20190153
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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

Plaintiff-Appellee,

Case No. 20190153

vs.

Civil No. 09-2017-CV-01047

Karen C. Wieland,

Defendant-Appellant.

BRIEF OF APPELLANT
"Oral Argument Requested"

APPEAL FROM THE PARTIAL SUMMARY JUDGMENT FOR PLAINTIFF AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 6, 2018, RESULTING IN JUDGMENT ON JURY VERDICT DATED JANUARY 15, 2019, AND AMENDED JUDGMENT ON JURY VERDICT DATED MARCH 13, 2019, WITH FINAL ORDER OF CONDEMNATION AUTHORIZING THE CITY OF FARGO TO TAKE POSSESSION DATED MARCH 28, 2019

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

TABLE OF AUTHORITIES

North Dakota Statutes

Paragraph

Other Authorities

ISSUES ON APPEAL

[¶1] A. Did the City of Fargo [hereinafter "City"] fail to honor N.D.C.C. § 54-12-01.1 which creates a statutory condition precedent to initiation of any condemnation action?

[¶2] B. Did the City, on December 19, 2016, take a giant improper and untimely step toward exercise of eminent domain by passing a "Resolution of Necessity and authorize the commencement of legal action to acquire property at 4021 and 4033 Copperfield Court South (Attachment 'A')" without predicate facts allowing exercise of eminent domain?

[¶3] C. Did the City, on December 19, 2016, have a public use project for which eminent domain could be exercised when no project exists?

[¶4] D. Did the City have the right to exercise eminent domain when there already exists other public uses to which the property was already devoted, to include utility easements, a drainage ditch dedication, and a drainage ditch easement?

[¶5] E. Was summary judgment inappropriate because of evidentiary and legal deficiencies when the City failed to sustain its burden of proof, and attempted to support its position utilizing impermissible opinion evidence?

[¶6] F. Did the district judge fulfill his judicial function to determine if the property may be taken under N.D.C.C. § 32-15-05 by requiring proof "the use to which it is to be applied is a use authorized by law", "that the taking is necessary to such use", and "if already appropriated to some public use, that

the public use to which it is to be applied is a more necessary public use"?

[¶7] G. Did the City have the right to use eminent domain in the first place when a flood control project, as authorized by N.D.C.C. § 40-05-01(67), must also meet the requirements of at least one (1) of the eleven (11) subsections set forth in N.D.C.C. § 32-15-02?

[¶8] H. Did the City have the right to use eminent domain to create an inventory of land for future projects?

[¶9] I. Does the City have the right to assert a necessity that is hopelessly vague or so broad that it encompasses virtually every conceivable public use, real or imagined?

[¶10] J. If the City's eminent domain process is inadequate, does it have the right to try to later justify prior deficiencies?

[¶11] K. Was the District Judge allowed to issue the Final Order of Condemnation Authorizing the City of Fargo to Take Possession of Defendant's property when the City had failed to pay the full amount of the judgment before its issuance?

[¶12] L. Was the District Judge allowed to take judicial notice of a mayor's declaration of emergency in violation of N.D.R.Ev. 201?

[¶13] M. Was the District Judge allowed to issue an authorization to the City to use the landowner's property as the City deems appropriate for flood mitigation purposes while appellate proceedings were still possible?

[¶14] N. Was the District Judge premature in issuance of a Final Order of Condemnation when not all monies had been paid to landowner (or deposited with the Court)?

[¶15] O. Is a landowner entitled to post-judgment statutory interest?

[¶16] **STATEMENT OF THE CASE**

[¶17] Defendant-Appellant Karen C. Wieland [hereinafter "Landowner"] appeals from the partial summary judgment (a) favoring the Plaintiff-Appellee City of Fargo, a political subdivision of the State of North Dakota ["City"], and (b) denying Landowner's motion for summary judgment, filed November 6, 2018, resulting in (1) Judgment on Jury Verdict dated January 15, 2019 [Appendix, pages 358-359], (2) Amended Judgment on Jury Verdict dated March 13, 2019 [App., ps. 371-372], with (3) a Final Order of Condemnation Authorizing the City of Fargo to Take Possession, dated March 28, 2019. App., ps. 376-378.

[¶18] Landowner seeks to uphold North Dakota's constitutional and statutory framework which does not allow any North Dakota political subdivision to utilize its power of eminent domain to create an inventory of land for future unspecified projects, among other reasons, nor does it allow a political subdivision to disregard prior public uses, such as existing drainage dedications or easements.

[¶19] Landowner owns her personal residence located at 4033 Copperfield Court South, Fargo, North Dakota [App., ps. 21, 58] – land which was coveted by the City of Fargo for future unspecified construction project(s). See ¶s 21, 31, 34-38, below. Due to past occasional flooding in south Fargo, the City engaged in numerous attempts to encourage

diverse landowners to *voluntarily sell* their land for future unspecified projects. Landowner refused to voluntarily sell her personal residence. App., ps. 21, 59, 122-329.

[¶20] The City commenced an eminent domain action by Summons and Complaint dated April 13, 2017 [App., ps. 19-48], which was timely responded to in Landowner's Special Appearance Objecting to Jurisdiction & Answer dated May 1, 2017, which specified and categorized the City's constitutional and statutory infirmities. App., ps. 50-60. Landowner asserted, and the City's discovery responses established [see ¶s 5-13 of Landowner's Affidavit including discovery responses; App., ps. 122-329], that the City "does not have eminent domain authority to create an inventory of land to be available for future unspecified municipal projects, and importantly, there must first exist statutorily mandated 'plans, drawings, and specifications for the improvement from an architect or engineer' relating to a public use authorized by law. N.D.C.C. § 48-01.2-02; N.D.C.C. Chap. 32-15; N.D.C.C. Chap. 48-01.2; N.D.C.C. Chap. 40-22, Constitution of North Dakota, Article I, § 16." App., ps. 50-57; ¶s 3-14]. In the summary judgment hearing, the City's attorney conceded "**the City does not own the Wieland property, so ... until we do own it, there will be no public project**. So [N.D.C.C. § 48-01.2-02[1]] and those requirements do not apply." Tr. of 11/6/18, p. 6, lines 10-18; **bolded** for emphasis; p. 24, ls. 23-25, "There is no biddable project at this time because the City doesn't own Ms. Wieland's property."; p. 26, ls. 19-24,

[1] "(I)f the estimated cost for the construction of a public improvement is in excess of the threshold established under section 48-01.2-02.1 ($150,000), **the governing body shall procure plans, drawings, and specifications for the improvement from an architect or engineer.**" **Emphasis** added.

"(T)here's no biddable project."

[¶21] Attempting to avoid a bench trial for the first required phase of any eminent domain action – wherein the City has the sole legal burden on the issues to be decided by the district court judge [Is there an authorized public use (which must be more necessary than any other public use), and is this land necessary for such use? N.D.C.C. § 32-15-05] – City brought a Motion for Partial Summary Judgment supported by the affidavits of its auditor Steven Sprague [App., p. 76]; engineer Nathan Boerboom [App., p. 80]; engineer Jerry Bents [App., p. 93]; and engineer Charles D. Hubbard [App., p. 97]. Landowner timely responded by affidavit [App., ps. 122-329] and legal brief [App., ps. 102-121] establishing the City's non-compliance with North Dakota's eminent domain laws, along with factual reasons why eminent domain and summary judgment were impossible. See ¶s 44-77 below.

[¶22] Following oral arguments, the district court issued its Partial Summary Judgment for Plaintiff and Denying Defendant's Motion for Summary Judgment dated November 6, 2018. App., ps. 348-353.

[¶23] Following the "second phase" jury trial, only intended to determine just compensation, the district court issued its Order for Judgment on Jury Verdict dated January 14, 2019 [App., ps. 355-357] resulting in the issuance of a Judgment on Jury Verdict dated January 15, 2019, in the total amount of $850,000.00, while also recognizing Landowner "may be entitled to an award of costs, including attorney's fees, expert witness fees, and applicable statutory fees, the amount of which will be addressed by a separate order." App., ps. 358-359. City deposited $850,000.00 with the Clerk of District Court on January 17,

2019. App., ps. 360-362.

[¶24] On March 7, 2019, the district court issued its Order on Request for Costs [App., ps. 366-369] resulting in an Amended Judgment on Jury Verdict dated March 13, 2019, in the amount of $939,044.32. App., ps. 371-372. City deposited an additional $89,044.32 on March 13, 2019. App., ps. 373-375. No post-judgment interest has been deposited or paid.

[¶25] Over objection by Landowner [Docket Entries #468-469], the district court issued a Final Order of Condemnation Authorizing the City of Fargo To Take Possession on March 27, 2019. App., ps. 376-378.

[¶26] Pursuant to N.D.C.C. § 32-15-25 (and N.D.C.C. § 32-15-35), as a result of the City's failure to fully pay within thirty days after the entry of final judgment the sum of money assessed, Landowner served and filed a Motion For Dismissal dated May 10, 2019. App., ps. 379-385.

[¶27] Subsequently, Landowner timely filed on May 10, 2019, a Notice of Appeal to the Supreme Court, along with a preliminary statement of issues. App., ps. 386-391.

[¶28] Landowner's motion for temporary remand to address the then-pending Motion for Dismissal was denied, apparently predicated upon City's allegation that the just compensation issue presented was previously decided by the district court when issuing the March 27, 2019, "Final Order of Condemnation". Supreme Court Docket Entries #s 6-8.

[¶29] **STATEMENT OF FACTS**

[¶30] Without dispute, Landowner owns Lot 8 in Block 1 of Copperfield Addition located within Fargo, Cass County, North Dakota, and for years, the City has wanted to buy it by

voluntary sale – which was never accomplished. App., ps. 21, 59; Tr. of 11/6/18, p. 10.

[¶31] The City did not honor N.D.C.C. § 54-12-01.1 which required it to provide Landowner with notice of certain online information describing North Dakota's eminent domain laws *prior to making an offer to purchase and initiating a condemnation action*, nor did they comply with an earlier statute requiring that information be provided in pamphlet form prior to February 23, 2017, the effective date of the statutory change. App., p. 122.

[¶32] On December 19, 2016, the City passed a Resolution of Necessity [App., ps. 30-31] relating to Landowner's property based upon five (5) pieces of paper,[2] one of which related to property owned by others. Docket Entry #39.

[¶33] On December 19, 2016, and as of October 11, 2018 - the date of Landowner's Affidavit opposing the City's motion for partial summary judgment [App., ps. 122-329] – City had no public use project, nor did they have any permit from the North Dakota state engineer. N.D.C.C. § 61-16.1-38 makes it a crime for any construction without the existence of "complete plans and specifications (having been) presented first to the state engineer". App., p. 123. Every "public improvement" [N.D.C.C. § 48-01.2-01(21)] with an estimated cost in excess of $150,000 requires the governing body to "procure plans, drawings, and specifications for the improvement from an architect or engineer." N.D.C.C. § 48-01.2-02; N.D.C.C. § 48-01.2-02.1. In that City offered Landowner $725,000 [App., p. 21], the public

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[2] A single page cover letter from city attorney Nancy J. Morris to the Board of City Commissioners with a two (2) page proposed "City of Fargo Resolution of Necessity", and a photocopy of two (2) single-page letters dated November 30, 2016, written to Jonathan Garaas [as to Landowner] and attorney Jade Rosenfeldt [as to landowners Swenson for 4021 Copperfield Court South].

improvement, if ever determined to be an authorized public use, always had to have "plans, drawings, and specifications" along with an approved project – none of the components, nor project presently exist.

[¶34] Landowner's property was already subject to pre-existing public uses to include a "10' utility easement", a "25' drainage ditch easement", and another "25' drainage ditch dedication"; the City made no attempt to show the City's proposed use of Landowner's land is superior to the pre-existing public uses, as required by N.D.C.C. § 32-15-05(3). App., p. 123.

[¶35] The "permanent records" of City, and also subsequent but different "permanent records (that should have first existed)", establish there was no project – only the mere possibility of contemplated projects existed; the contemplated projects were also illegal because they would economically benefit other individual landowners which is not permitted by North Dakota's statute(s) and constitution. App., ps. 123-124.

[¶36] City's mayor admitted that no construction project or construction plans and specifications existed as of June 25, 2018 [long after this action was commenced], and that such would be developed only after City owns the property [App., ps. 126-127], nor were there any permits for the closing of two (2) completed dikes, nor had any plans been submitted to the State of North Dakota.[3] App., p. 128.

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[3] City also advanced three (3) other referenced projects, all irrelevant or non-existent. The City had wrongfully asserted the existence of Project #FM-14-11 and Project #FR-14-12 [two (2) dike projects] which had been earlier completed (or nearly so with only "levee reseeding to be accepted" as of April 17, 2017), when neither project involved any construction on Landowner's property – so therefore irrelevant [with Mayor Mahoney

[¶37] The City's mayor [Mahoney] and the City's engineer [Boerboom] each testified that no minutes of the Fargo City Commission would reflect approval and passage of Project B-1 or plan B-1 or phase B-1 [also known as Option B(1) or B1 or B-1 Plan], nor were there any authorized plans [Mayor Mahoney – "At that point, we did not have an authorized plan."] with City engineer Boerboom testifying no construction plans and specifications had been developed. App., ps. 126-129. The transcript includes compelling comments made by the presiding judge – District Judge John Irby, the same district judge now involved: "So we have established now that there has never been a motion to vote on Plan B-1 that has been made or accepted", and later Judge Irby observed, "I think we have already established the point (there is no Fargo City Commission approval of B-1)." App., ps. 127-128; 246-248; 282-283. Even the City's attorney conceded there was no biddable project. Tr. of 11/6/18, p. 26.

[¶38] Only identifying a City desire for "'the acquisition and removal of creekside homes.' This was the B-1 plan" when granting partial summary judgment, District Judge Irby factually determined "(t)he City Commission considered the implementation of the flood mitigation measures impacting the Wieland property on numerous occasions and heard testimony from City staff and consulting engineers before making its determination that the Wieland property was necessary for flood protection for the public." App., p.349-350; ¶s 8 & 15. As a result, the district court determined, as a matter of law, a unique requirement for any eminent domain action – without any known or cited judicial precedence (unless the

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admitting both projects were fully completed as of June 25, 2018]. App., ps. 126; 128. Moreover, the City's mayor, Timothy Mahoney and the City's engineer [Nathan Boerboom] testified that project FM-14-13 did not exist. App., ps. 126-127.

lower court was confused and gave deference to the "political question", and ignored the "judicial question" imposed by statute(s) - see Points 1 & 3): "The City acted reasonably, and not arbitrarily, capriciously or in bad faith, in seeking to acquire the Wieland property, thus meeting the requirements of eminent domain." App., ps. 353, 351.

[¶39] **LAW AND ARGUMENT**

[¶40] Landowner does not believe that the City of Fargo has the right to utilize eminent domain to create an inventory of land for future unspecified projects, nor did the district judge do his job. A grant of power to a political subdivision to "exercise the right of eminent domain should be strictly construed". Sheridan County v. Davis, 61 N.D. 744, 240 N.W. 867 (1932), in paragraph 1 of the syllabus; and recognized in Square Butte Elec. Co-op. v. Hilken, 244 N.W.2d 519, 534 (N.D. 1976).

[¶41] **Standard of Review - Oral Argument**

[¶42] Questions of law are reviewed by the North Dakota Supreme Court *de novo*, while a clearly erroneous standard exists for factual findings. Wilkens v. Westby, 2019 ND 186, ¶4, __ N.W.2d __. Oral argument would be helpful in discussing the ramifications of both law and fact.

[¶43] **POINT 1. The district court judge failed to perform his eminent domain function.**

[¶44] District court judges are the sole protector of private landowners with respect to any "taking" which involves only two (2) questions: a "political question" and a "judicial question".

[¶45] With respect to exercise of eminent domain by any political subdivision, including

the State of North Dakota, Landowner asserts that the court shall always, so long as the law remains the same, have the power, among many powers, "(t)o hear and determine all adverse or conflicting claims to the property sought to be condemned" [N.D.C.C. § 32-15-21(1)(b)], but subject to superior legal concept(s) having constitutional basis – "(b)efore property can be taken it must appear .. (t)hat the use to which it is to be applied is a use authorized by law (and) (t)hat the taking is necessary to such use. .." N.D.C.C. § 32-15-05(1) & (2). These issues are the "judicial question(s)" or "legal" concept, and not the "political question/political concept" which each political subdivision first determines [and for which some deference will exist, if supported by substantial facts]. Such statutes reject Judge Irby's unique, and unsupported standard of review involving eminent domain decisions – our statute(s) require proof, both legal and factual. See ¶ 39 above.

[¶46] Since 1896, when the North Dakota Supreme Court noted, at *Syllabus* #4 in Bigelow v. Draper, 69 N.W. 570, 570 (N.D. 1896), "(t)he question of the necessity of condemning the property sought to be condemned, while in its essential nature a political question, has been made a judicial question in this state by statute; but it is triable by the court, and not by a jury." The Bigelow Court's discussion initially recognized the inherent right of the court to "inquire into the nature of the use for which the property is to be condemned for the purpose of determining whether such is, in fact, a public use", but by statute [Rev. Codes, § 5959; now, N.D.C.C. § 32-15-05], our legislature entrusted that to the judicial branch of government. *Id.*, page 574." See also, Pembina County v. Nord, 49 N.W.2d 665, 665 & 667 (N.D. 1951); City of Medora v. Golberg, 1997 ND 190, ¶ 8, 569 N.W.2d 257; and compellingly, City of Jamestown v. Leevers Supermarket, Inc., 552 N.W.2d 365, 369 (N.D.

1996).

[¶47] N.D.C.C. § 32-15-05 establishes the judicial role is to determine at least two (2) prerequisites for any exercise of eminent domain that must first exist – which must be based on substantial evidence: (1) a "use .. authorized by law", and (2) the "taking is necessary to such use". If any portion of the property proposed to be taken for an authorized use has been "already appropriated to some public use", then a third (3rd) judicial decision also needs to be established – that the new "public use to which it is to be applied is a more necessary public use." See, N.D.C.C. § 32-15-05; also see, Point 3.

[¶48] Any judicial officer is faced with making both factual and legal decisions when properly exercising the Court's jurisdiction under each subsection of the cited eminent domain statute(s).

[¶49] **A. As to the judicial issue, no deference to the City exists, and the City's eminent domain exercise must be supported by evidence.**

[¶50] The judiciary's proper role is to make sure that the statutory elements for exercise of eminent domain always exist, both factually and legally, *always supported by the evidence.* In City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 370 (N.D. 1996):

> This Court held almost a century ago "courts can always inquire into the nature of the use for which the property is to be condemned for the purpose of determining whether such is, in fact, a public use." *Bigelow v. Draper,* 6 N.D. 152, 69 N.W. 570, 574 (1896). *See also Northern Pacific Ry. Co. v. Kreszeszewski,* 17 N.D. 203, 115 N.W. 679, 681 (1908) ("mere legislative fiat cannot make that a public use which is clearly not such use"). Courts can inquire because a use must be public before private property can be taken by eminent domain under N.D. Const. Art. I, § 16 and U.S. Const. amend. V. *See Square Butte Elec. Coop. v. Hilken,* 244 N.W.2d 519, 523 (N.D.1976). This well-settled principle is explained in 2A J. Sackman and P. Rohan, *Nichols on Eminent Domain* § 7.03[11][b], at pp. 7-96-7-99 (Rev. 3rd

ed.1995) (footnotes omitted) (*Nichols*):

> "The presumption is that a use is public when the legislature has declared it to be. The legislature's decision must be treated with the consideration due to a coordinate department of the government of the state. However, this declaration is not binding upon the courts. If, after giving due respect to a legislative declaration, a court considers the purpose not to be reasonable or connected to a valid public use, it is the duty of the court to declare the act[ ] authorizing the taking as unconstitutional."

[¶51] The *Syllabus by the Court* in the case known as KEM Elec. Co-op., Inc. v. Materi, 247 N.W.2d 668 (N.D. 1976) *,* at page 669, clearly states [and concepts elaborated upon at page 670 relying upon Otter Tail Power Company v. Malme, 92 N.W.2d 514 (N.D. 1958), with additional reference to Malme's recognized legal evidentiary mandate, at page 521 ("under the laws of this state necessity must be established by evidence"]:

> 1. In this state the legislature has seen fit to take it out of the power of the person or corporation in an eminent domain action to settle the question of necessity, and entrust the determination of that issue to the judicial branch of government.
>
> 2. While in this state the necessity for the taking of property for a public use is a judicial question, ...

[¶52] The judiciary is entrusted with settling the question of necessity, and the necessity decision must be supported by evidence. *Id.* The KEM decision, at page 670, establishes "necessity must be established by evidence" to the satisfaction of the judiciary. The original issue to use eminent domain is political; the legitimacy of the actual exercise of eminent domain by passage of the resolution of necessity is a judicial question, and it must be supported by evidence – the five pieces of paper supplied to the City by its attorney [Docket Entry #39; see ¶33] evidenced nothing, nor did anything later submitted to the district judge

meet tests as to sufficiency or relevancy.

[¶53] **B. Summary judgment favoring the City was legally impossible due to City's insufficient and irrelevant evidence.**

[¶54] Partial summary judgment was not appropriate because there existed genuine issues of material fact, and the City was not entitled to judgment as a matter of law. N.D.R.Civ.P. 56(c); Beckler v. Bismarck Public School Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172 (establishing legal requirements for summary judgment). There was no project, nor was there any approval of the project by the governing body; there were no plans, nor specifications; there was no permit from the state engineer – summary judgment is impossible.

[¶55] In Perius v. Nodak Mut. Ins. Co., 2010 ND 355, ¶ 17, 782 N.W.2d 355, citing Farmers Union Oil Co. v. Harp, 462 N.W.2d 152, 155-56 (N.D. 1990), the City's evidentiary standard for summary judgment was recognized to be substantial – "facts identified in affidavit must be admissible in evidence to be considered for purpose of summary judgment". City did not have a project, nor was any project referenced within the five (5) pieces of paper submitted on December 19, 2016, which later caused City to obfuscate its legal and factual deficiencies by supplying substantial quantities of irrelevant papers/opinions to the court in support of its subsequent motion for partial summary judgment.

[¶56] Landowner specifically identified such evidentiary deficiencies with respect to the affidavits of engineer Jerry Bents [App., ps. 106-107], engineer Charles D. Hubbard [App., ps. 107], engineer Nathan Boerboom [App., ps. 107-110], and auditor Steve Sprague [App., ps. 124-126]. Simply put, not even a professional engineer's opinion that Option B1 was the

best option for permanent continuous flood protection in Copperfield Court is relevant when option B1 has never been approved by the City's governing body – no project was approved, nor had plans and specifications ever been prepared showing a need for Landowner's property. The role of the judiciary is to protect landowners, not excuse municipal insufficiencies.

[¶57] Perius, at ¶21, announces certain evidentiary standards [standards only met by Landowner – "specific facts showing there is a genuine issue for trial" because there is no project; the City does not have the right to create an inventory of land for future projects]: (a) "must set forth specific facts under (Rule 56(e)) and expert opinion must be more than conclusory assertion about ultimate issue", (b) "affidavits submitted in summary judgment proceedings [must] set forth specific facts", (c) "(Rule 56) requires affidavits to set forth specific facts", and (d) "an affidavit must set forth specific facts in order to have any probative value", ultimately leading the North Dakota Supreme Court to rule, at ¶ 27 of the opinion:

> We harmonize N.D.R.Civ.P. 56(e) and N.D.R.Ev. 705 and conclude that the rules of evidence do not alter the requirement in N.D.R.Civ.P. 56(e) for "specific facts" in summary judgment proceedings.

[¶58] The personal opinions of engineers Bents, Hubbard,[4] and Boerboom[5] – even if each

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[4] Professional Engineer's stated reason to "achieve compliance with FEMA and USACE stability and performance criteria, and qualify for insurance relief" also suggests an illegal/unconstitutional rationale – eminent domain may not be utilized to secure financial benefit in the form of reduced insurance premiums (or eliminated insurance premiums if out of the floodplain) for other property owners. N.D.C.C. § 32-15-01(3); North Dakota Constitution, Article I, § 16.

[5] Engineer Boerboom's testimony that "(o)n May 16, 2011, the City Commission adopted Flood Protection Goals for the City of Fargo" is equally irrelevant, and

is a professional engineer – are irrelevant, and inadmissible when the City has never approved "Option B1". The affidavits of the engineers should have been stricken and/or disregarded.

[¶59] The affidavit of engineer Boerboom should also have been disregarded due to its false claims. Division Engineer Nathan Boerboom **falsely asserts**, at ¶ 24 [App., p. 85], "(t)he City Commission authorized proceeding with option B1 for permanent flood protection in Copperfield Court. *Id.* (referencing FARGO'S EXHIBIT E) (at p. 45, Comprehensive Oakcreek/Copperfield/Coulee's Crossing Flood Risk Reduction Plan Map)." In fact, examination of EXHIBIT E [Docket Entries #121-125] will not disclose any action taken by the Fargo City Commission authorizing "option B1" in agenda item 7's background material,[6] nor is approval of "option B1" found anywhere within the minutes of that meeting – it did not happen. FARGO EXHIBIT E, page 298 [Docket Entries #121-125]; see also LANDOWNER'S EXHIBIT #8 [App., ps. 238-300] and LANDOWNER'S EXHIBIT #9 [App., ps. 301-329] as referenced in Landowner's Affidavit showing sworn testimony from mayor Mahoney and engineer Boerboom that no plans/project were approved, nor existed as of June 25 & 26, 2018 – long after the Resolution of Necessity and initiation of this eminent domain litigation.

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inadmissible under the Perius standards, but the reasoning advanced also proves the illegitimacy of the decision [eminent domain cannot be used for the benefit of private individuals] when he recognizes the "goals included permanent flood protection measures that could be certified by an engineer so it could be recognized by FEMA." *Id.*, ¶ 18. N.D.C.C. § 32-15-01(3); North Dakota Constitution, Article I, § 16.

[6] If such existed it would be evidence of a miracle – background materials furnished *prior to* the governmental meeting could never legitimately include reference to subsequent action taken by the Fargo City Commissioners.

[¶60] City stuffed the clerk's files with multiple documents unrelated to this specific eminent domain exercise against Landowner under the precept that any prior discussion involving flooding in Fargo is relevant evidence. Even in eminent domain summary judgment proceedings, North Dakota's Rules of Evidence should still guide litigants, and most certainly, the judiciary. N.D.R.Ev. 401 provides the test for relevant evidence, consisting of two (2) parts: (a) the evidence has a tendency to make a fact more or less probable than it would be without the evidence, **and** (b) the fact is of consequence in determining the action. This is an "action" against a single landowner – Karen Wieland. Introduction of documents, perhaps created years earlier, wherein some individual may have talked about floods, water, dikes, or any protective means, to include "water storage in the kitchen sink", does not make it a fact/document that is relevant in determining this single eminent domain action. The bulk of the documents presented by FARGO are not "relevant evidence" – only five (5) pages of background evidence were submitted to City's governing body on the day it prematurely acted - no project, no plans, no specifications; not even a state permit. Those documents are not "of consequence in determining the action." N.D.R.Ev. 401(b).

[¶61] Irrelevant, insufficient, non-existent and/or missing evidence cannot satisfy City's established legal threshold – always requiring the existence of substantial, and specific evidence, which is legally admissible showing the *necessity* of the "taking". The evidence must exist before property can be taken if N.D.C.C. § 32-15-05 be honored. Without the City ever approving the project, plans, or specifications showing a need for Landowner's specific property, City could never succeed; the lower court is clearly erroneous when

deciding "that plans were disclosed to the public, and the plans were appropriately approved by the City Commission."[7] Partial Summary Judgment for Plaintiff, ¶20; App., p. 351. *Nothing in the record supports such factual finding.*

[¶62] **POINT 2. The City failed to satisfy a mandatory notice requirement - a statutory condition precedent to any condemnation action.**

[¶63] City had no right to invoke the Court's jurisdiction to force an involuntary sale of land. N.D.C.C. § 54-12-01.1 mandates a condition precedent to any eminent domain action – "(a) condemnor shall notify a property owner of the available online information *before making an offer to purchase and initiating a condemnation action*." Emphasis added. North Dakota law clearly establishes the required time line before any litigation is possible - City had no right to initiate the eminent domain action.[8] The absence of a statutory penalty,

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[7] If the court is relying upon the 2012 "Citywide Comprehensive Plan", such is not evidence of a project at all, but merely a *concept* with a single goal – "to identify the projects needed to effectively remove properties from the current FEMA 100-year floodplain." LANDOWNER'S EXHIBIT 3(App., p. 134). It is a *conceptual goal* for which eminent domain is legally impossible under N.D.C.C. § 32-15-01, and North Dakota Constitution, Art. 1, § 16 (private property may not be taken for the use of private individuals, nor for public benefits of economic development). See also, N.D.C.C. § 32-15-05. The publication further recognizes its non-evidentiary, nebulous and ephemeral nature [*emphasis* added]:

> "In 2012, the City Commission approved a List of Acquisitions (PDF) which identifies properties for flood mitigation project acquisition. This list was developed using the projects outlined in the Comprehensive Plan and is *subject to change as projects are developed beyond the concept level contained in the Comprehensive Plan*. *Acquisition offers will not be made until* ***further project design details have been completed*** *and* ***it has been verified that the property must be acquired in order to successfully complete the project***."

[8] Nor did the City comply with an earlier statute requiring that information in pamphlet form prior to February 23, 2017, the effective date of the statutory change.

whether civil or criminal, is irrelevant when the statute identifies a condition precedent to any eminent domain action.

[¶64] While obviously intended to insure that affected landowners know the law, this Landowner argues that the statute also compels the condemnor(s) to be equally knowledgeable about what private property is subject to condemnation. The City failed to comply with this statutory condition precedent; and the evidence establishes the political subdivision was intent on avoiding the clear requirements of the eminent domain process – mandatory notice before offer/initiation of condemnation action, a statutory condition precedent to litigation. Every condemning authority is required to first provide the private landowner with notice of certain online information describing North Dakota's eminent domain laws *prior to making an offer to purchase and initiating a condemnation action*,. App., p. 122. City intended to skew free market pricing, and Landowner was deprived of her rights, privileges, or immunities guarding against wrongful takings. 42 U.S.C. § 1983.

[¶65] **POINT 3. The City failed to meet legal requirements for any "taking".**

[¶66] N.D.C.C. § 32-15-05 is the tip of the legal and factual pyramid that possibly allows for governmental taking(s) of private property. Entitled, "(w)hat must appear before property taken", the statute has a clear mandate to any political subdivision electing to use eminent domain – prove it first with real evidence that will be sustained upon judicial review, as follows:

> **N.D.C.C. § 32-15-05.** Before property can be taken it must appear:
>
> 1. That the use to which it is to be applied is a use authorized by law.
> 2. That the taking is necessary to such use.
> 3. If already appropriated to some public use, that the public use to

which it is to be applied is a more necessary public use.

[¶67] City's actions of December 19, 2016, must be judicially reviewed against such statutory standard – *without judicial deference*. Since there was no known public discussion, the Fargo City Commissioners' public record could not then include any evidentiary document(s) establishing **(A)** what "property" owned by Landowner was to be taken [N.D.C.C. § 32-15-03 – type of estate to be taken; N.D.C.C. § 32-15-04 - what property may be taken when already appropriated to other public uses; N.D.C.C. § 32-15-05(2)], **(B)** the actual "public use" [N.D.C.C. § 32-15-02; N.D.C.C. § 32-15-05(1)], and also, that it is "a use authorized by law"[N.D.C.C. § 32-15-02 - municipalities do not have unlimited eminent domain, they must still fit within other statutory constraints such as subsections 3 or 8, and possibly, subsection 4 (if building a canal or ditch for public transportation) while simultaneously meeting requirements of N.D.C.C. § 32-15-05(1&2); see Point 3(B), below], **(C)** the "taking is necessary to such use" [N.D.C.C. § 32-15-05(2)], and **(D)** is it a "more necessary public use" than the pre-existing public use(s) [N.D.C.C. § 32-15-05(3); N.D.C.C. § 32-15-04(3)] when both utility and drainage easements already exist?[9] The City never presented any evidence to its own governing body when deciding the initial political question, and it failed to present mandatory evidence satisfying the inherent judicial question(s) to be determined – if there is no project, nor plans and specifications, nor even permits, nor any supporting evidence, how can any district court judge find acquiring Landowner's property to be a "necessity"? Landowner submits the doctrine of impossibility,

[9] The City's lawyer acknowledged the existence of prior public uses. Tr. of 11/6/18, p. 8, ls. 11-16.

if not the cited North Dakota law, precludes judicial rubber stamps favoring the government that changes the definition of "'necessary' private land" so that "'coveted' private land" can be taken. The district judge should make judicial decisions, not those reserved to lexicographers.

[¶68] **A. Factual requirements for any flood project "taking" do not exist.**

[¶69] While a municipality has the statutory authority for a "flood control project" pursuant to N.D.C.C. § 40-05-01(67),[10] a second legal concept set forth in N.D.C.C. § 32-15-02 imposes another legal (statutory) limitation prohibiting City's exercise of eminent domain, now ignored by City, and the lower court. No municipality has "unlimited" flood control authority; it must first fit within one (1) of eleven (11) "public use(s)" or "purpose(s)" which would allow it, as a municipality, to exercise eminent domain as set forth in N.D.C.C. § 32-15-02. This second limiting legal concept bars any eminent domain action initiated against Landowner – City has no project fitting any specific subsection in the law. N.D.C.C. § 32-15-02 grants exercise of eminent domain to various political subdivisions, but not universally to North Dakota political entities/"person empowered to take property under the power of eminent domain" [N.D.C.C. § 32-15-01(4)] – certain exercises of such authority are specifically granted only to a specific type of entity, and even then, there exists further limitations upon the category itself. Review of the eleven (11) subsections set forth in N.D.C.C. § 32-15-02 will reveal the existence of only one (1) or two (2) possible "purpose(s) for which exercised" would involve eminent domain for a municipal "flood control project"

[10] Pursuant to statute, the eminent domain authority must be exercised "in accordance with chapter 32-15" - presently, there appear to be thirty (30) statutes in the chapter.

– at subsection 3,[11] with **emphasis** added noting the possibility of a "drainage ditch" or "raising the banks of streams":

> 3. Public buildings and grounds for the use of any county, city, park district, or school district; canals, aqueducts, flumes, **ditches**, or pipes for conducting water for the use of the inhabitants of any county or city, or **for draining any** county or **city**; **raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels**; roads, streets, and alleys, and all other uses for the benefit of any county, city, or park district, or the inhabitants thereof, which may be authorized by the legislative assembly, but the mode of apportioning and collecting the costs of such improvement shall be such as may be provided in the statutes by which the same may be authorized.

[¶70] Nowhere within the record is there a claim that City has a project involving the first possible exercise of eminent domain: a "ditch() .. for draining any .. city"; nor does the record reflect the existence of the second possible project allowing exercise of eminent domain: "raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels .." The general authority of N.D.C.C. § 40-05-01(67) always requires such flood control project to meet the specific(s) of N.D.C.C. § 32-15-02 – statutory limitations ignored by the lower court, and the City.

[¶71] City may have powers granted municipalities generally, but always it must be exercised "*in accordance with chapter 32-15"* [see footnote #10], and the laws of eminent domain set forth in N.D.C.C. Chap. 32-15 have not authorized any municipality to exercise

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[11] Each subsection contains words of limitations; some exercise(s) only favor specific types of political subdivisions, and some require specific factual presentations. City is restricted to flood control projects involving (a) ditches for drains, or (b) streams, banks of streams, or stream channels – drainage ditches are the opposite of flood control dikes/embankments and there are no streams contiguous to, or in close proximity to Landowner's property. The closest body of water fitting such term would be the Red River of the North about two (2) miles east, but only the state of North Dakota could claim the public purpose authorized by subsection 11.

eminent domain except in very limited factual circumstances for flood control projects [as above set forth].

[¶72] Simply put, there is no eminent domain statute identifying mere acquisition of land [to create an inventory of land for any future possible municipal project(s)] as authorized "public uses" or "purposes". Moreover, the municipal acquisition of land for a flood control project always requires the existence of a "stream", unless it involves a "ditch", under the statutory limitation(s) relating to municipal flood control projects – no such project, plans, or specifications were approved, nor do they exist. If non-existent, Landowner's real property cannot be judicially determined "necessary" to be taken.

[¶73] **B. The resolution of necessity is fatally flawed.**

[¶74] The vague signed Resolution of Necessity [App., ps. 30-31] is fatally flawed. It embodies City's determination to "condemn first, decide what to do with the property later", just like the City of Stockton as discussed in City of Stockton v. Marina Towers LLC, 171 Cal.App.4th 93, 100 (2009). As noted in Marina Towers, at page 104, "It is a cardinal principle of statutory and constitutional law that private property may only be taken for a *public* use. (Cal. Const., art. I, § 19; § 1240.010; see *Kelo v. New London* (2005) 545 U.S. 469, 477-478 ..)" While California has statutes that mandate the contents of the resolution of necessity, Landowner argues that North Dakota's eminent domain laws dictate the political subdivision's *resolution of necessity must contain, or reference then-existing evidence establishing all legal requirements for proper exercise of eminent domain*, to include (a) identification of the project, (b) proof that the project is an authorized public use, (c) that the specific property sought to be acquired is necessary for that project, and (d) the

new public use is superior to any pre-existing public uses. N.D.C.C. § 32-15-05. The appellate court in Marina Towers, at page 108, stated the obvious when justifying its condemnation of resolution(s) of necessity that define projects "hopelessly vague or so broad that it encompasses virtually every conceivable public use" [page 109]:

> It is both a physical and legal impossibility for legislators to make a determination that public interest and necessity require "the project," that "the project" is located or planned in a manner consistent with the greatest public good and least private injury, and that the property sought to be acquired is necessary for "the project" (statute omitted) if the resolution contains no intelligible description of what the project is.

If there is no project, plans, or specifications as required by law, no district court judge can practice devination and determine Landowner's property is necessary.

[¶75] The Marina Towers[12] court noted the United States Supreme Court case of *Cincinnati v. Vester*, 281 U.S. 439 (1930), which rejected the sufficiency of a project's description in a resolution of necessity when the municipality "resolution described the purpose of the taking 'in the most general terms'", going on to state:

> The principles of *Vester* apply here, where the city council essentially proclaimed: "We are authorized to take this land for a public use. We do not yet know what use that is. Therefore, the proposed project consists of any of the possible uses that are authorized by statute."
>
> A hopelessly obscure description of the project in a resolution of necessity cannot be justified simply because the governing body has incanted every statutorily authorized purpose. A statement that the property is being taken for any or all of the authorized purposes listed in the Government Code or Code of Civil Procedure amounts to a failure to disclose the purpose of the

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[12] At page 113, the Marina Towers court determined "a governing body's postresolution conduct is not relevant to whether a resolution's project description complies with (the law)." Stuffing judicial files would be postresolution conduct, and still no evidence that a single commissioner saw a single extraneous document, much less considered it. Five (5) pages should not suffice.

taking.

[¶76] Landowner asserts none of North Dakota's statutory predicates existed in the actual record of December 19, 2016, and City has no right to later attempt to fill the legal and factual evidentiary void with evidence, real or imagined, for any non-existent project. Similarly, insufficient and irrelevant evidence will never suffice; the lower court should have disregarded any "stuffing" when scrutinizing the non-existent project, plans, specifications, and permit.

[¶77] **POINT 4. Interest always accrues on judgments.**

[¶78] Interest is payable on judgments entered in the courts of North Dakota at the rate of 8.5% in 2019. N.D.C.C. § 28-20-34.

[¶79] Landowner moved the Court for an order of dismissal as authorized by N.D.C.C. § 32-15-25 when City failed to pay within thirty days after the entry of final judgment the sum of money assessed [even if dismissed, the statutory mandates of N.D.C.C. § 32-15-35 always require the City to be "liable for and pay to the owner of such land all court costs, expenses, and fees, including reasonable attorney's fees as shall be determined by the court in which the proceedings were filed"]. App., ps. 379-385. Landowner's "Calculations of Judgment Interest at 8.5% in 2019" determined that City had failed to pay (or deposit with the Court) accruing interest of $23,726.60 through May 8, 2019 [which continues to accrue thereafter pursuant to statute].[13] App., p. 383.

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[13] Interest on $850,000.00 continues to accrue post-judgment at the statutory rate of 8.5% on $850,000.00 through March 13, 2019; thereafter interest accrues on the total monetary judgment amount of $939,044.32 at the statutory rate of 8.5% until either April 13, 2019 (expiration of 30 days after entry of amended judgment; Docket Entry # 459), or May 1, 2019 (expiration of 30 days after entry of "Final Order of Condemnation Authorizing the

[¶80] There exists a statutory duty imposed upon the City pursuant to N.D.C.C. § 32-15-30, which provides (*emphasis* added):

> *The payment of the money into court as provided for in this chapter shall not discharge the plaintiff from liability to keep the said fund full and without diminution*, but such money shall be and remain as to all accidents, defalcations, or other contingencies as between the parties to the proceedings at the risk of the plaintiff, *and shall remain so until the amount of the compensation or damages finally is settled by judicial determination and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until the defendant is authorized or required by order of court to take it.* If for any reason the money at any time shall be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation finally is brought to an end, and until paid over or made payable to the defendant by order of the court, as provided in section 32-15-29, and until such time or times the clerk of court shall be deemed to be the custodian of the money and shall be liable to the plaintiff upon the clerk's official bond for the same, or any part thereof, if for any reason it is lost, or otherwise abstracted or withdrawn.

[¶81] At no time has the City paid the total amount due Landowner, nor has it ever deposited the total amount due Landowner as required by law to be done within thirty (30) days of any possible concluding dates. Landowner was entitled to a dismissal as a matter of law [subject to the statutory mandates imposed upon City by N.D.C.C. § 32-15-35].

[¶82] At no time was Landowner able to accept the deposited funds without giving up legal rights. N.D.C.C. § 32-15-29 specifically provides that the defendant-landowner make demand for the deposited funds, and then the judge will "order and direct that the money so paid into court for the defendant be delivered to the defendant upon the defendant's filing a satisfaction of judgment, or upon the defendants's filing a receipt therefor and an abandonment of all defenses to the action or proceeding except as to the amount of damages

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City of Fargo to Take Possession"; Docket Entry #470).

that the defendant may be entitled to in the event that a new trial shall be granted." The statute further provides: "A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses interposed by the defendant, except the defendant's claim for greater compensation." Landowner always sought to avail herself of an appeal primarily on the basis the right to take property was not established [phase one (1) of the two (2) phase proceedings wherein the District Judge rules first, followed by the jury decision as to phase two (2)], and Landowner never could, nor did, make such application for "just compensation" as awarded by the jury, and statutorily increased by accruing interest. N.D.C.C. § 28-20-34. The jury's "just compensation" and the Court-determined court costs, expenses, and fees, including reasonable attorney's fees .." [N.D.C.C. § 32-15-35], **plus statutory interest** as a matter of law [N.D.C.C. § 28-20-34], has never been paid, nor deposited with the court within any possible thirty (30) day period. The matter should have been dismissed [subject to City's statutory obligations for payments under N.D.C.C. § 32-15-35]. The lower court erred by prematurely issuing a "Final Order of Condemnation Authorizing the City of Fargo to Take Possession" [App., p. 376] (a) without full payment (or deposit) of "just compensation" and all accrued or accruing statutory post-judgment interest [Point 4], and (b) while relying upon inadmissible evidence by taking "Judicial Notice" of "Fargo Mayor Dr. Timothy Mahoney's issued .. Declaration of Emergency" [App., p. 377] in violation of due process of law. N.D.R.Ev. 201 only allows judges to take judicial notice of adjudicative facts – "the facts of the particular case before the courts, facts that are normally the subject of proof by formal introduction of evidence." See, explanatory notes to Rule 201. The hearsay, and self-serving declaration of the City's mayor does not

diminish, nor eliminate the constitutional prerequisite – "Private 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 ..." North Dakota Constitution, Article I, § 16. Opposing remand for determination of a pending motion of dismissal, City argued that the lower court had determined the issue of post-judgment interest. Landowner submits the district judge is without authority to eliminate statutory interest on judgment, and dismissal is compelled by statute.

[¶83] **CONCLUSION**

[¶84] Landowners must give up land for public use, but not before payment [North Dakota Constitution, Article I, § 16], AND ALSO, the judiciary affirms that the proposed use "is a use authorized by law", the "taking is necessary to such use", and "if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." N.D.C.C. § 32-15-05. Besides existing public use utility easements, Landowner's property was also subject to drainage easements along a legal drain always requiring state engineer approval of plans, and the possibility of criminal penalties for non-compliance. When already dedicated to another public use, the judiciary must determine that the new public use is more necessary – which prior public uses were known, but never considered by the City, so no evidence exists, just as there is a paucity of evidence (five pages of paper) supporting the City's resolution. The City's failure to create an improvement project involving a public use for which eminent domain is authorized, accompanied by plans, specifications, and drawings evidencing mandatory use of Landowner's property, should not be excused. Landowner requests the Supreme Court reverse the lower court's unwarranted

deference to this transgressing City intent on creating an inventory of land for future unknown projects.

Respectfully submitted this 17th day of July, 2019 .

Garaas Law Firm

/s/ Jonathan T. Garaas

_____

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The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Brief consisting of thirty-four (34) pages complies with the thirty-eight (38) page limitation imposed by N.D.R.App.P. 32(a)(8) for principal briefs.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

Plaintiff-Appellee

vs.

Karen C. Wieland,

Defendant-Appellant.

Affidavit Of Service By Electronic Means

Supreme Court No. 20190153

Civil No. 09-2017-CV-01047
(Cass County District Court)

State of North Dakota
County of Cass

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

[¶2] On the 17th day of July, 2019, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: **(1) Brief of Appellant, and (2) Appendix to Brief of Appellant**.

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

[¶4] Jane L. Dynes at jdynes@serklandlaw.com

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

/s/ Jonathan T. Garaas
_____
Jonathan T. Garaas

Subscribed and sworn to before me this the 17th day of July, 2019.
/s/ David Garaas with seal
_____
Notary Public

20190153
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 23, 2019
STATE OF NORTH DAKOTA

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/s/ David Garaas with seal
_____
Notary Public