

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Senske Rentals, LLC, a North Dakota  
Limited Liability Company,

and

Sierra Investments, LLC, a North Dakota  
Limited Liability Company,

Petitioners/Appellants,

Supreme Court No. 20220222

District Court No. 18-2021-CV-02258

v.

City of Grand Forks, a political subdivision  
of the State of North Dakota,

Respondent/Appellee.

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**BRIEF OF APPELLEE**

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APPEAL FROM THE MEMORANDUM DECISION AND ORDER AFFIRMING THE  
COMMISSION'S DECISION DATED JUNE 2, 2022 (DKT. NO. 33)  
COUNTY OF GRAND FORKS  
NORTHEAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE JOHN THELEN

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ORAL ARGUMENT REQUESTED

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**STATEMENT OF THE ISSUES**

[¶1] Whether the Special Assessment Commission's decision was arbitrary, capricious, or unreasonable.

**REQUEST FOR ORAL ARGUMENT**

[¶2] Respondent hereby requests oral argument as it would be helpful to the Court in considering the issues presented in this appeal.

## STATEMENT OF THE CASE

[¶3] This matter arises out of the Grand Forks City Council’s approval of the Special Assessment Commission’s (“Commission”) determination of assessments to properties in the Oscarville, Senske, and Lemm’s Acres Subdivisions (Collectively “Subdivision”). The assessments stem from a project to construct a storm sewer, storm pond, pump station, and discharge ditch (Collectively “Project”).

[¶4] In 2019, the City of Grand Forks (“City”) received commitment from all property owners in the Subdivision to move forward with the Project as a prerequisite to paving the roads in the Subdivision. The Commission was created and assigned benefits based on City policy and N.D.C.C. § 40-23-07. Appellants, property owners in the Subdivision, objected to the assessment of benefits, arguing they were too costly. The Commission reduced its assessments in response.

[¶5] Thereafter, Appellants argued to the City Council that the assessments were unreasonable. The City Council and City Attorney determined that the Commission’s determination of assessments followed policy and its actions were not arbitrary, capricious, or unreasonable.

[¶6] Appellants appealed to district court. The Honorable John Thelen, District Court Judge, upheld the assessments. This appeal follows.

## STATEMENT OF THE FACTS

[¶7] Appellants own property in the Subdivision. The Subdivision was originally platted and developed in the early 1960s. At that time, it was outside City limits. The roads in the Subdivision were gravel, with the exception of one main road. (R:16:99 (GF0204)). Due to poor drainage and heavy truck traffic, the gravel roads often became impassible or caused trucks to get stuck in the roadway. (*Id.*) Property owners had asked the City to pave roads in the Subdivision. (*Id.*). The City discussed with property owners that development of infrastructure would be complex due to existing driveways and underground utilities, which would contribute to the cost of construction. (*Id.*). Additionally, the City could not move forward with infrastructure improvements until a storm pond was installed to provide for proper drainage per federal regulation. (*Id. See also* R:15:31 (GF0031)). Upon commitment from all property owners in the Subdivision, the City moved forward with the Project to install a storm water pond and pave the roads. (*Id.*).

[¶8] The City Council approved plans for the Project and created a special assessment district and the Commission in February of 2019. (R:15:19 (GF0019)). On May 13, 2019, the Commission issued a report detailing that the current estimated cost of the project was \$3.5 million. (R:15:31 (GF0031)). City policy for local storm sewers was for the entirety of the project to be assessed to benefitting properties, minus a 15% share of the pond cost allocated to the City. (R:15:32 (GF0032)). However, given the construction estimate, the Commission determined that the City may need to share more than 15% of the cost. (*Id.*).

[¶9] The Commission met to assign benefits on May 30, 2019. (R:15:47 (GF0047)). The Commission noted the benefits from the Project included:

The benefits received from the project are to allow drainage to public and private property to include streets, allows increased impervious surface

areas caused by development, safely conveys storm water from the benefitting area and provides sanitary method of moving and holding storm water.

*(Id.)*.

[¶10] The Commission made findings consistent with past practices and those detailed in the City's policies and procedures. (R:15:3-11 (GF0003-0011); R:13 @ 1:12:43 (GF0242)). Further, the Commission assigned benefits to benefited properties in the Subdivision as follows:

- 100% benefit based on square footage to all properties in the district except for the lots along 42nd Avenue which will receive a 50% benefit and Lot 1, Block 1, Oscarville 2<sup>nd</sup> Subdivision and Lots 13 and 14, Block 1, Oscarville Subdivision, which will receive a 50% benefit based on half of their square footage;
- Zero benefit to the pond lot and 100% benefit to the areas south and west of the pond in the future assessment area.

(R:15:47-48 (GF0047-0048)).

[¶11] On June 3, 2019, the City approved changing their share of the Project from 15% to 50% of the cost of the storm pond. (R:15:46 (GF0046)). In response, City engineers prepared an updated estimate for the cost of the Project.

[¶12] Commission minutes from July 8, 2019, indicate that the Commission heard discussion on the project and the impact it has on all properties in the district. (R:16:1 (GF0106)). City Engineer Mark Walker noted that there was an unannexed future assessment area within the Subdivision that the City planned to purchase. *(Id.)*. That area would be used for the construction of the storm pond and to store the excavated dirt. *(Id.)*. The additional unannexed area would not drain into the pond initially but would have the option to drain into the pond at a later date for a fee. *(Id.)*. In response, the Commission amended its assessment of benefits for this area, updating it to:

- Zero benefit to the pond lot and 50% benefit to the area south of the pond in the future assessment area and zero benefit to the area west of the pond in the future assessment area;

*(Id.)*.

[¶13] Once benefits were determined, notice was sent to the property owners that the original assessment estimate ranged from \$0.98 to \$1.36 per square foot. (R:15:54-76 (GF0054-76); R:13 @ 56:00 (GF0242)). A public meeting was held where property owners were asked for input. Jim Senske, owner of Appellant Senske Rentals, LLC, wrote on a comment card, “I am in favor of this project in it’s [sic] entirety – been a long time coming – will be good for this part of town.” (R:15:84 (GF0084)).

[¶14] Construction bids were received and came in 27% higher than estimated by City engineers. (R:16:99 (GF0204)). Property owners were duly notified of an updated estimated assessment range of \$1.57 to \$1.80 per square foot. (R:16:15-37 (GF0120-0142; R:13 @ 56:00 (GF0242)). No comments or objections were received. (R:23 @ 56:00 (GF0242)).

[¶15] Upon completion of the Project, property owners were sent a letter with final assessments. The assessment equated to \$1.51 per square foot. (R:16:59-81 (GF0164-0186); R:13 @ 56:00 (GF0242)).

[¶16] On September 30, 2021, the Commission held a public hearing. (R:16:91 (GF0196)). The public was reminded that the Commission has no authority to determine the cost of the Project or the boundary of the assessment district. *(Id.)*. The Commission advised that its purpose was to determine the benefit and assessment to each property. *(Id.)*.

[¶17] Jim Senske, owner of Appellant Senske Rentals, LLC, advised that he owns multiple properties in the special assessment district and was concerned with the amount



of assessments on his multiple properties. (R:16:92 (GF0197)). In response, City Engineer Mark Walker advised that the City recognized the cost was going to be high and that is why the City contributed 50% rather than the required 15%. (*Id.*). After hearing comments, the City took off the administrative markup which brought the assessment down to \$1.41 per square foot (just 3.7% higher than the original estimate's high end). (R:16:99 (GF0204); R:16:103-106 (GF0208-0211)). The public was informed if they had additional issues or concerns, they could address it at the City Council meeting on October 18, 2021. (R:16:91 (GF0196)).

[¶18] At the City Council meeting on October 18, 2021, City Engineer Mark Walker provided background on the area. (R:16:99 (GF0204)). The area had consisted of gravel roads with no storm water system, causing the roads to often become impassible. (*Id.*). Property owners wanted the roads paved but were advised it would be complex and costly and would require installation of a storm water pond first. (*Id.*). He noted that the City did not move forward with the Project until a commitment from all property owners was received. (*Id.*).

[¶19] He summarized the assessments and notice to the property owners. The Commission met to assign benefits based on adopted City policy and the property owners were notified of preliminary estimates of the assessments (*Id.*). Property owners, including Appellants, repeatedly expressed their desire to have the Project completed. (*Id.*). After additional construction bids were received by the City, notice was sent to all property owners advising of a 27% increase in the estimated cost of construction and corresponding assessments. (*Id.*). No objections or comments were received, so the Project was constructed. (*Id.*). Upon completion of the Project, property owners were advised of the

final cost of construction and the assessment to each property, which came out right around the original estimate which property owners had supported. (*Id.*).

[¶20] Special Assessment Coordinator Emily Fossen provided information to the City Council regarding how the assessments were determined. (R:16:100 (GF0205)). She noted the benefits were assessed based on North Dakota Century Code requirements and City policy. (*Id.*). Counsel for Appellants spoke at the hearing, addressing Appellants' concerns that the policy did not fairly allocate costs and requested the City bear more of the cost. (*Id.*). City Council and City Attorney Daniel Gaustad heard arguments by Appellants' counsel but concluded that the Commission's determination followed policy and its actions were not arbitrary, capricious, or unreasonable. (R:13 @ 1:12:43 (GF0242)).

[¶21] Appellants then appealed to the district court, who upheld the assessments. This appeal follows.

### **STANDARD OF REVIEW**

[¶22] When considering an appeal from the decision of a local governing body under N.D.C.C. § 28–34–01, this Court's scope of review is the same as the district court's and is very limited. *Tibert v. City of Minto*, 2006 ND 189, ¶ 8, 720 N.W.2d 921.

[¶23] A decision by a special assessment commission must be affirmed unless the commission acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence to support the decision. *In re D & P Terminal, Inc.*, 2012 ND 149, ¶ 5, 819 N.W.2d 491, 492. Courts are not to act as a super grievance board or reweigh the evidence. *Id.* Rather, this Court must begin with the presumption that the assessments are valid, and the burden is on the party challenging the validity of the assessments to demonstrate they are invalid. *Id.*

[¶24] “A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.” *Id.* The record is adequate to support a commission’s findings and conclusions if it allows the Court to discern the rationale for the decision. *Id.* A commission’s failure to correctly interpret and apply controlling law constitutes arbitrary, capricious, and unreasonable conduct. *Id.*

### **LAW AND ARGUMENT**

[¶25] Based on the record and applicable North Dakota law, this Court will find that the assessments of the Special Assessment Commission were not arbitrary, capricious, or unreasonable.

**I. This Court should not take judicial notice of facts that were not presented to the district court nor the Special Assessment Commission.**

[¶26] Appellants “feel” that the special assessment is excessive. (Appellants’ Brief at ¶5). In support of this “feeling,” they cite to websites that are not part of the record on appeal nor were they presented to the Special Assessment Commission. Appellants ask this Court to take judicial notice of these websites.

[¶27] Under N.D.R.Ev. 201(b)(2), a court may judicially notice an adjudicative fact “that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Although a court has discretion to take judicial notice under N.D.R.Ev. 201, this court is not obligated to do so. *State v. Jordheim*, 508 N.W.2d 878, 883 n. 1 (N.D.1993). “Evidence which does not appear in the record of the [district] court proceedings cannot be considered by this Court on

appeal.” *Evenstad v. Buchholz*, 1997 ND 141, ¶ 12, 567 N.W.2d 194; see also *Arndt v. Maki*, 2012 ND 55, ¶ 15, 813 N.W.2d 564.

[¶28] Appellee objects to the inclusion of this evidence that was not presented to the Special Assessment Commission or to the district court. Additionally, Appellants have included facts without any record cites. (See Appellants’ Brief at ¶¶ 22, 23). It appears that these facts are not part of the record before this Court. These facts cannot be readily determined from sources whose accuracy cannot be questioned and this Court should not consider these facts in their review of this matter.

**II. The Special Assessment Commission did not act arbitrarily, capriciously, or unreasonably.**

[¶29] A municipality is permitted to specially assess for improvements. N.D.C.C. § 40-22-01. Specifically, once plans and an estimate of the total cost of the improvements are prepared, the municipality may direct assessments to be levied for the payment of all or any part of such cost. N.D.C.C. § 40-23-05. The cost of improvement shall include the estimated construction cost, a reasonable allowance for cost of extra work which may be authorized under the plans, engineering, fiscal agent’s and attorney’s fees, cost of publication of required notices, and all expenses incurred in the making of the improvement and levy of assessments. *Id.*

[¶30] Whenever the commission makes any special assessment, the commission shall determine the particular lots which, in the opinion of the commission, will be especially benefited by the construction of the work for which the assessment is to be made. N.D.C.C. § 40-23-07.

[¶31] This Court has stated three requirements must be satisfied for a special assessment to comply with N.D.C.C. § 40-23-07: The special benefit accruing to each lot from the

improvement must be determined; the special assessment levied against each lot must be limited to its just proportion of the total cost of the improvement; the assessment against any lot must not exceed the benefit which has been determined to have accrued thereto. *Bateman v. City of Grand Forks*, 2008 ND 72, ¶ 11, 747 N.W.2d 117.

[¶32] A municipality has broad discretion to choose the method used to decide what benefits a property receives from an improvement and to apportion the costs to individual properties. *Id.* at ¶ 16. A municipality may adopt any method to apportion benefits that is fair and legal and secures an assessment that is in proportion to the benefits as nearly as possible when no rule of apportionment prescribed by statute or charter exists. *Serenko v. City of Wilton*, 1999 ND 88, ¶ 21, 593 N.W.2d 368. The process of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. *Id.* An “assessment may be apportioned according to frontage, area, value of, or estimated benefits to, the property assessed, or according to districts or zones, or on any other reasonable basis that is fair, just, and equitable.” *Id.* at ¶ 21 (quoting *Cloverdale Foods Co. v City of Mandan*, 364 N.W.2d 56, 61 (N.D. 1985)).

[¶33] In this case, the City Council determined that a storm water system would benefit surrounding properties and created a special assessment district. (R:15:20-21 (GF0020-21)). It was determined that all costs for the Project will be specially assessed to benefitted properties with the exception of a 15% share paid by the City. (*Id.*).

[¶34] The Commission made findings consistent with past practices and those detailed in the policies and procedures. (R:15:3-11 (GF0003-11); R:13 @ 1:12:43 (GF0242)). Further, the Commission detailed findings that include:

The benefits received from the project are to allow drainage to public and private property to include streets, allows increased impervious surface

areas caused by development, safely conveys storm water from the benefitting area and provides sanitary method of moving and holding storm water.

Motion [] to assign benefit as follows:

- 100% benefit based on square footage to all properties in the district except for the lots along 42nd Avenue which will receive a 50% benefit and Lot 1, Block 1, Oscarville 2<sup>nd</sup> Subdivision and Lots 13 and 14, Block 1, Oscarville Subdivision, which will receive a 50% benefit based on half of their square footage;
- Zero benefit to the pond lot and 100% benefit to the areas south and west of the pond in the future assessment area.

(R:15:47-48 (GF0047-48)).

[¶35] On July 8, 2019, the Commission heard discussion on the project and the impact it has on all properties in the district. (R:16:1 (GF0106)). Thereafter, the Commission amended its assessment of benefits for certain lots in the district, updating it to:

- Zero benefit to the pond lot and 50% benefit to the area south of the pond in the future assessment area and zero benefit to the area west of the pond in the future assessment area;

(*Id.*).

[¶36] Discussion was held at a public hearing on October 18, 2021, where City Engineer Mark Walker explained the policy of assigning benefits based on property type. He explained that residential properties have less permeably land and thus have less run off than commercial properties, so they receive 50% benefit, and commercial properties 100% benefit. (R:13 @ 55:36 (GF0242)).

[¶37] The Commission detailed what benefits would be received by what properties, at what percent they would be benefitted, and even amended their assignment of benefits based on new information. Additionally, after hearing arguments from Appellants that the assessments were too large, the City Council reduced costs and waived administrative fees,

reducing the assessments to just 3.7% higher than the original estimate's high end. Notably, there was no objection to the original estimate (or even the second estimate) by Appellants.

[¶38] In applying the three requirements under N.D.C.C. § 40-23-07: First, the benefit accruing to each lot was determined and is detailed in the record. (R:16:103-106 (GF0208-211). Second, the assessment levied against each property was limited to its share of the total cost of improvement. (*Id.*). And third, the assessment does not exceed the benefit conferred. (*Id.*).

[¶39] Appellants argue that the Commission erroneously assigned benefits based on the cost of construction, and even go so far as to allege an unconstitutional taking of Appellants' property by the City. (Appellants' Brief at ¶¶ 20, 24). Appellants' argument is flawed and their brief lacks any supporting law. The very reason for assessments is to share in the cost of construction that leads to benefits for the properties. Moreover, Appellants ignore well established law. There is nothing that prohibits assessments based on the cost of construction. Rather, N.D.C.C. § 40-23-07 states that the commission “**shall** assess against each of such lots and parcels of land such sum, not exceeding the benefits, as shall be necessary to pay its just proportion of the **total cost of such work.**” (emphasis added); See also *Buehler v. City of Mandan*, 239 N.W.2d 522 (N.D. 1976).

[¶40] Appellants further suggest the use of a property's square footage as measurement is erroneous. North Dakota Courts disagree and routinely have upheld assessments based on area. See *Buehler*, 239 N.W.2d at 525–26; *Cloverdale*, 364 N.W.2d at 61; *Serenko*, 1999 ND 88, ¶ 22. Appellants cite to *Holter*'s dissent in support of their position. Even in *Holter*, however, the majority upheld a commission's determination based on square footage and cost of construction. *Holter v. City of Mandan*, 2020 ND 202, ¶ 19, 948 N.W.2d 858, reh'g

denied (Sept. 21, 2020). Appellants fail to cite to any relevant case law in support of their position.

[¶41] Appellants have failed to meet their burden of showing the City Council or Commission acted arbitrarily, capriciously, or unreasonably. The Commission followed City policy, made factual findings detailing the benefits conferred upon the properties, heard arguments and made revisions, and ultimately levied against the properties their portion of the total cost of the Project, but not exceeding the benefits. There is nothing in the record to support an allegation that the determination was arbitrary, capricious, or unreasonable. It should be further noted that Appellants had no objections to the initial estimated assessments. At the time of the initial estimated assessments, Appellants certainly did not think the determination was arbitrary, capricious, or unreasonable, despite using the same method to determine the amount assessed as the final assessment.

### **CONCLUSION**

[¶42] For all the foregoing reasons and based on the record and applicable North Dakota law, it is clear and indisputable that the district court properly upheld the Special Assessment Commission's determination. The Memorandum and Order of the district court should be affirmed.

Dated: October 12, 2022

**FISHER BREN & SHERIDAN, LLP**

/s/ Corey J. Quinton

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**CERTIFICATE OF COMPLIANCE**

[¶43] The undersigned, as attorney for the Appellee, in the above-entitled matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that this document complies with the page limitations and includes 16 pages, not including this Certificate of Compliance.

Dated October 12, 2022

**FISHER BREN & SHERIDAN, LLP**

*/s/ Corey J. Quinton*

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IN THE SUPREME COURT  
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Limited Liability Company,

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District Court No. 18-2021-CV-02258

v.

City of Grand Forks, a political subdivision  
of the State of North Dakota,

**AFFIDAVIT OF ELECTRONIC  
SERVICE**

Respondent/Appellee.

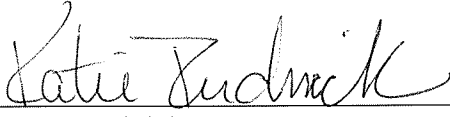
STATE OF NORTH DAKOTA            )  
  ) ss.  
COUNTY OF CASS                        )

[¶1] Katie Rudnick, being first duly sworn, deposes and states that on October 12, 2022, she served the following document:

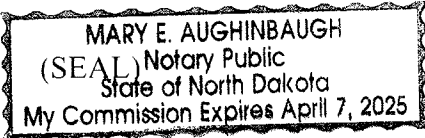
**BRIEF OF APPELLEE**

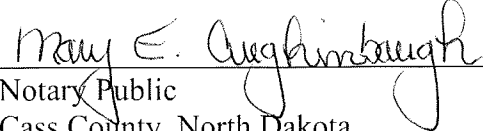
electronically via email to:

DeWayne Johnston - dewayne@wedefendyou.net

  
Katie Rudnick

Subscribed and sworn to before me this 12th day of October, 2022.



  
Notary Public  
Cass County, North Dakota