IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Fred M. Hector, Jr.,

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.

PETITION FOR REHEARING

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
HONORABLE JOHN C. IRBY

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Due to the opinion expressed in Hector v. City of Fargo, 2012 ND 80, ___ N.W.2d ___, Petitioner Fred M. Hector, Jr., ["HECTOR"] respectfully petitions this Court for a rehearing:

1. The Supreme Court's opinion renders North Dakota's statutory law meaningless.

The opinion, if not changed to reflect adherence to our current statutory scheme which *prohibits any legislative determination of benefits*, makes mockery of this judicial review. The opinion approving a *legislative determination of benefits* by way of the Fargo Infrastructure Funding Policy, and also providing for *city-wide uniformity – which makes it an illegal tax* – also ignores the role of the judiciary established by Robertson Lumber Co. v. City of Grand Forks, 147 N.W. 249, 252 (N.D. 1914), and *Marbury v. Madison,* 1 Cranch 137, 163 (1803).

The extent of the fundamental error expressed in the opinion is readily identified when it suggests Hector v. City of Fargo, 2010 ND 168, ¶ 5, 788 N.W.2d 354, can now be cited as authority for a statutory process – which was not followed herein. Fargo used to pretend its *special assessment commission* determined the benefits and assessed the costs and expenses. It is now established that the Fargo City Commission – a different legislative body, and not authorized by statute – enacted the Fargo Infrastructure Funding Policy, and the policy only addresses the amount of the assessment [without regard to certified costs]. There is no determination of "especial benefit" statutorily and constitutionally mandated to exist before any later assessment may take place, nor has there ever been in existence a list

of benefits [statutorily mandated to be different than the list of assessments].

The opinion's cited language is self-contradictory – it recognizes courts must reject any decision of a local governing body where "there is not substantial evidence supporting the decision .." [*Id.*, ¶ 13], but later denigrates HECTOR claiming evidence is not in the record. The opinion fails to recognize that N.D.C.C. § 40-22-06 does not apply to *all* special assessment districts – only those involving other governmental entities, and the statute clearly states that special assessments are "*over and above the amount of any bonds which have been voted and any other funds which are on hand and properly available for such purpose.*"

HECTOR has a right to expect that North Dakota's statutes would be followed by the city, and honored in a judicial review. Neither is done.

The opinion attempts to denigrate HECTOR'S record [*id.*, ¶s 19, 22, 28, 37, 51], overlooking the statutory duty upon the municipality – not HECTOR – to make the record justifying its actions. N.D.C.C. § 28-34-01(2). HECTOR'S presentation, at every stage, were documented by referenced events or documents. The burden of producing "substantial evidence" is first upon the municipality; if it is not in the record, the governing body's decision falls. If something is not in the record – the fault lies with the City.

The claimed record deficiencies are erroneous:

1. As to ¶ 19 indicating failure by HECTOR to cite specific evidence in the record supporting his claim of added project components, HECTOR submitted the proof on October 15, 2009. COF1461-COF1693. The City does not challenge such claim, just submitting claimed expense.

2. As to ¶ 22, had there been a valid resolution of necessity for the $5,000,000 frontage roads, HECTOR would have had the legal right to insist upon cheaper asphalt paving. N.D.C.C. § 40-22-26.

3. As to ¶ 28, the opinion overlooks the uncontroverted evidence establishing the extent of federal funds paid for the publically bid projects.

3. As to ¶ 37, the opinion erroneously claims "Hector has (the duty) to establish the assessed amounts exceeded the City's costs." The City's costs must first be certified by its auditor [N.D.C.C. § 40-23-05], and only those certified project costs in excess of all other funds can be specially assessed [all promised funds must first be expended]. N.D.C.C. § 40-22-06 also specifies the "amount" to be paid by special assessment. The opinion places the burden upon the wrong party.

4. As to ¶ 51 which indicates HECTOR had a duty to identify whether the $5,000,000 frontage roads are "local or collector streets", would it not be logical that a "frontage road" mandated to exist by both Federal and State officials with respect to an Interstate's Interchange is more than a "local" road even if so tagged by the City of Fargo? If it is a "local" road, Fargo constructs, and assesses, only based upon a 66' asphalt standard – HECTOR was treated differently.

The opinion is fatally flawed – it ignores the "the formation of the improvement district is the foundation for all subsequent proceedings" and that the "fundamental requirements of the special assessment laws must be complied with". Kvello v. City of

Lisbon, 164 N.W. 305, 306 (N.D. 1917), citing Robertson. In the context of this case – the $5,000,000 frontage roads solely assessed to HECTOR [disregarding the Fargo Infrastructure Funding Policy making HECTOR only liable for a 66' asphalt road {otherwise free}] has never been subjected to valid statutory special assessment process. If the Supreme Court disregards this undisputed fact, it cannot ignore the purpose for these statutes outlined in the Kvello decision, at page 306 [*emphasis* added]:

> The statute requires not merely a *resolution of necessity, but a resolution that shall refer intelligently to the plans and specifications. Its purpose is clear and is twofold. It is that the city officers shall themselves carefully consider the question of necessity as applied to the plans, and themselves be confronted with the determination of the question of actual necessity as well as of desirability.* It means that they shall really consider the matter, and from every standpoint. The statute also purposes that the property owner may have the plans and specifications before him, or a proper reference thereto, in order that he may determine for himself whether in reason he should protest against the improvement. Whittaker v. City of Deadwood, 23 S. D. 538, 122 N. W. 590, 593, 139 Am. St. Rep. 1076. These requirements are mandatory, and the property owner is entitled to a reasonable compliance therewith. Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249; Morrison v. City of Chicago, 142 Ill. 660, 32 N. E. 172.

Both city and landowner are mandated to have access to the engineer's plans in advance of the "resolution of necessity", not necessarily prior to the creation of the special assessment district. The opinion overlooks, or ignores, the sequential statutory process with respect to every valid special assessment. N.D.C.C. Chaps. 40-22 and 40-23; Murphy v. City of Bismarck, 109 N.W.2d 635 (N.D. 1961). The city engineer's role is mandated at least four times: (1) as a consultant when creating the size and form of an "improvement district" [N.D.C.C. § 40-22-09]; (2) to thereafter prepare the report involving "probable cost of the improvement" with mandated components [N.D.C.C. § 40-22-10]; (3) to prepare "detailed

plans and specifications for the construction of the improvement" [N.D.C.C. § 40-22-11] which are "filed in the office of the city auditor ..subject to inspection by any interested person" [N.D.C.C. § 40-22-14]; and (4) to supervise and inspect [N.D.C.C. § 40-22-36]. We early learn that one cannot change the rules after the game has started – it is no different with special assessment districts where constitutional property rights are at risk. This opinion makes mockery of our law's sequential mandates already previously judicially determined to be jurisdictional.

Fargo never once claimed that the 28 acre retention pond or the $5,000,000 frontage roads [approximate] were part of the original plans and specifications **approved by the Fargo City Commission on August 27, 2007**. COF1239. Even if the opinion is generically correct about the role of the engineer, he cannot alone change the plans and specifications after August 27, 2007 – there can be no added components as was done involving millions of dollars. Approved plans cannot be altered by the engineer; nor can the City Auditor merely insert costs associated with the extras [and a $1,000,000 storm sewer] making it a false certification of project cost, and subsequent illegal assessment, thereby lulling this Court into believing such conduct was proper. Fargo's lawyers never attempted to prove HECTOR'S assertions as to existence of added components were false. In addition to ignoring the law and lack of substantial evidence having been submitted to any governing body, the opinion of the Court rewards the City's lack of adherence to statutory process.

The opinion erroneously suggests the frontage roads can be expanded because they were originally referenced in the engineer's report. *Id.*, ¶ 21. The $990,000 frontage roads, free to HECTOR, when changed to $5,000,000 frontage roads by the City of Fargo without

legal process or HECTOR input, runs afoul of North Dakota's statutory concept that forbids such later construction under N.D.C.C. § 40-22-36 ["not exceed twenty percent of the amount estimated"] and/or N.D.C.C. § 40-22-29 ["exceeds the engineer's estimate .. by forty percent or more."]. From *no city cost* [$990,000 Federal/State expense] to claimed approximate $5,000,000 municipal expense – is obviously more than a twenty or forty percent increase – ALL WITHOUT THE REQUIRED RESOLUTION OF NECESSITY FOR SUCH CONSTRUCTION. The opinion negates virtually every statutory check, making it possible for Fargo to change every aspect of every future project. Instead of statutes to be strictly followed, the statutes are meaningless guideline(s) where even "close" is not necessary.

Disregarding law, the opinion sanctions an illegally convened meeting of the Special Assessment Commission on September 15, 2009, non-compliance with creation of mandatory lists which did not timely exist [and never made part of this record – is that not lack of substantial evidence in support of the governing bodies' decision(s)?], and failure to publish proper notice separated by a statutory 15 day time period for appeal. HECTOR Brief, pages 19-23.

2. The opinion deprives HECTOR of Due Process of Law.

The opinion correctly states that "(a) local governing body's failure to correctly interpret and apply controlling law constitutes arbitrary, capricious, and unreasonable conduct." *Id.*, ¶ 13.

Unfortunately, the opinion excuses virtually every statute created to impose a check upon improper governmental action – with respect to the $5,000,000 frontage roads, it

forgives the existence of a mandated resolution [N.D.C.C. § 40-22-15], a meaningful and timely engineer's report [N.D.C.C. § 40-22-10], an accurate certification of costs [N.D.C.C. § 40-23-05], determination of special benefit by the special assessment commission [N.D.C.C. § 40-23-07; not a *legislative determination*[1]]; actual preparation and certification of a list showing benefits and a separate determination of assessment [N.D.C.C. § 40-23-09]; actual filing of the created list(s) so available for inspection [N.D.C.C. § 40-23-10]; a hearing in public session with notice [N.D.C.C. § 40-23-11] followed by a certificate of confirmation [N.D.C.C. § 40-23-12]; published notice of the confirmation with a 15 day separation before further action [N.D.C.C. § 40-23-13]. These statutes are to be "strictly observed". Murphy v. City of Bismarck, 109 N.W.2d 635, 637 (N.D. 1961).

HECTOR believes Fargo's failure to honor the law should not be rewarded; if this opinion confirms the asserted standard of review, to uphold Fargo's actions is to deprive HECTOR of due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America. See also, Constitution of North Dakota, Article I, § 9.

HECTOR also asserts that it is legally impossible for the Court to ignore the decision in Robertson without explanation. The underlying laws have not significantly changed; the decision is clear that the City of Fargo did not honor those laws – there is no questions involving ambiguity. Fargo has not created any document, real or imagined, that adheres to law requiring two (2) separate numbers assigned to each lot or parcel of property

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[1] At ¶ 49, the opinion erroneously asserts "(t)he evidence supports the Special Assessment Commission's findings that Hector's property received a benefit from the improvements." If the statutorily-mandated document does not exist, such "evidence" does not exist. The opinion contains factual and legal error.

– first, the amount "especially benefited", and thereafter, the amount to be assessed [but never more than the benefit].

3. The opinion allows the City of Fargo to act as a bank to charge interest on an unidentified and un-asserted debt.

The interest costs of $1,199,854.40 were challenged as a matter of law. This record does not disclose the existence of any indebtedness for which interest could be charged – there was no "construction interest" because there were no special assessment warrents sold. Hoffman v. City of Minot, 77 N.W.2d 850, 851 (N.D. 1956). The City of Fargo violates N.D.C.C. § 40-24-02; the opinion sanctifies a false charge.

The opinion addresses the engineer's fees and lawyer's fees. Unfortunately, no resolution was passed by the governing body for the "cost of extra work", nor was there any evidence submitted that the work was related to the "authorization and financing" of this improvement [with respect to legal fees]. The opinion should not sanction that which did not happen.

The opinion sanctifies an assessment of HECTOR differently than any other property owner. Our Constitutions do not allow people, or commonly situated property, to be treated unequally; indeed, the opinion justifies the $5,000,000 special assessment for the frontage roads because it is unknown to the Supreme Court if the roads are "local or collector". If it is a "local" road, and the subject of a legal resolution for creation of a special assessment district, the road would have been built to a 66' asphalt standard only – all extra expense would be unnecessary [HECTOR'S farming operation did not even require a dirt road]. A larger, more expensive road than the free $990,000 asphalt road, provided

HECTOR with no *benefit*, only unwarranted expense without a jurisdictional resolution violative of the Equal Protection Clause of the United States Constitution, and/or its equivalent provision under the State Constitution [see specifically, Article I, Sections 21 and 22, and *Syllabus by the Court* #3, Northern Pacific Railway Company v. City of Grand Forks, 73 N.W.2d 348 (1955)]. The opinion countenances unequal assessments – it is wrong so to do. Fargo concedes NDDOT's progressive estimates [App., ps. 133-159] can be relied upon for the identification of federal funds that went into Phases 1 and 2. COF2005. Federal funds paid the monies – HECTOR had a right to rely upon the government's documents so proving.

The opinion exalts form over substance with respect to the governing body's hearing(s). HECTOR understands that those that hear, may not understand. A governing body that will not listen, nor review documents [including failure to review the subject of the appeal – the non-existent, but mandated list], and cuts short the presentation of an appellant has no chance of acting in conformity with law. *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'."

Our statutory law does not allow for any legislatively created assessment since 1907. Robertson.

CONCLUSION

HECTOR asks that the statutory and constitutional process be restored.

Respectfully submitted this 23rd day April, 2012.

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AFFIDAVIT OF MAILING

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 23rd day of April, 2012, 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: PETITION FOR REHEARING.

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

Ronald H. McLean
Jane L. Dynes
Serkland Law Firm
P.O. Box 6017
Fargo, ND 58107-6017

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
Pat Doty

Subscribed and sworn to before me this 23rd day of April, 2012.

Notary Public

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2015