

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

<p>Renee Becker, Rick Bischof, Jacqueline Bischof, Dr. Attas Boutrous, Tim Clausnitzer, Stacey Clausnitzer, Gary Hanson, Darlyne Hanson, Dr. Craig Lambrecht, Jewel Lambrecht, Howard Malloy, Lori Malloy, Tony Masset, Gretchen Masset, John Miller, Dr. Brenda Miller, Kim Parson, Sharon Parson, Dr. Josh Rampton, Dr. Karen Rampton, John Shaffer, Mary Shaffer, Todd Tescher, Lindsey Tescher, James Volk, and Catherine Volk,</p> <p style="text-align: right;">Plaintiffs</p> <p>and</p> <p>Dr. Attas Boutrous, Tim Clausnitzer, Stacey Clausnitzer, Gary Hanson, Darlyne Hanson, Howard Malloy, Lori Malloy, Tony Masset, Gretchen Masset, John Miller, Dr. Brenda Miller, Kim Parson, Sharon Parson, Dr. Josh Rampton, Dr. Karen Rampton, John Shaffer, Mary Shaffer, James Volk, and Catherine Volk,</p> <p style="text-align: right;">Plaintiffs and Appellants</p> <p>v.</p> <p>Burleigh County, Lincoln Township, and Burleigh County Water Resource District,</p> <p style="text-align: right;">Defendants and Appellees.</p>	<p>Supreme Court No. 20180259</p> <p>Burleigh County District Court Case No.: 08-2018-CV-00725</p>
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ON APPEAL FROM SUMMARY JUDGMENT ENTERED ON JUNE 25, 2018
IN THE DISTRICT COURT, COUNTY OF BURLEIGH, BY THE
HONORABLE JAMES S. HILL

BRIEF OF APPELLANTS DR. ATTAS BOUTROUS, TIM CLAUSNITZER,
STACEY CLAUSNITZER, GARY HANSON, DARLYNE HANSON,
HOWARD MALLOY, LORI MALLOY, TONY MASSET, GRETCHEN
MASSET, JOHN MILLER, DR. BRENDA MILLER, KIM PARSON, SHARON
PARSON, DR. JOSH RAMPTON, DR. KAREN RAMPTON, JOHN SHAFFER,
MARY SHAFFER, JAMES VOLK, AND CATHERINE VOLK

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STATEMENT OF THE ISSUES

[¶ 1] Did the district court err in concluding that raising the streets in Fox Island to construct a levee for flood protection was within the original purpose of the dedication?

[¶ 2] Did the district court err in concluding the dedication was statutory and transferred the fee of the property to the public?

[¶ 3] Did the district err in concluding Lincoln Township did not violate its duty as trustee of the public streets by granting an easement to BCWRD to construct a levee for flood protection?

[¶ 4] Did the district court err in concluding Plaintiffs' inverse condemnation claim was premature?

[¶ 5] Did the district court err in concluding Plaintiffs do not have a substantial probability of succeeding on the merits?

[¶ 6] Did the district court err in awarding Defendants Burleigh County and Lincoln Township \$18,756.75 in costs and disbursements when it did not allow Plaintiffs time to object and awarded \$18,701.75 in expert witness fees in a matter that was disposed of on summary judgment a few months after it was commenced?

STATEMENT OF THE CASE

[¶ 7] Fox Island is a residential subdivision located to south of the City of Bismarck and is under the jurisdiction of Lincoln Township, which is unincorporated and governed by the Burleigh County Commission. Fox Island was approved as a subdivision in 1994, and the streets within Fox Island were dedicated to the public use, as provided by the plat. Fox Island is adjacent to the Missouri River and experienced flooding in 2009 and 2011. As part of a flood protection plan for Fox Island and the City of Bismarck, Defendant Burleigh County Water Resource District (BCWRD) intends to construct a levee by raising the grade of certain public streets within Fox Island. Lincoln Township granted an easement to BCWRD, giving it the right to construct the levee on the streets. Plaintiffs all own real property abutting the streets on which the levee will be constructed. Plaintiffs object to the granting of the easement and the construction of the levee as an unlawful taking of their property.

[¶ 8] Plaintiffs filed their Complaint on March 9, 2018, requesting declaratory relief pursuant to North Dakota Century Code ch. 32-23. Specifically, Plaintiffs requested the district court declare the plat dedication conveyed only an easement to the public for travel and transportation and that Plaintiffs held title to the property in fee simple absolute to the middle of streets abutting their properties subject to the public's easement. Plaintiffs also requested the district court declare the easement granted by Lincoln Township to BCWRD was unlawful, as it exceed the scope of the dedication.

[¶ 9] In conjunction with filing their Complaint, Plaintiffs also moved the district court for a temporary restraining order immediately prohibiting Defendants from accepting or approving bids for the construction of a levee within Fox Island and from proceeding with any preparations for construction or proceeding with construction of the levee. In

response, Defendants submitted a letter to the district court on March 13, 2018 indicating that no bids for construction of the levee had been requested and arguing an immediate restraining order was unnecessary. The district court denied Plaintiffs' motion for a temporary restraining order on March 20, 2018, concluding that Plaintiffs' motion was unnecessary at the time.

[¶ 10] Plaintiffs then filed a motion for a preliminary injunction on April 13, 2018 seeking the same injunctive relief as their motion for a temporary restraining order. The motion for preliminary injunction included additional exhibits demonstrating BCWRD was continuing to move forward with the Fox Island levee project during the pendency of this case. Defendants Burleigh County and Lincoln Township answered Plaintiffs' motion and filed a motion for summary judgment seeking judgment as a matter of law on all of Plaintiffs' claims. BCWRD only filed a response to Plaintiffs' motion for a preliminary injunction. A hearing on the motions was held on May 14, 2018.

[¶ 11] On June 13, 2018, the Court issued a memorandum and order denying Plaintiffs' motion for preliminary injunction and granting summary judgment in favor of all Defendants. In its memorandum, the district court found against Plaintiffs on all of the claims alleged in their Complaint. The district court found that raising the grade of the streets for flood protection was consistent "with the primary use of the dedication: public use." The district court also found a levee was a permissible "second use" under the dedication. The district court further determined the dedication was statutory, which vested "the fee of the property" in the public. On Plaintiff's inverse condemnation claim, the district court concluded that no taking had yet occurred and therefore "[Plaintiffs'] claim

is entirely hypothetical since they have brought their claim for inverse condemnation prior to any taking.”

[¶ 12] Defendants Burleigh County and Lincoln Township submitted proposed findings of fact, conclusions of law, and order for judgment, a proposed judgment, and a proposed statement of costs and disbursements on June 22, 2018. The district court adopted the proposed documents and entered its Findings of Fact, Conclusions of Law, and Order for Judgment, and Judgment three days later on June 25, 2018. Defendants Burleigh County and Lincoln Township were awarded their claimed costs and disbursements totaling \$18,756.75.

[¶ 13] Plaintiffs filed a notice of appeal with this Court on June 26, 2018, appealing from the district court’s memorandum order denying Plaintiffs’ motion for preliminary injunction and granting Defendants’ motion for summary judgment. Plaintiffs then filed an amended notice of appeal which included the district court’s Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment.

STATEMENT OF FACTS

[¶ 14] Fox Island is a residential subdivision located in Burleigh County and was approved by the Burleigh County Board of County Commissioners on April 5, 1994. App. 52. Lincoln Township has jurisdiction over the streets within Fox Island; however, because Lincoln Township is unorganized, it is governed by the Burleigh County Commission. App. 56. Plaintiffs are all owners of real property within the Fox Island Subdivision. App. 50-51.



[¶ 15] The original owners of Fox Island, Keith Larson and Craig J. Lambrecht, dedicated the streets within the subdivision to the “public use” when the subdivision was approved on April 5, 1994. App. 52. The dedication provided:

OWNER'S CERTIFICATE AND DEDICATION

KNOW ALL MEN BY THESE PRESENTS THAT KEITH LARSON AND CRAIG LAMBRECHT AS INDIVIDUALS AND JOHN W. LARSON, LEE A. TAVIS, MARSHA TAVIS AKA MARY MARSHA TAVIS, SPENCER C. BOISE, AND MARTHA JANE BOISE AKA MARTHA T. BOISE AS INDIVIDUALS, SPENCER C. BOISE AND MARTHA JANE BOISE AKA MARTA T. BOISE AS TRUSTEES OF SPENCER AND MARTHA BOISE REVOCABLE TRUST, BY AND THRU ARLEN M. RUFF THEIR ATTORNEY IN FACT PURSUANT TO THE POWER OF ATTORNEY OWNERS AND PROPRIETORS OF THE PROPERTY SHOWN ON THE ANNEXED PLAT HAVE CAUSED THAT PORTION DESCRIBED HEREON TO BE SURVEYED AND PLATTED AS 'FOX ISLAND SUBDIVISION' TO THE CITY OF BISMARCK, NORTH DAKOTA AND DO SO DEDICATE STREETS AS SHOWN HEREON INCLUDING ALL SEWER, CULVERTS, WATER AND GAS DISTRIBUTION LINES AND OTHER PUBLIC UTILITY LINES, WHETHER SHOWN HEREON OR NOT, TO THE PUBLIC USE FOREVER.

THEY ALSO DEDICATE EASEMENTS TO RUN WITH THE LAND, FOR GAS, ELECTRIC, TELEPHONE AND OTHER PUBLIC UTILITIES OR SERVICES UNDER THOSE CERTAIN STRIPS OF LAND DESIGNATED HEREON AS "UTILITY EASEMENTS".


ARLEN M. RUFF


KEITH LARSON

CRAIG J. LAMBRECHT


Id. The dedication also includes “Utility Easements” which are identified on the plat map as the fifteen-foot strips parallel to the streets, but do not encroach on the streets. App. 52-53. The plat dedication did not reference flood protection. Id.

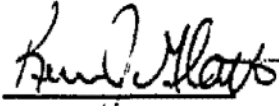
[¶ 16] The dedication was accepted by the Burleigh County Board of County Commissioners on the same day, April 5, 1994:

APPROVAL OF BOARD OF COUNTY COMMISSIONERS

THE BOARD OF COUNTY COMMISSIONERS OF BURLEIGH COUNTY, NORTH DAKOTA, HAS APPROVED THE SUBDIVISION OF LAND ON THE ATTACHED PLAT, HAS ACCEPTED THE DEDICATION OF ALL STREETS SHOWN THEREON AND HAS APPROVED THE GROUNDS AS SHOWN ON THE ATTACHED PLAT AS AN AMENDMENT TO THE MASTER PLAN OF BURLEIGH COUNTY.

THE FOREGOING ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF BURLEIGH COUNTY, NORTH DAKOTA, WAS TAKEN BY RESOLUTION APPROVED THE 5th DAY OF APRIL, 1994.


DOUGLAS SCHONERT (CHAIRMAN)


KEVIN GLATT (COUNTY AUDITOR)

App. 52.

[¶ 17] In response to flooding in 2009 and 2011, the Burleigh County Water Resource District (BCWRD) plans to build a levee within the Fox Island Subdivision. App. 57-93. The levee would be partially built by raising public roadways within Fox Island by one to two feet. App. 79, 94-111. The roadways to be raised are Gallatin Loop, Gallatin Drive, and Far West Drive. App. 69 & 78. To permit BCWRD to construct the proposed levee, Burleigh County, on behalf of Lincoln Township, granted BCWRD an easement upon and over these roadways on February 9, 2018. App. 112-14. The easement was specifically granted “for the purposes of constructing and maintaining an earthen flood control levee.” App. 112. A map of the proposed levee is below (the red lines indicate where the levee will be constructed by raising the grade of the streets):



App. 78. Plaintiffs’ properties all abut the streets BCWRD intends to raise, and many of Plaintiffs’ properties are also located on the so-called “wet side” of the levee. App. 50-51.

[¶ 18] In its order denying Plaintiffs’ motion for preliminary injunction and granting summary judgment in favor of Defendants, the district court found the primary use of streets was travel or transportation but that flood protection was a permissible “second[ary] use” of the streets that was within the purpose of the original dedication. App. 665, ¶ 23. The district court also found the dedication was statutory and therefore transferred the fee of the property to the public. App. 666-67, ¶¶ 27 & 30. Thus, pursuant to the district court’s order and judgment, Plaintiffs’ had no property rights in the property to middle of the street, and the streets were not limited to being used only for travel and transportation under the original dedication.

STANDARD OF REVIEW

[¶ 19] With regard to the district court’s award of summary judgment, this Court has enumerated its standard of review as follows:

A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Markgraf v. Welker, 2015 ND 303, ¶ 10, 873 N.W.2d 26 (internal quotation omitted).

This Court has also noted summary judgment is not appropriate “if reasonable differences of opinion exist as to the inferences to be drawn from the undisputed facts.” Id. In addition, a district court’s decision to grant or deny a preliminary injunction is reviewed under the abuse of discretion standard. Vorachek v. Citizens State Bank of Lankin, 461 N.W.2d 580, 585 (N.D. 1990). “A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner.” Id.

LAW AND ARGUMENT

[¶ 20] This Court should (i) reverse the district court’s award of summary judgment to Defendants; (ii) reverse the court’s denial of Plaintiffs’ motion for a preliminary injunction; and (iii) remand this matter back to the district court with instructions to enter a preliminary injunction prohibiting Defendants from proceeding with construction of the levee. However, even if this Court affirms the award of summary judgment, this Court should reverse the district court’s award of costs and disbursements

to Defendants Burleigh County and Lincoln Township in the amount of \$18,756.75 and direct the district court to provide Plaintiffs' with an opportunity to object to the requested costs and disbursements.

I. This Court Should Reverse the District Court's Award of Summary Judgment.

[¶ 21] This Court should reverse the district court's award of summary judgment in favor of Defendants because the district court erroneously found and concluded:

- 1) the use of the Fox Island streets for flood protection is within the purposes of the original dedication;
- 2) the dedication was statutory;
- 3) the dedication transferred the fee of the property to the public;
- 4) Lincoln Township did not violate its duty as trustee of the public streets by granting an easement to BCWRD to construct a levee for flood protection; and
- 5) Plaintiffs' inverse condemnation claim was premature.

Based upon the above issues, this Court should remand this matter back to the district court for further proceedings consistent with the Court's decision.

1. The district court erroneously concluded use of the Fox Island streets for flood protection is within the purposes of the original dedication.

[¶ 22] The district court's conclusion that raising the grade of the streets in Fox Island to construct a levee is an allowable "secondary use" within the purpose of the original dedication is contrary to the plain and ordinary meaning of the original dedication and is a conclusion that this Court has explicitly rejected. Additionally, because the district court applied an interpretation of the dedication that is distinct from those argued by the parties, it should have declared the dedication ambiguous and considered evidence of the intent of the parties to the dedication.

A. The district court's interpretation of the dedication is contrary to its plain and ordinary meaning.

[¶ 23] The plat of Fox Island dedicated the streets “to the public use forever.” This Court has consistently interpreted dedications of streets to the public use to mean dedication for only travel and transportation, and this Court has repeatedly rejected an expanded view of streets’ uses. Nevertheless, the district court rejected this Court’s precedent and expanded dedication of streets to also include “secondary or subsequent uses.” App. 665, ¶¶ 23-24. The district court agreed the primary use of streets is travel or transportation but concluded “[s]econd or subsequent uses that are separate and distinct from the primary use does not extinguish the primary use” are also within the purposes of dedication of streets. App. 665 at ¶ 23. Applying its interpretation this matter, the district court reasoned that, because flood protection (a secondary use) did not extinguish travel or transportation over the streets in Fox Island, the “raising of the road is consistent with the primary use of the dedication: public use.” Id.

[¶ 24] While it is accurate that the streets in Fox Island were dedicated “to the public use forever,” this Court has repeatedly held such a dedication is for travel and transportation alone and has declined to expand this interpretation by importing other uses that are arguably for the benefit of the public. This Court first addressed the issue of public dedication of streets in Donovan v. Allert, 91 N.W. 441 (N.D. 1902). In Donovan, this Court considered whether the erection of telephone poles on the public streets was within the purposes of the original dedication, which dedicated the streets to “public use.” Donovan, 91 N.W. at 442-44. The Donovan Court held “[t]he primary use of a street or highway is confined to travel or transportation.” Id. at 443. The Court expanded:

Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, on in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in car drawn by horses or moved by electricity, the object to be gained is moving from place to place.

Id. Consequently, because the uses of the streets were confined to travel and transportation, the erection of telephone poles was not within the purposes of the dedication. Id. at 443-44.

[¶ 25] Shortly after Donovan, this Court was faced with the similar question of whether telephone poles and telegraph lines were within the purposes of the dedication of a rural highway. See Cosgriff v. Tri-State Telephone & Telegraph Co., 107 N.W. 525, 526-27 (N.D. 1906). The Cosgriff Court refused to overrule Donovan and rejected the defendant's urging that it adopt a "more modern and progressive view" that would expand the uses of streets beyond travel or transportation. Id. at 527. This Court explained its rejection of the modern view in criticizing the opinion of a South Dakota court:

This [South Dakota] case, it will be noted, goes to the extent of holding that when a different use of the streets becomes necessary "the rights of the fee owners must yield to the public good," and that the new use must be deemed to have been compensated for in the original appropriation or dedication. The effect of this and cases announcing the same view . . . is to deprive abutting owners of their property rights by judicial fiat-rights, which, whether of great or small value, have been made the objects of constitutional protection. We cannot assent to this mode of transferring property rights.

Id. The Cosgriff Court explained "if telephone companies require the use of private property for the construction of their lines, they have the power of acquiring it by condemnation, but they may not, in our opinion lawfully take it without first making compensation." Id.

[¶ 26] The Donovan holding was more recently affirmed in City of Fargo v. Farhlander, 199 N.W.2d 30 (N.D. 1972) and Ceynar v. Tesoro Logistics LP, 2017 ND 112, 894 N.W.2d 374. In Farhlander, this Court again relied on Donovan to conclude a pedestrian mall was inconsistent with travel and transportation. 199 N.W.2d at 34. Although pedestrian traffic was consistent with travel, the Court held a “display area, sales area, exhibit area, restaurant theater, and retail spaces” were not and therefore were outside the purposes of the original dedication. Id. In Ceynar, this Court reviewed the scope of an easement limited to “highway purposes” and relied on Donovan in holding a parking lane was consistent with travel and transportation and thus within the scope of the easement. Ceynar, 2017 ND 112, ¶¶ 2, 14-17.

[¶ 27] As the above cases show, this Court has consistently held that streets dedicated to public use are dedicated for travel and transportation only and uses beyond travel and transportation are not within the purposes of the original dedication. Despite this Court’s consistent holdings, the district court applied the previously-rejected modern view expanding the uses of streets by concluding “second[ary]” or “subsequent uses” which do not “*extinguish* the primary use” are within the purpose of the original dedication. App. 665, ¶ 23 (emphasis added). Just as the Cosgriff Court reasoned, adopting the district court’s position in this case would deprive Plaintiffs’ of their property rights simply because flood protection is a public benefit and does not extinguish travel, regardless of whether flood protection is within the intended scope of the dedication. Being public entities, Defendants have the ability to acquire Plaintiffs’ property through eminent domain proceedings and should not be allowed to bypass this constitutional protection.

[¶ 28] Additionally, if uses outside of travel are allowed as secondary or subsequent uses, public streets could be used for anything as long the public can still travel upon them. Defendants could raise the streets in Fox Island twenty feet or even two-hundred feet, so long as such change would not extinguish travel. Defendants could also surely erect telephone poles, radio towers, or other public structures along the streets if the structures did not extinguish the public's ability to travel and a court considered such structures to be for the public benefit. As these examples demonstrate, secondary uses could be expansive and place significant burdens on adjacent property owners, depriving them of their property rights through "judicial-fiat rights." As it has repeatedly done before, this Court should conclude that the dedication of the streets in Fox Island to public use means that the streets were dedicated solely for travel and transportation and using the streets for flood protection is not encompassed by the original dedication.

[¶ 29] Finally, the district court also relied on N.D.C.C. § 40-05-01(8) ("Powers of all municipalities") in concluding "a city has the statutory power to lay out, establish, open, alter, repair, clean widen, vacate, grade, pave, park, or otherwise improve and regulate the use of streets and prevent and regulate obstructions and encroachments thereon." App. 664-65, ¶ 22. Fox Island is not within the City of Bismarck; it is within the jurisdiction of Lincoln Township, an unincorporated township. Therefore N.D.C.C. § 40-05-01(8) does not apply. Regardless, the statute does not provide any authority to construct a levee under or on a street, but rather provides municipalities with the power to "prevent and regulate obstructions and encroachments" on the streets. N.D.C.C. § 40-05-01(8). Cleaning, repairing, widening, and paving streets are clearly consistent with travel as they

aid in the public's travel over the streets, while the construction of a levee does not aid in travel or transportation.

B. The district court should have deemed the dedication ambiguous and considered extrinsic evidence of the parties' intent.

[¶ 30] If the district court did not find the plain, ordinary meaning of the dedication to dedicate the streets for travel and transportation alone, then the court should have declared the dedication as ambiguous and considered evidence of the intent at the time of the dedication.

[¶ 31] “Documents transferring real estate” should be interpreted “in the same manner as contracts.” Winnie Development, LLLP v. Reveling, 2018 ND 47, ¶ 7, 907 N.W.2d 413. “Whether a contract is ambiguous is a question of law” which this Court reviews independently. Langer v. Bartholomay, 2008 ND 40, ¶ 12, 745 N.W.2d 649. A “contract is ambiguous if rational arguments can be made for different interpretations.” Id. “When the terms of a contract are ambiguous, extrinsic evidence of the parties' intent may be considered and the terms of the contract and the parties' intent become questions of fact.” Moen v. Meidinger, 547 N.W.2d 544, 547 (N.D. 1996) (quoting Wachter Development, L.L.C. v. Gomke, 544 N.W.2d 127, 131 (N.D.1996)).

[¶ 32] Here, different meanings of the dedication were argued by the parties and the district court ultimately settled on an interpretation distinct from any party's argued interpretation. Plaintiffs argued to the district court that the streets were dedicated to the public to be used for only travel and transportation, and any use inconsistent with travel or transportation was not within the scope of the dedication. App. 157-62. Defendants agreed that travel and transportation was the primary use of streets but argued that the streets in

Fox Island could also be used for other municipal purposes that do not interfere with travel or transportation, such as flood protection. App. 205-09.

[¶ 33] Despite the parties' arguments, the district court concluded that the dedication of streets allows not only for travel and transportation over the streets but also for "secondary or subsequent uses" as long as these uses do not extinguish travel or transportation. App. 665, ¶¶ 23-24. While the district court's interpretation is similar to that argued by Defendants, it actually goes further: the court's interpretation allows secondary uses of the streets as long as they do not extinguish travel or transportation, rather than just interfere with travel and transportation as Defendants argued. Accordingly, because the parties presented several rational arguments for differing interpretations of the dedication, if the district court did not find the meaning to be clear and unambiguous, it should have considered extrinsic evidence to ascertain the intent of the parties to the dedication.

[¶ 34] The sole evidence before the district court as to the intent of the parties were the affidavits of Keith Larson and Craig Lambrecht, the property owners at the time the plat was prepared and who executed the dedication. App. 38-43. In their affidavits, Larson and Lambrecht both testified they did not intend to dedicate the streets for flood protection. App. 39 & 42. No other evidence was presented to the district court on the intent of the parties, such as an affidavit from the Burleigh County Commissioners who accepted the plat dedication. Therefore, the undisputed facts show that the streets were not intended to be dedicated to the public to use for flood protection or for any secondary uses, and the district court was clearly erroneous to ignore this undisputed evidence.

2. The district court erroneously concluded the dedication was statutory.

[¶ 35] This Court should conclude the district court erroneously concluded the undisputed facts established the dedication was statutory because several issues of material fact exist as to whether the dedication strictly complied with N.D.C.C. ch. 40-50.1 (providing the requirements for platting of townsites). A “[d]edication arises when a private landowner sets aside land for public use.” Winnie Development, LLLP, 2018 ND 47, ¶ 8. “Dedication may be express or implied, and may be established statutorily or by common law.” Id. A statutory dedication is “in the nature of a grant” and “is almost universally created by the filing and recording of a plat.” Id. (quoting Tibert v. City of Minto, 2004 ND 97, ¶ 13, 679 N.W.2d 440, & 11A Eugene McQuillin, The Law of Municipal Corporations § 33:4 (3d ed. 2009)). Common-law dedications “rest upon the principals of estoppel in pais.” Id. (quoting Tibert, 2004 ND 97, ¶ 13).

[¶ 36] Under North Dakota law, to be a valid statutory dedication, a plat dedication must strictly comply with the governing statutes, N.D.C.C. §§ 40-50.1-03 through 40-50.1-05. Id. ¶ 9. Section 40-50.1-03, N.D.C.C., provides numerous requirements, such as that the signatures on the plat must be in “black ink, not ballpoint” and the plat must be accompanied by “a copy of a title insurance policy or an attorney’s opinion of title” when presented for approval. If a plat dedication does not comply with these requirements, it may still be a common-law dedication. Winnie Development, LLLP, 2018 ND 47, ¶¶ 8-9.

[¶ 37] While the undisputed facts establish the dedication of Fox Island was an attempted plat dedication, the undisputed facts do not establish that the dedication fully complied with the requirements of N.D.C.C. ch. 40-50.1. The district court did not cite any facts to support its conclusion that the dedication was a statutory dedication, nor is there

any discussion of whether the dedication complied with N.D.C.C. ch. 40-50.1. App. 666, ¶ 27. The sole evidence on the nature of the dedication before the district court was a copy of the plat, and this evidence did not indicate whether the signatures were in “black ink, not ballpoint,” or that a “copy of a title insurance policy or an attorney’s opinion of title” was presented for approval to Lincoln Township or Burleigh County.

[¶ 38] Contrary to the district court’s conclusion, the undisputed facts show the dedication does not comply with Chapter 40-50.1. Section 40-50.1-05 requires that “the land intended to be used for the streets, alleys, ways, or other public uses in any jurisdiction or addition thereto must be held in the corporate name of the jurisdiction in trust for the uses and purposes set forth and expressed and intended.” (emphasis added). It is undisputed in the present matter that Lincoln Township is unincorporated and has jurisdiction over the streets within Fox Island. App. 151, ¶ 2; App. 652, ¶¶ 6 & 9. Based on these undisputed facts, the dedication is not in compliance with N.D.C.C. § 40-50.1-05 and Lincoln Township cannot hold title to the streets within Fox Island pursuant to N.D.C.C. § 40-50.1-05 because it is unincorporated.

3. The district court erroneously concluded the fee of the property was transferred to the public by the dedication.

[¶ 39] Additionally, this Court should conclude the district court erroneously concluded the fee of the property was transferred to the public as a result of the dedication. This Court should overrule such determination because even a statutory dedication of streets to public use transfers only an easement to the public, or at most a limited fee, and the abutting property owners still have property rights to the middle of the street.

[¶ 40] Even if this Court affirms the district court’s conclusion that the dedication was statutory, it should still conclude the title transferred was not fee simple absolute and

did not extinguish Plaintiffs' rights in the property to middle of the streets in Fox Island. The district court did not address the type of fee title transferred, but, after concluding that the dedication was statutory, simply added that "the fee of the property is in the public," and that "Plaintiffs do not hold fee simple absolute title in the real property to the middle of the street to which their property abuts." App. 666-67.

[¶ 41] This Court should conclude that a dedication of streets to public use transfers only an easement to the public, or at most a limited fee, and the abutting property owners still retain property rights up the middle of the street. As this Court held in Donovan, a dedication of streets to public use "does not convey an absolute fee to the public, but reserves the whole estate and title, except the limited fee conveyed to the public for the designated and intended use." Donovan, 91 N.W. at 442.

[¶ 42] Recently, in State v. Wilkie, 2017 ND 142, 895 N.W.2d 742, this Court relied on Donovan in concluding a dedication of streets to public use conveys only an easement to the public. The Wilkie Court was also analyzing a plat dedication in which the University of North Dakota dedicated the streets to public use. Id. ¶ 11. The language in the Wilkie dedication was very similar to the dedication language in the present matter:

"We, the undersigned, being all the Owners and lien holders of the lands platted herein, do hereby voluntarily consent to the execution of the Plat of University Village Addition to the City of Grand Forks, Grand Forks County, North Dakota and do dedicate the streets, alleys, parks and public grounds as shown thereon . . . to the public use."

Id.¹ This Court treated the above dedication of streets to the public use as a grant of an easement to the public which did "not relinquish the owner's property rights" and therefore

¹ The plat dedication in Wilkie goes on to designate easements specifically for "Flood Protection and Utility" showing that dedications for flood protection can be specifically

the University of North Dakota still owned the property to middle of the street. Id. ¶¶ 12-14. This Court did not determine whether the plat dedication was statutory or common-law, but, in citing the Donovan Court’s holding, concluded the plat dedication conveyed only an easement. Id. ¶ 12.

[¶ 43] The district court dismissed Wilkie as being irrelevant, claiming that a judicial determination of property ownership in a criminal case is “exceedingly different” than in a civil matter. App. 666, ¶ 29. In reality, this Court has relied on Donovan’s holding in both civil and criminal cases. See, e.g., Wilkie, 2017 ND 142, ¶ 11; Ceynar, 2017 ND 112, ¶¶ 2 & 15; Fahrlander, 199 N.W.2d at 34; Cosgriff, 107 N.W. at 526-27. There is no reason for the law applicable to determining property ownership to be altered based on the type of case before a court, as property ownership is static and based upon ancient legal concepts dating to the Norman Invasion of 1066. And, as ownership of the street on which the arrest took place in Wilkie determined whether the officer had jurisdiction to make the arrest, this Court’s holding that only an easement was transferred was essential to its decision. Wilkie, 2017 ND 142, ¶¶ 8, 10, 11-14.

[¶ 44] In addition, this Court should recognize its prior decisions regarding the limited nature of property rights transferred by a dedication are consistent with N.D.C.C. § 40-50.1-05, which governs the conveyance of land by plat dedications. The statute provides “every donation or grant to the public . . . is a sufficient conveyance to vest the fee simple title in the parcel of land as designated on the plat. . . . The land intended to be used for the streets, alleys, ways, or other public uses in any jurisdiction or addition thereto

granted, if intended. Wilkie, 2017 ND 142, ¶ 11, Supreme Court No. 20160401, Appellee’s Appendix 16.

must be held in the corporate name of the jurisdiction in trust for the uses and purposes set forth and expressed and intended.”

[¶ 45] Neither the above-cited case law nor N.D.C.C. § 40-50.1-05 specify the type of fee estate conveyed by a plat dedication, whether fee simple absolute, fee simple determinable, fee simple conditional, or the like. In addition, the requirement in N.D.C.C. § 40-50.1-05 that a dedicated street is held “in trust for the uses and purposes set forth and expressed and intended” defeats the district court’s conclusion that a statutory dedicate conveys fee simple absolute. If the dedication conveyed fee simple absolute, then the street would not be held in trust, and its uses would not be limited to those intended by the dedication. Section 40-50.1-05, N.D.C.C., indicates the Legislature intended to limit the title transferred in a street dedication, consistent with this Court’s longstanding holding in Donovan.

[¶ 46] Furthermore, the limited nature of fee transferred in a street dedication is demonstrated by the procedures for vacating streets previously dedicated to public use. If streets are no longer used for travel or transportation, N.D.C.C. ch. 40-39 generally provides they revert to the abutting property owners through vacation procedures established by the Legislature. See N.D.C.C. Ch. 40-39 (“Opening and Vacating Streets, Alleys, and Public Places”). If a street dedication transferred fee simple absolute, then the streets would need to be conveyed to abutting property owners, not simply vacated. The vacation of publicly-dedicated streets demonstrates the nature of the grant is at most a fee simple determinable grant, where the fee reverts back to abutting landowners when the use is no longer consistent with the nature of the dedication.

[¶ 47] If a dedication of streets to public use conveys only an easement for travel and transportation, the property owners abutting the street still hold fee simple absolute title, subject to the public's right of way. See N.D.C.C. § 47-01-16 ("An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."); Donovan, 91 N.W. at 443 (abutting property owners have "the exclusive right to the soil" and "all the usual rights and remedies of the owner of the freehold.") (quoting Elliot, Roads, & S. p. 519)). On the other hand, if a dedication of streets to public use conveys a fee simple determinable, the abutting property owners retain a reversionary ownership interest in the dedicated street, which property reverts to the owners if and when the beneficiary of the dedication exceeds its scope. Either way, this Court should conclude the district court was clearly erroneous to conclude the dedication in this case eliminated the abutting property owners' rights in the dedicated streets.

4. The district court erroneously concluded Lincoln Township did not violate its duty as trustee of the public streets by granting an easement to BCWRD to construct a levee.

[¶ 48] As previously stated, Lincoln Township is unincorporated and therefore cannot hold the streets in Fox Island in its corporate name as required by N.D.C.C. 40-50.1-05. Even if Lincoln Township were able to hold the streets in its corporate name, this Court should still conclude it is in violation of the duties imposed by N.D.C.C. § 40-50.1-05 because it granted an easement to BCWRD for the specific purpose of erecting a flood-control levee, which use is beyond the scope of the original dedication.

[¶ 49] Section 40-50.1-05, N.D.C.C., provides dedicated streets "must be held in the corporate name of the jurisdiction *for the uses and purposes set forth and expresses and intended.*" (Emphasis added). See also City of Jamestown v. Miemietz, 95 N.W.2d

897, 902 (N.D. 1991) (Title to streets is “held by the municipality in trust for the public, not in a proprietary capacity, and a municipality is without power to alienate the same, regardless of whether the corporation owns the fee or has merely an easement and it holds as trustee for the public.”).

[¶ 50] As discussed above, the uses and purposes expressed in the dedication of the Fox Island streets are limited to travel and transportation. By allowing the streets in Fox Island to be used for the construction of a levee, Lincoln Township has violated N.D.C.C. § 40-50.1-05 and breached its duty as trustee.

5. The district court erroneously concluded Plaintiffs’ inverse condemnation was premature.

[¶ 51] The district court erred in concluding Plaintiffs’ claim for inverse condemnation is premature because Lincoln Township’s granting of the easement to use the Fox Island streets for flood protection was itself a taking, and an injunction is appropriate remedy to prevent a further taking from occurring.

[¶ 52] This Court should conclude a taking occurred when Burleigh County, acting on behalf of Lincoln Township, granted an easement to BCWRD for the construction of a flood-control levee. The easement exceeded the scope of the dedication and imposed new burdens upon the adjoining landowners who either remain owners of a fee simple absolute interest to the middle of the street or have a reverter interest that is triggered upon exceeding the scope of the dedication. Under either scenario, the easement for flood control constituted a new servitude upon their property interests, and the imposition of this new servitude constituted a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433-36 (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164 (1979) (stating the right to exclude is “one of the most essential sticks in the bundle of rights that are

commonly characterized as property.”)). See also Cosgriff, 107 N.W. at 526 (“The proposed use must be within the purpose of the original dedication. If it is not, it constitutes an additional servitude. . . .”). While the monetary damages caused by the easement may be small in comparison to the damages caused by the actual construction of the levee, a taking exists upon intrusions of property rights whether large or small.

[¶ 53] Article 1, Section 16 of the Constitution of North Dakota mandates that “[p]rivate property shall not be taken or damaged for public use without just compensation having been *first made to*, or paid into court for the owner.” (Emphasis added). Because the taking of private property without compensation is so serious, an injunction is an appropriate remedy to prevent it from occurring. See Cosgriff, 107 N.W. at 527-28 (holding plaintiff was entitled to an injunction to prevent the erection of telephone lines upon the highway); Donovan, 91 N.W. at 445-47 (holding plaintiffs were entitled to an injunction to prevent the placement of telephone poles upon the street). Taking property and paying later is a violation of the state constitution and Plaintiffs are not required to wait for their property to be taken as they are required to just compensation prior to the taking. Just as in Donovan, Defendants are “proceeding to damage the plaintiff[s]’ property without first complying with a mandatory provision of the constitution” and therefore an injunction is an appropriate remedy. Donovan, 91 N.W. at 445.

[¶ 54] In this case, the district court relied on Hager v. City of Devils Lake, 2009 ND 180, ¶ 42, 773 N.W.2d 420 and Maragos v. City of Minot, 191 N.W.2d 570, 572 (N.D. 1971) to conclude that Plaintiffs did not yet have a claim for inverse condemnation. Both Hager and Maragos involved questions of when the statute of limitations began to run for an inverse condemnation claim. Neither case addressed whether a plaintiff could request

injunctive relief to prevent an imminent taking without first receiving compensation. Hager, 2009 ND 180, ¶ 42; Maragos, 191 N.W.2d at 572. If an injunction were not available to prevent an unlawful taking, a public entity would be encouraged to just take property first and compensate the property owner later, if the owners made a claim, rather than adhering to the Constitution of North Dakota and providing just compensation before the taking occurs.

II. The District Court Erred in Denying Plaintiffs' Motion for Preliminary Injunction Because Plaintiffs Are Likely to Succeed on the Merits.

[¶ 55] In addition to reversing the district court's award of summary judgment, this Court should also reverse the district court's denial of Plaintiffs' motion for a preliminary injunction. As discussed above, Plaintiffs' claims and arguments are consistent with this Court's prior precedent involving similar facts and are also congruous with N.D.C.C. ch. 40-50.1. Thus, if and when Plaintiffs prevail on these issues before this Court on appeal, their claims will be likely to succeed and the district court should be directed to entered a preliminary injunction prohibiting the Defendants from proceeding with construction of the levee in Fox Island during the pendency of the case.

III. The District Court Erred in Awarding Defendants Burleigh County and Lincoln Township \$18,756.75 in Costs and Disbursements.

[¶ 56] Even if this Court affirms the award of summary judgment against Plaintiffs, it should reverse the district court's award of costs and disbursements to Defendants Burleigh County and Lincoln Township because Plaintiffs were not provided with an opportunity to object and the district court made no findings regarding the reasonableness of the expert witness fees.

[¶ 57] Defendants Burleigh County and Lincoln Township submitted their proposed statement of costs and disbursements on June 22, 2018. The costs and disbursements included \$18,701.75 for “Houston Engineering, Inc. – Expert Fees (6/11/18).” App. 676-77. Defendants did not provide the district court an itemized invoice identifying the specific services underlying the expert fee request, nor even the persons who supposedly provided expert services. The Clerk of Court entered the full amount of the requested costs and disbursements three days later on June 25, 2018 without allowing Plaintiffs adequate time to object to the statement of costs and disbursements. App. 687.

[¶ 58] Pursuant to N.D.C.C. § 28-26-06, “the clerk of district court shall tax as part of the judgment in favor of the prevailing party . . . the fees of expert witnesses. The fees must be reasonable as determined by the court” In awarding reasonable expert witness fees, a court should consider seven factors:

- (1) the common-law area of expertise;
- (2) education and training that is required to provide expert insight that is sought;
- (3) prevailing rates of other comparably respected available experts;
- (4) nature, quality, and complexity of discovery responses provided;
- (5) the fee actually being charged to the party who retains the expert;
- (6) fees traditionally charged by the expert on related matters; and
- (7) any other factor likely to be of assistance to the court in balancing the interests implicated.

N. Dakota Dep't of Transportation v. Schmitz, 2018 ND 113, ¶ 11, 910 N.W.2d 874 (internal quotation omitted).

[¶ 59] An award of expert fees is reviewed “for abuse of discretion.” Id. ¶ 5. “A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law.” Id. (quoting Thompson v. Schmitz, 2011 ND 70, ¶ 18, 795 N.W.2d 913). In this case, the district court clearly misapplied the law by failing to provide Plaintiffs with an opportunity to object to the proposed costs and disbursements, as well as awarding fees without applying the respective law.

[¶ 60] As this matter was disposed of on summary judgment approximately three months after it was commenced, and no evidentiary hearings, expert depositions, or other significant fact discovery took place, expert witness fees of \$18,701.75 are not reasonable. The contested issues in this matter primarily involved legal issues surrounding the dedication language and the application of North Dakota law to the dedication. The invoice and description of tasks completed by Houston Engineering do not show why its expertise was needed or how the tasks it completed were related to responding to Plaintiffs’ motion for a preliminary injunction or assisting in preparing Defendants’ motion for summary judgment. In addition, under N.D.R.Ct. 7.1(a), parties specifically have 14 days to respond to proposed findings of fact and conclusions of law. While the rule does not specifically apply to proposed Statements of Costs and Disbursements, it is instructive on the time period normally granted to review and respond to proposed documents.

[¶ 61] Therefore, this Court should reverse the district court’s award of \$18,756.75 in costs and disbursements to Defendants Burleigh County and Lincoln Township and

direct the district court to allow Plaintiffs to object to the statement of costs and disbursements.

CONCLUSION

[¶ 62] This Court should reverse the district court's award of summary judgment to Defendants and remand the matter for further proceedings. This Court should also reverse the district court's denial of Plaintiffs' motion for a preliminary injunction and direct the district court to enter a preliminary injunction prohibiting Defendants from proceeding with construction of the Fox Island levee. Lastly, even if this Court affirms the award of summary judgment in favor of Defendants, this Court should reverse the district court's award of costs and disbursements to Defendants Lincoln Township and Burleigh County in the amount of \$18,756.75 and direct the district court to provide Plaintiffs with an opportunity to object.

Dated this 1st day of August, 2018.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

/s/ Stephen Welle

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Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Renee Becker, Rick Bischof, Jacqueline Bischof, Dr. Attas Boutrous, Tim Clausnitzer, Stacey Clausnitzer, Gary Hanson, Darlyne Hanson, Dr. Craig Lambrecht, Jewel Lambrecht, Howard Malloy, Lori Malloy, Tony Masset, Gretchen Masset, John Miller, Dr. Brenda Miller, Kim Parson, Sharon Parson, Dr. Josh Rampton, Dr. Karen Rampton, John Shaffer, Mary Shaffer, Todd Tescher, Lindsey Tescher, James Volk, and Catherine Volk,

Plaintiffs

and

Dr. Attas Boutrous, Tim Clausnitzer, Stacey Clausnitzer, Gary Hanson, Darlyne Hanson, Howard Malloy, Lori Malloy, Tony Masset, Gretchen Masset, John Miller, Dr. Brenda Miller, Kim Parson, Sharon Parson, Dr. Josh Rampton, Dr. Karen Rampton, John Shaffer, Mary Shaffer, James Volk, and Catherine Volk,

Plaintiffs and Appellants

v.

Burleigh County, Lincoln Township, and Burleigh County Water Resource District,

Defendants and Appellees.

Supreme Court No. 20180259

Burleigh County District Court Case
No.: 08-2018-CV-00725

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Jessica Simpson, being first duly sworn, deposes and says that on August 7, 2018, she served the following documents:

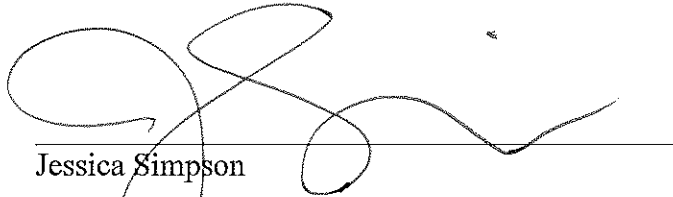
Appellant's Brief
Appellant's Appendix (updated cover page only)

Via email upon the following:

Clerk of the Supreme Court ND
supclerkofcourt@ndcourts.gov

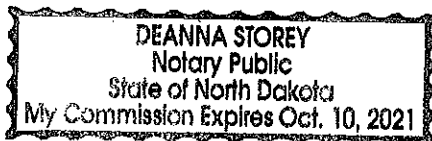
Scott Porsborg
Austin Lafferty
sporsborg@smithporsborg.com
alafferty@smithporsborg.com

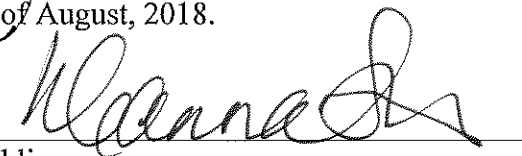
David Bliss
blisslaw@blisslaw.com



Jessica Simpson

Subscribed and sworn to before me this 7th day of August, 2018.





Notary Public
Cass County, North Dakota

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Renee Becker, Rick Bischof, Jacqueline Bischof, Dr. Attas Boutrous, Tim Clausnitzer, Stacey Clausnitzer, Gary Hanson, Darlyne Hanson, Dr. Craig Lambrecht, Jewel Lambrecht, Howard Malloy, Lori Malloy, Tony Masset, Gretchen Masset, John Miller, Dr. Brenda Miller, Kim Parson, Sharon Parson, Dr. Josh Rampton, Dr. Karen Rampton, John Shaffer, Mary Shaffer, Todd Tescher, Lindsey Tescher, James Volk, and Catherine Volk,

Plaintiffs/Appellants,

v.

Burleigh County, Lincoln Township, and
Burleigh County Water Resource District,

Defendants/Appellees.

Supreme Court No. 20180259

Burleigh County District Court Case
No.: 08-2018-CV-00725

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Jessica Simpson, being first duly sworn, deposes and says that on August 1, 2018, she served the following documents:

Appellants' Brief (via email)
Appellants' Appendix (via USPS on flash drive)

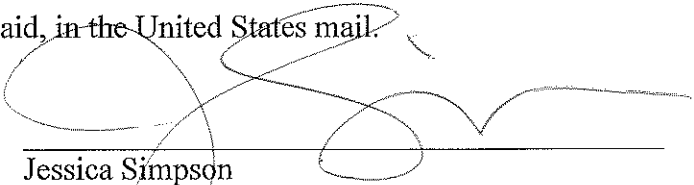
by placing a true and correct copy thereof in an envelope addressed as follows upon:

Clerk of the Supreme Court ND
600 E. Boulevard Avenue
Bismarck, ND 58505
supclerkofcourt@ndcourts.gov

Scott Porsborg
Austin Lafferty
PO Box 460
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sporsborg@smithporsborg.com
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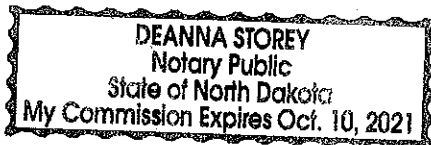
David Bliss
Bliss Law Firm
400 E. Broadway Ave, Suite 308
Bismarck, ND 58501
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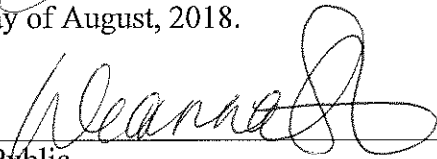
and depositing the same, with postage prepaid, in the United States mail.



Jessica Simpson

Subscribed and sworn to before me this 1st day of August, 2018.





Notary Public
Cass County, North Dakota