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FEBRUARY 16, 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-Appellee

vs.

Mark Alexander McAllister,
Defendant-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, legatees, devisees, personal representatives, creditors or otherwise,
Defendant-Appellees.

Supreme Court No. 20210360

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

APPELLANT'S REPLY BRIEF
(ORAL ARGUMENT REQUESTED)

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, SOUTHEAST JUDICIAL DISTRICT
HONORABLE SUSAN BAILEY

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[¶1] **ISSUES ON APPEAL**

[¶2] No court has the discretion to disregard the laws relating to eminent domain.

[¶3] **STATEMENT OF THE CASE**

[¶4] To its credit, City of West Fargo ("CITY") makes no attempt to claim the legal or factual existence of (a) a special assessment project, or (b) a special assessment district. It claims "separate eminent domain actions against several property owners, including Defendant-Appellant Mark Alexander McAllister (LANDOWNER)." CITY'S Brief, ¶ 4.

[¶5] Similarly, CITY does not dispute (a) it "did not anticipate having to go through quick take", or (b) its late-honoring notices required by N.D.C.C. § 54-12-01.2. CITY falsely states, in ¶ 8 of its Brief, that LANDOWNER asserts the "resolution deeming it necessary to establish a sewer improvement district known as Sewer Improvement Project No. 1308" was passed in executive session. LANDOWNER has never made such assertion about that resolution creating Sewer Improvement Project No. 1308 originally passed on August 21, 2017. App., p. 49. However, CITY did illegally pass a Resolution of Offer to Purchase LANDOWNER'S property for $36,000 *when in executive session on August 20, 2018* (App., ps. 33-34), violating both law and negotiation standards. Appellant's Brief, ¶s 13-14; an issue first raised before Judge McCullough, but given no legal regard.

[¶6] Additionally, as part of its Statement of the Case, CITY does not dispute that its Complaint was legally flawed, nor did it object to any portion of LANDOWNER'S recitation of the identified legal process. Appellant's Brief, ¶s 12-24.

[¶7] **STATEMENT OF FACTS**

[¶8] Consistently, CITY fails to identify any dispute with the facts recited by

LANDOWNER. Appellant's Brief, ¶s 26-37. Hence, CITY does not dispute (a) the factual values identified by the LANDOWNER [$600,000 - pre-easement; $300,000.00 post-easement] and LANDOWNER'S expert appraiser [$485,000.00 - pre-easement; $245,000.00 post-easement][Appellant's Brief, ¶s 24, 33-34], (b) LANDOWNER'S inability to access or benefit from the project [Appellant's Brief, ¶s 25], (c) non-existence of a special assessment district [Appellant's Brief, ¶s 28], (d) "(t)he northern boundary of the permanent easement is 75' north of LANDOWNER'S property line", and the reason for the substantial distance was future roads [Appellant's Brief, ¶s 29-31], (e) "having a force main in somebody's front yard right near their house devalued it" [Appellant's Brief, ¶s 31-32], and (f) as a result of the forcemain easement boundary line, LANDOWNER'S dwelling would be non-compliant, and incapable of being rebuilt. [Appellant's Brief, ¶s 33-37.]

[¶9] **LAW AND ARGUMENT**

[¶10] **Standard of Review**

[¶11] CITY recognizes questions of law are fully reviewable on appeal, and cannot seriously suggest deference to a lower court's erroneous legal opinion so it is only subject to reversal under "abuse of discretion" standards. CITY'S Brief, ¶ 14. A court always abuses its discretion "when it misinterprets or misapplies the law". Kost v. Kraft, 2014 ND 92, ¶9, 845 N.W.2d 889.

[¶12] **POINT 1. CITY is not entitled to "quick take" - there exists a constitutional hurdle, and resulting statutory pleading requirements.**

[¶13] CITY ignores an explicit constitutional limitation with regard to quick take set forth in North Dakota Constitution, Article 1, § 16 – only "right of way" may be taken ("When the

state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located."). Not all constitutional authorizations are self-executing, another legal concept ignored by CITY. The Legislative Assembly has to specifically provide for such action. Johnson v. Wells County Water Resource Board, 410 N.W.2d 525, 528-530 (N.D. 1987).

[¶14] **A. Quick take authorization is limited to a highway "right of way".**

[¶15] The will of the sovereign power is expressed by a hierarchy of law with North Dakota's Constitution in fourth place immediately above the statutes of this state at number 5. N.D.C.C. § 1-01-03. By law, North Dakota's Constitution restricts "quick take" to "right of way" and hence, the definition of "right of way" has constitutional importance. CITY concedes the North Dakota Supreme Court has already determined what the term "right of way" means in Tormaschy v. Hjelle, 210 N.W.2d 100, 102 (N.D. 1973), and also, by North Dakota statute - N.D.C.C. § 24-01-01.1(38). See, CITY'S Brief, ¶s16-19. N.D.C.C. § 1-01-09 makes clear, statutorily defined words or phrases are always applied except when a contrary intention plainly appears – "right of way" will only relate to a right of passage over another person's ground – not *use and permanent structures under* the ground. *Black's Law Dictionary*, Second Edition, 1910; Northern and Santa Fe Railway Company v. Box Creek Mineral Limited Partnership, 420 P.3rd 161, ¶s 32-35 (Wyoming, 2018).

[¶16] **B. The "quick take" authorization, found within Article 1, § 16 of the North Dakota Constitution, is not self-executing.**

[¶17] CITY fails to address the inherent constitutional limitation – only "right of way", and

never temporary construction easements, can be the subject of a "quick take". LANDOWNER has never denied that temporary construction easements are available through condemnation.

[¶18] **1. There is no special assessment project – unless there exists a special assessment project, the non-self-executing constitutional provision lies useless.**

[¶19] CITY accurately quotes the second sentence of N.D.C.C. § 40-22-05 in its Brief at ¶23, but fails to recognize, or address, the limitations imposed by the first sentence (***emp****hasis* added) [it cannot be an improvement authorized only in N.D.C.C. Chapter 32-15]:

> *Whenever property required to make any* ***improvement authorized by this chapter*** *is to be taken by condemnation proceedings*, the court, upon request by resolution of the governing body making such improvement, shall call a special term of court for the trial of the proceedings and may summon a jury for the trial whenever necessary.

N.D.C.C. Chapter 40-22 requires a special assessment project meeting one (1) of five (5) "types of improvements by special assessment()".[1] N.D.C.C. § 40-22-01. Only if there exists a *first sentence* "improvement authorized by this chapter" which requires acquisition of private property can CITY attempt a *second sentence* procedure (with possession upon deposit), but CITY must still comply with N.D.C.C. Chapter 32-15.

[¶20] CITY is always permitted eminent domain under N.D.C.C. Chapter 32-15, just no

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[1] CITY argues, at ¶30, that Chapter 40-22 "encompasses other aspects of municipal government", citing N.D.C.C. § 40-22-02's reference to a "Sewerage system". Such sewerage system is specifically mentioned as a legally possible special assessment district project at N.D.C.C. § 40-22-01(1). There is an inherent special assessment district project requirement, now ignored by CITY. Further, at ¶30, CITY argues special assessments are permissive ("may"), rather than mandatory – CITY is confused; North Dakota statutes do not require "all" of the project costs to be paid by special assessments, some construction costs "may" certainly be paid by general tax dollars, or even Federal or State monies.

"quick take" unless there first exists a qualified special assessment district project within the five (5) categories listed in N.D.C.C. § 40-22-01.

[¶21] **2. There is no right to quick take for temporary construction easements.**

[¶22] CITY'S sole cited authority to take *temporary construction easements* is N.D.C.C. § 40-22-05 which "specifically allows a city to acquire whatever rights are necessary to construct a sewer project." CITY'S Brief, ¶27. Under our hierarchy of law, two (2) Constitutions reject CITY'S asserted usurpation of LANDOWNER'S property. Constitution of United States, Fifth and Fourteenth Amendments; Constitution of North Dakota, Art. 1, § 16. Courts cannot authorize trespass, or statutory non-compliance, nor should it be sanctioned. Temporary construction easements are not right-of-ways; quick take is inapplicable.

[¶23] **C. CITY should have negotiated first.**

[¶24] CITY'S statutory duty to negotiate in good faith always exists. N.D.C.C. § 32-15-06.1(1). Even when LANDOWNER'S counsel exists, North Dakota statutes should be followed.

[¶25] **D. There exists a statutory pleading requirement that precludes CITY'S "quick take" action.**

[¶26] CITY'S Brief, at ¶26, erroneously describes LANDOWNER'S argument and N.D.C.C. § 32-15-18 which identifies mandatory complaint pleadings. If this project was limited to only LANDOWNER'S specific land, there never would be a legitimate "public use" for LANDOWNER'S private property – what public good are two (2) sanitory force

mains necessarily capped on both ends?

[¶27] **POINT 2. LANDOWNER is entitled to provide testimony as to "just compensation" for determination by the jury, not judge.**

[¶28] **A. LANDOWNER has the right to present testimony as to his theory of the value of the land taken, or impacted.**

[¶29] CITY fails to comprehend the essence of all witness testimony - personal knowledge of the matter, and relevancy. N.D.R.Ev. Rule 401; N.D.R.Ev. 602. CITY also ignores LANDOWNER'S right to testify about severance damages, which are measured by the depreciation in value to the property not taken, in Northern States Power Company by Board of Directors v. Mikkelson, 2020 ND 54, ¶ 7, 940 N.W.2d 308. LANDOWNER and his expert appraiser should be able to flesh-out their testimony as to value – even the CITY'S design engineers know that "having a force main in somebody's front yard right near their house devalued it" [Appellant's Brief, ¶s 31-32]. The "effect" of a prospective road, is a "fact" to be determined by the jury. The lower court intruded upon a jury issue by limiting LANDOWNER'S evidence as to value, by stifling his ability to reference relevant facts.

[¶30] **B. CITY'S zoning ordinance requirements and prospective road create the possibility of severance damages.**

[¶31] First, CITY'S Director of Planning and Zoning has no known judicial authority to determine the easement "does not change the setback requirement for the McAllister Property" [CITY'S Brief, ¶40], and his opinion may not be shared by LANDOWNER, expert appraiser(s), prospective purchasers of LANDOWNER'S property, or even his successor,

which has a factual bearing on the issue now presented. Second, the CITY'S setback requirements are set by ordinance – they are followed, or ignored at one's peril. Contrary to CITY'S arguments, the definition for "Yard, Front" is not in controversy – its definition will always remain the same. CITY'S Brief, ¶ 45. What will change is the location of the intersecting line(s) between (a) "the front lot line" and the (b) "front of the principal building or any projections thereof" because of the "Yard Requirements" set forth in Section 4-421.4(f) [and footnote #1 indicating definite words of instruction – "Whichever requires the greater setback."]:

> f. 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.

[¶32] CITY'S Section 4-0402.2, entitled "DEFINITIONS", provides the definition for an established right-of-way - a definition always to be used when interpreting a phrase unless another intention plainly appears (N.D.C.C. § 1-01-09):

> Right-of-Way - A strip of land acquired by reservation, dedication, forced dedication, prescription or condemnation and intended to be occupied or occupied by a road, crosswalk, railroad, electric transmission lines, oil or gas pipeline, waterline, sanitary sewers and other similar uses. See Figure 2.

[¶33] Simply put, any new intersecting line, whether by new road easement(s) or utility easement(s) or sanitary sewer easement(s), will create the possibility of non-compliance with CITY'S ordinances, which did occur in 2018 when CITY took possession of a "right of way" by quick take condemnation causing severance damages. With the existing township road

(whether measured from its centerline or statutorily-determined 33' north of the section line {also LANDOWNER'S property line}), LANDOWNER'S property was compliant – LANDOWNER'S principal building is more than "150' from centerline or 75' from the established right-of-way, whichever is greater". Immediately upon taking the right of way by 2018 quick take, LANDOWNER'S principal building, or any projections, violates both minimum measurements – the structure is (a) within 150' of the centerline of the right of way, and/or (b) within 75' from the established right of way. The structure's proximity to the right of way, and also, the prospective road diminishes the value of LANDOWNER'S private property – LANDOWNER, and his expert should be able to testify accordingly. CITY has done nothing to alter the legal effect of such ordinances when exercising eminent domain, nor has CITY passed any other ordinances ameliorating or eliminating the adverse effects of this taking to LANDOWNER'S remaining property.

[¶34] **POINT 3. The lower court invaded the province of the jury.**

[¶35] CITY appears to agree; CITY did not directly address the issue.

[¶36] **CONCLUSION**

[¶37] LANDOWNER requests judicial relief from trespass and wrongful taking.

Respectfully submitted this 16th day of February, 2022.

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The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Reply Brief consisting of twelve (12) pages (not counting this page) complies with the twelve (12) page limitation imposed by N.D.R.App.P. 32(a)(8)(A) for reply briefs.

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STATE OF NORTH DAKOTA

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Defendant-Appellee

Supreme Court No. 20210360

Affidavit Of Service By Electronic Means

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

State of North Dakota
County of Cass

[¶1] Jonathan T. Garaas, being first duly sworn on oath, deposes and says that Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 16th day of February, 2022, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: **Appellant's Reply Brief (Oral Argument Requested)**.

[¶3] The electronically attached documents were served upon the identified lawyer as follows:

[¶4] Christopher M. McShane at cmcshsane@ohnstadlaw.com

[¶5] Copies of the same documents were simultaneously mailed to:

Alerus Financial, N.A.
Jerrod Hanson, Registered Agent
401 Demers Avenue
Grand Forks, North Dakota 58201

[¶6] To the best of Affiant's knowledge, the electronic address above given was the actual electronic mailing address, or post office address of the party intended to be so served. The above documents were duly e-mailed or mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

/s/ Jonathan T. Garaas

_____

Jonathan T. Garaas

Subscribed and sworn to before me this the 16th day of February, 2022.

/s/ David Garaas & Seal

_____

Notary Public