

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

D&P Terminal, Inc.; Potter Enterprises;  
and William F. Rakowski,

Petitioners/Appellants,

vs.

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

Respondent/Appellee.

Supreme Court No. 20110194

District Court No. 09-2010-CV-03869

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**BRIEF OF APPELLEE**

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APPEAL FROM THE OPINION AFFIRMING ASSESSMENT ENTERED ON  
JUNE 22, 2011, AN ORDER FOR JUDGMENT DATED JULY 5, 2011,  
AND THE RESULTING JUDGMENT DATED JULY 12, 2011

CASS COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT  
HONORABLE WICKHAM CORWIN

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**STATEMENT OF THE ISSUES**

[¶ 1] Whether the District Court Judgment upholding the Fargo City Commission's October 4, 2010 approval of the Special Assessment Commission's assessment list for Improvement District 5547 should be affirmed.

## **STATEMENT OF THE CASE**

[¶ 2] Appellants D&P Terminal, Inc. and Potter Enterprises (hereinafter referred to collectively as “D&P”) objected to the proposed special assessments on their properties in Special Assessment District 5547. D&P appealed the Special Assessment Commission’s assessments against their property to the Board of City Commissioners for the City of Fargo. (D&P Appendix<sup>1</sup> pp. 13-14 - Minutes of the City Commission October 4, 2010 regular meeting).

[¶ 3] D&P then appealed the decision of the Board of Commissioners of the City of Fargo to the District Court pursuant to N.D.C.C. § 28-34-01. (App. pp. 4-5). On June 22, 2011, the Honorable Wickham Corwin affirmed the decision of the Fargo City Commission approving D&P’s assessments in District 5547. (App. pp. 267-274 – Opinion Affirming Assessment). D&P appealed from the Opinion Affirming Assessment entered on June 22, 2011 to this Court. (App. p. 275). An Order for Judgment was entered on July 5, 2011. (App. p. 293). Judgment was entered on July 12, 2011. (App. p. 294). Thereafter, D&P filed an Amended Notice of Appeal from the June 22, 2011 Opinion Affirming Assessment, the Order for Judgment dated July 5, 2011, and the resulting Judgment dated July 12, 2011. (App. p. 284 – Amended Notice of Appeal).

[¶ 4] The specific issue before this Court is whether the Fargo City Commission acted arbitrarily, capriciously or unreasonably in approving the Special Assessment Commission’s assessments against D&P’s properties in Special Improvement District 5547.

[¶ 5] For the reasons detailed herein, the City of Fargo respectfully submits that this Court should dismiss the appeal and affirm the Judgment of the District Court.

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<sup>1</sup> Hereafter, all references to the D&P Appendix shall be to “App.”

## STATEMENT OF FACTS

### **A. Description of Land at Issue.**

[¶ 6] Twelfth Avenue is an arterial street that services the NDSU campus and much of north Fargo. (Docket ID#<sup>2</sup> 45 – Part #25 Online Board Packet Submitted Prior to September 22, 2008 by the City of Fargo – Description in Engineer’s Report dated September 2008 – COF 473). The street was deteriorated and needed renovation. Id. By letter dated September 17, 2008, D&P were notified that the North Dakota Department of Transportation and the City of Fargo planned to reconstruct 12<sup>th</sup> Avenue North from 9<sup>th</sup> Street to Interstate 29. (Doc ID# 46 – Part #26 Letter to Property Owners dated September 17, 2008 with attachments – COF 486-488). Improvement District 5547 follows 12<sup>th</sup> Avenue North from 9th Street to Interstate 29 and extends north and south of 12<sup>th</sup> Avenue. (Doc ID# 45 – COF 484-485 – Maps). Special Improvement District 5547 called for making significant improvements to 12<sup>th</sup> Avenue North over a length of approximately two miles. (Doc ID# 21 – Part #11 Staff Memo and Response to Objections, dated August 20, 2010 – COF 294). The project called for replacing cast iron water main along the corridor, replacing selected sanitary sewers, installing additional storm sewers to provide more capacity, installing street lights and widening a new bridge deck on the 12<sup>th</sup> Avenue viaduct at the Burlington Northern Railroad crossing. Id. The completed project would improve flow and access to NDSU and improve pedestrian access. (Doc ID# 45 – Part #25 Online Board Packet Submitted Prior to September 22, 2008 by the City of Fargo – COF 473). The sewer and water main portions of the project would replace deteriorated mains and service piping under the roadway. Id.

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<sup>2</sup> Hereafter, the Docket ID designation will be referenced to as “Doc ID.”



**B. Improvement District 5547 Created September 22, 2008.**

[¶ 7] The City Commission adopted the resolution creating Improvement District 5547 for sanitary sewer, water main, storm sewer, paving, street lighting, bridge construction and incidentals on September 22, 2008. (Doc ID# 44 – Part #24 Board of City Commissioners Permanent Minutes September 22, 2008 – COF 460-463 – Minutes of City Commission Meeting). The City received the requested Engineer’s report as to the general nature, purpose and feasibility of Improvement District 5547 and obtained the engineer’s estimate of costs. Id. at COF 463. (See also, Doc ID# 45 – Part #25 Online Board Packet Submitted Prior to September 22, 2008 by the City of Fargo – COF 473-474 – Engineer’s Report). The City Commission approved the City Engineer’s plans and specifications for Improvement District 5547. (Doc ID# 44 – Part #24 – COF 463). The City Commission also adopted a resolution declaring the sanitary sewer, water main, storm sewer, paving, street lighting, bridge construction and incidentals to be necessary. Id. at COF 463-464. A portion of the City’s responsibility for the improvement project was to be paid from special assessments against the benefited property in amounts proportionate to the benefits received. Id. at COF 463-464. (See also, Doc ID# 45 – Part #25 Online Board Packet Submitted Prior to September 22, 2008 by the City of Fargo - COF 474 – Engineer’s Report).

[¶ 8] In September 2008 the cost of the entire Improvement District (which included the bridge or viaduct portion) was estimated be \$26,936,520. Id. The estimated amount to be specially assessed to benefited landowners was \$4,057,200. Id. The City entered into a Cost Participation Agreement with the State of North Dakota for the roadway construction on November 3, 2008. (Doc ID# 23 - #2 ND Dept. of Transportation Cost Participation and

Maintenance Agreement – COF 305). The Cost Participation and Maintenance Agreement Project #HPU-U-CMU-8-294(006)001 for the roadway reconstruction, storm sewer, city utilities, signals, lighting and landscaping was entered into in November 2008. Id. The Agreement specified that the City would pay 10% of the total costs of all items which were determined eligible for federal aid participation and this total cost would include the actual construction costs plus 10% for preliminary and construction engineering. Id. Additionally, the City agreed to pay 100% of the construction costs plus 10% for the preliminary and construction engineering of all items not eligible for federal aid participation. Id. The City would pay the North Dakota Department of Transportation as work progressed and as billed by the Department of Transportation. The Agreement estimated the preliminary cost of the roadway construction project at \$13,023,492 with the City's estimated share being \$4,339,981 as of November 2008. Id. As to the roadway portion of the Improvement District, the construction total was estimated to be \$12,603,286 after the bid of Master Construction was made. (Doc ID# 45 – Part #25 Online Board Packet – COF 482-483 – December 2008 Amended Engineer's Report and Letter to Commissioners). The amount to be assessed was revised to be \$3,924,111.00. Id. at COF 483. The City had previously entered into a Cost Participation Agreement with the State of North Dakota for the bridge reconstruction portion in October 2007. (Doc ID# 47 – Part #27 2007 Documents for the Start of Project – COF 492-495). Though the bridge is part of the Improvement District, the costs of its construction were not assessed against landowners in the Improvement District. (Doc ID# 17 – Part #7 [Transcript] of Meeting of the Special Assessment Commission Dated September 14, 2010 – pp. 183-251 – COF 216-219). None of the costs associated with the construction of the bridge are part of the assessments at issue in this appeal. Id. –

Bittner Testimony at September 14, 2010 meeting of Special Assessment Commission – COF 224.

[¶ 9] The statutory resolution of necessity for Improvement District 5547 was published in the official newspaper on September 29 and October 6, 2008. (Doc ID# 26 – #5 Regular Meeting, November 3, 2008 – COF 333 and Doc ID # 41 – Part #21 Board of City Commissioners Permanent Minutes – February 8, 2010 – COF 455). The required protest period passed without protest. (Doc ID# 25 - #4 Letter from Mark Bittner to the Commissioners – COF 330 and Doc ID# 26 - #5 Regular Meeting, November 3, 2008 – COF 333-334). On November 3, 2008, the City Commission declared no protests were filed. Id. at COF 333.

**C. Assessment Process.**

[¶ 10] While it was first thought the work on Improvement District 5547 was substantially complete in the fall of 2009, the City determined more work was required and pulled this district from the 2009 assessment process. However, in connection with the anticipated assessment process, the City Auditor Steve Sprague created a certification of costs for Improvement District 5547 dated September 9, 2009. (Doc ID# 11 – Part #1 Notice of Appeal with Attachments Dated October 30, 2010 – COF 36). This cost certification included all costs regarding the bridge and the roadway project. Before the assessment process was temporarily suspended, D&P filed objections regarding Special Improvement District 5547 in September of 2009. (Doc ID# 48 – Part #28 Objection of Property Owner to Assessment in Special Assessment Project #5547 – Potter Enterprises – COF 501-551 and Doc ID# 49 – Part #29 Objection of Property Owner to Assessment in Special Assessment Project #5547 – D & P Terminal – COF 560-613). Also, on September 30,

2009, Engineer Mark Bittner amended his Engineer's Statement of Estimated Costs for Improvement District 5547 as it related to the roadway portion but the estimated assessed costs remained the same. (Doc ID # 45 – Part #25 Online Board Packet – COF 481 - NDOT Project 8-294(006)001).

[¶ 11] At its regular meeting on February 8, 2010, the Fargo City Commission adopted its resolution recognizing that Improvement District 5547 was substantially complete. (Doc ID# 41 – Part #21 Permanent Minutes – February 8, 2010 – COF 438 (item bb) and COF 451. See also, Doc ID# 31 - #10 Permanent Minutes – COF 373-374, Signed Resolution). The City Auditor issued an amended certificate of costs on February 8, 2010. (Doc ID# 11 – Part #1 Notice of Appeal with Attachments – COF 37). On February 16, 2010, the City of Fargo issued Special Assessment Notices to D&P for their respective properties. (Doc ID# 39 – Part #19 Special Assessment Notices – March 2010 – COF 428 (D&P \$161,395.00) and Id. at COF 429 (Potter \$62,250.00)).

**D. Special Assessment Commission Meeting March 4, 2010.**

[¶ 12] On March 4, 2010, the Special Assessment Commission met to discuss the portion of Improvement District 5547 to be assessed. Before the hearing, D&P Terminal, Inc. and Potter Enterprises filed a joint objection with the Special Assessment Commission dated March 3, 2010. (Doc ID# 51 – Part #31 Joint Objection of Property Owners to Assessment in Special Assessment Project #5547 with A, B, C, D, E Attached – COF 665-720). D&P maintained that the City failed to reduce the amount of the assessments by the full amount of the sales tax funds “promised” and by \$3,000,000 of federal funds. (Doc ID# 37 – Part #17 [Transcript] of the Meeting of the Special Assessment Commission on March 4, 2010 – COF 410-425). The Special Assessment Commission continued the meeting to

allow the staff to respond to the D&P objections. Id. at COF 423-425; March 4, 2010, internal pp. 53-62. A letter was sent to the property owners within the Improvement District on March 8, 2010 advising them that the hearing had been put on hold. (Doc ID# 36 – Part #16 Correspondence From the City of Fargo – March 2010 – COF 408). The letter also advised the property owners that along with notice of the continued Special Assessment Commission hearing, a new assessment notice would be mailed.

**E. Special Assessment Commission Meeting July 28, 2010.**

[¶ 13] The City Auditor issued an amended Certification of Costs for Improvement District 5547 on July 13, 2010 which reflected the City’s costs for the roadway project alone. (Doc ID# 11 – Part #1 Notice of Appeal with Attachments Dated October 30, 2010 – COF 38). On July 19, 2010, special assessment notices were sent to Appellants again advising them of the Special Assessment Commission hearing on July 28, 2010. (Doc ID# 35 – Part #15 Special Assessment Notices – July 2010 – COF 404-405). Additionally, a letter dated July 19, 2010 was sent to property owners advising them of the Special Assessment Commission hearing date and a revised special assessment notice. Id. at COF 403. A letter was sent to D&P’s counsel informing him that the March 4, 2010 Special Assessment Commission meeting was continued to July 28, 2010. Id. at COF 402. The Board of Special Assessment Commissioners met on July 28, 2010 and D&P attended through counsel. (Doc ID# 34 – Part #14 Minutes of the Special Assessment Hearing Dated July 28, 2010 – COF 401). D&P filed a Second Joint objection with the Special Assessment Commission. (Doc ID# 52 – Part #32 Second Joint Objection of Property Owners to Assessment in Special Assessment Project #5547 – COF 721-791). Counsel for D&P advised the Special Assessment Commission that no publication of the notice of the hearing

had been made. (Doc ID# 34 – Part #14 Minutes of Special Assessment hearing July 28, 2010 – COF 401). Therefore, the meeting was again continued with the understanding that the objecting parties would receive a copy of the City’s response to their objections sufficiently in advance of the next meeting date to prepare a response. (Doc ID# 33 – Part #13 [Transcript] of Meeting of the Special Assessment Commission date July 28, 2010 – COF 380-400, COF 395-399).

**F. Special Assessment Commission Meeting August 31, 2010.**

[¶ 14] The City Auditor issued an amended Certificate of Costs on August 4, 2010. (Doc ID# 11 – Part #1 Notice of Appeal with Attachments Dated October 30, 2010 – COF 39). The City’s costs for the roadway were \$6,119,279.00 and the proposed amount to be assessed was \$3,927,563.00. Id. The City staff responded to the D&P objections in a memo dated August 20, 2010. (Doc ID# 21 – Part #11 Staff Memo and Response to Objections, dated August 20, 2010 – COF 293-301; Doc ID# 22 - #1 Engineer’s Report – COF 302-303; Doc ID# 23 - #2 ND Dept. of Transportation Cost Participation and Maintenance Agreement – COF 304-327; Doc ID# 24 - #3 Regular Meeting, September 22, 2008 – COF 323-324; Doc ID# 25 - #4 Letter from Mark Bittner to the Commissioners – COF 330; Doc ID# 26 - #5 Regular Meeting, November 3, 2008 – COF 331-336; Doc ID# 27 - #6 Amended Assessment from the City Auditor – COF 337-338; Doc ID# 28 – #7 Public Works Projects Evaluation Committee – COF 339-353; Doc ID# 29 - #8 Report of Action – COF 354-364; Doc ID# 30 - #9 Pictures – COF 365-368; Doc ID# 31 - #10 Permanent Minutes – COF 369-374). The continuance of the meeting on the Improvement District 5547 assessments was scheduled for August 31, 2010. (Doc ID#32 – Part #12 Special Assessment Notices – August 2010 – COF 375, 376-378).

[¶15] On August 31, 2010, the Board of Special Assessment continued the hearing on Improvement District 5547. (Doc ID# 20 – Part #10 [Transcript] of Meeting of the Special Assessment Commission dated August 31, 2010 – COF 257-292). City Auditor Steve Sprague reminded the commission that the engineer’s estimate and his certification of costs reflect snapshots in time. In 2008, the special assessments were estimated to be \$4,057,000. Id. at COF 257; internal p. 3. A spreadsheet made by Engineer Mark Bittner in December of 2008, showed the assessment was estimated to be \$4,055,000. Id. at COF 258; internal p. 5. (See also, Doc ID# 18 – Part #8 Attachment of Costs by Mark Bittner referenced in September 14, 2010 Transcript – COF 252-253). D&P had maintained that the City could not apply their special assessment policy until it applied all city funds. (Doc ID# 20 – Part #10 [Transcript] of Meeting of the Special Assessment Commission dated August 31, 2010 – COF 271; internal p. 60). Auditor Sprague responded that the City has always applied its special assessment capped policies so that the policy is applied uniformly regardless of how a bid comes in. Id. at COF 272; internal p. 61. City Attorney Johnson reviewed N.D.C.C. § 40-22-06 at the Commission’s request and noted that the statute does not have a priority of payment application requiring sales tax funds and other funds be paid first before a special assessment amount can be calculated. Id. at COF 273; internal pp. 66-68. The Fargo Infrastructure Policy sets the assessed rates and the applicable funding sources. Id. at COF 275; internal pp. 73- 74. The policy benefits property owners by declaring a maximum for various project elements. (Doc ID# 21 – Part #11 Staff Memo and Response to Objections, dated August 20, 2010 – COF 298). Attorney Johnson explained that the assessment process required by statute was followed by the City in connection with Improvement District 5547. (Doc ID# 20 – Part #10 [Transcript] of Meeting of the Special

Assessment Commission dated August 31, 2010 – COF 283-284; internal pp. 108-109). Mr. Sprague noted that the special assessment number had been very consistent from the Engineers estimate in 2008 to the proposed 2010 assessments. (Doc ID# 20 – Part #10 [Transcript] of Meeting of the Special Assessment Commission dated August 31, 2010 – COF 258; internal p. 8). While Improvement District 5547 included the roadway and bridge in one Improvement District, the special assessments did not include the bridge portion of the Special Improvement District. Id. at COF 277, internal p. 84. The Commission was asked to assess only the portion of the City’s costs for sanitary sewer, water main, storm sewer and street lighting. Id. at COF 262; internal pp. 23-24. Special Assessment Coordinator Dan Eberhardt testified that benefits are calculated first and then the costs are calculated. Id. at COF 278.

**G. Special Assessment Commission Meeting September 14, 2010.**

[¶ 16] Because of the length of the meeting, the August 31, 2010 Special Assessment Commission meeting was continued until September 14, 2010. (Doc ID# 17 – Part #7 [Transcript] of Meeting of the Special Assessment Commission Dated September 14, 2010 – COF 183-251). The meeting continued the discussion of D&P’s objections to the proposed assessments associated with the roadway portion of the project. Improvement District 5547 consisted of two contracts, one was for the bridge itself and the other was for the roadway construction. Id. at COF 202. D&P again restated their arguments. Id. at COF 204-211. The Special Assessment Commission concluded the bridge portion of the project was not assessed against property owners. Id. at COF 216-217. While there were earlier certifications of costs by the City Auditor for 5547, his Amended August 4, 2010 cost certification was based only on the numbers he had available to him through the City’s



records which reflect the City's costs for the roadway project. (Doc ID# 17 – Part #7 [Transcript] of Meeting of the Special Assessment Commission Dated September 14, 2010 – COF 183-251; specifically COF 248; internal pp. 5-7 and Doc ID# 27 - #6 Amended Assessment from the City Auditor – COF 338 – August 4, 2010 Spreadsheet).

[¶ 17] At the close of the September 14, 2010 Special Assessment Commission meeting, the Commissioners certified the assessment list as presented to them dated August 9, 2010. (Doc ID# 17 – Part #7 [Transcript] of Meeting of the Special Assessment Commission Dated September 14, 2010 – COF 245-250; Doc ID# 19 – Part #9 Minutes of the Special Assessment Hearing Dated September 14 2010 – COF 256; Doc ID# 16 – Part #6 Special Assessment List Certification – COF 76-182). The revised final amended certification by the Special Assessment Commission was completed on September 14, 2010. (Doc ID# 16 – Part #6 Special Assessment List Certification – COF 74; Doc ID# 14 – Part #4 Online Board Packet Submitted prior to the October 4, 2010 [meeting] by the City of Fargo – COF 64 – Confirmation of same to City Commission).

#### **H. October 4, 2010 Meeting of the City Commission.**

[¶ 18] Notice of the Special Assessment Commission action was published in the Fargo Forum on Thursday, September 16, 2010. (Doc ID# 14 – Part #4 Online Board Packet Submitted prior to the October 4, 2010 [meeting] by the City of Fargo – COF 62-63). Following the Special Assessment Commission's confirmation of the assessment list on September 14, 2010, a memorandum was sent to the Board of Commissioners requesting approval of the special assessment listing. Id. COF 60-61. Notice of the upcoming public hearing before the City Commission was provided. Id. COF 68-69. The approval of the assessment list as confirmed by the Special Assessment Commission was addressed by the

Fargo City Commission on October 4, 2010. The City Commission heard the arguments of D&P as well as the responses of the City. City Attorney Erik Johnson reviewed the process that included the special assessment coordinator, Dan Eberhardt, assigning proposed benefits to the property prior to any calculation of assessed amounts. (Doc ID# 12 – Part #2 Partial Transcript of the Regular Meeting of the Fargo City Commission dated October 4, 2010 – COF 46-47; internal p. 20-22). There was a discussion of benefits with the Special Assessment Commission when they did their initial drive-through. Id. He reminded the Commission that the amount to be assessed had actually decreased from the beginning of the project. Id. The City Commission approved the Special Assessment Commission’s September 14, 2010 confirmation of the Special Assessment List for Special Improvement District 5547 . (Doc ID# 13 – Part #3 Board of City Commissioners Permanent Minutes – October 4, 2010 – COF 57-58). The City Commission confirmed the assessment list and ordered that it be filed in the Office of the City Auditor. The City Auditor was instructed to proceed to collect the assessments. Id. COF 58.

[¶ 19] The City of Fargo complied with all statutes, due process was afforded and the action of the City Commission should be affirmed.

## **LAW AND ARGUMENT**

### **A. Standard of Review.**

[¶ 20] A court’s review of a special assessment decision is limited, in part, by the separation of powers doctrine:

The special assessment commission is in essence a legislative tribunal created by legislative authority to “(1) determin[e] the benefits accruing to the several tracts of land in an improvement district by reason of the construction of an improvement and (2) assess[ ] the costs and expenses thereof against each tract in proportion to the

benefit received.” Accordingly, judicial review is limited to assuring that local taxing authorities do not act arbitrarily, capriciously, or unreasonably. Courts are not to act as a super grievance board, and we do not try special assessment cases anew or reweigh the evidence. Rather, we begin with the presumption that assessments for local improvements are valid and the burden is on the party challenging the validity of the assessments to demonstrate they are invalid.

Bateman v. City of Grand Forks, 2008 N.D. 72, ¶ 10, 747 N.W. 2d 117, p. 120 (2008) (citing Serenko v. City of Wilton, 1999 N.D. 88, ¶ 20, 593 N.W. 2d 368).

[¶ 21] The City Commission’s decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. Haggerott v. Morton County Board of Commissioners. 2010 ND 83 ¶ 7, 778 N.W.2d 813, 817 (citations omitted). A decision is not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and law relied upon are construed together for the purpose of achieving a reasoned and reasonable interpretation. Id. (citations omitted). The record on appeal from a governing body’s decision is adequate to support the findings and conclusions of the City if it allows a court to discover the rationale for the decision. Hector v. City of Fargo, 2009 ND 14 ¶ 11, 760 N.W.2d 108.

**B. District Court’s Decision.**

[¶ 22] In reviewing the decision of the City Commission, the District Court noted that the requirement for “substantial evidence” does not permit a review in court to independently weigh or assess the credibility of the evidence. (App. 267). Further, the district court determined that a governing body’s exercise of its significant discretion cannot be set aside if the record reflects “a rationale mental process by which the facts

and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable” result. Tybert v. City of Minto, 2006 ND 1989, ¶ 8, 720 N.W.2d 921. The court reviewed D&P’s claims that they were denied due process, that the City applied a faulty assessment process and that the City’s certification of costs were false and that the City was required to apply money from other sources other before it could determine the assessed amounts. The district court considered these arguments but determined that the City Commission acted appropriately. (App. 268-274).

**C. Special Assessment Law.**

[¶ 23] There are three requirements that must be met for a special assessment to conform to N.D.C.C. § 40-23-07:

1. The special benefit accruing to each lot or parcel of land from the improvement must be determined.
2. The special assessment levied against each lot must be limited to its just proportion of the total cost of the improvement.
3. The assessment against any lot or parcel of land must not exceed the benefit which has been determined to have accrued thereto.

Bateman, 2008 N.D. 72, ¶ 11, 747 N.W. 2d at 121 (*citing* Cloverdale Foods Company v. City of Mandan, 364 N.W. 2d 56, 61 (N.D. 1985)).

[¶ 24] The special assessment commission has broad discretion to choose the method used to determine benefits and apportion cost to individual properties within the improvement district. Serenko v. City of Wilton, 1999 N.D. 88, ¶ 21, 593 N.W. 2d 368, 373.

Where no rule of apportionment is prescribed by statute or charter, the municipality may adopt any mode that would be fair and legal and such as would secure an assessment in proportion to the benefit accruing as nearly as practicable. Absolute equality is not to be expected.

Id. (*citing* Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56-61 (N.D. 1985)).

**1. Assessment Method.**

[¶ 25] The City of Fargo properly assessed the benefits of the improvements from the 5547 project to D&P using its infrastructure policy. (Doc ID# 20 – Part #10 [Transcript] of Special Assessment Commission August 31, 2010 – COF 275; internal pp. 73-74). The process of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. Serenko, 1990 ND 88 ¶ 21, 593 N.W.2d at 373. There simply is no precise formula for quantifying benefits. Id. (*citing* Haman v. City of Surrey, 418 N.W.2d 605, 608 (N.D. 1988)). The statutory directive is “just proportion”, not absolute uniformity. Serenko, 2009 ND 88 ¶ 21, 593 N.W.2d at 373. (*citing* Farmers Union Central Exchange, 443 N.W.2d 907, 910 (N.D. 1989)). “An assessment may be apportioned according to frontage, area, value of, or estimated benefits to the property assessed, or according to districts or zones, or any other reasonable basis that is fair, just and equitable.” Serenko (*citing* 63, CJS Municipal Corporation § 1423 p.1212).

[¶ 26] The special assessment commission not only has discretion to choose the method to decide benefits and apportion assessments, it is not required to limit the assessments on the basis of a property’s current use and the benefits it currently receives from the improvement. Bateman, 2008 N.D. 72 ¶ 17, 747 N.W. 2d 117, 123, *citing* Haman, 418 N.W. 2d 608. A benefit is presumed to inure, not to the present use, but to the property itself. 70C Am. Jur. 2d Special or Local Assessment § 25. Thus, the proper measure of the benefits accruing to a property from an improvement is not limited to the use made of the improvement at the time the improvement is made, but extends to the use

which could be made of the improvement in the future if the property were devoted to any use which might reasonably be made of it. Id. The Special Assessment Commission, as it is allowed to do, looked beyond the present use of the property in making benefit and assessment determination. (Doc ID# 17 – Part #7 [Transcript] of Meeting of the Special Assessment Commission Dated September 14, 2010 – COF 241).

[¶ 27] Fargo has an Infrastructure Policy to make its application of special assessments consistent. (Doc ID# 29 - #8 Report of Action – COF 357-364). The City applied this policy in assessing D&P's properties.

**D. Special Assessments at Issue Are Not A Tax Because A Benefit is Received.**

[¶ 28] D&P's properties received a benefit because of the improvement to 12<sup>th</sup> Avenue North and the replacement and expansion of the water and sewer piping. (Doc ID# 21 – Part #11 Staff Memo and Response to Objections, dated August 20, 2010 – COF 298 - describing limited life of the 1964 water main and the benefit of reconstruction). D&P do have curb cuts onto, and therefore access to, 12<sup>th</sup> Avenue. Id. COF 299; Doc ID# 30 - #9 Pictures – COF 366-368. Special assessments for city improvements are considered taxes for some purposes but the law distinguishes between general taxes and special assessments. Moore v. Furstenau, 129 N. W. 81, 83 (N.D. 1910).

A special assessment is a tax in the sense that it is an enforced contribution from the property owner for the public benefit, but not in the sense that it is a burden, as he receives an equivalent in the shape of the enhanced value of his property, and only property benefited by the improvement may be assessed...

Although possessing many points of similarity, special assessments and taxes are inherently different, and the

same rule of construction, where words are used in statutes, will not be indiscriminately applied. Id.

[¶ 29] When property is specially assessed, in theory the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. Murphy v. City of Bismarck, 109 N.W. 2d 635, 646 (N.D. 1961). It is within the power of the legislature of the state to create special taxing districts and to charge the cost of the local improvement, in whole or in part, upon the property in said district, either according to evaluation or superficial area or frontage, and that it was not the intention of this Court to hold otherwise. Id. The legislative grant of authority to municipalities to create special assessment districts is constitutional and due process is satisfied as long as there is an opportunity to be heard and a right to review. Fisher v. City of Minot, 188 N.W.2d 745, 751 (N.D. 1971).

[¶ 30] The distinction between general taxation and special assessments can be “generally explained by noting that general taxes are exacted upon citizens by taxing authorities for the support of government but special assessments are imposed only on property in a limited area for the payment of special or local improvement.” 14 *McQuillin Municipal Corporations*, § 38.1 (3<sup>rd</sup> Edition). Improvement District 5547 benefited only those properties within its boundaries. The properties received apportioned benefits. There is no general tax present here.

**E. The Special Assessment Commission and City Commission Properly Performed Their Duties.**

[¶ 31] The Special Assessment Commission and the City Commission acted reasonably, consistently and responsibly in fulfilling their duties in relation to the

assessments at issue in this appeal. (See summary at Doc ID# 21 – Part #11 Staff Memo – COF 296-297).

**1. Procedures Followed.**

[¶ 32] The Improvement District was created pursuant to N.D.C.C. §§ 40-22-08 and 40-22-09 on September 22, 2008. The City Commission approved the Engineer’s report, plans, specifications and estimates pursuant to N.D.C.C. § 40-22-10, § 40-22-11 and § 40-22-12. The City Commission approved a Resolution of Necessity and published notice for protest. N.D.C.C. § 40-22-15 There was a determination of insufficient protest. N.D.C.C. § 40-22-17 and § 40-22-18. The requisite provisions for creating Improvement District 5547, part of the cost of which was to be specially assessed to benefiting landowners, were followed before the Cost Sharing Agreement was entered into with the State. N.D.C.C. § 40-22-06. As always, should any deficiency be found in the process, the assessment is not invalidated unless there is fraud or an unlawful purpose. N.D.C.C. § 40-22-43. The Commission determined the project was substantially complete in February 2010. The City Auditor was then required to certify the items of the total costs thereof “so far as the same have been ascertained.” N.D.C.C. § 40-23-05. The Special Assessment Commission determined the spread of the benefits. Hearings by the Special Assessment Commission were held on March 4, 2010, July 28, 2010, August 31, 2010 and September 14, 2010. These hearings reflect approximately six hours of consideration of D&P’s arguments and the City’s response. (Doc ID# 14 – Part #4 Online Board Packet Submitted prior to the October 4, 2010 [meeting] by the City of Fargo – COF 60). Notice of the proposed assessments was again sent to property owners on August 13, 2010. (Doc ID# 16 – Part #6 Special Assessment List Certification – COF 76. See, also COF 77-182



Assessment List). See, N.D.C.C. § 40-23-10. The list was confirmed on September 14, 2010 and published notice of the hearing before the City Commission occurred. (Doc ID# 14 – Part #4 Online Board Packet Submitted prior to the October 4, 2010 [meeting] by the City of Fargo – COF 62-63). Should any error in estimating the costs require correction, a supplemental assessment can be made. N.D.C.C. § 40-23-05 and N.D.C.C. § 40-26-02.

[¶ 33] There can be no claim that D&P and other landowners did not have adequate notice of the proposed assessments. Nor can D&P complain that it did not have adequate notice or opportunity to voice objections before the Special Assessment Commission or the City Commission.

**2. Assistance of Others Permitted.**

[¶ 34] There is no evidence that the actions of the Special Assessment Commissioners were performed in violation of their duties under N.D.C.C. § 40-23 et seq. or any other statutory provision. The assistance of municipal employees is understood to be part of a commission’s decision. Pursuant to N.D.C.C. § 40-23-04, each officer and employee of the municipality shall give to the Special Assessment Commission such information, advice, and assistance as it may request. Additionally, this Court has stated that N.D.C.C. § 40-23-09 “clearly anticipates that assistance would be used in compiling statistical information necessary to arrive at a reasonable and equitable conclusion in such a complicated process.” Patterson v City of Bismarck, 212 N.W.2d 374, 386 (N.D. 1973). Indeed, failure to call on such expertise could itself be grounds for criticism. Id.

[¶ 35] The Special Assessment Commission properly worked with and relied on City Staff to assist them in their duties in determining the benefits to the land within the improvement district and in assessing the costs of those benefits.

**3. No False Certifications of Cost.**

[¶ 36] From September 2009 to August 4, 2010, the City Auditor issued four cost certifications for Improvement District 5547. He is obligated to certify the costs as far as they can be ascertained. N.D.C.C. § 40-23-05. Mr. Sprague explained that the costs change over the period of construction and his certified costs changed as well. (Doc ID# 20 – Part #10 [Transcript] of Meeting of the Special Assessment Commission dated August 31, 2010 – COF 257-258; internal p. 3-8). He also explained that the cost certifications for July and August were limited to the roadway portion of the project which was the only portion being assessed. Calling such certifications “false” is simply not justified.

**4. Due Process Requirement Satisfied.**

[¶ 37] D&P argue that the notices of assessment sent to them were statutorily invalid because they could not legally exist if the Special Assessment Commission had not yet acted. (Appellant’s Brief p. 37). However, the multiple notices gave new hearing dates to keep D&P informed of the various continuations of the Special Assessment Commission hearings. As noted by Judge Corwin in his Order Affirming Assessment, D&P filed numerous pages of written commentary outlining their objections to the proposed assessments. (Doc ID# 48 – Part #28 Objection of Property Owner to Assessment in Special Assessment Project #5547 – Potter Enterprises – pp. 501-558; Doc ID# 49 – Part #29 Objection of Property Owner to Assessment in Special Assessment

Project #5547 – D & P Terminal – pp. 560-613; Doc ID # 51 – Part #31 Joint Objection of Property Owners to Assessment in Special Assessment Project #5547 with A, B, C, D, E Attached – pp. 666-719; Doc ID# 52 – Part #32 Second Joint Objection of Property Owners to Assessment in Special Assessment Project #5547 – pp. 722-790; Doc ID# 53 – Part #32 Second Joint Objection of Property Owners to Assessment in Special Assessment Project #5547 – pp. 793-799). A continuance was granted when D&P raised an issue of adequacy of notice. (Doc ID# 33 – Part #13 [Transcript] of Meeting of the Special Assessment Commission dated July 28, 2010 – COF 383 and COF 395-399). Another continuance was provided to D&P so that they could have additional time to present objections. (Doc ID# 37 – Part #17 [Transcript] of the Meeting of the Special Assessment Commission dated March 4, 2010 – pp. 409-425 – COF 423; internal p. 53). The Special Assessment Commission devoted nearly six hours to the consideration of Appellants’ objections and the City’s responses. (Doc ID# 14 – Part #4 Online Board Packet Submitted prior to the October 4, 2010 [meeting] by the City of Fargo – p. 60).

[¶ 38] Clearly, there was notice and opportunity to be heard in these proceedings. In this jurisdiction, an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the constitutions of the United States and North Dakota. Serenko v. City of Wilton, 593 N.W.2d 368, 372, 1999 ND 88, ¶ 14.

[¶ 39] Even if there had been an error with regard to the assessment process, there is no justification to reverse the actions of the local governing body. D&P, through counsel, knew of, attended and participated in the Special Assessment Commission Meetings and the Board of City Commissioners meeting. Through all the continuations

however, D&P fully participated and had every opportunity to voice their objections to the assessments as proposed. D&P was not prejudiced by any possible error in procedure. See, Haman v. City of Surrey, 418 N.W.2d 605 (N.D. 1988). Like the complaining property owners in Serenko, D&P availed themselves “of the opportunity to challenge the assessments before the special assessment commission and the city commission.” Serenko, 1999 ND 88, ¶ 13, 593 N.W.2d at 371. D&P has had made full use of the right to be heard and the right to review and thus due process has been satisfied. D&P cannot claim any prejudice by the statutory deviations alleged.

**5. Fees Charged are Statutorily Allowed and Not Duplicative.**

[¶ 40] The City is allowed to charge for engineering and administrative fees. Such fees are specifically permitted by statute. Pursuant to N.D.C.C. § 40-23-05, the governing body may direct assessments to be levied for the payment of all or any part of special assessment work. The total cost of the improvement certified to the assessment commission shall include:

The estimated construction cost under the terms of the contract, a reasonable allowance as determined by the governing body for cost of extra work which may be authorized under the plans and specifications, engineering, fiscal agent’s and attorney’s fees for any services in connection with the authorization and financing of the improvement, cost of publication of required notices and printing of improvement warrants, and all expenses incurred in the making of the improvement and levy of assessment therefore.

N.D.C.C. § 40-23-05 (*emphasis added*).

[¶ 41] D&P’s objection appears to be that the City Engineers are already paid and so including engineering costs in the City’s cost total is invalid. As noted above, the statute allows such costs. Furthermore, the City’s budget includes such fees as a revenue

item. (Doc ID# 21 – Part #11 Staff Memo and Response to Objections, dated August 20, 2010 – COF 300). Not all the City’s engineering expense arises from the work of city engineers, some is contracted out. Allowing the assessments of such engineering fees allows the City to equalize assessments for projects using outside engineers.

[¶ 42] Based on the materials and testimony before it, the October 4, 2010 determination of the City Commission to affirm the Special Assessment Commission’s certification of assessments was not arbitrary, capricious or unreasonable and the appeal should be denied.

#### **6. Application of Funding Sources.**

[¶ 43] The improvements for which the assessments are being levied include sanitary sewer, storm sewer, paving and street lighting. D&P assert that the September 22, 2008 resolution of the Board of City Commissioners constituted a promise that, in calculating the assessment amount, the City would apply its sales tax money to reduce the City’s cost before it calculated the amount that needed to be assessed. Further, D&P argues that the phrase “approximately 15% is to be assessed against benefited property,” when considered in connection with the engineer’s report (which contained the specific special assessment figure in connection with the bridge and roadway construction project), requires the City to assess only 15% of its costs on the road construction project. (Doc ID# 44 – Part #24 Board of Commissioners Permanent Minutes September 22, 2008 – COF 463-464; Doc ID# 45 – Part #25 Online Board Packet Submitted Prior to September 22, 2008 by the City of Fargo – COF 479-480). However, as the City has already shown, it is entitled to specially assess costs that it has incurred. N.D.C.C. § 20-23-05. Attorney Johnson explained that N.D.C.C. § 40-22-06 does not establish a

requirement that other funds be applied before property is specially assessed. (Doc ID# 20 – Part #10 [Transcript] of Special Assessment Commission August 31, 2010 – COF 273; internal pp. 66-68). As of August 4, 2010, the total City share of the project (leaving out the viaduct) was \$6,119,279. (Doc ID# 11 – Part # 1 Notice of Appeal with Attachments Dated October 30, 2010 – COF 39). Thus, under statute, the City could have assessed that amount. Instead, the City followed its infrastructure policy and assessed an amount very similar to that specified in the engineer’s report. Id. As of August 4, 2010, the amount to be assessed was \$3,927,563, substantially less than the cost that the City spent on the project. Id.

[¶ 44] While it is clear that D&P would prefer that the City apply all funding sources to its costs before it calculates the proposed special assessment amount, that is not what the law requires. The City of Fargo developed and applied its infrastructure policy, and complied with the assessment statutory provisions, to create a consistent and uniform special assessment process throughout its boundaries. The City’s costs with regard to the assessed portion of Improvement District 5547 are accurate and the assessed amounts are lawful and appropriate.

### **CONCLUSION**

[¶ 45] D&P had the burden of demonstrating that the assessments are invalid but they have failed to do so. The record shows the time, care and conscientiousness of the City of Fargo in reaching its decision as to the assessments herein. There is substantial evidence showing that the City followed the requirements of law and reached a rational decision that was not arbitrary, unreasonable or capricious. Based on the foregoing, the City respectfully requests this Court affirm the Judgment of the district court approving the City

Commission's decision to confirm the special assessments for Special Improvement District  
5547.

Dated this 8<sup>th</sup> day of September, 2011.

/s/ Jane L. Dynes

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## **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and 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 this certificate of compliance, totals 7,152.

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**AFFIDAVIT OF SERVICE BY MAIL**

**Potter, D&P Terminal and William Rakowski (Special Assessment 5547 Appeal)**

**vs.**

**City of Fargo**

**District Court No.: 09-2010-CV-3869**

**Supreme Court No.: 20110194**

STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF CASS )

Katie Rudnick, being duly sworn, deposes and says that she is a resident of the City of Moorhead, State of Minnesota, is of legal age; and that she served the within:

**BRIEF OF APPELLEE**

on September 8, 2011, by United States Mail and by placing a true and correct copy thereof in an envelope as follows, to-wit:

Jonathan T. Garaas  
DeMores Office Park  
1314 – 23<sup>rd</sup> Street South  
Fargo, ND 58103-3796

and depositing the same with postage prepaid in the United States mail at Fargo, North Dakota.

To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above document was mailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Katie Rudnick  
Katie Rudnick

Subscribed and sworn to before me this 8<sup>th</sup> day of September, 2011.

/s/ Lacey A. Hallsten  
Notary Public  
Cass County, North Dakota  
Commission Expires: 9-21-16

(SEAL)