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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lincoln Land Development, LLP,	)	
	)	Supreme Court
Appellee,	)	Case No: 20180117
	)	
vs.	)	
	)	
City of Lincoln,	)	
	)	
Appellant.	)	

*** *** ***

APPEAL FROM FINAL ORDERS, JUDGMENT, AND AMENDED JUDGMENT IN THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE JAMES HILL
CIVIL NO. 08-2015-CV-00348

BRIEF OF APPELLANT CITY OF LINCOLN

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] City of Lincoln provides the following issues presented for review:

A. THE COURT ERRED IN CONCLUDING AND INSTRUCTING THE JURY THAT CITY'S PUBLIC EASEMENT ESTABLISHED THROUGH PRESCRIPTIVE USE IS A TAKING OF PLAINTIFF'S PROPERTY WITHOUT JUST COMPENSATION. *McKenzie Cty. v. Reichman*, 2012 ND 20 at ¶ 11, 812 N.W.2d 332.

B. THE COURT ERRED IN REQUIRING A PERMANENT ROADWAY EASEMENT DESPITE CITY'S PUBLIC EASEMENT ESTABLISHED THROUGH PRESCRIPTIVE USE. *Keidel v. Rask,* 290 N.W.2d 255, 257 (N.D.1980).

C. THE COURT ERRED IN REFUSING TO CONSIDER DIRECT DOCUMENTARY EVIDENCE OF CITY'S EASEMENT IN LAGOON ROAD.

D. THE COURT ERRED IN DETERMINING PLAINTIFF WAS THE SOLE PREVAILING PARTY WHERE DEFENDANT PREVAILED IN THE DEFENSE OF ALL BUT A SINGLE LAWSUIT CLAIM. *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 49, 730 N.W.2d 841, 858.

II. STATEMENT OF THE CASE

[¶2] Plaintiff-Appellee Lincoln Land Development ("Plaintiff" or "LLD") sued Defendant-Appellant City of Lincoln ("City") in December of 2014 asserting inverse condemnation for the claimed taking of its property without just compensation in relation to City's use and improvement of a gravel road across LLD's agricultural property, known as Lagoon Road, which serves City's sewage lagoons. LLD took title to the property in April of 2005. Lagoon Road had been in use continuously by City to access City's sewage lagoons since approximately 1985, and was most recently improved by City in 2011. LLD raised several discrete inverse condemnation claims against City concerning claimed increased surface water drainage, wetlands, and storm water detention ponds on the property, as well as claimed nuisance and trespass. City raised affirmative defenses to the claims, including the improvement of Lagoon Road in 2011 did not create any increased surface water drainage, wetlands, storm water detention ponds, or any damage to the property. City also asserted various easement related defenses, including that a public easement through prescriptive use existed.

[¶3] LLD's nuisance and trespass claims were dismissed by the district court ("court") early in the case. The court determined at the bench trial conducted September 11-15, 2017, that inverse condemnation claims based on increased surface water drainage, wetlands, and storm water detention ponds lacked evidence. The court further concluded City proved by clear and convincing evidence its public easement established through prescriptive use (a/k/a "prescriptive easement) pursuant to N.D.C.C. § 24-07-01. But the court also concluded, erroneously, such prescriptive use constituted a "lawful taking" without just compensation, and thus Plaintiff was entitled to proceed to a jury trial on damages. The court's legal conclusions that City's prescriptive easement – obtained well prior to the 2011 improvement project and pursuant to ND statute clothed with a

strong presumption of Constitutionality – could constitute a "taking", is erroneous. The court also erroneously refused to consider documents that provided direct evidence of City's easement in Lagoon Road.

[¶4] The court ordered the issue of damages on the "lawful taking" to proceed to a jury trial, conducted December 19-22, 2017. At that trial, the court instructed the jury several times, erroneously, that City's prescriptive easement was in fact a taking, and the jury was to determine whether such "taking" damaged LLD, and if so, in what amount. The court's written instructions to the jury, a curative instruction, and the verdict form also contain the same error about City's prescriptive easement being considered a taking entitling LLD to damages. Applying the court's erroneous instructions to the evidence at the second trial, the jury awarded a verdict in the amount of $8,924 plus interest.

[¶5] After the jury trial, the court erroneously ignored the previous dismissal of the nuisance and trespass claims, and ignored the many claims and defenses City prevailed on at trial. Thus the court erroneously determined LLD was the "prevailing party" entitled to costs and disbursements in the amount of $18,106.95. Based on the same errors, the court ignored City as a prevailing party prior to and at trial, and awarded LLD attorneys' fees of $122,705.50.

[¶ 6] The court's errors of law and the final judgment entered thereon should be reversed. No remand is necessary as City should prevail on all appealable issues. City is entitled to the complete dismissal of the lawsuit with prejudice based on its meritorious prescriptive easement and other easement defenses. LLD is not entitled to costs, disbursements, and attorneys' fees given LLD is not the "prevailing party". City is the prevailing party entitled to costs and disbursements. The final judgment should be vacated and judgment should be entered in City's favor.

III. STATEMENT OF FACTS RELEVANT TO THE ISSUES

A. The Parties' Lawsuit Claims and Defenses.

[¶7] This case concerns inverse condemnation and other claims by the Plaintiff-Appellee LLD against the Defendant-Appellant City. (doc.72; app.21)[1]. LLD contends City's use and 2011 improvement of an access road to City's sewage lagoons, known as Lagoon Road, partially on its property, constituted a taking without just compensation. (app.23). LLD also claims City's actions in using and improving Lagoon Road increased storm water drainage on its property, created wetlands, and impounded water in storm water detention ponds, all resulting in claimed taking of its property without just compensation. (app.23, 39).

[¶8] City answered raising affirmative defenses, including the grant of a perpetual easement (¶XV), prescriptive easement (¶XVI), easement by estoppel (¶XVII), and that the surface-water related issues were without evidence or merit (¶XVI). (app.28-29, 38-39). LLD's nuisance and trespass claims in the original Complaint (doc.2) were dismissed with prejudice as legally deficient. (doc.24). All of the inverse condemnation claims were tried to the court on liability and to a second jury trial on the extent of the taking and the prescriptive easement, and the issue of damages. (app.34, 41).

B. The Property and Road at Issue

[¶9] LLD purchased the agricultural property in April of 2005 from the previous property owner Central Investment Properties, LLP (CIP). (doc.541 at 28-33; app.46-47). CIP dissolved effective March 22, 2010. (doc.185). Lance Hagen is the owner of LLD, (app.41), and LLD has never claimed to be a successor in interest to CIP. (doc.2; app.21). Moreover, none of the CIP

[1] References to the docket are to "doc.___". References to the Appendix are to "app.___".

documents on file with the ND Secretary of State identify Hagen or LLD as a successor in interest to CIP. (doc.186).

[¶10] In 1984-1985, City built and began using Lagoon Road, including traveling partially across CIP's then-property, to access its sewage Lagoons on adjacent property owned by City. (app.60-70). Lagoon Road was used by City openly, continuously and without opposition from CIP approximately 20 years prior to LLD's purchase of the land in 2005. (app.65-66).

[¶11] In 2011, City improved Lagoon Road in order to comply with directives by the ND Department of Health, which has oversight over municipal sewage operations. (app.65-66; docs.310-312). As part of the improvement project, City raised the roadbed somewhat and created minor ditches and installed culverts. (doc.312; app.67-68). The footprint of Lagoon Road as originally constructed is in the precise location of the current, post 2011 improved Lagoon Road. (app.43, 61, 74-75; doc.513). Until this lawsuit, LLD never challenged City's use or improvement of Lagoon Road. (app.66).

C. Pre-Bench Trial Matters

[¶12] City moved for summary judgment on its defenses on the basis there existed a permanent easement allowing City to use and improve Lagoon Road, that an easement by estoppel existed, and/or that a prescriptive easement existed. (docs.133-135, 180). The court determined disputed factual issues remained and denied the motion. (doc.214). In addition to summary judgment, City filed motions in limine to exclude certain of LLD's testimony and expert testimony, (docs.196, 200), which motions were denied. (docs.270, 271, 275).

[¶13] Prior to the first trial, City submitted proposed jury instructions, verdict forms, (docs.219, 220), and a detailed Trial Brief setting forth detailed evidence and analysis. (doc.222). The court

decided to bifurcate the trials on liability and damages, with the first trial being a bench trial and the second a jury trial on damages. (doc.268). In its Order on Trial Sequence the court stated:

> **IT IS HEREBY ORDERED** that the trial set for September 11, 2017, shall be by court trial with all issues of a taking, to include any and all defenses to the alleged taking, to be tried to the Court. Should the Court find that a taking has occurred, a jury trial will be set at a later date to determine the issue of damages[.]"

(app.34).

[¶14] At the bench trial conducted September 11-15, 2017, numerous witnesses testified on behalf of LLD and City. (app.41). Following the bench trial, the court issued its *Findings, Conclusions and Order for Judgment* (app.36) ("the Order").

D. The Court Determined at the Bench Trial LLD's Inverse Condemnation Claims Due to Increased Surface Water Drainage, Wetlands, and Storm Water Detention Ponds Lacked Supporting Evidence.

[¶15] In the Order, the court determined no taking occurred concerning LLD's claimed surface water drainage, wetlands, and storm water detention pond inverse condemnation claims. (app.46, 72).

[¶16] The court addressed the surface water related claims in detail, making lengthy findings of fact and conclusions of law. (app.43-46, 72). The water related claims formed the vast majority of LLD's claimed damages in the lawsuit: in a March 3, 2016 letter (doc.239), offered by LLD to the court as evidence of the prior disclosure of Lance Hagen's putative expert testimony (doc.241), LLD separately analyzes the "roadway" taking and the "wetlands" taking claims, calculating roadway damages at only $31,050 and wetlands damages at $803,400, more than 25 times the amount of the Lagoon Road claim.

E. The Court Determined at the Bench Trial Both City's Prescriptive Easement Defense was Meritorious, and, the Prescriptive Easement was Considered a Taking Entitling LLD to Compensation.

[¶17] The court also addressed the prescriptive easement evidence in detail making lengthy findings of fact (app.59-70), and conclusions, including that City's expenditures of public funding made it a public road. (app.74). The court's legal conclusions include the following applicable to the assignment of error:

> [T]he Court must determine whether there existed an easement by prescriptive use. **If so, the issue of extent and value of "taking" is relevant for determination by a jury.**
>
> (. . . .)
>
> At the same time the Court finds that not only is the prescriptive easement in existence but the general scope of the easement is discernable from the undisputed records. (Exhibit P-1). **Its value is for a jury to decide**.
>
> . . . .
>
> As a consequence, the Court affirmatively concludes that City of Lincoln has proven with clear and convincing evidence its affirmative defense of a public roadway through prescriptive use. The proof of that defense negates in the claim of Lincoln Land Development in relation to Lagoon Road, which relies on a theory of an "unlawful" governmental taking. **However, the issue of just compensation remains**.

(app.24, 59, 66-67, 73-76).

F. The Court Did Not Account for Documents Evidencing City's Pre-existing Easement or Right of Way in Lagoon Road.

[¶18] City introduced several critical exhibits at the bench trial showing direct evidence of City's implied or express easements or right of way in Lagoon Road. Those exhibits included a July 2, 1985 plat map prepared, approved, and signed by CIP and delivered to City in relation to a subdivision that was never built, North Lincoln First Addition. (app.51). The documents included an August 16, 1985 letter by the former Mayor to CIP. (doc.350). The court refused to consider the 1985 letter (app.51-52) and refused to consider the 1985 plat referenced in the letter. (app.51). The court also refused to consider the stamped August 2, 1984 Veigel Engineering plans (app.84) as evidence indicating an easement, (app.50-51), despite the fact those plans reflect a "50'

Permanent Easement" and show the same street names, lot numbers, roadway centerlines, and locations of manholes, and other benchmarks as are found in the 1985 plat. (app.86, 89-94).

[¶19] The court also failed to consider plat maps, part of the CIP-LLD Warranty Deed on file and of record against the real property at the Burleigh County Recorder's Office. (app.78-83). The 2005 plat maps show the very same rights of way or easements in precisely the same location as Lagoon Road reflected in the 1984 Veigel plans (app.85) and in the 1985 plat map (app.31), but the court did not mention those maps in its Order except in passing. (app.47).

G. Pre-Jury Trial Matters

[¶20] After receiving the Order (app.36), City filed a Motion to Correct pursuant to N.D.R.Civ.P. 60(a). (docs.442, 443). The court denied the Rule 60 motion without addressing the serious legal errors therein and without addressing the fact City had prevailed on the trespass and nuisance claims and all claims at the bench trial but one. (app.138). City also sent a letter to the court pointing out the internal inconsistencies in the Order. (doc.431).

[¶21] LLD made a motion in limine prior to the jury trial (doc. 453), opposed by City (docs.458-462), seeking to exclude testimony or evidence by City in relation to Lance Hagen's prior felony criminal charges. The court granted LLD's motion. (doc.476). City filed a motion in limine to exclude completely new engineering work and testimony by LLD's engineer, disclosed for the first time just a few days prior to the jury trial. (docs.469 & 470). The court denied that motion. (doc.475).

H. The Jury Trial

[¶22] At the jury trial, evidence was presented by both parties through testimony and exhibits. The court's Charge (a/k/a Instructions) to the Jury (app.105) included numerous misstatements of law, including:

> This Court has found that there has been a "governmental taking" by City of Lincoln of private property of Lincoln Land Development, LLP, as a result of the construction/improvement of Lagoon Road in 2011 for which Lincoln Land Development may be entitled to compensation.
>
> At the same time the Court has also determined legally that City of Lincoln had, by the year 2011, acquired a right of access, known as a prescriptive easement, on a portion of the property belonging to Lincoln Land Development upon which Lagoon Road was built/improved, which, as noted, the Court has concluded constitutes a "taking for public use" by City of Lincoln.

(app.106-107).

[¶23] The court furthermore gave the jury a "curative instruction" (app.132) during the trial, including:

> This Court has also found that there has been a "governmental taking" by City of Lincoln of private property of Lincoln Land Development, LLP, as a result of the construction/improvement of Lagoon [Road] in 2011 for which Lincoln Land Development is entitled to be compensated.
>
> Once again, you are instructed that there remains a factual dispute as to the precise legal description and scope of the prescriptive easement and the value of the property taken, if any in the construction/improvement of Lagoon Road in 2011.

(app.133).

[¶24] The court also provided the jury a Special Verdict Form containing the following:

> Do you find that the "taking for public use" in August of 2011 of Lincoln Land Development property by City of Lincoln when City of Lincoln improved and/or constructed Lagoon Road proximately caused damage to Lincoln Land Development? (Mark "yes" or "no").

(app.135). Although the Charge to the jury and the curative instruction provided that the scope and extent of the prescriptive easement was in dispute and to be decided by the jury, the verdict form did not include any such questions, although requested by City. (docs.449, 450). Nor did the verdict form contain any questions about the precise legal description (by acreage, metes and bounds, or otherwise) of the "taking for public use" determined by the court as a matter of law, as requested by City (docs.448, 449). The court's jury instructions (app.105) and its special verdict

form (app.135) also allowed LLD to seek severance damages from the City despite the fact severance damages was not claimed by LLD. (app.21)

[¶25] At the close of the jury trial, the jury awarded LLD a verdict of $8,924, plus interest of 1.33%. (app.135).

I. Post-Jury Trial Matters

[¶26] Following the second trial, LLD requested its costs and disbursements, arguing it was the prevailing party at trial. (doc.657). City objected, arguing it too had prevailed at trial on several of LLD's claims and on certain defenses and there was no single prevailing party entitled to costs. (doc.673). In ruling, the court focused on the single Lagoon Road claim LLD prevailed on at trial recovering a mere $8,924, failed to mention City's success on the merits of several claims and defenses, and affirmed all of LLD's costs and disbursements taxed as costs (app.doc.694) in the total amount of $18,106.95. (app.165).

[¶27] Following entry of judgment (doc.659), LLD requested attorneys' fees under N.D.C.C. § 32-15-32. (doc.664). City filed a brief in opposition (doc.683), and the court once again ruled (app.141) against City characterizing the verdict as an "excellent result" (app.159), and awarding most of LLD's requested attorneys' fees of $122,705.50. (app.163). The jury's verdict, the award of costs and disbursements, and the award of attorneys' fees were essentially consolidated into the *Amended Judgment On Jury Verdict* reflecting a monetary judgment in the total amount of $150,504.19. (app.177).

[¶28] City timely issued its Notice of Appeal (app.178), including appealing the Order and the *Amended Judgment on Jury Verdict.*

IV. STANDARD OF REVIEW

[¶29] This Court's standard of review in relation to the court's Order following the bench trial is "well established":

> In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. In a bench trial, the trial court is the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations.

Forbes Equity Exch., Inc. v. Jensen, 2014 ND 11, ¶ 8, 841 N.W.2d 759, 762 (citations and internal quotations omitted). This Court reviews the court's legal conclusions regarding prescriptive easement, inverse condemnation, and the interplay between City's prescriptive easement defense and LLD's inverse condemnation claims de novo. *Nagel v. Emmons Cty. N. Dakota Water Res. Dist.*, 474 N.W.2d 46, 47 (N.D. 1991) ("We note that conclusions of law [concerning a prescriptive easement] are fully reviewable on appeal." (citation omitted)).

[¶30] To the extent the court's legal conclusions are based on interpretation of statutes, including but not limited to N.D.C.C. §§ 24-07-01 & 28-26-06, such interpretations are also subject to de novo review. "Statutory interpretations is a question of law and is fully reviewable on appeal." *Rocky Mountain Steel Foundations, Inc. v. Brockett Co., LLC*, 2018 ND 96, ¶ 5, 909 N.W.2d 671, 672 (citations omitted).

V. ARGUMENT

A. The Court's Legal Conclusions and Statutory Interpretation that City's Prescriptive Easement In Lagoon Road Constituted A Taking Without Just Compensation Entitling LLD to Damages Is Erroneous.

[¶31] Under the clear and convincing evidence standard, the court concluded City established a prescriptive easement prior to the 2011 improvement project. (doc.429 at ¶¶73, 91 & 99).

Contradicting this, the court also concluded the prescriptive easement was considered a "lawful taking" without just compensation and thus supported LLD's inverse condemnation claim for damages. (App. [Order, Charge, Curative, and Special Verdict Form]. The court's erroneous legal conclusions and its instructions to the jury premised on those erroneous legal conclusions, resulting in the entry of judgment against City, should be reversed.

1. *Prescriptive easement – legal standard*

[¶32] It has never been disputed in this case that ND statute expressly allows for a public easement to be established through prescriptive use:

> All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not.

N.D.C.C. § 24-07-01. The legal standard that must be proven is also not in dispute: "A party claiming a road by prescription under N.D.C.C. § 24–07–01, must establish by clear and convincing evidence the general, continuous, uninterrupted and adverse use of the road by the public under a claim of right for 20 years." *McKenzie Cty. v. Reichman*, 2012 ND 20, ¶11, 812 N.W.2d 332, 337 (citations omitted) ("*Reichman*"). Nowhere in the above standard, whether under the statute or the case law, is payment required to the record title owner to obtain a prescriptive easement. *See id.*

2. *Inverse condemnation – legal standard*

[¶33] The definition and essential elements of an inverse condemnation claim are also relevant to the issues. The ND Constitution holds "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." Article I, § 16, North Dakota Constitution. "Inverse condemnation actions are a property owner's remedy, exercised when a public entity has taken or damaged the owner's property for a public use

without the public entity's having brought an eminent domain proceeding." *Bala v. State*, 2010 ND 164, ¶ 8, 787 N.W.2d 761 (citations omitted).

[¶34] "To establish an inverse condemnation claim, a property owner must prove a public entity took or damaged the owner's property for a public use and the public use was the proximate cause of the taking or damages." *Id.* (citations omitted).

> The question of whether or not there has been a taking or damaging of private property for a public use has been determined by this court to be a question of law. The trial court determines if the claim of damages arises because of the disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and by reason of such disturbance he has sustained a special damage with respect to his property in excess to that sustained by the public generally. The only function of the jury in such issues is to assess the level of damages, not to determine if the damages are compensable.

United Power Association v. Heley, 277 N.W.2d 262, 267 (N.D. 1979) (citations omitted).

3. *Reichman controls – dismissal of LLD's inverse condemnation claim was appropriate and required.*

[¶35] City agrees with the court's detailed findings of fact and conclusions of law that City had obtained a prescriptive easement prior to the 2011 project. That aspect of the court's Order is sound as it is based on numerous citations to trial exhibits and to extensive trial testimony, both by LLD and by City. However, it is the court's further legal reasoning concluding City's prescriptive use of the road can be considered a "taking" that is erroneous, precisely because the right to use property, an essential characteristic of a prescriptive easement, means that prescriptive use cannot be considered a "taking". *See Nagel v. Emmons Cty. N. Dakota Water Res. Dist.*, 474 N.W.2d at 49 ("An easement is a burden on one estate for the benefit of another." (citation omitted)).

[¶36] Moreover, the North Dakota Supreme Court has already addressed this type of situation in nearly identical situations and in other contexts. The court's holding in *Reichman*, a case involving

a prescriptive easement and a claimed inverse condemnation, controls this case. The *Reichman* court determined a public easement established through prescriptive use extinguishes a landowner's right to claims inverse condemnation, holding:

> Under N.D.C.C. § 24–07–01, the prescriptive road, as will be described on remand, became a public road without any formal action after the expiration of the prescriptive period, which began to run under the district court's findings in the early 1950s. Reichman is not entitled to damages for inverse condemnation because the road became a public road before she obtained her interest in the land in 2000. *See Nagel,* 474 N.W.2d at 50; *Kritzberger,* 62 N.D. at 214, 242 N.W. at 916. Reichman therefore acquired her land with the burden of the prescriptive road upon her land, and the district court did not err in dismissing her claim for inverse condemnation.

Id. ¶ 38 (citing *Nagel v. Emmons Cty.*, 474 N.W.2d 46, 50 (1991) ("*Nagel*") and *Kritzberger v. Traill Cty.*, 62 N.D. 208, 242 N.W. 913, 916 (1932) ("*Kritzberger*")

[¶37] While the *Reichman* posture was different than this case, its legal holding inverse condemnation is unavailable where the property is burdened by a prescriptive easement by the public applies here, and should have been applied to dismiss LLD's Lagoon Road inverse condemnation claim. The *Reichman* differences are minor: prescriptive easement is a defense in the instant case and a direct legal claim in *Reichman*, and, *Reichman* took title well after the prescriptive period had run, whereas the court here held the prescriptive period ran prior to the 2011 improvement project. Neither difference matters: *Reichman* mandated dismissal of the inverse condemnation claim where City had obtained a prescriptive easement.

[¶38] While the court in the instant case did not provide a specific date the 20-year prescriptive period fully ran, this does not negate LLD's established acquiescence in City's adverse and continuous use for at least 5 years prior to the 2011 improvement project (and 20 years' acquiescence by CIP) as determined based on the clear and convincing evidence. (app.66). LLD acquiesced in City's adverse use of the road during and after the 2011 improvement project until

it finally brought this lawsuit in late December of 2014. (app.73). Because LLD's property rights were burdened by City's prescriptive easement well prior to the 2011 improvement project, LLD's right to claim inverse condemnation was extinguished by operation of law. But the court failed to follow *Reichman* in this regard without explanation.

4. *Dismissal of LLD's inverse condemnation claim was required despite City's improvement of Lagoon Road.*

[¶39] This Court has provided the same rationale found in *Reichman* in other cases involving different facts. For example, in *Nagel*, 474 N.W.2d 46, a case involving alleged flooding of rural property by Emmons County, this Court upheld the dismissal of the plaintiff's complaint on the basis the county had obtained a common-law based prescriptive flowage easement, which barred plaintiff's claims. *Id.* at 47. The holding provides:

> The resulting effect of the County's adverse use of Nagel's property for the prescriptive period is that the County cannot now be held liable for its use during the prescriptive period. *See* Restatement of Property, Servitudes § 465 (1944). Rights obtained by prescriptive use relate back to the inception of the use. [] Thus, although the County's invasion of Nagel's property may have created a cause of action during the prescriptive period, the County's subsequent acquisition of the right of use by prescription leaves Nagel without the rights upon which an action could be maintained.

Id. at 50 (citation omitted)

[¶40] Another case cited in *Reichman*, *Kritzberger*, involves the common-law establishment of a highway by the prescriptive use of the public. The *Kritzberger* Court upheld dismissal of the plaintiff's injunction claim, holding: "The road was there when plaintiff purchased the land. The right of the public to claim this as a public highway had accrued years before he purchased the land, and he acquired the land with this burden upon it." *Id.* at 916. The fact scenario of *Kritzberger* is instructive. While the "quarter line" road at issue had been in public use for many years, it was not until Traill County sought to improve the road to the statutory 66 feet in width did the landowner Kritzberger object and bring the lawsuit seeking an injunction. *Id.* at 913. The

landowner argued the road should only be as wide as the "quarter line", which prior to the County's improvement, was "two rods only". *Id.* at 915. The *Kritzberger* Court disagreed, holding the public opening of the road, termed a "legal highway" under ND law then in force, was a minimum of 66 feet in width regardless whether the public had formerly used all 66 feet: "The fact that the public may not use or travel over the full width of such a highway will not operate to narrow it [and] [i]f a legally acquired highway was of the width of the track merely, it could not be worked or improved." *Id.* at 916 (internal citation omitted). The *Kritzberger* Court held the County was entitled to improve the road and widen it based on the public's prescriptive use of the road for the statutory time period. *Id.*

[¶41] Here, the court cited to *Nagel* that the 2011 improvement project was not beyond City's authority under its prescriptive easement and the prescriptive easement defense "negates [] the claim" of LLD (app.74-75). But the court contradicts itself concluding the prescriptive easement demands compensation and is evidence of a taking: "However, the issue of just compensation remains."). (app.75). The court also concluded, contrary to *Nagel* and *Kritzberger*: "[t]he burden of establishing the existence of an easement which would have been necessary for the construction of the permanent Lagoon Road, rests with City of Lincoln. It has failed [in] that burden." (app.57). Similar mistakes are found in verdict form (app.135) and in the "curative instruction":

> During the trial you have heard counsel for [] City state that easements existed for the construction of Lagoon Road. The Court has found that there were no expressed easements allowing for the construction and/or improvement of Lagoon Road. No written permanent roadway easements exist.

(app.133). As shown in the court's contradictory and erroneous conclusions and instructions, it set up a false dichotomy, determining on the one hand that the prescriptive easement validated City's use of the road but on the other hand determining nothing short of a "written permanent

roadway easement", in addition to a prescriptive easement, was required for the 2011 improvement. That is contrary to *Reichman*, *Kritzberger*, *Nagel*, and *Keidel* discussed below.

5. *The 2011 improvement project was within the scope of City's public easement established through prescriptive use.*

[¶42] The court's legal reasoning is not only wrong because it conflicts with binding legal precedent, but it defies common sense that improvements and infrastructure are a necessary and entirely valid part of a public roadway established via prescriptive easement. The *Reichman* Court cited approvingly to a 1980 case for this very proposition, *Keidel v. Rask,* 290 N.W.2d 255, 258 (N.D.1980) ("*Keidel*"):

> We explained the "width of a prescriptive public road ... is determined from the extent of actual use of the property for roadway purposes over the prescriptive period," which "includes not only the actual traveled surface area of the roadway, but also any adjacent land which is needed for the prescription to be maintained as a public road, including any land reasonably necessary for ditches, shoulders, and slopes."

Reichman, 2012 ND 20 at ¶ 31 (quotations in original). *Keidel*, quoting approvingly from *Corpus Juris Secundum*, stated:

> Generally speaking, the width and extent of a highway established by prescription or user are governed, measured, and limited by the extent of the actual user for road purposes. The easement is not, however, necessarily limited to the beaten path or traveled track, or to such path and the ditches on either side, but carries with it the usual width of highways in the locality, or such width as is reasonably necessary for the safety and convenience of the traveling public, and for ordinary repairs and improvements.

Id. at 258-259 (quoting 39A *C.J.S. Highways* § 20(b) (1976)). In this case, the width of the roadway is not in dispute. The court found based on clear and convincing evidence the road's footprint was functionally identical at all times from construction of the road in 1984-1985 through the 2011 improvement. (App.43, 61, 74-75). However, the court ignored the concept addressed in *Reichman*, in *Keidel*, and in *Kritzberger* – of allowing a prescriptive use to include the necessary

maintenance or improvements to the public road such as widening the road, constructing ditches, shoulders, and slopes, and installing culverts. The court erred when it held a "permanent roadway easement" was required to improve the road in 2011.

6. *The Court's legal conclusions and erroneous instructions implicitly overruling N.D.C.C. § 24-07-01 as unconstitutional is erroneous*.

[¶43] The court concluded City had obtained a public easement through prescriptive use pursuant to N.D.C.C. § 24-07-01:

> [¶91] Applying the language of N.D.C.C. § 24-07-01 and the language of *McKenzie Co. v. Reichman,* 2012 ND 20, the Court does conclude, as a matter of law, that City of Lincoln has established an easement by prescription upon the Subject Property.

(app.73). Despite this conclusion based on the clear and convincing evidence at trial, the court also determined and instructed the jury to consider City's prescriptive easement as a taking under the North Dakota Constitution. For example:

> At the same time the Court finds that not only is the prescriptive easement in existence but the general scope of the easement is discernable from the undisputed records. (Exhibit P-1). **Its value is for a jury to decide**.

(app.66-67, 75) (emphasis added). The jury instructions include similar errors, for example:

> At the same time the Court has also determined legally that City of Lincoln had, by the year 2011, acquired a right of access, known as a prescriptive easement, on a portion of the property belonging to Lincoln Land Development upon which Lagoon Road was built/improved, which, as noted, the Court has concluded constitutes a "taking for public use" by City of Lincoln.

(app.107). The curative instruction had the same error:

> Once again, you are instructed that there remains a factual dispute as to the precise legal description and scope of the prescriptive easement and the value of the property taken, if any in the construction/improvement of Lagoon Road in 2011.

(app.133). And the Special Verdict Form (doc.650) never even mentioned City's prescriptive easement, reversing jury and curative instructions stating "description and scope" were for the

jury, thus essentially compelling the jury to assess damages for the "lawful" taking found by the court. The court's instructions effectively negated the prescriptive easement statute, Section 24-07-01.

[¶44] The court's negation of City's meritorious prescriptive easement defense by re-categorizing it as a "lawful taking" is not only contrary to controlling case law, but it serves as a de facto declaration that Section 24-07-01 is unconstitutional in light of Article I Section 16 of the North Dakota Constitution. Yet, none of the parties challenged Section 24-07-01 on constitutional grounds or requested a declaration stating same. Nor did the court move *sua sponte* for such a declaration.

[¶45] Section 24-07-01 clothed with a strong presumption of constitutionality, *Menz v. Coyle*, 117 N.W.2d 290, 295 (N.D. 1962) ("In considering the constitutionality of an Act, every reasonable presumption in favor of its constitutionality prevails. And the courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt." (citations omitted)). The court was without authority to overrule Section 24-07-01 or construe it out of existence. The court's apparent attack on Section 24-07-01 also would have required compliance with N.D.C.C. § 32-23-11, stating in relevant part, "[] **if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must be served with a copy of the proceeding and is entitled to be heard**. . ." N.D.C.C. § 32-23-11 (applicable to declaratory judgments) (emphasis added). Neither the parties nor the court ever attempted to challenge Section 24-07-01 on constitutional grounds, and no effort was ever made to comply with Section 32-23-11 by the court or otherwise. The court's conduct essentially nullifying a valid ND statute, and by extension City's defense, was erroneous.

7. *The court's erroneous Order, jury instructions, curative instruction, and special verdict form require reversal.*

[¶46] The court's Order, its instructions to the jury, its curative instruction, and its special verdict form are all contrary to the legal standards in *Reichman* and in the other ND Supreme Court cases, which mandated the dismissal of LLD's inverse condemnation claim. The controlling legal authority dictates that an inverse condemnation action cannot be maintained where LLD took title to property burdened by City's prescriptive use as the court has properly determined in this case. The controlling authority further dictates that City's 2011 improvement project, including raising the roadbed and installing culverts and ditches, was well within the rights it already obtained as part of its prescriptive easement, and no express permanent roadway easement was necessary. As such, the court's erroneous Order, erroneous jury instructions, curative instruction, and special verdict form are grounds for reversal.

B. The Court's Determination City Obtained No Express or Implied Easement Or Easement By Estoppel Is Erroneous.

[¶47] The following standard applies to easements generally:

> An easement is an interest in land "consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose. An easement may be created by an express grant or reservation contained in a written instrument, *see* 25 Am. Jr.2d *Easements and Licenses* §§ 13, 15–17 (2004); N.D.C.C. § 47–05–02.1, or may arise by implication under the facts and circumstances of a particular case.

Wagner v. Crossland Const. Co., 2013 ND 219, ¶ 6, 840 N.W.2d 81, 84 (internal citations and quotations omitted). Easement by estoppel is subject to the following legal standard:

> A court can imply an easement created by estoppel when 1) the owner of the servient estate "permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked," 2) the user substantially changed position in reasonable reliance on that belief, and 3) injustice can be avoided only by establishment of a servitude.

Hager v. City of Devils Lake, 2009 ND 180, ¶¶ 48-50, 773 N.W.2d 420, 435–37 (quoting with approval *Lobato v. Taylor,* 71 P.3d 938, 950–51 (Colo.2002) (en banc); Restatement (Third) of Property § 2.10 (2000)); *see also* 25 Am.Jur.2d *Easements and Licenses* § 14 (2004)).

[¶48] The court minimized and discounted a handful of critically important trial exhibits submitted by City in support of its easement defenses, including that there existed a permanent easement in Lagoon Road, by implication, by estoppel, and/or by express grant. Those exhibits include the plat maps attached to the Warranty Deed on file with the Burleigh County Recorder's Office, duly executed by the grantor CIP to grantee LLD in April of 2005. (app.78-83). The 2005 plat maps show in diagrammatic form the very same rights of way or easements in precisely the same location as the originally built and after the 2011 improvement. (app.80, 82). Those real property records, with independent legal significance in their own right, were signed and notarized by both CIP and by LLD. Despite the critical importance of documents of record showing the same roadway footprint, the court fails to evaluate them as evidence of an easement. (app.47). City brought the irregular plats to the court's attention, including in its Trial Brief (doc.222) and by filing an Offer of Proof. (doc.477). The court should have but failed to consider those plats as evidence of an express easement, an implied easement, and/or as an easement by estoppel.

[¶49] Another exhibit the court should have considered is a July 2, 1985 plat map prepared, approved, and signed by CIP and delivered to City. (app.31, 51). The 1985 plat includes real property grant language giving to City perpetual rights of way in streets in the precise location of Lagoon Road. (app.31, providing, "[CIP] DEDICATE[S] STREETS [] WHETHER SHOWN HEREON OR NOT TO THE PUBLIC USE FOREVER." (caps in original)). The plat map shows CIP granted and dedicated to City a perpetual right of way on the exact location where Lagoon Road was built, the exact location where it was improved in 2011, and where it presently exists.

(app.31). Yet, the court refused to consider the 1985 plat map signed and sealed by CIP as evidence of an easement, whether express, implied or by operation of estoppel. (app.53-59). It was error to require City to offer testimony about the 1985 plat when it was a document with independent legal significance.

[¶50] Another document City used in support of its defenses that an easement or right of way existed is an August 16, 1985 letter by the Mayor of City of Lincoln, Philip K. Nelson, to Mr. Gerald W. Engel, Managing Partner of CIP. (doc.350). That letter contains the following language:

> On July 2, 1985, the Lincoln City Council granted approval to the Plat of North Lincoln 1st Addition. With that approval **City of Lincoln accepted the dedication of all streets and other dedicated rights of way**.
>
> (. . . .)
>
> Our City Engineer has gathered all preliminary survey data that he will need . . .
>
> (. . . .)
>
> At the present time, Lincoln is in the process of completing a major wastewater treatment expansion project. Part of this project involved laying a large diameter sewer line to our new lagoon site located about one mile north of Lincoln. **A portion of this line has been placed within the street right of way of North Lincoln 1st Addition.**

(app.35). (Emphasis Added) Like the 1985 plat, the court refused to consider the 1985 letter as evidence in support of an easement, (app.51-52), despite the fact it references the rights of way in the street and references the City's reliance on the dedication of those rights of way. The letter references the July 2, 1985 plat map and the sewer, which is the very same sewer installed under Lagoon Road. (app.48). Again, this is a document with independent legal significance whether oral testimony was offered or not.

[¶51] In 1984, City's engineer at that time, Veigel Engineering, prepared construction drawings, plans, and specifications for the lagoon project, including for Lagoon Road. (app.84). The Veigel

plans stamped on August 2, 1984 reference in several locations the very same easements ("50' Permanent Easement") or rights of way CIP submitted to City in the 1985 plat, and in particular reference the same street names, lot numbers, roadway centerlines, and locations of manholes, and other benchmarks as are found in the 1985 plat. (app.86, 89-94). The court refused to consider the 1984 Veigel plans as evidence of an easement, whether express, implied or by estoppel. (app.50 et seq.)

[¶52] The point of the foregoing exhibits is that all of them reference precisely the same rights of way or easements in Lagoon Road as well as the underpinnings suggesting City's reliance on the landowner's conduct. The failure to consider those exhibits, and the cumulative effect of those exhibits, was error.

C. The Court's Determination LLD is the Prevailing Party Entitled to Costs, Disbursements, and Attorney's Fees is Erroneous.

[¶53] The court granted LLD its costs, disbursements, and its attorneys' fees, holding LLD was the "prevailing party". That conclusion is erroneous, whether this Court agrees the foregoing legal conclusions and instructions by the court are in error or not. The fact is that City prevailed on most of LLD's lawsuit claims and on certain of its defenses at the bench trial. Therefore, LLD is not the prevailing party and any orders and judgments stating otherwise should be reversed. By virtue of its success on the merits of certain defenses at trial and prior to trial, the court should determine City is the prevailing party and judgment should be entered in City's favor accordingly.

[¶54] This Court reviews the court's "prevailing party" conclusions de novo. *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 49, 730 N.W.2d 841, 858. North Dakota law allows the "prevailing party" to a lawsuit to recover certain statutory costs and disbursements. N.D.C.C. §§ 28-26-(02) & (06); *Carpenter v. Rohrer*, 2006 ND 111, ¶ 35, 714 N.W.2d 804, 815 ("Generally, the prevailing party to a suit, for the purpose of determining who is entitled to costs, is the one

who successfully prosecutes the action **or successfully defends against it**, prevailing on the merits of the main issue, in other words, the prevailing party is the one in whose favor the decision or verdict is rendered and the judgment entered." (emphasis added)). The North Dakota Supreme Court "has often said **when opposing litigants each prevail on some issues, there may not be a single prevailing party for whom disbursements may be taxed**." *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 49, 730 N.W.2d 841, 858 (listing cases) (emphasis added). In that situation where there is not a single prevailing party, it is appropriate to rule that each party must bear his own costs. *Liebelt v. Saby*, 279 N.W.2d 881, 888 (N.D. 1979); *Moen v. Norwest Bank of Minot*, 647 F. Supp. 1333, 1344 (D.N.D. 1986).

[¶55] LLD's inverse condemnation-related claims actually consist of several discrete claims, including: (1) inverse condemnation due to the improvement of Lagoon Road in 2011, (2) inverse condemnation due to alleged increased surface water drainage, (3) inverse condemnation due to the alleged formation of wetlands, (4) inverse condemnation due to City using its property as a storm-water detention pond, and (5) inverse condemnation due to inability to develop Plaintiff's property because of City's prior development decisions. (app.21; docs.165, 166).

[¶56] LLD claimed significant damages as part of the water-related inverse condemnation claims and attributed those damages to its alleged inability to develop the remainder of the property. Following the bench trial, the court provided lengthy findings of fact and conclusions of law where it essentially dismissed those claims due to a failure of evidence by LLD:

> The Court finds that Lincoln Land Development failed to meet its burden of proving its surface water surface claims and therefore no "taking" occurred in that regard. . .

(app.46, 72-73). Those surface water related claims constitute the vast majority of the claimed monetary losses but the jury nevertheless only awarded LLD $8,924 plus interest strictly in relation

to Lagoon Road. (app.135). LLD's March 3, 2016 letter (doc.239), offered to the court as evidence by LLD's attorney of the alleged prior disclosure of Lance Hagen's putative expert testimony (doc.241), confirms LLD placed the greatest monetary losses on the surface water related claims. In the letter, LLD separately analyzes the "roadway" taking issue and the "wetlands" taking issues, and calculates the roadway damages at a mere $31,050 and the wetlands damages at $803,400. LLD assessed its surface water damages at more than 25 times its roadway damages. City argued to the court the foregoing points in its Rule 60(a) briefing (app.443), but the court provided no rationale why it decided to treat LLD as the sole prevailing party when the record suggests otherwise. (app.138).

[¶57] Even if this Court disagrees the court erred with respect to the contradictory determination a prescriptive easement is a taking or that a written permanent roadway easement was required for the 2011 improvement, Plaintiff can only be said to have prevailed on one of its many claims. Significant amounts of discovery, trial time, and expense were incurred by City in defending itself against the other water related claims on which the Plaintiff did not prevail and on which City did prevail at trial.

[¶58] The *Taxation of Costs* (doc.657), *Order for Judgment on Jury Verdict* (doc.658), *Judgment on Jury Verdict* (doc.659); *Order to Correct Court's Findings and Order For Judgment* (app.138), *Order Regarding Attorney Fees*, (app.141), *Order Denying Objection to Costs, Order for Judgment and Judgment on Jury Verdict* (app.165) and *Amended Judgment On Jury Verdict* (app.177), are not supported by North Dakota's "prevailing party" law, are erroneous, and should be vacated and reversed.

VI. CONCLUSION

[¶59] For the foregoing reasons, City of Lincoln requests the challenged orders and judgments, including the *Findings, Conclusions and Order for Judgment* (app.36) and the *Amended Judgment On Jury Verdict* (app.177), be reversed in all respects and judgment entered in the City's favor.

[¶60] Dated this 3rd day of July, 2018.

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CERTIFICATE OF COMPLIANCE

[¶61] The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7,980 words.

Dated this 3rd day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT CITY OF LINCOLN** was on the 3rd day of July, 2018, emailed to the following:

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