

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Mark Tibert and Suzi Tibert,	)	
and Melvin Tibert and Cathy Tibert	)	
	)	
Appellants,	)	
vs.	)	Supreme Court No.: 20050393
	)	
The City of Minto, through its	)	Walsh County No.: 03-C-158
governing body, an incorporated	)	
political subdivision,	)	
	)	
Appellee.	)	

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Appeal From a Final Appealable Decision Entered September 22, 2005  
In the District Court, Northeast Judicial District Walsh County

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**APPELLEE BRIEF**

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## STATEMENT OF THE ISSUES

1. Absent from the brief of the appellants is a statement of the issues presented for review as required by Rule 28(a)(3) of the North Dakota Rules of Appellate Procedure. From a review of the appellant's brief, the appellee, City of Minto (hereinafter referred to as "City") believes the issues for review are:

A. Whether the decision by the Minto City council to grant an application for a building permit by Minto Grain, LLC, at its regular meeting on July 7, 2003, following the recommendation for approval by the City Planning and Zoning Committee on June 24, 2003, it is *arbitrary, capricious or unreasonable*.

B. Whether the fact that the City Planning and Zoning Committee failed to prepare minutes of its June 24, 2003 meeting prior to the decision of the City council on July 7, 2003 to approve the subject building permit renders the City council's decision to be arbitrary, capricious or unreasonable.

## NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

2. The City agrees with the statement of the case set forth in numbered paragraphs 1-4 of the brief of the appellants. The appellants will be hereinafter referred to in this brief as "Tiberts".

## STATEMENT OF FACTS

3. The statement of facts set forth in numbered paragraphs 5-24 of the Tiberts' brief in this case are both incomplete and misleading. For example, in footnotes 1 and 3 of their brief the Tiberts point out that the Minto Planning and Zoning Committee did not prepare minutes of its June 24, 2003 meeting until after the North Dakota Attorney General had determined that the North Dakota open meetings and open records laws had

been violated. However, the Tiberts neglect to mention in their brief, or include in their appendix, the amended certification of record with attachments (Docket No. 28) and Affidavit of Tamara Jane Ulland (Docket No. 29) which were filed in the District Court in this case. Those items are attached to this brief as an addendum. They establish that the minutes of the Planning and Zoning Committee of June 24, 2003 were prepared as directed by the Attorney General's opinion.

4. At paragraph 15 of their brief the Tiberts quote what they purport to be the pertinent part of an easement for ingress and egress provided by Minto Grain, LLC to the City of Minto. While the quoted language is indeed contained within the easement, the most pertinent language applicable to this case was omitted. That language provides as follows:

\* \* \*

*WHEREAS the GRANTOR desires to improve its property and business, to include the widening of the roadway, and has made preparation to do so at great expense to itself; and*

*WHEREAS the GRANTOR desires to preserve its property for the needs of commerce along the rail, and limit the permissive non-commercial use by the public; and*

\* \* \*

1) *GRANTOR shall continue to own control the roadway, and utilize said roadway for its commercial purposes, including the facilitation of the safe passage of trucks to and from the rail.*

2) *GRANTOR reserves the right to limit access upon the roadway, police the roadway, and to promulgate rules and regulations upon the roadway in a manner to foster a safe and orderly operation of the roadway and the commercial enterprises existing thereupon, now or in the future.*

\* \* \*

*Access may be impeded from time to time due to truck traffic, accidents, road improvement projects or other reasonable and legitimate commercial purposes or natural occurrences. GRANTOR will not unreasonably delay or hinder the ingress and egress rights herein. If, under the control of GRANTOR, any portion of the roadway has to be closed, alternative routes will be provided. Any temporary closure will ordinarily not exceed 24 hours.*

4) *GRANTOR and GRANTEE agree that it is not the intention herein to create a public street, but rather to provide the GRANTEE the limited right to ingress and egress over and across the property in a manner which will not impede the progress, safety or operation of the commercial enterprises privately located thereupon.*

\* \* \*

5. At paragraph 17 of their brief the Tiberts quote a portion of Judge Geiger's decision in Minto Grain, LLC v. Melvin and Cathy Tibert, Walsh County case number 01-C-214, in support of an argument that the Tiberts were entitled to avail themselves to "full use and enjoyment" of the easement. However, when the court examines Judge Geiger's opinion in that case (App. pps. 95-98) it will find that the court granted summary judgment to the plaintiff, Minto Grain, LLC, evicting the Tiberts from the Kilowatt Drive property and restraining them from any activity (other than the full use and enjoyment of its easement) that interferes with the plaintiffs' use and enjoyment of the property. (App. p. 98)

6. At paragraphs 18-20 of their brief the Tiberts create the impression that their interest in Kilowatt Drive is substantially equivalent to a public street. In fashioning that argument the Tiberts selectively quote from this court's decision in Minto Grain, LLC v. Tibert, 204 N.D. 107, 681 N.W.2d 70, as well as an excerpt from the audiotape of the oral argument heard in that case. What the Tiberts fail to note is that the North Dakota Supreme Court in the cited case affirmed the District Court's decision granting an

eviction order in favor of Minto Grain, LLC. The Tiberts also ignore an earlier decision by the North Dakota Supreme Court in the case Tibert v. City of Minto, et al., 2004 N.D. 97, 679 N.W.2d 440. See para. 9, infra.

7. Inasmuch as this case is the sixth appeal to the North Dakota Supreme Court involving disputes between the Tiberts and Minto Grain, LLC (and its owners) a brief overview of the previous cases is in order.

8. The first case to be appealed to this court was Nowling, et al. v. BNSF Railway, et al., 2002 N.D. 104, 646 N.W.2d 719. The plaintiffs in that case are neighbors of the Tiberts, and the Tiberts were allowed to file an amicus curiae brief. The City of Minto was also allowed to file an amicus curiae brief. The landowners in Nowling brought a quiet title action against the railroad and its lessee, Minto Grain, LLC concerning Kilowatt Drive. The District Court entered a judgment quieting title to the plaintiffs. The Supreme Court reversed holding that a railroad right-a-way for an operating railroad line is a public highway under North Dakota Constitution Article 12, § 13, and is therefore not subject to adverse possession or acquiescence.

9. The next case to come before the Supreme Court involving Kilowatt Drive was Tibert v. City of Minto, et al., 2004 N.D. 97, 697 N.W.2d 440. The Tiberts in that case brought a declaratory action against the City and Minto Grain, LLC seeking a declaration that Kilowatt Drive was a public street pursuant to common law dedication. Following a bench trial the District Court entered findings of fact, conclusions of law and a judgment holding that the easement at issue in this case (App. pp. 90-92) was the substantive equivalent of a statutory or common law dedication of Kilowatt Drive as a city street. Accordingly, the District Court concluded that the action of the Tiberts was moot. In

addition, the court went on to hold that clear and convincing evidence did not establish that Kilowatt Drive was ever statutorily established or dedicated as an official city street. On appeal the North Dakota Supreme Court disagreed with the District Court's conclusion that the action was moot. The Supreme Court specifically held that the easement was more limited than if the trial court had declared a public dedication of Kilowatt Drive. As relevant to the instant case the Supreme Court held:

*Under the terms of the easement, the access may now be restricted. The stated goal of the newly-created easement is to "limit the non-commercial use of the roadway by the public". Although the easement purports to allow access to residences, Minto Grain has reserved the right to close Kilowatt Drive for specified periods at its discretion.*

2004 ND 97, ¶11. The Court went on to hold that the trial court did not error in finding a lack of clear and convincing evidence that BNSF or its predecessors dedicated Kilowatt Drive as a public street.

10. The next case before the Supreme Court involving the subject property was Minto Grain, LLC v. Tibert, 2004 N.D. 107, 681 N.W.2d 70. See discussion at numbered paragraphs 5 and 6, supra.

11. The fourth case appealed to the North Dakota Supreme Court is Tibert v. Minto Grain, LLC, et al., 2004 N.D. 133, 682 N.W.2d 294. In that case the Tiberts brought an action against Minto Grain, LLC and its owners (the Slominskis) to quiet title and for declaratory relief claiming that Kilowatt Drive was the boundary between the parties respective properties. The Supreme Court affirmed the trial court's judgment on the pleadings dismissing the Tiberts' complaint finding that the Tiberts had failed to show that they were entitled to relief under theories of adverse possession and acquiescence, based upon the court's prior holding in the Nowling decision.

12. The fifth case appealed to the North Dakota Supreme Court involving Kilowatt Drive is Tibert v. Slominski, 2005 N.D. 36 692 N.W.2d 133. In that case the Tiberts brought a claim for damages under nuisance and trespass theories asserting that noise generated by the operation of the Minto Grain, LLC elevator, and dust and exhaust fumes from trucks coming to and leaving the facility, would damage the plaintiffs. The District Court granted Minto Grain's motion for summary judgment finding that North Dakota Century Code § 42-04-02 barred the plaintiffs' claim for nuisance and further finding that the elements for a claim of trespass were not present. The Supreme Court affirmed. The Court held that the District Court was correct in concluding that North Dakota Century Code § 42-04-02 protected Minto Grain from the plaintiffs' nuisance claim. With respect to the trespass claim, the court agreed with the District Court's conclusion that there was no specific scientific evidence as to how much dust would accumulate on the Tiberts' property or a showing of an actual injury necessary to support an essential element of the claim for trespass.

13. At numbered paragraph 21 of their brief, the Tiberts allege that Minto Grain, LLC principal, William Slominski, provided graphic testimony as to his intentions with respect to the three grain storage structures Minto Grain, LLC wishes to erect, and which were the subject of its building permit. The implication given in paragraph 21 of the Tiberts' brief, combined with the statements contained in paragraphs 22 and 23, create the impression that Minto Grain, LLC intends to block the Tiberts' access to their properties by way of Kilowatt Drive. To the contrary, when the court examines the transcript of Mr. Slominski's testimony it will find that the first of the three containers covered by the building permit application does not impact Kilowatt Drive at all. (App. p. 109) In

addition, Mr. Slominski testified that there is sufficient land on the property south of the roadway to build the temporary grain facilities without impeding traffic. (App. p. 115, lines 2-5)

14. Mr. Slominski's testimony is consistent with his statements given to the City Planning and Zoning Committee, in connection with its consideration of his application for a building permit, as well as his statements to the City council when it approved that building permit. See transcript of City of Minto Planning and Zoning Committee meeting of June 24, 2003 (App. pp. 44-64) and July 7, 2003 City council meeting (App. pp. 68-74). Contrary to the implication given by number paragraphs 41 and 42 of the Tiberts' brief, that the City did not thoroughly consider the building permit application but rather relied exclusively on the Planning and Zoning Committee, the record in this case reveals that the City council thoroughly discussed the matter and received input from the Tiberts and Mr. Slominski before making its decision.<sup>1</sup>

#### **STANDARD OF REVIEW**

15. This appeal is governed by North Dakota Century Code § 28-34-01 which provides as follows:

***28-34-01. Appeals from local governing bodies -- Procedures.***  
*This section, to the extent that it is not inconsistent with procedural rules adopted by the North Dakota supreme court, governs any appeal provided by statute from the decision of a local governing body, except those court reviews provided under sections 2-04-11 and 40-51.2-15. For the purposes of this section, "local governing body" includes any officer, board, commission, resource or conservation district, or other political subdivision. Each appeal is governed by the following procedure:*

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<sup>1</sup> We note that the District Court in this case did error at page 2 of its order affirming city council by stating "while the city council did not discuss their approval, it appears they have delegated this responsibility to the Planning and Zoning Commission." The transcript of the July 7, 2003 city council meeting (App. pp. 68-74) undeniably refutes that statement.

1. *The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.*

2. *The appellee shall prepare and file a single copy of the record on appeal with the court. Within thirty days, or such longer time as the court by order may direct, after the notice of appeal has been filed in the court, and after the deposit by the appellant of the estimated cost of a transcript of the evidence, the local governing body shall prepare and file in the office of the clerk of the court in which the appeal is pending the original or a certified copy of the entire proceedings before the local governing body, or such abstract of the record as may be agreed upon and stipulated by the parties, including the pleadings, notices, transcripts of all testimony taken, exhibits, reports or memoranda, exceptions or objections, briefs, findings of fact, proposed findings of fact submitted to the local governing body, and the decision of the local governing body in the proceedings. If the notice of appeal specifies that no exception or objection is made to the local governing body's findings of fact, and that the appeal is concerned only with the local governing body's conclusions based on the facts found by it, the evidence submitted at the hearing before the local governing body must be omitted from the record filed in the court. The court may permit amendments or additions to the record to complete the record.*

3. *If the court determines on its own motion or if an application for leave to adduce additional evidence is made to the court in which an appeal from a determination from a local governing body is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there are reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the local governing body, or that such evidence is material to the issues involved and was rejected or excluded by the local governing body, the 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. After considering the additional evidence, the local governing body may amend or modify its decision and shall file with the court a transcript of the additional evidence together with its new or modified decision, if any.*

16. The North Dakota Supreme Court has stated the following with respect to the standard of review on appeals from decisions of political subdivisions:

*In cases subsequent to the enactment of N.D.C.C. § 28-34-01,...., we have clearly delineated the scope of review of an appeal from a local governing body under N.D.C.C. § 28-34-01. We have stated the courts must not substitute their judgment for that of the local governing body who initially made the decision. Pic v. City of Grafton, 460 N.W.2d 706, 710 (N.D. 1990) (Pic II). Thus judicial review is limited to determining if the governing body's decision is arbitrary, capricious, or unreasonable. Smith v. Burleigh County Bd. of Com'rs., 1998 ND 105, ¶11, 578 N.W.2d 533; City of Fargo v. Ness, 529 N.W.2d 572 (N.D. 1995).*

Pic v. City of Grafton, 1998 ND 202, ¶11, 586 N.W.2d 159; See also Trollwood Village Ltd. Pt'ship. v. Cass County Board of County Comm., 557 N.W.2d 732, 734 (N.D. 1996) (providing that judicial review of a county board decision is "limited to determining if the decision is arbitrary, capricious or unreasonable"). Thus, the decision of the City to grant the subject building permit must be affirmed unless the Tiberts demonstrate that the decision was arbitrarily, capriciously or unreasonably, or there lacks evidence to support the decision. Burlington Northern and Santa Fe Railway Co. v. Benson County Water Res. Dist., 2000 ND 182, ¶5, 618 N.W.2d 155; Anderson v. Richland County Water Res. Bd., 506 N.W.2d 362, 367 (N.D. 1993).

17. As noted by this court, "*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 law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.*" Burlington Northern, 2000 ND 182, ¶5, 618 N.W.2d 155 (citing Graber v. Logan County Water Res. Bd., 1990 ND 168, ¶7, 598 N.W.2d 846). The mere presence of more convincing evidence is not a sufficient basis for which to overturn the City's decision. Trollwood Village, 557 N.W.2d at 734. Rather, the Tiberts are required to establish an absence of evidence in order for this Court to set aside the

City's decision. Id. As explained herein, the Tiberts have failed to meet this burden and therefore the lower court's order upholding the City's decision must be affirmed.

### ARGUMENT

**I. The decision of the City to grant the building permit was not arbitrary, capricious, or unreasonable.**

18. The position of the Tiberts on this issue stems from a misinterpretation of the easement for ingress and egress granted by Minto Grain, LLC to the City of Minto (See Appendix 90-92). The easement grants the City and residents a perpetual easement for ingress and egress over the easternmost eighty feet of what was previously BNSF Railway property. Tiberts argue that the easement grants an eighty-foot wide roadway, or street, upon which Minto Grain could not exercise further commercial ventures or impede in any manner. The easement, however, cannot be construed this narrowly. First, the easement specifically recites that the Grantor (Minto Grain, LLC) shall continue to own and control the roadway and that it is not dedicated as a public street. The easement further defines access:

*Access shall be defined as a general or simple right of ingress and egress. No alterations will be allowed upon the roadway without the written permission of the GRANTOR, and any private crossing adjoining the roadway must meet the grade of the roadway. No additional crossings or driveways may connect to the roadway without the prior consent and approval of GRANTOR. Access may be impeded from time to time due to truck traffic, accidents, road improvement projects or other reasonable and legitimate commercial purposes or natural occurrences. GRANTOR will not unreasonable delay or hinder the ingress and egress rights herein. If, under the control of GRANTOR, any portion of the roadway has to be closed, alternative routes will be provides. Any temporary closure will ordinarily not exceed twenty-four hours." (Emphasis applied)*

19. In Tibert v. City of Minto, 679 N.W.2d 440 (ND 2004) the North Dakota Supreme Court held that Tiberts had failed to establish that the eighty-foot strip in

question, historically referred to as Kilowatt Drive, was a public street, or a common law dedication. The Court disagreed with the Trial Court's conclusion that the easement from Minto Grain, LLC conferred upon Tiberts the same rights they would receive under a common law dedication, but found the Tiberts were not entitled to any further relief.

20. As argued by Tiberts, it would be contrary to the easement terms should Minto Grain "build" a permanent structure on the easement property that would impede the ingress and egress conferred. Nevertheless, the language of the easement quoted above does not prevent Minto Grain from putting up certain temporary storage units which consist of "reasonable and legitimate commercial purposes" upon the property of Minto Grain.

21. As indicated in the transcript (Appendix 48-64), the Planning and Zoning Committee meeting included a full airing and discussion of the concerns of the Tiberts. Clearly, they had the opportunity to direct all questions or concerns to both the Minto Grain proprietor and the Committee. Chairman Ron Ophaug appropriately summarized the position of the Committee in his comments at or near the end of the meeting. Mr. Ophaug stated:

*"...he is looking for the permit to do something on his property that was intended to be done on his property. He wants to store grain on elevator property. And, I can't see how we can say you can't do that."* (App. 62)

*"I am sure you are going to get the attorneys involved in this again so that I am personally going to approve this subject to what is legal, I mean he can't do this until this restraining order comes off. He can't do it if somehow your attorney proves in Court that this easement is the full eighty-feet. I think all that stuff is not our concern. It is not this council's concern."* (App. 63)

*"I am assuming by signing all of this that any legal restrictions that are in place have to meet. And I would assume the City Council would insist on that also." (App. 64)*

22. Again at the July 7<sup>th</sup> City Council meeting, Tiberts were offered every opportunity to discuss their concerns. (See App. 68-74) At the meeting Mr. Slominski summarized his position as follows:

*"First of all, the easement granted to the City from us, because we are the land owners, very specifically talks about us to preserve our rights to utilize the property for our commercial and business need and to limit the use of this property by the public and an easement was granted to the City to provide for access to the adjoining land owners, homes and properties. In no way or shape or form do anything to take away from our rights to be able to utilize that property for grain bins to facilitate traffic and whatnot. When the Planning and Zoning Committee met, I simply said that we would follow and not violate the rules of the easement that we had granted." (App. 69)*

The Council then approved the request for temporary storage units. Notably, before the application was approved and signed of by the Mayor and Auditor, the following language was inserted:

*"Construct temporary grain storage units. Metal rings with dirt floor and tarp roofs. May construct up to three units. Stay 4' from property lines and abide by all Court rulings." (App. 30)*

23. At paragraphs 33 through 39 the Tiberts cite cases from other jurisdictions for the proposition that the subject easement should be strictly and narrowly construed against Minto Grain, LLC to limit the use of the subject property solely to that of a road. At the outset, we note that the language of the easement itself dispenses with the Tiberts' argument. See paragraph 4, supra.

24. Even if strict construction of the easement against Minto Grain, LLC were appropriate, a review of applicable North Dakota Supreme Court precedents establishes that Minto Grain, LLC is entitled to use the subject property for the purposes of

constructing temporary grain storage facilities as long as the Tiberts are provided with ingress and egress from their property. See for example Ottertall Power Company v. Von Bank, 72 ND 497, 8 N.W.2d 599 (N.D. 1943). In that case the court held that an easement granted for use of agricultural land for highway purposes reserved to the grantor the right to use that portion of the property not specifically used for travel, for agricultural purposes, such as planting of hay or grain so long as it did not interfere with the use of the land for highway purposes. 8 N.W.2d 599, 604. See also Hjelle v. JC Snyder & Sons, 133 N.W.2d 625 (N.D. 1965) (holding the use of highway right-of-way by the abutting land owner, which does not injure or obstruct right-of-way, is not interference with use of right-of-way for highway purposes and is not enjoinable).

25. In Burleigh County Water Resource District v. Burleigh County, 510 N.W.2d 624 (N.D. 1994) the Burleigh County Water Resource District and interested individuals appealed a district court judgment affirming the Burleigh County Board of Commissioners refusal to take action for removal of an existing encroachment along a section line. In affirming the District Court's decision, the Court observed that in reviewing a decision by a local legislative body a court must not substitute its judgment for that of the body, but rather must determine whether the body erroneously exercised its discretion. Id., 510 N.W.2d at 627. The Court held that the public's right to travel on a section line does not include an absolute right to an object-free zone for the complete length and width of the section line. The court reviewed the record in the case and found that the partial encroachment to the section line did not completely block the public from using the section line. Accordingly, the court found that the Board of County

Commissioners did not erroneously exercise its discretion in deciding not to require removal of the partial obstruction.

26. In this case the evidence reflects that the City Planning and Zoning Commission as well as the City Council carefully considered all of the evidence submitted by the Tiberts and the Minto Grain, LLC, and accepted Minto Grain, LLC's principal's promise not to completely block the Tiberts' ingress and egress with regard to the placement of temporary grain storage facilities on the subject property. Further, the City's approval of the building permit application is conditioned upon the Slominski's and Minto Grain, LLC's promise to abide by the easement and all court orders. The City's decision is clearly the result of a rational mental process, and is not arbitrary, capricious or unreasonable.

**II. The failure of the City Planning and Zoning Committee to prepare minutes of its June 24, 2003 meeting does not render the Minto City Councils' decision of July 7, 2003 to grant the building permit application of Minto Grain, LLC to be arbitrary, capricious or unreasonable.**

27. It is true that the Planning and Zoning Committee did not prepare minutes of its June 24, 2003 meeting. The Tiberts made a complaint to the Attorney General who issued a decision on November 3, 2003. The Tiberts' brief in this case fails to note that the City Planning and Zoning Committee complied with the attorney general's opinion by preparing minutes within 7 days of that opinion. Those minutes were filed with the District Court in this case. See addendum at pps. 12 and 13.

28. The Tiberts completely fail to establish how the lack of minutes from the Planning and Zoning Committee made any impact on the City Council's decision of July 7, 2003.

29. Indeed, had minutes of the June 24, 2003 Planning and Zoning Committee been prepared, at a minimum (in technical compliance with the law) all that would have been required is:

- a. *The names of the members attending the meeting;*
- b. *the date and time the meeting was called to order and adjourned;*
- c. *A list of topics discussed regarding public business;*
- d. *A description of each motion made at the meeting and whether the motion was seconded;*
- e. *The results of every vote taken at the meeting; and*
- f. *The vote of each member on every recorded roll call vote.*

See A.G. Opinion, App. 87, citing to North Dakota Century Code § 44-04-21(2).

30. Although not cited by the Tiberts in their brief, we note that the North Dakota Supreme Court has held that violations of the open meetings and the records laws may result in actions taken by a political subdivision being void. Peters v. Bowman Public School District #1, 231 N.W.2d 817 (N.D. 1975).

31. In Dickinson Education Association v. Dickinson Public School District #1, 252 N.W.2d 205 (N.D. 1977) the North Dakota Supreme Court explained its decision in the Peters case and held that violation of the open meetings and records laws renders action taken by the political subdivision as voidable, and not void, depending upon all of the circumstances. In Dickinson Education Association the Supreme Court held that although constitutional and statutory open meetings provisions were violated by secret consultations at which major bargaining positions were discussed and adopted by the school board's negotiation team, where subsequent events mitigated the violation, the violation did not require that the completed negotiations be voided.

32. In Annexation of a part of Donny Brook Public School District #24 of Mountrail and Ward Counties to Stanley Public School District #2 of Mountrail County, 365

N.W.2d 415 (N.D. 1985), the Court held that failure of the county committee to take a recorded roll call vote was not an adequate reason to deny the annexation petition.

33. The open meetings and open records law in North Dakota provide a statutory mechanism for a citizen who believes there has been a violation. In this case the Tiberts, who were present at the meeting in question, filed a complaint with the North Dakota Attorney General. The North Dakota Attorney General issued its opinion finding that the City Planning and Zoning Committee had failed to keep minutes of its meeting and ordered the Planning and Zoning Committee to rectify that deficiency within 7 days. The record in this case reflects that the Planning and Zoning Committee did exactly that.

34. The Tiberts have demonstrated no harm whatsoever with regard to the Planning and Zoning Committee's failure to prepare minutes of its June 24, 2003 meeting. Moreover, given the fact that the Tiberts were at that meeting, as well as the subsequent City council meeting approving Minto Grain, LLC's building permit application, the Tiberts can hardly argue that they have been harmed by the failure of the Planning and Zoning Committee to prepare minutes. In addition, the Planning and Zoning Committee recommended approval of the building permit application, a position contrary to that being advocated by the Tiberts. Under those circumstances, minutes would not have been helpful to the Tiberts. Finally, given the fact that minutes would not be required to set forth the discussion that occurred at the meeting, the City council would not have been prejudiced in any fashion by the lack of those minutes.

35. Given all of the circumstances present in this case, the failure of the Planning and Zoning Committee to prepare minutes of its June 24, 2003 meeting was harmless error, which has now been rectified.

**CONCLUSION**

36. For all of the foregoing reasons the City of Minto respectfully requests that this Court affirm in all respect the Trial Court's decision upholding the City of Minto's decision to grant the building permit application of Minto Grain, LLC.

Dated this 4<sup>th</sup> day of May, 2006.

s/ **RONALD F. FISCHER**, ND ID# 03707  
PEARSON CHRISTENSEN & CLAPP, PLLP  
24 North 4th Street - P.O. Box 5758  
Grand Forks, ND 58206-5758  
(701) 775-0521 FAX (701) 775-0524  
Attorney for Defendant/Appellee City of Minto

**NICHOLAS B. HALL**, ND ID# 03223  
Hodny Currie Lawyers  
710 Hill Ave. - P.O. Box 610  
Grafton, ND 58237-0610  
(701) 352-2810 FAX (701) 352-1550  
Minto City Attorney

**CERTIFICATE OF COMPLIANCE**

37. The undersigned, as attorney for the Defendant/Appellee City of Minto in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 5,190.

Dated this 4<sup>th</sup> day of May, 2006.

s/ **RONALD F. FISCHER**, ND ID# 03707  
PEARSON CHRISTENSEN & CLAPP, PLLP  
24 North 4th Street - P.O. Box 5758  
Grand Forks, ND 58206-5758  
(701) 775-0521 FAX (701) 775-0524  
Attorney for Defendant/Appellee City of Minto

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Mark Tibert and Suzi Tibert,	)	
and Melvin Tibert and Cathy Tibert	)	
	)	
Appellants,	)	
vs.	)	Supreme Court No.: 20050393
	)	
The City of Minto, through its	)	Walsh County No.: 03-C-158
governing body, an incorporated	)	
political subdivision,	)	
	)	
Appellee.	)	

---

Appeal From a Final Appealable Decision Entered September 22, 2005  
In the District Court, Northeast Judicial District Walsh County

---

**ADDENDUM TO APPELLEE BRIEF**

---

**RONALD F. FISCHER**, ND ID# 03707  
PEARSON CHRISTENSEN & CLAPP, PLLP  
24 North 4<sup>th</sup> Street - P.O. Box 5758  
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(701) 352-2810 FAX (701) 352-1550  
Minto City Attorney

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1 STATE OF NORTH DAKOTA

IN DISTRICT COURT

2 COUNTY OF WALSH

NORTHEAST JUDICIAL DISTRICT

3 Mark Tibert and Suzi Tibert, )  
4 and Melvin Tibert and Cathy Tibert )

5 Appellants, )

6 vs. )

Court File No. 50-03-C-158

7 The City of Minto, through its )  
8 governing body, an incorporated )  
9 political subdivision, )

10 Appellee. )

11 **AFFIDAVIT OF TAMARA J. ULLAND**

12 STATE OF NORTH DAKOTA )

13 COUNTY OF WALSH )ss )

14 The undersigned, TAMARA J. ULLAND, upon being sworn under oath, states to the Court  
15 as follows:

- 16 1. That I am the City Auditor for the City of Minto, North Dakota, and have been at all
- 17 times relevant hereto.
- 18 2. That the Certification of Record prepared on August 27, 2003, in this matter,
- 19 erroneously did not include the Minutes of the Planning and Zoning Committee for
- 20 the meeting held June 24, 2003.
- 21 3. That said Minutes were prepared as directed, within 7 days of Attorney General
- 22 Opinion 2003-0-18, dated November 3, 2003.
- 23 4. That further, said Minutes were promptly furnished to Suzi Tibert as directed.
- 24 5. That an Amended Certificate of Record has now been prepared to be filed with the
- 25 Court, including the June 24<sup>th</sup> Minutes of the Planning and Zoning Committee.

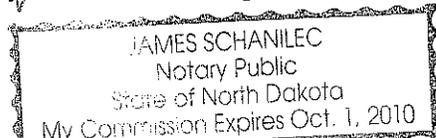
26 DATED this 19 day of November, 2004.

*Tamara J. Ulland*  
\_\_\_\_\_  
Tamara J. Ulland

0001

27 Subscribed and sworn to before me this 19 day of November, 2004.

*James Schanilec*  
\_\_\_\_\_  
Notary Public  
My Commission Expires:



1 STATE OF NORTH DAKOTA

IN DISTRICT COURT

2 COUNTY OF WALSH

NORTHEAST JUDICIAL DISTRICT

3 Mark Tibert and Suzi Tibert, )  
4 and Melvin Tibert and Cathy Tibert )

5 Appellants, )

6 vs. )

Court File No. 50-03-C-158

7 The City of Minto, through its )  
8 governing body, an incorporated )  
9 political subdivision, )

10 Appellee. )

11 **AMENDED CERTIFICATION OF RECORD**

12 The undersigned, Tamara J. Ulland, City Auditor for the City of Minto, North Dakota,  
13 certifies herein that the attached documents as follows:

- 14 1. Application for Building Permit;
- 15 2. City Council meeting agenda - June 2, 2003;
- 16 3. City Council meeting minutes - June 2, 2003;
- 17 4. Report of planning and zoning committee - June 24, 2003;
- 18 5. Minutes of planning and zoning committee - June 24, 2003;
- 19 6. City Council meeting agenda - July 7, 2003; and
- 20 7. City Council meeting minutes - July 7, 2003.

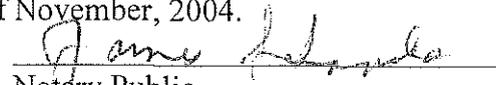
21  
22  
23 Constitute the record reflecting any meeting or minutes of the Minto City Council relative  
24 to the above-referenced appeal.

25 DATED this 19 day of November, 2004.

  
Tamara J. Ulland

0002

26  
27  
28 Subscribed and sworn to before me this 19 day of November, 2004.

  
Notary Public  
My Commission Expires:

JAMES SCHANILEC  
Notary Public  
State of North Dakota  
My Commission Expires Oct. 1, 2010

Fee \$ 2.00

FORM 93

No. 2003011

# APPLICATION FOR BUILDING OR MOVING PERMIT

City of Minto, North Dakota

Date Application Made 6/19/03 Date Approved or Rejected 7-7

Name of Owner Minto Grain, LLC

Location of Building Between Harvey Ave & Gillette Ave on MG, LLC

Legal Description property on or on South tract - South of Gillette Ave

Building to be Moved From \_\_\_\_\_ to \_\_\_\_\_

General Contractor Bill Stominaki

Address \_\_\_\_\_

Application — Permit For: New Construction  Moving Building

Will Curb Be Cut? Yes  No  Type of Construction metal, tarp

1st Floor \_\_\_\_\_ S. F. Outside Dimensions \_\_\_\_\_

2nd Floor \_\_\_\_\_ S. F. Outside Dimensions \_\_\_\_\_

Basement \_\_\_\_\_ S. F. Outside Dimensions \_\_\_\_\_

Basement \_\_\_\_\_ % Finished Porches \_\_\_\_\_ S. F. Size \_\_\_\_\_

Garage: Attached? Yes  No  Area \_\_\_\_\_ S. F. Outside Dim. \_\_\_\_\_

Roof Type \_\_\_\_\_ Fireplace \_\_\_\_\_

Estimated Cost of Construction (exclusive of land) \$ 16,916.00

### BUILT-IN FEATURES

- |                           |                       |                      |
|---------------------------|-----------------------|----------------------|
| 1. Garbage Disposal _____ | 5. Stove _____        | Other Features _____ |
| 2. Dishwasher _____       | 6. Exhaust Fan _____  |                      |
| 3. Refrigerator _____     | 7. Exhaust Hood _____ |                      |
| 4. Freezer _____          | 8. Bath Vanity _____  |                      |

Construct temporary grain storage under  
 metal ramp w/ dirt floor & tarp roof.  
 May construct up to 3 units, stay  
 4' from property lines and abide by  
 all court rulings.  
 at: Daz

0003

Rejected \_\_\_\_\_

Approved Paul Boehm

Attest Mama Julland AUDITOR

NOTE: This permit is regulated by ordinances of the City. Any and all permits may be revoked for cause by the City.

City of Minto  
Planning and Zoning Committee

I am applying for a building permit for the following project:

Name: Minto Grain LLC

Location: See Attached map

Approximate cost: \$9696.00

Type of Construction: \_\_\_\_\_

metal ring with tarp roof

Size & shape may vary

For any construction over \$5,000.00 please submit plans with drawings of the project.

By signing the above application, I agree to keep my property in a neat and orderly manner. I agree to complete this project in a timely manner.

Signed: Bell Stominski

app: 7-703  
Permit #: 2003-011

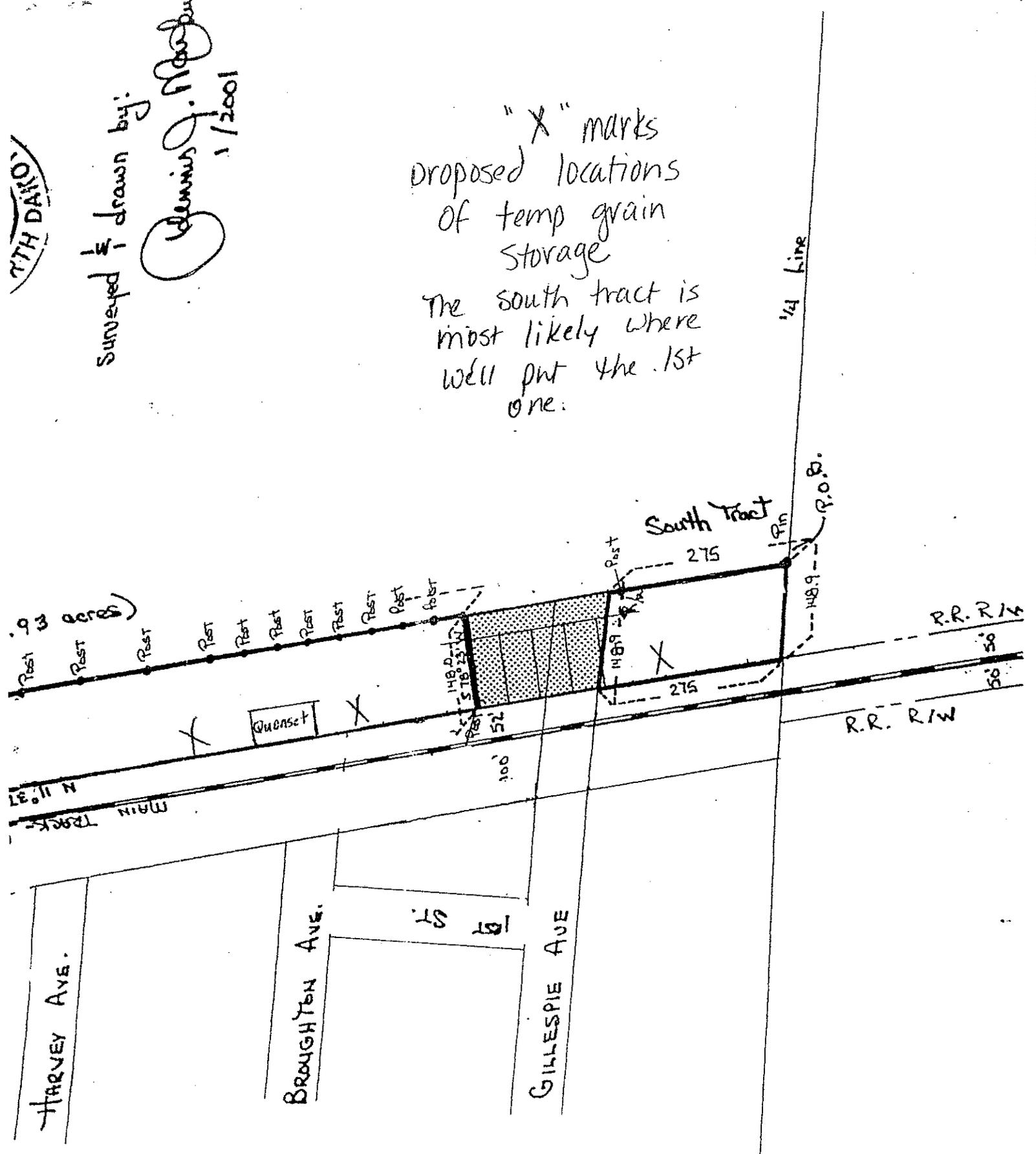
7TH DAIRY

Surveyed & drawn by:

Dennis J. Marburn  
1/2001

"X" marks  
Proposed locations  
of temp grain  
storage

The south tract is  
most likely where  
we'll put the 1st  
one.



**CITY COUNCIL MEETING  
TENTATIVE AGENDA  
June 2, 2003  
7:00 PM**

- 1. Call to Order.**
- 2. Roll call/Quorum established?**
- 3. Approve minutes from last meeting (May 5).**
- 4. Guests.**
  - A. Melvin Tibert – Update on Minto City Park boundaries.
  - B. Minto Action League – Message Center.
  - C. Minto Action League – Banners.
- 5. Committee reports.**
  - A. Streets, Grounds & Lights -- Brad.
  - B. Animal Warden -- DeLinda.
  - C. Employee Relations – Tom, DeLinda, Paul.
  - D. Planning & Zoning – Nellie, DeLinda.
  - E. Cemetery Committee -- Tom.
  - F. Forestry Committee – Tom, Nellie.
- 6. Unfinished business.**
  - A. Cable TV franchise contract – Nellie.
  - B. Insect control.
  - C. Ordinance update.
  - D. Other old business.
- 7. New business.**
  - A. Approve bills.
  - B. Building permits.
  - C. ½ Mill Self Help Program.
  - D. Other new business.
- 8. Announcements.**
  - A. Solving Personnel Puzzles – June 4, Bismarck.
  - B. Going After Grants – July 2, Bismarck.
  - C. Municipal Laws of ND & City Ordinance Maintenance – July 30, Grafton.
  - D.
- 9. Adjournment.**

**Next regular meeting: July 7, 2003.**

Record of the minutes of a regular meeting of the City Council of the City of Minto, Walsh County, North Dakota, held on June 2, 2003 at 7 PM at the City Hall.

Mayor Koehmstedt called the meeting to order. Present were: Mayor Paul Koehmstedt; Councilmen Tom Gerszewski, DeLinda Long, Brad Narloch and Nellie Shutt.

Minutes from the regular meeting held on May 5, 2003 were on motion duly made, seconded, and carried. The minutes were approved with the addition of the Auditor's salary and benefit package included.

Melvin Tibert questioned where the boundaries for the Minto City Park are located. Narloch stated according to the city attorney, if the City has a deed, it is their property.

The Minto Action League presented the banners they have purchased for the City. There are twelve banners which will be placed on the light poles along Highway 81. Otter Tail Power Company will install the brackets and banners. On motion by Gerszewski, seconded by Narloch, and carried. It was approved to accept the banners with Otter Tail Power installing them and the Minto Action League ensuring all State highway regulations are met.

The status of the Minto Message Center was discussed. Minto Action League would like the City to maintain the Message Center. Also discussed was the possibility of raising the price of advertising. On motion by Narloch, seconded by Shutt, and carried. It was approved to accept the responsibility for the electricity and phone lines for the Minto Message Center until December 31, 2003. The status of the Message Center will be reviewed annually.

Rick Swank of Farmers Union Oil was present to discuss the propane tanks at the water plant. The LP regulators need to be replaced because of new regulations. The tanks need to be repaired and painted. Mr. Swank will obtain bids for refurbishing vs. purchasing new tanks and will present the information at the July meeting.

The roads in the Stoltzman's Subdivision were discussed. It was agreed they are in better condition, but still not good. Drainage needs to be improved. Narloch will shoot with the laser and explore ditching options. Drainage on the Farmers Union lot will also be looked into.

Jon Markusen of Kadrmas Lee & Jackson was present to discuss the First Street Bridge replacement project. The project is in the preliminary stages right now. Concerns include Johnson Avenue access, the water line under the river, and the Minto Dam. Removal of the dam was discussed. The deck of the new bridge could be lowered 3.2' if the dam is removed. Removal of the dam and excavation is estimated at \$85,000-\$100,000. The State Water Commission may be able to participate up to 50% in a removal project. The bridge project cannot continue until Mr. Markusen knows if the dam is staying or being removed.

Access to ABC Daycare was discussed. It was agreed the alley in Block 12 needs to be better maintained. It was agreed 5<sup>th</sup> Street will remain as is.

Jason McBride's 6-month review was discussed. The Council commends Mr. McBride for doing a great job. On motion by Gerszewski, seconded by Long, and carried. It was approved to upgrade Mr. McBride's health insurance to a family plan and to cap it at \$507.19 with any increases being paid by the employee.

Planning and Zoning presented three permit applications to the Council for approval. On motion by Shutt, seconded by Long, and carried. Building permits were approved for Scott and Nikki Larson for a garage addition and Doug and Tami Ulland for a kitchen addition. It was agreed to table an application from Scott and Nikki Larson for a fence until more information could be obtained. It was agreed to table an application from Minto Grain for temporary grain storage bins until the Planning and Zoning Commission has an opportunity to review and offer a recommendation.

Gerszewski has not heard from North Central Granite about when they will be here to do the work in the cemetery.

The Forestry Committee will be erecting a retaining wall and planting flowers in the OWLS project area on Wednesday, June 4.

According to Rod Carlson from Midcontinent Cable, the corporate office is looking at upgrading all of their small services. He will be in touch with Shutt in July.

Narloch has discussed aerial spraying for mosquitoes with Airborne Custom Spraying out of Halstad, MN. The estimated cost is approximately \$750.00 per application if Minto is on a schedule with neighboring communities. On motion by Gerszewski, seconded by Shutt, and carried. It was approved to authorize Narloch to complete the paperwork and schedule one application to see how effective it is. Narloch will also check on the ground sprayer and larvacide.

The monthly bills were presented and discussed. On motion by Shutt, seconded by Long, and carried. The following bills were approved for payment:

**General Fund:**

*Stanley Zolondek	Salary (April)	665.00
*Hodny Currie Lawyers	Deed, review district court decision	75.00
*Qwest	Office, fax line	100.00
Otter Tail Power	Whiteway	272.92
AT&T	Long distance – office, fax/modem	71.79
NDPERS	Retirement	136.80
NDPERS	Insurance	516.83
Walsh County Treasurer	Policing Contract	657.00
Paul Koehmstedt	2002 yard work on Svir lot (45 hours)	450.00

Ewald's Plaza	Office rent	200.00
Tami Ulland	Salary	1500.00
Paul Koehmstedt	Salary	375.00
Tom Gerszewski	Salary	195.00
Delinda Long	Salary	195.00
Brad Narloch	Salary	195.00
Lynelle Shutt	Salary	195.00
Park River Vet Clinic	Board dog	20.00
Minto Service Center	Gas – mower	33.05

**Highway Distribution Fund:**

*Narloch Trucking	Gravel, crusher dust, dirt	50.00
NDPERS	Retirement	172.62
NDPERS	Insurance	210.21
Walsh County Highway Dept.	School crossing sign	150.78
Hansons Auto & Implement	Radiator cap for tractor	6.77
Elmer Schill	Salary	87.50
Jason McBride	Salary	1892.80
Farmers Union Oil	Diesel – sweeper	17.56
Narloch Trucking	Blading, gravel, rock	797.00
Super Service	Flasher for sweeper, oil, marking paint	11.33

**Advertising Fund:**

*Morgan Printing	Minutes – April	61.20
	Clean-up Day ads	55.26

**Street Lights Fund:**

Otter Tail Power	Street Lights	641.51
------------------	---------------	--------

**Forest/Snow/Insect Fund:**

Menards	Retaining stone, concrete – OWLS	117.19
Helen's Country Greenhouse	Flowers – OWLS	26.59
Super Service	Paint for flagpole	8.58

**Community Message Center Fund:**

*Qwest	Phone line	40.24
Otter Tail Power	Electricity	18.72

**Water Fund**

*Hawkins Chemical	Container charge	10.00
*Advanced Engineering	Replace roll seal valve	598.80
*ND One Call, Inc.	Locates	5.85
*Qwest	Phone	26.29
*Cellular One	Phone	29.31
*Minto Post Office	Water billing postage	62.79

Otter Tail Power	Electricity	480.74
Nodak Electric Cooperative	Electricity	182.55
AT&T	Phone	40.32
Super Service	Misc.	14.82
Minto Service Center	Gas – pickup	139.05
NDPERS	Retirement	193.80
NDPERS	Insurance	211.86
Qwest	Aquifer switch	80.77
Henry Czapiewski	Overtime – 8 hrs. Memorial Day 13.25 other hours	390.58
Polar Communications	Aquifer switch	46.93
Jason McBride	Overtime – 19.75 hours	323.51
Henry Czapiewski	Salary	2125.00
Langowski's Market	Cleaning supplies, kleenix	7.71

**Sewer Fund:**

Otter Tail Power	Electricity	62.14
Northern Water Works Supply	Discharge valve @ Lagoon	1105.99
City of Grand Forks	Lagoon testing	109.50
DeWayne Knudson	Salary	70.00
Lewis Knudson	Salary	50.00
Super Service	Garbage bags	13.78
Kringstad Septic Service	Jetting sewer mains	762.50

**Garbage Fund:**

Refuse Disposal Service	Collections	2447.72
Refuse Disposal Service	Clean-up Day	850.00
Langowski's Market	Food for clean-up day	98.89

A building permit was issued to Minto Grain to replace a overhead door that was damaged.

The ½-mill Self-Help Program was discussed. A project will be decided on at a later date.

Part-time seasonal employees were discussed. On motion by Gerszewski, seconded by Long, and carried. It was approved to hire Garrett Evenson and Elmer Schill at \$8.00/hour for mowing.

Koehmstedt will contact Denton Offutt for dandelion spraying on city lots.

Narloch will check into installing Watch for Children signs along Major Avenue.

The condition of the David Koehn yard was discussed. Shutt will talk to him about cleaning it up.

The following resolution was introduced.

**RESOLUTION 2003-02**

By virtue of the Authority vested in the governing body for the City of Minto, by the North Dakota Disaster Act of 1985 (NDCC 37-17.1), we do hereby order that the Walsh County Local Emergency Operations Plan be effective and promulgated to all appropriate entities of the City of Minto. This plan assigns tasks and responsibilities to organizations within the County and City. The plan establishes a broad concept for conducting response and recovery operations should an emergency or disaster threaten or occur anywhere in the County and/or the Cities therein.

This resolution shall have the full force and effect of the Law. Executed at Minto, Walsh County, North Dakota this 2<sup>nd</sup> day of June, 2003.

Signed: \_\_\_\_\_  
Mayor

Attested: \_\_\_\_\_  
Auditor

On motion by Narloch, seconded by Gerszewski and carried. Resolution 2003-02 was approved.

Upcoming meetings and seminars were announced. Mayor Koehmstedt will be attending the Going After Grants seminar in Bismarck on July 2. Mrs. Ulland will be attending the Municipal Laws of ND & City Ordinance Maintenance seminar in Grafton on July 30.

There being no further business, on motion duly made, seconded and carried. The meeting was adjourned. The next regular meeting will be held on July 7, 2003.

\_\_\_\_\_  
Mayor

Attest: \_\_\_\_\_  
Auditor

June 24, 2003

The planning and zoning committee held a meeting at the Minto water plant at approximately 7 pm with Nellie Shutt, Delinda Long, Sid Dvorak, Ron Ophaug, Elmer Schill, and LT Wysocki present.

Steve Severson applied to build a utility shed. After a brief discussion there was a motion and second to approve. Carried unanimously.

Joe Kosobud applied to build a patio deck. After a brief discussion there was a motion and second to approve. Carried unanimously.

Robert Langowski applied to build a metal utility shed. After a brief discussion there was a motion and second to approve. Carried unanimously.

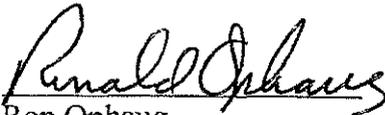
Allan Gerszewski applied to build a garden fence. After a brief discussion there was a motion and second to approve. Carried unanimously.

John Narloch applied to build a deck. After a brief discussion there was a motion and second to approve. Carried unanimously.

Minto Grain, LLC applied to build temporary grain storage. After a lengthy discussion and several comments and questions from the board and comments from those attending the meeting, there was a motion and second to approve. The vote was 5 in favor and 1 abstaining (Dvorak).

The above recommendations will be forwarded to the City Council for approval.

There being no further business to come before the board, the meeting was adjourned at approximately 8 pm.

  
Ron Ophaug

We, the planning and zoning committce of the City of Minto, hereby submit to the City Council our recommendation for the following:

Ronald Ophaug  
Ron Ophaug

Approve  Do not Approve \_\_\_\_\_

Ronald Spale  
Ron Spale

Approve  Do not Approve \_\_\_\_\_

Delinda Long  
Delinda Long

Approve  Do not Approve \_\_\_\_\_

Elmer Schill  
Elmer Schill

Approve  Do not Approve \_\_\_\_\_

L. T. Wysocki  
L T Wysocki

Approve  Do not Approve \_\_\_\_\_

Nellie Shutt  
Nellie Shutt

Approve  Do not Approve \_\_\_\_\_

\_\_\_\_\_  
Sid Dvorak

Approve \_\_\_\_\_ Do not Approve \_\_\_\_\_

**CITY COUNCIL MEETING  
TENTATIVE AGENDA  
July 7, 2003  
7:00 PM**

1. **Call to Order.**
2. **Roll call/Quorum established?**
3. **Open Petitions from the Public.**  
Each speaker limited to 5 minutes.
4. **Approve minutes from last meeting (June 2).**
5. **Guests.**
  - A. Rick Swank – Propane tanks.
6. **Committee reports.**
  - A. Streets, Grounds & Lights -- Brad.
  - B. Animal Warden -- DeLinda.
  - C. Employee Relations – Tom, DeLinda, Paul.
  - D. Planning & Zoning – Nellie, DeLinda.
  - E. Cemetery Committee -- Tom.
  - F. Forestry Committee – Tom, Nellie.
7. **Unfinished business.**
  - A. Cable TV franchise contract – Nellie.
  - B. Insect control.
  - C. Minto Dam/1<sup>st</sup> Street Bridge project.
  - D. Other old business.
8. **New business.**
  - A. Approve bills.
  - B. Building permits.
  - C. ½ Mill Self Help Program.
  - D. Refurbishing light poles on Highway 81.
  - E. Other new business.
9. **Announcements.**
  - A. Red River Regional Council's Annual Meeting – July 8, Grafton.
  - B. 2003 North Dakota Water Tours – various dates.
  - C. Executive Briefing on Drought – July 15, Fargo.
  - D. Municipal Laws of ND & City Ordinance Maintenance – July 30, Grafton.
  - E. Risk Management Training – August 19, Bismarck.
  - F. Comprehensive Zoning and Land Use Planning – August 22, Fargo.
  - G. Tami on vacation – August 5-11.
10. **Adjournment.**  
**Next regular meeting: August 4, 2003.**  
**City Auditor's office closed: August 6 & 8. Open August 5 morning.**

Record of the minutes of a regular meeting of the City Council of the City of Minto, Walsh County, North Dakota, held on July 7, 2003 at 7 PM at the City Hall.

Council President Gerszewski called the meeting to order. Present were Councilmen Tom Gerszewski, DeLinda Long, Brad Narloch and Nellie Shutt. Absent was Mayor Paul Koehmstedt.

Open petitions from the public were heard.

Minutes from the regular meeting held on June 2, 2003 were on motion duly made, seconded, and carried. The minutes were approved.

Rick Swank, Farmers Union Oil, was present to discuss the LP tanks at the plant. On motion by Long, seconded by Narloch, and carried. It was approved to purchase two new LP tanks along with installation and necessary repairs from Farmers Union Oil Co. and to authorize Koehmstedt to sell the old tanks with the propane if possible.

Dennis Markusen, Walsh County Highway Department, and Tork Kilichowski, Walsh County Commissioners, were present to discuss the First Street Bridge Replacement project. Walsh County recommends the construction of a 94' double-span quad-T (?) structure. The estimated cost is \$265,000 with the City's share being \$26,500. Options with the dam in place or removed were discussed. Estimated cost for the dam removal is \$100,000 with 50% paid by the City and 50% paid by the ND Water Commission. Also discussed was the timing needed with decisions so everything will be ready for the November bid letting. On motion by Narloch, seconded by Long and carried. It was approved to put this project on the November bid letting with two engineering alternatives, one with the dam in place and one with the dam removed. Funding for the dam removal will be pursued.

Roger Grimsley, Advanced Engineering, was present to discuss the engineering proposals for a street assessment and a sanitary sewer main assessment. It was stated no action will be taken on these proposals at this time.

Narloch stated the lagoon culvert across the road at L.T. Wysocki's has collapsed and needs to be repaired.

Watch for Children signs along Major Avenue were discussed. On motion by Long, seconded by Shutt, and carried. It was approved to install Watch for Children and 20 mph speed zone signs in Stoltman's Subdivision along Major Avenue and 6<sup>th</sup> Street.

Drainage in Stoltman's Subdivision was discussed. Narloch stated the south side of Major Avenue is pretty good. Along the north side of Major Avenue there is a section that needs to be lowered about 9" in order to drain the west end. Driveway culverts would need to be lowered also. Different options were discussed. Gerszewski and Long will organize a community meeting after Narloch receives some cost estimates.

Building permit applications from the Planning and Zoning committee were discussed. On motion by Long, seconded by Shutt, and carried. A building permit for Steve Severson for a 12' x 16' utility shed was approved. On motion by Long, seconded by Shutt, and carried. A building permit for Joe Kosobud for a patio deck was approved. On motion by Long, seconded by Shutt, and carried. A building permit for Robert Langowski for an 18' x 20' metal storage building was approved. On motion by Long, seconded by Shutt, and carried. A building permit for Allen Gerszewski for a rock pillar and cedar board fence was approved. On motion by Long, seconded by Shutt, and carried. A building permit for John Narloch for a 10' x 12' deck was approved. On motion by Long, seconded by Shutt, and carried. A building permit for Minto Grain for temporary grain storage bins consisting of metal rings, tarp roofs, and dirt floors was approved.

Gerszewski stated North Central Granite is planning on being here in July to do the repairs in the cemetery.

Shutt stated the Tree City USA flag is up in the OWLS project area. Shutt also stated Linda Otto from Grafton is donating a tree to the City of Minto and she will pick it up.

Narloch stated Airborne Custom Spraying had been here to do aerial spraying for mosquitoes on July 2<sup>nd</sup>. The City will be on a two week rotation, weather permitting, so will be sprayed again on July 16<sup>th</sup>.

The monthly bills were presented and discussed. On motion by Shutt, seconded by Long, and carried. The following bills were approved for payment:

**General Fund:**

*Stanley Zolondek	Salary (May)	1232.00
*Qwest	Office, fax line	103.65
*Minto Post Office	Stamps	23.00
Otter Tail Power	Whiteway	272.92
Farmers Union Oil	Diesel – tractor mower	17.55
AT&T	Long distance – office, fax/modem	25.48
Minto Service Center	Gas – mowers	26.65
NDPERS	Retirement	136.80
NDPERS	Insurance	516.83
Walsh County Treasurer	Policing Contract	657.00
ND League of Cities	Going After Grants workshop	40.00
	Municipal Laws of ND & City Ord.	50.00
State Fire and Tornado Fund	Property insurance – museum	416.64
	Property insurance – warming house	6.83
Tami Ulland	Mileage, meals – school in Minot	209.65
Tami Ulland	School in Minot – 11 hours	190.41
JR Welding	Repair Woods mower	358.00
Hodny Currie Lawyers	AG letter, Park Board issues	210.00
Farm Plan (Grafton Equipment)	Parts for Woods mower	82.40

Ewald's Plaza	Office rent	200.00
International Inn	Auditor's school in Minot	90.00
Elmer Schill	Salary – mowing - 6.5 hours	52.00
Helen's Country Greenhouse	Plant for baby McBride	12.00
Tami Ulland	Salary	1500.00
Paul Koehmstedt	Mileage to Bismarck	186.00
Fertile Grow Turf & Tree Care	Weed spraying	300.00
Garrett Evenson	Mowing – 11.5 hours	92.00

**Highway Distribution Fund:**

*Narloch Trucking	Gravel, crusher dust, dirt	50.00
Farmers Union Oil	Diesel – sweeper	49.04
Narloch Trucking	Blading 6/9, 27	240.00
NDPERS	Retirement	172.62
NDPERS	Insurance	233.04
Swanston Equipment	Gutter broom – sweeper	161.27
Elmer Schill	Salary – 12.5 hours	93.75

**Advertising Fund:**

*Morgan Printing	Clean-up Day ads	55.26
Morgan Printing	CCR report, notice	190.05

**Cemetery Fund:**

Paul Koehmstedt	Mowing – 20 hours	200.00
Garrett Evenson	Mowing – 16 hours	128.00

**Street Lights Fund:**

Otter Tail Power	Street Lights	641.51
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**F.S.I. Fund:**

True Value	Hook, rope for flagpole	16.62
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**Economic Development Fund:**

Division of Community Services	ABC Daycare loan payment	3397.61
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**Community Message Center Fund:**

*Qwest	Phone line	40.24
Otter Tail Power	Electricity	20.96

**1956 Water Supply Fund:**

Maguire Iron, Inc.	Service to tower	845.00
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**Water Fund**

*Hawkins Chemical	Chemicals	697.69
*ND One Call, Inc.	Locates	11.70

*Hawkins Chemical	Container charge	5.00
*Qwest	Phone	22.92
*Cellular One	Phone	30.33
*Minto Post Office	Water billing postage	61.64
Otter Tail Power	Electricity	361.91
Nodak Electric Cooperative	Electricity	188.54
Farmers Union Oil	Keys for water plant	3.90
Farmers Union Oil	Propane	38.25
AT&T	Phone	47.64
Super Service	Wrench	3.29
Minto Service Center	Gas – pickup	130.92
NDPERS	Retirement	193.80
NDPERS	Insurance	234.69
Qwest	Aquifer switch	80.77
Henry Czapiewski	27.75 hours overtime	510.05
Polar Communications	Aquifer switch	46.93
State Fire and Tornado Fund	Property insurance – plant, wellhouse, Equipment	1221.75
Ray Feltman	June hours – 7.5 hours	90.68
Vessco, Inc.	Feeder parts	651.37
JR Welding	Threaded pipe for LP tanks	11.90
Jason McBride	Overtime – 9.25 hours	151.52
Henry Czapiewski	Salary	2125.00
Jason McBride	Salary	1892.80
Minto Electric	Bulbs – water tower	23.04
Praxair	Carbon dioxide	148.82

**Sewer Fund:**

Otter Tail Power	Electricity	81.19
State Fire and Tornado Fund	Property insurance – lift stations	37.58
DeWayne Knudson	Salary	70.00
Lewis Knudson	Salary	50.00

**Garbage Fund:**

Refuse Disposal Service	Collections	2447.72
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**Withholding Fund:**

NDPERS	Insurance	56.51
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A building permit was issued to Lenny Schanilec to reshingle his home.

The ½-mill Self-Help Program was discussed. On motion by Narloch, seconded by Shutt, and carried. It was approved to apply for ½-mill Self-Help funds for the cemetery repairs.

Refurbishing the light poles along Highway 81 was discussed. The poles belong to the

City so will be the City's obligation. Estimate from Cudmore Sandblasting to sandblast, prime, and paint is \$350.00 per pole for 17 poles. An anonymous individual has offered to donate \$3000.00 towards this project. On motion by Shutt, second by Long, and carried. It was approved to accept the bid from Cudmore Sandblasting to refurbish the light poles.

Upcoming meetings and seminars were announced. Mrs. Ulland will be attending the Municipal Laws of ND & City Ordinance Maintenance seminar in Grafton on July 30.

There being no further business, on motion duly made, seconded and carried. The meeting was adjourned. The next regular meeting will be held on August 4, 2003.

\_\_\_\_\_  
Mayor

Attest: \_\_\_\_\_  
Auditor

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Mark Tibert and Suzi Tibert, )  
and Melvin Tibert and Cathy Tibert )  
 )  
Appellants, )  
vs. )  
 )  
The City of Minto, through its )  
governing body, an incorporated )  
political subdivision, )  
 )  
Appellee. )

Supreme Court No.: 20050393

Walsh County No.: 03-C-158

**AFFIDAVIT OF SERVICE VIA E-MAIL**

STATE OF NORTH DAKOTA )  
 )ss  
COUNTY OF GRAND FORKS )

Norma O'Halloran, being first duly sworn on oath, deposes and says: That she is of legal age, a citizen of the United States, and is not a party to, nor has she an interest in the above-entitled action: that on May 4, 2006, she e-mailed, a true and correct copy of the following document filed in the above-entitled action:

1. Appellee Brief; and  
Addendum to Appellee Brief.

That said e-mail was addressed as follows:

David Thompson  
dct@rrv.net

To the best of your affiant's knowledge, information, and belief, such address as given above with the actual post office address of the part intended to be so served.

That the above document duly mailed in accordance with the provisions of the *Rules of Civil Procedure*.

  
\_\_\_\_\_  
Norma O'Halloran

Subscribed and sworn to before me on May 4, 2006.

  
\_\_\_\_\_  
Notary Public

MARY K. BACHMEIER  
NOTARY PUBLIC  
STATE OF NORTH DAKOTA  
My Commission Expires: Sept. 23, 2006