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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| Dakota Resource Council,<br><br>Appellant and Cross-Appellee,<br><br>and<br><br>Neighbors United, Myron and Nancy Eberts, Neil and Laura Tangen, Brittany Huggins, and Frank and Lucy Hurt,<br><br>v.<br><br>Stark County Board of Commissioners and Great Northern Project Development,<br><br>Appellees and Cross-Appellants. | ) | Supreme Court No. 20110172 |

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Appeal from the Judgment entered on April 6, 2011
Civ. No. 45-10-C-00315
County of Stark, Southwest Judicial District
Honorable Wickham Corwin, Presiding

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# BRIEF OF APPELLEE/CROSS-APPELLANT GREAT NORTHERN PROJECT DEVELOPMENT

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## STATEMENT OF ISSUES

[¶ 1] Whether Appellee and Cross-Appellant Stark County Board of County Commissioners ("Board"), properly applied the law in granting Appellee and Cross-Appellant Great Northern Project Development ("Great Northern"), a conditional use permit. Whether the individual appellants, DRC, and Neighbors United lacked standing to appeal the decision of the Board to the district court.

## STATEMENT OF CASE

[¶ 2] This appeal arises out of an application filed by Great Northern with the Stark County Zoning Commission ("Commission"), by which Great Northern requested an amendment to the zoning of certain land located in Stark County, North Dakota from agricultural to industrial. Following a public hearing on the application and a recommendation from the Commission, the Board approved the application subject to certain conditions. Several parties appealed to the Stark County District Court asserting that the decision of the Board to approve the application filed by Great Northern was arbitrary and capricious and must be overturned. After a hearing, the district court held that the appellants had standing to appeal, but affirmed the Board's decision. DRC then brought the instant appeal asserting that the Board erred in issuing Great Northern a conditional use permit. Great Northern and the Board cross-appealed as to the district court's holding that the appellants, including DRC, had standing to appeal the Board's decision to the district court.

## STATEMENT OF FACTS

### I. Facts.

[¶ 3] On or about February 22, 2010, Great Northern filed an application with the Commission by which it requested an amendment to the zoning ordinance and map to

rezone certain described real property located in Stark County, North Dakota, from agricultural to industrial with nine conditional uses as identified in the application. (*See* Great Northern's Appendix to Brief of Appellee Great Northern Project Development, (Docket No. 35), 1-4). Great Northern filed its application in connection with its plans to construct and operate a coal gasification facility and adjacent surface coal mine on the subject property. (App. to Docket No. 35, 22). The plant will produce hydrogen-based electric power, carbon dioxide for use in enhanced oil recovery, and sulfuric acid. (*Id.*).

[¶ 4] On April 5, 2010, the Commission held a public hearing to consider and take public comments regarding the application. (Appellant's Appendix ("App.") at 6). At the hearing, Great Northern submitted a document describing the details of the proposed project, including an explanation of the various components of the project and purposes for the same. (App. to Docket No. 35, 22-29). In addition, the document addressed the various local, state, and federal approvals and permits that Great Northern would be required to obtain in order to construct and complete construction of the plant and mine, as well as to operate the same. (*Id.*). Several representatives of Great Northern appeared to give testimony and answer questions at the hearing regarding the details of the proposed project, the economic and environmental impacts of the project, and the application filed by Great Northern.[1] (App. at 6). In addition, certain members of the public, as well as various environmental and other interested groups, appeared at the

[1] The brief that the Board submitted to the district court contains a detailed discussion of the testimony provided by the representatives of Great Northern at the April 5, 2010, hearing. (*See* Brief of Appellee Stark Board of County Commissioners (Docket No. 24), 3-4). For the sake of judicial economy, Great Northern joins in and specifically incorporates this discussion in its brief as if fully set forth herein.

hearing and spoke in opposition to the application filed by Great Northern.[2] (*Id.*). The Commission took extensive testimony from all parties and questioned representatives of Great Northern regarding a variety of concerns voiced by the members of the Commission and the public regarding the proposed project. (*Id.*).

[¶ 5] At the conclusion of the hearing, the Commission unanimously voted to recommend to the Board that it approve the application filed by Great Northern subject to Great Northern obtaining all of the necessary local, state, and federal permits and approvals required for the compliant construction and operation of the project, as well as the approval and signing of any road agreement required by the County. (*Id.*). On April 6, 2010, at its next regularly scheduling meeting, the Board considered the recommendation of the Commission regarding Great Northern's application. (App. at 6-7). At the meeting, Commissioner Elkin moved to recommend Great Northern's application for rezoning subject to four additional conditions. (App. at 7). Those conditions were as follows:

1. Great Northern Project Development obtains all the necessary local, state, and federal approvals, licenses, and permits relative to the operation of the coal mine;

2. Great Northern Project Development agrees in writing to replace all water lost as a result of damage to water wells caused by their mining operation;

3. Great Northern Project Development builds and maintains necessary access roads to the mining plant, in such, roads be built to the satisfaction of the Stark County Commission; and,

4. Great Northern Project Development will work in concert with law enforcement and emergency responders to facilitate public safety.

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[2] Most of the individuals that opposed the application based their opposition on the contention that the Commission and the public did not have enough information about the project to make a decision at that time.

(App. at 8-9).

[¶ 6] Following Commissioner Elkin's motion, there was some discussion among the members of the Board as to whether the property would be immediately rezoned subject to the four stated conditions or whether the decision to rezone would be delayed until the four conditions were satisfied by Great Northern. (App. at 7). Following this discussion, Commissioner Elkin's motion was seconded, and the motion was passed unanimously by the Board. (*Id.*).

[¶ 7] The Board called a special meeting on June 15, 2010, to clear up some confusion that remained as a result of the discussion at the April 6, 2010, meeting, and to further clarify the decision of the Board in regard to the rezoning application. (*Id.*). At the June 15, 2010, meeting, it was made clear that the intent of Commissioner Elkin's motion and the ultimate decision of the Board was to immediately rezone the subject property from agricultural to industrial subject to the four previously-stated conditions. (*Id.*). Following this clarification, the Board took another vote on the motion and unanimously passed the motion as clarified. (*Id.*). Thereafter, the Board prepared written findings and a resolution confirming the decision and the rationale behind the same. (*Id.*).

## II. **Procedural History.**

[¶ 8] On or about May 6, 2010, Appellants filed and served their Notice of Appeal with the district court challenging the Board's decision. (App. at 2). However, Appellants failed to name Great Northern as a party to the appeal. (*Id.*). Appellants filed their brief in support of their appeal on or about November 22, 2010, asserting that the Board's decision must be overturned because it was arbitrary, capricious, and unreasonable, not supported by substantial evidence, and that Great Northern did not

comply with the requirements of Section 6.10-A of the Stark County Ordinance. (App. at 3); *see also* Brief of Appellants (Docket No. 23). The Board filed its response brief on or about December 21, 2010. (App. at 3). The Board asserted, among other things, that the appeal must be dismissed for failure to name Great Northern as a party to this appeal. (Docket No. 24, 8-9). In response, the Appellants filed a motion to join Great Northern as a party pursuant to Rule 19 of the North Dakota Rules of Civil Procedure. *See* Memorandum in Support of Motion for Joinder and Motion for Extension of Time (Docket No. 26). Despite opposition from the Board, the Court granted the Appellants' motion. *See* Court's Memorandum Decision and Order (Docket No. 32). Thereafter, Great Northern was made a party to this appeal. (*Id.*). Great Northern submitted its response brief on or about February 22, 2011. (*See* Docket No. 35).

**III. District Court's Determination.**

[¶ 9] On March 22, 2011, a hearing was held on the appellants' appeal before the Honorable Wickham Corwin at the Burleigh County Courthouse in Bismarck, North Dakota. (App. at 5). On April 5, 2011, the district court issued an Opinion and Judgment affirming the Board's decision. (App. 5-26).

[¶ 10] The district court determined the appellants had standing, but declined to overrule the Board's decision. The district court found that the individual appellants had standing, despite the lack of any concrete, economic injury, due to the potential for odors and "noise and visual pollution." (App. 12-13). DRC was found to have standing because the district court determined that at least some of its members had standing. (App. at 13). While the district court found that it did not "matter much" whether Neighbors United had standing, it held that Neighbors United did have standing, because it was a "person" according to the definition of that term in the Administrative Agencies

Practices Act (N.D.C.C. § 28-32-01(9)). (App. at 14). The district court did not address the law regarding nonprofit corporations' standing in his decision. (*See id.*). On the merits of the case, the district court held in favor of Great Northern and the Board. (App. at 20-21).

## LAW AND ARGUMENT

### I. DRC, Neighbors United, and the Individual Appellants did not have Standing to Appeal the Board's Decision.

[¶ 11] None of the appellants before the district court had standing to appeal the Board's decision.[3] Thus, this Court should reverse the district court's decision insofar as the district court held that DRC, Neighbors United, and the individual appellants had standing. Standing is purely an issue of law and is reviewed *de novo*. *First Int'l Bank & Trust v. Peterson*, 2011 ND 87, ¶ 9, 797 N.W.2d 316, 321.

#### A. The Individual Appellants before the District Court did not have Standing to Appeal the Board's Decision.

[¶ 12] The individual appellants before the district court did not have a concrete injury in fact resulting from the Board's decision and therefore did not have standing to appeal the decision to the district court. Pursuant to N.D.C.C. § 11-33-12, any person who is "aggrieved" by a county commission's decision under N.D.C.C. ch. 11-33 may appeal to the district court as provided by N.D.C.C. § 28-34-01. This statutory requirement is in line with the jurisprudence of the North Dakota Supreme Court regarding standing. This Court has explained the term "aggrieved" by requiring the person asserting standing to demonstrate that they have "some legal interest that may be

[3] The following appealed the Board's decision to the Stark County District Court: DRC, Neighbors United, Myron and Nancy Eberts, Neil and Laura Tangen, Brittany Huggins, and Frank and Lucy Hurt. Only DRC has appealed to this Court.

enlarged or diminished by the decision to be appealed from." *Hagerott v. Morton Cnty. Bd. of Comm'rs*, 2010 ND 32, ¶ 9, 778 N.W.2d 813, 818 (quoting *Huber v. Miller*, 101 N.W.2d 136, 140 (N.D. 1960)). "In other words, such party must be injuriously affected by the decision." *Id.* "[M]ere dissatisfaction or displeasure" with a decision is not sufficient. *Huber*, 101 N.W.2d at 140. The burden to establish standing is on the person claiming injury. *Id.* at 140-41 (stating that a "person must show a personal, individual interest" and plaintiffs were "required to show an individual and personal interest").

[¶ 13] In *Hagerott*, the plaintiff was found to be factually aggrieved where the Morton County Commission granted a conditional use permit for a hog feedlot within the one-mile odor setback of the construction site of plaintiff's new home. *Id.* The appellants before the district court used this case to argue that if a *proposed* residence can cause a person to be aggrieved, an existing residence must as well. (*See* Docket No. 23, 4-5). However, in *Hagerott*, the feedlot was within the statutory odor setback from plaintiff's proposed residence and it was undisputed that he would be negatively affected by the smell. In another case, school districts were found to be adversely affected, on a case-by-case basis, when a decision caused them to "lose land or gain unwanted land." *Cathay Special Sch. Dist. No. 9 v. Wells Cnty.*, 118 N.W.2d 720 (N.D. 1962). Again, the effects on the school districts were certain and proven—the school districts were gaining or losing land. *Id.* However, in a similar case, the Court found that the subject school district was not adversely affected by the changes, and thus denied standing. *Washburn Pub. Sch. Dist. No. 4 of McLean Cnty. v. State Bd. of Pub. Sch. Educ.*, 338 N.W.2d 664, 668 (N.D. 1983). The *Washburn* Court discussed the distinction between the *Washburn* and *Cathay* cases. In *Cathay*, the administrative decision caused the plaintiff school

district to lose land. *Id.* at 667. However, in *Washburn*, the subject school district had merely lost the potential to gain more land. *Id.* The Court noted the distinction between being "aggrieved in fact," as in *Cathay* where property was lost, and the "potential to be aggrieved," as in *Washburn* where the district merely lost an opportunity to gain property. *Id.* Similarly, a court will not allow an appeal where "any potential effect . . . is so remote and speculative that there is no reasonable basis for judicial review." *Shark v. U.S. W. Comms., Inc.*, 545 N.W.2d 194, 200 (N.D. 1996). In *Shark*, the plaintiff argued he was aggrieved by the agency's decision to allow a sale of telephone exchanges because the sale was under-capitalized. *Id.* The plaintiff claimed that this could lead to the lender taking control which could then lead to a disruption in service. *Id.* The Court held that this speculation as to possible future harm was not sufficient to give the plaintiff standing. *Id.*

[¶ 14] In this case, the individual appellants who submitted standing affidavits to the district court are residents in the general vicinity of the new project and have only alleged speculative concerns they have regarding potential harmful effects they believe might result from the zoning amendment.[4] They merely state that they "believe" the new construction would impact them and that they are "concerned about" its "potential" effects. (Appellee/Cross-Appellants' Supplemental Appendix[5] ("Supp. App."), 2-5, 8-9).

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[4] In accordance with Stark County Ordinance 9.05(4)(c), the County was required to send notification of the zoning application to "all owners of properties within 200 feet of the property in question by personal service." As pointed out by the County in its Response Brief on Standing, submitted to the district court, of the named individual appellants, only Neil and Laura Tangen are persons who must receive personal service of the zoning amendment (*i.e.*, they own property within 200 feet of the property in question) (Docket No. 38, 3). The Tangens failed to timely submit an affidavit or other information to establish standing or how they were "aggrieved" by the County's decision. (*Id.*).

[5] Appellee/Cross-Appellants' Supplemental Appendix is being filed by Appellee and Cross-Appellant Stark County Board of County Commissioners in connection with its Brief to this Court.

However, the individual appellants failed to prove what harmful effects could or would in fact occur as a result of the Board's decision to grant the zoning amendment sought by Great Northern. None of the individual appellants demonstrated that they will lose the use of their property or that the value of the property will be diminished by the granting of the conditional use permit, which is the type of injury that would likely support standing. The beliefs and conjecture of laypersons do not constitute evidence that the individual appellants will be factually aggrieved by the Board's decision. Rather, they are more akin to grievances held in their capacity as electors or taxpayers, which this Court has held are not sufficient to establish standing. *See Huber*, 101 N.W.2d at 140 (any grievance suffered simply because a person is an elector or taxpayer is not sufficient to give him the right to appeal). The affidavits submitted on behalf of DRC add little to establish standing on the part of the individual appellants as they simply make conclusory statements that their members, which include the individual appellants, "will be . . . aggrieved" or "are aggrieved" without explaining exactly how they are or will be aggrieved. (Supp. App. at 6-7).

[¶ 15] Neither the standing affidavits nor the pleadings presented any evidence of any factual injury as a result of the decision of the Board. They contain speculation and conclusions unsupported by evidence. The record is equally devoid of such evidence. In *Hagerott* and *Cathay*, where the grievances were known and undisputed, the Court granted plaintiffs standing. However, in *Shark*, where there were only potential, unproven, future damages, and in *Washburn* where there was no actual injury, the Court refused to grant standing. Here, the individual appellants have, at best, only alleged potential, unproven, future damages and fail to prove any actual injury resulting from the

Board's decision. Thus, as in *Shark* and *Washburn*, the Court must reverse the district court's decision insofar as it held that the individual appellants had standing to appeal the Board's decision regarding the application filed by Great Northern.

**B. DRC did not have Standing to Appeal the Board's Decision.**

[¶ 16] DRC likewise did not have standing to appeal the Board's decision to the district court. There are three requirements that a nonprofit organization, such as DRC, must show that it meets to have standing to sue as the representative of its members. *Nodak Mut. Ins. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 14, 676 N.W.2d 752, 758. First, the organization's members must have standing to sue in their own right. *Id.* Second, the interests the organization seeks to protect must be "germane to the organization." *Id.* Third, "neither the claim asserted nor the relief requested" may require the participation of individual members in the suit. *Id.*

[¶ 17] As discussed above, the individual appellants before the district court did not have standing to appeal the Board's decision. The members of DRC claiming individual standard are the individual appellants. Therefore, DRC cannot meet the first part of the three-part test. DRC did not have standing before the district court because its individual members lacked standing. Thus, this Court should reverse the district court's decision insofar as it held that DRC had standing to challenge the Board's decision.

**C. Neighbors United did not have Standing to Appeal the Board's Decision.**

[¶ 18] Neighbors United, like DRC, did not have organizational standing to appeal the Board's decision to the district court because its individual members did not have standing. However, even if its members had standing, Neighbors United did not have standing because it is not a nonprofit corporation. The North Dakota Supreme

Court and the U.S. Supreme Court have ruled similarly on a nonprofit corporation's standing to sue on behalf of its members.

> [A] nonprofit organization that has not suffered an injury itself can sue as the representative of its members if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Nodak*, 676 N.W.2d at 752 (quoting Volume 9, Fletcher Cyclopedia of the Law of Private Corporations § 4227, at pp. 47-49 (1999 Rev. Ed.)); *see also, Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

[¶ 19] Neighbors United does not fall within the class covered by *Nodak* or *Hunt*, a nonprofit organization. In North Dakota, these organizations are governed by N.D.C.C. Chapter 10-33 and their articles of incorporation must be filed with the secretary of state. N.D.C.C. § 10-33-08 (2011). Neighbors United is an unincorporated group of persons who, according to the appellants who appeared before the district court, live somewhere near the rezoned property. (App. at 13). In an effort to establish standing on the part of Neighbors United, the appellants before the district court cited case law stating that unincorporated associations such as partnerships may sue and be sued. While this is true, it has no bearing on the standing issue under N.D.C.C. § 11-33-12. The general right to sue as a legal entity does not equate to standing in any particular case. Moreover, to allow this group to participate in this action would be to ignore the language in *Nodak, Hunt*, and other cases and essentially read the phrase "[a] *nonprofit organization* . . . can sue as the representative of its members" out of the established law. The district court found that Neighbors United had standing because N.D.C.C. § 11-33-12 allows any "person aggrieved" to appeal a county's decision and Neighbors United was a "person"

under the Administrative Agencies Practices Act ("AAPA") (App. at 14) (quoting N.D.C.C. § 28-32-01(9) which includes an "association" in the definition of "person"). This decision is erroneous for two reasons. First, the definition of "person" in the AAPA, which is not applicable to this case, cannot simply override the judicially established rules for standing, which is a constitutional doctrine rooted in separation of powers principles. Second, the *Nodak* case, which granted standing to an incorporated nonprofit organization, made it clear that the distinction between different types of "associations" was important to the issue of standing. Quoting a treatise, the *Nodak* Court stated that while a corporation does not have standing to address its shareholders rights a "nonprofit membership corporation" did have standing. *Nodak*, 2004 ND 60, ¶ 14, 676 N.W.2d at 759. Thus, the Court held that a for-profit corporation did not have standing, while a not-for-profit corporation did have standing. *Id.* The Court never held that a loosely tied group of persons could proclaim themselves a group and assert standing.

[¶ 20] Finally, the appellants cited a North Carolina Court of Appeals case from 1983 to support their assertion that Neighbors United had standing. (*See* Docket No. 37, 8). In that case, the court granted an *incorporated* association of property owners standing to sue. *See Piney Mountain Neighborhood Ass'n, Inc. v. Town of Chapel Hill*, 304 S.E. 2d 251, 252 (N.C. App. 1983). Here, it is undisputed that Neighbors United is an unincorporated group of persons and is not a legally recognized entity. Thus, Neighbors United did not have standing to appeal the Board's decision to the district court and this Court should reverse the district court's decision insofar as it holds to the contrary.

## II. The District Court's Decision should be affirmed and DRC's Appeal should be Dismissed Because DRC has Failed to Meet its Burden to Show that the Board's Decision Should be Overturned.

[¶ 21] The only issue that DRC submitted to this Court for appeal is whether the Board properly applied Section 6.10 of the Stark County Zoning Ordinance. This Court should dismiss DRC's appeal because DRC has failed to meet its burden to show that the Board's interpretation or application of the law was erroneous.

### A. Review of the Board's Decision on Appeal is Limited.

[¶ 22] The scope of review of a local governing body decision by the Supreme Court under N.D.C.C. § 28-34-01 is the same as the district court's and is very limited. *Tibert v. City of Minto*, 2006 ND 189, ¶ 8, 720 N.W.2d 921, 924. The decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. *Id.* (citations omitted). It is the appellant's burden to prove that the decision should be overturned. *Pulkrabek v. Morton Cnty.*, 389 N.W.2d 609, 613 (N.D. 1986). This Court's review is limited because "the decision to issue or deny a special use permit, pursuant to county zoning ordinances, is a legislative function" and the Court may not substitute its judgment for that of the county zoning body. *Id.* This rule "prevents a reviewing court from sitting as a super board and redeciding issues which were decided in the first instance by the county commission." *Id.* at 614. In *Pulkrabek*, at issue was the county zoning commission's interpretation of a zoning ordinance. *Id.* The Court stated that the general rules of statutory construction apply equally to county zoning ordinances: "An ordinance must be viewed as a whole and given a fair and reasonable construction in view of the setting in which it was enacted; the goals and purposes of the ordinance; the plain and ordinary meaning of the words; and the general structure of the ordinance." *Id.* at 615. Further, the Court held

that deference must be given to the county's interpretation of its own ordinance, stating that "interpretations of ordinances by a [local body] are quasi-judicial acts, and a reviewing court should give deference to the judgment and interpretation of the council rather than substitute its own judgment for that of the enacting body." *Id.*

[¶ 23] DRC bases the bulk of its argument to this Court on the claim that the district court improperly decided this case. However, on appeal to the Supreme Court, the Court's "scope of review is the same as the district court's and is very limited." *Hagerott*, 2010 ND 32, ¶ 7, 778 N.W.2d at 817 (citation omitted). The Court must "independently determine the propriety of the [County Board's] decision without giving special deference to the district court decision." *Id.* Rather, as stated above, it is the Board's decision that is entitled to deference. *See Pulkbarek*, 389 N.W.2d at 615.

### B. DRC Failed to Meet its Burden to Show that the Board Improperly Applied the Law.

[¶ 24] DRC failed to meet its burden to show that the Board improperly applied the law and therefore this appeal should be dismissed. Section 6.10 of the Stark County Zoning Ordinance provides as follows:

> Any operation involved in the search, exploration or prosperity for any substance or mineral or involved in the extraction or excavation of any mineral or materials including, sand, gravel or scoria shall do so only upon the granting of a land disturbance permit by the board of county commissioners.

(App. at 81). Section 6.10-A, a subpart to Section 6.10, requires that the applicant of a land disturbance permit submit an application and plan containing certain information as listed therein in order to receive said permit. (App. at 82). A separate section, Section 3.04 states:

> A conditional use permit shall serve as a land disturbance permit when no buildings or structures are involved and as a building permit, when a

> structure or building is involved. . . . Unlike a variance to the zoning ordinance, a conditional use permit involves more rather than less stringent guidelines.

(App. at 51). At issue in the instant appeal is one conditional use that the Board granted to Great Northern. Brief of Appellants, ¶ 1. Great Northern was granted a conditional use in "accordance with provisions of 6.10." Brief of Appellants, ¶ 8. Further, the conditional use is subject to the requirement that Great Northern obtain "all the necessary local, state, and federal approvals, licenses and permits relative to the operation of the coal mine." (App. at 21) (emphasis added). Among the local permits required before beginning construction is a land disturbance permit, in accordance with Section 6.10.

[¶ 25] In its brief, DRC claims that the Board's decision is invalid because Section 3.04 required Great Northern to comply with the procedural requirements of Section 6.10-A of the Stark County Zoning Ordinance. (App. at 51; Brief of Appellants, ¶¶ 15-16). DRC claims that the language of Section 3.04 requires Great Northern to comply with Section 6.10-A because Great Northern's permitted conditional use is equivalent to a land disturbance permit. This argument fails for several reasons. First, the conditional use permit requires Great Northern to proceed in "accordance with provisions of Section 6.10." In other words, Great Northern was granted the conditional use, but must adhere to the provisions of Section 6.10, and therefore Section 6.10-A, before actually utilizing the property for coal operations. Second, the conditional use permit requires Great Northern to obtain all necessary permits to move forward, including all necessary local permits. This means that Great Northern must still obtain a land disturbance permit in accordance with Section 6.10.

[¶ 26] Further, the Board, which pursuant to *Pulkrabek* is entitled to deference when interpreting its own ordinances, determined that Sections 6.10 and 6.10-A were inapplicable at this early stage in the permitting process. In its brief to the district court, the Board stated:

> Section 6.10-A addresses a specific land disturbance permit which has not been issued and which has no bearing on the County's ultimate decision. Appellants' attempt to engraft additional requirements from a not-yet-even-applied-for permit into the zoning amendment process appears to be simply an attempt to distract the Court from the applicable governing law and ordinances, which the County did consider and follow.

(Docket No. 23, 22). Similarly, at the hearing before the district court, counsel for the Board clarified that the conditional use permit merely means that Great Northern has the right to use the rezoned land in one of the ways listed under the ordinance "but they have to do it in compliance with 6.10. So they still have to go through that process. The company [Great Northern] and the County agreed to that."[6] (Transcript of Motion Hearing before the Honorable Wickham Corwin ("Transcript"), p. 58, ln. 16-19). In other words, the Board did not grant Great Northern the right to begin construction on a coal mine or plant. Rather, the land was rezoned to allow it to be used for such operations in the future, but Great Northern must comply with the provisions of Sections 6.10 and 6.10-A by obtaining a land disturbance permit before occupying the land. At the hearing before the district court, the Board and Great Northern agreed that this was the proper procedure.

[6] DRC did not raise the specific issue of Section 3.04 until its reply brief and Great Northern and the Board were not given an opportunity to brief the issue. Thus, although the parties had the opportunity to briefly discuss the issue at hearing, Great Northern and the Board did not have the opportunity to fully and formally brief the issue before the district court.

[¶ 27] The Board also pointed out the importance of viewing the ordinance as a whole, as required by *Pulkrabek*. (Transcript, p. 48, ln. 15-25). For example, DRC's assertion that the conditional use permit is all that Great Northern is required to obtain due to the language in Section 3.04 ignores the definitions of a conditional use permit and land disturbance permit. A conditionally permitted use is one that is "not usually allowed within a particular zoning district, but which may be allowed under special conditions . . . ." (App. at 40) (citing Stark County Zoning Ordinance § 2.02(26)). Thus, Great Northern was required to apply for a conditional use permit because its planned coal facilities are "not usually allowed within" an industrial district. A land disturbance permit is "required prior to the occupancy of a building, parcel or tract of land . . . ." (App. at 43) (citing Stark County Zoning Ordinance § 2.02(59)). Therefore, although the lands have been rezoned with a conditionally permitted use, Great Northern must obtain a land disturbance permit before occupancy.

[¶ 28] The Board's interpretation of its own ordinance is entitled to deference from a reviewing court. The Board determined that the grant of a conditional use permit does not satisfy Great Northern's obligation to obtain a land disturbance permit in accordance with the Stark County Zoning Ordinance. Further, when read as a whole, the ordinance makes clear that there are multiple steps in the process from rezoning to occupation of a tract of land. The requirements of Section 6.10-A will apply when Great Northern applies for a land disturbance permit. They did not apply to Great Northern's application for a conditional use permit. Therefore, this Court must uphold the Board's decision to grant Great Northern's application and dismiss DRC's appeal with prejudice.

## CONCLUSION

[¶ 29] DRC's appeal of the district court's affirmation of the Board's order should be denied and Great Northern's cross-appeal should be granted. None of the appellants before the district court had standing to appeal the Board's order. Even if DRC had standing in this case, it failed to show that the Board improperly applied the law, or that its decision was not supported by substantial evidence. For these reasons, Great Northern respectfully requests that this Court dismiss DRC's appeal with prejudice and affirm the Board's decision. Great Northern also requests that this Court reverse the district court's order insofar as it held that the individual appellants, DRC, and Neighbors United had standing to appeal the Board's decision.

Dated this 13th day of October, 2011.

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# ADDENDUM

**N.D.C.C. 10-33-08. Filing of articles of incorporation.**

An original of the articles of incorporation must be filed with the secretary of state. If the secretary of state finds that the articles of incorporation conform and all fees have been paid under section 10-33-140, the secretary of state shall issue a certificate of incorporation to the incorporators or their representative.

**N.D.C.C. 11-33-12. Appeals to district court.**

Any person, or persons, jointly or severally, aggrieved by a decision of the board of county commissioners under this chapter, may appeal to the district court in the manner provided in section 28-34-01.

**N.D.C.C. 28-32-01. Definitions.**

In this chapter, unless the context or subject matter otherwise provides:

9. "Person" includes an individual, association, partnership, corporation, limited liability company, state governmental agency or governmental subdivision, or an agency of such governmental subdivision.

**N.D.C.C. 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:

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.

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| Dakota Resource Council,<br><br>Appellant and<br>Cross-Appellee,<br><br>and<br><br>Neighbors United, Myron and Nancy Eberts, Neil and Laura Tangen, Brittany Huggins, and Frank and Lucy Hurt,<br><br>v.<br><br>Stark County Board of Commissioners and Great Northern Project Development<br><br>Appellees and<br>Cross-Appellants. | ) | Supreme Court No. 20110172 |

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

I hereby certify that on October 13, 2011, I electronically filed the foregoing with the Clerk of the North Dakota Supreme Court and served the same electronically as follows:

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| Mr. Derrick L. Braaten | derrick@baumstarkbraaten.com |
| Mr. Mitchell D. Armstrong | marmstrong@smithbakke.com |

Dated: October 13, 2011

*/s/ Lawrence Bender*
LAWRENCE BENDER