20180028
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 11, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20180028
Cass County District Court No. 09-2016-CV-2207

Cass County Joint Water Resource District,
a North Dakota Political Subdivision,

~~Appellee~~ Plaintiff/Appellee/Cross-Appellant,

v.

Curtis W. Erickson, Karen S. Erickson

Defendants/Appellants/Cross-Appellees.

and

Choice Financial Group,

Defendant/Appellee.

BRIEF OF CURTIS W. ERICKSON AND KAREN S. ERICKSON

Appeal From The November 21, 2017 Judgment And September 12, 2017 Order Of Fee Simple Condemnation And Determination Of Just Compensation Of The Honorable John C. Irby, East Central Judicial District, Cass County

---

Michael T. Andrews (ND ID 05516)
ANDERSON, BOTTRELL, SANDEN & THOMPSON
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mandrews@andersonbottrell.com
(701) 235-3300
Attorney for Defendants/Appellants/Cross-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF THE ISSUES.. 1
STATEMENT OF THE CASE .... ¶1
STATEMENT OF THE FACTS .... ¶9
A. Summary Of The Evidence .... ¶9
B. The District Court's September 12, 2017 Decision. .... ¶13
LAW AND ARGUMENT.. ¶15
I. STANDARD OF REVIEW .... ¶15
II. THE DISTRICT COURT FAILED TO COMPENSATE ERICKSONS FOR THEIR PROPERTIES' "HIGHEST AND BEST USE". .... ¶18
A. The District Court Unlawfully Disregarded The Existing, Intended Use Of Ericksons' Lots .... ¶21
B. The District Court Unlawfully Failed To Consider All Uses For Which Ericksons' Lots Were Adaptable. .... ¶26
C. The District Court Failed Value The Lots Based Upon The Highest And Best Use That It Found. .... ¶29
III. THE DISTRICT COURT VIOLATED THE "PROJECT INFLUENCE RULE"…………………………….................. …………………………¶30
IV. THE DISTRICT COURT VIOLATED SECTION 32-15-06.1 BY ADOPTING BOCK'S MARCH 9, 2015 APPRAISAL.. ¶36
V. THE JUST COMPENSATION AWARD WAS NOT WITHIN THE RANGE OF THE ADMISSIBLE EVIDENCE. .... ¶38
VI. RELIEF REQUESTED .... ¶40
CONCLUSION... ¶42

TABLE OF AUTHORITIES

Cases

United States v. Va. Elec. Power Co., 365 U.S. 624, 636 (1961) .... ¶30
Aladdin, Inc. v. Black Hawk Cty., 562 N.W.2d 608, 611–12 (Iowa 1997) .... ¶30
Anda, 789 N.W.2d at 876 .... ¶26
Billy Graham Evangelistic Ass'n v. City of Minneapolis, 667 N.W.2d 117, 126 (Minn.2003)…………………………………………………………………………¶34
Childers v. United States, 116 Fed. Cl. 486, 508 (2013). .... ¶26
City of Devils Lake v. Davis, 480 N.W.2d 720, 725 (N.D. 1992) .... ¶15
City of Hazelton v. Daugherty, 275 N.W.2d 624, 627 (N.D. 1979) .... ¶15
City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 374–75 (N.D. 1996) .... ¶15
City of San Diego v. Rancho Penasquitos P'ship, 130 Cal. Rptr. 2d 108 (Cal. Ct. App. 2003) .... ¶31
City of St. Paul v. Rein Recreation, Inc., 298 N.W.2d 46, 49 (Minn. 1980) .... ¶22
City of Valdez v. 18.99 Acres, More or Less, of Land Situated in City of Valdez, 686 P.2d 682, 683 (Alaska 1984) .... ¶30
Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. banc 2008) .... ¶30
Commissioner of Transp. v. Bakery Place Ltd. Partnership, 925 A.2d 468 (Conn. Super. Ct. 2005) .... ¶26
Done Holding Co. v. State, 534 N.Y.S.2d 406 (N.Y. App. Div. 1988) .... ¶22
Ferguson v. City of Fargo, 2016 ND 194, ¶ 9, 886 N.W.2d 557…………………¶34
First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal., 482 U.S. 304, 319 (1987) .... ¶39
In re City of New York, 929 N.Y.S.2d 478, 481 (N.Y. Sup. Ct. 2011) .... ¶37
L.P., 846 N.E.2d 559 (Ohio Ct. App. 2005) .... ¶26
Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153, 156 (1990) .... ¶26
McCandless v. United States, 298 U.S. 342, 345 (1936) .... ¶26
Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860, 876 (Minn. 2010)........ ¶19
National Food & Beverage Co., Inc. v. U.S., 105 Fed. Cl. 679 (2012).............. ¶26
New Hampshire Dep't of Transp. v. Franchi, 48 A.3d 849, 852 (N.H. 2012) .... ¶26
Olson v. United States, 292 U.S. 246, 255 (1934)................................... ¶19, ¶26
Redevelopment Agency of City of San Diego v. Attisha, 27 Cal. Rptr. 3d 126, 135 (Ct. App. 2005) .... ¶22
Rose Park Place, Inc. v. State, 985 N.Y.S.2d 350, 354 (N.Y. App. Div. 2014) . ¶30
St. Louis Cty. v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116, 130 (Mo. 2013) .... ¶30
State ex rel. Missouri Highways & Transp. Comm'n v. 1811 N. Broadway, LLC, 405 S.W.3d 539, 546 (Mo. Ct. App. 2013)... ¶30, ¶34
State Properties, Ltd., 72 P.3d 954, 964 (Nev. 2003) .... ¶30
State v. Rivera, 2018 ND 15, 905 N.W.2d 739 .... ¶16
U.S. ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land In Tennessee, 821 F.3d 742, 753 (6th Cir. 2016)... ¶22

U.S. v. 1.604 Acres of Land, More or Less, Situate in City of Norfolk, Va., 844 F.Supp.2d 668, 681 (E.D. Va. 2011) ¶35
U.S. v. 480.00 Acres of Land, 557 F.3d 1297, 1307 (11th Cir. 2009) ¶30
United States v. 1.604 Acres of Land, More or Less, Situate in City of Norfolk, Va., 844 F. Supp. 2d 668, 679 (E.D. Va. 2011) ¶22
United States v. 69.1 Acres of Land, 942 F.2d 290, 292 (4th Cir. 1991) ¶22
United States v. An Easement & Right-of-way Over 6.09 Acres of Land, More or Less, in Madison Cty., Alabama, 140 F. Supp. 3d 1218, 1233 (N.D. Ala. 2015) ¶22
United States v. Certain Lands in Truro, 476 F.Supp. 1031 (D. Mass. 1979) ¶31
United States v. Reynolds, 397 U.S. 14, 16 (1970) ¶19
Wahl v. Country Mut. Ins. Co., 2002 ND 42, ¶ 8, 640 N.W.2d 689 ¶16
Westby v. Schmidt, 2010 ND 44, ¶ 13, 779 N.W.2d 681 ¶34

Statutes

N.D. Cent. Code Section 32-15-06.1 ¶4
N.D. Cent. Code Section 32-15-22 ¶18
Section 32-15-06.1 ¶36
Section 32-15-06.1(3) ¶5, ¶30
Section 32-15-32 ¶41

Other Authorities

29A C.J.S. Eminent Domain § 359 ¶31
60 Am. Jur. Trials 447 (1996) ¶22
Annotation, Zoning as a Factor in Determination of Damages in Eminent Domain, 9 A.L.R.3d 291 (1966) ¶31
NDJI—Civil 75.05 ¶18, ¶26, ¶39
N.D. Const. Art. I, Section 16 ¶18
42 U.S.C. § 4602(b) ¶39

Rules

N.D R. Evid. 103 ¶5
N.D. R. Evid. 702 ¶34

STATEMENT OF THE ISSUES

I. Did the District Court violate N.D. Cent. Code Section 32-15-22 and NDJI—Civil 75.05 by failing to compensate Ericksons for the "highest and best use" of their property?

II. Did the District Court violate Section 32-15-06.1(3) and the "Project Influence Rule"?

III. Did the District Court violate Section 32-15-06.1 by adopting Appellee's March 9, 2015 Appraisal?

IV. Is the District Court's Just Compensation Award in the range of the admissible evidence?

STATEMENT OF THE CASE

[¶1] This is an appeal from a November 21, 2017 Judgment and September 12, 2017 Order Of Fee Simple Condemnation And Determination Of Just Compensation by the Honorable John C. Irby, East Central Judicial District, Cass County. App. at 57 and 70. This eminent domain action arises out of the F-M Diversion Project and "OHB ring levee" around the City of Oxbow ("OHB ring levee" or "Project").

[¶2] Appellants Curt and Karen Erickson are residents of West Fargo, and were the owners in fee simple of the following property:

Lots Thirty-nine (39) and Forty (40), Oxbow Country Club and Estates, situated in the County of Cass, State of North Dakota.

These were platted, residential lots in the path of the OHB ring levee.

[¶3] Appellee is the owner of the Project.

[¶4] This action was commenced on August 20, 2016. Ericksons answered and counterclaimed for inverse condemnation, breach of contract/bad faith, and violation of N.D. Cent. Code Section 32-15-06.1. App. at 32. Ericksons served and filed an Answer and First Amended Counterclaim on May 16, 2017. App. at 45.

[¶5] Prior to Trial on June 7, 2017, Ericksons agreed to dismiss their Counterclaims and agreed to a "date of taking" of May 14, 2015, in exchange for Appellee's agreement not to oppose Ericksons' request for an award of reasonable attorneys' fees, costs and interest. App. at 55. (This Stipulation will be addressed in response to Appellee's purported Cross Appeal.) On June 9, 2017, Ericksons submitted their Pretrial Statement which requested the District Court exclude all evidence which ran "afoul of the project influence rule or are otherwise irrelevant, pursuant to N.D R. Evid. 103 and Section 32-15-06.1(3)". Doc. ID# 61.

[¶6] The case was tried to the Court on June 12-14, 2017. On September 12, 2017, the District Court awarded "Just Compensation" for Ericksons' lots on the date of taking of $48,200, plus interest and costs of ownership. App. at 57.

[¶7] Via Order dated November 17, 2017, the District Court awarded Ericksons $114,346.47 in costs and fees, by offsetting $11,538.19 in delinquent taxes against a total award of $125,884.66. (This award will be addressed in response to Appellee's purported Cross Appeal). App. at 65.

[¶8] Judgment was entered on November 21, 2017. App. at 70. Notice of Entry was served on November 22, 2017. Doc. ID# 201. Ericksons timely filed appealed on January 19, 2018. App. at 114. Appellee purportedly cross-appealed on January 26, 2018. App. at 116.

STATEMENT OF THE FACTS

A. Summary Of The Evidence

[¶9] The Court saw some 67 exhibits, and heard 9 witnesses. The following evidence was adduced:

- Lot 40 consisted of ***33,112 square feet*** net of water area.
- Lot 39 was ***32,272 square feet*** in area.
- The lots were platted in 1974. Ex. 1.
- The lots were among 5 purchased in 1999 for a total $28,000. Ex. 3
- Ericksons purchased them 6 years later, for a total of ***$150,000.*** Ex. 4.
- Ericksons listed the lots for sale 3-4 years later for ***$98,888-109,900*** each. Ex. 48.
- The lots were located on Schnell Drive, a paved street terminating in a cul-de-sac.
- The lots were served with utilities and municipal services.
- The lots were subject to special assessments.
- The lots were beautiful, wooded lots along and with views of the Red River.
- The lots' elevation was from 915 feet to 918 feet.
- The base flood elevation in the area was 914.2 feet.
- ***Applicable Covenants required the ground floor area of any 1 family home (exclusive of porches and garages) be only 1,600 square feet with a single story, 900 square feet if a two story, 1,000 square feet if a 1 ½ story, 1,100 square feet if a bilevel, and 1,800 square feet of above ground floor area if a split level***. Ex. 2
- ***Applicable zoning was single family residential.*** Ex. 111.
- ***Applicable zoning requirements contained no setback from the river or river bank.*** The only setbacks were from the lot lines.
- Applicable ordinances required only that homes be constructed in accordance with standard floodplain requirements.
- In July/August, 2013, the Diversion Authority gained access to Ericksons' properties to, *inter alia,* conduct geotechnical surveys and soil borings ***"for the proposed ring levee".*** Ex. 7.
- Appellee's first purported appraisal (Ex. 17) of Ericksons' lots was dated ***March 9, 2015***. The Appraiser was Gerald Bock. This appraisal valued both lots combined as of December 31, 2014 at ***$48,200.00,*** and opined their highest and best use was "recreational" or "surplus". This appraisal—which the District Court adopted for its "Just Compensation" award—is discussed below.
- On May 14, 2015, Ericksons and Appellee entered into an "Agreement For Entry And Construction" whereby Ericksons allowed Appellee access to the lots in exchange for Appellee's promise "to continue negotiations in good faith to reach a mutually acceptable agreement as

to the compensation to be paid to Owner for . . . the Property[] . . . ." Ex. 24. The parties ultimately stipulated to use May 14, 2015 as the "date of taking".

- Unbeknownst to Ericksons, on August 27, 2015, Appellee directed Houston-Moore Group, LLC to hire Barr Engineering "to perform geotechnical work and provide a report on the Ericksons' properties ***for the Oxbow-Hickson-Bakke Ring Levee Project".*** Ex. 27. ***Ericksons' lots were the only lots upon which such studies were performed.***
- This "Barr Report" (Ex. 30) was issued October 12, 2015.
- The "Barr Report" essentially proposed restrictions or "setbacks" which would limit the area in which homes could be constructed on the lots, based upon "geotechnical" concerns for the "slope stability" of the river bank.
- Barr's analysis was "conducted to determine the minimum setback for structures from the crest of the Red River based on United States Army Corps of Engineers recommendations . . . ." The soil boring it analyzed was performed for the "Project: Fargo-Moorhead Metro PED - Oxbow, Hickson, Bakke Ring Levee". The model methods and procedure to analyze the stability of the riverbank slopes were "[s]imilar to all modeling completed for the OHB Ring Levee Project[] . . . ." Barr's "analysis was completed using seepage and shear strength parameters discussed in the Design Documentation Report (DR), Oxbow, Hickson, Bakke Ring Levee Attachment D-1, Geotechnical Engineering Parameters dated 3 January 2014." The Barr Report applied "[s]etback analysis factor of safety requirements . . . in the Design Documentation Report (DDR), Oxbow, Hickson, Bakke Ring Levee Geotechnical Engineering Seepage and Slope Stability Methodology dated 6 February 2014."
- According to Barr's hypothetical geotechnical restrictions, even without any efforts to mitigate "slope stability" concerns there was 7,045 square feet of "usable area" on Ericksons' lots (plus another 14,000 square feet of usable area along the front of the lots). Barr's hypothetical "usable area" encompassed both lots, such that they would need to be combined to construct one home on them.
- On February 3, 2016 (Ex 33), Appellee's agent (ProSource) transmitted a "final offer to purchase" Ericksons' lots, revealing for the first time to Ericksons that a geotechnical study of their lots was done. ProSource admitted "[t]he northerly lot does show a buildable area". It also essentially told Ericksons they needed to obtain a geotechnical report of their own to controvert Appellee's position. ***Appellee did not impose this requirement upon any other property owners in Oxbow.***
- Appellee's other purchases along Schnell Drive and throughout Oxbow reveal that no other properties were devalued due to "geotechnical: concerns:
  - Bartram (two large lots and one home adjacent to Ericksons' lots and along the river best depicted at Ex. 23) ***$2,700,000***;
  - Lots 127-130 (four lots and one home along the river) ***$1,222,600***;

- Lot 43 (Schnell Drive along the river) ***$561,000***;
- Lot 35 (Schnell Drive) ***$496,000***;
- Lot 37 (Schnell Drive) ***$492,100***;
- Lot 41 (Schnell Drive, along the river and directly next door to Ericksons' south lot) ***$490,700***;
- Lot 32 (Schnell Drive) ***$484,200***;
- Lot 33 (Schnell Drive) ***$481,100***;
- Lot 36 (Schnell Drive) ***$469,400***;
- Lot 34 (Schnell Drive) ***$307,600***. (Ex. 1, 11-16, 22, 23, 25, 28, 32).

- Appellee also purchased the vacant lot next door to Ericksons (Ex. 31), for ***$125,000.*** This lot was 1) lower, 2) had no river frontage, and 3) abutted Highway 81.
- The home on Lot 35 fit neatly into the 7,045 square feet "usable area" hypothesized by Barr. (Ex. 124, p. 3). Appellee purchased this property for ***$496,000.00.*** Ex. 13.
- Appellee transmitted a second purported appraisal (Ex. 37) by Bock on ***January 11, 2017***. This appraisal valued Ericksons' lots at a combined at ***$37,100*** based upon a "highest and best use" of "recreational" or "surplus land". (Tr. at 379; 381; 391-394). This appraisal is discussed below.
- A third appraisal (Ex. 39) was transmitted by Appellee on ***May 31, 2017***, less than two weeks before Trial. This appraisal, again by Bock, valued Ericksons' lots at a combined ***$37,100*** based upon a "highest and best use" of "recreational". This appraisal—which Appellee submitted at Trial as its actual, final appraisal—is discussed below. (Tr. at 380-381).
- Curt Erickson testified Ericksons purchased their lots as the platted, residential lots they were; and fully intended to either sell or use them as such by constructing homes on them. (Tr. at 4-28; 34-42; 61-67; 74-75; 79-801; 83-85; 95). Ericksons were never informed Appellee was conducting tests on their lots in order to devalue their lots. (Tr. at 51-55; 81-82; 86-89; 91).
- Ericksons called Joel Paulsen, a Civil Engineer and then Senior Project Manager with Fargo's Bolton and Menk engineering firm. He has extensive experience in acquiring properties for public projects. He is also a member of the Board of the Diversion Authority itself. (Ex. 34). (He is now a member of the Governors' Diversion Task Force and Moorhead City Council). While he made clear he was not testifying on behalf of the Diversion Authority, his experience and qualifications were without peer. He testified both lots supported residential construction, regardless the preferences engineers might have as to the wisdom of building close to a river bank. (Tr. at 139-141; 149-155; 178). Further, Barr's hypothetical restrictions were based upon Project data and requirements, and could ***<u>not</u>*** be considered for purposes of valuing the Ericksons' lots. (Tr. at 142; 171). He testified there were no geotechnical setback, study or testing requirements for residential construction in the City of Oxbow (Tr. at 157; 163-164; 197-203). If there were, then all the neighboring properties along Schnell Drive would have

been in violation thereof, as would countless other homes up and down the Red River. He confirmed this by physically inspecting Ericksons' lots and neighboring properties on multiple occasions. (Tr. at 159-160). He testified Barr's hypothetical restrictions failed to take into account options to mitigate slope stability concerns. (Tr. at 174-175). His opinions were not controverted by any witness for Appellee.

- Ericksons called Mike Brekke, a professional Builder and licensed North Dakota Contractor. (Ex. 47). He testified both lots are suitable for residential construction (Tr. at 240; 244; 248); their restrictions were no different than those he encounters when building in other areas in Fargo-Moorhead (Tr. at 243); and he could easily construct a beautiful home within 7045 square feet. (Tr. at 240; 244; 246-247). Appellee offered no testimony from a builder or Licensed Contractor to controvert Brekke.
- Ericksons called Randy Cramer, whose vacant next door lot was purchased for $125,000. He testified his property was also first appraised by Bock as "recreational" property, and valued at only $49,500. In fact, his appraisal was essentially identical to the March 9, 2015 appraisal of Ericksons' lots. In his case, however, Appellee subsequently negotiated and paid Cramer nearly 3 times that amount. (Tr. at 219-225). He also owned a home on Schnell Drive, which he sold in 2009 to a private purchaser. This home was subsequently acquired by Appellee for ***$492,000*** (Lot 37). He testified as to the history of property construction and ownership along Schnell Drive/in Oxbow (Tr. at 208-212); that Ericksons' lots were not submerged in the 2009 flood (Tr. at 213); and that his property and Ericksons' were suitable for residential construction. (Tr. at 224; 226; 231-232).
- Appellee called Bill Kussman, a Barr Geotechnical Engineer from the Twin Cities. He admitted Barr did not conduct a geotechnical analysis of any other lots besides Ericksons'. (Tr. at 500). Nor did he set foot on Ericksons' lots. He had no basis to conclude their geotechnical condition was in any way unique. (Tr. at 506). In fact, he conceded soils are uniform throughout the Red River valley. (Tr. at 460; 476-477; 505-506). He also conceded the soil boring analyzed by Barr was obtained for the Project (Tr. at 503-504; 507; 515), and private parties would never obtain such studies. (Tr. at 454-455; 505). He conceded the 7045 square foot area Barr hypothesized as "usable" did not account for any mitigation of geotechnical or slope stability concerns, and there are several such measures available. (Tr. at 485; 491; 493; 512-513).
- Appellee called Chris Gross of Moore Engineering, Project Manager of the OHB ring levee. He testified the Stormwater Outfall for the OHB ring levee would be constructed across the Ericksons' lots. (Tr. at 524-526) (Ex. 26). The Ericksons' lots are "essentially right in the middle of this outfall structure." The structure consists of a "60 inch reinforced concrete pipe", a "head wall structure, some sheet pile, and a large shaping of the ground. There's a significant amount of unloading being done on the banks, and then the pipe and head wall will be installed within that unloading area". (Tr. at 525-531). ***Thus, while Appellee claimed Ericksons' lots were not***

stable enough to support a house, its own Project Engineer confirmed they are stable enough to support the outfall structure for the OHB ring levee. Gross also conceded the boring done on the Ericksons' lots was for the Project. (Tr. at 527)

- Appellee called Jim Nyhof, Oxbow Mayor. He conceded properties in Oxbow were valuable and worth saving. (Tr. at 401-405; 428-430). He built his own home in Oxbow in 2003, notwithstanding flooding concerns, because he wanted to live there and send his kids to the local school. (Tr. at 399; 448). He "got a LOMR" (Letter of Map Revision from FEMA) and built his home out of the floodplain, like so many others up and down the valley. (Tr. at 448). Appellee purchases his own home and also paid him several hundred thousand dollars for one half of a twin home he owned. (Tr. at 433; 435-436).

[¶10] Ericksons' appraiser was Jim Wise, EB Herman Companies. (Ex. 38). He concluded the highest and best use of Ericksons' lots was their actual, intended use: single-family residential development. (Tr. at 267; 268; 276; 283; 337; 342). He used comparable residential properties along waterways—***with appropriate adjustments for the presence/absence of flood protection***—to arrive at values of ***$252,000*** for Lot 40, ***$204,000*** for Lot 39, for a total of ***$456,000***. (Tr. at 286). He also analyzed as a hypothetical the value of Ericksons' lots as combined lots subject to Barr's hypothetical building restrictions, concluding this value would be ***$289,000.*** Ex. 49. (Tr. at 344). He conducted his appraisal in accordance with the legal requirements for Just Compensation determinations in North Dakota, specifically "highest and best use" and the "project influence rule. (Tr. at 260; 277-278; 292; 295; 296-298).

[¶11] Bock did not adhere to these legal requirements. None of his appraisals valued the properties based upon a highest and best use of residential development. His last two appraisals were replete with project influence. All of his appraisals had errors. And his testimony was biased and incoherent:

- He performed ***three separate appraisals***. He did not "re-appraise" any other properties. (Tr. at 533-534). At least two contained an incorrect "critical building elevation" of "915.9 feet". Both Paulsen and Gross (to whom Bock attributed this information) testified this was wrong. (Tr. at 534).
- Barr's first appraisal (Ex. 17) of ***March 9, 2015*** actually cited the correct zoning, and concluded residential construction was legally permissible. It also states the lots contain ***38,091 square feet*** of usable land area—not 7,045—and residential construction was physically possible. It suggests a "highest and best use" of "recreational" or "surplus" based upon the belief that it would cost an estimated $29-50,000 to build up the lots. (Tr. at 544-559; 560-589). These estimates were proven to be completely speculative, and in the end indicative of nothing more than ordinary building costs associated with residential construction. (Ex. 21). Moreover, having clearly concluded the lots were adaptable to residential construction, the law required Bock to value them based upon that use.
- Bock's second appraisal (Ex. 37) was transmitted on January 11, 2017, and valued the lots at a combined at $37,100 based upon a purported highest and best use of "recreational" or "surplus land". (Tr. at 379; 381; 391-394). This appraisal applied ***the wrong, project-influenced zoning***. (Tr. at 394; 535-536; 611). It also relied upon the Barr Report. Bock conceded it was legally, physically and financially possible to construct a home within Barr's hypothetical 7045 square foot usable area. (Tr. at 544; 609-610).
- Bock's third appraisal (Ex. 39) was not transmitted until ***May 31, 2017***, less than two weeks before Trial. It "corrected" his zoning error, but still valued the properties at $37,100 combined (Tr. at 380-381) based upon the same "recreational" use. It also still relied upon project-influenced zoning and the Barr report. (Tr. at 611).
- Bock did not use any comparable residential river lots in any of his appraisals. (Tr. at 602). While Ericksons' lots were river lots located in a premier golf course community, Bock used lots in small rural communities neither along rivers nor proximal to a Country Club or similar amenity. The lots he used in Oxbow were not river lots and were outdated.
- Bock testified he was "fiduciary" of the Appellee. (Tr. at 548; 551).

[¶12] At Trial, Appellee urged the Court to impose Barr's nonexistent land use restrictions and offered Bock's third appraisal of $37,100 as its final appraisal. Ericksons maintained the law required the District Court to value their lots based upon their "highest and best use" of residential development, and free of "project influence". Because Appellee submitted no evidence of the value of Ericksons'

lots based upon based upon this highest and best use, the law required the District Court to award ***$456,000***. Alternatively, Ericksons maintained that even if the District Court imposed Barr's hypothetical land use restrictions, it must still award ***$289,000***, as this was the only competent evidence of value submitted for these circumstances based upon a legally required highest and best use of residential development.

B. The District Court's September 12, 2017 Decision.

[¶13] Despite the mountain of evidence it heard and saw, the District Court's Order is barely 7 pages long. It is a confusing and contradictory mishmash of findings and conclusions, which ultimately reveal glaring legal errors. To wit, relevant excerpts are as follows:

> [18] [. . . .] Bock indicated that even before the Barr report was made public, a knowledgeable buyer would have enough information to know that buying one of the subject lots for residential development was an extremely risky undertaking. For example, a knowledgeable buyer would know:
>
> . . . .
>
> ***3) A knowledgeable buyer would notice soil stability problems with the property.***
> ***4) A knowledgeable buyer would know that corrective measures for soil stability problems are expensive and would request expert advice on where a structure can be built.***
> ***5) The physical characteristics of the subject property and the conditions which lead to the determination that the soil conditions were unstable which would make building a home on the subject property a risky venture all existed prior to the date of taking.***
>
> [¶19] Mr. William Kussmann . . . . indicated that ***even without physically inspecting the property*** there was significant publicly available information to review that would be indicative of ***soil stability problems.***

. . . .

> [¶24] [. . .] Bock's revised opinion decreasing his valuation of the property between his first and second report ***is due to the confirmation of his questions regarding soil stability as indicated in the October, 2015 Barr report.***
>
> [¶25] ***Although soil stability issues were of a concern and were contributing factors to the diminution of the value of the subject property from the time the Ericksons bought the lots to the date of taking, it is unlikely that the average knowledgeable buyer would have commissioned a Barr type report. Using the results of that report dated October 12, 2015 to further diminish the hypothetical value of the property on May 14, 2015 is not acceptable. The Barr report is based in part on the Design Documentation Report (DDR) Oxbow, Hickson, Bakke Ring Levee, Geotechnical Engineering Seepage and Slope Stability Methodology dated February 6, 2014. Mr. Bock was not aware of this when he made his initial appraisal and it is unlikely that even a knowledgeable buyer at the time of the taking would know of it.***
>
> [¶26] ***At best the highest and best use for the property as of the date of taking, assuming no project, would be for a modest home on the northern most lot, Lot 39. Such a home could have been built within the buildable area of that lot.***
>
> [¶27] Consistent with the initial Bock appraisal report ***and the condition of the property as generally known at the time of the taking,*** the market value of the property as of the date of taking, May 14, 2015 is $48,200.00.

[¶14] Thus, while ostensibly eschewing the Barr report, the District Court by judicial fiat imposed similar building restrictions by ruling only a "modest home could have been built within the ***buildable area***" of the Ericksons' lots. This clearly violated the "project influence rule". Moreover, despite expressly finding the lots suitable for residential construction, the District Court adopted Bock's "recreational" valuation. This violated the requirement that Just Compensation be determined based upon the property's "highest and best use". Further, the District Court adopted Barr's

first appraisal of March 9, 2015 even though Appellee did not offer it as its final appraisal of the lots.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

[¶15] The amount of damages in an eminent domain action is a question of fact. City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 374–75 (N.D. 1996) (citing City of Devils Lake v. Davis, 480 N.W.2d 720, 725 (N.D. 1992). This Court will ordinarily sustain an award if it is within the range of the admissible evidence presented. Id. (citing City of Hazelton v. Daugherty, 275 N.W.2d 624, 627 (N.D. 1979)).

[¶16] But the construction or interpretation of a statute is a question of law, fully reviewable by this Court. See State v. Rivera, 2018 ND 15, 905 N.W.2d 739; Wahl v. Country Mut. Ins. Co., 2002 ND 42, ¶ 8, 640 N.W.2d 689. The primary objective of statutory construction is to ascertain the intent of the Legislature. This Court looks first in ascertaining legislative intent at the words used in the statute, giving the words their ordinary, plain language meaning. Statutes must be construed as a whole to determine the legislative intent and the intent must be derived from the whole statute. Wahl at ¶ 8.

[¶17] Primarily at issue here are statutory violations and legal errors by the District Court, which are fully reviewable on appeal.

II. THE DISTRICT COURT FAILED TO COMPENSATE ERICKSONS FOR THEIR PROPERTIES' "HIGHEST AND BEST USE".

[¶18] N.D. Const. Art. I, Section 16 contains our Constitution's Just Compensation guarantee. N.D. Cent. Code Section 32-15-22 provides that "The . . . [C]ourt[] . . . must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess[] . . . . [t]he value of the

property sought to be condemned . . . . If it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed." NDJI—Civil 75.05 further refines the guarantee:

> Just Compensation for the property actually taken is the fair market value of that property and all improvements on that property, if any. [. . . .]
> "Fair market value" is the highest price for which the property can be sold in the open market by a ***willing seller*** to a willing purchaser, ***neither party acting under compulsion and both exercising reasonable judgment.***
> In determining fair market value, ***you should consider past uses of the property, and all other uses for which it is suitable or adaptable and needed or likely to be needed in the reasonably near future, as will in reasonable probability affect its market value while it is privately owned.*** [. . . .]

[¶19] While the basic measurement of compensation in eminent domain involves a hypothetical "willing buyer, willing seller", this measurement "has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee" of Just Compensation. United States v. Reynolds, 397 U.S. 14, 16 (1970). Chief among these is the concept of "highest and best use". The Just Compensation constitutionally required in eminent domain proceedings is the fair cash market value of the property for its "highest and best use". "Highest and best use" is that use, ***not necessarily the present use, which would give the property its highest value on the date of taking. It may be any use that may be anticipated with such reasonable certainty that it would enhance market value***. Courts must be "vigilant in enforcing the Just Compensation requirement". The government must put a property owner "in as good a position pecuniarily as if his property had not been taken". Moorhead Econ. Dev. Auth. v.

Anda, 789 N.W.2d 860, 876 (Minn. 2010) (citing Olson v. United States, 292 U.S. 246, 255 (1934)).

[¶20] The District Court's Just Compensation award violated this bedrock principle. First, it inexplicably and unlawfully disregarded the existing, intended use of Erickons' lots: residential development. Second, it unlawfully failed to consider all uses for which the lots were adaptable, even though the March 9, 2015 appraisal it adopted very clearly concludes the lots were readily adaptable to residential construction. Third, even with its unlawful limitations on building on the lots, the District Court still explicitly found they were suitable for residential construction. Yet it unlawfully failed to value the lots based upon that highest and best use.

A. The District Court Unlawfully Disregarded The Existing, Intended Use Of Ericksons' Lots

[¶21] Ericksons' lots were platted, residential lots, on a paved street terminating in a cul-de-sac, served with utilities and municipal services, and subject to special assessments. They were zoned for residential construction, with no prohibitions or restrictions upon building other than those covenants, etc., set forth above. They were, undeniably, residential lots. And Ericksons asked only that they be compensated for this use, even though the law allowed them to ask the District Court to value their properties based upon any use to which they were adaptable.

[¶22] The law ***presumes*** the current use of property to be its highest and best use. See U.S. ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land In Tennessee, 821 F.3d 742, 753 (6th Cir. 2016); Redevelopment Agency of City of San Diego v. Attisha, 27 Cal. Rptr. 3d 126, 135 (Ct. App. 2005); United States v. 69.1 Acres of

Land, 942 F.2d 290, 292 (4th Cir. 1991). This presumption derives from the axiom that "economic demands normally result in an owner's putting his land to the most advantageous use." United States v. An Easement & Right-of-way Over 6.09 Acres of Land, More or Less, in Madison Cty., Alabama, 140 F. Supp. 3d 1218, 1233 (N.D. Ala. 2015)(citations omitted). See United States v. 1.604 Acres of Land, More or Less, Situate in City of Norfolk, Va., 844 F. Supp. 2d 668, 679 (E.D. Va. 2011). Part and parcel of this presumption, applicable zoning regulations ***must*** be considered in arriving at the appropriate measure of compensation in an eminent domain proceeding. See 60 Am. Jur. Trials 447 (1996)(citing cases); City of St. Paul v. Rein Recreation, Inc., 298 N.W.2d 46, 49 (Minn. 1980)(value of property is to be determined with reference to highest and best use under applicable zoning regulations); see also Done Holding Co. v. State, 534 N.Y.S.2d 406 (N.Y. App. Div. 1988)(property owner entitled to $377,000 for wetlands as highest and best use would be cluster-type development, and State failed to establish existence of ordinance/regulation prohibiting such use).

[¶23] The highest and best use of the Ericksons' platted, residential lots was clearly that for which they were always intended: residential development. Appellee set forth no admissible evidence to rebut this presumption; but rather only project-influenced evidence which the Court itself ostensibly rejected, and which the law prohibited it from considering. See infra. Yet the District Court disregarded these most basic facts about the property, as well as its zoning.

[¶24] This disregard was particularly bewildering given Judge Irby's disposition of Ericksons' related inverse condemnation action against Appellee. Ericksons first sued

Appellee on July 12, 2016, alleging claims of inverse condemnation and breach of contract/rescission. Curt and Karen Erickson v. Cass County Joint Water Resource District, Case No. 09-2016-CV-02022. App. at 73. But that action was dismissed by Judge Irby on September 27, 2016, because Ericksons could not allege a regulatory taking. In obtaining this dismissal, Appellee's Counsel made repeated, correct, representations that there were no building prohibitions or restrictions on Ericksons' lots prior to their taking on May 14, 2015. Rather, Ericksons were free to construct homes on the lots until the date of taking. Appellee's briefing in support of its motion to dismiss stated:

- ***[. . .] [T]here is no zoning ordinance or other land-use regulation at issue in this case.***
- ***[. . .] [T]here is no zoning action complained of. No prohibition or limitation has been placed upon the use of Erickson property.***
- ***The Ericksons have been able to use, manage, and occupy their property as they see fit,*** and the District has not imposed any regulation restricting their ability to use the property.

App. at 78.

Appellee's Counsel made the same arguments at the hearing on its dismissal motion:

4 [. . . .] ***There wasn't a zoning ordinance.*** [. . . .]
7 [. . . . ***There was not any kind of a***
8 regulation of state law or anything that would limit their
9 ability to build there. If they didn't build there, that
10 was their own decision. [. . . .]

App. at 92.

And Judge Irby himself expressly acknowledged the absence of any building restrictions:

21 THE COURT: Well, as a practical matter it would
22 be a dumb thing to do, ***but as a legal matter, was there any***

23 legal impediment to building on there?

Id.

[¶25] The District Court's disregard for the presumptive highest and best use of Ericksons' lots was legal error.

B. The District Court Unlawfully Failed To Consider All Uses For Which Ericksons' Lots Were Adaptable.

[¶26] In determining "highest and best use" of Ericksons' lots, the law required the District Court to consider all uses for which they were "***adaptable***". NDJI—Civil 75.05. Courts ***must*** consider any use to which property may be ***readily converted***. See, e.g., National Food & Beverage Co., Inc. v. U.S., 105 Fed. Cl. 679 (2012); Anda, 789 N.W.2d at 876 (citing Olson, 292 U.S. at 255); Commissioner of Transp. v. Bakery Place Ltd. Partnership, 925 A.2d 468 (Conn. Super. Ct. 2005); Hilliard v. First Indus., L.P., 846 N.E.2d 559 (Ohio Ct. App. 2005) (highest and best use may include use not permitted under existing zoning regulations). The owner is entitled to have the land appraised at ***the most profitable or advantageous use to which it could be put on the day of the taking.*** New Hampshire Dep't of Transp. v. Franchi, 48 A.3d 849, 852 (N.H. 2012)(citing cases); McCandless v. United States, 298 U.S. 342, 345 (1936); Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153, 156 (1990) (highest and best use is reasonably probable and legal use of vacant land which is physically possible, appropriately supported, financially feasible, and results in highest value). A property can be appraised using a proposed use when there is a reasonable probability that, at the time of the taking, the land was both physically

adaptable for such use and that there was a need or demand for such use in the reasonably near future. Childers v. United States, 116 Fed. Cl. 486, 508 (2013).

[¶27] The District Court adopted Bock's first appraisal (Ex. 17) of ***March 9, 2015***. That appraisal concluded residential construction was legally permissible and physically possible. The appraisal assigned a "highest and best use" of "recreational" based only upon Bock's belief that there would be an estimated $29-50,000 in increased costs to build up the lots. While this belief was unsupported and incorrect, this appraisal very clearly concluded the lots were "adaptable" to residential construction. The black letter law set forth above required the District Court to value the lots based upon that use. It also required the District Court to consider the testimony from Engineers Paulsen and Kussman, that any purported "geotechnical" conditions of the lots could be mitigated.

[¶28] The District Court's failure to consider the uses to which Erickson lots were adaptable was legal error.

C. The District Court Failed Value The Lots Based Upon The Highest And Best Use That It Found.

[¶29] As confusing as any aspect of the District Court's Order is the juxtaposition between its express finding that the lots are suitable for residential construction, against its decision to assign them only a "recreational" value. This house of cards cannot withstand the weight of the foregoing black letter law. To be sure, Ericksons submit the District Court's judicial building restriction of the "buildable area" of the lots violated the "project influence rule". See infra. Once the District Court found Ericksons' lots were suitable for any residential construction, however, it was required by law to value them based upon that use. Its failure to do so was legal error.

III. THE DISTRICT COURT VIOLATED THE "PROJECT INFLUENCE RULE"

[¶30] Section 32-15-06.1(3) embodies the "project influence rule":

> In establishing the amount believed to be Just Compensation, the condemnor ***shall disregard any decrease*** . . . in the fair market value of the property ***caused by the project*** for which the property is to be acquired ***or by the reasonable likelihood that the property will be acquired*** for that project, other than a decrease due to physical deterioration within the reasonable control of the owner.

(emphases added). This rule embodies the United States Supreme Court's directive that "it would be manifestly unjust to permit a public authority to depreciate property values by a threat of the construction of a government project and then to take advantage of this depression in the price which it must pay for the property when eventually condemned". United States v. Va. Elec. Power Co., 365 U.S. 624, 636 (1961). The rule exists to protect citizens who own private property from being penalized by receiving depreciated compensation for their land, that would not have been so low but for the Project. Rose Park Place, Inc. v. State, 985 N.Y.S.2d 350, 354 (N.Y. App. Div. 2014); St. Louis Cty. v. River Bend Estates Homeowners' Ass'n, 408 S.W.3d 116, 130 (Mo. 2013). A landowner is entitled to Just Compensation for his land as if the taking had not occurred. Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859, 863 (Mo. banc 2008); County of Clark v. Sun State Properties, Ltd., 72 P.3d 954, 964 (Nev. 2003). The project influence rule renders any evidence of value that is influenced by the Project irrelevant to the value of land without the Project. State ex rel. Missouri Highways & Transp. Comm'n v. 1811 N. Broadway, LLC, 405 S.W.3d 539, 546 (Mo. Ct. App. 2013); City of Valdez v. 18.99 Acres, More or Less, of Land Situated in City of Valdez, 686 P.2d 682, 683 (Alaska 1984)(geotechnical and environmental evaluations for

purposes of a project should be excluded if performed when property is likely to be condemned). It also prohibits the Court from considering the negative impact of ***any decision the Government makes*** within the scope of the project which prompted the taking. U.S. v. 480.00 Acres of Land, 557 F.3d 1297, 1307 (11th Cir. 2009); Aladdin, Inc. v. Black Hawk Cty., 562 N.W.2d 608, 611–12 (Iowa 1997).

[¶31] To these ends, Courts serially refuse to allow the imposition of land use restrictions upon, or re-zoning of, property so as to freeze or depress its value. See United States v. Certain Lands in Truro, 476 F.Supp. 1031 (D. Mass. 1979); see generally, Annotation, Zoning as a Factor in Determination of Damages in Eminent Domain, 9 A.L.R.3d 291 (1966); 29A C.J.S. Eminent Domain § 359); see. e.g., City of San Diego v. Rancho Penasquitos P'ship, 130 Cal. Rptr. 2d 108 (Cal. Ct. App. 2003).

[¶32] There were no prohibitions or limitations on residential construction on the Ericksons' lots, other than those run of the mill covenants and ordinances set forth above. There were no geotechnical setback or study regulations in the City of Oxbow. Barr's hypothetical "geotechnical" restrictions were based upon Project data and studies. The District Court ostensibly rejected them. Yet it restricted—by judicial fiat—construction on the lots to a "modest home" within what it called the "buildable area".

[¶33] The District Court had no authority to "rezone" Ericksons' lots by judicial fiat, solely to depress their value. And the only reason it did so—indeed the only plausible origin of the term "buildable area"—was the very project-influenced Barr report it ostensibly rejected. This Court should not be fooled by the District Court's

attempt to bootstrap its judicial rezoning to Bock's "suspicions" about "soil stability". Bock's March 9, 2015 appraisal made no mention of such issues; to the contrary it concluded the lots contained a whopping ***38,091 square feet*** of usable land. The District Court's judicial rezoning was anathema to the black letter law of Just Compensation, which not only required it to ***apply*** the zoning and building regulations in effect prior to the taking, but also ***presume*** they reflected the properties' highest and best use. The law clearly does not allow the District Court to impose more restrictive building regulations than in existence at the time of the taking, and then apply them to the taking.[1]

[¶34] The District Court also should have disregarded Bock's opinions and testimony, as they were replete with project influence. Two of his appraisals relied upon project-influenced zoning and the Barr report. His serial appraisals and contradictory, incoherent testimony evinced a preordained conclusion in search of a rationale. And his admission that he considered himself a "fiduciary" of the Appellee evinced a clear bias. His appraisals and testimony should have been given no weight at all. N.D. R. Evid. 702; Westby v. Schmidt, 2010 ND 44, ¶ 13,

---

[1] The District Court's judicial rezoning also raises Equal Protection concerns. Equal Protection prevents "government decision-makers from treating differently persons who are in all relevant respects alike." Ferguson v. City of Fargo, 2016 ND 194, ¶ 9, 886 N.W.2d 557 (citations omitted). See Billy Graham Evangelistic Ass'n v. City of Minneapolis, 667 N.W.2d 117, 126 (Minn. 2003)(disparate treatment of two similarly-situated property owners may be an indication that government is acting unreasonably or arbitrarily). No other properties were analyzed for "geotechnical stability", and there was no evidence that the condition of Ericksons' lots was any different than countless others up and down the Red River—including those ***on their own street*** which were acquired by Appellee for substantial sums. This Court should not allow Appellee or the District Court to treat Ericksons disparately from all other similarly-situated property owners.

779 N.W.2d 681. See State ex rel. Missouri Highways & Transp. Comm'n v. 1811 N. Broadway, LLC, 405 S.W.3d 539, 549 (Mo. Ct. App. 2013)(project-influenced evidence proffered by appraiser caused substantial and glaring injustice to landowner in condemnation action; appraiser's opinion drove down value of land by undermining evidence of commercial use in progress, and then using that to find comparable sales establishing a much lower industrial value); U.S. v. 1.604 Acres of Land, More or Less, Situate in City of Norfolk, Va., 844 F.Supp.2d 668, 681 (E.D. Va. 2011) (excluding appraiser's opinion because appraiser took into account influence of project in determining financial feasibility of current use).

[¶35] The District Court's reliance upon project-influenced evidence was legal error.

IV. THE DISTRICT COURT VIOLATED SECTION 32-15-06.1 BY ADOPTING BOCK'S MARCH 9, 2015 APPRAISAL

[¶36] Section 32-15-06.1, entitled "Duty to negotiate - Just Compensation – Appraisals", requires the condemnor to, *inter alia*, "provide the owner of the property with a written appraisal[] . . . showing the basis for the amount it established as Just Compensation for the property." The statute further requires any offers be based upon that appraisal.

[¶37] Appellee's third and final appraisal was not transmitted until May 31, 2017, just days before Trial. Appellee submitted this appraisal as its appraisal of the lots. It was rejected by the District Court due to its reliance upon the Barr report. However, instead of ruling as a result that Appellee failed to submit an admissible appraisal, it adopted the March 9, 2015 appraisal, which was not even offered and had long since been abandoned by Appellee. By doing so, the District Court

rendered the foregoing statutory requirement that Appellee transmit an appraisal a nullity. This was legal error.[2] See In re City of New York, 929 N.Y.S.2d 478, 481 (N.Y. Sup. Ct. 2011) (while burden of proof is on claimant, State has independent obligation to pay just compensation and, in connection therewith, present its own appraisal of property's highest use and value).

V. THE JUST COMPENSATION AWARD WAS NOT WITHIN THE RANGE OF THE ADMISSIBLE EVIDENCE.

[¶38] Although the September 12, 2017 Order is succinct, it is rife with additional clear error. It incredibly makes no mention of the testimony of Joel Paulsen, by far the most qualified witness the District Court heard. Its contradictory and confusing findings make it difficult to discern whether and to what extent it considered or rejected the project-influenced evidence introduced by Appellee. It inexplicably credits the appraiser who had to redo one of his appraisals due to the wrong, project influenced zoning ordinance, and who had another appraisal thrown out.

[¶39] More fundamentally, it violates the requirement that the Court determine what a ***willing seller*** would accept, and what a ***willing buyer*** would pay. NDJI—Civil 75.05. It gives no consideration to whether Ericksons would have sold their lots for anywhere close to as little $48,200, and therefore violates the United States Supreme Court’s directive that “[i]t is the owner's loss, not the taker's gain, which

---

[2] The District Court’s finding that Appellee’s other purchases had no relevance because some were “primary residences with special criteria for their acquisition” was also error. The legal provision to which the Court refers involves relocation assistance, and has nothing to do with the compensation paid for the owners’ property in eminent domain. See 42 U.S.C. § 4602(b). For example, the owners of Lots 127-130, 4 lots and one home along the river purchased by Appellee for a whopping ***$1,222,600***, did not relocate within Oxbow.

is the measure of the value of the property taken". First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal., 482 U.S. 304, 319 (1987). Proof positive of this is the fact that it fails to even mention that these lots appreciated substantially in value between 1999 and 2005. Instead it actually included in its findings their tax-assessed value ***as of September, 2017***, which was highly improper. It is also clearly written from the standpoint of an ***unwilling*** buyer. To be sure, there are risks associated with living along a river. But those risks are open and notorious to all, and thousands of buyers are willing to take those risks. Clearly, Judge Irby is not one of them. But the law required him to value the property from the standpoint of someone who is. The District Court's finding that these beautiful, wooded, riverfront/view lots, minutes south of ever-expanding Fargo near a premier golf course, ***lost*** 2/3 of their value between 2005-2015, is completely divorced from the concept of "fair market value" . . . and reality.

VI. RELIEF REQUESTED

[¶40] Ericksons submit the only legally admissible evidence of value the District Court heard was theirs. The legally required highest and best use of their lots was that for which they were always intended: residential development. Appellee set forth no admissible evidence of any lesser value based upon this legally required highest and best use. All of its appraisals were based upon other, lesser uses of the lots and project influence. Accordingly, this Court must reverse the District Court's September 12, 2017 Order and remand with instructions to enter a Just Compensation award of ***$456,000***, together with an award of interest, costs and reasonable attorneys' fees incurred herein pursuant to Section 32-15-32.

[¶41] Alternatively, if this Court lets stand the District Court's judicial rezoning of the lots, it still cannot affirm an award based upon anything other than their legally-required highest and best use of residential construction, as found by the District Court. Again, the only legally admissible evidence of value under these conditions, based upon the properties' highest and best use, was submitted by Erickson. Appellee set forth no admissible evidence of any lesser value based upon this legally required highest and best use. Accordingly, under this alternative analysis this Court must reverse the District Court's September 12, 2017 Order and remand with instructions to enter a Just Compensation award of ***$289,000***, together with an award of interest, costs and reasonable attorneys' fees incurred herein.

CONCLUSION

[¶42] Ericksons respectfully request the District Court's November 21, 2017 Judgment And September 12, 2017 Order be reversed.

Dated this 11th day of May, 2018.

/s/ Michael T. Andrews
Michael T. Andrews (ND #05516)
Anderson, Bottrell, Sanden & Thompson
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mandrews@andersonbottrell.com
(701) 235-3300
Attorney for Appellants

Word Count Approx. 7,952

AFFIDAVIT OF SERVICE BY E-MAIL

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

The undersigned, being first sworn, says upon her oath that on 16th day of May, 2018, she delivered via e-mail a true and correct copy of each of the following:

Brief and Appendix of Defendants/Appellants/Cross-Appellees

A copy of the foregoing was securely e-mailed to the address(es) as follows:

Christopher M. McShane
Ohnstad Twichell, P.C.
cmcshane@ohnstadlaw.com

Paul Campbell
Kennelly Business Law
paul@kennellybusinesslaw.com

To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

Dated this 16th day of May, 2018.

____
Liza A. Gion

Subscribed and sworn to before me this 16th day of May, 2018.

____
Notary Public

AFFIDAVIT OF SERVICE BY E-MAIL

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

The undersigned, being first sworn, says upon her oath that on 11th day of May, 2018, she delivered via e-mail a true and correct copy of each of the following:

Brief and Appendix of Defendants/Appellants/Cross-Appellees

A copy of the foregoing was securely e-mailed to the address(es) as follows:

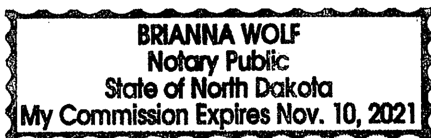
Christopher M. McShane
Ohnstad Twichell, P.C.
cmcshane@ohnstadlaw.com

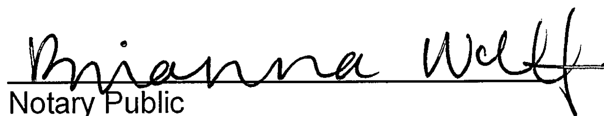
To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

Dated this 11th day of May, 2018.

Liza A. Gion

Subscribed and sworn to before me this 11th day of May, 2018.





Notary Public

20180028
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 16, 2018
STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY E-MAIL

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

The undersigned, being first sworn, says upon her oath that on 16th day of May, 2018, she delivered via e-mail a true and correct copy of each of the following:

Brief and Appendix of Defendants/Appellants/Cross-Appellees

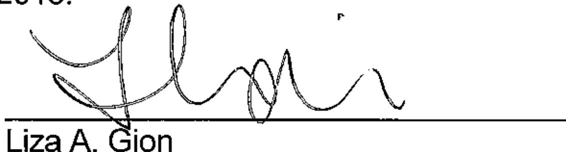
A copy of the foregoing was securely e-mailed to the address(es) as follows:

Christopher M. McShane
Ohnstad Twichell, P.C.
cmcshane@ohnstadlaw.com

Paul Campbell
Kennelly Business Law
paul@kennellybusinesslaw.com

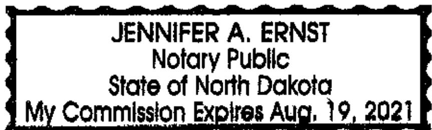
To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

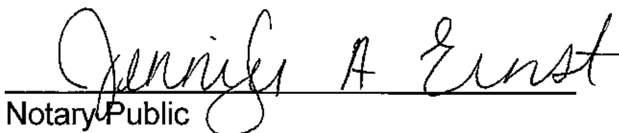
Dated this 16th day of May, 2018.



Liza A. Gion

Subscribed and sworn to before me this 16th day of May, 2018.





Notary Public