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IN THE OFFICE OF THE
CLERK OF SUPREME COURT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

OCT 27 2011

Fred M. Hector, Jr.,

STATE OF NORTH DAKOTA

Petitioner-Appellant,

Supreme Court No. 20110187

vs.

District Court No. 09-2009-CV-04473

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

Respondent-Appellee.

REPLY BRIEF OF PETITIONER-APPELLANT

APPEAL FROM (A) THE ORDER ON APPEAL FROM DECISION OF
LOCAL GOVERNING BODY ENTERED ON MAY 13, 2011; (B) THE ORDER
FOR JUDGMENT DATED JUNE 24, 2011, AND THE RESULTING
JUDGMENT DATED JUNE 27, 2011, BOTH OF WHICH WERE FILED
ON THE SAME DAY OF THE ORIGINAL NOTICE OF APPEAL

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
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TABLE OF CONTENTS

	Page
ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
LAW AND ARGUMENT	4
POINT 1. The Assessment Commission failed to perform its statutory duties.	5
A. The wrong party actually made the assessment based only on Fargo’s Infrastructure Funding Policy, and not upon the benefit to each lot.	5
B. The Assessment Commission failed to timely file the assessment list with the city.	7
C. The Assessment Commission failed to make proper assessment of benefits.	7
1. The interest costs of \$1,199,854.40 is challenged.	7
2. Costs for extra work not authorized by the adopted Resolution of Necessity is challenged.	8
3. FARGO’S engineering and administration fees are challenged.	8
POINT 2. FARGO attempts to reap a benefit at the expense of landowners owning real property adjacent to city projects.	8
POINT 3. HECTOR’S land is agricultural land, but is improperly treated as developed commercial property and assessed by illegal formula.	8
POINT 4. HECTOR lands were improperly assessed [lack of uniform application; denial of Equal Protection Clause]	9

POINT 5.	HECTOR lands were improperly assessed [improper calculations].	9
POINT 6.	The City Commission failed to perform its statutory duties.	9
POINT 7.	The assessments for SAD #5314 illegally exceed the amount stated in the Resolution of Necessity and/or the FARGO’S true cost of construction.	10
A.	First “cap” for the Amount of Special Assessments – the assessments are limited to the amount stated in the Resolution of Necessity.	10
B.	Second “cap” for the amount of Special Assessments – the assessment cannot exceed the true costs of the project to the City.	10
POINT 8.	Federal funds cannot be converted by FARGO – as was done to the detriment of the district’s landowners.	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

North Dakota Cases

<u>Bateman v. City of Grand Forks</u> , 2008 ND, 747 N.W.2d 117	6
<u>Haggerott v. Morton County Board of Commissioners</u> , 2010 ND 32, 778 N.W.2d 813	5
<u>Hector v. City of Fargo</u> , 2009 ND, 14, 760 N.W.2d 108	9
<u>Hoffman v. City of Minot</u> , 77 N.W.2d 850 (N.D. 1956)	7
<u>Murphy v. City of Bismarck</u> , 109 N.W.2d 635 (N.D. 1961)	10
<u>Robertson Lumber Co. v. City of Grand Forks</u> , 174 N.W. 249 (N.D. 1914)	5, 6

Cases of Other Jurisdictions

<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1970)	9
<u>Dodson v. City of Ulysses</u> , 549 P.2d 430 (Kan. 1976)	8
<i>Morgan v. United States</i> , 298 U.S. 468 (1936)	7
<u>Teutsch v. City of Santa Fe</u> , 410 P.2d 742 (N. Mex. 1966)	6

Statutes

N.D.C.C. Chap. 40-22	4, 5
N.D.C.C. Chap. 40-23	4, 5
N.D.C.C. Chap. 40-23.1	4, 5
N.D.C.C. § 40-22-06	5, 10

N.D.C.C. § 40-22-10	10
N.D.C.C. § 40-23-06	3
N.D.C.C. § 40-23-07	6
N.D.C.C. § 40-23-09	3, 6, 7
N.D.C.C. § 40-23-10	4, 7
N.D.C.C. § 40-23-13	4, 7
N.D.C.C. § 40-24-02	8

Other Authorities

N.D.R.App.P. 28(c)	1
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ISSUES ON APPEAL

The City of Fargo ["FARGO"] does not express dissatisfaction with Petitioner-Appellant Fred M. Hector, Jr.'s [hereinafter "HECTOR"] statement(s) of issue on appeal. N.D.R.App.P. 28(c).

STATEMENT OF THE CASE

FARGO does not express dissatisfaction with HECTOR'S statement of the case. N.D.R.App.P. 28(c).

STATEMENT OF FACTS

FARGO does not challenge a single factual assertion made by HECTOR concerning FARGO's true cash outlay set forth in this record once federal reimbursing funds are revealed.

Nor does FARGO challenge:

- A. \$6,240,595.32 is the maximum amount assessable [HECTOR Brief, p. 13];
- B. The "City Commission's Resolution of Necessity only approved the design of two (2) frontage roads to be constructed by the State at Federal/State cost of \$990,000 - with no financial participation involving FARGO." [HECTOR Brief, p. 7];
- C. The two (2) frontage roads, including city water distribution and water mains cost \$5,255,406.31 [HECTOR Brief, p. 10]. and the contractor was paid \$5,097,202.63 with **federal funds**, as of a certain date [HECTOR Brief, p. 11], but FARGO still assesses HECTOR'S lands for \$4,577,141.24 for frontage roads and \$545,945.81 for water mains [a total of \$5,123,087.05;

FARGO’S Brief, ¶s 14-17]; and

- D. FARGO follows its “Fargo Infrastructure Policy”¹ when it assesses HECTOR’s lands – even though there is no jurisdictional Resolution of Necessity or commensurate cash outlay for the amounts assessed HECTOR under the policy.

Although HECTOR’S Statement of Facts remains unchallenged, HECTOR must point out inaccuracies in FARGO’s rendition of the facts. In ¶ 11 of its brief, FARGO states, “Phase III was for paving, water main distribution and storm sewer work on 52nd Avenue west of the northwest I-29 frontage road (38th Street) to the Sheyenne River.” This statement is erroneous in that Phase III construction also included a water transmission line; and, all construction for paving, storm sewer, and water main distribution ended at 45th Street – not the Sheyenne River. App., p. 160. No construction was contemplated west of 45th Street at the time FARGO’S City Commission adopted its Resolution of Necessity and accepted its Engineer’s Report. App., ps. 66-A; 66-B. HECTOR continues to challenge special assessments for added construction costs relating to certain improvements to the storm sewer – *outside the city limits* on other HECTOR land(s) toward Drain 27 which lies west of 45th Street. FARGO’S App., p. 31.

In ¶ 18 of its brief, FARGO asserts that the “frontage roads’ locations were moved from the standard layout at Hector’s insistence.” The location of the frontage road(s) were one term or condition in the contract between HECTOR and NDDOT on September 11, 2007.

¹ FARGO’S Brief, ¶22; see also, ¶s 12, 30, 34, 51, 52, and 74.

App., ps. 126-128. When locating the frontage roads, NDDOT considered the City of Frontier's suggestions, the plat of the District [Walmart], and the views of HECTOR. FARGO'S App., p. 72. The frontage roads were built to standards not contemplated at the time of August 27, 2007, Resolution of Necessity, and *insisted upon by FARGO without involvement of HECTOR*. FARGO'S App., ps. 73-79.

Within ¶s 20 and 21 of its Statement of Facts, FARGO correctly identifies October 5, 2009, as the date its City Commission adopted the required resolution, under N.D.C.C. § 40-23-06 when project work is not completed, authorizing the city auditor to certify total costs to the special assessment commission. FARGO does not explain, though, how an October 5, 2009, resolution authorizes earlier issuance of a false certification of costs on August 25, 2009.

In ¶ 24 of its brief, FARGO claims its Special Assessment Commission confirmed a special assessment list on September 15, 2009. At the hearing of October 15, 2009, the supposed list was only in summation form and purportedly only "based on caps and the actual costs.." Commissioner Dunn acknowledged that the commissioners "have not seen the stack, but we [special assessment commissioners] have seen summaries of the stack previously." FARGO'S App., p. 83.

This record does not contain a complete special assessment list of the benefits and assessments as to each tract of land. There has never been such a list, or even a summary of such a list, that identifies the amount each lot or tract is benefitted by the improvement that is separate from the assessed amount as required by N.D.C.C. § 40-23-09.

In ¶ 26 of its brief, FARGO acknowledges its special assessment commission “again approved the list [which had only been reviewed in summary form, and based on caps and costs]. There was no publication of that list after the October 15, 2009, hearing which is mandated by N.D.C.C. § 40-23-10 or N.D.C.C. § 40-23-13, depending upon which sequential special assessment step was performed.

In ¶ 26 and 27 of its brief, FARGO acknowledges that HECTOR was forced to present his case to the City Commission just four days after the October 15, 2009, Special Assessment Commission concluded its evidentiary hearing and “again approved the assessment list” – contrary to N.D.C.C. § 40-23-13 requiring separation by fifteen days.

There are no Special Assessment Deferral Agreements in this record that relate to the lands once owned by the Fargo Public School District, and now owned by HECTOR – a parcel of land involved in this appeal. The special assessment deferral agreements are irrelevant to the issues presented by this appeal.

LAW AND ARGUMENT

FARGO gives its “Overview of Parties’ Position” erroneously asserting that we are before this Court because HECTOR “disagrees with the City of Fargo’s procedure for specially assessing City Improvements.” FARGO’S Brief, ¶ 30. HECTOR submits that judicial relief was sought because FARGO, and its Special Assessment Commissioners, disregard jurisdictional limitations and procedures, designed to protect landowners from an unconstitutional “taking” as set forth in N.D.C.C. Chap. 40-22, N.D.C.C. Chap. 40-23, and/or N.D.C.C. Chap. 40-23.1, or other pertinent statutory provisions, and also, the “courts should

insist upon a greater care and stricter compliance with the fundamental law in the case of special assessments.” Robertson Lumber Co. v. City of Grand Forks, 174 N.W. 249, 252 (N.D. 1914).

HECTOR agrees with FARGO that he objects to its infrastructure funding policy since such policy, contrary to statutory law, authorizes an assessment without the determination of the special benefit to each separate lot.

HECTOR also acknowledges that FARGO and he disagree as to the interpretation of N.D.C.C. § 40-22-06. Under HECTOR’s interpretation of N.D.C.C. § 40-22-06, special assessment funds are “over and above ... any other funds which are on hand and properly available...” to pay for the public improvement. Under HECTOR’S interpretation of statute, which does not ignore words within the statute as is done by FARGO, special assessment funds are used last – not first.

FARGO and HECTOR can both rely upon Haggerott v. Morton County Board of Commissioners, 2010 ND 32, ¶ 7, 778 N.W.2d 813 as to this Court’s standard of review.

POINT 1. The Assessment Commission failed to perform its statutory duties.

Nothing in FARGO’S brief dispels HECTOR’s observation that all of the actions of the Assessment Commissioners were in apparent disregard of their legal duties set forth in N.D.C.C. Chap. 40-22, N.D.C.C. Chap. 40-23, and/or N.D.C.C. Chap. 40-23.1, or other pertinent provisions.

A. The wrong party actually made the assessment based only on Fargo’s Infrastructure Funding Policy, and not upon the benefit to each lot.

Citing Bateman v. City of Grand Forks, 2008 ND. ¶ 11, 747 N.W.2d 117, FARGO recognizes three requirements for a special assessment to conform to N.D.C.C. § 40-23-07. FARGO’S Brief, ¶33. When specially assessing HECTOR [and other district landowners] for SAD #5314, FARGO’S Special Assessment Commission failed to determine the special benefit accruing to each lot from the improvement. When assessing HECTOR’s lands, FARGO readily admits that it only applied its infrastructure funding policy. FARGO’s Brief, ¶s 12, 22, 30, 34, 51, 52 and 74.

If FARGO merely follows its infrastructure funding policy when FARGO assesses HECTOR’s lands, FARGO is not making a determination of the especial benefit to each lot or tract of land as required by N.D.C.C. § 40-23-07. Rather, by following its infrastructure funding policy, FARGO is merely apportioning its *alleged* costs, and not apportioning benefits. This failure to make a determination of the special benefit to each lot is “jurisdictional”. Robertson Lumber Co. v. City of Grand Forks, 174 N.W. 249, 252 (N.D. 1914). FARGO has no right to specially assess HECTOR’S lands without this “benefit” determination – never done herein.

Case law suggests that the methodology used by FARGO generally invalidates a special assessment tax. Teutsch v. City of Santa Fe, 410 P.2d 742, 746-747 (N. Mex. 1966) categorically rejects “division of costs” without a determination of benefits – such a process is invalid. FARGO ignores this issue, and presents nothing to any court showing the Special Assessment Commission’s compliance with the law by first determining a benefit to each lot or tract of land. N.D.C.C. § 40-23-09.

B. The Assessment Commission failed to timely file the assessment list with the city.

The record does not contain a complete special assessment list that states separately a determined benefit to each tract and assessments as to each tract of land as required by N.D.C.C. § 40-23-09. In ¶ 26 of its brief, FARGO acknowledges its special assessment commission “again approved the list [which had only been reviewed in summary form, and based on caps and costs]. There was no publication of the list after the October 15, 2009, hearing. N.D.C.C. § 40-23-10 or N.D.C.C. § 40-23-13.

FARGO’S statutory adherence is virtually non-existent, now less than lip-service, and proven by even FARGO’s recitation of the record. FARGO relies upon its Special Assessment Commission’s September 15, 2009, confirmation of the “stack” but acknowledges the evidentiary hearing continued to October 15, 2011. “If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.” *Morgan v. United States*, 298 U.S. 468, 480-81 (1936). It is submitted due process of law is denied when quasi judicial boards issue findings before hearing all the evidence.

Failure to follow the statutory procedure, jurisdictional in nature, should vitiate HECTOR’s special assessments.

C. The Assessment Commission failed to make proper assessment of benefits.

1. The interest costs of \$1,199,854.40 is challenged.

FARGO ignores Hoffman v. City of Minot, 77 N.W.2d 850, 851 (N.D. 1956) which

defines “construction interest” and also identifies when it may be claimed as a cost by statute [N.D.C.C. § 40-24-02]. \$1,199,854.40 in carrying costs *for a period of time that precedes the sale or issuance of special assessment warrants or bonds* is illegal. The interest FARGO seeks is a profit, not an incurred cost.

2. Costs for extra work not authorized by the adopted Resolution of Necessity is challenged.

FARGO provides no statutory authority for specially assessing costs relating to public improvements not included in its adopted Resolution of Necessity, including the constructed frontage roads, a 28 acre retention pond [over \$1.850,000], payment for land previously dedicated for 53rd Street, and a \$1,000,000 storm sewer/lift station located outside the city limits and west of 45th Street [COF1955, at p. 32; FARGO’S App., p. 31].

3. FARGO’S engineering and administration fees are challenged.

See following discussion at Point 2.

POINT 2. FARGO attempts to reap a benefit at the expense of landowners owning real property adjacent to city projects.

The salaries of City employees, including its auditors and engineers, have already been paid by general tax dollars – to require landowners to again pay for services already paid for by general taxes constitutes the imposition of an illegal tax. Dodson v. City of Ulysses, 549 P.2d 430, 437 (Kan. 1976).

POINT 3. HECTOR’S land is agricultural land, but is improperly treated as developed commercial property and assessed by illegal formula.

FARGO seeks to assess on obligation against HECTOR land, without ever assigning benefit to HECTOR lands primarily used for agricultural purposes. HECTOR tried to have much of this agricultural property zoned for commercial purposes, but FARGO refused to allow for the re-zoning of the property for use by commercial entities – and it remains zoned for agricultural purposes except for certain lands in STARR QUARTER. See, Hector v. City of Fargo, 2009 ND, ¶ 14, 760 N.W.2d 108. Any land not zoned residential, is still treated as commercial for paving assessment under the Fargo Infrastructure Funding Policy. App., ps. 72-73.

POINT 4. HECTOR lands were improperly assessed [lack of uniform application; denial of Equal Protection Clause]

When HECTOR is hit for a special assessment of 100% of the *estimated cost* of the frontage roads, constructed without the jurisdictional Resolution of Necessity, and without a determination his agricultural lands have benefitted, HECTOR is denied the Equal Protection of statutory law.

POINT 5. HECTOR lands were improperly assessed [improper calculations].

FARGO fully recognizes it assessed HECTOR’S land(s)s using Fargo’s Infrastructure Funding Policy that is legally objectionable – it apportions alleged [*not real*] costs without a determination of benefit (value).

POINT 6. The City Commission failed to perform its statutory duties.

FARGO ignores *Boddie v. Connecticut*, 401 U.S. 371, 378 (1970) recognizing the Constitution requires “an opportunity *** granted at a meaningful time and in a meaningful

manner' .. 'for (a) hearing appropriate to the nature of the case'." A rubber stamp following non-compliance with sequential special assessment steps is wrong. Murphy v. City of Bismarck, 109 N.W.2d 635, 643-649 (N.D. 1961).

POINT 7. The assessments for SAD #5314 illegally exceed the amount stated in the Resolution of Necessity and/or the FARGO'S true cost of construction.

A. First "cap" for the Amount of Special Assessments – the assessments are limited to the amount stated in the Resolution of Necessity.

FARGO misinterprets its authority under N.D.C.C. § 40-22-06 and does not limit special assessment funds to be amounts "over and above ... any other funds...". With only citation to an inapposite statute [N.D.C.C. § 40-22-10, at ¶ 69], FARGO does not limit its special assessment to the amount specified in its jurisdictional Resolution of Necessity – \$12,840,948.00 [the "lesser amount" specified by the governing body; N.D.C.C. § 40-22-06].

B. Second "cap" for the amount of Special Assessments – the assessment cannot exceed the true costs of the project to the City.

FARGO is capped by its true cash outlay. Since federal funds are used to reimburse a project sponsor's cash outlay, one cannot determine the true cost of a project by merely adding outlay from various funding sources. FARGO ignores the obvious – a special improvement district is not the same as a special assessment district.

POINT 8. Federal funds cannot be converted by FARGO – as was done to the detriment of the district's landowners.

If federal [or state] funds totaling \$31,774,930.47 were dedicated to the construction

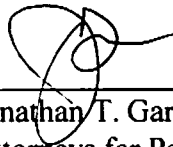
of Phases 1 and 2 [including frontage roads], FARGO necessarily has received federal reimbursement for the costs it seeks from HECTOR and other landowners.

CONCLUSION

HECTOR asks that the statutory and constitutional process be restored, and that the assessments for this special assessment project be judicially rejected by ordering a re-assessment pursuant to law.

Respectfully submitted this 27th day October, 2011.

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STATE OF NORTH DAKOTA

Fred M. Hector, Jr.,

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Supreme Court No. 20110187

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vs.

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

AFFIDAVIT OF MAILING

Defendant-Appellee.

State of North Dakota
County of Cass


Pat Doty, being first duly sworn on oath, deposes and says: 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.

On the day of 27th day of October, 2011, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF PETITIONER-APPELLANT.

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

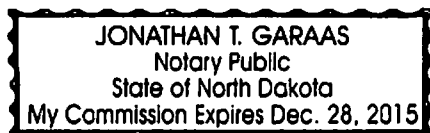
Ronald H. McLean
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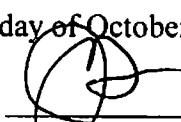
To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Pat Doty

Subscribed and sworn to before me this 27th day of October, 2011.





Notary Public