

STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Allen Lenertz)	
Plaintiff, Appellant)	
)	Supreme Ct # 20180153
)	
)	Civ # 51-2015-CV-01874
vs.)	
)	
City of Minot N.D.)	
Defendant, Appellee)	

APPELLANT- ALLEN LENERTZ REPLY BRIEF

District Court of Ward County - North Central Judicial District
Hon Gary Lee, D.J. Presiding

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ANALYSIS

1. Alan Lenertz has appealed to the North Dakota Supreme Court the Amended Judgment of Dismissal and the underlying Order of Dismissal the Hon. Gary Lee D.J. Presiding. He has submitted his Appellate Brief. That has been Responded to by the City of Minot. That Response compels a Reply. Note this case pertains to inverse condemnation and costs.

2. City of Minot on its Response Brief urges- that as there was no listing or evidence of diminution in value of the property by Lenertz on account of the flooding caused by its project. Therefore the case must be dismissed. The lower court indicated that there needed to be a residual value to the property. Judge Lee felt it was incredulous that there would be no residual value to the land in question with the improvements thereon. (Tran -day #2- pg 222,227- you need fair market value before and fair market value after; 224- the value of just compensation is the diminishment of value: Tran -day #3- 47- proper measurement of damages is diminishment in value; 48- diminishment in value is fair market value before and fair market value after.

3. In this case Daniel Boris (Lenertz expert appraiser) testified as follows:

Q If your property is affected by uncontrolled water

events that you have no ability to regulate or effect, how does that affect your bundle of rights.

A. Again. It really gets down to the ability to market the property. If you have significant issues to access that you cannot access the property, effectively, you know, in many recast the property might be condemned.

Q. Does this flooding event materially effect those bundle of rights.

A. Absolutely.

Q. And I told you that there was no easement or permissive right granted in perpetuity on the adjoining landowner to back up water, does that effect this property and the ability to be marketed?

A. Absolutely

Q. Does that effect the ability to reduce damages

A. Yes

Q. Is there a complete taking.

A. Is there a complete taking.

Q. Or complete damaging of this property?

A. I was going to say damage-wise. Yes (Tran day 3 28-29)

By this testimony it is apparent that the appraiser considered the relevant standards in measuring the loss, and applied them to the facts in this case. So also does the deposition testimony of Daniel Boris that Minot

suggests on it Appellee Brief. (Appellee Supplemental Appendix pg 003)

4. In this matter the lower court was fixated as was Minot on *diminution in value*. That however is not controlling absolutely considering NDCC 32-15 -22 Assessment of Damages. There at subsection #3 the legislature related that:

If the property , though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages. (Emphasis supplied)

5. City of Minot in its brief does not address this enactment. Why is unknown. It merely urges that Boris' methodology conflicts with the law. All Minot urges is that Lenertz has not pointed to any law or case authority for the premise that flooding can equate with a total loss of complete marketability. For that position Minot does not comment upon NDCC 32-15-22(3) nor adequately respond to any of the authorities relied upon by Lenertz. Nor does it fully consider the evidence in this case.

6. Minot does not address how uncontrolled *flooding that can't be fixed or cured* still leaves the property with a residual market value. Who would buy land with buildings on it that would flood every handful of years. That flooding would be inches deep uniformly across the property

and would come from storms (as Judge Lee noted) every couple of years. It has been noted that Lenertz can't fix the problem and that Minot can't get an easement to block the water coming onto the affected land or otherwise permanently resolving the issue. (Tran Vol #1 pg 76, Tran Vol #2 pg14-15 Tran Vol #1 pg 74). As such Boris testimony is supported by not only the law but logic.

7. Boris says the uncontrollable flooding that will occur again leads to a total loss in market value. That is a fact question and goes to weight and credibility. It does not go to admissibility. Minot's assertion that there is no evidence to support Boris assertion on lack of marketability is not supported by its trial court argument, or the presentation of facts before the lower court. It overlooks that its designed and constructed project leads to perpetual flooding as the evidence shows. Again this is not isolated but continuing as Judge Lee notes. Tran - Vol #3 pg 45

8. Assuming that there is some merit to Minot's argument where is its proof on that point. Minot has no expert on this point. Boris position as noted at Tran - Vol# 3 pg 22-
..if there is some significant impediment to that property that precludes it being marketed that has to be quantified.....

...

Boris did that

Q. And I told you that there was no easement or permissive right granted in perpetuity on the adjoining landowner to back up water, does that effect this property and the ability to be marketed

A. Absolutely (Tran Vol #3 pg 29)

9. In this matter Minot has not addressed nor considered the definition of *Fair Market Value*. That being the willing buyer and willing seller standard. It makes no difference whether Lenertz has generated some income or losses that can be used for tax purposes or if he has tenants. (Note Boris discounted the tenants on the property. Minot ignores that testimony and the reasons ascribed thereto.) The question in this case is market value under the willing buyer willing seller standard and damages. That metric has been used and noted in Lenertz opening brief.

10. Minot feels that the date of valuation is somehow germane to the question. Nothing was shown by Minot that valuation would be different or would vary because of the short period of time from construction to the first flooding and when the appraisal occurred. In fact the tax assessments of Minot on the subject tract reveals stable valuation. Further Minot has waived the point by not adequately presenting it in its closing argument.

Boris has noted that the damages continued and that the

taking occurred with the continual flooding thereafter.
NDCC 32-15-22 and Hager v Devils Lake 2009 ND 180 , 773
NW2d 420 address this point. "We read the statute as the
district court did: The right to compensation, and to bring
an inverse condemnation action to recover such
compensation, accrues on the date the property is taken.
See Maragos, 191 N.W.2d at 572 [***32] (inverse
condemnation action "accrued when the property was invaded
and damaged, [and] the plaintiffs' cause of action and
damage, at the latest, accrued . . . when the project was
completed") The valuation date used by Lenertz was correct
and the damages were determined proximate to when the
property was adversely affected.

11. Minot asserts that the valuation urged by Lenertz
himself was thin. Even if it was, there was enough to get
the valuation issue to the jury. What Minot ignores is that
it was the valuation that Minot used to determine true and
fair value for tax purposes. That valuation was not
objected to by Minot and they waived any objection that
they might have had.

12. The other points raised by Minot were addressed by
Lenertz main brief.

CONCLUSION

13. In the case at bar proof was shown that supports
Lenertz claim. That proof supports a reversal of the

judgment of dismissal.

Dated this 8th day of August, 2018

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CERTIFICATE OF SERVICE

I undersigned herewith certify that I served a copy of the foregoing Appellant's Rely Brief upon the following persons by email to wit:

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Dated this 8th day of August, 2018

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