20180117
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 2, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lincoln Land Development, LLP,	)	
	)	
Appellee/Plaintiff,	)	Supreme Court No. 20180117
	)	
v.	)	Burleigh Co. No. 08-2015-CV-00348
	)	
City of Lincoln,	)	
	)	
Appellant/Defendant.	)	

APPEAL FROM FINAL ORDERS, JUDGMENT, AND AMENDED JUDGMENT IN THE DISTRICT COURT,
SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA,
THE HONORABLE JAMES HILL

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

[1] Lincoln Land Development ("LLD") provides the following issues presented for the City of Lincoln's appeal.

I. Whether the district court properly concluded the City's construction of Lagoon Road in 2011 constituted a taking without just compensation.

II. Whether the district court properly concluded LLD's inverse condemnation claim was not barred by the City's prescriptive easement.

III. Whether the district court properly concluded the City did not have an express easement, an implied easement, and/or an easement by estoppel.

IV. Whether the district court properly awarded costs and attorney's fees to Plaintiff as the prevailing party in an inverse condemnation proceeding in accordance with N.D.C.C. § 32-15-32.

STATEMENT OF THE CASE

[2] Plaintiff/Appellee Lincoln Land Development, LLP, ("LLD"), commenced an inverse condemnation action against the City of Lincoln ("the City"), in December of 2014. In the summer of 2011, the City took LLD's private property for the construction of a gravel road ("Lagoon Road"), which included the construction of new ditches and culverts that did not exist before, without initiating eminent domain proceedings, without permission, and without paying just compensation. As part of its claim for inverse condemnation, LLD also asserted another theory of recovery due to storm water from other developments in the City being drained on LLD's property causing damage.

[3] The City denied the taking asserting it had an easement for construction of the road in 2011 or that it obtained a prescriptive easement through adverse use which permitted it to construct Lagoon Road in 2011.

[4] LLD's claim for inverse condemnation was heard at a bench trial conducted September 11-15, 2017. Following conclusion of the bench trial, the district court concluded the 2011 construction of Lagoon Road constituted a "governmental taking" by the City of LLD's private property, for which LLD was entitled to compensation. The district court also concluded the City obtained a prescriptive easement on LLD's property to access the lagoon. The extent and the scope of the City's prescriptive easement and the damages for the City's taking for the construction of Lagoon Road were determined to be issues for the jury.

[5] At the jury trial, conducted December 19-22, 2017, the jury found the City's taking in August of 2011 caused damaged to LLD's property, and the jury awarded $8,924.00 in damages, plus interest, for LLD's property taken by the City.

[6] Following the jury trial, LLD was properly awarded its costs and disbursements in accordance with N.D.C.C. § 32-15-32 and as the prevailing party for its claim of inverse condemnation against the City. After the entry of judgment, LLD moved for attorneys' fees under N.D.C.C. § 32-15-32. The district court awarded a portion of LLD's attorneys' fees in the amount of $122,705.50. Following the district court's award of costs, disbursements, and attorney's fees, an Amended Judgment on Jury Verdict was issued in the amount of $150,504.19. The City filed its Notice of Appeal on March 23, 2018.

STATEMENT OF FACTS

[7] In its appeal, the City challenges several the district court's factual findings used as the basis for the court's conclusions of law. On appeal, the City failed to file a transcript of both the bench trial and jury trial in this action. Rule 10(b), N.D.R.App.P., requires the appellant to furnish a transcript of the proceedings on appeal. If an appellant does not file a complete transcript on appeal, he assumes the risk of failing in the appeal as a consequence. See Lithun v. Du Paul, 447 N.W.2d 297, 300 (N.D. 1989). When an appellant raises issues on appeal regarding the findings of fact, it is difficult, if not impossible, for this Court to discuss of the merits of the appeal without a transcript. See e.g., Sanford v. Sanden, 333 N.W.2d 429 (N.D. 1983). Moreover, when the record on appeal does not allow for a meaningful

and intelligent review of the alleged error, this Court will decline to review the issues altogether. Lithun, 447 N.W.2d at 300. Without the transcript, the City has failed to provide the evidence necessary to meaningfully and intelligently review the district court's factual findings. Thus, the district court's factual findings cannot be found to be clearly erroneous, and the district court's factual findings contained in its order summarized below should be accepted as the facts in this matter.

[8] LLD commenced this inverse condemnation action against the City resulting from the taking of LLD's private property without just compensation for the City's 2011 construction of Lagoon Road on LLD's property. Doc. ID# 2. Subsequently, LLD moved to amend its Complaint to assert a second inverse condemnation claim against the City arising from storm water runoff from other developments in the City being permitted to drain on LLD's property. App. 21-24. The City denied any governmental taking without just compensation and asserted numerous defenses to the inverse condemnation claim, including an express easement over LLD's property, an easement by estoppel over LLD's property, and an easement by prescription. App. 26-30.

[9] LLD's property at issue is located within the city limits of the City of Lincoln but has not been platted. App. 42. LLD is a limited liability partnership, formed in 2004 as a real estate holding company. App. 47. The property at issue was purchased by LLD from Central Investment Properties (CIP) in April 2005. Id. At the time of purchase, there was no easement for any road across LLD's property

filed at the Burleigh County Recorder's Office, and the title insurance policy for the property did not identify any easement for a road across the property. App. 47.

[10] Just north of the LLD's property, is the City's wastewater treatment site ("lagoon"), which was constructed in the mid-1980s. App. 46. An underground sewer line runs across a portion of LLD's property connecting the City to the lagoon. App. 49. Critical to this analysis, the district court's factual findings regarding the dirt trail on LLD's property included the following: At the time LLD purchased the property, a dirt trail existed on the property. App. 49. The dirt trail was established when the sewer line was constructed in the mid-1980s. Id. LLD's principal owner, Lance Hagen, testified it was a two-tire track dirt trail, approximately six feet wide. App. 49. Hagen also testified the dirt trail was not raised above the existing grade, that it matched the elevation of the adjacent land, that there were no ditches adjacent to the dirt trail, and that there were not any culverts under the dirt trail. Id. Mike Heinsohn ("Heinsohn"), the owner of property adjacent to LLD, testified the width of the dirt trail was two-tire-tracks, that the dirt trail had vegetation growing in the middle. Id. Heinsohn testified the dirt trail did not include any ditches or culverts prior to the 2011 construction project. Id. Ervin Fischer, a member of the Lincoln City Counsel and life-long resident of Lincoln, described the dirt trail as a flat prairie trail with two-tire-tracks. App. 50. Fischer also confirmed the growth of vegetation in the dirt trail and that there were no ditches around the trail prior to the construction project in 2011 Id. The district court was also presented with numerous photographs

taken during the 2011 construction confirming the condition of the existing dirt trail prior to the Lagoon Road construction. App. 68 & Doc. ID## 394-418.

[11] On appeal, the City represents the North Dakota State Health Department mandated the construction of an "all-weather access road". However, the district court specifically found the City's claim that the State mandated construction of Lagoon Road was not justified. App. 53. On November 4, 2010, the City Engineer, presented the City with a document titled "Lincoln Land Development-Alternate Analysis and Comparison". App. 52 & Doc. ID# 311. Specifically, the City Engineer's report stated, "the lack of a raised profile along the roadway leaves no ditches for snow storage". Doc. ID# 311. The district court found, following the November 4, 2010, city council meeting, the City Auditor searched for any easements for the construction of Lagoon Road but was unable to locate any easements. App. 53. Despite knowing it did not have any easement for construction of Lagoon Road, the City moved forward with the construction project in August 2011. App. 42.

[12] In August of 2011, the City began constructing a permanent road in the general area of the dirt trail on LLD's property. App. 42-43. The City constructed a rural gravel road on LLD's property within the City limits, not a city street, which would cause problems for future development. App. 70. Contrary to the City's assertion on appeal, Lagoon Road was never designated as a public road by the City and, in fact, the City placed "No Trespassing" signs on the road following construction "restricting access to anything other than authorized

vehicles." App, 63, Doc. ID## 360 & 392. The district court found there was no public or business purpose for the road other than accessing the City's lagoons. App. 63-64.

[13] As part of the construction project for the new permanent Lagoon Road, the district court reviewed a variety of photographs that depicted various stages of the project. App. 68 & Doc. ID## 394-418. The photographs showed the City cutting ditches, installing culverts under the new road, and that the final elevation of new permanent roadway was raised above the existing grade in many locations. Id. The photographs also showed the width of the new road as constructed, the placement of gravel on the road, and the placement and storage of construction materials and equipment on LLD's Property during construction. App. 68-69 & Doc. ID## 394-418.

[14] The district court found the City constructed 1,325 linear feet of road center line on LLD's property. App. 69. The district court also received into evidence the City Engineer's final construction plans for the 2011 construction project. App. 67. Prior to construction, the existing trail was surveyed by the City's Engineer and was identified in the construction plans as the existing trail. Id. The survey also showed no ditches existed along the dirt trail. App. 68. Based upon the City Engineer's survey, the district court found the dirt trail was approximately eight-feet wide and the new roadtop was sixteen-feet wide. App. 67. Each station called for the road to be raised and to have a downslope to the west that would match into the existing grade of the adjacent property and a downslope with a two to three-

and-a-half-foot ditch depth, a flat ditch bottom approximately teen feet wide, and a backslope that would tie into the existing grade east of the road. App. 67-68. The City also installed a culvert under the road on LLD's property to control water drainage. Id. The construction plans also identified the stripping limits for the project, which showed the total amount of LLD's property disturbed for construction of the road. Id.

[15] The construction plans also contained a plan and profile view for the project that identified the elevation of the pre-existing dirt trail prior to construction as well as the proposed centerline grade of the new permanent road. Id. Based upon this information, the district court found there were significant elevation changes over short distances following construction of Lagoon Rood. Id.

[16] The district court also found the City used LLD's property for storage of construction materials and equipment during construction. App. 69. The City never requested permission from LLD to store materials on its property during construction. Id. The district court concluded the storage of construction materials and equipment on LLD's property constituted a taking, but whether it resulted in damage to LLD's property was a question for the jury. Id.

[17] Weighing the evidence and testimony submitted at the bench trial, the district court concluded:

> The improvement/construction by the City of Lincoln of Lagoon Road in 2011, including the widening of the road top, raising the elevation of the road, the cutting of ditches, inclusion of culverts, and storage of construction materials and equipment constitutes a taking of Lincoln Land Development property for a public use without

> compensation. The extent and value of the taking is a question for a jury.

App. 72. The district court specifically found, "[w]hat existed before August 2011 was structurally different than was placed there in August 2011." App. 43. In finding the City's construction of Lagoon Road constituted a taking, the district court also found the City did not produce any written easement that explicitly granted the City the right to construct and build Lagoon Road. App. 47.

[18] Having found no express easement, the district court next analyzed whether an easement arose under the facts and circumstances of this case. Id. In its findings of fact, the district court thoroughly analyzed a variety of documents submitted by the City regarding its claim for a permanent easement, easement by implication, and/or an easement by estoppel. App. 50-59. Contrary to the City's argument on appeal, the district court specifically considered the following documents: (1) a 1985 plat for a portion of the neighboring property that was never recorded or built; (2) a 1985 letter from the City's Mayor to CIP regarding approval of the North Lincoln First Addition plat; (3) a letter from CIP's attorney dated August 1, 1995; and (4) the 1984 engineering plans for the city lagoons. App. 31, 35, 50-51 & 84-104, & Doc. ID# 350. With respect to the 1984 engineering plans which identified an "access road and sewer main" and a "50' permanent easement," the City conceded there was never any corresponding written easement that was recorded. App. 50 & 84-104. The district court concluded these documents failed to establish an easement by implication and did not meet the requirements of an easement under N.D.C.C. § 47-05-02.1 App. 55-56. The district court also

concluded the City failed to prove by a preponderance of the evidence its affirmative defense that there existed a permanent roadway easement by "implication under the facts and circumstances" set forth in the trial record. App. 55, 72 & 73.

[19] The district court concluded the City acquired an easement by prescription on LLD's Property. App. 59. From the testimony provided by the City's Public Works Director, Robert Dickson, and the supporting exhibits, the district court found the City used this dirt trail to access the city lagoon continuously since 1984. App. 61-62. The district court concluded the City established an easement by prescription through the general, continuous, and uninterrupted use of the dirt trail for more than 20 years prior to the time LLD took title to the property. App. 73. The district court also concluded "the general scope of the easement is discernable from the undisputed records." App. 66. However, as the post-2011 Lagoon Road was clearly different than the pre-2011 dirt trail, the district court concluded the construction and improvements of the dirt trail in 2011 constituted a taking for which LLD must be compensated. App. 75.

[20] The district court determined there was no taking under LLD's inverse condemnation claim for the drainage of storm water runoff from other developments in the City. App. 72.

[21] Therefore, the Court concluded it was for a jury to determine the value of the City's taking for the 2011 construction of Lagoon Road, including raising the profile of the road, widening the road top, cutting ditches, installing culverts, and the temporary storage of construction materials. App. 72. The Court also concluded

the jury should determine the scope of the prescriptive easement and the impact on the amount of property taken by the 2011 construction project. App. 75. The jury trial was conducted December 19-22, 2017. At the close of the jury trial, the jury awarded LLD $8,924.00, plus interest, for the City's taking. App. 135.

STANDARD OF REVIEW

[22] In an appeal from a bench trial, the district court's conclusions of law are fully reviewable. KLE Constr., LLC v. Twalker Dev. LLC, 2016 ND 229, ¶ 5, 887 N.W.2d 536. Whether there has been a taking of private property for public use is a question of law which is fully reviewable on appeal. City of Minot v. Boger, 2008 ND 7, ¶ 16, 774 N.W.2d 277. Similarly, whether the facts as found by the district court support the conclusion that a prescriptive easement exists is a question of law fully reviewable on appeal. Wagner v. Crossland Const. Co., Inc., 2013 ND 219, ¶ 16, 840 N.W.2d 81.

ARGUMENT

I. The district court's conclusion the City's construction of Lagoon Road in 2011 constituted a governmental taking without just compensation should be affirmed.

[23] The record on appeal establishes the district court correctly concluded the City took LLD's private property for the construction of Lagoon Road in 2011 with just compensation. "Private property shall not be taken or damaged for public use without just compensation having been first made to . . . the owner." N.D. Const. art. I, § 16. "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." Knutson v. City of Fargo, 2006 ND 97, ¶ 9, 714 N.W.2d 44. Under N.D. Const. art. I., § 16, an inverse condemnation claim does not hinge on negligence or intent to harm, but "requires a public entity's taking or damaging an owner's property by some deliberate act, whether done intentionally, negligently, or innocently." Knutson, 2006 ND 97, ¶ 9, 714 N.W.2d 44.

[24] At the bench trial, LLD presented evidence and testimony that in the summer of 2011, the City took LLD's private property for the construction of a new permanent road in the area of a previously existing dirt trail. Based on the testimony, photographs, construction plans, and other exhibits, the district court concluded the post-2011 Lagoon Road to be clearly different compared to the dirt trail that existed prior to construction. App. 75. The district court concluded the City's construction of Lagoon Road widened the road, raised the elevation of the road, constructed ditches, installed culverts, and stored construction materials and equipment on LLD's property, all of which constituted a taking of LLD's property for public use without just compensation. App. 72. The district court determined the value of the taking was a question for the jury. Id.

[25] While the City asserts it had an express easement for the 2011 construction project, the alleged easement was never produced and submitted to the district court, and in turn, the district court correctly found there was "no actual written easement identified in the record which explicitly grants to [the City] the right to construct and build 'Lagoon Road' as it did in 2011." App. 47. The district

court's legal conclusion finding a taking by the City is not erroneous, it was sufficiently supported by the evidence in the record.

II. The district court properly concluded LLD's inverse condemnation claim was not barred by the City's prescriptive easement.

[26] The City argues it is entitled to a complete dismissal of LLD's inverse condemnation claim based upon its meritorious prescriptive easement defense. Appellant's Br., at ¶ 6. The crux of the City's argument and the issue for determination on appeal is whether the finding of a prescriptive easement is a complete bar to LLD's inverse condemnation claim.

[27] This court explained that when a roadway is established by prescription, "the public acquires merely an easement of passage, the fee title remaining in the landowner." Casey v. Corwin, 71 N.W.2d 553, 555 (N.D. 1955). The Casey Court held the State did not acquire any ownership interest beyond the right of passage. Id.

[28] On appeal, the City erroneously argues "a public easement established through prescriptive use extinguishes a landowner's right to claims[*sic*] inverse condemnation". Appellant's Br., at ¶ 36 (citing McKenzie Cty. v. Reichman, 2012 ND 20, 812 N.W.2d 332). The City argues Reichman mandates dismissal of an inverse condemnation claim when a prescriptive easement exists. Id. at ¶ 37. The City's reliance upon the Reichman Opinion to support its argument is misplaced. The facts and issues in Reichman are distinguishable from the issues present in this case. In Reichman, the county built a public road, including ditches and culverts, on the property in the 1950s with the consent of the owner of the property. Id. at ¶

5. The current landowner asserting the claim for inverse condemnation for the road purchased the property fifty years after the road was constructed. Id. The district court found the twenty-year period for calculating a prescriptive easement began when the county constructed the road in the 1950s and the road had not changed since that time. Id. at ¶ 8. Because the landowner acquired the land in 2000 with the existing burden of the prescriptive easement for the road on the land, the Court affirmed the dismissal of her inverse condemnation claim for the existing road. Id. at ¶ 38.

[29] Likewise, the City's reliance on Kritzberger for the proposition the City may expand the prescriptive easement for a public road is equally flawed. See Kritzberger v. Traill County, 242 N.W. 913 (N.D. 1932). In 1932, at the time Kritzberger was decided, North Dakota had a statute requiring all public roads to be a minimum width. Id. at 916 (concluding a public road established by prescription must be a minimum statutory width). This Court has subsequently limited the Kritzberger holding based upon the state in effect at the time. See Keidel v. Rask, 304 N.W.2d 402, 403 (N.D. 1981).

[30] In the present case, only a two-tire track dirt trail, with no ditches or culverts, existed on the property at the time of LLD's purchase in 2005. App. 67. Following LLD's purchase, the City constructed Lagoon Road in 2011, which involved removal of the dirt trail, constructing a sixteen-foot-wide gravel road, changing the elevation of the road, cutting ditches and installing culverts, all of which had not existed on the property at the time of LLD's purchase. App. 68. While

the City may have continued to access the property in the same manner, as the district court found, the dirt trail that existed on the property was structurally different than what the City constructed in August of 2011. App. 43. The City's construction constituted a taking entitling LLD to just compensation for the construction exceeding the land previously used.

[31] The North Dakota case that is, in fact, on point to the present case is Keidel. In Keidel, the issue was how much land was included in a prescriptive easement and whether the existing roadway acquired by prescription could be expanded to meet the City of Mandan's ordinances for roadways. 304 N.W.2d at 403-04. This Court rejected the argument that the road obtained by prescription could be expanded to meet the city's standards, stating, "[p]rivately owned land cannot become public road by adverse use beyond the portion so used merely by a statutory pronouncement to that effect." Id. at 408. "Public use cannot be said to apply to lands not actually used," as "a property owner receives no notice as to a public claim on any property in excess of that which has been actually used". Id. at 409 (citing Barfnecht v. Town Bd. of Hollywood Tp., 232 N.W.2d 420, 423-24 (Minn. 1975)). The Keidel Court determined "the width of the prescriptive easement, however, is not limited to that portion of the road actually traveled; it may include the shoulders and ditches that are needed **and have actually been used to support and maintain the traveled portion**." Id. (emphasis added). The Court explained its ruling does not prevent a governmental body from upgrading, widening, or improving a public road, but such acts must be accomplished through

the use of eminent domain, which provides landowners with notice and the opportunity to secure just and fair compensation in return for the property taken. Id. (noting additional right-of-way needed to maintain a road acquired by prescription cannot be acquired simply by testimony of an official of the public stating it is necessary for maintenance, convenience, or safety of the public).

[32] Pursuant to the holding in Keidel, the City's expansion of the right of access acquired by prescription to the dirt trail on LLD's property needed to be accomplished through eminent domain. Moreover, the scope of the City's prescriptive easement on LLD's property was limited to the portion of the road actually travelled and any shoulders and ditches were "actually used to support and maintain the traveled portion." See Keidel, 304 N.W.2d at 409. In the present case, the district court found the actual traveled portion was an eight-foot wide dirt trail and there were no shoulders or ditches supporting the trail. Therefore, the City's construction of a sixteen-foot wide road with shoulders, ditches, and culverts exceeded its prescriptive easement and constituted a taking of LLD's property for which just compensation was owed. See id.

[33] Similarly, other courts have also held that the increase in width of a prescriptive easement would constitute an impermissible expansion of the easement. See, e.g., Aztec, Ltd. v. Creekside Inv. Co., 602 P.2d 64, 67 (Idaho 1979); Danial v. Delhi, 185 A.D.2d 500 (N.Y. 1992) (finding the width of a prescriptive easement is limited to the actual use and present width); Argosy Trust v. Wininger, 141 Idaho 570, 5114 P.3d 128, 131 (holding the plaintiff could not increase the width of the

easement in order to further develop the land). In Aztec, the court explained an increase to the width of a prescriptive easement does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land. Id. (stating rights acquired by prescription should be closely scrutinized and strictly limited). In Ellison v. Fellows, the New Hampshire Supreme Court rejected the plaintiff's attempt to change the location of a prescriptive easement and build a bridge, as the use of the easement must be consistent with the previous use and cannot interfere with the owner's use of the property. 437 A.2d. 278, 279 (N.H. 1981).

[34] The Restatements of Property are also instructive on this issue. The Restatement 1st of Property, § 478 (1936) discusses the extent of changing a prescriptive easement, stating:

> In ascertaining whether a particular use is permissible under an easement created by prescription a comparison must be made between such use and the use by which the easement was created with respect to
>
> (a) their physical character,
> (b) their purpose,
> (c) the relative burden caused by them upon the servient tenement.

Restatement 1st of Property, § 478 (1936). The Restatement 3d of Property: Servitudes § 4.8 (2000), provides the owner of an easement is entitled to make changes to the easement, but only if the changes do not increase the burden on the owner of the property. The comment notes that changes in height and depth are more readily permitted than changes in width, as changes in width are more burdensome to the landowner's property. Id. Illustration 3 to the prescriptive

easement comment is illustrative to the present dispute:

> 3. O, the owner of Blackacre, acquired a prescriptive easement by use of a one-lane country road across Whiteacre for the prescriptive period. O now plans to subdivide Blackacre and wants to widen the road to two lanes with shoulders and drainage ditches on either side. **Because these changes would probably increase the burden on the servient estate substantially, it would be reasonable to conclude that O is not entitled to expand the size of the easement.** Even if safety required expansion of the roadway, the proposed expansion would not be within the scope of the easement because the increase in width and traffic would unreasonably increase the burden on the servient estate.

Id.

[35] LLD's claim for inverse condemnation was not extinguished by the finding of a prescriptive easement or the holding in Reichman. While there is no dispute the scope of a prescriptive road includes not only the traveled surface but also the adjacent land needed to maintain the road including ditches, shoulders, and slopes, the undisputed evidence in the record established the City's prescriptive easement consisted of a two-tire-track dirt trail with no ditches or culverts. As the property adjacent to the dirt trail was never used to support and maintain the trail prior to 2011, the additional adjacent property that was taken in 2011 to widen the road top, to construct the new ditches, to install culverts, and to store construction equipment were not part of the access that the City acquired by prescription. Because the City's 2011 construction exceeded its prescriptive easement, the district court properly determined LLD was entitled to just compensation for the property taken to be determined by the jury. See Keidel, 304 N.W.2d at 409. To the extent there was any inconsistency or error in the district court's order, such error was

harmless and should be disregarded because it did not affect the City's substantial rights. N.D.R.Civ.P. 61.

[36] The City also argues the district court abused its discretion in its jury instructions and special verdict form given at trial, which it contends constitutes grounds for reversal. However, the City has failed to preserve this issue for appeal by failing to provide any proof that it objected to the court's jury instructions and special verdict form.

[37] "The trial court has broad discretion over the nature and scope of written questions submitted to the jury, and appellate review is limited to determining whether there was an abuse of discretion." Victory Park Apartments, Inc., v. Axelson, 367 N.W.2d 155, 165 (N.D. 1985). When reviewing alleged error in jury instructions, this Court has held:

> Jury instructions must correctly and adequately inform the jury of the applicable law, and must not mislead of confuse the jury. On appeal, [this Court] review[s] jury instructions as a whole to decide whether the instructions adequately and correctly inform the jury of the applicable law, even though part of the instruction standing alone may be insufficient or erroneous. When considered as a whole, if a jury instruction correctly advises the jury of the law, it is sufficient even if part of it standing alone may be insufficient. Selecting only part of the erroneous and misleading inferences. Further a district court is not required to give jury instructions in the specific language requested by the defendant.

Flynn v. Hurley Enters., Inc., 2015 ND 58, ¶¶ 18-19, 860 N.W.2d 450 (internal quotations and citations omitted). Most importantly, this Court has repeatedly held, a party failing to object to a proposed jury instruction, including distinctly stating the matter objected to and the grounds of the objection, waives the objection and the

instructions become the law of the case. See e.g., Bakke v. D&A Landscaping Co., LLC, 2012 ND 170, ¶ 14, 820 N.W.2d 357. In the absence of a timely objection, only a fundamental and highly prejudicial error in the instructions will be reviewed by this Court under N.D.R.Civ.P. 51(c). Id. at ¶ 15.

[38] Absent a transcript of the jury trial, there is no evidence in the record the City objected to the district court's jury instructions. Therefore, this Court cannot make a meaningful and intelligent review of the alleged error and it should decline to review this issue. See Lithun, 447 N.W.2d at 300. However, even if the Court were to review the jury instructions for a fundamental and highly prejudicial error, the district court's jury instructions, read as a whole, correctly informed the jury of the applicable law. It also must be noted that the curative instruction the City complains of was necessary because the City continued to assert during the jury trial that "easements existed for the construction of Lagoon Road," which was contrary to the Court's prior conclusion that there were no express easements allowing for the construction or improvement of Lagoon Road. App. 133. The district court did not err in its jury instructions given during trial.

[39] The City also objects to the Special Verdict Form given by the district court. App. 135-137. Again, there is nothing in the record to establish any objection by the City to the proposed verdict form. When no objection is made to a special verdict form, any objection on appeal to a jury's finding upon the special verdict is waived. Van Klootwyk v. Arman, 477 N.W.2d 590 (N.D. 1991) (citing Hoerr v. Northfield Foundry and Mach. Co., 376 N.W.2d 323 (N.D. 1985)). When a party

also fails to object to a special verdict form that omits question on which evidence has been presented, the party is deemed to have waived the right to have these issues tried to the jury. Horstmeyer v. Golden Eagle Fireworks, 534 N.W.2d 835, 840 (N.D. 1995). In the present case, the City waived any objection it may have by failing to file a transcript on appeal establishing it objected to the special verdict form.

III. The Court correctly concluded the City did not obtain an express easement, an implied easement or easement by Estoppel.

[40] The City argues the district court "minimized and discounted a handful of critically important trial exhibits submitted by the city," and that "[t]he 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." Appellant's Br., at ¶ 48. The City also asserts the district court's alleged failure "to consider those exhibits, and the cumulative effect of those exhibits, was error." Appellant's Br., at ¶ 52.

[41] The existence of an easement is a question of law for the district court, and giving fair weight to the facts presented, the district court correctly determined the City failed to establish the existence of an easement. App. 55 – 59. Further, the district court found the facts did not establish a right of way that arose by "implication under the facts and circumstances." App. 55.

[42] The City is requesting this Court reweigh the evidence admitted during the bench trial to find that these exhibits constitute an express easement, an implied easement, and/or an easement by estoppel. While the determination of the

existence of an easement is a question of law, the City is challenging the district court's findings of fact regarding trial exhibits submitted by the City. Without a transcript, this Court is not able to conduct a meaningful and intelligent review of any alleged error. For that reason alone, this Court should decline to review this issue altogether. Lithun, 447 N.W.2d at 300 (declining to review an issue on appeal if the record does not allow for meaningful and intelligent review of the alleged error).

[43] If this Court reviews the alleged error, the district court did not ignore or discount these exhibits submitted by the City. In fact, the district court spent nine pages of its Order addressing these exhibits, the issues present in these exhibits, and the testimony the district court heard regarding these exhibits. App. 50-58.

[44] With respect to the 1985 Plat for property that was not owned by LLD and was never recorded or built, the 1985 letter from the City's Mayor to CIP regarding the plat, and the other historical records of the City in relation to the unrecorded plat, the district court found:

> The City of Lincoln needed a "story teller to connect these documents and it could not produce one. Its entire analysis on these documents as set out in its proposed Findings and Facts and Conclusions of Law . . . is argument without foundation. The documents simply do not create an easement as a matter of law and there is no factual testimony to support a theory that this was intended by this series of seemingly unrelated documents. As an example, the Court cannot put itself in the place of then-May Nelson and declare this is what the parties intended by that letter. And to suggest that since the City of Lincoln "presented no evidence or document from CIP taking issue with former Mayor Nelson" therefore it must be true, is burden shifting at its worst. Again, there is no testimony in the record to support the argument of the City of Lincoln with respect to its theory of the documents it depends on for a finding of an existing easement.

App. 51-52.

[45] In assessing these documents, the Court relied on N.D.C.C. § 47-05-02.1, regarding the legal requirements for easements on real property. Importantly, the Court noted, N.D.C.C. § 47-05-02.1, specifically requires the area of land covered by the easement to be properly described and that the easement set out the area of land covered by the easement. App. 55-56. Applying the statutory requirements, the district court properly concluded, the 1985 unrecorded plat for the neighboring property failed to meet the requirements of N.D.C.C. § 47-05-02.1. App. 56. The district court also noted the City's argument that an unrecorded plat "granted and dedicated" the City an all-time right of way in the area where Lagoon Road was built in 2011 to be factually and legally unpersuasive. App. 53. The argument that LLD took title to the property with a right of way easement pursuant to this 1985 unrecorded plat for a subdivision that was never built, was found to "stretch logic and credibility." App. 54.

[46] With respect to the 1984 Engineering plans, these are construction plans. App. 84. A reference to an alleged easement that was drawn on the construction plans does not properly describe the easement, or the specific area of land that the easement covered. Further, the City has not submitted any legal authority to support the contention that information solely contained in construction plans can establish an easement under North Dakota law.

[47] For the irregular plats attached to a Warranty Deed on file with the Burleigh County Recorder's Office, there is a diagram that is noted as a "50'

sanitary sewer easement." App. 78-83. However, the irregular plats do not describe the property in the alleged easement, or the specific area of land that the easement allegedly covered. Id. Further, there is not any document in the record to establish what this "50' sanitary sewer easement" is, or what the drafter was relying on when it was drawn into the irregular plats. The City has also failed to assert any legal authority to establish how an alleged "50' sanitary sewer easement" granted the City the right to construct a road on LLD's property in 2011. Thus, the district court did not err when it concluded the City did not possess a permanent easement for Lagoon Road as a result of these documents. The district court also did not err when it concluded these documents did not create an easement by implication through the facts and circumstances "testified to by those witnesses that actually did offer competent testimony at trial." App. 58.

IV. The Court correctly found LLD was entitled to costs, disbursements, and attorney fees as a prevailing party and in accordance with N.D.C.C. § 32-15-32.

[48] Following the jury's verdict in favor of LLD, the district court entered a judgment in favor of LLD on its inverse condemnation claim. On appeal, the City erroneously argues it was the prevailing party in this action and LLD is not entitled to costs and attorney fees. It should be noted the City is not challenging the amount of the district court's award of costs and attorney fees to LLD.

[49] Pursuant to N.D.C.C. § 32-15-32, LLD is statutorily entitled to costs, disbursements and attorney fees, because it received compensation for the unlawful

taking of its property. The district court did not err in awarding reasonable costs and attorney's fees under N.D.C.C. § 32-15-32. As set forth by this court:

> [A]n inverse condemnation action constitutes, in effect, a proceeding provided for under Chapter 32-15, N.D.C.C., which, under Section 32-15-01, N.D.C.C., provides in relevant part, "private property shall not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner." The purpose of an inverse condemnation action is to allow a landowner whose private property has been taken for public use to secure the just compensation which he should have received in proceedings instituted by the public entity under Chapter 32-15, N.D.C.C., prior to the taking or damaging of the property. Accordingly, we conclude that when a landowner brings an action in inverse condemnation through which he receives a compensation for the taking or damaging of his property for public use it is proper for the trial court to award, in its discretion, reasonable costs and attorney's fees under Section 32-15-32.

Arenson v. Fargo, 331 N.W.2d 30, 20-21 (N.D. 1983). Under N.D.C.C. § 32-15-32 and North Dakota law set forth by this Court, the award for reasonable costs and attorney's fees by the district court was proper. The district court's award must be affirmed.

[50] The City's argument it is the prevailing party is without merit and has no significance in light of the district court's findings under N.D.C.C. § 32-15-32. The district court concluded LLD was the prevailing party both at the bench trial and the jury trial on its inverse condemnation cause of action and the only judgment that could be entered was in favor of LLD against the City. The district court stated the City "continues to desperately argue that it was the 'prevailing party.' It must accept that it is not." App. 169 & Doc. ID# 694 at ¶ 10. The "prevailing party" to an action "is the one in whose favor the decision or verdict is rendered and the

judgment is entered." Lemer v. Campbell, 1999 ND 223, ¶ 9, 602 N.W.2d 686. "The determination of who is the prevailing party entitled to recover necessary disbursements under the statute is based upon success on the merits, not damages." WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 49, 730 N.W.2d 841.

[51] The record establishes LLD was the prevailing party at both the bench trial and the jury trial. In addressing the City's prevailing party argument, the district court found, "[t]his was an inverse condemnation action upon which [LLD] prevailed. The defenses that were asserted by [the City] were not a complete bar to recovery by [LLD]." App. 139. Further, "[s]imply because the Court eliminated some theories of recovery asserted by [LLD] does not change the reality that [LLD] was and is the prevailing party on its inverse condemnation action." App. 139.

[52] In this action, the district court never found the City to be a prevailing party on **any** claim. The City's reliance on WFND and Liebelt v. Saby, 279 N.W.2d 881 (N.D. 1979) is misplaced. In WFND, after a six-day bench trial, the district court ruled the defendant was liable to plaintiff on plaintiff's fraud claim and that plaintiff was liable to defendant for defendant's breach of contract claim. 2007 ND 67, at ¶ 7, 730 N.W.2d 841. On appeal, this Court held, "Because both parties prevailed on their respective claims, we conclude there is no prevailing party for purposes of N.D.C.C. § 28-26-06." Id. at ¶ 50. In Liebelt, a brother and sister were found to have both prevailed on certain issues regarding an estate dispute, and as such, there was no single prevailing party against whom the clerk could tax disbursements." 279 N.W.2d 888. WFND and Liebelt are distinguishable from the

present action in which LLD was the only party to prevail on a claim and a judgment was entered only in favor of LLD. The district court did not error in finding LLD to be the prevailing party.

[53] The City's argument that LLD should not be considered a prevailing party because LLD did not recover all the damages it was seeking is without merit. This Court has repeatedly rejected the City's misguided argument holding the determination of who is a prevailing party entitled to recover necessary disbursements under the statute is based upon success on the merits, not damages. Lemer, 1999 ND 223, at ¶ 9 (concluding plaintiff was the prevailing party since she prevailed on her claim, even though she recovered no damages). The district court properly concluded LLD was the prevailing party following the jury's verdict was rendered in favor of LLD on its inverse condemnation claim.

[54] As the district court's determination of LLD as the prevailing party is not erroneous, the Taxation of Costs, Doc. ID# 657, Order for Judgment on Jury Verdict, Doc. ID# 658, Judgment on Jury Verdict, Doc. ID# 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, are appropriate.

[55] Section 32-15-32, N.D.C.C., authorizes the award of reasonable attorney fees "for all judicial proceedings", including defending an appeal to the Supreme Court. Dutchuk v. Board of County Comm'rs, 429 N.W.2d 21, 24 (N.D. 1988) (stating an attorney fee award in the district court should not be dissipated by

uncompensated attorney fees incurred in successfully defending a judgment on appeal). LLD respectfully requests this Court remand this case back to the district court for a determination of reasonable attorney fees for defending this appeal. Id.

CONCLUSION

[56] For the foregoing reasons, Lincoln Land Development, LLP, requests the district court's order and judgments, including the Findings, Conclusions and Order for Judgment and the Amended Judgment on Jury Verdict be affirmed in all respects and this matter be remanded to the district court for a determination of reasonable attorney fees for defending this appeal.

Dated this 2nd day of August, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as 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 7584.

CERTIFICATE OF SERVICE

I, Paul Sanderson, a license attorney in the State of North Dakota and officer of the Court, certify that on the 2nd day of August, 2018, a true and correct copy of the Appellee's Brief was e-mailed to opposing counsel to the following names and addresses:

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