

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

<p>Nandan, LLP,                                  Plaintiff/Appellant,  and  Border States Paving, Inc.                                  Plaintiff,                                  vs.  City of Fargo,                                  Defendant/Appellee.</p>	<p>Supreme Court No. <u>20160166</u></p>
--	--

---

**BRIEF OF APPELLEE CITY OF FARGO**

---

**DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE STEVEN L. MARQUART PRESIDING  
DISTRICT COURT NO. 09-2013-CV-02762**

**APPEAL FROM THE JUDGMENT DATED 3/7/16 AND  
MEMORANDUM OPINION & ORDER DATED 4/13/16**

---

Jane L. Dynes (ND #04495)  
Ronald H. McLean (ND #03260)  
**SERKLAND LAW FIRM**  
10 Roberts Street | PO Box 6017  
Fargo, ND 58108-6017  
Phone: (701) 232-8957  
jdynes@serklandlaw.com  
rmclean@serklandlaw.com  
**ATTORNEYS FOR APPELLEE  
CITY OF FARGO**

**TABLE OF CONTENTS**

	<b><u>Paragraph No.</u></b>
I. STATEMENT OF ISSUES .....	1
II. STATEMENT OF CASE AND COURSE OF PROCEEDINGS .....	2
III. STATEMENT OF FACTS .....	6
IV. STATEMENT OF THE STANDARD OF REVIEW .....	16
V. LAW AND ARGUMENT	
A. Supreme Court Mandate Limited the District Court’s Review .....	18
1. The Facts Support the Grant of Summary Judgment.....	25
2. The repairs to 32nd Street North were incidental to the water and sewer system repairs of Improvement District No. 6237.....	28
B. Nandan’s Statutory Construction Argument Fails.....	37
1. The term “outlet” includes “drains .....	39
2. The term sewer includes storm sewer .....	42
3. The water statutes Nandan relies on are not controlling.....	45
VI. CONCLUSION.....	48

**TABLE OF AUTHORITIES**

	<b><u>Paragraph No.</u></b>
<b>CASES</b>	
<u>Davis v. Enget</u> 2010 ND 34, 779 N.W.2d 126 .....	7
<u>Eastburn v. C.J.A.</u> 473 N.W.2d 439 (N.D. 1991) .....	14
<u>Eichhorn v. Waldo Township Board of Supervisors</u> 2006 ND 214, 723 N.W.2d 112 (N.D. 2006).....	14, 18
<u>Investors Title Ins. Co. v. Herzig</u> 2013 ND 13, 826 N.W.2d 310 .....	8, 9
<u>K &amp; L Homes, Inc. v. American Family Mutual Ins. Co.</u> 2013 ND 57, 829 N.W.2d 724 .....	7
<u>Kautzman v. Kautzman</u> 2000 ND 116, 611 N.W.2d 883 .....	9
<u>Kavaney Realtor &amp; Developer, Inc. v. Travelers Insurance Co.</u> 501 N.W.2d 335 (N.D. 1993) .....	11
<u>Kirkham, Michael &amp; Associates v. City of Minot</u> 122 N.W. 2d 862 (N.D. 1963) .....	15, 16
<u>Larson v. Wells County Water Resource Board</u> 385 N.W.2d 480 (ND 1986) .....	17
<u>Nandan, LLP and Border States Paving, Inc. v. City of Fargo</u> 2015 ND 37, 858 N.W.2d 892 .....	
<u>Rojas v. Workforce Safety and Ins.</u> 2006 ND 221, 723 N.W.2d 403 .....	18
<b>STATUTES</b>	
N.D.C.C. § 1-02-01 .....	39
N.D.C.C. § 40-05-01 (12) .....	42
N.D.C.C. § 40-05-01(12) and (23).....	44

N.D.C.C. § 40-22-01.....	21, 25, 30, 35
N.D.C.C. § 40-22-01(1) .....	1, 2, 3, 4, 18, 39, 42, 43, 44
N.D.C.C. § 40-22-01(2) .....	32
N.D.C.C. § 40-22-01(3) .....	33
N.D.C.C. § 40-22-01(4) .....	34
N.D.C.C. § 40-22-01(5) .....	35
N.D.C.C. § 40-22-01(2)-(5) .....	18, 21
N.D.C.C. § 40-22-02.....	42
N.D.C.C. § 40-22-15.....	5, 18, 42, 48
N.D.C.C. § 60-16.1-09(19) .....	46
N.D.C.C. § 61-16.1-02.....	40
N.D.C.C. § 61-16.1-02(7) .....	45
N.D.C.C. § 61-16.1-12.....	47
N.D.C.C. § 61-16.1-61 .....	45
N.D.C.C. § 61-21 .....	45

## I. STATEMENT OF ISSUES

¶1 Whether the district court erred in following this Court’s remand mandate when it granted the City of Fargo’s motion for summary judgment motion upon determining that Improvement District No. 6237 consisted of a water and sewer project pursuant to N.D.C.C. § 40-22-01(1).

## II. STATEMENT OF CASE AND COURSE OF PROCEEDINGS

¶2 Nandan, LLP and Border States Paving (hereinafter referred to as “Nandan”) commenced this action against the City of Fargo in September 2013 asserting that the City Commission of the City of Fargo (hereinafter referred to as “City”) failed to consider Nandan’s protest of the creation of Improvement District No. 6237. App. p. 6-8. The City filed a Rule 12(b)(6) motion to dismiss Nandan’s Complaint for failure to state a claim. App. p. 1 Doc ID#s 15-16. The district court granted the City’s motion on February 2, 2014. App. p. 2, Doc ID# 34. Nandan appealed the decision. This Court reversed in part and remanded the action to the district court with a directive to determine whether Improvement District No. 6237 was a water and sewer project pursuant to N.D.C.C. § 40-22-01(1). Nandan, LLP and Border States Paving, Inc. v. City of Fargo, 2015 ND 37 ¶31, 858 N.W.2d 892.

¶3 On remand, the Court entered a Rule 16 Scheduling Order. Doc ID# 52. The City produced voluminous documents in response to Nandan’s written discovery requests. Nandan sought to amend its complaint for a second time. Doc ID#s 65-68. The district court denied the motion. Doc ID# 77. In November 2015 the City filed a motion for summary judgment, supported by affidavits and documents, to establish that

Improvement District No. 6237 was a water and sewer project pursuant to N.D.C.C. § 40-22-01(1).

[¶4] A hearing on the City’s summary judgment motion was held on February 19, 2016. In response to the motion, Nandan asserted that Drain 10 was not part of the City’s storm sewer system within the definition of N.D.C.C. § 40-22-01(1). See, Transcript (hereinafter referred to as “Tr.”) p. 5, lines 16-25. Nandan argued that a sewer project cannot include work on a drain. Id.

[¶5] Following the hearing on the motion, the district court entered its Memorandum and Order in which it determined that the road repairs were incidental to the repairs on the City storm sewer (including its use of Drain 10), sanitary sewer and water supply system performed pursuant to Improvement District No. 6237. App. p. 99. The Court determined the project qualified as a water and sewer project pursuant to N.D.C.C. § 40-22-15 and, therefore, a resolution of necessity was not required. App. p. 100. The Court granted the City’s motion for Summary Judgment. App. pp. 97-100. The Order for Judgment, Judgment and Notice of Entry of Judgment were entered on March 7, 2016. Doc ID#s 122, 123, 124. Nandan filed a motion requesting Rule 60 (b)(6) relief. App. p. 4, Doc ID#s 129, 126. That motion was denied on April 13, 2016. App. p. 104. This appeal followed. App. p. 105.

### **III. STATEMENT OF FACTS**

[¶6] On May 31, 2012, a landslide occurred along 32nd Street North, near the industrial facility of Border States Paving. App. p. 45: Affidavit of Nathan Boerboom, ¶2. According to Braun Intertec, the firm commissioned to look for the source of the landslide, a stockpile of granular material was located along the western border of the

Border States Paving facility where the soil failure occurred. Id.; and App. p. 52: June 8, 2012 Braun Intertec Report, pg. 1. The City of Fargo Water Department had noticed loss of water pressure in a tower on the north side of the City. App. p. 45: Boerboom Affidavit, ¶2. City workers assumed the loss in pressure was caused by a water main break and explored the service area of the tower. Id. City workers found the water main break at 4101 32<sup>nd</sup> Street North where the landslide occurred. Id. Border States Paving operates at this location on land owned by Nandan, LLP. Id. The landslide initiated from approximately 20 feet east of the Border States Paving site boundary fence. App. p. 52: Braun Intertec Report, p. 1. The toe of the slide caused the bottom of Drain 10 to heave upward approximately seven to nine feet. Id.; and Doc ID# 90-91: Aerial photos of landslide location. The landslide blocked Cass County Drain 10, causing the flow in the Drain to back up at the south end of the landslide site. App. p. 46, ¶3; and Doc ID# 92.

[¶7] Cass County Drain 10 is part of the City of Fargo Storm Sewer System. App. p. 46, ¶4; and App. p. 13, ¶13. The City directs storm water through culverts, pipes and channels to Drain 10 through which the storm water is then directed north and east to the Red River. Id. In addition to blocking Drain 10, the landslide broke a City storm sewer culvert buried under 32<sup>nd</sup> Street at the north end of the landslide location. Id. at ¶5; and Doc ID# 93: Photo of Broken Storm Sewer Culvert.

[¶8] The landslide also damaged elements of the City water system. App. p. 46: Boerboom Affidavit, ¶6. The force of the landslide moved 32<sup>nd</sup> Street North to the west approximately 10 to 15 feet. Id. A City fire hydrant at the north end of the landslide section sank. Id. at ¶6; and Doc ID# 94: Photo of Hydrant; and App. p. 54: Braun Report, p. 3. The landslide ruptured a City of Fargo water main buried along the east side of the

32<sup>nd</sup> Street roadway at both the north and south ends of the landslide section. App. p. 46, ¶6; and App. p. 54: Braun Report, p. 3. The landslide also severed a buried private sanitary sewer line buried along the east side of 32<sup>nd</sup> Street North. App. p. 47, ¶7.

[¶9] The landslide displaced a section of 32<sup>nd</sup> Street North, making it impassable. App. p. 47, ¶8; and App. p. 59: Photo of landslide looking north on 32<sup>nd</sup> Street. The surface of 32<sup>nd</sup> Street was damaged in the landslide shift. Doc ID# 96: Photo of damaged road surface. At the time of the landslide, the surface of 32<sup>nd</sup> Street was unpaved, compacted gravel with no curbs or gutters. App. p. 47, ¶8.

[¶10] The City of Fargo and Southeast Cass Water Resource District entered into a Joint Powers Agreement to address the repairs necessary to Drain 10 and City infrastructure. App. p. 47, ¶9; and App. p. 9: Joint Powers Agreement. As has been established previously, the City of Fargo created Special Improvement District No. 6237. App. p. 47, ¶10. The City of Fargo contracted with Industrial Builders to construct the project. Southeast Cass County Water Resource District hired Moore Engineering to design the project with the City of Fargo. Id.; and App. p. 61: Affidavit of Christopher Gross, ¶1. Christopher Gross was Moore Engineering's Project Engineer who worked with the City of Fargo on the Project. Id. Mr. Gross used Industrial Builder's bid proposal for the Project. Id.; and App. p. 68: Gross Exhibit A, Industrial Builder's Bid. He received periodic payment requests from Industrial Builders. App. p. 61, ¶2. Mr. Gross verified the payment requests and invoices against the project specifications and requirements and forwarded payment recommendations to the City of Fargo Engineering Department. Id. He tracked the costs on a monthly basis and prepared a final cost summary for Improvement District No. 6237. Id.; and App. p. 77: Final Cost Summary.



[¶11] The project costs were attributed to five categories of work performed in connection with Improvement District No. 6237. App. p. 62, ¶3. Those five categories are: 1) Drain 10, 2) storm sewer system (other than Drain 10), 3) water line, 4) sanitary line, and 5) roadway. Three types of work on the Final Cost Summary, mobilization, storm water management and site preparation, reflect costs attributable to each of the five work categories. App. p. 77: Final Cost Summary; and App. pp. 63-64, ¶¶4-7. Moore Engineering allocated the bulk of the mobilization costs (90%) to Drain 10 because of the large equipment required for the box culverts. Id.; and Doc ID# 101: Photo of Box Culverts installed. The four other work categories were allocated much smaller amounts for mobilization costs. App. pp. 63-64, ¶¶9-12. Storm Water Management is an erosion control construction cost that also applied to the entire Project. App. p. 64, ¶13. The cost was allocated equally between all work categories. Id.; and App. p. 77: Final Cost Summary. Site Preparation was also a construction cost that was allocated equally between all five work categories. App. p. 65, ¶14.

[¶12] The Final Cost Summary shows the total spent in each category of work. App. p. 77. The Drain 10 reconstruction totaled \$1,062,246.69. Id.; and App. p. 65, ¶15. The repairs to the City of Fargo storm sewer system (other than Drain 10) totaled \$21,664.61. App. p. 77; and App. p. 65, ¶16. The repairs to the City water system totaled \$53,816.41. App. p. 77; and App. p. 65, ¶17. The repairs to the private sanitary sewer line totaled \$24,599.66. App. p. 77; and App. p. 66, ¶18. The repairs to 32<sup>nd</sup> Street North totaled \$19,916.83. App. p. 77; and App. p. 66, ¶19.

[¶13] Slopes at the landslide site were graded as part of the repair process. The slopes are not “boulevards” or considered “public places.” App. p. 49, ¶19. The exposed

soil and slopes around the construction area were mulched and planted with indigenous grasses/plants in an effort to bring the site back to its pre-landslide appearance. Id.

[¶14] The City of Fargo did not acquire any easements in connection with the work performed pursuant to Improvement District No. 6237. App. 49, ¶20.

[¶15] The City of Fargo did not acquire any additional real property through purchase or lease in connection with Improvement District No. 6237. App. p. 49, ¶21. The City of Fargo did not construct any parking lots, garages, ramps or other facilities for motor vehicles in connection with Improvement District No. 6237. App. pp. 49-50, ¶21.

#### **IV. STATEMENT OF THE STANDARD OF REVIEW**

##### **A. The District Court Followed the Correct Summary Judgment Standard.**

[¶16] The North Dakota Supreme Court has established standards for reviewing summary judgment decisions as follows:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law, which we review de novo on the entire record.

K & L Homes, Inc. v. American Family Mutual Ins. Co., 2013 ND 57, ¶6, 829 N.W.2d 724 (citations omitted). The party opposing summary judgment must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact. Davis v. Enget, 2010 ND 34, ¶6, 779 N.W.2d 126. For an opposing party to demonstrate a genuine issue of material fact, the party must present enough evidence to allow a reasonable fact finder to rule in their favor. Id.

[¶17] Nandan did not dispute the facts regarding the work performed, the categorization of costs or totals presented by the City of Fargo. Nandan's expert did not even consider the existence of the storm sewer work which was part of Improvement District No. 6237. Nor did he recognize that Drain 10 is part of the City's storm sewer system. App. p. 96, Pope Report. Instead, Nandan argued only that the district court failed to apply what Nandan now claims to be applicable law. Nandan's argument is without merit and the district court's order and judgment are properly affirmed.

## **V. LAW AND ARGUMENT**

### **A. Supreme Court Mandate Limited the District Court's Review.**

[¶18] In addition to the Summary Judgment Standard, this Court must determine whether the district court followed its remand mandate. In the first appeal Nandan argued that the City of Fargo failed to pass a resolution of necessity when it created Improvement District No. 6237 and, by so doing, denied Nandan a right to protest. A resolution of necessity is not required for water or sewer system improvements pursuant to N.D.C.C. § 40-22-01(1). See, N.D.C.C. §40-22-15. When no resolution of necessity is required, there is no right of protest. This Court stated that, given the evidence at the time the City's Motion to Dismiss was granted, it was "unknown from the

pleadings whether the other repairs were incidental to the water and sewer repairs.” Nandan, 2015 ND 37, ¶30, 858 N.W.2d 892. However, if “the other repairs were incidental to the sewer and water repairs under N.D.C.C. § 40-22-01, a resolution declaring the improvements necessary would not be required under N.D.C.C. § 40-22-15.” Id. On remand, the district court was to consider additional evidence offered by the parties to decide whether the other repairs funded by Improvement District No. 6237 were incidental to the water and sewer repairs, or whether they were a type of improvement described in N.D.C.C. § 40-22-01(2)-(5). Id. at ¶31.

[¶19] In the proceedings below, Nandan urged the district court to act contrary to this Court’s remand. Nandan continues to assert that the City’s portion of the costs under the Joint Powers Agreement, funded under Improvement District No. 6237, for repairs to Drain 10 cannot constitute a water or sewer improvement as described in N.D. Cent. Code § 40-22-01(1) because Southeast Cass Water Resource Board owns/controls Drain 10. However, Nandan raised the Drain 10 ownership/control issue in its first appeal and this Court, at least implicitly, rejected it. See, Supreme Court No. 20140121, Nandan’s August 2015 Reply Brief, ¶15 and App. p. 98 ¶6. Moreover, Nandan’s position cannot survive application of the mandate rule.

[¶20] The mandate rule requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to “carry the appellate court’s mandate into effect according to its terms.” Investors Title Ins. Co. v. Herzig, 2013 ND 13, ¶10, 826 N.W.2d 310.

[¶21] This Court listed the purposes of Improvement District No. 6237: 1) “repairing the water and sewer infrastructure as well as 32<sup>nd</sup> street...”; 2) “reconstruction

of [Fargo’s] water main, sewer main and 32<sup>nd</sup> Street North” and 3) “the project is intended to restore function of Drain 10... and repair 32<sup>nd</sup> Street North and the affected utilities.” Nandan v. City, 2015 ND 37, ¶28, 858 N.W.2d 892. The Supreme Court then directed:

On remand, the district court must analyze N.D.C.C. § 40-22-01 and consider any additional evidence offered by the parties in deciding whether the project constituted a sewer or water improvement. Specifically, the district court must decide whether the other repairs funded by Improvement District No. 6237 were incidental to the water and sewer repairs or whether they were a type of improvement described in N.D.C.C. § 40-22-01(2) through (5). Id. at ¶31.

[¶22] When the Supreme Court mandate makes clear the defects which need to be cured by the district court, the district court need to no more than rectify those defects and proceed in a manner consistent with the Court’s Opinion. Kautzman v. Kautzman, 2000 ND 116, ¶17, 611 N.W.2d 883.

[¶23] The law of the case doctrine is “the principle that if an appellate court has passed on a legal question and remanded the case to the Court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.” Herzig, 2013 ND 13, ¶10, 826 N.W.2d 310. The mandate rule is a more specific application of law of the case. The Supreme Court retains the authority to decide whether the district court fully carried out its mandate. Id.

[¶24] In Herzig, the Supreme Court narrowly framed the remand issue. The district court was required to determine what portion of the daily sanctions was to compensate the defendant. Herzig, 2013 ND 13, ¶13, 826 N.W.2d 310. Instead, on

remand, the district court determined that the sanctions had abated because they were coercive. The Herzig court simply failed to comply with the limited terms of the mandate. Here, the district strictly followed the Court's mandate and examined the facts.

**1. The Facts Support the Grant of Summary Judgment.**

[¶25] There is no dispute that Improvement District No. 6237 was created to fund water and sewer repairs. The issue is whether the non-sewer (both storm and sanitary) and non-water system repairs completed during the project required a resolution of necessity and made the entire project subject to protest. In this case, street repair work was done as part of Improvement District No. 6237. Including that street repair work in the project did not change the nature of the project and did not require a resolution of necessity. Governing bodies are given authority to use judgment when funding improvements by special assessment. N.D.C.C. § 40-22-01 provides as follows:

In planning an improvement project of a type specified in any one of the foregoing subsections, the governing body may include in such plans any and all items of work and materials which in its judgment are necessary or reasonably incidental to the completion of an improvement project of such type.

N.D.C.C. § 40-22-01.

[¶26] The costs to repair 32nd Street were the only part of Improvement District No. 6237 that were not related to Drain 10 (part of the City Storm sewer system), the severed storm culvert, the severed water line or the severed sanitary sewer line. App. p. 77.

**2. The repairs to 32nd Street North were incidental to the water and sewer system repairs of Improvement District No. 6237.**

[¶27] The word “incidental” is defined as “subordinate” or “secondary” in importance or position. See, Merriam Webster’s Dictionary of Law 1996. In a case involving an insurance policy, the North Dakota Supreme Court considered the definition of “incidental.” Kavaney Realtor & Developer, Inc. v. Travelers Insurance Co., 501 N.W.2d 335, 338 (N.D. 1993). Relying on Webster’s Third New International Dictionary, 1971, the Court cited the following definition for incidental:

“Incidental . . . 1: subordinate, nonessential, or attendant in position or significance: as a: occurring merely by chance or without intention or calculation: occurring as a minor concomitant . . . b: being likely to ensue as a chance or minor consequence.”

Kavaney at 338.

[¶28] The repairs to 32nd Street North were subordinate to the repairs to Drain 10 and the City sewer (both storm and sanitary) and water systems. In order to repair the severed storm sewer culvert and pipes for the water and sanitary sewer lines, 32nd Street North had to be excavated. App. p. 48, ¶13. Prior to the May 31, 2012 landslide, the City had no plans to improve 32nd Street North. App. p. 49, ¶16. The street did not receive an “upgrade” as a result of the repairs. Id. at ¶18. The street was placed back into alignment, graded and gravel was reapplied. Id.

[¶29] The essential repairs Improvement District No. 6237 provided were those related to the City water system, the sanitary sewer line and the City storm sewer system, including Drain 10. Repairing these multiple systems was the focus of Improvement District No. 6237. The City of Fargo reasonably exercised its judgment by including the 32nd Street repairs as an incidental item in Improvement District No. 6237.

[¶30] Not only were the roadway repairs subordinate to the other repairs in terms of critical need, they were a small part of the cost of the overall project. The cost of the roadway repairs were less than any other category of work on the Project. App. p. 77; and App. p. 64, ¶12. The evidence presented shows that the repair work to 32nd Street North, in terms of critical need and costs, was incidental to the sewer and water infrastructure repairs funded by Improvement District No. 6237. As such, Improvement District No. 6237 was a sewer and water project which did not require a resolution of necessity.

**3. N.D.C.C. § 40-22-01 Subsections (2) Through (5) Do Not Apply to Work Performed Pursuant to Improvement District No. 6237.**

[¶31] The evidence presented to the district court showed that subsections (2) through (5) do not apply the work performed pursuant to Improvement District No. 6237.

[¶32] The repairs to 32nd Street were made as part of the critical repairs to City water supply, sanitary sewer and storm sewer systems. The street had to be excavated to get to and replace the severed pipes. App. p. 48, ¶13. The City would not have worked on 32nd Street but for the damage to its sewer and water systems caused by the landslide. App. p. 49, ¶16. Based on these circumstances, the street repairs did not change this sewer and water project into a street project pursuant to N.D.C.C. § 40-22-01(2).

[¶33] N.D.C.C. § 40-22-01(3) relates to improvements of boulevards and public places through the planting of trees, construction of grass plots, the sowing of grass seeds, and the maintenance and preservation of such improvements. This subsection of the statute does not apply here. The planting of grass and indigenous plants in connection with Improvement District No. 6237 was a requirement of the North Dakota Health Department. App. p. 64, ¶13. Planting the grass seed was a required erosion control



measure. The seeding was not done to create a public place or boulevard for recreational use. App. p. 49, ¶19.

[¶34] The City of Fargo did not acquire any land or easements pursuant to N.D.C.C. § 40-22-01(4) to complete the repairs for Improvement District No. 6237. App. p. 49-50, ¶¶20-21.

[¶35] The last subsection of N.D.C.C. § 40-22-01 is also not applicable. See, N.D.C.C. § 40-22-01(5). Improvement District No. 6237 was meant to repair damage caused by a landslide to Drain 10, the city storm sewer system (including its use of Drain 10), a city water main, a private sewer line and the roadway of 32nd Street North. No land was acquired for the construction of a parking lot, a ramp, garage or other facilities for motor vehicles. App. p. 49-50, ¶21.

[¶36] The repair to 32nd Street was not the focus of Improvement District No. 6237 and the street repair generated a small portion of the work. See, App. p. 50, ¶22. The facts presented show the repair to the roadway was incidental to the water and sewer work performed. The district court determined the undisputed facts established that the road repairs on 32nd Street North were incidental to the work necessary to repair the City water supply system, City storm sewer system (including its use of Drain 10), and City sanitary sewer system damaged by the landslide. App. p. 99, ¶10. The district court followed the specific mandate and should be affirmed.

**B. Nandan’s Statutory Construction Argument Fails.**

[¶37] Nandan first raised an abbreviated version of its statutory construction argument in its reply to the summary judgment motion. Doc ID# 104, ¶24. It expanded that argument at the February 19, 2016 oral argument and in its Brief in support of Rule

60 relief. Doc ID# 126. Nandan acknowledged that its present arguments are based on research it conducted after the summary judgment argument. Doc ID# 126: Nandan Brief, fn. 1.

[¶38] The Joint Powers Agreement was entered into by Southeast Cass Water Resource District and the City of Fargo. App. pp. 9-21. N.D.C.C. § 61-16.1 applies to Southeast Cass Water Resource District. It does not apply to the City of Fargo. Nandan's action is against the City of Fargo and the City's actions must be reviewed pursuant to N.D.C.C. § 40-22-01, not the statutes Nandan relies on in its brief.

**1. The term “outlet” includes “drains.”**

[¶39] A cardinal rule of statutory construction is to construe provisions in the code with a view to obtaining their objectives. N.D.C.C. § 1-02-01; Eastburn v. C.J.A., 473 N.W.2d 439 (N.D. 1991). Statutory construction requires understanding words in their ordinary sense. N.D.C.C. § 1-02-01. Nandan concentrates its argument on the absence of the word “drain” from N.D.C.C. § 40-22-01. While doing so, Nandan wholly ignores N.D.C.C. § 40-22-01(1)'s specific reference to “storm sewer mains and outlets” and “all other contrivances, appurtenances and structures”. See, N.D.C.C. § 40-22-01(1). An outlet is any discharge point, including storm sewers, into a watercourse, pond, ditch or other body of surface or groundwater. See, City of Fargo Land Development Code, Storm Water Management, Section 37-0102(26): [https://www.municode.com/library/nd/fargo/codes/code\\_of\\_ordinances?nodeId=CH37STWAMA](https://www.municode.com/library/nd/fargo/codes/code_of_ordinances?nodeId=CH37STWAMA). Culverts are one type of outlet for the removal of surface water runoff. Eichhorn v. Waldo Township Board of Supervisors, 2006 ND 214, ¶27, 723 N.W.2d 112, 120 (N.D. 2006).

[¶40] Under the chapter regarding the operation of water resource districts, an assessment drain is defined as:

Any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage, and any artificial drain of any nature or description constructed for the purpose of drainage, including dikes and appurtenant works, which are financed in whole or in part by special assessment. This definition may include more than one watercourse or artificial channel constructed for the purpose of drainage when the watercourse or channels drain land within a practical drainage area.

N.D.C.C. § 61-16.1-02 (emphasis added).

[¶41] Based on the above, an outlet is a storm sewer discharge point into a watercourse. A drain is a natural or artificial watercourse for the purpose of drainage. Using the words of the statutes in their ordinary sense shows that there is no statutory conflict in construing “outlet” to include “drain.”

**2. The term sewer includes storm sewer.**

[¶42] “Sewer” as used in N.D.C.C. § 40-22-15 includes storm sewers as well as sanitary sewers. Kirkham, Michael & Associates v. City of Minot, 122 N.W.2d 862 (N.D. 1963). The Kirkham court recognized that N.D.C.C. § 40-05-01 (12) gave cities the power to construct and repair “sewers” “tunnels” and “drains.” Id. at 863. The court went on to review the meaning of the word “sewer” as an “artificially constructed” trench, a “ditch,” a “surface drain or artificial subterranean conduit.” Id. Kirkham holds that both storm and sanitary sewers are installed to promote the public health. Id. at 864. The Kirkham court went further stating:

“as further evidence of the legislative intent that the term sewer should include both storm and sanitary sewers, we note that the legislature, in granting municipalities the power and authority to construct certain types of

improvements and to defray the expenses thereof by special assessments, included in the term “sewerage system” both sanitary sewers and storm sewers. See, N.D.C.C. § 40-22-01(1) and N.D.C.C. § 40-22-02.”

Id.

[¶43] The City presented affidavits specifying that the City’s storm sewer system, at the repair location, uses Drain 10 as an outlet to carry storm water to the Red River. App. p. 46, ¶¶4-7; and App. p. 62, ¶4. N.D.C.C. § 40-22-01(1) also specifies that a city can assess for sewer and water systems including “all other appurtenances useful to a complete system.” N.D.C.C. § 40-22-01(1) states as follows:

Any municipality, upon complying with the provisions of this chapter, may defray the expense of any or all of the following types of improvements by special assessments:

1. The construction of a water supply system, or a sewerage system, or both, or any part thereof, or any improvement thereto or extension or replacement thereof, including the construction and erection of wells, intakes, pumping stations, settling basins, filtration plants, standpipes, water towers, reservoirs, water mains, sanitary and storm sewer mains and outlets, facilities for the treatment and disposal of sewage and other municipal, industrial, and domestic wastes, and all other appurtenances, contrivances, and structures used or useful for a complete water supply and sewerage system.

N.D.C.C. § 40-22-01(1) (emphasis added).

[¶44] N.D.C.C. § 40-22-01(1) may not include the word “drain,” it does, however, include “storm sewer outlets” and “all other appurtenances, contrivances, and structures used or useful to a complete storm sewer system.” An “outlet” is a broad term which encompasses more than just one type of removal mechanism. Sewer includes trenches, ditches and surface drains. Kirkham, 122 N.W.2d at 863. Moreover, N.D.C.C. §

40-05-01(12) and (23) give municipalities power to repair sewers, culverts and drains within their corporate limits. A statute must be construed to avoid absurd and ludicrous results or to require idle or unnecessary acts. Larson v. Wells County Water Resource Board, 385 N.W.2d 480, 483 (N.D. 1986). It makes no sense to dictate that a storm sewer outlet cannot be a drain. The Joint Powers Agreement specifies that the City is within Drain 10's watershed area. App. p. 10, ¶1. By arguing that a drain has nothing to do with a sewer system under N.D.C.C. § 40-22-01(1), Nandan simply ignores the fact that a "sewer system" includes a storm sewer system. See, Nandan Brief, ¶¶22, 24, 25.

**3. The water statutes Nandan relies on are not controlling.**

[¶45] Throughout its brief, Nandan relies heavily on N.D.C.C. § 61-21 "Drainage Projects." However, Drain 10, as an established drain, is within the authority of the Southeast Cass Water Resource District. Water resource districts are governed by N.D.C.C. § 61-16.1, not § 61-21. Water resource districts acquired the assets of county drain boards in 1981. N.D.C.C. § 61-16.1-61. Water resource district facilities are not limited to drains. N.D.C.C. § 61-16.1-02(7). A project within the authority of the operation of a water resource district chapter includes:

Any undertaking for water conservation, flood control, water supply, water delivery, erosion control and watershed improvement, drainage of surface waters, collection, processing, and treatment of sewage, or discharge of sewage effluent, or any combination thereof, including incidental features of any such undertaking.

N.D.C.C. § 61-16.1-02(7) (emphasis added).

[¶46] Water Resource Districts are authorized to:

Plan, locate, relocate, construct, reconstruct, modify, extend, improve, operate, maintain, and repair sanitary and storm sewer systems, or combinations thereof, including

sewage and water treatment plants, and regulate the quantity of sewage effluent discharged from municipal lagoons; and contract with the United States government, or any department or agency thereof, or any private or public corporation or limited liability company, the government of this state, or any department, agency, or political subdivision thereof, or any municipality or person with respect to any such systems.

N.D.C.C. § 60-16.1-09(19) (emphasis added).

[¶47] This Court interprets statutes in context and in relation to other statutes on the same subject to give meaning to each without rendering one or the other useless. Rojas v. Workforce Safety and Ins., 2006 ND 221, 723 N.W.2d 403 (citations omitted). North Dakota water resource management statutes envision cooperation between townships and water resource district boards. See, Eichhorn v. The Waldo Township Bd. of Supervisors, 2006 ND 214, ¶25, 723 N.W.2d 112. The legislature contemplated that water resource districts would enter into agreements with entities, including municipalities to assist and cooperate in planning, constructing and maintaining flood control and other projects. See, e.g. N.D.C.C. § 61-16.1-12. Nandan has cited no statute that prevents a city from using a county drain as an outlet for its storm sewer system. Nothing in the pertinent statutes prevents a water resource district from working with a city under a joint powers agreement to repair a commonly used drain. Nandan's statutory construction argument must fail.

## **VI. CONCLUSION**

[¶48] The district court properly complied with the Supreme Court remand directive and determined that the roadwork was incidental to the sanitary sewer, storm sewer (including the City's portion of the Drain 10 repairs), and water system project pursuant to N.D.C.C § 40-22-01(1). Therefore, Improvement District No. 6237

constitutes a water and sewer project which does not provide a right of protest under N.D.C.C. § 40-22-15. The City of Fargo respectfully requests that this Court affirm the district court's Order and Judgment granting the City's Motion for Summary Judgment and dismissing Nandan's complaint against it.

Dated this 20th day of September, 2016.

/s/ Jane L. Dynes

Jane L. Dynes (ND #04495)

Ronald H. McLean (ND #03260)

**SERKLAND LAW FIRM**

10 Roberts Street | PO Box 6017

Fargo, ND 58108-6017

Phone: (701) 232-8957

[jdynes@serklandlaw.com](mailto:jdynes@serklandlaw.com)

[rmclean@serklandlaw.com](mailto:rmclean@serklandlaw.com)

**ATTORNEYS FOR APPELLANT**

**CITY OF FARGO**

## **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for the Appellee, City of Fargo, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and 32(8)(a) 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, certificate of service and this certificate of compliance, totals **5,482**.

Dated this 20th day of September, 2016.

*/s/ Jane L. Dynes*

\_\_\_\_\_  
Jane L. Dynes (ND #04495)  
Ronald H. McLean (ND #03260)

**SERKLAND LAW FIRM**  
10 Roberts Street | PO Box 6017  
Fargo, ND 58108-6017  
Phone: (701) 232-8957  
jdynes@serklandlaw.com  
rmclean@serklandlaw.com  
**ATTORNEYS FOR APPELLEE**  
**CITY OF FARGO**



**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

---

<p>Nandan, LLP, and Border States Paving, Inc.</p> <p style="text-align: center;">Plaintiff- Appellant,</p> <p style="text-align: center;">vs.</p> <p>City of Fargo,</p> <p style="text-align: center;">Defendant–Appellee.</p>	<p style="text-align: center;">Supreme Court No. <u>20160166</u></p>
---	--

---

**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that the following was served:

**BRIEF OF APPELLEE CITY OF FARGO**

on September 26, 2016, by sending a true and correct copy thereof by electronic means to the following e-mail address, to wit:

**Joseph A. Turman**  
**TURMAN & LANG, LTD.**  
*jturman@turmanlaw.com*

**Katrina A. Turman Lang**  
**TURMAN & LANG, LTD.**  
*katrina@turmanlaw.com*

To the best of undersigned’s knowledge, the email addresses given above are the actual email addresses of each party intended to be so served.

Dated: September 26, 2016

/s/ Jane L. Dynes  
Jane L. Dynes (ND #04495)  
Ronald H. McLean (ND #03260)  
**SERKLAND LAW FIRM**  
10 Roberts Street | PO Box 6017  
Fargo, ND 58108-6017  
Phone: (701) 232-8957  
jdynes@serklandlaw.com  
rmclean@serklandlaw.com  
**ATTORNEYS FOR APPELLEE  
CITY OF FARGO**