 217.)

[¶41] The setbacks for the McAllister Property are governed by Section 4-421.4 of the West Fargo City Ordinances. McAllister and the City disagree as to whether the Sanitary Sewer Easement impacts the McAllister Property's compliance with the setback requirements of Section 4-421.4. McAllister interprets the ordinances in such a way as to conclude the Sanitary Sewer Easement impacts the McAllister Property's compliance with the setbacks required by Section 4-421.4, and the City interprets its Ordinances in such a way that the Sanitary Sewer Easement does not impact the McAllister Property's compliance with the setback requirements.

[¶42] The McAllister Property is within the exclusive extraterritorial zoning area of West Fargo. App. p. 226 (¶ 3.) The McAllister Property has been zoned as "A" District. Id (¶ 4.) The setback requirements for the "A" District are set forth in Section 4-421.4. (Id.) Subsection 4-421.4(f) of the West Fargo City Ordinances is set forth in its entirety as follows:

> **Minimum Front Yard:-** Local: 120' from centerline or 40' from the established right-of-way, whichever is greater.
> - Collector: 150' from centerline or 75' from the established right-of-way, whichever is greater.
> - Arterial: 150' from centerline or 75' from the established right-of-way, whichever is greater.

Id. (emphasis added).

[¶43] The district court was required to interpret the West Fargo City Ordinances to resolve the issue of whether the Sanitary Sewer Easement causes the McAllister Property to be nonconforming with the setback requirements found in Section 4-421.4. "The interpretation of a zoning ordinance is governed by the rules of statutory construction." Hagerott v. Morton Cty. Bd. of Comm'rs, 2010 ND 32, ¶ 13, 778 N.W.2d 813. Although McAllister argues the jury should be responsible for determining whether the Sanitary Sewer Easement impacts the McAllister Property's conformance with the setback requirements, the interpretation of ordinances and statutes is a legal question in North Dakota. Id. The district court is required to instruct the jury on the law, and the court must avoid misstatements of law to the jury by any party at trial. When interpreting zoning ordinances, courts must also be mindful that the "interpretation of a zoning ordinance by a governmental entity is a quasi-judicial act, and a reviewing court should give deference to the judgment and

interpretation of the governing body rather than substitute its judgment for that of the enacting body." Id.

[¶44] The City determined the Sanitary Sewer Easement does not impact the McAllister Property's compliance with the setback requirements set forth in Section 4-421.4 of the West Fargo Ordinances. App. p. 228 (¶11). The City's interpretation of the setback requirements in its own zoning code is based upon the definitions in Chapter 4-200 of the zoning ordinances and the structure of the setback ordinances themselves.

[¶45] Section 4-421.4(f) provides three options for a "Minimum Front Yard" depending on what type of road is located adjacent to the property. App. p. 227 (¶ 6.) The term "Yard, Front" is defined in Chapter 4-200 of the West Fargo ordinances as "A yard extending across the front of a lot between the side lot lines and extending **from the front lot line** to the front of the principal building or any projections thereof. The Front Yard shall be facing a public street." App. p. 241 (emphasis added).

[¶46] The definitions section of Chapter 4-200 requires front yard depths to be measured as follows: "At right angles to a straight line joining the foremost points of the side lot lines." Id. Chapter 4-200 also defines "Setback" as follows: "The required distance between every structure and the front lot line, as prescribed in the district regulations of this Ordinance." App. p. 239.

[¶47] When utilizing the definitions found in Chapter 4-200, the "front yard" "setback" required in the "A" zone is to be measured from the front lot line. The Sanitary Sewer Easement does not impact the lot line of the McAllister Property. The Sanitary Sewer Easement is just an easement. McAllister still owns the land encumbered by the Sanitary Sewer Easement. The easement area is just burdened by the easement in favor of the City

allowing for the construction, operation, and maintenance of a sanitary sewer line. McAllister can still use the easement area for the same purposes he was allowed to use the easement area for before the Sanitary Sewer Easement was acquired by the City, so long as the use does not interfere with sewer lines buried under the surface of the property. The front yard setbacks required by Section 4-421.4(f) are not requirements the structures be a certain distance from the property owned by McAllister but encumbered by the Sanitary Sewer Easement. Any such testimony would have resulted in the jury being exposed to an erroneous interpretation of the law, which the district court would then have been forced to **try** to correct with a proper instruction on the law.

[¶48] McAllister argues that Section 4-421.4(f) requires a 75 foot setback from the northern edge of the Sanitary Sewer Easement because it is a permanent right of way easement. McAllister has interpreted Section 4-421.4(f) in this manner based upon the definitions found in West Fargo Ordinance Section 4-0402. The definitions in Section 4-0402 that McAllister relies upon are applicable to the Subdivision Regulations of the City of West Fargo, North Dakota. McAllister's property is not subdivided, and will not be subdivided as a result of the Project. Section 4-0402.1(A) states, "Words within these regulations shall be used, interpreted, and defined as presented **in this chapter**." App. p. 184 (emphasis added). The ordinances go further to distinguish between the definitions for the Subdivision Regulations and the Zoning Ordinances (Chapter 4-200), when the ordinances state, "Any definition not found in these regulations, and found in the Zoning Ordinance Definitions, shall have the same meaning as defined in the Zoning Ordinance." Id. at subsection (G). The provisions of Section 4-0401.1 governing what the definitions are applicable to are different than the applicability provision of Chapter 4-200, which states,

"For the purpose of this ordinance, certain terms or words used herein shall be interpreted as follows." App. p. 233.

[¶49] McAllister points to the definition of "right of way" as found in the Subdivision Regulations. The definitions within the Subdivision Regulations do not apply to the Zoning Ordinances. Within the Zoning Ordinance Definitions (Chapter 4-200), the only time "right of way" is used is in the definition of "street line" where the term is defined as "the right of way line of a street." This does not support the legal conclusion McAllister and his appraiser intended to testify about to support their claim the Sanitary Sewer Easement causes the McAllister home to be nonconforming with the setback requirements found within the Zoning Ordinances.

[¶50] Section 4-421.4(f) requires different front yard setback requirements depending on what type of street the property fronts upon. For a local street, the front yard setback requirement is 40 feet from the established right of way. For collector and arterial streets, the front yard setback is 75 feet from the established right of way. The Sanitary Sewer Easement is entirely underground. The use of the Sanitary Sewer Easement would not change if 19th Avenue was a local street or an arterial street. It is absurd to think the required setback from an underground easement would be different based upon the use of the street it runs parallel to. Statutes, and therefore City ordinances, are to be interpreted in such a way as to avoid absurd or illogical results. Metz v. City of Elgin, Grant County, 2011 ND 148, ¶ 7, 800 N.W.2d 710.

[¶51] When read as a whole, the intent of the front yard setback requirement in Section 4-421.4(f) is to have structures no less than 75 feet from the edge of the street right of way, not 75 feet from the edge of the Sanitary Sewer Easement that runs underground parallel to the street.

[¶52] The City sought a judicial determination from the district court confirming that its interpretation of its own ordinances is correct. The district court granted the motion in limine, noting that it was rejecting McAllister's interpretation of the West Fargo City Ordinances "as a matter of law." (App. at 260.) This ruling did not deprive McAllister from testifying about the value of his property. It allowed McAllister and his appraiser to provide an opinion of just compensation for the Sanitary Sewer Easement that is grounded in the law instead of being based upon a misapplication of the law. The district court's ruling also prevented McAllister and his appraiser from unfairly prejudicing the jury with a misstatement of the law. The district court did not abuse its discretion by granting the City's motion in limine.

CONCLUSION

[¶53] The district court correctly concluded that the City was authorized to acquire a right of way for Sewer Improvement Project No. 1308 via quick take under N.D.C.C. § 40-22-05, and the district court did not abuse its discretion by granting the City's motion in limine. The judgment in this case should therefore be affirmed in all respects.

Dated: February 15, 2022.

/s/ Christopher M. McShane
Christopher M. McShane, ND ID #06207

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
Fargo, ND 58078-0458
TEL (701) 282-3249
FAX (701) 282-0825
cmcshane@ohnstadlaw.com
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

In accordance with N.D.R.App.P. 32(a)(8)(A), the undersigned hereby certifies that the above brief contains 25 pages, which is within the limit of 38 pages.

/s/ Christopher M. McShane
Christopher M. McShane, ND ID #06207

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of West Fargo, a political subdivision of the State of North Dakota,

Plaintiff and Appellee,

v.

Mark Alexander McAllister;

Defendant and Appellant,

and

Alerus Financial, N.A.; and all other persons unknown claiming an estate or interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, devisees, personal representatives, creditors or otherwise,

Defendants and Appellees.

Supreme Court No. 20210360

District Court No.
09-2018-CV-02940
(Cass County District Court)

CERTIFICATE OF SERVICE

[¶1] Dawn M. Schaefer, being first duly sworn, deposes and says that on the 17th day of February, 2022, she served the following document:

1. Appellee's Brief;

with the Clerk of the North Dakota Supreme Court and served the same electronically as follows:

By North Dakota Supreme Court E-Filing Portal:

Jonathan T. Garaas . . . . . garaaslawfirm@ideaone.net

By First-Class Mail:

Alerus Financial, N.A.
c/o Registered Agent, Jerrod Hanson
401 Demers Ave
Grand Forks, ND 58201

[¶2] I declare under penalty of perjury that the foregoing is true and correct. I signed this Affidavit in the County of Cass, State of North Dakota, on this 17th day of February, 2022.

/s/ Dawn M. Schaefer
Dawn M. Schaefer