

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The City of Harwood, a political)	
subdivision of the State of North)	
Dakota, and Lake Shure Estates, Inc., a)	Supreme Court No. 20140089
North Dakota nonprofit corporation,)	
)	
Plaintiffs and Appellees,)	District Court No. 09-2011-CV-02313
)	
vs.)	
)	
The City of Reiles Acres, a political)	
subdivision of the State of North)	
Dakota, Dr. Ron Knutson, and all other)	
persons unknown claiming any interest)	
or estate in, or lien or encumbrance)	
upon, the property described in the)	
Complaint,)	
)	
Defendants.)	
-----)	
The City of Reiles Acres, a political)	
subdivision of the State of)	
North Dakota,)	
)	
Appellant.)	

Appeal from the Findings of Fact, Conclusions of Law and Order for Judgment Entered on July 26, 2013; The Judgment of Said District Court Entered on August 13, 2013; and the Order Confirming Sale Dated January 23, 2014
County of Cass, East Central Judicial District
Honorable Steven L. Marquart, Presiding

APPELLEES' BRIEF

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TABLE OF CONTENTS

	<u>Paragraph</u>
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS.....	8
1. Agreements Between the Parties.....	10
2. The Operation of the Harwood Lagoons.....	15
A. The three-cells act as a batch treatment system.....	15
B. Harwood and Reile’s Acres no longer use the Harwood Lagoons.	22
C. The present condition of the Harwood Lagoons.....	25
D. The district court’s decision to order a partition by sale.....	29
ARGUMENT.....	33
I. Standard of Review.....	33
II. Whether the trial court abused its discretion when it granted a declaratory judgment by construing the parties’ contracts and determining the ownership of the Harwood Lagoons.....	36
A. The 1985 Agreement between Harwood and Reile’s Acres superseded all previous agreements and its purpose was frustrated or made impracticable by intervening circumstances.....	37
B. Lake Shure has an interest in and right to use the 6-inch force main running to the Harwood Lagoons from the intersection of 45th Street and 52nd Avenue.....	51

Paragraph

III.	Whether the trial court clearly erred when it found a partition by sale of the Harwood Lagoons would afford the parties the greatest value for their interests because the Harwood Lagoons had not been used since 2010, the nonuse resulted in deterioration of the facility, and the three cells had no individual value.	57
A.	A partition by sale is appropriate given the unchallenged factual findings.	57
B.	Lake Shure was not granted relief in the partition action.	65
C.	Reile’s Acres statutory challenges are without merit..	67
	CONCLUSION.	73
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Paragraph

CASES

Berg v. Kremers, 181 N.W.2d 730 (N.D. 1970). 64

Farmers Alliance Mut. Ins. Co. v. Hulstrand Const., Inc., 2001 ND 145,
632 N.W.2d 473. 37

Gottbreht v. State, 1999 ND 159, 598 N.W.2d 794. 34

In Interest of McMullen, 470 N.W.2d 196 (N.D. 1991). 34, 48

In re Estate of Loomer, 2010 ND 93, 782 N.W.2d 648. 57, 63, 66

Investors Title Ins. Co. v. Herzig, 2010 ND 169, 788 N.W.2d 312. 67

Kautzman v. Kautzman, 1998 ND 192, 585 N.W.2d 561. 45, 61

McKechnie v. Berg, 2003 ND 136, 667 N.W.2d 628. 35

McKenzie Cnty. v. Casady, 214 N.W. 461 (N.D. 1927). 67

Niles v. Eldridge, 2013 ND 52, 828 N.W.2d 521. 33, 45, 46

Nodak Mut. Ins. Co. v. Wamsley, 2004 ND 174, 687 N.W.2d 226. 34

Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, 751 N.W.2d 206. 40

Riverside Park Condominiums Unit Owners Ass’n v. Lucas, 2005 ND 26,
691 N.W.2d 862 47, 50

Schmidt v. Frank, 140 N.W.2d 588, 593 (N.D. 1966). 69, 70

Schmidt v. Wittinger, 2004 ND 189, 687 N.W.2d 479. 35, 57-59, 61

State v. J.P. Lamb Land Co., 359 N.W.2d 368 (N.D. 1984). 48

STATUTES

N.D.C.C. § 32-06-06. 70

N.D.C.C. § 32-16-01. 57, 66

N.D.C.C. § 32-16-02. 65, 71

N.D.C.C. § 32-16-03. 71

N.D.C.C. § 32-16-04. 67

N.D.C.C. § 32-16-05. 68-69

N.D.C.C. § 32-16-06. 69

N.D.C.C. § 32-16-12. 58, 61, 64

N.D.C.C. § 32-16-45. 64

N.D.C.C. § 32-23-02. 38

N.D.C.C. § 32-23-03. 46

N.D.C.C. § 32-23-08. 73

N.D.C.C. § 32-23-11. 49

N.D.C.C. § 32-23-12. 36

OTHER AUTHORITIES

N.D.R.Civ.P. 52(a).. 33

N.D.R.Civ.P. 54(b). 5

STATEMENT OF THE ISSUES

[¶1] Whether the District Court abused its discretion by granting declaratory judgment construing the parties' contracts to determine the parties' rights, status, and legal relations, determined ownership of the Harwood Lagoons, and granted partition.

[¶2] Whether the District Court's findings of fact were clearly erroneous where it found a partition by sale of the Harwood Lagoons would afford the parties the greatest value for their interests because the Harwood Lagoons had not been used since 2010, the nonuse resulted in deterioration of the facility, the three cells had no individual value, and they could not be partitioned in kind.

STATEMENT OF THE CASE

[¶3] This action was commenced on July 26, 2011, by the City of Harwood (“Harwood”), and Lake Shure Estates, Inc., a North Dakota nonprofit corporation (“Lake Shure”), against the City of Reile’s Acres (“Reile’s Acres”), Dr. Ron Knutson, and all other persons unknown claiming any interest or estate in, or lien or encumbrance upon, the property described in the Complaint.

[¶4] Harwood and Reile’s Acres are the record owners of a wastewater treatment facility located in Cass County, North Dakota, known as the Harwood Lagoons. There is agreement that Harwood owns an undivided 68 percent, and Reile’s Acres an undivided 32 percent interest, in the Harwood Lagoons. Lake Shure and Dr. Ron Knutson purchased the right to use a certain capacity of the Harwood Lagoons. After Harwood, Reile’s Acres, and Lake Shure entered into separate agreements with the City of Fargo (“Fargo”), whereby Fargo would provide wastewater treatment services to each entity, Harwood and Lake Shure filed a Complaint requesting a declaratory judgment and a partition by sale of the Harwood Lagoons.

[¶5] A one-day bench trial was held by the trial court on June 24, 2013. On July 29, 2013, the trial court entered its Findings of Fact, Conclusions of Law, and Order for Judgment. The trial court determined the ownership interests of Harwood and Reile’s Acres to be at 68 percent and 32 percent, respectively. The trial court also granted the request for a partition by public sale. Judgment was entered on August 13, 2013. When Reile’s Acres attempted to appeal the Judgment, this Court dismissed the appeal on

October 25, 2013, because it was not a final judgment and no certification had been entered under N.D.R.Civ.P. 54(b).

[¶6] After Harwood advertised a sale of the property, the bids were opened during Harwood's City Council meeting on December 17, 2013. The highest bid was submitted by Fargo, in the amount of \$250,000. Harwood's City Council voted to accept the high bid, contingent upon approval by the trial court and the buyer signing the appropriate legal documents, with the closing to take place within 90 days after Court approval. On January 23, 2014, the trial court entered an Order Confirming Sale, wherein it found Harwood satisfied the partition by sale requirements, and granted the sale of the Harwood Lagoons to Fargo, with the proceeds of the sale to be distributed according to the respective ownership interests of the parties.

[¶7] Reile's Acres filed a Notice of Appeal on March 12, 2014.

STATEMENT OF THE FACTS

[¶8] The dispute in this case centers around the Harwood Lagoons, a wastewater treatment facility located in Cass County, North Dakota. The Harwood Lagoons, which were constructed nearly thirty years ago, have outlived their usefulness to the parties. Appellant's App. 136-37. Harwood, Reile's Acres, and Lake Shure no longer use the Harwood Lagoons for their sewage needs. Dr. Knutson has never used them. Id. However, there are significant maintenance demands for the Harwood Lagoons, which have deteriorated over the years. Id.

[¶9] Accordingly, rather than continue to incur the maintenance costs for a facility no longer in use, Harwood filed this action seeking a declaratory judgment and partition by sale. Id. The trial court granted Harwood's requested relief, which is now challenged on appeal by Reile's Acres. Id. at 139-40, 158.

1. Agreements Between the Parties

[¶10] The Harwood Lagoons were constructed pursuant to a 1984 agreement between Harwood and Reile's Acres (the "1984 Agreement"), each of whom desired to improve their sewage treatment facilities. Id. at 39. Under the 1984 Agreement, Harwood was responsible for 68 percent of the construction costs of the Harwood Lagoons, and Reile's Acres was responsible for the remaining 32 percent. Id. at 40. Each party was responsible for their own maintenance and operational costs, and Harwood was designated as the party responsible for administering the operation of the lagoons. Id. The 1984 Agreement also provided, in pertinent part:

10. Both parties to this Agreement understand and agree that there shall be reserved unto Harwood sixty-eight percent of the capacity of the lagoon to be constructed for the benefit of the customers and users of Harwood. Further, that there is reserved unto Reile's Acres thirty-two percent of the capacity of the lagoon to be constructed for the use of its customers or users.

Id. at 42.

[¶11] On June 12, 1985, Harwood and Reile's Acres entered into an agreement that superseded the prior agreements between the parties (the "1985 Agreement"). Id. at 56.

The 1985 Agreement provided, in part:

1. Harwood will purchase the necessary property and enter into contracts for the construction of a sanitary sewer treatment lagoon, pursuant to plans and specifications on file with the City Auditor of Harwood, which have been approved by the Environmental Protection Agency and the Farmers Home Administration. The cost of the land acquisition and construction, including, but not limited to, engineering and attorney fees, shall be shared 68% by Harwood and 32% by Reile's Acres. The percentage of the cost of land acquisition and construction shall be paid by Reile's Acres to Harwood prior to the award of construction contracts by Harwood. The property purchased and the construction thereon shall continue to remain the sole property of Harwood and be held in the name of the City of Harwood until such time as the Farmers Home Administration loan to Harwood is paid, whereupon Reile's Acres shall be deeded a 32% interest in said property.

Id. at 53. Harwood reserved the right to 68 percent of the capacity of the system, for the benefit of its customers and users, and Reile's Acres reserved the right to 32 percent of the capacity of the lagoon for its users. Id. at 55.

[¶12] On July 23, 1985, Lake Shure Properties, a North Dakota partnership ("Lake Shure Properties") entered into an agreement with Reile's Acres whereby Lake Shure Properties purchased from Reile's Acres "the right to use fifty percent (50%) of the treatment facility volume allocated to Reile's Acres," or 16 percent of the total capacity of the

Harwood Lagoons. Id. at 61-62. Lake Shure Properties also paid its share of the cost for the sewer line to the Harwood Lagoons. Exhibit 7. Id. at 62. Exhibit 24. Id. at 95-96. Thus, after the sale, Reile's Acres retained a 16 percent interest in the total capacity of the lagoon.

[¶13] As constructed, a 4-inch main travels from Reile's Acres north along 45th Street to 52nd Avenue North. Trial Tr. 125:2-5. At the intersection of 45th Street and 52nd Avenue, it increases to a 6-inch main that runs east and north to the Harwood Lagoons. Id. at 125:6-8; 131:8-15. The increase in size corresponds with the additional flow that was expected from Lake Shure Properties. Id. at 126:1-25; Appellant's App. 87.

[¶14] On March 30, 1993, Lake Shure Properties transferred 56.5 percent of its interest in the 6-inch force main and the Harwood Lagoons to Lake Shure. Appellant's App. 65-68. As a result, Lake Shure was allocated 9.04 percent of the total capacity of the Harwood Lagoons. Id. Lake Shure is located to the west of 52nd Avenue and 45th Street; its force main goes east from 57th Street to 45th Street, at which point it taps into the 6-inch force main above. Trial Tr. 9-25; Appellant's App. 87.

2. The Operation of the Harwood Lagoons

A. The three-cells act as a batch treatment system

[¶15] The Harwood Lagoons consist of a three-cell conventional waste stabilization pond. Trial Tr. 36:15-17. The three cells perform different functions; the primary cell is used for primary settling of solids and initial treatment of raw sewage, and two secondary

cells provide further treatment. Id. at 59:7-11. The ponds are very shallow, running only about five feet deep. Id. at 59:4-6.

[¶16] The system is designed to treat wastewater from raw sewage to the treated effluent. Id. at 36:17-22. Typically, the stabilization pond uses sunlight and aeration from the waves on the top of the pond to feed the microorganisms that break down the sewage. Id. at 37:3-7. The wastewater then makes its way from the primary cell to the secondary cells. Id. at 37:3-13. Once the system satisfies certain treatment standards in the secondary cells, discharge can be made into an adjacent county drain. Id. at 36:17-37:8.

[¶17] Accordingly, the pond functions as a batch treatment system, where small transfers of water are made throughout the year from the primary cell to one of the secondary cells. Id. at 41:14-25. The water reaches a higher treatment quality upon being transferred, until it can meet the discharge standards that are required under Harwood's permit with the State's water quality division. Id. at 41:14-42:2. By virtue of the batch treatment system, each cell has a purpose, and the cells could not operate in the same manner with only a single cell. Id. at 41:9-25. In the case of the Harwood Lagoons in particular, a parallel system was used, where the sewage from the primary cell runs into the two secondary cells until it was of high enough quality for discharge, rather than a series system that would transfer from the primary cell to a second cell, and then to a third cell. Id. at 65:18-66:6.

[¶18] Communities with systems like the Harwood Lagoons are required to provide 180 days of winter storage capacity in the system. Id. at 42:14-17. The capacity is tied to the population of the community served by the ponds. Id. at 42:18-25. If the design capacity

of the pond is exceeded by growth in the community, the community can outgrow the lagoon system and be required to utilize other methods of waste water treatment. Id. at 43:1-9.

[¶19] During the last eight to ten years of operation, Harwood began to have difficulty obtaining the 180 days of storage capacity due to population growth in both Harwood and Reile's Acres. Id. at 67:23-68:11. To accommodate the population growth, multiple discharges were made in the summer, which ran counter to how the lagoons were supposed to operate. Id. at 68:12-69:5. While the parties discussed adding a fourth cell, this was never done because the cities sought alternative options. Id. at 70:5-71:9.

[¶20] Each lagoon system is required to have a certified operator to manage the pond system. Id. at 42:3-9. Maintenance is required on lagoons, including mowing the dikes, keeping the pond free of rodents, cattails, and other aquatic weeds, and protecting the dike slopes with rip rap or other means of preventing erosion on the interior dikes of the cell. Id. at 43:16-44:4.

[¶21] The certified lagoon operator of the Harwood Lagoons is Harwood's Superintendent of Public Works, Bernie Stasch. Id. at 64:5-24. Stasch testified he conducts maintenance on the Harwood Lagoons, including mowing, weed and varmint control, fencing and signage work, and complying with the other regulations set by the State Health Department. Id. at 65:3-9.

B. Harwood and Reile's Acres no longer use the Harwood Lagoons

[¶22] When the Harwood Lagoons were constructed in the mid-1980s, Reile's Acres' population was fewer than one hundred. Trial Tr. 111:8-12. Reile's Acres grew to

a population of approximately 510 residents, as of the 2010 census. Id. at 111:13-16. In early 1998, Reile's Acres contracted with Fargo to send all of Reile's Acres' raw sewage to Fargo, via a 6-inch force main constructed by Fargo. Id. at 110:6-11; Appellant's App. 74. Reile's Acres felt the most cost efficient manner of handling its sewage was to connect to Fargo's wastewater treatment facilities. Appellant's App. 74. Since 1998, Reile's Acres has not used the Harwood Lagoons for any purpose. Trial Tr. 16-19.

[¶23] Harwood also experienced significant population growth over the past 25 years. Id. at 94:5-11. While the lagoon capacity was estimated at around 500, Harwood's population had grown past 700. Id. at 68:1-4; 72:18-20. Given its increased population, Harwood looked at building another lagoon to increase the capacity for the City's sewage needs. Id. at 71:20-25. However, Harwood decided the cost to expand and repair the existing lagoons was simply too high when compared to the cost for the City to connect to the Fargo system. Id. at 93:12-94:6. Accordingly, Harwood connected to Fargo's system in 2009. Id. at 94:8-12. Lake Shure connected to Fargo's system at the same time and shortly thereafter, in 2010, Lake Shure also signed a contract with Fargo for sewage services. Id. at 105:25-106:3.

[¶24] In sum, no entity has used the lagoons for municipal waste since 2009. Id. at 116:19-21.

C. The present condition of the Harwood Lagoons

[¶25] While the Harwood Lagoons have not been used by the parties for years, the lagoon system still requires maintenance and upkeep. As discussed above, Stasch must

mow, spray, and maintain the property. Id. at 77:1-4. Sherry Morris, Harwood's City Auditor, testified that Harwood has not billed Reile's Acres for the latter's share of maintenance costs over the last few years because Reile's Acres has not used the lagoon. Id. at 30:18-31:5. During that time, Harwood has incurred all of the costs of upkeep and maintenance. Id. at 31:3-5.

[¶26] Despite Stasch's efforts, the lagoons have become a landfill, as tires, couches, mattresses, and other garbage have been improperly thrown into the lagoons. Id. at 77:5-16. In addition, significant repairs would need to be made for the Harwood Lagoons to be functional again, as it is not operational in its current state. Id. at 78:4-8. For instance, the banks of the lagoon are falling into the pond, along with the rip rap covered in dirt. Id. at 73:5-74:3. Stasch explained that additional rip rap would be needed to replace the rocks that have fallen in already. Id. at 75:6-19. Moreover, rodents, particularly muskrats, have burrowed a hole in the berm of one of the secondary cells, causing a leak that would need to be repaired. Id. at 76:1-18. All of these repairs would come at a cost, and even once restored, it would still only be operational for a 500-person capacity unless further expansion were done. Id. at 78:9-25. Harwood and Reile's Acres **each** exceed the lagoon's capacity at this time.

[¶27] In sum, Harwood's City Engineer, Jeff LeDoux, stated the existing lagoon system is in poor condition. Appellee's App. 4. LeDoux believed there were significant repair issues that needed to be addressed, including repairing the sides of all three cells, installing rip rap, fixing leaks, removing sludge, and replacing five gate valves. Id.

[¶28] Given the current condition of the Harwood Lagoons, David Bergsagel, an Environmental Engineer with the North Dakota Department of Health, did not recommend that either city operate or lease the system, or any individual cells, for use as septage disposal ponds. Id. at 1. Bergsagel stated at least three cells would be needed to provide treatment. Id. He also stated “now would be the time to either reclaim the ponds by removing the existing sludge from the ponds and leveling the site, or to sell the site to a developer who is willing to remove the sludge and reclaim the site for future development.” Id. at 2.

D. The district court’s decision to order a partition by sale

[¶29] The district court concluded the 1985 Agreement between Harwood and Reile’s Acres superseded all other agreements between the parties. Appellant’s App. 137. The principal purpose of the 1985 Agreement, according to the district court, was to construct and maintain the Harwood Lagoons for the benefit of each city’s customers and users. Id. at 136. The district court determined this purpose was substantially frustrated by the fact that both Reile’s Acres and Harwood contracted with Fargo for each entity’s sewage needs, because the Harwood Lagoons no longer served as the sewage treatment facility for either city. Id. Moreover, the district court concluded Harwood’s contractual responsibilities to maintain the lagoons was impracticable because neither party used the Harwood Lagoons after contracting with Fargo. Id. The court also recognized the increased population of each city made it infeasible to continue use of the Harwood Lagoons because of capacity issues. Id. at 137.

[¶30] The district court also concluded the Harwood Lagoons' non-use had caused the ponds to deteriorate. The individual cells of the Harwood Lagoons had no value, according to the court, because the three cells operated as a single unit. Id. Therefore, the court ordered a partition by a public sale, which would allow the parties to recover the greatest value for their respective interests, which the court found to be 68 percent for Harwood and 32 percent for Reile's Acres. Id.

[¶31] After the district court entered Judgment, Harwood solicited bids for the sale of the property by publishing advertisements in local newspapers and mailing letters to different entities. Id. at 144. Bidders were allowed to bid the entire property or individual cells, whichever returned greater value to the sellers. Id. at 138. When the bids were opened at Harwood's City Council meeting on December 17, 2013, the highest bid was revealed to be from Fargo, in the amount of \$250,000. Id. Reile's Acres had also entered a bid in the amount of \$200,001 for the entire system, or for each individual cell totaling \$155,000. Id. at 153. Harwood petitioned the district court to approve the sale of the Harwood Lagoons to Fargo, and to direct the execution of the necessary conveyances and provide for the distribution of the proceeds of the sale. Id. at 144-45.

[¶32] The district court granted Harwood's petition to confirm the sale of the Harwood Lagoons to Fargo in the amount of \$250,000. Id. at 156. After deducting the costs of publication, the remainder of the proceeds were to be distributed to Harwood and Reile's Acres according to their respective interests in the property. Id. at 157.

ARGUMENT

I. Standard of Review

[¶33] The trial court granted declaratory relief and a partition by sale after a bench trial. “In an appeal from a bench trial, the trial court’s findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable.” Niles v. Eldridge, 2013 ND 52, ¶ 6, 828 N.W.2d 521 (internal quotation marks and citation omitted). “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made.” Id. (internal quotation marks and citation omitted).

[¶34] “The declaratory judgment act is remedial and is to be liberally construed and administered.” In Interest of McMullen, 470 N.W.2d 196, 198 (N.D. 1991). A trial court’s decision to grant or deny a request for a declaratory judgment will not be set aside unless the trial court abused its discretion. Nodak Mut. Ins. Co. v. Wamsley, 2004 ND 174, ¶ 7, 687 N.W.2d 226. “A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner.” Gottbreht v. State, 1999 ND 159, ¶ 10, 598 N.W.2d 794.

[¶35] “Trial courts have wide judicial discretion in partition actions to do equity and to make a fair and just division of the property or proceeds between the parties, and great flexibility in fashioning appropriate relief for the parties.” McKechnie v. Berg, 2003 ND 136, ¶ 11, 667 N.W.2d 628 (internal quotation marks and citation omitted). “The trial

court's findings in a partition action will not be reversed on appeal unless they are clearly erroneous." Schmidt v. Wittinger, 2004 ND 189, ¶ 10, 687 N.W.2d 479.

II. Whether the trial court abused its discretion when it granted a declaratory judgment by construing the parties' contracts and determining the ownership of the Harwood Lagoons.

[¶36] By its own terms, North Dakota's declaratory judgment act is remedial and "[i]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be construed and administered liberally." N.D.C.C. § 32-23-12. The trial court granted declaratory relief by determining that the 1985 Agreement between Harwood and Reile's Acres superseded all prior agreements between the parties, that the parties' responsibilities to comply with the 1985 Agreement were discharged by reason of frustration of purpose and/or impossibility of performance, and that Reile's Acres, Lake Shure, and Dr. Knutson each had an undivided ownership interest in and right to use the 6-inch force main running to the Harwood Lagoons from 45th Street and 52nd Avenue North. Appellant's App. 139-140. None of these determinations constituted error.

A. The 1985 Agreement between Harwood and Reile's Acres superseded all previous agreements and its purpose was frustrated or made impracticable by intervening circumstances

[¶37] Reile's Acres first claims each individual contract was required to be construed as a separate contract. However, Reile's Acres provides nothing to show the trial court failed to construe each contract by its own terms. To the extent Reile's Acres suggests each contract required a separate declaratory judgment action, this argument contradicts the

basic rules of contract interpretation. Indeed, courts regularly construe multiple contracts between parties to determine the parties' rights and obligations. See, e.g., Farmers Alliance Mut. Ins. Co. v. Hulstrand Const., Inc., 2001 ND 145, ¶¶ 12-15, 632 N.W.2d 473 (construing the parties' multiple agreements).

[¶38] Moreover, the declaratory judgment statutes expressly contemplate the court's ability to determine the parties' rights and obligations arising under different contracts, and Harwood's right to request such a determination. See N.D.C.C. § 32-23-02 (allowing any person interested or affected by a contract to have determined "any question of construction or validity" and to "obtain a declaration of rights, status, or other legal relations thereunder."). Reile's Acres further concedes the 1985 Agreement superseded all previous agreements between Harwood and Reile's Acres, which is precisely what the trial court concluded based upon the unambiguous contract language. Appellant's App. 134, 137.

[¶39] Reile's Acres spends much of its brief arguing the trial court was without jurisdiction to alter, reform, or modify the 1985 Agreement, but it points to nothing in the record showing this actually occurred. The trial court did not alter or modify the parties' contract, it simply concluded the purpose of the contract — to construct and maintain a sewage treatment facility for the benefit of Harwood and Reile's Acres — was frustrated and made impracticable by intervening circumstances. Id. at 136.

[¶40] "Frustration of purpose occurs when after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, ¶ 56, 751 N.W.2d 206 (internal quotation

marks and citation omitted). Under the related doctrine of impossibility of performance, “where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged.” Id. (internal quotation marks and citation omitted).

[¶41] “Neither doctrine applies if either the frustration or the impossibility is caused by a party to the contract.” Id. Accordingly, Reile’s Acres argument that it did nothing wrong under the contracts is of no consequence, because the doctrines of frustration of purpose and impossibility presuppose no wrongful conduct. Rather than focus on wrongful conduct, the doctrines center around whether events have occurred since the formation of the contract that frustrate the purpose of the contract or make performance impracticable. The trial court made multiple factual findings supporting its determination to this effect.

[¶42] First, the trial court found the parties no longer used the Harwood Lagoons after they contracted with Fargo for their sewage needs. Id. at 136. Reile’s Acres switched to Fargo’s system in 1998, followed by Harwood, and Lake Shure in 2009. Trial Tr. 94:8-12; 105:25-106:3; 110:6-11. Consequently, no entity now uses the Harwood Lagoons for municipal waste. Id. at 116:19-21.

[¶43] Second, the trial court found the parties were not at fault for contracting with Fargo because the transition was prompted by population growth for each community. Appellant’s App. 137. The capacity of the lagoons was a basic assumption on which the 1985 Agreement was made because the parties constructed the lagoons to handle a certain quantity of effluent. Id. at 53-55. In the decades after the Harwood Lagoons were

constructed, Reile's Acres and Harwood each experienced significant growth, with each entity now exceeding the estimated capacity for the Harwood Lagoons by itself. Trial Tr. 68:1-4; 72:18-20; 94:5-11; 111:13-16. Neither entity can be deemed at "fault" for outgrowing the population capacity of the Harwood Lagoons.

[¶44] Third, the trial court found the nonuse of the lagoons resulted in it being impracticable for Harwood to pay maintenance and upkeep costs for the lagoons. Appellant's App. 136. Harwood employed a certified operator who undertook various responsibilities to maintain the lagoons. Trial Tr. 77:1-4. Harwood has paid all of the maintenance costs over the past few years, *id.* at 31:3-5, and the trial court correctly found it was impracticable for Harwood to continue paying such costs when no entity used the lagoons for municipal waste as had been the original purpose of the contract. Appellant's App. 136.

[¶45] Reile's Acres does not directly challenge these factual findings on appeal, and therefore the findings are not before this Court. See Kautzman v. Kautzman, 1998 ND 192, ¶ 8, 585 N.W.2d 561 ("If a party does not challenge specific findings of fact, we will not review them."). At most, Reile's Acres challenges the finding that Harwood and Lake Shure were not at fault when they contracted with Fargo for sewage services in lieu of the Harwood Lagoons. This argument is specious, given that Reile's Acres contracted with Fargo over a decade before Harwood and Lake Shure followed. Trial Tr. 94:8-12; 105:25-106:3; 110:6-11. In this sense, if Reile's Acres were correct that the 1985 Agreement provides for the survivor entity to "continue operations if the other municipality no longer wanted so to do," Appellant's Br. 20, Harwood would be the survivor entity -- not Reile's Acres

-- because Reile's Acres was the first entity to abandon the operations of the Harwood Lagoons.¹ In sum, there is no clear error in the trial court's findings because there was substantial evidence introduced at trial to support the findings, as discussed above. Niles, 2013 ND 52, ¶ 6.

[¶46] Reile's Acres also challenges the applicability of the doctrines to this action, by arguing the doctrines may only be employed as defenses to a breach of contract action. While this may be true as a general matter, Reile's Acres cites no authority for the proposition that these doctrines are unavailable in a declaratory judgment action, nor does any exist. Indeed, the declaratory judgment statutes allow contracts to be "construed before or after breach," and therefore it is not necessary for Harwood to breach the 1985 Agreement merely to be able to assert frustration of purpose and impracticability as defenses to a theoretical breach of contract action brought by Reile's Acres. Niles, 2013 ND 52, ¶ 11; N.D.C.C. § 32-23-03.

[¶47] Harwood has the right to seek declaratory relief "to settle uncertainties about rights, status, and other legal relations," and the declaratory judgment chapter "is to be construed and administered liberally." Riverside Park Condominiums Unit Owners Ass'n v. Lucas, 2005 ND 26, ¶ 25, 691 N.W.2d 862. Given the purpose and construction of the declaratory judgment chapter, the court acted within its discretion by granting declaratory relief based upon the doctrines of frustration of purpose and impossibility.

¹Reile's Acres' argument to this effect is belied by the language of the 1985 Agreement, which only speaks of the remaining entity continuing operations if Harwood or Reile's Acres "should cease to exist[.]" Appellant's App. 56. Neither Harwood or Reile's Acres ceased to exist, and therefore this provision has no effect in this case.

[¶48] It must further be noted that, despite Reile's Acres' attempts to frame its arguments as jurisdictional challenges, North Dakota's declaratory judgment statutes are not jurisdictional in nature. State v. J.P. Lamb Land Co., 359 N.W.2d 368, 368 (N.D. 1984). In conjunction with the liberal construction of the declaratory judgment statutes, this Court has declined to "exalt form over substance," which is exactly what Reile's Acres attempts to do with its "jurisdictional" arguments. In Interest of McMullen, 470 N.W.2d at 199.

[¶49] Reile's Acres also claims the trial court lacked personal jurisdiction because certain entities were not made parties to this action. N.D.C.C. § 32-23-11 states "all parties who have or claim any interest that would be affected by the declaration must be made parties, and a declaration may not prejudice the rights of persons not parties to the proceeding." However, the parties Reile's Acres points to, Lake Shure Properties and Edgewood Rentals, did not have an interest in the Harwood Lagoons. Lake Shure Properties had an interest, but it was assigned in part to Lake Shure, with the remainder going to Dr. Ron Knutson. Dr. Knutson was made a party to the action, but did not appear at trial. Trial Tr. 8:14-22. Accordingly, the parties who had or claimed an interest were made parties. Moreover, the declaration made by the trial court in no way prejudiced the rights of these persons or others who were not parties. For instance, Dr. Knutson, while a party, saw no prejudice in the court's declaration because his right in the 6-inch force main was recognized. Appellant's App. 138. In any event, none of this would provide Reile's Acres with grounds for appeal, because Reile's Acres was made a party and given an opportunity to be heard.

[¶50] Once again, the declaratory judgment statutes give Harwood the right to seek declaratory relief as to its rights and obligations under the parties' contracts. Lucas, 2005 ND 26, ¶ 25. The trial court granted this relief by construing the parties' agreements and determining the relative ownership interests of the parties to the Harwood Lagoons prior to ordering a partition. There was no error in the trial court's decision, and the determination of ownership interests was a prerequisite to ordering a partition, as the partition required the division of proceeds according to the parties' relative ownership interests. N.D.C.C. § 32-16-45. Those respective interests were agreed upon by the parties. Therefore, the trial court did not abuse its discretion with respect to the declaratory judgment regarding the 1985 Agreement.

B. Lake Shure has an interest in and right to use the 6-inch force main running to the Harwood Lagoons from the intersection of 45th Street and 52nd Avenue

[¶51] Reile's Acres next argues Lake Shure was not a party to the 1985 Agreement and had no right to a declaratory judgment under that agreement. Once again, Reile's Acres' argument disregards the trial court's actual determination, which did not include Lake Shure in the declaratory judgment on the 1985 Agreement. Appellant's App. 137-138. The only determination made by the trial court concerning Lake Shure was to declare that Lake Shure had an undivided ownership interest in and right to use the 6-inch force main running to the Harwood Lagoons from near the intersection of 45th Street and 52nd Avenue North. Id. at 138.

[¶52] Reile's Acres incorrectly argues Lake Shure has no interest in the collection lines running from Reile's Acres to the Harwood Lagoons. Once again, Lake Shure's interest stems from the interest of Lake Shure Properties, because Lake Shure purchased 56.5 percent of Lake Shure Properties' interest in 1993. Id. at 65-66. Lake Shure Properties had an interest not only in 16 percent of the total capacity of the Harwood Lagoons, but also a share of the 6-inch force main running to the Harwood Lagoons from near the intersection of 45th Street and 52nd Avenue North. Id. at 61-63.

[¶53] Jeff Volk, an engineer who was involved at multiple stages of the lagoon project, clarified Lake Shure's interest in his testimony. Volk explained that Exhibit 24, a worksheet for Reile's Acres Sewer Improvement District No. 1, listed all of the bid items for various types of materials involved in the project. Trial Tr. 128:4-9; Appellant's App. 95-96. As constructed, Reile's Acres owned the 4" force main running from Reile's Acres to the area near the intersection of 45th Street and 52nd Avenue North. Trial Tr. 131:8-19; Appellant's App. 95. At that point, the line changed from a 4" force main to a 6-inch force main. Trial Tr. 145:18-24. Reile's Acres and Lake Shure Properties shared the cost equally for the 6-inch force main running from near the intersection of 45th Street and 52nd Avenue North to the Harwood Lagoons. Trial Tr. 129:4-131:15; 145:18-24; Appellant's App. 95-96.

[¶54] A separate force main is owned by Lake Shure that runs east from Lake Shure until it taps into the 6-inch force main near the intersection of 45th Street and 52nd Avenue, which was depicted in Exhibit 21. Trial Tr. 132:7-133:4; Appellant's App. 93-94. After Lake Shure purchased Lake Shure Properties' interest, Lake Shure obtained an interest in the

6-inch force main running from the intersection of 45th Street and 52nd Avenue to the Harwood Lagoons. Trial Tr. 137:9-21; Appellant’s App. at 65-66.

[¶55] The trial court, after hearing Volk’s testimony and receiving the above exhibits, found that Lake Shure Properties paid for its share of the 6-inch force main running from the intersection of 45th Street and 52nd Avenue North to the Harwood Lagoons. Appellant’s App. 134. The trial court further found Lake Shure purchased 56.5 percent of Lake Shure Properties’ interest in the force main and in the capacity of the Harwood Lagoons. Id.

[¶56] Reile’s Acres fails to show these findings were clearly erroneous. Nor does Reile’s Acres demonstrate the trial court abused its discretion by declaring Lake Shure’s interest and right to use the 6-inch force main running from the intersection of 45th Street and 52nd Avenue North to the Harwood Lagoons. Id. at 138. Accordingly, the trial court’s declaratory judgment regarding Lake Shure’s interest in the 6-inch force main should be affirmed.

III. Whether the trial court clearly erred when it found a partition by sale of the Harwood Lagoons would afford the parties the greatest value for their interests because the Harwood Lagoons had not been used since 2010, the nonuse resulted in deterioration of the facility, and the three cells had no individual value.

A. A partition by sale is appropriate given the unchallenged factual findings

[¶57] “Partition of property is available under N.D.C.C. § 32-16-01 when there are cotenants with current possessory interests in the property.” Schmidt, 2004 ND 189, ¶ 5. “Partition is a matter of right between cotenants.” In re Estate of Loomer, 2010 ND 93, ¶ 17, 782 N.W.2d 648. “District courts have wide judicial discretion in partition actions to do

equity and to make a fair and just division of the property or proceeds between the parties, and great flexibility in fashioning appropriate relief for the parties.” Id. (internal quotation marks and citation omitted).

[¶58] While the law favors partition in kind, “Section 32-16-12, N.D.C.C. provides for a partition sale if a partition in kind cannot be made without great prejudice to the owners.” Schmidt, 2004 ND 189, ¶ 6. “Great prejudice exists when the value of the share of each in case of a partition would be materially less than the share of the money equivalent that each could probably obtain from the whole.” Id. at ¶ 7.

[¶59] In Schmidt, this Court upheld a partition sale after the trial court found a partition in kind would result in great prejudice to the owners. Id. at ¶ 10. In particular, the trial court found a partition in kind would require building and maintaining fences on the farmland that was at issue, the farmland would have to be broken up into smaller tracts of land that typically do not sell for as much per acre, and the value of the share of each owner would be materially less than could be obtained at a sale on the whole. Id. at ¶ 8. The trial court also found the usefulness of the property would be substantially diminished in a partition in kind. Id.

[¶60] Here, no entity has used the Harwood Lagoons for municipal waste since 2009. Trial Tr. 116:19-21. During the years the lagoons have sat unused, they have become an attractant of discarded rubble, vandals, and invasive rodents causing holes in the dikes. Id. at 77:5-16. Moreover, the nonuse has not changed the maintenance needs, such as mowing, spraying, and other upkeep of the property. Id. at 77:1-4. Significant repairs would

be needed to restore the lagoons to full operation, and the lagoons would still only be operational for a 500-person capacity unless further expansion were done. Id. at 78:4-25.

[¶61] The trial court also acknowledged the unique nature of the Harwood Lagoons, by finding the three cells of the lagoons operated as a single unit, and each cell had no value individually. Appellant's App. 137. The court's findings are supported by the evidence introduced at trial, which explained how the three cells perform different functions, while working in unison to treat raw sewage into a higher quality effluent that can be discharged. Trial Tr. 36:17-37:13; 41:9-42:2; 59:7-11; 65:18-66:6. Reile's Acres fails to challenge any of these findings, much less show they were clearly erroneous. See Kautzman, 1998 ND 192, ¶ 8; Schmidt, 2004 ND 189, ¶ 10; see also N.D.C.C. § 32-16-12.

[¶62] Instead, Reile's Acres claims it does not believe the lagoons needed to be partitioned. Reile's Acres desires to continue the status quo of the lagoon operations, or to be appointed as the administrator of the lagoons. Reile's Acres also suggests the lagoons should have been partitioned to give it the primary cell.

[¶63] Reile's Acres' complaints about the partition do not amount to clear error in the trial court's factual findings or an abuse of discretion by the trial court in ordering the partition sale. As a joint owner of the lagoons, Harwood had the right to seek partition, regardless of whether Reile's Acres desired the partition. In re Estate of Loomer, 2010 ND 93, ¶ 17. Moreover, to appoint Reile's Acres as administrator and force Harwood to continue to own the lagoons as is would not only violate Harwood's right to a partition, it would amount to a modification of the contract, which, as Reile's Acres argues, the court lacked the ability to do. Essentially, Reile's Acres wants to accept the lagoons as a gift, and to force

Harwood to continue paying the bulk of the costs against its rights as an owner to seek partition.

[¶64] Reile's Acres' alternative suggestion to partition the cells so that the primary cell would be given to Reile's Acres lacks any basis in the record. The district court ordered the cells to be sold individually or as a unit, depending on which returned the most value to the owners, which is far different than giving Reile's Acres the primary cell and Harwood two worthless cells. See N.D.C.C. § 32-16-12. As discussed above, each cell has a role to play in the overall operation of the lagoon system. Therefore, it would not be equitable to carve out one cell roughly equivalent to Reile's Acres' 32 percent interest because the remaining two cells no longer constitute a lagoon system. See Berg v. Kremers, 181 N.W.2d 730, 733 (N.D. 1970) (noting a sale of land in partition may be ordered if "it is necessary to protect the parties from serious loss.") (internal quotation marks and citation omitted). At the end of the day, Reile's Acres had an opportunity to bid on the lagoons, and it did so, but it simply bid too little to be awarded the sale. Appellant's App. 153. Reile's Acres' low bid does not generate reversible error on the part of the trial court in ordering the sale in the first place, and therefore the partition sale should be affirmed and Reile's Acres can be given its share of the proceeds from the sale. N.D.C.C. § 32-16-45.

B. Lake Shure was not granted relief in the partition action

[¶65] Reile's Acres argues the trial court improperly granted Lake Shure relief with respect to the partition of the lagoons, because Lake Shure did not own any of the land underlying the Harwood Lagoons. As discussed above, however, Lake Shure had a right to be involved in the action because it owned a certain percentage of the capacity of the

Harwood Lagoons. Appellant's App. 65-66; N.D.C.C. § 32-16-02 (stating the interests of all persons in the property should be set forth in the action). Moreover, Lake Shure retained the right to use the sewer line it purchased at the same time it purchased the right to use the Harwood Lagoons, and therefore there was no error in the trial court declaring Lake Shure's rights with respect to its sewer lines, as discussed above. The same is true for Dr. Knutson.

[¶66] Lake Shure agrees it did not own the Harwood Lagoons' Property. However, Harwood was the owner of a 68 percent interest in the property, which Reile's Acres did not challenge below or on appeal. Therefore, Harwood has a right to seek partition, irrespective of Lake Shure's interest. In re Estate of Loomer, 2010 ND 93, ¶ 17; N.D.C.C. § 32-16-01. Indeed, the trial court's partition order does not grant Lake Shure any share of the proceeds of the partition sale or any other interest in the partition, aside from simply declaring Lake Shure's interest in the sewer lines and capacity. Appellant's App. 136-138. Because Harwood has the right to seek partition as the co-owner of the Property, there was no error in the trial court granting a partition.

C. Reile's Acres statutory challenges are without merit

[¶67] Reile's Acres asserts a number of alleged errors with respect to the partition procedure. First, Reile's Acres correctly states no lis pendens was filed immediately after the action was commenced under N.D.C.C. § 32-16-04, as a lis pendens was not filed until December 2013. This was a mere oversight, however, which did not prejudice Reile's Acres in any fashion. "[T]he purpose of a notice of lis pendens is to let the world know that there is an action pending, and everybody interested can go to the clerk's office, and there learn the particulars from the complaint." Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 25,

788 N.W.2d 312 (internal quotation marks and citation omitted). The notice of lis pendens creates no rights in any party, McKenzie Cnty. v. Casady, 214 N.W. 461, 465 (N.D. 1927), and therefore the inadvertent failure to file notice in this case is of no effect, particularly where the property was not sold until after the notice was filed in December 2013.

[¶68] Second, Reile's Acres contends the summons did not comply with N.D.C.C. § 32-16-05. N.D.C.C. § 32-16-05 states a summons "must be directed to all the joint tenants and tenants in common and all persons having an interest in or any lien of record . . . and generally to all persons unknown who have or claim any interest in the property." Similarly, Reile's Acres argues there was no evidence of service by publication under N.D.C.C. § 32-16-06. To be clear, Reile's Acres does not contend it was not properly served in this lawsuit.

[¶69] In Schmidt v. Frank, 140 N.W.2d 588, 593 (N.D. 1966), this Court rejected a similar argument that the court did not have jurisdiction to make a final determination where N.D.C.C. §§ 32-16-05 and were not satisfied. The Court concluded "the provision directing the summons upon all persons unknown applies only in the case of service by publication." Id. at 594. In other words, N.D.C.C. § 32-16-05 only applies when publication is made under N.D.C.C. 32-16-06. Id. However, the language of N.D.C.C. § 32-16-06 "indicates that service in a partition action need not always be made by publication[.]" Id. Indeed, the statute begins with the introductory phrase, "[w]hen service of the summons is made by publication," which is repeated in other statutes throughout the chapter. Id.

[¶70] Reile's Acres' arguments are thus foreclosed by this Court's decision in Schmidt. While the Complaint and Summons were drafted to include unknown parties, there

ultimately were no unknown parties to serve by publication in this matter, and therefore service by publication was not required under N.D.C.C. § 32-06-06.

[¶71] Likewise, while the Complaint discusses Lake Shure Properties' interest, Lake Shure Properties was not required to be named as a party because they no longer have any interest in the Harwood Lagoons after they conveyed their interest to Lake Shure and Dr. Knutson. Dr. Knutson was named as a party and served accordingly. Reile's Acres' argument confuses N.D.C.C. § 32-16-02, which discusses setting forth a person's interest in the complaint, with N.D.C.C. § 32-16-03, which only requires a person to be made a party if a "conveyance or lien appears of record." Since Lake Shure Properties, or any of the other entities Reile's Acres suggests, did not have conveyances appearing of record, they were not necessary parties under N.D.C.C. § 32-16-03.

[¶72] In any event, even if Reile's Acres was correct that service by publication should have occurred, there is no question Reile's Acres was served properly, and there is no harm to Reile's Acres if some unknown party was not served by publication. The trial court simply declared ownership of the Harwood Lagoons to be at 68 percent for Harwood and 32 percent for Reile's Acres, which Reile's Acres does not challenge on appeal. The court then ordered a partition, which was proper given Harwood's right as an owner to seek partition of its Property. Under these circumstances, the Court should reject Reile's Acres' attempts to create an appealable issue by speculating about the rights of some unknown third party who has nothing to do with Reile's Acres' interest.

CONCLUSION

[¶73] The trial court did not clearly err in its factual findings or abuse its discretion by declaring the ownership interests of Harwood and Reile's Acres in the Harwood Lagoons. Nor did the court err in declaring Lake Shure had an interest in and right to use the 6-inch force main running to the Harwood Lagoons. N.D.C.C. § 32-23-08 allows parties to seek further relief based on a declaratory judgment whenever necessary or proper.

[¶74] As an owner of the Harwood Lagoons, Harwood had a right to request a partition of the Property, with the proceeds of the sale being distributed according to the ownership interests agreed by the parties and determined by the trial court. Given the unique nature of the Harwood Lagoons, and the need to return the most value to the respective owners, the trial court did not clearly err in its factual findings or abuse its discretion by ordering a partition sale.

Dated: May 21, 2014.

/s/ Robert G. Hoy

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The City of Harwood, a political)
subdivision of the State of North)
Dakota, and Lake Shure Estates, Inc., a) Supreme Court No. 20140089
North Dakota nonprofit corporation,)
)
Plaintiffs and Appellees,) District Court No. 09-2011-CV-02313
)

vs.)

CERTIFICATE OF SERVICE

The City of Reiles Acres, a political)
subdivision of the State of North)
Dakota, Dr. Ron Knutson, and all other)
persons unknown claiming any interest)
or estate in, or lien or encumbrance)
upon, the property described in the)
Complaint,)

Defendants.)

-----)
The City of Reiles Acres, a political)
subdivision of the State of)
North Dakota,)

Appellant.)

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

I hereby certify that on May 28, 2014, I caused to be electronically filed the **Corrected Appellees' Brief** and **Corrected Appellees' Appendix** with the Clerk of the North Dakota Supreme Court and served the same electronically upon **Jonathan T. Garaas** and **Sean O. Smith** as follows:

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Dated: May 28, 2014.

/s/ Robert G. Hoy
Robert G. Hoy