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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Richard Dahm, Appellant, vs. Stark County Board of Commissioners, Appellees,	)	Supreme Court No. 20130238

Appeal from Order Denying Motion to Submit Additional Evidence and Affirming Denial of Zoning Application entered
on May 31, 2013 and Judgment entered on June 5, 2013
Civil No. 45-2012-cv-710
County of Mountrail, Northwest Judicial District
Honorable Zane Anderson, Presiding

BRIEF OF APPELLANT RICHARD DAHM

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STATEMENT OF ISSUES

[¶ 1] There are three issues presented for this Court's review:

1. Whether the district court erred in denying Appellant Richard Dahm's ("Dahm") Motion to Submit Additional Evidence.
2. Whether the Stark County Board of Commissioners ("County Board") erred in denying Dahm's application for a zoning amendment from agricultural to residential and request for preliminary plat approval.
3. Whether the County Board erred in prohibiting Dahm from appearing before the County for six months.

STATEMENT OF CASE

[¶ 2] Dahm submitted an application for a zoning amendment on July 13, 2012 ("Application"). (*See* Appellant's Appendix ("App."), 7.) On August 30, 2012, the Stark County Planning and Zoning Commission ("Zoning Commission"), voted to recommend denial of the Application. On September 4, 2012, the County Board denied the request for zoning change from agricultural to residential. (*See* App. 70.) The County Board added a condition that Dahm was prohibited from appearing before the Board for a period of six months. (*Id.*) Jay Elkin seconded the motion, which passed. (*Id.*)

[¶ 3] Dahm appealed the County Board's decision to the Stark County District Court. (*See* App. 5.) In addition, Dahm filed a Motion to Submit Additional Evidence with the district court. (*See* App. 176.) On May 31, 2013, the Stark County District Court issued its Memorandum Opinion, denying Dahm's Motion to Submit Additional Evidence and affirming the County Board's decision. (*See* App. 393.) Judgment was entered June 5, 2013. (*See* App. 417.)

[¶ 4] Dahm filed a Notice of Appeal to this Court on August 5, 2013. (*See* App. 419.) Dahm seeks a reversal of both the district court's and the County Board's decisions in this matter. The district court's decision to deny Dahm's Motion to Submit Additional Evidence was in error because the documents Dahm sought to admit are strong evidence that multiple Stark County Commissioners acted in a biased, unreasonable, and arbitrary nature in denying Dahm's Application and preliminary plat approval request. Further, the County Board's decision to deny the Application should be reversed because the decision was arbitrary, capricious, and unreasonable, and based on the County Board's own pecuniary interests, rather than the evidence submitted along with the Application.

STATEMENT OF FACTS

I. Record and Proceedings Before the County Board.

[¶ 5] Dahm submitted his Application requesting a zoning amendment from agricultural to residential relating to certain property located in Stark County, North Dakota. (*See* App. 7.) The Application also requested approval of a preliminary plat depicting the proposed Duck Creek Estates subdivision ("Project"). (*Id.*) Along with the Application, Dahm submitted a "Narrative for Duck Creek Estates Zone Change," and a proposed zoning map. (*See* App. 8–11.) The purpose of the Project is to provide affordable, quasi-rural housing in an area that is currently experiencing rapid population growth and an extreme shortage of affordable housing. (*See* App. 8.)

[¶ 6] A public hearing was held before the Zoning Commission on August 2, 2012. (*See* App. 23–28.) At the hearing, City and County Planner Steve Josephson ("Planner") recommended denial of the Application based on several alleged deficiencies. (App. 24–25, 28.) The County Board voted to continue the request for zoning change based on these alleged deficiencies in the preliminary plat. (*Id.*)

[¶ 7] On August 14, 2012, Dahm submitted the Duck Creek Estates Zone Change & Preliminary Plat Response to Review Comments ("August 14 Response"). (*See* App. 32–35.) The August 14 Response addressed each and every concern noted at the August 2, 2012, public hearing. (*See* App. 33–35.) At that time, Dahm also submitted his original application materials, as well as an addendum intended to address the County Board's concerns. (*See* App. 36–47.)

[¶ 8] On August 15, 2012, the Southwestern District Health Unit submitted a letter to the County Board stating that Dahm's plans for sewer systems were satisfactory. (*See* App. 48.)

[¶ 9] On August 28, 2012, County staff recommended denial of Dahm's preliminary plat. (*See* App. 51.) The staff noted certain alleged deficiencies in the preliminary plat. (*Id.*) The staff admitted that Dahm had addressed their concerns "in a comments letter and with attachments." (*See* App. 52.) However, the staff claimed that the "information actually needs to be included on the proposed plat." (*Id.*) Again, the staff issued a list of alleged deficiencies. (*See* App. 55.)

[¶ 10] A Zoning Commission public hearing was held on August 30, 2012. (*See* App. 57; *see also id.* at 130 (transcript of public hearing).) The Planner again recommended denial of the Application based on certain alleged deficiencies. (*Id.*) Commissioner Jay Elkin moved to recommend the Zoning Commission deny the zoning change from agricultural to residential. (*Id.*) At that time, Commissioner Elkin pointed out that the County intended to revise their zoning ordinance to require "considerably larger" lots. (App. 165.) The motion passed. (App. 57.)

[¶ 11] On September 4, 2012, the County Board denied the request for zoning change from agricultural to residential ("September 4 Decision"). (*See* App. 70.) The County Board added a condition that Dahm was prohibited from appearing before the County Board for a period of six months. (*Id.*) Commissioner Elkin seconded the motion, which passed. (*Id.*)

[¶ 12] Less than thirty days later, on October 2, 2012, Stark County adopted a new Zoning Ordinance ("New Ordinance"). (*See* Exhibit B to Appellee's Brief, Doc ID #54) The New Ordinance requires that all subdivision lots be at least five acres. (*See id.* at p. 28) The Ordinance in existence at the time the above-described events occurred ("Original Ordinance") required that all subdivision lots be at least 7,000 square feet. (*See* Appellee's Brief, Exh. A, Doc ID #53, p. 25.)

II. Supplemental Evidence Submitted to the District Court.

[¶ 13] The Zoning Commission approved rezoning and plat approval requests based on far less information than was submitted by Dahm. For example, one entity seeking to develop temporary workforce housing obtained a rezoning from agricultural to industrial based on a "survey plat," with no information regarding whether South West Water Authority could provide adequate water, and no information regarding wetlands or floodplains. (*See* App. 186.) At an earlier meeting, the County Board approved a request to rezone from agricultural to industrial for a crude oil refinery, with no concerns regarding traffic, water usage, or other issues that should arise in siting a large refinery. (*See* App. 206–09.)

[¶ 14] Not only has the Zoning Commission approved several very similar subdivisions, two of the Commissioners, also members of the County Board, had direct pecuniary involvement in recent land development in the same vicinity as the Project.

On August 18, 2010, Russell Hoff, a member of the County Board and the Zoning Commission, acquired a tract of land located in the S/2 of Section 31, Township 140 North, Range 96 West, Stark County North Dakota ("Hoff Property"). (*See* App. 244–46.) On January 5, 2012, Hoff sold a 50-acre tract of the Hoff Property to Roers Development, Inc. ("Roers Development") for a price of $750,000. (*See* App. 247–49.) On March 8, 2012, effective December 29, 2011, Hoff sold a 25-acre tract of the Hoff Property to Roers Development. (*See* App. 250–51.) Roers Development is currently planning a residential and commercial development project in Stark County that covers nearly 1,000 acres ("West Ridge Project"). (*See* App. 255–59.) The eastern portion of the West Ridge Project is comprised of the Hoff Property, a portion of which is still owned by Commissioner Hoff. (*Id.*; *see also id.* at 247–51.) The West Ridge Project is adjacent to the Project. (App. 257.)

[¶ 15] On August 10, 2010, Jay Elkin, a member of the County Board and the Zoning Commission, acquired a tract of land located in Section 4, Township 139 North, Range 94 West, Stark County, North Dakota ("Elkin Property"). (*See* App. 260–61.) On May 17, 2011, Bakken Shale Development, LLC filed an application with Stark County for a zoning amendment and plat approval for the Bakken Estates Development, which is located on the Elkin Property. (*See* App. 262–64.) The application for the Bakken Estates Development consisted of the County's single-page application form and a "preliminary plat" that contained almost none of the information required by the Stark County Zoning Ordinance or Subdivision Regulations. (*Id.*) In fact, the preliminary plat depicted only the size and layout of the lots. (*Id.*) On June 6, 2011, the Zoning Commission held a public hearing where the Bakken Estates application was presented

for approval. (*See* App. 271.) One of the Commissioners noted the deficiencies in the "preliminary plat," stating that it was basically a "sketch" of a plat. (*See* App. 272–74.) Despite this, the Zoning Commission voted to recommend approval of the zoning amendment and "preliminary plat," conditioning approval on the submission of an adequate final plat. (*See* App. 274–75.)

[¶ 16] On June 7, 2011, the County Board voted to approve the Bakken Estates application for zoning amendment and preliminary plat approval. (*See* App. 277–78.) Jay Elkin abstained from the vote. (*Id.*) On July 5, 2011, the Chairman of the County Board, Ken Zander, signed his approval of the Bakken Estates final plat. (*See* App. 185.) At the time the Bakken Estates application was filed and approved, Commissioner Elkin owned the Elkin Property. On July 12, 2011, Elkin sold a portion of the Elkin Property to Bakken Shale Development. (*See* App. 280–81.) On May 21, 2012, Elkin sold two more portions of the Elkin Property to Bakken Shale Development. (*See* App. 282–85.)

LAW AND ARGUMENT

I. Standard of Review.

[¶ 17] Any person "aggrieved by a decision" of a county board of commissioners may appeal to the district court. N.D.C.C. § 11-33-12; *see also* N.D.C.C. § 11-33.2-09 (applying the same rule of appeals from decisions regarding county regulation of subdivisions). On appeal from a local governing body's decision, the district court must determine whether the body "acted arbitrarily, capriciously, or unreasonably, or if there is not substantial evidence supporting the decision." *See* N.D.C.C. § 28-34-01; *see also Hector v. City of Fargo*, 2009 ND 14, ¶ 9, 760 N.W.2d 108, 111 (citation omitted). On appeal from the district court's decision, the "Court's function is to independently determine the propriety of the local governing body's decision, without any special

deference to the district court's decision." *Hector*, 2009 ND 14, ¶ 9, 760 N.W.2d at 111 (citation omitted).

II. The District Court Erred in Denying the Motion to Submit Additional Evidence.

[¶ 18] A court may adduce additional evidence in an appeal from a local governing body where "such additional evidence is material and . . . there are reasonable grounds for the failure to adduce such evidence in the hearing . . . before the local governing body." N.D.C.C. § 28-34-01(3); *see also City of Jamestown v. Leevers Supermarkets, Inc.* 552 N.W.2d 365, 371 (N.D. 1996) (holding that that "trial court properly ruled it could review additional evidence presented at trial in deciding whether the City Council abused its discretion"). The court may also order the local governing body to consider the additional evidence "on such terms and conditions as the court may determine." N.D.C.C. § 28-34-01(3). "A district court's decision whether to order the taking of additional evidence under N.D.C.C. § 28-34-01(3) is discretionary." *In the Matter of Appeal of Grand Forks Homes, Inc. v. Grand Forks Bd. of Cnty. Comm'rs*, 2011 ND 50, ¶8, 795 N.W.2d 381, 385 (N.D. 2011).

[¶ 19] Here, the evidence in the record before the County Board demonstrates that its decision was arbitrary and capricious. However, the arbitrary nature of the decision is further demonstrated by the activities of Commissioners Hoff and Elkin. First, evidence regarding Commissioner Hoff's and Commissioner Elkin's conflicts of interest is material to the determination of whether the denial of the Application was arbitrary. Commissioners Hoff and Elkin have recently profited from the development of residential property in Stark County. Commissioner Hoff profited from purchasing and selling a large tract of land to Roers Development. Particularly, in January 2012, Hoff

sold a portion to Roers Development for $750,000, and still owns a portion of said property. (*See* App. 247–49.) Currently, Roers Development plans to develop nearly 1,000 acres of land, including the land it obtained from Commissioner Hoff, and land Hoff still owns, immediately adjacent to the Project. (*See* App. 255–59.) This development includes commercial, residential, and high-density residential lots. (*See id.*) The land acquired and still owned by Hoff is intended to be developed into a high density commercial district, including a Menards. (*See id.*) Commissioner Hoff's objections to the "high density" nature of the Project, which consists of lots ranging from one to two acres, are questionable in light of the fact that he has profited from his involvement with a project being developed directly adjacent to the Project and that includes high density residential and commercial development. Similarly, Commissioner Elkin has profited from selling a large tract of land to Bakken Shale Development, which was developed into a residential subdivision known as Bakken Estates. Elkin still owned the property when the application for Bakken Estates was submitted and approved by the County Board, despite gross deficiencies in the plat. Just a few days after the County Board approved the application for the Bakken Estates development, Elkin began selling portions of the property to Bakken Shale Development. (*See* App. 280–85.) The approval of the Bakken Shale Development raises serious questions as to the County Board's impartiality.

[¶ 20] Second, additional evidence Dahm sought to submit shows the approval of several other residential subdivisions by the Zoning Commission and the County Board, which are very similar in lot size and layout as the Project. In its denial of the Application, the County Board listed four "implementation strategies" of the Stark

County Comprehensive plan it claimed the Project was inconsistent with. (App. 72.) One of those strategies is that subdivisions should be "compatible with the environmental characteristics of the site, as well as complement the location." (*Id.*) The Project complemented the location, as it was immediately adjacent to the Maryville subdivision. (App. 39.) However, rather than rely on the evidence in the record, which does not actually describe the Maryville or other nearby subdivisions, Dahm sought to submit evidence that would allow the district court to actually assess whether the Project complements the location. As that evidence demonstrates, the Project is very similar to the Maryville subdivision, as well as nearby West Ridge Acres Subdivision, Kubischta Addition, and Bakken Estates Subdivision, all of which were approved by the County Board with approximately one-acre lots. (*See* App. 182–85.) Accordingly, evidence regarding the four nearby subdivisions is material to this Court's review of whether the Project complements the location.

[¶ 21] Moreover, evidence regarding the County Board's approval of other parties' rezoning requests and preliminary and final plats in 2011 and 2012 is material to this appeal. The County Board claimed a lack of water and increased traffic were primary reasons for denying the Application. (App. 72.) However, if the Zoning Commission were truly concerned with adequate water supply, traffic, etc., it would not have approved WBI Energy Inc.'s ("WBI") Application for the MDU Resources crude oil refinery without first addressing these concerns. At the June 28, 2012 public meeting of the Zoning Commission, WBI presented its application for rezoning from agricultural to industrial. (App. 206.) The Commission was unconcerned with WBI's statement that 50 to 60 fuel trucks would be leaving the refinery each day. (App. 207.) The

Commission was similarly unconcerned with the layout of the refinery and where certain facilities would be located, such as a water retention system. (*Id.*)

[¶ 22] Finally, there are reasonable grounds for Dahm's failure to adduce such evidence in the hearing before the Zoning Commission and County Board. First, there was no reason for Dahm to be aware of the County's prior dealings at the time the Application was submitted. Second, even if Dahm did have knowledge of this type of information, it would likely not have been prudent for Dahm to address such issues at a public hearing. Such information would not have been received well, and would have made it even less likely that the Application would be approved. Thus, the evidence Dahm sought to submit was both relevant and the very type of evidence that would not have been presented to the County Board. This Court should therefore reverse the district court's decision to deny the Motion to Submit Additional Evidence.

III. The Decision of the County Board Was Arbitrary, Capricious, and Unreasonable.

A. The Denial of the Application for a Zoning Change was Arbitrary, Capricious, and Unreasonable.

[¶ 23] A county may regulate property to promote "health, safety, morals, public convenience, general prosperity, and public welfare . . . ." N.D.C.C. § 11-33-01. The Original Ordinance contains a procedure whereby any person may apply for an amendment of the County's Zoning District Map. (*See* Appellee's Brief, Exh. A, Doc ID #53, p. 53.) An application for a zoning amendment is made by completing a form provided by the county zoning administrator and submitting an application fee, site plan, and expenses of notifying adjacent landowners. (*Id.*) The County Board's denial of the Application for a zoning amendment stated the following rationale: "the requested zoning change and plat approval is not consistent with the Stark County Comprehensive Plan

and there continues to be concerns with density, traffic, and sewer and water issues . . . ." (App. 72.)

[¶ 24] With regard to the Comprehensive Plan, the County Board listed four "implementation strategies" it claimed the request was inconsistent with.

1. Characteristics of the site and surrounding location.

[¶ 25] The Comprehensive Plan "supports subdivision designs that are compatible with the environmental characteristics of the site, as well as complement the location." The Project clearly complemented the location, as it was directly adjacent to the very similar Maryville subdivision. (App. 39.) In fact, "Duck Creek and Maryville are nearly identical in appearance and design." (*Id.*; *see also id.* at 114) Further, the roadways in the Project will be "similar to" those in the Maryville Subdivision. (App. 40.) The two properties are adjacent, very similar, and therefore are clearly compatible and complement each other. The Project is also very similar to the nearby West Ridge Acres Subdivision and Kubischta Addition, both of which were approved by the County Board. (App. 182–83.) These subdivisions and the Project all have approximately one to two acre lots, and similar lot and roadway layouts. (*See id.*) Thus, the Project is "compatible with the environmental characteristics of the site, as well as complement[s] the location" in accordance with Stark County's Comprehensive Plan.

2. Water and waste disposal.

[¶ 26] The Comprehensive Plan "supports ensuring that adequate water and waste disposal are available prior to final subdivision approval." This rationale fails for two reasons. First, Dahm was not seeking final subdivision approval, but simply rezoning of the land from agricultural to residential and preliminary plat approval. There were several steps in the process to final subdivision approval, including preliminary and final

plat approval. In fact, much of the scrutiny the preliminary plat received was not typical of the Commission staff's review. As noted at the August 2, 2012 hearing, the procedure was "a step up that ha[d] not been previously proposed." (App. 120.) In fact, the State Attorney warned that "the threshold has effectively been put at a level that's much higher than we used" in the past. (*Id.*)

[¶ 27] Second, notwithstanding the "step up" in scrutiny, Dahm demonstrated that there was "an underlying aquifer sufficient to support this development in addition to the area public water system which will provide water in the future." (App. 35.) The Southwestern District Health Unit approved the proposed sewer system, and suggested that "as each lot is developed, that the plans for the sewer system be submitted" for approval. (App. 48.) At the August 30, 2012 public hearing, there was ample discussion of the water and sewer systems that Dahm intended for the Project. (*See* App. 133, 135, 138, 146.) Further, the County Board's concerns regarding water and wastewater are dubious given (1) it approved rezoning from agricultural to industrial for WBI Energy, Inc. with no inquiry regarding the large quantities of water WBI would require for refining (App. 206–08.); and (2) the County Board was aware of the fact that Southwest Water Authority was more concerned with water use by industrial users than residential users. (App. 151.) The fact that the County Board routinely approves other projects with far less information is evidence that the County Board's so-called concerns regarding the Project were fabricated to justify denial of the Application.

3. Preservation of open spaces in development.

[¶ 28] The Comprehensive Plan "supports the preservation of open spaces and natural resources in private and public development." Dahm was requesting low-density residential rezoning. (App. 43, 36.) The Project would be immediately adjacent to the

nearly identical Maryville subdivision and West Ridge Acres subdivision. (*See* App. 183, 184.) Dahm pointed out that the open area along the creek and some of the wider portions of the floodplain would retain the natural feel of the creek. (App. 147.) He also stated that an approximately two-acre area along the creek, in the floodplain, would be a community park area. (*Id.*) Finally, the Project would be adjacent to the West Ridge Development, which includes high density residential and commercial lots. (*See* App. 257.) In fact, the adjacent West Ridge Development would prevent the Project from being "in the country" at all.

4. Ingress and egress.

[¶ 29] The Comprehensive Plan "supports the prohibition of non-farm development from being placed in a location that does not have a paved road or highway as its primary route of access to the development's local street system." The Project includes "two roadways connected with the Maryville Subdivision," which were similar to or better than those in Maryville. (App. 39, 40.) The Project would also "provide appropriate access for routine traffic as well as emergency services . . . consistent with other rural neighborhoods within the County." (*Id.*) The Original Ordinance does not contain a requirement that a traffic study be conducted. (*See* Appellee's Brief, Exh. A, Doc. ID #53.) However, to address the County's concerns, engineers working on the Project used national traffic study standards to estimate the traffic impact of the Project. The engineers found the Project would cause approximately "73 trips her hour at peak hour flows," spread out among three planned outlet roads. (App. 59–64.) This amounts to approximately twelve cars every ten minutes at peak conditions. The Planner's estimate, which was apparently based on absolute conjecture, was that the Project "could conceivably generate an additional 1,500 to 2,000 trips per day" onto a single street.

(App. 51.) Not only is this "estimate" not based on evidence, it is absurdly high. The Project, which is to be developed in several stages, is intended to eventually include up to 99 single family homes. To produce 2,000 trips per day, each home would need to make 20 trips per day. Further, the Planner made the erroneous assumption that all of the vehicles would be traveling on a single street. The Planner's estimate is demonstrably false and therefore evidence that the County Board's denial was unreasonable.

[¶ 30] The findings in support of the decision of the County Board, which are approximately one page in length, contain nothing but conclusory, vague statements.[1] The County Board clearly ignored much of the evidence presented to it. Because the decision of the County Board was not based on the evidence it was obligated to review, that decision was arbitrary, capricious, and not based on substantial evidence. This Court should order the County Board to rezone the property from agricultural to low density residential.

B. The Denial of Dahm's Request for Preliminary Plat Approval was Arbitrary, Capricious, and Unreasonable.

[¶ 31] Where a subdivision plat addresses all issues listed in a county's subdivision regulations the plat must be "finally approved." N.D.C.C. § 11-33.2-12; *see also* 83 Am. Jur. 2d Zoning and Planning § 462 ("If a preliminary plat complies with the statutes and the subdivision regulations, preliminary approval of such plat must be given."). Thus, a county is not permitted to disregard its subdivision regulations and substitute its own discretion. *Richardson v. City of Little Rock Planning Comm'n*, 747 S.W.2d 116, 117 (Ark. 1988). The purpose of this rule "is to ensure that a landowner's

[1] Indeed, the County Board's findings were prepared and issued after Dahm appealed its decision to the district court. (*See* App. 5, 74.)

plat will be objectively measured against the concrete standards of the subdivision ordinance in effect." *Id.* In other words, "public policy requires that this authority be exercised in a standardized and clearly defined manner so as to enable both the landowner and the [governing body] to act with assurance and authority regarding the development of such areas." *Tippecanoe Cnty. Area Plan Comm'n v. Sheffield Developers, Inc.*, 394 N.E.2d 176, 180 (Ind. App. 1979). Once the applicable regulations are complied with, it becomes the "mandatory duty" of the zoning authority to approve a subdivision plat. *Id.*; *see also Akin v. South Middleton Twp.*, 547 A.2d 883, 884 (Pa. 1988); *Richardson*, 747 S.W.2d at 117–18; *Kaufman v. Planning & Zoning Comm'n of the City of Fairmont*, 298 S.E.2d 148, 158 (W. Va. 1982); *Projects Am. Corp. v. Hilliard*, 711 S.W.2d 386, 389 (Tex. App. 1986).

[¶ 32] The Subdivision Regulations require that several items be depicted on a preliminary plat for plat approval. (*See* Appellee's Brief, Exh. A, Doc ID #53, p. 15.) Dahm submitted his Application on July 13, 2012. (App. 7–11.) On August 2, 2012, the County staff recommended denial of the Application. (App. 24.) The staff noted several items that it claimed were required but not represented on the preliminary plat. (App. 27.) Dahm submitted the August 14 response, which included an updated preliminary plat to address these additional issues, as well as a memorandum specifically addressing each of the staff's concerns. (App. 33–47.) The alleged deficiencies and Dahm's responses were as follows:

a. Location by section, township, range: This information was provided in the original July 12, 2012 narrative, and was added to the preliminary plat before the August 14 Response. (App. 8, 33, 46.)

b. Name and address of developer, owners, lienholders, certificatory: This was added to the preliminary plat before the August 14 Response. (App. 33, 46.)

c. Date of submittal: The date of submittal is shown on the original application and submittal letters. (App. 7, 8, 33.)

d. Total acreage: The total acreage is shown on the Application and the July 12 and July 25 narratives, and was added to the preliminary plat before the August 14 Response. (App. 7, 8, 33, 46.)

e. Location and widths of alleys and easements, and easement functions: The exact easement specifications (*e.g.*, utility lines and roadways) cannot be shown until various governmental agencies have approved their locations. (App. 33.)

f. Location, type, and size of utility lines: Existing utilities are shown on the original and supplemental submissions. (App. 7, 33, 46.) Location and size of future utilities cannot be shown until various governmental agencies have approved their locations.

g. Location and sizes of sidewalks, curbs, gutters: There are no sidewalks, curbs, or gutters in the Project. (App. 33.)

h. Location, size, and type of all principal structures: The location, size, and type of existing structures are shown on the original and supplemental submissions. (App. 7, 33, 46.) The exact location and size of all structures cannot be shown until the final plat stage. (App. 33–34.)

i. Topographic contours at two-foot intervals: Contour intervals of two feet were added to the preliminary plat before the August 14 Response. (App. 34, 46.)

j. Location and extent of problem soil type: Several subsurface excavations and tests were conducted, with soil types including sand, silt, and clay. (App. 34.)

k. Location, size, depth, and quality of wells: There is only one existing well on the site. (App. 34.) Further, Dahm provided several well logs of surrounding wells demonstrating the availability of water. (*Id.*)

l. Boundary lines and owners names of adjacent properties: The boundaries lines and some of the adjacent owners' names were included on the preliminary plat. (App. 11, 34.) Due to title company backlog, Dahm was not able to obtain all adjacent owners' names, and requested the information from the County, which it possessed but never provided. (*Id.*)

m. Location map of the subdivision: A location map was provided multiple times. (App. 11, 34, 43.)

n. Zoning and subdivision names of adjacent properties: These items were added to the preliminary plat before the August 14 Response. (App. 34, 46.)

o. All streams and other waterbodies within a 100-year floodplain: Existing waterbodies and floodplains were depicted on the original preliminary plat. (App. 11, 34.) Dahm pointed this out at the August 2 public hearing. (App. 105.) Further, the August 14 Response included a current wetland

inventory map and flood insurance rate map showing locations of the same. (App. 34, 50.)

p. All trees at least four inches in diameter: There are no such trees on the property. (App. 34.)

[¶ 33] The Planner also had several "comments" regarding the Application. (App. 24.) Dahm responded to these comments in the August 14 Response. The comments and Dahm's responses were as follows:

a. Application did not specify the type of residential Dahm sought: This was indicated on the August 14 Response as Residential Low Density, and added to the preliminary plat. (App. 34, 43.)

b. Application did not contain a written agreement with the adjacent property owner guaranteeing access to County Highway 10: Dahm owned sufficient property to allow access to Highway 10 without the need to involve the adjacent property owner. (App. 34.)

c. Application did not indicate that road widths would meet Stark County standards: The road widths in the Project meet or exceed Stark County Standards. (App. 35.) Further, a cross-section of the roads was included on the preliminary plat submitted on August 14. (App. 46.)

d. Application did not specify exactly how roads would cross Duck Creek: The Duck Creek crossings were not yet designed, but would meet U.S. Army Corps of Engineers ("Army Corps"), FEMA, and Stark County standards. (App. 35.)

e. Dahm did not submit a floodplain analysis to FEMA or conduct a study to satisfy Army Corps "as well as other Federal and State agencies": The US Fish and Wildlife Service indicated that there are no wetlands on the Project. (App. 35.) The studies requested are extensive and costly, especially prior to preliminary plat or rezoning approval. (*Id.*) Further, Dahm would not be permitted to construct roads or other structures without federal agency approval. Finally, the requested studies are not required by the Subdivision Regulations. (*See* Exhibit A to Appellee's Brief, Doc ID #53, p. 15.)

f. The Project could result in "pinching" of Duck Creek: Army Corps regulations do not permit pinching of waterbodies. (App. 35.)

g. Southwest Water Authority could not guarantee that it could provide potable water: If Southwest Water was unable to provide potable water to the site, a community water system would be developed. (App. 9–10, 35.)

[¶ 34] On August 28, 2012, the staff again recommended denial of the preliminary plat. (App. 51–52.) The staff again noted several items that it felt Dahm did not address. (App. 55.) However, many of the "deficiencies" noted by the staff were addressed in the Application and August 14 Response. These are addressed below:

a. Location and widths of alleys and easements, and easement functions: The exact easement specifications (*e.g.*, utility lines and roadways) cannot be shown until various governmental agencies have approved their locations. (App. 33.)

b. Location, type, and size, of utility lines: Existing utilities are shown on the original and supplemental submissions. (App. 33; *see also id.* at 143.) Also, location and size of future utilities cannot be shown until various governmental agencies have approved their locations.

c. Location and approximate sizes of sidewalks, curbs, and gutters: There are no sidewalks, curbs, or gutters. (App. 33; *see also id.* at 144.)

d. Location, size, and type of all principal structures: The location, size, and type of existing structures are shown on the original and supplemental submissions. (App. 33.) The exact location and size of all structures cannot be shown until the final plat stage. (App. 33–34.)

e. Topographic contours at two-foot intervals: Contour intervals of two feet were added to the preliminary plat before the August 14, 2012 submission. (App. 34; *see also id.* at 144.)

f. Location and extent of problem soil type: Subsurface excavations and tests were conducted, with soil types including sand, silt, and clay. (App. 34; *see also id.* at 144.) Also, soil testing engineers determined that the soil was ideal for the type of community sewer system that was proposed. (App. 139.)

g. Location, size, depth, and quality of wells: There is only one existing well on the site. (App. 34.) Further, Dahm provided several well logs of surrounding wells demonstrating the availability of water. (*Id.*)

h. Boundary lines and owners names of adjacent properties: The boundaries lines and some of the adjacent owners' names were included on the

preliminary plat. (App. 34.) Due to title company backlog, Dahm was not able to obtain all of the adjacent owners' names, and requested the information from the County, which it possessed but never provided. (*Id.*)

i. All streams and other waterbodies within a 100-year floodplain: Existing waterbodies and floodplains were depicted on the original preliminary plat submission. (App. 11, 34.) Further, the August 14 Response included maps showing locations of the same. (App. 34, 50.) Finally, the requested cross-section of Duck Creek was provided at the August 30 public hearing. (App. 145.)

[¶ 35] Similarly, the Planner again listed several "concerns" that led him to recommend denial. (App. 51–52.) These concerns were as follows:

a. The Project could generate an additional 1,500 to 2,000 trips per day onto a single street: The Original Ordinance does not contain a requirement that a traffic study be conducted. However, the Project would cause approximately "73 trips her hour at peak hour flows," spread out among three outlets. (App. 59–64.) This would amount to a total of approximately 245 total trips per day. (App. 134.) This was not raised as a concern in the Planner's first set of comments. (App. 24, 28.)

b. One access to the Project will be via a street in Maryville that does not meet current road standards: The fact that previously existing roads in another subdivision do not meet current road standards, cannot be a basis for denying the Application. This is akin to saying that a properly supported application for rezoning should be denied if it is near a

nonconforming use. Dahm obviously has no control over how the streets in Maryville were constructed over 30 years ago. Further, the Maryville street is only one of three planned outlets. As noted at the August 30 hearing, a neighboring property owner granted an easement for additional access. (App. 131.) Finally, the condition of the Maryville street was not raised as a concern in the Planner's first set of comments, dated August 2, 2012. (App. 24, 28.)

c. Application does not contain a delineation of wetlands or floodplains, and Dahm did not submit a floodplain analysis to FEMA or conduct a study to satisfy Army Corps: There are no wetlands in the Project and floodplains are delineated on the preliminary plat. (App. 11, 34, 50; *see also id.* at 134.) Also, the requested studies are not required in the Subdivision Regulations. (*See* Appellee's Brief, Exh. A, Doc ID #53, p. 15.)

d. Dahm did not identify the entity that would maintain a community well system: A homeowner's association would be responsible for maintaining a community well system. (App. 136.) This information was not requested in the Planner's first set of comments, dated August 2, 2012. (App. 24, 28.)

e. City of Dickinson planning staff indicated that the development is inconsistent with their plans for Extra Territorial Zoning: The Project was not within the 2-mile extra territorial zoning boundary of the City of Dickinson. (App. 43.) This was not raised as a concern in the Planner's first set of comments, dated August 2, 2012. (App. 24, 28.)

[¶ 36] The recommendation and ultimate denial were based not on the contents of the preliminary plat, but on the County's failure to actually review the plat and supporting documents. The decision to ignore the evidence is not valid grounds for denial of the Application.[2] Because the determination of the County Board was not based on the evidence it was obligated to review, that determination was arbitrary and not based on substantial evidence. This Court should therefore overturn the County Board's determination to reject Dahm's Application.

C. Certain Commissioners' Conflicts of Interest Led to an Arbitrary and Capricious Decision.

[¶ 37] A decision is arbitrary where it is "founded on prejudice or preference rather than on reason or fact." Black's Law Dictionary, p. 42 (3d ed. 2006). As discussed above, the County Board's denial was not founded on reason or fact, as it ignored much of the evidence in the Application. Commissioner Hoff's and Commissioner Elkin's conflicts of interest are further evidence that the denial was founded on preference for their own projects, and prejudice against a competing project.

[¶ 38] Commissioner Hoff acquired the Hoff Property, a large tract of land near Dickinson, in August 2010. In July 2012, Hoff sold a portion to Roers Development for a total of $750,000, and still owns a portion. Roers Development plans to develop nearly 1,000 acres of land, including the land it obtained from Commissioner Hoff, and land Hoff still owns, in the vicinity of the Project. (App. 255–59.) This development includes commercial, residential, and even high density residential lots. (*Id.*) Commissioner

[2] As demonstrated, the County created new issues each time Dahm appeared. It was impossible for Dahm to satisfy the Planner when, each time Dahm addressed the Planner's previous concerns, the Planner presented new, previously unmentioned concerns.

Hoff's purported objections to the "high density" nature of the Project, which actually qualifies as low density residential and includes lots ranging from one to two acres, are highly suspicious in light of the fact that he has profited from his involvement with an adjacent project that includes high density residential and commercial development.

[¶ 39] Similarly, Commissioner Elkin profited from residential development in Stark County near the Project. Elkin purchased the Elkin Property in August 2010. In May 2011, Bakken Shale Development submitted its application for rezoning and plat approval. (App. 262–64.) In July 2011, the County Board approved the final plat. (*See id.*) Just a few days after the County Board approved the application for the Bakken Estates development, Elkin began transferring the Elkin Property to Bakken Shale Development. (App. 280–85.) The Bakken Estates development is very similar in home and lot size, and general layout, to the Project. Thus, the denial of Dahm's preliminary plat is especially arbitrary given that the County Board and Zoning Commission approved the final plat for Bakken Estates, which had many more deficiencies than the preliminary plat submitted by Dahm. The application for Bakken Estates consisted of the county's single-page application form and a "preliminary plat" that depicted only lot sizes and layout. (App. 262–64) The preliminary plat contained no information regarding wetlands, floodplains, water or sewer systems, adjacent landowners, ingress and egress, or many other required items. (*See id.*)

[¶ 40] On June 6, 2011, the Bakken Estates application was presented for approval.[3] (App. 271.) The streets were set for 60 feet, which is below the County's minimum width standard. (App. 272.) Commissioner Hoff informed Duane Schwab, who presented the application, that the section line easement depicted on the preliminary would need to be over twice as wide as shown. (App. 271–72.) Schwab responded that he would "deal with whatever that is." (*Id.*) Commissioner Jackson asked, "[I]s this intended to be a final plat? Is this a sketch plat, preliminary?" (App. 272.) Schwab responded, "Preliminary, final." (*Id.*) Jackson stated that although he thought the project was "a great project . . . [t]he plat has a lot of technical deficiencies, many." (*Id.*) Jackson stated that it was basically a "sketch" of a plat. (*Id.*) Some confusion followed as to what Bakken Shale Development believed it was submitting— a "sketch plat," a preliminary plat, or a final plat. Commissioner Jackson suggested: "[C]ome back when you've complied with the ordinance and state law." (App. 273.)

[¶ 41] Following this discussion, the Commission asked almost no questions and closed the public hearing. There were no inquiries about water, sewer, or density concerns regarding the size of the lots, which were between one and two acres. (App. 262–264, 273–75.) A neighboring landowner expressed concerns about density and traffic, but none of the Commissioners responded to this comment or voiced similar concerns. (App. 274.) Instead, the Commission allowed Schwab to respond, a courtesy it did not extend to Dahm. (*Id.*) After the public discussion, Commissioner Jackson, who

[3] Elkin did not participate in the discussion. However, it was not explained why Elkin did not participate, namely, that he owned the property Bakken Shale Development, LLC sought to develop. (App. 270.)

had noted the many deficiencies of the plat, inexplicably voiced his approval and asked Schwab to do the Commission the "favor" of providing a more complete final plat:

> Mr. Chairman, it was my intention to make a motion approving the preliminary plat. You know, Duane, if you look at the requirements of a preliminary plat, this isn't ready, this looks like a sketch plat. This isn't ready.
>
> And I think if I could suggest, you could help this board and the county by telling the developer that they should look at this stuff, if you would do us that favor. It's really for the developer's good more than anything.

(*Id.*) The Commission voted to recommend approval of the zoning amendment and "preliminary plat." (App. 274–75.) Rather than address the deficiencies in the plat, the Commission simply conditioned approval on the submission of an adequate final plat. (*Id.*) Commissioner Hoff moved and the County Board voted to approve the Bakken Estates application for zoning amendment and preliminary plat approval. (*Id.*) One month later, Elkin sold a portion of the Elkin Property to Bakken Shale Development. (App. 280–81.) Later, in May 2012, Elkin sold two more portions of the Elkin Property to Bakken Shale Development. (App. 284–85.)

[¶ 42] Commissioner Hoff's and Commissioner Elkin's pecuniary interests in residential development in the immediate vicinity of the Project, and the disparity in scrutiny that the Application received compared to Elkin's project, are strong evidence that the County Board's decision in denying the Application was arbitrary and should be overturned.

IV. The Six-Month Prohibition was Not Only Arbitrary, Capricious, and Unreasonable, But Unconstitutional and Beyond the County Board's Statutory Authority.

[¶ 43] "A zoning ordinance must be reasonable: Courts will invalidate a zoning ordinance that bears no reasonable relationship to a legitimate government purpose, that

is arbitrary, or that deprives a property owner of all or substantially all reasonable uses of his land." *Eck v. City of Bismarck*, 302 N.W.2d 739, 741 (N.D. 1981). The prohibition from appearing before the County Board for six months after denial of an application, placed on Dahm by the County Board and included in the New Ordinance, must be invalidated for three reasons. First, it is arbitrary. The County Board has provided no rationale for the time limit. This is especially true considering Dahm was able to immediately address the concerns of the Zoning Commission when noted. Forcing an applicant, who has spent considerable time and money purchasing real property and preparing an application, to wait six months to re-file an application, is both unreasonable and arbitrary.

[¶ 44] Second, the six-month prohibition deprives Dahm of all reasonable uses of his land and therefore constitutes an unconstitutional taking. The Fifth Amendment of the North Dakota State Constitution states: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law." N.D. Const. art. I, § 16. This is broader than the Takings Clause in the Fifth Amendment of the United States Constitution. *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346 (N.D. 1987). North Dakota's takings clause "was intended to secure to owners, not only the possession of property, but also those rights of possession which render possession valuable." *Id.* (citation omitted). Thus, a regulation that prohibits substantially all reasonable use of property constitutes a taking. *Id.* To determine whether a taking has occurred, the courts look "to the effect of the restriction on the parcel as a whole." *Id.*

[¶ 45] Here, because the New Ordinance was passed during the six month period, the six-month prohibition forced Dahm to apply under the more onerous New Ordinance, pursue an appeal, or give up on the Project. Dahm purchased approximately 218 acres of real property with the intent to subdivide the property and provide affordable single family housing in a "quasi-rural" setting. (App. 8.) Dahm did so in reliance on the Original Ordinance and Subdivision Regulations. Because the County Board's decision deprived Dahm of all reasonable use of the property, the decision constitutes an unconstitutional taking.

[¶ 46] Finally, the New Ordinance states that the County Board "shall review and decide all applications for zoning modifications." (*See* Appellee's Brief, Exh. B, Doc ID #54, p. 83.) The Original Ordinance imposed similar obligations. (*See* Appellee's Brief, Exh. A, Doc ID #53, pp. 55, 58, 59.) Imposing the six-month prohibition improperly relieves the County Board of its obligation to "review and decide all applications for zoning modifications." Thus, not only does the six-month prohibition "bear no reasonable relationship to a legitimate government purpose," it is in derogation of the County Board's duties to review and decide all zoning applications. This Court must overturn the decision of the County Board to the extent it prohibits Dahm from filing another application for six months.

CONCLUSION

[¶ 47] Appellant Richard Dahm respectfully requests this Court reverse the district court's denial of the Motion to Submit Additional Evidence and the County Board's denial of the Application for zoning amendment and preliminary plat approval.

DATED this 20th day of September, 2013.

FREDRIKSON & BYRON, P.A.

By */s/ Amy L. De Kok*

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Richard Dahm, Appellant and Appellant, vs. Stark County Board of Commissioners, Appellee and Appellee,	)	Supreme Court No. 20130238 **CERTIFICATE OF SERVICE**

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

I hereby certify that on September 16, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. BRIEF OF APPELLANT RICHARD DAHM; and

2. APPENDIX OF APPELLANT RICHARD DAHM

and served the same electronically as follows:

Mitchell D. Armstrong
SMITH BAKKE PORSBORG
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/s/ Amy L. De Kok
AMY L. DE KOK

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Richard Dahm, Appellant and Appellant, vs. Stark County Board of Commissioners, Appellee and Appellee,	)	Supreme Court No. 20130238 **CERTIFICATE OF SERVICE**

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

I hereby certify that on September 20, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. BRIEF OF APPELLANT RICHARD DAHM;

and served the same electronically as follows:

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/s/ Amy L. De Kok
AMY L. DE KOK

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