20160311

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

Donald Robert Cossette, individually, and
Donald Robert Cossette and Marjorie Cossette as
Co-Trustees of the Angela R. Cossette Revocable
Living Trust Dated November 21, 2002,

Plaintiffs-Appellants

vs.

Cass County Joint Water Resource District,

Defendant-Appellee.

Supreme Court No. 20160311

Civil No. 09-2016-CV-01391
(Cass County District Court)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE
DISTRICT COURT ENTERED ON JULY 22, 2016

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN L. MARQUART

GARAAS LAW FIRM

Jonathan T. Garaas
Attorneys for Plaintiffs-Appellants
Office and Post Office Address
DeMores Office Park
1314 - 23rd Street South
Fargo, ND 58103
E-mail address: garaaslawfirm@ideaone.net
North Dakota ID # 03080
Telephone: 701-293-7211

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[¶1] **ISSUES ON APPEAL**

[¶2] Without appealing, the JOINT BOARD advances two (2) issues only peripherally involved with the six (6) issues advanced by the only appealing parties. See, Brief of Plaintiffs-Appellants, ¶s 2-7. Advancing its own peripheral issues, the JOINT BOARD fails to even address all of the LANDOWNERS' issues.

[¶3] **STATEMENT OF THE CASE**

[¶4] Without expressing dissatisfaction [N.D.R.App.P. 28(c)(3)] the JOINT BOARD fails to identify its legal basis for its claim to eminent domain authority. This is glaring in view of two (2) legal concepts that rejects such notion. The first legal principle is set forth in Hale v. State, 2012 ND 148, ¶ 13, 818 N.W.2d 684, and In re Dionne, 2013 ND 40, ¶ 11, 827 N.W.2d 555, extensively quoted in the Brief of Plaintiffs-Appellants, at ¶s 15, 16, 46, and 87, establishing that this Court should accept LANDOWNERS' alleged facts as true. The JOINT BOARD does not contest such position, nor even mention either case. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." Charolais Breeding Ranches, Ltd. V. FPC Securities Corp., 279 N.W.2d 493, 499 (Wis.Ct.App. 1979), citing State ex rel. Blank v. Gramling, 262 N.W. 614, 615 (Wis. 1935). As noted by LANDOWNERS, at ¶ 19 of the Brief of Plaintiffs-Appellants – there is no legal basis to believe eminent domain authority exists in the absence of a statutorily-mandated agreement granting such eminent domain authority – *which has not been produced.*

[¶5] The second legal principle relates to honesty – it is the expectation of every citizen that the government only speak truth. The JOINT BOARD regards its "determination ..

memorialized in the form of a Resolution of Necessity" as gospel [Appellee's Brief, ¶ 3], when *legally considered false* under Hale or Dionne, and also, *when it is factually considered both false and legally impossible*. Brief of Plaintiffs-Appellants, ¶s 30-44. The predicate document for any legal eminent domain action under N.D.C.C. Chap. 32-15 must always be a truthful resolution of governmental intentions and authority to proceed.

[¶6] **STATEMENT OF FACTS**

[¶7] The JOINT BOARD does not dispute LANDOWNERS' facts, but incredibly, asserts its own Resolution of Necessity as its sole authority source for its facts. Appellee's Brief, ¶s 7-9; App., ps. 250-262. While government(s) would like a presumption of regularity for its documents, it is disputable, and there is no known presumption of truth. N.D.C.C. § 31-11-03(15); Haugland v. City of Bismarck, 2014 ND 51, ¶ 12, 843 N.W.2d 840; Latif v. Obama,666 F.3d 746, 750 (D.C. Cir. 2011) ["The presumption of regularity–to the extent it is not rebutted–requires a court to treat the Government's record as accurate; it does not compel a determination that the record established what it is offered to prove."]. Contrary to the JOINT BOARD'S representation at ¶ 7 of its Brief, Appendix pages 250-262 do not bear out the claim that "a flood control project has been designed in conjunction with the United States Army Corps of Engineers" [only that a "Diversion Project" has been "developed by the USACE"], and, the cited Public Law 113-121 did not authorize the Diversion Project, only a final feasibility study was so authorized. App., ps. 524-526.

[¶8] **LAW AND ARGUMENT**

[¶9] **Standard of Review**

[¶10] No apparent controversy exists.

[¶11] **Background**

[¶12] The JOINT BOARD correctly points out the district court did not address the issues raised by LANDOWNERS. Appellee's Brief, ¶ 10. Instead, the district court judge let someone else do his job based upon a *subsequent* eminent domain proceeding, and so stated. LANDOWNERS tried to eliminate bifurcated proceedings. Brief of Plaintiffs-Appellants, ¶s 51-56.

[¶13] **POINT 1. The JOINT BOARD has ignored its duty to file its record with the District Court within thirty (30) days of the notice of appeal, as required under N.D.C.C. § 28-34-01.**

[¶14] The JOINT BOARD ignored its statutory duty to file its underlying record with the District Court, and now ignores this issue at the appellate level. Charolais Breeding, p. 499. Instead, the JOINT BOARD asserts irrelevant case law, and North Dakota case law that impliedly condemns, in a footnote, a local governing body's failure to file the complete record with the court. Citation to Chester v. Einarson, 34 N.W.2d 418, 427-28 (N.D. 1948) and Hector v. City of Fargo, 214 ND 53, ¶ 23, 844 N.W.2d 542 [Appellee's Brief, ¶ 14], is a red herring. Einarson involved litigants that earlier failed to pursue "an adequate remedy at law for a review of the order establishing the drain"; equity will not allow a subsequent action *provided* there was no "limit upon the review on appeal" so that the district court was not "restricted and limited to any particular question or questions .." *Id.*, ps 428-429. Hector cites Shark Bros., Inc. v. Cass County, 256 N.W.2d 701, 703-06 (N.D. 1977) as authority for avoiding bifurcated procedures. First, an appeal under N.D.C.C. § 28-34-01 no longer achieves the required predicate judicial standard announced in Einarson requiring – no "limit

upon the review on appeal" and/or the district court cannot be "restricted and limited to any particular question or questions .." The subsequent decision in Hentz v. Elma Twp. Bd. of Supervisors, 2007 ND 19, ¶ 4, 727 N.W.2d 276, as cited in Gowan v. Ward County Com'n, 2009 ND 72, ¶ 5, 764 N.W.2d 425, makes clear such standard is not met at any judicial level – "When considering an appeal from the decision of a local governing body under N.D.C.C. § 28–34–01, our scope of review is the same as the district court's and is very limited." Second, the district judge erroneously decided that COSSETTES' had no appeal, which would then ensure that they should have had an equitable remedy, which was simultaneously denied.

[¶15] At ¶ 15 of its Brief, the JOINT BOARD asserts Anderson v. Richland County Water Resource Board, 506 N.W.2d 362 (N.D. 1993) is analogous, so that the Court should "review only the appeal from the decision of the political subdivision" pursuant to N.D.C.C. § 28-34-01 – unfortunately for such argument, the 1993 Anderson decision came at a time when the Einarson *unlimited* judicial inquiry/review standard existed which was evidenced by the Supreme Court's opinion addressing multiple legal arguments [Part II - the propriety of voting on reassessments; Part III - propriety of time limits of over 30 years to reapportion benefits; Part IV - sufficiency of record created 30 years earlier; Part V - actual benefits] far beyond the appeal of a July, 1991, "order confirming the reassessments." Anderson, p. 364. Anderson's footnote #4 noting "(t)he record submitted to the district court does not appear to be complete under N.D.C.C. § 28-34-01(2) which requires (the entire file of the local governing body to be filed with the court)" is also compelling. COSSETTES did, and do object to the non-compliance; the JOINT BOARD cites Anderson without understanding its

principles – a full judicial review at each judicial level, and expectation of filing compliance (a full judicial review should require informed jurists).

[¶16] **POINT 2. COSSETTES' action for declaratory relief involves an actual, ongoing justiciable controversy, and a cumulative remedy to the relief requested in COSSETTES' appeal.**

[¶17] **A. The court first acquiring jurisdiction should retain it to the end.**

[¶18] The JOINT BOARD fails to address this issue, except to argue [Appellee's Brief, ¶ 20] that it is a completely new argument not raised at the district court so it should not be considered on appeal. The issue never existed until the district judge decided to waive his jurisdiction and get someone else to do his job. Charolais Breeding, p. 499.

[¶19] **B. LANDOWNERS were entitled to declaratory relief – their pleadings are deemed true.**

[¶20] JOINT BOARD's failure to address an issue acts to confess. Charolais Breeding, p. 499.

[¶21] **1. Basic Requirements for Declaratory Relief are met in this case.**

[¶22] The JOINT BOARD's failure to address an issue acts to confess. Charolais Breeding, p. 499.

[¶23] The JOINT BOARD'S Brief should be internally consistent, but is not. At ¶ 21, the JOINT BOARD argues there is no justiciable controversy on May 20, 2016 [the date of the Complaint and after the Resolution of Necessity] because it "had not initiated eminent domain proceedings seeking property rights from the Cossettes" [App., ps. 250-262 certainly says otherwise], but later seems to be delighted to be able to say, at ¶ 28 of its Brief,

"Counsel for the Cossettes acknowledged at the hearing the Resolution of Necessity is only one of the required steps to acquire property through eminent domain." COSSETTES will agree, every required step should be legal.

[¶24] **2. Declaratory Relief is a cumulative remedy to COSSETTES' appeal.**

[¶25] The JOINT BOARD, without citation to legal authority, asserts at ¶17 of its Brief, "In North Dakota, a declaratory judgment action is not cumulative with the statutorily authorized appeal process, it is prohibited by that remedy." The JOINT BOARD'S failure to cite authority, or even address COSSETTES' legal authority to the contrary [Brief of Plaintiffs-Appellants, ¶s 75-78] acts to confess the issue. Charolais Breeding, p. 499.

[¶26] **3. COSSETTES' eminent domain challenge(s) should have been considered by the lower court.**

[¶27] The JOINT BOARD's failure to address the issue acts to confess. Charolais Breeding, p. 499.

[¶28] **POINT 3. COSSETTES' appeal should not have been dismissed – COSSETTES are aggrieved persons.**

[¶29] Only those susceptible to the words of two (2) weavers promising an emperor a new suit of clothes that are invisible to those who are unfit for their positions, stupid, or incompetent would possibly accept the argument that COSSETTES are not "aggrieved person(s)" – they are "THE PRIMARY AGGRIEVED PARTIES" appealing from a Resolution of Necessity that is (a) predicated upon falsehood, (b) determined by an entity with no established legal authority to exercise eminent domain, and (c) only *their land* is

subjected to the illegal process. They act to protect every other citizen who has lesser reason for grief, but also are aggrieved when the government violates the law. If the decisions of a local governing body can be judicially afforded elevated legal status under res judicata, collateral estoppel, or waiver theories, as now established possible by Mills v. City of Grand Forks, 2012 ND 56, ¶ 15, 813 N.W.2d 574, COSSETTES' appeal is mandatory to prevent some judicial officer from later saying, "Too late, so sad, too bad!" The JOINT BOARD does not accurately paraphrase COSSETTES' legal counsel [Appellee's Brief, ¶ 28; ¶ 21[1]], nor the District Judge [Appellee's Brief, ¶ 12[2]]. Both forget that later raising an issue will prove to be an idle act so long as anyone pays attention to Mills – COSSETTES are always entitled to a decision based upon true "administrative facts", strict adherence to law in the exercise of eminent domain [to include its authority to act by proof of the predicate "agreement"; N.D.C.C. § 61-16.1-11 – another confessed issue? Charolais Breeding, p. 499], followed by full judicial review – they got none of the above.

[¶30] **POINT 4. The JOINT BOARD'S failure to bring its compulsory counterclaim precludes any subsequent action arising out of the May 18, 2016, proceedings.**

[¶31] Except to say it is "not relevant" [Appellee's Brief, ¶ 10] or misrepresenting judicial

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[1] The undersigned did not so admit, but questioned the judge's understandings (the source of which is unknown)]. When the undersigned would not blindly follow the Court's lead, the Court had to get attorney McShane [not attorney Garaas] to state that "the May 18th decision (was raised) in the (later) eminent domain proceeding." Tr., p. 20, l. 15, to p., 22, l. 21.

[2] The judge did not suggest "a compulsory counterclaim" would be decided by the other judge; only the lack of a "state permit" would be so decided. Tr., p. 22, l. 22, to p. 23, l. 1.

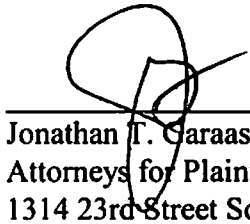
comments [see footnote 2], the JOINT BOARD ignores this issue, thereby making further confession. Charolais Breeding, p. 499].

[¶32] **CONCLUSION**

[¶33] COSSETTES pray for judicial relief as previously set forth.

Respectfully, this 12th day of December, 2016 .

Garaas Law Firm



Jonathan T. Garaas
Attorneys for Plaintiffs-Appellants
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
Telephone: (701) 293-7211
ND Bar ID # 03080

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AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the day of 12th day of December, 2016, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF PLAINTIFFS-APPELLANTS.

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Christopher M. McShane
Ohnstad Twichell, P.C.
P.O. Box 458
West Fargo, ND 58078-0458

[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty
Pat Doty

Subscribed and sworn to before me this 12th day of December, 2016.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2021

Notary Public

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