



## TABLE OF CONTENTS

1.	Table of Authorities	Page ii.
2.	Statement of the Issues	Page v.
3.	Statement of the Case	¶1
4.	Statement of the Facts	¶4
5.	Argument	¶20
6.	Conclusion	¶63

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>¶</b>
<u>Barr v. Barnes County Bd. of County Com'rs</u> , 194 N.W.2d 744 (N.D. 1972)	30,44
<u>Braaten v. Brenna</u> , 63 N.W.2d 302 (N.D. 1954)	53
<u>Caminetti v. U.S.</u> , 242 U.S. 470 (1917)	27
<u>Capital Electric Coop, Inc. v. Public Service Comm'n</u> , 534 N.W.2d 587 (N.D. 1995)	52
<u>City of Dickinson v. Thress</u> , 290 N.W. 653, 657 (N.D. 1940)	49
<u>Clarys v. Ford Motor Co.</u> , 592 N.W.2d 573, 1999 N.D. 72	52
<u>Clausnitzer v. Tesoro Refining &amp; Marketing, Co.</u> , 820 N.W.2d 665 2012 N.D. 172	27
<u>Ebach v. Ralston</u> , 469 N.W.2d 801 (N.D. 1991)	37
<u>Effertz v. North Dakota Workers Compensation Bureau</u> , 525 N.W.2d 691 (N.D. 1994)	52
<u>Eklund v. Eklund</u> , 538 N.W.2d 182 (N.D. 1995)	52
<u>Farmers Union Oil Co. of Garrison v. Smetana</u> , 764 N.W.2d 665, 2009 N.D. 74	23, 58
<u>Hale v. Ward County</u> , 818 N.W.2d 697, 2012 N.D. 144	23
<u>Hoffman v. North Dakota Workers Compensation Bureau</u> , 651 N.W.2d 601 2002 N.D. 138	52
<u>In re Township 143 North, Range 55 West, Cass County</u> , 183 N.W.2d 520 (N.D. 1971)	48
<u>Kavaney Realtor and Developer, Inc. v. Travelers Insurance Co.</u> , 501 N.W. 2d 335 (N.D. 1993)	32
<u>Lapland v. Stearns</u> , 54 N.W.2d 748 (N.D. 1952)	52
<u>Little v. Tracy</u> , 497 N.W.2d 700 (N.D. 1993)	48
<u>North Dakota State Water Com'n v. Board of Managers</u> , 332 N.W.2d 254 (N.D. 1983)	30, 41
<u>Olson v. City of Garrison</u> , 539 N.W.2d 663 (N.D. 1995)	53
<u>Reed v. University of North Dakota</u> , 589 N.W.2d 880, 1999 N.D. 25	38
<u>Rogas v. Workforce Safety &amp; Ins.</u> 723 N.W. 2d 403, 2006 N.D. 221	37
<u>Sanderson v. Walsh County</u> , 712 N.W.2d 842, 2006 N.D. 83	49
<u>Shiek v. North Dakota Workers Compensation Bureau</u> , 582 N.W.2d 639 1998 N.D. 139	27
<u>State v. Brown</u> , 771 N.W.2d 267, 2009 N.D. 150	38
<u>State ex. rel. Kjelden v. Horne</u> , 98 N.W.2d 150 (N.D. 1959)	52
<u>Walstad v. Dawson</u> , 252 N.W. 64 (N.D. 1934)	55
<u>Zueger v. North Dakota Workers Compensation Bureau</u> , 584 N.W.2d 530 1998 N.D. 175	38, 46, 49

N.D. Att’y Gen. Op. No. 79-294 (July 11, 1979)	54
N.D. Att’y Gen. Op. No. 97-F-09 (Oct. 17, 1997)	55

**Other Authority**

N.D. Admin. Code § 89-05-01-07	41
N.D. Admin. Code § 89-05-01-09	41
N.D. Cent. Code. § 11-09.1-05(5)	38
N.D. Cent. Code § 23-26-02(10)	31
N.D. Cent. Code § 24-03-07	41
N.D. Cent. Code § 24-06-11	41
N.D. Cent. Code § 32-03.2-02	38
N.D. Cent. Code § 40-22-01	24, 25, 28, 33, 55, 56
N.D. Cent. Code § 40-22-01(1)	21, 22, 25, 26, 27, 29, 34, 40, 46, 48, 50, 54, 58, 64
N.D. Cent. Code §40-22-01(2)	24
N.D. Cent. Code § 40-22-15	21, 22, 25
N.D. Cent. Code § 61-07-16	41
N.D. Cent. Code § 61-12-47	41
N.D. Cent. Code § 61-16.1-02(2)	30
N.D. Cent. Code § 61-16.1-09.1	41
N.D. Cent. Code § 61-16.1-51	41
N.D. Cent. Code § 61-16.1-61	41
N.D. Cent. Code § 61-21-01(4)	30
N.D. Cent. Code § 61-21-12	43
N.D. Cent. Code § 61-21-13	43
N.D. Cent. Code § 61-21-18	43
N.D. Cent. Code § 61-21-20	43
N.D. Cent. Code § 61-21-22	43
N.D. Cent. Code § 61-28-02(12)	32
N.D. Cent. Code § 61-32-03.1	39
N.D. Cent. Code § 65-05-28(4)	38
N.D. Cent Code §65-05-33	38
47 N.D. L. REV. 471 (1971)	30
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993)	33
MERRIAM WEBSTER’S DICTIONARY OF LAW (1996)	33
RED RIVER BASIN BOARD, INVENTORY TEAM REPORT ON DRAINAGE 2 (Sept. 2000)	30

## STATEMENT OF THE ISSUE

**Issue 1:** The lower court erred in ruling that the repairs to Cass County Drain No. 10 qualify as a water or sewer improvement pursuant to N.D. Cent. Code § 40-22-01(1), and therefore, a resolution of necessity was not required under N.D. Cent. Code § 40-22-15.

1. **Statement of the Case**

2. This matter came before the District Court on the City of Fargo's (City) Motion for Summary Judgment. Oral arguments were held and the Court granted the Motion. Earlier in the litigation, the City had moved for judgment on the pleadings and to dismiss the case for failure to state a claim. The Court granted the motion and an appeal followed, this Court reversed and remanded the case for trial. Appendix P118.

3. Notice of Appeal was timely filed by the Plaintiff on May 3, 2016.

4. **Statement of the Facts**

5. Nandan, LLP (Nandan) owns Lots 1 and 2 of Block 1, less South 140 feet of the West 150 feet of Lot 2 and less the easterly 100 feet of the westerly 250 feet of the Southerly 140 feet of Block 1, of TBL Subdivision, City of Fargo, Cass County, North Dakota, a/k/a 4104 32 Street North, Fargo, ND. Appendix P22 ¶3.

6. On May 31, 2012, a landslide occurred along 32<sup>nd</sup> Street North adjacent to the Nandan property. Appendix P45 ¶2. This landslide occurred along Drain No. 10. Id. at ¶3. The landslide damaged Drain No. 10, 32<sup>nd</sup> Street North, and adjacent water and sewer lines. Id. at ¶13.

7. Drain No. 10 is owned, operated, and maintained by the Southeast Cass Water Resource District. Appendix P9. The road and adjacent water and sewer lines are owned by the City. Id.

8. Nandan received a Notice from the City dated July 18, 2013 stating: “The City of Fargo has created Improvement District 6237 to fund a portion of the local share of a project that would provide for drain, water main and sanitary sewer repairs on a portion of Cass County Drain No. 10 No. 10 North of Cass County Road 20.” Appendix P34. The only property located in the Assessment District was Nandan’s property, and it would bear the entirety of the City’s contribution to the project. Appendix P35.
9. The Agenda for the Fargo City Commission meeting on July 22, 2013, included in its Consent Agenda at item “ff” for the creation of Improvement District 6237. Appendix P36. The background information that was attached for Item “ff”, Improvement District 6237 of the July 22, 2013 Consent Agenda was provided by the City in its Reply Memorandum in Support of Motion to Dismiss. Appendix P78. The packet included a Cover Sheet which showed a checklist associated with 2013 Cass County Drain No. 10 Channel Repairs for Improvement District 6237. Appendix P89. This checklist has a line item for “Adopt Resolution of Necessity,” with the letters N/A instead of an x like all of the other line items on the Cover Sheet. Id. The next page of the packet was entitled “Report of Action- Public Works Projects Evaluation Committee.” Appendix P90. These notes show the committee reviewed the “proposed alternatives for completing a slide repair project on Drain

10. Id. In 2012 the drain slope on the east side failed. Id. The failure took a city road and sewer infrastructure with it.” Id. The Committee notes go on to discuss the proposed repair alternatives. Id. The notes state: “However in order to be able to bid the project within this construction season South East Cass [Water Resource District] needs concurrence from the City on the preferred alternative so that they can begin the design.” Id. The Committee notes go on to state that the Committee voted to recommend approval of the installation of two 10x14 box culverts as the preferred slide repair method. Id.

10. The Engineer’s Report 2013 Cass County Drain No. 10 Channel Repairs Improvement District No. 6237 outlined the Nature and Scope of the Improvement District as well as the purpose as follows:

**Nature and Scope**

This Improvement District is for the reconstruction of Drain No. 10 and adjacent water main, sewer main, and 32<sup>nd</sup> Street North. The purpose of the project is to repair the damage caused to this infrastructure from a deep rotational failure that caused uplifting of the drain bottom, shifting of 32<sup>nd</sup> Street North, and damage to buried utilities. ...

**Purpose**

This project is intended to restore the function of Drain 10 where the geotechnical failure has occurred and repair 32<sup>nd</sup> Street North and the affected utilities within the road corridor.

Appendix P21.



The report went on to provide the cost of the project and how the project would be funded with \$600,000 from the City of Fargo Special Assessment and the remaining \$700,000 from the Southeast Cass Water Resource District. Id. The next page provided the legal description and location of Improvement District No. 6237, which only included Nandan's property. Id. The Report showed a map of the Improvement District. Appendix P17.

11. On Monday, July 22, 2013, the following action was taken at the regular meeting of the Board of City Commissioners for the City, "2013 Cass County Drain No. 10 Channel Repairs Improvement District No. 6237 (Drain No. 10 North of Cass County 20)." Appendix P84. Commissioner Mahoney moved that the following action be taken in connection with the Improvement District:

- A resolution was adopted creating Improvement District No. 6237 comprising of Lots 1 and 2, inclusive, Block 1 of the TBL Subdivision.
- There was further resolution requesting a report estimate of cost from the City Engineer for Improvement District No. 6237.
- There was an order of plans and specifications for Improvement District No. 6237.
- There was a resolution approving the Plans and Specification and Engineer's Report prepared by the City Engineer for Improvement District No. 6237.
- There was a direction of the City Engineer to call for bids for Improvement District No. 6237.

Id.

12. The City then published an advertisement for bids for “2013 Cass County Drain No. 10 Channel Repairs Improvement District No. 6237.” Appendix P32. That advertisement also gave notice of creation of District No. 6237 and stated it was “for the construction of 2013 Cass County Drain No. 10 Channel Repairs, Improvement District No. 6237 on the following: Drain 10 and 32<sup>nd</sup> Street North.” Id. The advertisement was published on August 5, 12, and 19, 2013. Id.
13. On August 6, 2013, the City entered into a Joint Powers Agreement with Southeast Cass Water District (District) Appendix P9. The Agreement provided that the purpose was to provide for repairs necessitated by the May 2012 landslide which resulted in significant damages to Drain No. 10, 32<sup>nd</sup> Street, and to water and sewer infrastructure. Id. Under the Joint Powers Agreement, the District’s obligations were to procure consultants regarding project development, and design (including plans and specifications), cost estimating, permit document development, and environmental assessment support; design the project in cooperation with the City, and subject to final approval by both the City and the District; and levy an annual maintenance levy against all properties and political subdivisions within the Drain 10 assessment district, among other enumerated items. Id. The City was to assist in the design, provide

engineering support, design approval, advertise for bids and enter into a construction contract for construction of the project, construct the Project, in accordance with the final design approved jointly by the City and the District; and if deemed appropriate by the City regarding the City's financing and funding obligations under the Agreement, conduct the requisite proceedings to create a special assessment district regarding the Project in accordance with the applicable North Dakota law. Id.

14. Border States delivered a Protest to Special Assessment District No. 6237 to the City on August 26, 2013. Appendix P33. In a letter dated August 28, 2013, the City Engineer acknowledged receipt of the protest from Border States Paving, but stated it determined the Improvement District was not subject to protest. Appendix P91. The letter went on to recommend the contractor to which the contract should be awarded. Id.
15. On September 3, 2013, the City Commission received bids for the Improvement District. Appendix P88. There was no mention that the contract constitutes a water or sewer improvement. Appendix P40. The minutes do not indicate that the Board of City Commissioners considered the Protest of the Plaintiffs to the Improvement District. Appendix P88. The City reviewed the bids for the Project and awarded the bid to Industrial Builders, Inc. in the amount of \$906,960.00. Appendix P87.

16. The City's website lists information regarding special assessments against the subject property. Appendix P78. The special assessments list assessment #6237 and classify it as "streets." Appendix P81. When you click on assessment #6237 to see the actual assessment information details it gives the following description "repair drain slope repair." Appendix P82.

17. Randall Pope, a professional engineer with Interstate Engineering, examined the project documents as a part of his review of this project. Appendix P92.

18. Randall Pope's report indicated that the items of work in the project consisted of Water Main Repair, Sanitary Sewer Main Repair and repairs to 32<sup>nd</sup> Street North and Reconstruction of Drain No. 10. Id. The repairs were made because of the slide on Drain No. 10. Id.

19. It is Mr. Pope's opinion that this project was a reconstruction of Drain No. 10 to reduce future chances of slide failure of the slope in the area. Id. The Water Main, Sanitary Sewer Main and 32<sup>nd</sup> Street north repairs were only minor and incidental to the improvements to Drain No. 10. Id.

20. **ARGUMENT**

21. **Issue 1: The lower court erred in ruling that the repairs to Cass County Drain No. 10 qualify as a water or sewer improvement**

**pursuant to N.D. Cent. Code § 40-22-01(1), and therefore, a resolution of necessity was not required under N.D. Cent. Code § 40-22-15.**

22. In this case, Nandan alleges that the district court erred in granting summary judgment to Defendant and Appellee, City of Fargo. Specifically, Nandan alleges that the district court erred in ruling that the repairs to Cass County Drain No. 10 qualify as a water or sewer improvement pursuant to N.D. Cent. Code § 40-22-01(1), and therefore, a resolution of necessity was not required under N.D. Cent. Code § 40-22-15.

23. Whether the district court properly granted summary judgment is a question of law that the North Dakota Supreme Court reviews de novo on the entire record. See Hale v. Ward County, 818 N.W.2d 697, 702 (N.D. 2012). The Court must decide “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.” Id. (quoting Farmers Union Oil Co. of Garrison v. Smetana, 764 N.W.2d 665, ¶ 8 (N.D. 2009)). In addition, the Court must “view the evidence in the light most favorable to the opposing party and give the opposing party the benefit of all favorable inferences which can be reasonably drawn from the record.” Id.

24. Per the direction of the Supreme Court:

*On remand, the district court must analyze N.D. Cent. Code § 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. 6327 were incidental to the water and sewer repairs or whether they were a type of improvement described in N.D. Cent. Code § 40-22-01(2) through (5). Appendix P110 (emphasis added).*

25. For the reasons set forth below, and as a matter of law, the repairs to Drain No. 10 (i.e. the “other repairs”) cannot be considered “incidental” to the sewer and water repairs.<sup>1</sup> In addition there is a

---

<sup>1</sup> In its April 13, 2015 Memorandum Opinion and Order, the district court incorrectly stated that “the issue of Drain 10 was not remanded to this Court.” Appendix P103. This statement is completely contrary to the Supreme Court’s Order. In describing the issues in this case, the Supreme Court’s Order described a total of four repairs at issue, one of which was the repair to Drain No. 10. Indeed, the Court started its Order by describing the four repairs at issue: “The landslide ruptured a water main and storm sewer [repair 1 and repair 2], and damaged 32<sup>nd</sup> Street North [repair 3] and Drain No. 10 [repair 4].” Appendix P110; *see also Id.* at ¶5 (“This Improvement District is for the reconstruction of Drain No. 10 and adjacent water main, sewer main, and 32nd Street North.”). The Court went on to describe Drain No. 10 as one of the “other items” and “other repairs” (i.e. not a repair to the water main or sewer main):

According to the statements in the exhibits attached to the amended complaint, the improvement district included street repairs, utilities and *other items* not specifically included in the description of a water or sewer improvement under N.D.C.C. § 40-22-01(1) (under which a resolution of necessity would not be required under N.D.C.C. § 40-22-15). It is also unknown from the pleadings whether the *other repairs* were incidental to the water and sewer repairs. See N.D.C.C. § 40-22-01 (stating a municipality may include items of work and materials which in its judgment are necessary or reasonably incidental to the completion of an improvement project). If the *other repairs* were incidental to the

dispute of fact that precludes judgment as a matter of law. As such, Appellee was not and is not entitled to judgment as a matter of law.

**26. Based on the plain language of N.D. Cent. Code § 40-22-01(1), Drain No. 10 is neither part of a water supply or sewerage system, nor incidental to such an improvement.**

27. In order to interpret N.D. Cent. Code § 40-22-01(1), we must first examine the plain language of the statute. As the North Dakota Supreme Court explained in Clausnitzer v. Tesoro Refining & Marketing, Co.: “In interpreting a statute, we look at the plain language of the statute and give each word its plain and ordinary meaning unless a contrary intention plainly appears.” 820 N.W.2d 665, 670 (N.D. 2012) (citations omitted); see also N.D. Cent. Code § 1-02-02 (“Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.”); Shiek v. North Dakota Workers Compensation Bureau, 582 N.W.2d 639, 643 (N.D. 1998) (“[W]e look first in ascertaining legislative intent at the words used in the statute, giving the words their ordinary, plain language meaning.”) (citations omitted). If the statutory language is

---

water and sewer repairs under N.D.C.C. § 40-22-01, a resolution declaring the improvements were necessary would not be required under N.D.C.C. § 40-22-15.

Appendix P117 ¶30 (emphasis added). Based on the above, the issue of Drain No. 10 was remanded to the district court.

“plain,” “the sole function of the courts is to *enforce it according to its terms*. Caminetti v. U.S., 242 U.S. 470, 485 (1917) (citations omitted) (emphasis added).

28. Turning to the statute at issue here, N.D. Cent. Code § 40-22-01 states:

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.

\*\*\*

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.

29. When you examine the meaning attached to the terms used in N.D. Cent.

Code § 40-22-01(1), it is clear that a “drain” has nothing to do with a "water supply system" or a "sewerage system."



30. A "drain" is defined as: "[A]ny natural watercourse opened, or proposed to be opened, and improved *for drainage* and any artificial drains of any nature or description constructed *for that purpose*, including dikes and appurtenant works." N.D. Cent. Code § 61-21-01(4) (emphasis added); *see also* N.D. Cent. Code § 61-16.1-02(2) (explaining that an "Assessment drain" is constructed "for the purpose of drainage"). One purpose of a drainage system is to "control flooding." See North Dakota State Water Com'n v. Board of Managers, 332 N.W.2d 254, 256 (N.D. 1983); see also Barr v. Barnes County Bd. of County Com'rs, 194 N.W.2d 744, 746-47 (N.D. 1972) (the failure to establish a legal drain under N.D. Cent. Code § 61-21 resulted in flooding). This explains why the federal government has assisted North Dakota on drainage projects "under the Watershed Protection and Flood Prevention Act." North Dakota State Water Com'n, 332 N.W.2d at 259; see also Beck & Bohlman, Drainage Law in North Dakota: An Overview, 47 N.D. L. REV. 471 (1971). The other purpose is to "enable maximum [agricultural] production." See RED RIVER BASIN BOARD, INVENTORY TEAM REPORT ON DRAINAGE 2 (Sept. 2000), available at [http://www.redriverbasincommission.org/Drainage\\_Report.PDF](http://www.redriverbasincommission.org/Drainage_Report.PDF); see also US ARMY CORPS OF ENGINEERS, FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT FINAL FEASIBILITY REPORT AND

ENVIRONMENTAL IMPACT STATEMENT 26 (July 2011), available at [http://www.fmdiversion.com/wp-content/uploads/2015/03/Main.](http://www.fmdiversion.com/wp-content/uploads/2015/03/Main.Report_with_Attachments.pdf)

Report\_with\_Attachments.pdf. (“In North Dakota, drains and drain outlets are constructed to remove excess summer rainfall from cropland to prevent crop damage.”)

31. In contrast to a “drain,” a “water supply system” does not provide “drainage,” “flood protection,” or assistance for “agricultural production” or “prevent crop damage”. They serve entirely different purposes. A “water supply system” is defined as: “[T]he system of pipes, structures, and facilities through which a public water supply is obtained, treated, and sold or distributed for human consumption or household use.” N.D. Cent. Code § 23-26-02(10).

32. Likewise, a “sewerage system” does not provide “drainage,” “flood protection,” “assistance for agricultural production.”, or “prevent crop damage.” They too serve entirely different purposes. A “sewerage system” is defined as: “[P]ipelines or conduits, pumping stations, and force mains, and all other structures, devices, appurtenances, and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal.” N.D. Cent. Code § 61-28-02(12).

33. It is also important to note that the term “drain” does not appear anywhere in N.D. Cent. Code § 40-22-01, and, while the Legislature included a

catchall for all items of work that are “reasonably incidental” to the construction of a water supply system or sewerage system, the term “incidental” is defined as “subordinate” or “secondary” in importance. See MERRIAM WEBSTER’S DICTIONARY OF LAW (1996); see also Kavaney Realtor and Developer, Inc. v. Travelers Insurance Co., 501 N.W. 2d 335, 338 (N.D. 1993) (defining “incidental” as “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”) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993)). Since the cost of the repairs to Drain No. 10 constituted 91.56% of the total cost of the Project (as compared to only 8.46% for the cost of the water and sewer repairs), Drain No. 10 can hardly be considered “incidental,” “subordinate,” or “secondary” to the water or sewer repairs. Appendix P77. To the contrary, it is the repairs to the water and sewer lines that are “incidental” to the repairs to Drain No. 10. Appendix P97 ¶5.

34. In summary, based on the plain language of N.D. Cent. Code § 40-22-01(1), as well as the meaning attached to terms used therein, Drain No. 10 is neither part of a water supply or sewerage system, nor “incidental” to the improvement of such systems.

35. **In order to harmonize N.D. Cent. Code § 40-22-01(1) with the other North Dakota statutes that concern “drains” and their related “assessments,” N.D. Cent. Code § 40-22-01(1) cannot be interpreted to include drains.**

36. In interpreting statutes, the Court is required to fulfill the object and intent of the legislature and to give meaningful effect to two statutes that appear to proscribe the same conduct.

37. In addition to the “plain language” rule discussed above, the rules of statutory interpretation also require the Court to give meaningful effect to statutes that appear to proscribe the same conduct. As the North Dakota Supreme Court explained in Ebach v. Ralston, 469 N.W.2d 801, 803-04 (N.D. 1991):

*Our duty in interpreting statutes is to fulfill the object and intent of the legislature. Several rules of construction guide our inquiry into legislative intent. Statutes must be construed as a whole to determine the intent of the legislature, deriving that intent by taking and comparing every section and subsection as a part of a whole. We interpret statutes in context . . . and, in particular, read a statute in relation to others on the same subject in order to give meaning to each statute without rendering one or the other useless. Our goal is to harmonize statutes and to avoid conflicts.*  
(citations omitted) (emphasis added).

See also Rojas v. Workforce Safety and Ins., 723 N.W.2d 403, 406 (N.D. 2006) (explaining that court must “interpret statutes in context and in relation to others on the same subject to give meaning to each without

rendering one or the other useless”).

38. State v. Brown, 771 N.W.2d 267 (N.D. 2009), is one example of a case where the North Dakota Supreme Court interpreted statutes that relate to the same subject matter. In State v. Brown, the North Dakota Supreme Court was required to interpret the language of N.D. Cent. Code. § 11-09.1-05(5), which provides that a county may:

Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and civil and criminal penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.

Id. at 271-72.

The defendant argued that the Court should interpret the second sentence of this statute broadly, and preclude any action by a county if there is a state law or rule addressing the same subject matter. Id. at 272. Relying on the rules of statutory interpretation detailed above, the Court held:

We must therefore construe the language of the second sentence of N.D. Cent. Code § 11–09.1–05(5) in the context of the overall statutory scheme, including the provisions in N.D. Cent. Code ch. 11–09.1 which give broad authority to a home rule county to enact ordinances and which direct that such ordinances will generally supersede any conflicting state law. In doing so, *we conclude that the broad interpretation of N.D. Cent. Code § 11–09.1–05(5) proposed by [the defendant] would lead to an absurd result, and would render other provisions in N.D. Cent. Code ch. 11–*

*09.1 meaningless.*  
Id. at 273 (emphasis added).

See also Reed v. University of North Dakota, 589 N.W.2d 880, 888-89 (N.D. 1999) (declining to broadly construe the “in concert” language of N.D. Cent. Code § 32–03.2–02 to include concurrent negligence, because that construction would effectively render meaningless the general rule for several liability); Zueger v. North Dakota Workers Compensation Bureau, 584 N.W.2d 530, 535 (N.D. 1998) (“We must construe N.D. Cent. Code §§ 65–05–28(4) and 65–05–33 together and harmonize them, giving meaning to each without rendering either largely meaningless. If we adopted the interpretation urged by the Bureau, construing a “statement” under N.D. Cent. Code § 65–05–33(1) to include nonverbal conduct on an FCE, it would render N.D. Cent. Code § 65–05–28(4) largely meaningless.”) (citations omitted).

39. N.D. Cent. Code § 61-21 includes a detailed statutory scheme regarding drains and the related rights and obligations of any assessments pertaining to drains.

40. Applying the above rules to N.D. Cent. Code § 40-22-01(1), the Court must examine whether there are any other North Dakota statutes that pertain to drains and related assessments with which N.D. Cent. Code § 40-22-01(1) must be harmonized.

41. “North Dakota's drainage law has existed since 1883, Laws of Dakota, Ch. 75 (1883), and has since been the subject of much legislative activity.” North Dakota State Water Com'n v. Board of Managers, 332 N.W.2d 254, 259 (N.D. 1983)-see also US ARMY CORPS OF ENGINEERS, FARGO-MOORHEAD METROPOLITAN AREA FLOOD RISK MANAGEMENT FINAL FEASIBILITY REPORT AND ENVIRONMENTAL IMPACT STATEMENT 8 (July 2011), available at [http://www.fmdiversion.com/wpcontent/uploads/2015/03/Main\\_Report\\_with\\_Attachments.pdf](http://www.fmdiversion.com/wpcontent/uploads/2015/03/Main_Report_with_Attachments.pdf). (“In North Dakota, legislation was passed in 1893 that provided for the instituting of drain commission boards to construct and maintain drainage structures.”). Indeed, North Dakota has a myriad of statutes that address both “drains” and related “assessments.” *See, e.g.* N.D. Cent. Code § 24-03-07 (entitled “Drains across state highways”); N.D. Cent. Code § 24-06-11 (entitled “Construction of crossings over ditches, drains, and roads”); N.D. Cent. Code § 61-07-16 (permitting irrigation districts to levy special assessments for the drainage of lands); N.D. Cent. Code § 61-12-47 (permitting the board of flood irrigation to levy a special tax to procure property drainage); N.D. Cent. Code §§ 61-16.1-09.1, 61-16.1-42 through 61-16.1-51, 61-16.1-61, 61-16.1-62 (addressing the operation of water resource districts, drains, and related assessments); N.D. Cent. Code §§ 61-21-01 to -76 (addressing the rights and obligations associated

with assessments projects); N.D. Cent. Code §§ 61-32-03.1 (addressing drainage permits); N.D. Admin. Code §§ 89-05-01-07 -09 (addressing dikes across natural waterways and legal drains and the need to locate legal drains for applications to construct dikes).

42. N.D. Cent. Code §§ 61-21-01 to-76 entitled “Drainage Assessment Projects,” is particularly relevant to the instant case and the proper interpretation of N.D. Cent. Code § 40-22-01(1). N.D. Cent. Code § 61-21, et. seq. it includes a detailed statutory scheme regarding “drains” and the related rights and obligations of any assessments pertaining to drains, and Drain No. 10 is a “drain” as defined under this statute. Indeed, Drain No. 10 is not only a “legal assessment drain” owned, operated, and maintained by the Cass County Joint Water Resource Board (i.e. a “Board” as defined in N.D. Cent. Code § 61-21-1(2)), but it is a “natural watercourse opened, or proposed to be opened, and improved for drainage and any artificial drains of any nature or description constructed for that purpose, including dikes and appurtenant works” (i.e. a “Drain” as defined in N.D. Cent. Code § 61-21-1(2)). Appendix P9. See The Joint Powers Agreement wherein the Board and the City acknowledge that the District owns, operates and maintains Drain No. 10. As such Drain No. 10 falls within the provisions of N.D. Cent. Code § 61-21.



43. Per N.D. Cent. Code §§ 61-21-12 and -15, the board of managers of water resource district the Board has an obligation to make a "resolution" and an "order" to authorize "drain" construction. N.D. Cent. Code §§ 61-21-13 to -22, contains a very detailed scheme for an affected landowner to challenge proposed "drain" construction. Per N.D. Cent. Code §§ 61-21-13 and -14, affected landowners have the *right* to protest the proposed "drain" construction at a hearing. If the Board issues an "order" establishing the drain, then affected landowners have the *right* to "appeal to the district court" pursuant to N.D. Cent. Code § 61-21-18. After the Board determines the proposed assessment cost pursuant to N.D. Cent. Code § 61-21-20, affected landowners then have the *right* to protest the determination at a hearing pursuant to N.D. Cent. Code § 61-21-22. After this hearing, affected landowners may also have the *right* to "appeal to the state engineer" pursuant to N.D. Cent. Code § 61-21-22.
44. Based on the above, N.D. Cent. Code § 61-21, et. seq. provides both rights and obligations with regard to the construction of drains generally, and Drain No.10 specifically. Indeed, as explained above, this statute provides an *obligation* for the Board to properly authorize drain construction, and thereafter provides affected landowners with *four rights* to challenge such construction. If this statute's procedural requirements are not complied

with, the drain construction is unlawful. See Barr v. Barnes County Board of County Com'rs, 194 N.W. 2d 744, 747, 749 (N.D. 1972).

45. To conclude that Drain No. 10 is a water or sewer improvement as described in N.D. Cent. Code § 40-22-01(1) would render the provisions of N.D. Cent. Code § 61-21 meaningless.
46. There should be no dispute that: 1) Drain No. 10 is a “drain;” 2) N.D. Cent. Code § 61-21 includes detailed provisions pertaining to drains and related assessments; and 3) N.D. Cent. Code § 61-21 provides *unqualified obligations and rights* pertaining to drain construction. Since N.D. Cent. Code § 61-21 does not include an *exception* to these *obligations and rights* if a drain is considered part of a sewer or water improvement, the Court must “harmonize” the language of N.D. Cent. Code § 40-22-01(1) and N.D. Cent. Code § 61-21, “giving meaning to each without rendering either largely meaningless.” See Zueger v. North Dakota Workers Compensation Bureau, 584 N.W.2d 530, 535 (N.D. 1998). Thus, even if the City directs storm water to Drain No. 10 as a matter of *fact*, as a matter of *law*, the Court cannot conclude that Drain No. 10 is a water or sewer improvement as described in N.D. Cent. Code § 40-22-01(1). To do so would render the *obligations and rights* of N.D. Cent. Code § 61-21. “meaningless” because the Board would not have the statutory *obligation* to properly authorize drain construction, and affected landowners would

no longer have the statutory *rights* to challenge the construction under N.D. Cent. Code § 61-21, et seq.<sup>2</sup>

**47. The Legislature’s exclusion of the term “drain” from the express language of N.D. Cent Code § 40-22-01(1) must be interpreted to mean that the legislature intended to exclude drains. N.D. Cent. Code § 40-22-01(1).**

48. It is also important to address the Legislature’s exclusion of the term “drain” from the express language of N.D. Cent Code § 40-22-01(1). As explained in Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993):

Generally, the law is what the Legislature says, not what is unsaid. The Bureau recognizes that “[t]here exists a principle of statutory interpretation that the mention of one thing implies the exclusion of another,” citing In re Township 143 North, Range 55 West, Cass County, 183 N.W.2d 520 (N.D. 1971).

49. It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that

---

<sup>2</sup> To conclude that Drain No. 10 is a water or sewer improvement as described in N.D. Cent. Code § 40-22-01(1) would render the following rights and obligations of N.D. Cent. Code § 61-21 et seq. meaningless: 1) the “resolution” and “order” required by N.D. Cent. Code §§ 61-21-12 and -15; 2) the affected landowner’s right to protest the proposed drain construction at a hearing pursuant to N.D. Cent. Code §§ 61-21-13 and -14; 3) the affected landowner’s right to appeal the “order” establishing the drain pursuant to N.D. Cent. Code § 61-21-18; 4) the affected landowners right to protest the assessment cost at a hearing pursuant to N.D. Cent. Code § 61-21-22; and 5) the affected landowners right to “appeal to the state engineer” pursuant to N.D. Cent. Code § 61-21-22.

it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the “court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.”

City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940) (citations omitted).

See also Sanderson v. Walsh County, 712 N.W.2d 842, 848 (N.D. 2006)

(“In construing statutes and rules, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of another.”)

(citing Zueger v. North Dakota Workers Compensation Bureau, 584 N.W.2d 530 (N.D. 1998)).

50. Applying this cannon of statutory interpretation to N.D. Cent. Code § 40-22-01(1), the Legislature included a list of items that are properly considered to be “used or useful for a complete water supply and sewerage system.” The Legislature expressly referenced “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.” N.D. Cent. Code § 40-22-01(1). Because the term “drain” is not included among this

list, it must be presumed that the Legislature *intended* to exclude drains from N.D. Cent. Code § 40-22-01(1), and to instead address drains under N.D. Cent. Code § 61-21, aptly titled "Drainage Assessment Projects." The Court must therefore address Drain #10 under N.D. Cent. Code § 40-22-01(1).

**51. At the time N.D. Cent. Code § 40-22-01(1) was enacted, the Legislature is presumed to have known the construction of its statutes by the executive and judicial branches, and therefore intended that N.D. Cent. Code § 61-21 would continue to control assessments as they relate to drains.**

52. The final canon of statutory interpretation that proves that drain construction is not included in N.D. Cent. Code § 40-22-01(1) is the presumption regarding the past construction of statutes by the executive and judicial branches. In North Dakota, "the legislature is presumed to know the construction of its statutes by the executive and judicial branches, and the failure to amend the statute indicates legislative acquiescence in that construction." Hoffman v. North Dakota Workers Compensation Bureau, 651 N.W.2d 601, 611 (N.D. 2002); see also State ex. rel. Kjelden v. Horne, 98 N.W.2d 150, 154 (N.D. 1959); Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 632 N.W.2d 407, 417 (N.D. 2001); Western Nat'l Mut. Ins. Co. v. University of North Dakota,

643 N.W.2d 4 (N.D. 2002); Clarys v. Ford Motor Co., 592 N.W.2d 573 (1999); Effertz v. North Dakota Workers Compensation Bureau, 525 N.W.2d 691, 693 (N.D. 1994); Eklund v. Eklund, 538 N.W.2d 182 (N.D. 1995); Capital Electric Coop, Inc. v. Public Service Comm'n, 534 N.W.2d 587 (N.D. 1995); Lapland v. Stearns, 54 N.W.2d 748 753 (N.D. 1952).

53. With regard to N.D. Cent. Code § 40-22-01, before this statute was enacted, the court in Braaten v. Brenna, 63 N.W.2d 302, 303 (N.D. 1954), held that N.D. Cent. Code § 61-21 controlled a challenge to the proposed assessment of a drain. See also Olson v. City of Garrison, 539 N.W.2d 663, 669 (N.D. 1995) (noting the City's authority to operate water distribution systems and other utilities, and explaining that "the authority in Chapter 40-22 to levy special assessments for those purposes includes only water and sewer systems").

54. The North Dakota executive branch, specifically the Attorney General, reached the same result before N.D. Cent. Code § 40-22-01(1) was enacted. The Attorney General explained that challenges to the proposed assessment for a legal drain (i.e. "seeking a reduction in assessment") should be addressed under N.D. Cent. Code § 61-21 (which specifically addresses "drains"). See N.D. Att'y Gen. Op. No. 79-294 (July 11, 1979).

55. Notably, the legislature did not amend N.D. Cent. Code § 61-21 when it enacted N.D. Cent. Code § 40-22-01. It is therefore proper for the Court

to presume that the Legislature continued to believe N.D. Cent. Code § 61-21 controlled both the required governmental *obligations* regarding drain construction and the corresponding *rights* of landowners to challenge the governmental decisions. If the Legislature wanted to change either the government's obligations or the landowners' rights, it would have amended N.D. Cent. Code § 61-21 to include an exception for drains that are considered part of a sewer or water system under N.D. Cent. Code § 40-22-01(1). See N.D. Att'y Gen. Op. No. 97-F-09 (Oct. 17, 1997) (the Attorney General stated that landowners have a justifiable "expectation that existing methods of assessment will continue") (citing Walstad v. Dawson, 252 N.W. 64, 69 (N.D. 1934)). The Legislature never made such an amendment.<sup>3</sup>

56. Based on the above, there should be no dispute that, at the time N.D. Cent. Code § 40-22-01 was enacted, the Legislature knew the construction of its statutes by the executive and judicial branches, and therefore intended that N.D. Cent. Code § 61-21 would continue to control assessments as they relate to drains.

---

<sup>3</sup> Notably, the Legislature has not proposed any amendments to N.D. Cent. Code § 61-21, and the only proposed amendment the Legislature has made is to N.D. Cent. Code § 40-22-01. The Legislature has sought to *limit* the scope of the statute by *eliminating* the language that currently allows for work to be included that is "necessary or reasonably incidental to." *See* H.R. 1322, 64th Leg. (N.D. 2015).

**57. There is a genuine issue of material fact whether Cass County Drain No. 10 is part of the City of Fargo's Storm Sewer System.**

58. In addition to the above rules of statutory interpretation (which prove, as a matter of law, that Drain No. 10 does not and cannot constitute a water or sewer improvement as described N.D. Cent. Code § 40-22-01(1)), there is also a genuine issue of material fact that precluded the district court from granting Appellee's motion for summary judgment. As noted above, when ruling on a motion for summary judgment the Court must decide "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." Farmers Union Oil Co. of Garrison v. Smetana, 764 N.W.2d 665, ¶ 8 (N.D. 2009).

59. In granting Appellee's motion for summary judgment, the District Court stated:

It is undisputed that Cass County Drain 10 is part of the City of Fargo's storm sewer system. The city directs storm water through culverts, pipes and channels to Drain 10 through which the storm water is then directed north and east of the Red River. In fact, Nandan concedes that Drain 10 is a water and sewer improvement under this definition.  
Appendix P98 ¶5.

60. The record does not support this statement. First, while the City may direct its storm water to Drain No. 10, that fact alone does not mean that Drain No. 10 is a "part of" the City's storm sewer system. The District



Court's argument is akin to saying that a homeowner's local wastewater treatment plant is part of the homeowner's bathroom because the wastewater from the homeowner's shower and toilet is directed to the wastewater treatment plan. Here, Drain No. 10 has other purposes besides collecting and directing the City's storm water. Indeed, the City's attorney conceded during oral arguments that "Drain 10 . . . drains the entire watershed" and not just the City's storm water. Appendix P108.

61. Moreover, Appellant did not "concede" this fact. Neither the transcript of proceedings on Appellee's Motion for Summary Judgment, nor any of the relevant filings indicates that Appellant conceded that Drain No. 10 is a part of the City's storm water system. To the contrary, Appellants' Memorandum in Opposition to the Motion for Summary Judgment *unequivocally* states: "Contrary to the position the City of Fargo takes in its brief, Cass County Drain No. 10 is not part of the City of Fargo's storm sewer system." Docket 104 ¶19. The only concession Appellant made was stating: "If the City owned it [(i.e. Drain No. 10)], maybe it would [fall within 40-22-01(1)]. But the City doesn't own this." Appendix P109 L15.

62. Based on the above, there is a genuine issue of material fact whether Cass County Drain No. 10 is part of the City of Fargo's Storm Sewer System. As such, Appellee was not entitled to summary judgment.

63.

**CONCLUSION**

64. For the reasons stated above, Nandan requests this Court determine as a matter of law: (1) that the repairs made by the City to Drain #10 do not qualify as a water of sewer improvement under N.D. Cent. Code §40-22-01(1); and/or (2) there is a genuine issue of material fact as to whether Cass County Drain No. 10 is part of the City's storm sewer system. Nandan respectfully requests this Court reverse the decision of the district court and remanded with specific instructions to enter judgment consistent with its opinion.

TURMAN & LANG, LTD.

/s/ Joseph A. Turman

JOSEPH A. TURMAN (#03128)

505 Broadway, Suite 207

P.O. Box 110

Fargo, ND 58107-0110

(701) 293-5592

[jturman@turmanlaw.com](mailto:jturman@turmanlaw.com)

Attorneys for Appellants

**65. CERTIFICATE OF COMPLIANCE**

66. The undersigned, as attorney for Appellant, Nandan, LLP and Border States Paving, Inc., and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the brief was prepared with proportional typeface (Times New Roman) and the brief, excluding the table of contents, the table citations, and certificate of compliance, does not exceed 8,000 words.

TURMAN & LANG, LTD.

/s/ Joseph A. Turman

JOSEPH A. TURMAN (#03128)

505 Broadway, Suite 207

P.O. Box 110

Fargo, ND 58107-0110

(701) 293-5592

[jturman@turmanlaw.com](mailto:jturman@turmanlaw.com)

Attorneys for Appellants

**67. CERTIFICATE OF SERVICE**

68. I hereby certify that on August 22, 2016, true and correct copies of the

Appellant's Brief was served electronically upon the following:

Ronald H. McLean  
[rmclean@serklandlaw.com](mailto:rmclean@serklandlaw.com)

Jane L. Dynes  
[jdynes@serklandlaw.com](mailto:jdynes@serklandlaw.com)

/s/ Joseph A. Turman  
Joseph A. Turman (#03128)

