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OPINIONS AND ORDERS

REHEARING ORDER

OPINION OF THE SUPREME COURT OF NORTH DAKOTA (JULY 22, 2020)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

DEBORAH HOLTER,

Petitioner and Appellant,

v.

CITY OF MANDAN, a Political Subdivision of the State of North Dakota,

Respondent and Appellee.

2020 ND 202

Appeal from the District Court of Morton County, South Central Judicial District, No. 20190277, the Honorable Cynthia M. Feland, Judge.

Before: Lisa Fair MCEVERS, Daniel J. CROTHERS, Gerald W. VANDEWALLE, Judges.

McEvers, Justice.

[¶1] Deborah Holter appeals a district court judgment dismissing her appeal of the Mandan Board of City Commissioners' decision to specially assess her property for street improvements. We affirm.

I

[¶2] In February 2015, a public hearing was held regarding needed repairs to streets and alleys. In March 2015, the Board adopted a resolution creating Street Improvement District No. 199 and a resolution declaring the cost of the improvements would be specially assessed against the benefited properties in the district in amounts proportionate to but not exceeding the benefits the properties received from the improvements. The improvement district included construction on streets between 4th Avenue Northeast to Mandan Avenue and between Main Street and 3rd Street Northeast in Mandan. The minutes reflect that the total cost of the project was estimated to be $3,653,297 and approximately five percent of the project would be paid by city sales tax, with the remainder to be assessed to the benefiting properties.[1]

[¶3] The actual cost of the improvements was $3,316,595.73. The City paid $225,000,[2] and the remaining amount of $3,091,595.73 was specially assessed to the properties especially benefited by the improvements. In July 2017, the Mandan Special Assessment Commission published a notice of a meeting in August 2017 that contained the items of expense of the improvement, allocation of a portion of the cost to the City, and the net amount to be assessed. The notice provided a list of properties found to be especially benefited by the construction performed in the project and the amounts to be assessed. The notice provided:

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[1] Five percent of the estimate is roughly $182,665.

[2] More than 6.75% of the total costs.

> We the undersigned, constituting the Special Assessment Commission of the City of Mandan do hereby certify that the following is a true and correct list of the particular lots of land which, in the opinion of the Commission, are especially benefited by the construction performed . . . showing the amount against each lot or tract, the same is a true and correct assessment of the property there in described to the best judgement of the members of the Commission.

(Emphasis added.)

[¶4] In August 2017, the Special Assessment Commission approved the proposed assessments against the especially benefited properties and moved the decision to the Board for its consideration. The Board approved the special assessments in October 2017.

[¶5] Holter owns three undeveloped residential lots in the improvement district. Each lot was assessed $15,928.40, for a total of $47,785.20. Holter objected to the assessments against her properties, claiming they exceeded the value of the benefits they receive. She also argued the method for determining the assessments was unfair because corner lot owners and non-corner lot owners were not treated equally.

[¶6] Holter appealed the Board's decision approving the special assessments to the district court. The court twice remanded the case to the City for further findings on the value of the benefits to Holter's properties. On the second remand, the Special Assessment Commission met and determined that under the City's Special Assessment Policy, Holter's

properties were benefited by the amounts assessed against them. Additional findings from the November 2018 meeting stated:

> Winks [commissioner] moved in conformance with the City of Mandan's Special Assessment Policy and the methods prescribed therein, were used to decide the benefits and costs to the Holter properties/parcel number B20-1, B20-2 and B20-3 in the amount of $15,928.40 for each parcel and that the parcels are specially benefitted in that amount by reason of the improvements in Street Improvement District 199.

[¶7] The court affirmed the City's special assessments against Holter's properties. The court concluded the special assessments to Holter's properties under the City's policy were consistent with the amounts assessed to other properties and were not arbitrary, capricious, or unreasonable.

II

[¶8] Holter contends the City failed to determine the value of the benefit to her properties and her properties were assessed in an amount exceeding the benefit to the properties.

[¶9] We exercise a limited review of challenges to special assessments in part because of the separation of powers doctrine:

> The special assessment commission is in essence a legislative tribunal created by legislative authority to "(1) determin[e] the benefits accruing to the several tracts of land in an improvement district by reason of the

> construction of an improvement and (2) assess [ ] the costs and expenses thereof against each tract in proportion to the benefit received." Accordingly, judicial review is limited to assuring that local taxing authorities do not act arbitrarily, capriciously, or unreasonably. Courts are not to act as a super grievance board, and we do not try special assessment cases anew or reweigh the evidence. Rather, we begin with the presumption that assessments for local improvements are valid, and the burden is on the party challenging the validity of the assessments to demonstrate they are invalid.

Bateman v. City of Grand Forks, 2008 ND 72, ¶ 10, 747 N.W.2d 117 (quoting *Serenko v. City of Wilton*, 1999 ND 88, ¶ 20, 593 N.W.2d 368).

[¶10] Section 40-23-07, N.D.C.C., governs a special assessment commission's decision relating to benefits and assessments:

> The commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as is necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment, including all expenses incurred in making such assessment and publishing necessary notices with reference thereto and the per diem of the commission.

[¶11] 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 or parcel of land 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 or parcel of land must not exceed the benefit which has been determined to have accrued thereto.

Bateman, 2008 ND 72, ¶ 11, 747 N.W.2d 117.

[¶12] This Court looks at whether, on its face, the legislative act was arbitrary, capricious, or legally unreasonable. This Court stated in *Ulvedal v. Bd. of Cty. Comm'rs of Grand Forks Cty.*, 434 N.W.2d 707, 708-09 (N.D. 1989):

> Several decades ago, this court addressed the proper role of courts in reviewing a tax assessment by a local governing body. *Appeal of Johnson*, 173 N.W.2d 475 (N.D. 1970). In that earlier appeal, also from an assessment of real estate in Grand Forks, this court surveyed how courts in other states approached review of assessments of property for tax purposes. We concluded that "it is not for the court to substitute its judgment for that of the lawfully designated taxing authorities, . . . " *Id.* at 484. When "there is substantial evidence to support the appraisal made by the assessing authorities and no evidence of any discrimination," *id.* at 484,

a decision of county commissioners should be upheld.

Later, in *Shaw v. Burleigh County*, 286 N.W. 2d 792 (N.D. 1979), this court carefully defined the scope of "de novo" review of a county commissioner's decision under NDCC 11-11-43. A decision about zoning was under review. This court recognized that it was examining the exercise of "a legislative function and not a judicial one." *Id.* at 795. For separation of powers reasons, we held:

> " . . . that a 'de novo' hearing, as applied to judicial review of decisions of the Board of County Commissioners under Section 11-11-43, N.D.C.C., means a trial to determine whether or not the Board acted arbitrarily, capriciously, or unreasonably. Section 11-11-43, N.D.C.C., must be treated as merely providing the procedure by which the proceeding may be brought before the court to determine whether or not the Board acted properly." 286 N.W.2d at 797.

Thus, a reviewing court may not reverse a local governing body's action simply because it finds some of the material considered more convincing. Only when there is such an absence of evidence or reason as to amount to arbitrary, capricious or unreasonable action, can a reviewing court reverse. Both the district court and this court are limited to this scope of review. *Shaw*, *supra* at 797.

This limited review, carefully explained in *Shaw*, had been anticipated in *Johnson*:

> "[T]he taxation of property is a legislative rather than a judicial function, . . . '[t]he court must presume, in the absence of contrary evidence, that the assessing officers performed their duty, and the court will not set aside an assessment merely because of a difference of opinion as to value. (Citations omitted)'" 173 N.W.2d at 481-482.
>
> We have continued to employ this restricted concept in reviewing decisions by local governing bodies. Thus, in *Haman v. City of Surrey*, 418 N.W.2d 605 (N.D. 1988), we affirmed that a city's special assessment commission had not acted arbitrarily, oppressively or unreasonably in assessing benefits from water and sewer improvements. *See also Cloverdale Foods Company v. City of Mandan*, 364 N.W.2d 56 (N.D. 1985).

[¶13] As such, a municipality has broad discretion to determine benefits and apportion assessments and costs to properties within an improvement district. *Bateman*, 2008 ND 72, ¶ 16, 747 N.W.2d 117. There is no exact formula for quantifying benefits. *Id.* "[A]n '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.'" *Serenko*, 1999 ND 88, ¶ 21, 593 N.W.2d 368 (quoting *Cloverdale Foods Co. v City of Mandan*, 364 N.W.2d 56, 61 (N.D. 1985)). "The method used to apportion the assessment cannot be arbitrary and must have some relation to the benefits." *Bateman*, at ¶ 16.

[¶14] Here, the City assessed Holter's property under its Special Assessment Policy. *See* N.D.C.C. § 40-22-01.2 (stating a city with a population over 10,000 must have written policies "which will be applied for cost allocation among properties benefited by a special assessment project"). The purpose of the City's policy is to "provide for and ensure consistent, uniform, fair and equitable treatment, insofar as is practical, lawful and possible for all property owners in regards to the assessment of cost for benefits to properties for the qualifying improvements as listed in the [Century Code]." The policy states the special assessment commission is responsible for determining the benefits to property within the improvement district.

[¶15] Section 3.2 of the City's policy, relating to street improvement districts, provides:

> Typical benefit allocations on single-family, residential properties can be assessed by determining a unit cost. The allocation is based on a unit cost, if similar in size, by applying an equal cost share to each parcel/lot within the district. A unit cost may be determined by taking the total project costs and dividing by the total lots within the district.

[¶16] The City assessed properties benefited by the street improvements on the basis of linear feet. Holter's three residential lots each contained 100 linear feet. The City assessed each lot $15,928.40, for a total of $47,785.20.

[¶17] Holter asserts the City failed to determine the value of the benefits to her properties. She claims the assessments exceed the benefits to her properties

in violation of N.D.C.C. § 40-23-07. She contends the assessments were unreasonable because they were slightly less than the total value of the properties. To support her argument, Holter provided a letter from a real estate agent stating the approximate value of her three lots was $50,000 to $75,000.

[¶18] This Court has, in numerous opinions, approved the use of formulas such as front footage, area or value to determine the benefits to assessed properties. *D & P Terminal, Inc., v. City of Fargo*, 2012 ND 149, ¶ 14, 819 N.W.2d 491 (citing *Hector v. City of Fargo*, 2012 ND 80, ¶ 45, 815 N.W.2d 240; *Bateman*, 2008 ND 72, ¶ 16, 747 N.W.2d 117; *Serenko*, 1999 ND 88, ¶ 21, 593 N.W.2d 368; *Cloverdale*, 364 N.W.2d at 61; *Buehler v. City of Mandan*, 239 N.W.2d 522, 523, 526 (N.D. 1976); *Fisher v. City of Minot*, 188 N.W.2d 745, 746-47 Syll. ¶ 2 (N.D. 1971)).

[¶19] Holter raises arguments similar to those addressed in *Serenko*. In *Serenko*, 1999 ND 88, ¶ 22, 593 N.W.2d 368, property owners in a street improvement district were assessed based on the square footage of their lots. Some landowners disagreed with the assessments, claiming the "method did not sufficiently individualize the determination of benefits to their properties, and failed to properly consider the undeveloped nature of their property." *Id.* In rejecting the argument, this Court stated:

> We have rejected similar arguments in the past and upheld assessments based upon square footage of the property. Although the landowners and Serenkos may disagree with the special assessment commission's choice of method, and with its conclusion their properties were substantially benefitted by

> the street improvement project, it is not our function to reweigh the evidence. The landowners and Serenkos have failed to meet their burden of demonstrating the commission acted arbitrarily, capriciously, or unreasonably.

Id. at ¶ 23 (citations omitted).

[¶20] Here, Holter's properties were assessed under the City's Special Assessment Policy. The City uses the policy to determine benefits and assessments to properties in an improvement district. The special assessment commission determined that under the policy, the improvements benefited Holter's properties in the amount assessed to them, $47,785.20.

[¶21] Although the City's determination of benefits and assessments is based on a formula similar to others upheld by this Court, this case does raise some concerns. Under the City's policy, the terms "benefit" and "assessment" appear to be used interchangeably, which may explain why the special assessment commission determined the amount of the benefit to Holter's properties equaled the amounts assessed to them. However, the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work. While the findings by the Special Assessment Commission on the amount of the benefit may be somewhat conclusory, the amount of the benefit was determined to be less than the total cost and was determined to be a just proportion of the total cost based on the City's formula.

[¶22] Despite the City's difficulty in explaining the determination of benefits, we nevertheless conclude the assessments to Holter's properties satisfy N.D.C.C. § 40-23-07. The special assessment commission determined the benefits under the City's policy, and the assessments do not exceed the benefits.

[¶23] Under this Court's limited standard of review, we conclude the City did not act arbitrarily, capriciously, or unreasonably in determining the benefits and assessments to Holter's properties.

III

[¶24] We have considered Holter's remaining arguments and conclude they are either without merit or not necessary to our decision. The judgment is affirmed.

[¶25] Lisa Fair McEvers

Daniel J. Crothers

Gerald W. VandeWalle

DISSENTING OPINION OF JUSTICE TUFTE

Tufte, Justice, dissenting.

[¶26] Because I believe the majority is going further than our precedent requires, and in doing so interprets an important procedural protection out of N.D.C.C. § 40-23-07, I respectfully dissent.

[¶27] In short, the problem is this: the City calculated its determination of benefit to Holter's property using the same formula by which it calculated the costs it assessed to that property. Under the City's policy, the benefit determination for a lot is defined as the unit cost allocation. The City's reduction of total assessments by five percent does not convert what is a cost allocation into a benefit determination. The City policy thus subverts the express intent of the statute that costs assessed to a lot be limited to no more than the benefit. The majority acknowledges the City's interchangeable use of assessment and benefit but appears to announce a rule that affirms the City's direct allocation of cost because something less than 100% of the total cost is assessed against the properties in the district.

[¶28] As the majority explains, we have long approved formulaic allocation of costs by the assessed lots' area or front footage. We have also approved formulas to determine benefits to a property based on front footage, area, or value. *D&P Terminal v. City of Fargo, Inc.*, 2012 ND 149, ¶ 14, 819 N.W.2d 491. Where we have approved formulas to calculate benefits, they were applied under N.D.C.C. § 40-23-07 to set "'caps,' or maximums" to limit the assessed costs. *Id.* at ¶ 8

("These caps are generally based upon front footage or square footage of the assessed property, and the suggested benefit amount is generally less than the actual cost of the improvements."); *Hector v. City of Fargo*, 2012 ND 80, ¶ 5, 815 N.W.2d 240 ("The amount determined under the formula is considered to be the amount the property benefits from the improvement without considering the actual cost of the improvement." (emphasis added)).

[¶29] Here, by defining the benefit in terms of the lot's unit costs, the City has eliminated part of the statutory protection for property owners. "When an assessment exceeds the benefits to the property assessed, the excess is a taking of property without due process of law." *Bateman v. City of Grand Forks*, 2008 ND 72, ¶ 20, 747 N.W.2d 117 (citing *Cloverdale Foods Co. v. City of Mandan*, 364 N.W.2d 56, 61 (N.D. 1985)). To avoid becoming a "super grievance board," *Hector,* 2012 ND 80, ¶ 13, 815 N.W.2d 240, this Court has incrementally reduced its review of special assessments. On the issue of whether assessed costs exceed benefits, the majority now applies our increasingly limited standard of review to approve the City's *ipse dixit* that benefit equals cost[3] and thereby avoid review under a statute designed to protect against uncompensated takings. Under the City policy, it is impossible to arrive at a finding that costs exceed benefits. That should be a clear warning there is something amiss.

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[3] The City defines benefit equal to cost, whether or not it assesses total cost less 5% or total cost less 6.75%. Majority, at ¶¶ 2-3. Whether the City assesses 100% of total costs or 95% or 93.25%, the benefit determination is still calculated as a function of cost and so cannot supply the limitation as intended by the statute.

The rule announced by the majority reduces the standard of review, limited though it may be, to something that is neither a standard nor provides any review.

[¶30] When the City voted to accept a bid and proceed with the project, it legislatively determined that the total project cost was justified by the total benefit of the project. We properly do not review that legislative decision. That is the only point in this process where any determination was made that cost did not exceed benefit. But that determination was made as to total project cost and total project benefit, not to the benefit accruing to each lot.

[¶31] This Court has consistently identified three separate requirements of N.D.C.C. § 40-23-07: (1) determine the "special benefit" to each lot; (2) assess costs against each lot "limited to its just proportion of the total cost"; and (3) ensure "[t]he assessment against any lot or parcel of land must not exceed the benefit which has been determined to have accrued thereto." *Hector*, 2012 ND 80, ¶ 42, 815 N.W.2d 240; *Bateman*, 2008 ND 72, ¶ 11, 747 N.W.2d 117; *Cloverdale Foods*, 364 N.W.2d at 61. By merging the determination of benefits with costs, the City satisfies only requirement 2, that costs are assessed in proportion to benefits, and only because it ensures they are identical and so always at a 1:1 ratio.

[¶32] The Majority, at ¶ 21, generously notes the City policy appears to use the terms "benefit" and "assessment" interchangeably. This is another indication that the policy does not comply with the statutory requirement to compare assessed costs with benefits and ensure the costs do not exceed the benefits. Because the City policy uses the terms interchangeably, it is essentially comparing the assessed amount with

itself. In every instance, A = A. Costs will never exceed benefits where benefits by definition equal costs.

[¶33] In deferring to the City's subversion of the statute, the majority makes the same error. Reasoning that by deducting a modest percentage of the total project cost from the total amount assessed, the City had decoupled cost and benefit, the majority infers the City "determined the benefits for all properties assessed was less than the total cost of the work," and "the amount of the benefit was determined to be less than the total cost." Majority, at ¶ 21. This statement cannot be squared with the statutory requirement that the costs "not exceed[ ] the benefits."

[¶34] By applying the standard as I suggest we should, we would not substitute our judgment for that of the board. Reweighing evidence is properly not within the scope of judicial review under separation of powers. Instead, we review only to ensure the local taxing authority does not act "arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision." *D&P Terminal, Inc. v. City of Fargo*, 2012 ND 149, ¶ 5, 819 N.W.2d 491. What is not beyond judicial review is to ensure the City makes some determination of benefits that is separate from its allocation of costs so that it might ensure that the allocated costs do not exceed the benefit, as required by the statute and ultimately by the takings clause. By approving the use of a single formula to calculate both benefits and costs, the majority allows the City to shortcut the statutory process and avoid the requirement to ensure the benefit to each lot does not exceed the costs.

[¶35] We have never before said an assessment process may treat costs and benefits interchangeably

so long as they are proportional. Consistent with our prior cases, I would interpret N.D.C.C. § 40-23-07 to require some reasonable determination of estimated benefits to each lot, independently from assessment of costs. "[N]o precise formula for quantifying benefits" is required—a city may determine benefits by frontage, area, value, or "any other reasonable basis that is fair, just, and equitable." *Hector*, 2012 ND 80, ¶ 43, 815 N.W.2d 240 (quoting *Serenko v. City of Wilton*, 1999 ND 88, ¶ 21, 593 N.W.2d 368); *Cloverdale Foods Co.,* 364 N.W.2d at 61-62 (approving determination of benefits received from sewer project by "water use" method) (relying on per lot use of parking ramp to determine benefits in *Patterson v. City of Bismarck*, 212 N.W.2d 374 (N.D. 1973)). But because N.D.C.C. § 40-2307 requires the benefit to be compared to allocated cost, the benefit determination may not be calculated by the same formula that allocates cost. To do so misapplies the law.

[¶36] Under the City's policy, if the bids for a project are higher than expected, the City's benefit determination will increase by an identical percent. New pavement and sidewalks increase the value of adjacent property, which would constitute a benefit under N.D.C.C. § 40-23-07. But the benefit is not necessarily the same as or connected to the cost of the project. It is one thing to say property along a street will benefit from new pavement by an amount proportional to its area or frontage. It is quite another to say that if the cost of paving doubles, the benefit also doubles.

[¶37] The problem is best illustrated by two examples. Suppose the City decides to proceed with a paving project based on its engineer's estimate that it

will cost $5 million. In this example, if the City were to make an independent determination, it would find the project was expected to benefit the affected area by approximately $6 million. But applying City policy section 3.2, (reproduced in Majority, at ¶ 15) it calculates benefits to each lot as a function of unit costs, and so proceeds with a finding that both costs and benefits are $5 million and then spreads an equal cost and benefit proportionally to each lot. During the project, suppose there is a labor strike, materials shortage, or other disruption that results in project costs doubling to a total of $10 million. Under the City policy, because the costs have doubled, the benefits have also doubled. A project that it initially determined by formula would benefit the affected lots by a total of $5 million it now determines by formula would benefit those lots by the increased total cost of $10 million. One can readily see that if the City followed the statute and the cases we have decided before today, the City would have had to determine benefit without regard to cost and would have had to limit the assessment of costs to its pre-project determination of benefits, which in this hypothetical would be $6 million.

[¶38] For a second illustrative example, suppose the existing pavement is five years old and is in usable condition. The City could bid the same repaving project at the same cost as in the first example. Because of the way the City policy determines benefit from cost, it will again conclude that each lot benefits according to its proportional fraction of the cost. But in this instance, the pavement to be replaced is still in reasonable condition and so the actual benefit to the adjacent properties is the difference between five-year-old

pavement and new pavement, a negligible improvement no matter how it is determined. These examples illustrate the dangers inherent in conflating costs with benefits.

[¶39] Paragraph 21 of the majority opinion also expands this Court's deference to political subdivisions in special assessment cases beyond the arguments presented by the City. Paragraph 21 asserts "the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work." The City argued, and the majority affirms, that the City satisfied the statutory requirement to determine benefit, because it need not determine benefit separately from cost. But at no point in this Court or in the district court did the City ever articulate this deduction as a rationale supporting its determination of benefit in the special assessment process. There is not a single reference to the $225,000 reduction of costs and expenses in the City's brief to this Court, and the record does not reflect that particular rationale ever having been asserted as a justification or an explanation by the City to the district court—not in the first appeal to the district court, and not after either of the two district court remands to the City demanding an explanation of the benefits. This case appears to represent the first instance where this Court, in the absence of any satisfactory explanation of how a political subdivision determined the amount of benefit to each lot resulting from a special assessment project, engaged in its own search of the record to invent an explanation on behalf of a

political subdivision. While great deference should be afforded to the legislative function of a political subdivision, this Court should not be satisfied by any conceivable justification that the Court can imagine, in the absence of a rational explanation being provided by the political subdivision.

[¶40] I would conclude the City did not comply with the requirements of N.D.C.C. § 40-23-07, reverse the district court, and remand to the City to redetermine the benefits to Holter's lots without considering the actual per-lot cost and then assess only those costs that do not exceed the benefits.

[¶41] I respectfully dissent.

[¶42] Jerod E. Tufte

Jon J. Jensen
Chief Justice

MEMORANDUM OPINION ON APPEAL OF THE DISTRICT COURT OF NORTH DAKOTA, SOUTH CENTRAL JUDICIAL DISTRICT (JUNE 28, 2019)

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF MORTON

DEBORAH HOLTER,

Appellant,

v.

CITY OF MANDAN, a Political Subdivision of the State of North Dakota,

Appellee.

Case No. 30-2017-CV-01003

Before: Cynthia M. FELAND, District Judge.

[¶1] This matter is before the Court on the Appellant's, Deborah Holter's, appeal from the decision of the Board of City Commissioners of the City of Mandan (BOCC) regarding the approval of the Special Assessments lists for Street Improvement District No. 199. Specifically, Holter asserts that the City Commission and the Special Assessment Commission acted arbitrarily, capriciously, and unreasonably in approving the special assessments for District 199.

Appellee, the City of Mandan (City), argues the decision of the Commission to approve the special assessments should be affirmed.

FACTS

[¶2] On March 3, 2015, the BOCC held a meeting and adopted (1) a Resolution Approving Engineer's Report and Authorizing Preparation of the Detailed Plans and Specifications for the Construction of the Improvement in Street Improvement District No. 199, (2) Resolution Declaring the Necessity of an Improvement Project In and For Street Improvement District No. 199 of the City of Mandan to be Paid by the Levy of Special Assessments on Property Benefitted Thereby, and (3) the Resolution Creating Street Improvement District No. 199. *Docket No. 8* (*Record on Appeal–part 1*) at pp. 18-23, and 26.

[¶3] On April 13, 2015, the opportunity for lodging protests to the improvements ended. *Id.* at P. 55. On April 21, 2015, the BOCC approved (1) the Resolution Determining Insufficiency of Protests for Street Improvement District No. 199, (2) the Resolution Directing Advertisement for Bids for Street Improvement District No. 199, and (3) the Resolution Approving Plans and Specifications for Street Improvement District No. 199. *Id.* at pp. 41-45, 49-50.

[¶4] On May 14, 2016, two bids were received for the improvements to District No. 199. *Id.* at P. 55. These bids, however, were substantially higher than the estimate provided by the City's engineer. *Id.* At the BOCC meeting on May 19, 2016, the bids were rejected and the BOCC authorized the City's Planning and Engineering Department to revise the plans and specifications and rebid the project. *Id.* at pp. 63-64.

[¶5] At the BOCC meeting on June 2, 2015, resolutions approving of revised plans for District No. 199 and authorizing solicitation of the bids for the same were approved. *Id.* at pp. 82-86, and 89-90.

[¶6] At the BOCC meeting on June 30, 2015, new bids for District No. 199 were reviewed, and the BOCC awarded the contract for District No. 199 to Mariner Construction. *Id.* at P. 99. The base bid was for $2,641,458.69, plus administrative and engineering costs of $924,510.54, for a total estimated cost of $3,465,969.23. *Id.*

[¶7] The improvements for District No. 199 were completed and, on July 7, 2017, the Mandan Special Assessment Commission (MSAC) held a meeting to discuss approval of the proposed special assessments for District No. 199. *Id.* at P. 101. The MSAC consisted of Keith Winks, Carl Jacobsen, and the Petitioner, Deborah Holter. All three members were present at the July 7, 2017 meeting. *Id.* at P. 103.

[¶8] Holter owns three properties on the 1100 block of 3rd Street within the proposed special assessments for District No. 199. None of Holter's three properties had sidewalks.

[¶9] During the meeting, Holter contested the amount of assessments because her three parcels, located on the north side of the 1100 block of 3rd Street, were being assessed at a higher rate than the corner parcels on the south side of the 1100 block of 3rd Street. The remaining members of the MSAC voted to approve the special assessments for District No. 199. *Id.* Later, a written objection was lodged alleging that 3rd Street should be considered a "collector street." *Id.* at pp. 106-107.

[¶10] Notice of Hearing of Objections to Special Assessments for Street Improvement District No. 199 was given. *Id.* at pp. 108-116. On August 9, 2017, the MSAC held a public hearing. *Id.* at pp. 108-116, and 119. At the public hearing, Holter objected to the assessment against her three properties. *Id.* at P. 121. Holter noted that her three properties were assessed at a total of approximately $50,000.00 ($15,928.40 per parcel, for a combined total assessment of $47,785.20) and asserted that the assessment was unfair. *Id.* at pp. 108-121. In addition, Holter expressed her concern that the School District may have been assessed differently than the rest of the parcels within District No. 199. *Id.* At the conclusion of the public hearing, a motion was made to approve the assessment for District No. 199 and move it to the BOCC for consideration. *Id.* Holter abstained from the vote; the remaining members voted in favor of the motion. *Id.*

[¶11] On November 13, 2017, Holier filed her *Notice of Appeal,* requesting judicial review of the BOCC's decision to confirm the special assessments for street improvements to District 199. *See Docket No. 1* (*Notice of Appeal from Decision of Local Governing Body*). Briefing was completed by both parties for the issues on appeal on January 26, 2018.

[¶12] On March 20, 2018, this Court issued an *Order* remanding the proceedings for further findings regarding how the City calculated the benefit to Holter's property from the assessments. *Docket Number 32* (Order). Specifically, this Court stated:

> After review, the record indicates that Holter's three properties were assessed at $15,928.40 per parcel, for a combined total

> assessment of $47,785.20. The record, however, fails to indicate the amount the properties will benefit by the improvement. As a result, this Court is unable to determine whether the BOCC erred in its determination because either the record is incomplete or the BOCC failed to determined 'the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made.'

Id. at ¶ 15. Because this Court could not determine how the Commission reached its decision, the matter was remanded for further necessary findings.

[¶13] On August 29, 2018, the BOCC filed a *Return to the Order of Remand* expressing that "the Special Assessment Committee minutes appear to be confusing as to what the Court's remand was intended to be." *Docket Number 35* (*Return to the Order of Remand*). The BOCC asserted that it "believes that the Special Assessment Committee is making the assessments for Street Improvement District No. 199 as found in ROA 108, are in fact correct, and that the Commission did follow the law in ascertaining the benefits to each property including the Holter Property." *Id.* at ¶ 4. No additional findings were provided to the Court regarding the benefit to Holter's property. *Id.*

[¶14] On September 24th, 2018, this Court again remanded the matter for additional findings describing the method used to decide the benefits and apportion costs to individual properties within the assessment district at issue. *Docket Number 39* (*Order on Return*). The Court specifically cited to the law detailing that commissions have broad discretion in choosing the

methods to apportion costs in relation to the benefits, and that there is no precise formula for doing so, but that the method used cannot be arbitrary and must have some relation to the benefits. *Id.* at ¶ 6 (and cases cited therein).

[¶15] On April 2, 2019, the City filed its *Response to the Court's Order*, detailing that the Special Assessment Commission met on November 6, 2018, after the Court's second remand. *Docket Number 40* (*City of Mandan's Response to Court's Order*). Attached to its *Response,* the City included the minutes from the November 6, 2018 meeting, as well as a memorandum the City's attorney drafted for the Commission. *Docket Number 41* (*Exhibit 1 to City of Mandan's Response*) and *Docket Number 43* (*Exhibit 1-A to City of Mandan's Response*). The City also cited to its Special Assessment Policy, which was part of the *Record on Appeal. Docket Number 8* (*Record on Appeal–part 1*) at pp. at 29-36.

[¶16] At the November 6, 2018 meeting, the Commission determined that Holter's parcels were specially benefited in the amount assessed by reason of the improvements in Street Improvement District No. 199. *Docket Number 41* (*Exhibit 1 to City of Mandan's Response*). Specifically, the Commission decided as follows:

> Winks [commissioner] moved in conformance with the City of Mandan's Special Assessment Policy and the methods prescribed therein, were used to decide the benefits and costs to the Halter properties/parcel numbers B20-1, B20-2 and B20-3 in the amount of $15,928.40 for each parcel and that the parcels are specially benefited in that amount by reason

> of the improvements in Street Improvement District 199.

Id at P. 1.

[¶17] On April 15, 2019, Holter filed a *Reply Brief* asserting that while the Mandan Special Assessment Committee held a meeting on the Court's second remand, they failed to make further findings on the value to Holter's parcels and the method used to determine the values. *Docket Number 45* (*Petitioner's Reply to City of Mandan's Response*).

STANDARD OF REVIEW

[¶18] The North Dakota Supreme Court has clearly laid out the standard of review for appeals from a decision by a board of county commissioners:

> In an appeal from a decision by a board of county commissioners, the "principle of separation of powers precludes parties from relitigating the correctness and propriety of the county commission's decision and prevents a reviewing court from sitting as a super board and redeciding issues that were decided in the first instance by the county commission." *Hagerott v. Morton Cty. Bd of Comm'rs,* 2010 ND 32, ¶ 7, 778 N.W.2d 813. We have explained that deferential standard of review:
>
> > 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. This Court's function is to independently determine the propriety of

> the [Board's] decision without giving special deference to the district court decision. The [Board's] decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. 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.

Grand Forks Hous. Auths. v. Grand Forks Bd. of Cty. Comm'rs, 2010 ND 245, ¶ 6, 793 N.W.2d 168 (quoting *Hagerott*, at ¶ 7).

Our deferential standard of review ensures that a court does not substitute its judgment for that of the local governing body. *Hector v. City of Fargo*, 2009 ND 14, ¶ 9, 760 N.W.2d 108. In reviewing factual findings by a county board, we will not reverse its decision simply because we may have found other evidence more convincing; instead, we will reverse the board's decision only if there is an absence of evidence or reason which constitutes arbitrary, capricious, or unreasonable action. *Ulvedal v. Board of Cty. Comm'rs of Grand Forks Cty.*, 434 N.W.2d 707, 709 (N.D. 1989). A county board's interpretation of a statute, however, is fully reviewable, and a board's failure to correctly interpret and apply controlling law is arbitrary, capricious, and unreasonable. *Gullickson v. Stark Cty. Bd. of*

> *Cty. Comm'rs*, 474 N.W.2d 890, 892 (N.D. 1991).

Plains Marketing, LP v. Mountrail County Board of County Commissioners, 2016 N.D. 100, ¶ 6-7, 879 N.W.2d 75.

[¶19] In a case involving an appeal from a decision of a board of county commissioners, the Court stated "such a standard of review ensures that the court does not substitute its judgment for that of the local governing body which initially made the decision. In an appeal from a county board, the record is adequate to support the findings and conclusions of the board if it allows us to discern the rationale for the decision." *Dahm v. Stark County Board of County Commissioners*, 2013 N.D. 241, ¶ 8, 841 N.W.2d 416. "It is not the province of this Court to substitute its judgment for that of the County Board." *Id.* at ¶ 20.

LAW AND DECISION

[¶20] On appeal, Holter argues that the City acted arbitrarily, capriciously, unreasonably and contrary to law when it assessed properties in an amount exceeding the benefit to the properties. The City asserts the properties benefited from the construction of sidewalks and the road, and the benefit to the properties exceeds or is equal to the amount assessed.

[¶21] Section 40-23-07 of the North Dakota Century Code governs the determination of special assessments by commission:

> The commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment

> is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as is necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment, including all expenses incurred in making such assessment and publishing necessary notices with reference thereto and the per diem of the commission.

N.D.C.C. § 40-23-07.

[¶22] In *Bateman v. City of Grand Forks*, the North Dakota Supreme Court identified three requirements for a special assessment to comply with Section 40-23-07:

> The special benefit accruing to each lot or parcel of land 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 or parcel of land 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 (quoting *Cloverdale Foods Co. v. City of Mandan*, 364 N.W.2d 56, 61 (N.D. 1985)).

[¶23] A special assessment commission's broad discretion includes choosing the method used to decide benefits and apportioning costs to individual properties. *Serenko v. City of Wilton*, 1999 ND 88, ¶ 21, 593 N.W. 2d 368. The assessments levied against property must be limited to a "just proportion," but "the process of quantifying benefits accruing to each lot inevitably

rests on the judgment and discretion of the special assessment commission." *Haman v. City of Surrey*, 418 N.W.2d 605, 608 (N.D. 1988).

[¶24] "[A]n 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." *Serenko*, 1999 ND 88 at ¶ 21. "'[I]t is the total work product which was used in determining the final assessment which is important, rather than the exact method used in determining the assessment.'" *Cloverdale Food v. City of Mandan*, 364 N.W.2d 56, 61 (N.D. 2008).

[¶25] After the second remand, the City provided the Court with its meeting minutes; specifically finding that the City's Special Assessment policies were used to decide the benefits and costs to Holter's properties. *Docket No. 41* (*Exhibit 1 to City of Mandan's Response*). A *Memorandum* prepared by the City's attorney was made part of the meeting minutes and was also provided to the Court. *Docket No. 43* (*Exhibit 1-A to City of Mandan's Response–Memorandum*).

[¶26] The City Attorney's Memorandum cites to the Mandan Special Assessment Policies; specifically, Policy numbers 3.3, 3.4, and 3.6. The "Determination and Distribution of Benefits" section of the Special Assessment Policies states: "[t]he basic/methods of assessments are per lot or parcel unit cost, front footage, lot area or a combination of these methods." *Docket No. 9* (*Record on Appeal—part 2*) at P. 33.

[¶27] Policy 3.3 then states:

> If the single family residential properties vary greatly in size or front footage, the units may

> be increased or a combination of allowable methods may be used. For calculations purposes, all effective areas and front footages for all properties are provided by the City Assessor's Office.

Docket No. 9 (*Record on Appeal—part 2*) at P. 34.

[¶28] Policy 3.4 provides:

> Multi-family property may be special assessed at a greater number of units proportionate to the properties use of the benefits (apartments, duplexes, condominiums, twin homes and/or townhomes, mobile home parks/ manufactured homes).

Id.

[¶29] Policy 3.6 provides:

> Corner lots are assessed at a rate of one-half the unit cost if only one street abutting the lot/parcel is constructed or improved. When the second street is constructed, one-half the unit cost can be assigned to the lot of parcel abutting that street thus allowing equality amongst the surrounding properties.

Id

[¶30] The parties do not dispute that Holter's three properties are vacant, and combined they have 300' of frontage on the newly paved street. Specifically, each tract has 100' of frontage on Third Street NE. While Holter's property is currently vacant, it could reasonably be developed in the future. The special assessments the City attributed to Holter's lots are

summarized in the *Record on Appeal. Docket No. 16* (*Supplemental Record on Appeal*).

[¶31] The summary illustrates the rate for each type of frontage, including commercial street, residential street, commercial alley, residential alley, and area impact. *Id.* The "quantity" listed for Holter's property is 100.0 feet of residential street frontage. *Id.* At a rate of 159.2840 per foot, the total amount of assessments for each of Holter's lots equals $15,928.40. The City specifically found that they used the above policies "to decide the benefits and costs to the Holter properties/parcel numbers B20-1, B20-2 and B20-3 in the amount of $15,928.40 for each parcel and that the parcels are specially benefited in that amount by reason of the improvements in Street Improvement District 199." *Docket Number 41* (*Exhibit 1 to City's Response*).

[¶32] Therefore, this Court concludes that the amount assessed to Holter's property is consistent with the amounts assessed to other lots in District 199, and it is clearly based on frontage. With the exception of corner lots, for which the City has an express policy, Holter's lots were assessed in the same manner as other lots in the same district, and the Special Assessment Commission specifically found that each of Holter's lots were benefited by the improvements in the amount of $15,928.40 per lot.

[¶33] [T]he process of quantifying the benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission. There simply is no precise formula for quantifying benefits." *Serenko v. City of Wilton*, 1999 ND 88, ¶ 21, 593 N.W.2d 368. Assessments 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.* (quoting 63 C.J.S. *Municipal Corporations* § 1423, at 1212; now at 64 C.J.S. *Municipal Corporations* § 1618, at 356-357 (2011)). This Court also must give great deference to the decisions of special assessment commissions.

[¶34] In this case, the Special Assessment Commission determined the benefits to each tract in District 199, as found in the minutes and in the summary for each lot, assessing the costs to each particular tract.

[¶35] This Court concludes the decision of the Special Assessment Commission, as affirmed by the City Commission, was not arbitrary, capricious, or unreasonable. The City reasonably followed its policies relating to benefits and assessments for street improvement projects. Therefore, the confirmation of special assessments for District 199, including Holter's lots, must be affirmed.

CONCLUSION

[¶36] For the foregoing reasons, the confirmation of special assessments in this matter is hereby AFFIRMED.

IT IS SO ORDERED.

Dated this 28th day of June, 2019.

By the Court

/s/ Cynthia Feland
District Judge
South Central Judicial District

ORDER ON RETURN OF THE DISTRICT COURT OF NORTH DAKOTA, SOUTH CENTRAL JUDICIAL DISTRICT (SEPTEMBER 24, 2018)

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF MORTON

DEBORAH HOLTER,

Petitioner/Appellant,

v.

CITY OF MANDAN, a Political Subdivision of the State of North Dakota,

Respondent/Appellee.

Case No. 30-2017-CV-01003

Before: Cynthia M. FELAND, District Judge.

[¶1] On March 20, 2018, this Court issued an *Order* remanding the proceedings for further findings regarding the benefit to Holter's properties. On August 29, 2018, Board of City Commissioners of the City of Mandan (City) filed a *Return to the Order of Remand* expressing that "the Special Assessment Committee minutes appear to be confusing as to what the Court's remand was intended to be." *Docket No. 35* (*Return to the Order of Remand*) at ¶ 3. The City

asserts that it "believes that the Special Assessment Committee is making the assessments for Street Improvement District No. 199 as found in the ROA 108, are in fact correct, and that the Commission did follow the law in ascertaining the benefits to each property including the Holter property" and requests dismissal of the appeal *Id.* at ¶ 4.

[¶2] On September 7, 2018, Holter filed a *Reply* asserting that while the Mandan Special Assessment Committee held a meeting on the Court's remand, they failed to make any further findings asserting that it "believes that the benefit to each property in the district equal or exceeds the dollar of the assessment that was made by the commission last year." *Docket No. 37* (*Petitioner's Reply to Respondent's Return to the Order of Remand*) at ¶¶ 4-5. As a result, Holier asserts that *her appeal* should be upheld. *Id.*

LAW AND DECISION

[¶3] Holter argues the City acted arbitrarily, capriciously, unreasonably and contrary to law when it assessed properties in an amount exceeding the benefit to the properties. In turn, the City argues the properties benefited from the construction of sidewalks, and the benefit to the properties is equal to or exceeds the amount assessed.

[¶4] Section 40-23-07 of the North Dakota Century Code governs the determination of special assessments by commission:

> The commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment

> is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as is necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment, including all expenses incurred in making such assessment and publishing necessary notices with reference thereto and the per diem of the commission.

N.D.C.C. § 40-23-07 (emphasis added).

[¶5] In *Bateman v. City of Grand Forks*, the North Dakota Supreme Court identified three requirements for a special assessment to comply with Section 40-23-07:

> The special benefit accruing to each lot or parcel of land 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 or parcel of land must not exceed the benefit which has been determined to have accrued thereto.

Bateman v. City of Grand Forks, 2008 ND 72, 1111, 747 N.W.2d 117 (quoting *Cloverdale Foods Co. v. City of Mandan*, 364 N.W.2d 56, 61 (N.D. 1985)) (emphasis added).

[¶6] A special assessment commission's broad discretion includes choosing the method used to decide benefits and apportioning costs to individual properties. *Serenko v. City of Wilton*, 1999 ND 88, ¶ 21, 593 N.W.2d 368. The assessments levied against property must be limited to a "just proportion," but "the process

of quantifying benefits accruing to each lot inevitably rests on the judgment and discretion of the special assessment commission." *Haman v. City of Surrey*, 418 N.W.2d 605, 608 (N.D. 1988). There is no precise formula for quantifying benefits. *Id.* "[A]n '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.'". *Serenko*, at ¶ 21 (quoting *Cloverdale Food v. City of Mandan*, 364 N.W.2d 56, 61). The method used to apportion the assessment cannot be arbitrary and must have some relation to the benefits. *Cloverdale,* 364 N.W.2d at 61. A city may adopt any mode of apportionment that is fair and legal and would secure an assessment in proportion to the benefits accruing as nearly as practicable, if there is no statute prescribing the method to use. *Id.* "'[i]t is the total work product which was used in determining the final assessment which is important, rather than the exact method used in determining the assessment.'" *Id.* (quoting *United Pub. Sch. Dist. No.* 7 *v. City of Burlington*, 196 N.W.2d 65, 69 (N.D. 1972)).

[¶7] As stated in the Court's *Order* of March 20, 2018, while the record in this case indicates that Holter's three properties were assessed at $15,928.40 per parcel, for a combined total assessment of $47,785.20; the record fails to indicate the of "the special benefit accruing to each lot or parcel of land from the improvement." *Docket No. 32* (*Order*) at ¶ 15. The City is once again directed to supplement the record to provide the Court with the method used to decide benefits and apportion costs to individual

properties within the assessment district at issue in this case.

Dated this 24th day of September, 2018.

By the Court

/s/ Cynthia M. Feland
District Judge

ORDER OF THE DISTRICT COURT OF NORTH DAKOTA, SOUTH CENTRAL JUDICIAL DISTRICT (MARCH 20, 2018)

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF MORTON

DEBORAH HOLTER,

Appellant,

v.

CITY OF MANDAN, a Political Subdivision of the State of North Dakota,

Appellee.

Case No. 30-2017-CV-01003

Before: Cynthia M. FELAND, District Judge.

[¶1] Appellant, Deborah Holter, appeals from a decision by the Board of City Commissioners of the City of Mandan (City) "relating to Confirmation of Special Assessments for Street Improvement District No. 199 over the objections/appeals of Landowners." *Docket No. 1.* In her *Notice of Appeal*, Holter argues BOCC acted arbitrarily, capriciously, unreasonably and contrary to law when it assessed the affected properties in an amount exceeding the benefit to the affected

properties. *Id.* The City opposes the appeal, arguing that the affected properties benefited from the construction of sidewalks and that the benefit to the properties exceeds the amount assessed. *Docket No. 28*.

STANDARD OF REVIEW

[¶2] Section 28-34-01 of the North Dakota Century Code governs an appeal from the decision of a local governing body. The governing body's decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. *Tibert v. City of Minto*, 2006 ND 189, ¶ 8, 720 N.W.2d 921 (citing *Graber v. Logan County Water Res. Bd.*, 1999 ND 168, ¶ 7, 598 N.W.2d 846). "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." *Tibert*, at ¶ 8 (citing *Klindt v. Pembina County Water Res. Bd.*, 2005 ND 106, ¶ 12, 697 N.W.2d 339).

[¶3] Under Section 28-34-01(3) of the North Dakota Century Code, a district court "may order that such additional evidence be taken, heard, and considered by the local governing body on such terms and conditions as the court may determine" if it is shown to the satisfaction of the court that "such additional evidence is material to the issues involved and was rejected or excluded by the local governing body . . . " N.D.C.C. § 28-34-01(3). "A district court's decision whether to order the taking of additional evidence under N.D.C.C. § 28-34-01(3) is discretionary."

Grand Forks Homes, Inc. v. Grand Forks Bd of Cnty. Comm'rs, 2011 ND 50, ¶ 8, 795 N.W.2d 381.

FINDINGS OF FACT

[¶4] On March 3, 2015, the BOCC held a meeting and adopted (1) a Resolution Approving Engineer's Report and Authorizing Preparation of the Detailed Plans and Specifications for the Construction of the Improvement in Street Improvement District No. 199, (2) Resolution Declaring the Necessity of an Improvement Project In and For Street Improvement District No. 199 of the City of Mandan to be Paid by the Levy of Special Assessments on Property Benefitted Thereby, and (3) the Resolution Creating Street Improvement District No. 199. ROA 18-23, 26.

[¶5] On April 13, 2015, the opportunity for lodging protests to the improvements ended. ROA 55. On April 21, 2015, the BOCC approved a Resolution Determining Insufficiency of Protests for Street Improvement District No. 199, a Resolution Directing Advertisement for Bids for Street Improvement District No. 199, and a Resolution Approving Plans and Specifications for Street Improvement District No. 199. *Docket No. 8 [ROA], pp. 41-45, and 49-50.*

[¶6] On May 14, 2016, two bids were received for the improvements to District No. 199. *Id. at P. 55.* Both of the bids were substantially higher than the estimate provided by the City's engineer. *Id.* At the City meeting on May 19, 2016, both bids were rejected and the City's Planning and Engineering Department was directed to revise the plans and specifications and rebid the project. *Id. at pp. 63-64.*

[¶7] By resolution on June 2, 2015, the City approved the revised plans for District No. 199 and authorized solicitation of bids. *Id. at pp. 82-86, and 89-90.*

[¶8] At the City meeting on June 30, 2015, new bids for District No. 199 *were* reviewed, and the City awarded the contract for District No. 199 to Mariner Construction in the amount of $2,641,458.69, plus administrative and engineering costs of $924,510.54, for a total estimated cost of $3,465,969.23. *Id. at P. 99.*

[¶9] After completion of the improvements for District No. 199, on July 7, 2017, the Mandan Special Assessment Commission (MSAC) held a meeting to discuss approval of the proposed special assessments for District No. 199. *Id. at P. 101.* All three members of the MSAC, Keith Winks, Carl Jacobsen, and the Petitioner, Deborah Holter, were present at the meeting on the July 7, 2017, *at P. 103.*

[¶10] During the meeting, Holter contested the amount of assessments because her three parcels, located on the north side of the 1100 block of 3rd Street, were being assessed at a higher rate than the corner parcels on the south side of the 1100 block of 3rd Street. *Id.* The remaining members of the MSAC voted to approve the special assessments for District No. 199. *Id.* After the July 7, 2017 meeting, a written objection was lodged alleging that 3rd Street should be considered a "collector street." *Id. at pp. 106-107.*

[¶11] Notice of Hearing of Objections to Special Assessments for Street Improvement District No. 199 was issued and the MSAC held a public hearing that was held on August 9, 2017. *Id. at pp. 108-121.* At the public hearing Holter objected to the assessment of

approximately $50,000.00 against her three properties as being unfair. *Id. at P. 121.* Holter also expressed her concern that the School District may have been assessed differently than the rest of the parcels within District No. 199. *Id.* Hearing no other objections, a motion to approve the assessment for District No. 199 and move it to the BOCC for consideration was made and passed. *Id.* Holter abstained from the vote. *Id.*

LAW AND DECISION

[¶12] Holter argues the City acted arbitrarily, capriciously, unreasonably and contrary to law when it assessed properties in an amount exceeding the benefit to the properties. In response, the City argues the properties benefited from the construction of sidewalks, and the benefit to the properties exceeds the amount assessed.

[¶13] Section 40-23-07 of the North Dakota Century Code governs the determination of special assessments by commission:

> The commission shall determine the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made, and shall assess against each of such lots and parcels of land such sum, not exceeding the benefits, as is necessary to pay its just proportion of the total cost of such work, or of the part thereof which is to be paid by special assessment, including all expenses incurred in making such assessment

> and publishing necessary notices with reference thereto and the per diem of the commission.

N.D.C.C. § 40-23-07.

[¶14] In *Bateman v. City of Grand Forks*, the North Dakota Supreme Court identified three requirements for a special assessment to comply with Section 40-23-07:

> The special benefit accruing to each lot or parcel of land 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 or parcel of land 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 (quoting *Cloverdale Foods Co. v. City of Mandan*, 364 N.W.2d 56, 61 (N.D.1985)).

[¶15] After review, the record indicates that Holter's three properties were assessed at $15,928.40 per parcel, for a combined total assessment of $47,785.20. The record, however, fails to indicate the amount of "the special benefit accruing to each lot or parcel of land from the improvement." As a result, this Court is unable to determine whether the City erred in its determination because either the record is incomplete or the City failed to determined "the amount in which each of the lots and parcels of land will be especially benefited by the construction of the work for which such special assessment is to be made." As evidence of the amount of the resulting

benefit is material to the issues involved, this case is REMANDED for further findings regarding the benefit to Holter's properties.

Dated this 20th day of March, 2018.

By the Court

/s/ Cynthia M. Feland
District Judge

ORDER OF THE SUPREME COURT OF NORTH DAKOTA DENYING PETITION FOR REHEARING (SEPTEMBER 21, 2020)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

DEBORAH HOLTER,

Petitioner and Appellant,

v.

CITY OF MANDAN, a Political Subdivision of the State of North Dakota,

Respondent and Appellee.

Supreme Court No. 20190277

Morton Co. No. 30-2017-CV-01003

Before: Lisa Fair MCEVERS, Daniel J. CROTHERS, Gerald W. VANDEWALLE, Judges.

[¶ 1] This appeal having been heard by the Court at the January 2020 Term and an opinion having been filed on July 22, 2020, by:

[¶ 2] Chief Justice Jon J. Jensen, Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Lisa Fair McEvers, and Justice Jerod E. Tufte;

[¶ 3] and a petition for rehearing having been filed by William C. Black, counsel for the Appellant, and the Court having considered the matter, it is hereby

ORDERED AND ADJUDGED, that the petition be and is hereby DENIED.

[¶ 4] AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

By the Court

/s/ Lisa Fair McEvers

/s/ Daniel J. Crothers

/s/ Gerald W. VandeWalle

DISSENTING OPINION OF CHIEF JUSTICE JENSEN

Jensen, Chief Justice.

[¶43] The majority has denied Holter's petition for rehearing. I have voted to grant the petition for rehearing. The petition, in part, requests an opportunity to address the rationale underlying the majority's affirmance of the special assessment. Paragraph 21 of the majority opinion asserts "the Special Assessment Commission did more than simply take the total cost of the project and divide it by using the formula. It first deducted $225,000 from the costs and expenses. In doing so, it determined the benefits for all properties assessed was less than the total cost of the work." What paragraph 21 of the majority opinion omits is recognition that the City never advanced that argument in this Court or in the district court. This Court, not the City, articulated the $225,000 deduction as a rationale supporting the City's determination of benefit in the special assessment process. There is not a single reference to the $225,000 reduction of costs and expenses in the City's brief to this Court. The record does not reflect the City ever advancing the rationale articulated by this Court as a justification or an explanation to the district court—not in the first appeal to the district court, and not after either of the two district court remands to the City demanding an explanation of the benefits. The petition, in part, seeks an opportunity to address the rationale of this Court, an opportunity the Holter has never been given because the rationale was never advanced by the City and was first articulated in the opinion of this Court issued subsequent to the briefing and oral argument.

[¶44] This Court rightfully affords great deference to local taxing authorities. However, we should not extend that deference to the point that we deny taxpayers an opportunity to address the rationale this Court ultimately selects as the rationale for affirming the decision of a local taxing authority. Justice VandeWalle noted the danger of overextending and understating this Court's review of local tax authorities as follows:

> If the courts are to review these actions, and it is not necessary as a matter of constitutional right that they be empowered to do so, it should be a meaningful review recognizing the limitations thereon by the doctrine of separation of powers. Anything less than a meaningful review gives a false sense of adherence to our system of checks and balances which makes the judicial branch little more than an apologist for the actions of the executive branch of government, on the one hand, or a usurper of powers on the other. Neither is a desirable result.

Koch Hydrocarbon Co. v. State By & Through State Bd. of Equalization, 454 N.W.2d 508, 515 (N.D. 1990) (VandeWalle, Justice, concurring specially).

[¶45] My concern is a decision founded on rationale never advanced by the taxing authority, without providing a taxpayer an opportunity to respond, makes this Court "little more than an apologist for the actions of the executive branch of government." Following a rehearing we may elect not to alter our prior opinion, but we should at least allow taxpayers an opportunity to respond to a rationale articulated first by this Court

and a rationale that was never previously advanced by the taxing authority.

[¶46] Jon J. Jensen
Chief Justice

Jerod E. Tufte