

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Robert Hale)	
d/b/a Bullwinkle Builders, Inc.,)	
)	
Appellant,)	Supreme Court No.: 20140337
)	Ward Co. No.: 2014-CV-00072
v.)	
)	
)	
City of Minot,)	
)	
Appellee.)	

APPEAL OF THE ORDER, DATED JULY 30, 2014

BRIEF OF APPELLEE CITY OF MINOT

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 3. Whether it was Arbitrary, Capricious, or Unreasonable for the City of Minot Board of Appeals to Refuse to Grant a Modification or Alternative Method of Construction

IV. STATEMENT OF CASE

[¶ 1] This is an appeal from the district court's *Order* affirming the City of Minot Board of Appeals' decision which affirmed the City of Minot Building Official's denial of a building permit request submitted by the Appellant, Robert Hale, (hereinafter "Mr. Hale"). The City of Minot Building Official, Mitch Flanagan (hereinafter "Mr. Flanagan") ultimately denied Mr. Hale's building permit after Mr. Hale failed to submit the required documentation with his building permit application. App. at 6. Mr. Hale appealed the denial to the City of Minot Board of Appeals (hereinafter "Board") pursuant to section 9-2 of the City of Minot Code of Ordinances. App. at 7-14. The Board decided the following issues: (1) whether Mr. Flanagan properly classified the proposed project as an I-1; (2) whether Mr. Flanagan properly requested drawings prepared and certified by a qualified, licensed design professional; (3) whether Mr. Flanagan properly requested a code study; and (4) whether Mr. Flanagan properly denied modifications with respect to the proposed project. The Board unanimously affirmed Mr. Flanagan's denial. App. at 15-21. Mr. Hale appealed the Board's decision to the North Central Judicial

District pursuant to section 28-34-01 of the North Dakota Century Code. App. at 22.

The Honorable Gary H. Lee heard the appeal and affirmed the City of Minot Board of Appeals' decision in an *Order* dated July 30, 2014. App. at 23-32. Mr. Hale appealed to this Court. App. at 33.

V. STATEMENT OF FACTS

[¶ 2] This matter relates to a proposed subsequent expansion project on an existing facility identified as Somerset Court located in Minot, North Dakota, operated by Mr. Hale. It appears that the Somerset Court facility was initially constructed in approximately 1999, when the applicable building code did not contain a specific classification for an assisted living facility (I-1).

[¶ 3] In 2013, Mr. Hale apparently made a decision to construct what was proposed as a three story addition (70 units) to the existing Somerset Court facility, which was specifically identified in the building permit application as an “addition to an existing assisted living facility.” App. at 5. Mr. Flanagan monitored and reviewed this proposed project by Mr. Hale through the application process. Initial authorization by the City was granted for this project with the “use group” classification of I-1 being identified in the foundational permit only. This Group I-1 category is identified in the 2009 International Building Code (hereinafter “2009 IBC”) to include “assisted living facilities.” 2009 IBC § 308.2; App. at 44.

[¶ 4] Subsequently, Mr. Hale made application for the building permit from the City of Minot with respect to the requested addition to Somerset Court pursuant to section 105.1 of the 2009 IBC. See 2009 IBC § 105.1; App. at 41. In connection with this application, and over approximately a four month period from August through

December of 2013, Mr. Flanagan made various requests to Mr. Hale for sufficient information and/or documentation which would authorize construction on the proposed project as I-1 in compliance with the terms and provisions of the 2009 IBC. Specifically, Mr. Flanagan requested stamped architecture plans as required for I-1 facilities by sections 43-03-02(1) and 43-03-22 of the North Dakota Century Code. When Mr. Hale provided unstamped plans drawn by a drafter and refused to provide stamped plans, Mr. Flanagan issued a written denial of the building permit application on or about December 2, 2013. Doc. No. 38, Tr. at 84:1-5; App. at 6. This initial denial specified an improper designation of occupancy for the project, lack of properly prepared documents, and failure to submit a code study for all proposed construction. App. at 6.

[¶ 5] Pursuant to Section 9-2 of the Minot City Code of Ordinances, on December 5, 2013, Mr. Hale appealed Mr. Flanagan's determinations to the Board. App. at 7-14. The City filed a brief in response to Mr. Hale's Notice of Appeal and included numerous exhibits. Mr. Hale replied to the response. The Board held a hearing at 1:30 PM on December 20, 2013 at City of Minot Council Chambers. The parties presented evidence to the Board.

[¶ 6] In a written decision dated December 24, 2013, the Board unanimously found in favor of the City of Minot on all issues, affirming Mr. Flanagan's denial of Mr. Hale's building permit. App. at 15-21. Mr. Hale filed a Notice of Appeal with the North Central Judicial District on January 22, 2014 pursuant to section 28-34-01 of the North Dakota Century Code. App. at 22. The Honorable Gary H. Lee, presiding judge of the North Central Judicial District, affirmed the unanimous decision of the Board. App. at 23-32. It is the City's position that Mr. Flanagan complied with the City of Minot Code

of Ordinances, the North Dakota Century Code, and the applicable 2009 IBC and that the Board and district court correctly affirmed the Mr. Flanagan’s decisions. With that, the City respectfully requests that this Court affirm the district court and Board’s decision.

VI. STATEMENT OF STANDARD OF REVIEW

[¶ 7] Mr. Hale’s burden on appeal is high. In an appeal from a local governing body, this Court’s scope of review is “very limited.” Klindt v. Pemina County Water Res. Bd., 2005 ND 106, ¶ 12, 697 N.W.2d 339 (citing Douville v. Pembina County Water Res. Dist., 2000 ND 124, ¶ 5, 612 N.W.2d 270 (quoting Graber v. Logan County Water Res. Bd., 1999 ND 168, ¶ 7, 598 N.W.2d 846)).

[U]nless the Board acted arbitrarily, capriciously or unreasonably, or there is not substantial evidence to support the decision, it must be affirmed. A decision is not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.

Id. A decision by a board or governing body is considered to be “arbitrary and capricious” or “arbitrary, oppressive and unreasonable” when the findings or decisions of the board or governing body are without probative value and there is essentially no evidence to support a decision made by the legislative body. See Tri-County Electric Co-op., Inc. v. Elkin, 224 N.W.2d 785, 791 (N.D. 1974).

[¶ 8] “[T]he courts must not substitute their judgment for that of the local governing body who initially made the decision.” Pic v. City of Grafton, 1998 ND 202, ¶ 11, 586 N.W.2d 159. The court does not review the decisions of the local governing body de novo. Id. ¶¶ 6-11. “In reviewing decisions of local governing bodies, courts are very limited by the doctrine of separation of powers.” Id. ¶ 6 (citing Lindteigen v. City of Bismarck, 1997 ND 123, ¶ 6, 565 N.W.2d 47). Case law decided by the North Dakota

Supreme Court indicates that the district court should be deferential to the local governing body decision by the Board. In light of the evidence before the Board, the Board did not act arbitrarily, capriciously, or unreasonably when it affirmed Mr. Flanagan's determinations relating to Mr. Hale's building permit. The decision of the district court should therefore be affirmed.

VII. ARGUMENT

A. Whether the Decision of the Board of Appeals to Affirm the Building Official's Denial of Mr. Hale's Building Permit was Arbitrary, Capricious, or Unreasonable

[¶ 9] As a preliminary matter, it is important to note that the City of Minot previously incorporated the 2009 IBC into the City of Minot Code of Ordinances. See City of Minot Code of Ordinances § 9-1; App. at 35. Specific modifications or amendments to the 2009 IBC are contained in section 9-2 of the City of Minot Code of Ordinances. See City of Minot Code of Ordinances § 9-2; App. at 35-38. With that, applicable 2009 IBC sections directed Mr. Flanagan's decision with regard to Mr. Hale's building permit application. Specifically, section 104.1 of the 2009 IBC provides that the building official is authorized and directed to enforce the provisions and render interpretations of the code in compliance with the intent and purpose of the code. See 2009 IBC § 104.1; App. at 40.

1. Under the Deferential Standard that Applies, the Decision was not Arbitrary, Capricious, or Unreasonable and there is Substantial Evidence to Affirm the City of Minot Board of Appeals' Affirmation of the Building Official's Determination that Somerset Court is an Assisted Living Facility under the 2009 IBC and/or Applicable North Dakota law and that I-1 was the Correct Classification

[¶ 10] The City submits that the primary threshold issue with regard to this appeal is whether the Board's affirmance of Mr. Flanagan's classification of Somerset

Court as an assisted living facility under the 2009 IBC and/or North Dakota law was arbitrary, capricious, or unreasonable. While Mr. Hale contends that this facility is a Residential Group R-2, as opposed to a Group I-1, inasmuch as the residents of Somerset Court are allegedly not supervised and allegedly do not receive personal care services, it is the City's position that the classification of Somerset Court as an I-1 was not arbitrary, capricious, or unreasonable. The City believes the Board's decision was the product of a rational mental process by which the applicable facts and the law were considered together; the Board ultimately achieved a reasoned interpretation.

[¶ 11] Subsection 308.2 of the 2009 IBC specifically provides that a Group I-1 classification is a building or structure that houses more than 16 persons on a 24 hour basis, and that because of age or other reasons, those residential individuals live in a supervised residential environment that provides personal care services. 2009 IBC § 308.2; App. at 44. While Mr. Hale asserts that the residents of Somerset are independent and unsupervised, therefore not constituting residents of an assisted living facility, the definitions of personal care services and assisted living facilities do not require chronic or invalid status and care. As seen in the definitions of the IBC, "personal care services" means the care of residents who do not require chronic or convalescent medical or nursing care, but does involve responsibility for the safety of the residents while inside the building. 2009 IBC § 310.2; App. at 46. Simply stated, the "assisted living facility" definition requires a building housing a certain number of persons on a 24 hour basis who live in the supervised residential environment providing personal care services. The definition also specifies that this classification shall include assisted living facilities. 2009 IBC § 308.2; App. at 44.

[¶ 12] Likewise, Mr. Hale’s contentions that Somerset is more appropriately classified as a Residential Group R-2 structure is also in error in that Subsection 310.1 emphatically states that Group R includes, among others, the use of a building or structure, or a portion thereof, for sleeping purposes when not classified as an Institutional Group I or when not regulated by the International Residential Code in accordance with Section 101.2. 2009 IBC § 310.1; App. at 46. Therefore, this definition of Group R, on its face, excludes as residential a facility that is appropriately classified as Group I, such as assisted living facilities.

[¶ 13] Subsection 102.2 of the IBC indicates that the various provisions of the IBC shall not be deemed to nullify any provision of local, state or federal law. 2009 IBC § 102.2; App. at 39. Building from this pronouncement, it is to be noted that both North Dakota state law and administrative regulations of the North Dakota Department of Human Services Agency also contain specific definitions relating to “assisted living facilities.” Section 23-09-01 of the North Dakota Century Code specifies the following:

1. “Assisted living facility” means a building or structure containing a series of at least five living units operated as one entity to provide services for five or more individuals who are not related by blood, marriage, or guardianship to the owner or manager of the entity and which is kept, used, maintained, advertised, or held out to the public as a place that provides or coordinates individualized support services to accommodate the individual’s needs and abilities to maintain as much independence as possible. An assisted living facility in this chapter includes a facility that is defined as an assisted living facility in any other part of the code.

N.D. Cent. Code § 23-09-01(1) (emphasis added); Doc. No. 20. With regard to the North Dakota Department of Human Services, Chapter 75-03-34 governs the provisions for licensing of assisted living facilities. See N.D. Admin. Code § 75-03-34; Doc. No. 21. The “Definitions” section in Chapter 75-03-34-01 gives further clarification to the terms

“assisted living facility,” “individualized support services,” and “medication management.” N.D. Admin. Code § 75-03-34-01. What should be noted is that, identical to the section 23-09-01(1) provisions, both definitions of “assisted living facility” can be met not only by the providing of the services, but, can also be attained by simply holding out to the public that it is a place that provides or coordinates individualized support services to accommodate the individual’s needs and abilities to maintain as much independence as possible. These “individualized support services” are defined as “services provided to individuals who may require assistance with the activities of daily living of bathing, dressing, toileting, transferring, eating, medication management, and personal hygiene.” N.D. Admin. Code § 75-03-34-01(4) (emphasis added). Nowhere does it indicate that these services are required to be total in nature, but simply that, under appropriate circumstances, these services may be provided. Finally, “medication management” means “providing assistance to an assisted living facility tenant with prescribed medications.” N.D. Admin. Code § 75-03-34-01(6).

[¶ 14] In determining whether Somerset Court constituted an assisted living facility, the Board specifically stated “[c]onsidering all testimony and printed materials given at the Board of Appeals meeting on 12-20-2013, the Board unanimously agrees that the proposed addition to Somerset Court should be classified as Institutional Group I-1 occupancy per section 308.2.” App. at 16. Further, the Board of Appeals provided specific reasons for its findings:

1. The proposed building is to provide “care for” people on an as needed basis.
 - a. Medical rooms
2. The 2009 IBC specifically identifies assisted living facilities as Institutional.
3. Building configuration, code review sheets C1, C2, C3, C4.

- a. Housekeeping rooms
 - b. Building amenities seem to exceed those in a typical apartment complex.
4. 2009 IBC code requires a greater need for tenant health, fire safety, and egress requirements for Assisted Living Facilities. The 2009 IBC addresses this with the Institutional Group I-1.
- a. The capacity for tenants is more than sixteen (16) per 2009 IBC 308.2 Group I-1.
 - b. Code changes are the results of disasters. This was supported by testimony during the hearing.

App. at 17. The Board clearly evaluated the evidence before it, applied the facts of this matter to the applicable law, and unanimously reached a reasonable decision based on the facts and the applicable law. Ample evidence was received by the Board indicating that Somerset Court is an assisted living facility under the 2009 IBC, North Dakota law, and administrative regulations relating to assisted living facilities. A **portion** of that evidence is summarized as follows:

(1) Mr. Hale testified that the purpose of Somerset Court was to provide a living space for elderly people in the community. Doc. No. 38, Tr. at 44:15-16 (quoting Mr. Hale, “There was a demand for more housing for people that are older”).

(2) Mr. Hale’s testimony revealed that Somerset Court offers services beyond that of a typical apartment complex and charges rent beyond that of a typical apartment complex:

- a. “We do provide medication assistance. In other words, on doctor’s orders, we will see that they have their medications presented to them when they are supposed to be having them. And we record that so that when they go to see their doctors, the doctors know what they’ve actually been taking.”
Doc. No. 38, Tr. at 46:16-22.

b. “Yes, we do have a transportation system, and we take our residents wherever they want to go. . . . In the winter time, when people don’t want to drive, we have a chauffeur service and we offer that to our residents.”

Doc. No. 38, Tr. at 66:22-67:4.

c. “It depends on whether people want to have food service or not have food service. Better [sic] rents run anywhere from, like, \$2,500 to \$4,500 depending on which size units that people get.” Doc. No. 38, Tr. at 113:9-

13.

(3) Mr. Hale filled out the Building Permit Application and specifically noted that this was an “addition to an existing assisted living facility.” App. at 5.

(4) Mr. Hale accepted the foundation permit which noted the code classification as an I-1 occupancy. App. at 5.

(5) Despite Mr. Hale’s assertions that Somerset Court is not an assisted living facility, that entity has requested and received assisted living facility licenses. Doc. Nos. 22, 23. Mr. Hale attempted to deflect this issue by claiming Somerset Court only obtained licensure so residents can employ and qualify for long term care policies:

MR. HALE: We have the – we seek the license – so that our residence [sic] – if they have long-term care insurance – can access it because all long-term care insurance policies have as a requirement that the resident, the individual, is residing in a licensed facility. And in North Dakota, that’s done under the social services department, not the health department.

And the purpose of it is to allow our residents to be able to access those policies and that’s how most policies are accessed.

MR. BOUGHEY: But you’re not providing the services of an assisted living facility as defined by state law. Meaning, with all the different daily care?

MR. HALE: Not defined by the statute, yes.

Doc. No. 38, Tr. at 48:3-18. Jim Heckman, Director of the Environmental Health Division of the First District Health Unit, however, testified and offered conflicting information to the Board:

MR. HECKMAN: So the assisted living facility definition that Mr. Van Grinsven read to you earlier has the exact wording in it that our code does. But I would like to point out to you that in the same definition, we also have an assisted living facility in this code that includes the facility that is defined as an assisted living facility and any other code rule or regulation.

And while there are individualized support services – I believe, Mr. Van Grinsven read those out to you that anyone may require assistance of activities of daily living, bathing, dressing, toileting, transferring, eating, medication management and personal hygiene. These are the elements that we consider services of a structure such as this into an assisted living licensure category.

If none of these services are available, then it would just be strictly an apartment building – an individualized apartment building. But because those services are advertised, and that's what he's [Mr. Hale's] provided, that's what puts it into that category of licensure.

MR. MERCER: Does it only take one of these services or does there have –

MR. HECKMAN: Any one of those services.

MR. MERCER: Have you ever heard of two levels of assisted living units?

MR. HECKMAN: No.

MR. MERCER: In the previous testimony here, I noted that there was mention of non-supervised assisted living and supervised assisted living.

MR. HECKMAN: There is not a definition that lists supervision in that context that I am familiar with. . . .

Doc. No. 38, Tr. at 117:9-118:18 (emphasis added). Mr. Heckman's testimony provided information as to why Somerset Court has an assisted living facility license, and clearly evidence presented established that the reason Somerset Court was licensed as an assisted living facility goes beyond Mr. Hale's assertion that it

is licensed simply to assist its residents in employing and qualifying for long term care policies.

- (6) Somerset Court held itself out to the public to be an assisted living facility as evidenced by the phonebook pages and references to the Somerset Court website. Doc. No. 24. While Mr. Hale suggests that the City failed to recognize that Somerset Court was also listed under other titles of the phonebook, the fact is that Somerset Court classified itself and held itself out to be an assisted living facility which is further evidenced by one of its locations in the local SRT phonebook. The City also referenced information located at that website for Somerset facilities in both Minot, North Dakota, and Rapid City, South Dakota in its Response Brief before the Board of Appeals and during the hearing:

MR. VAN GRINSVEN: The website. "Somerset Court is an assisted living community," that's what it says. They say that transportation services are second to none. We have an emergency call system. Our trained staff is available 24 hours a day. We are pleased to provide personal assistance to our residents including bathing, supplemental dressing under the amenity section. Assistance with, bathing, light housekeeping, laundry and medication reminders. Medication supervision included, emergency call system. Again, the restaurant is highlighted.

The services referred fall into six basic categories: dressing, eating, toiletry, transferring, mobility, continence, and bathing. They will do those things if they are requested to do it. And under those personalized services, for the assisted living facility, every one of those are listed, and they indicate they do it. . . .

Doc. No. 38, Tr. at 33:10-34:5. These services again meet or are closely akin to the various categories previously specified in the definition of "individualized support services."

- (7) Despite Mr. Hale's contention that no other jurisdictions would implement the 2009 IBC like Mr. Flanagan, Mr. Flanagan's testimony contradicted Mr. Hale's

assertion: “I have talked to other building officials too. I talked to Mr. Solon down in Rapid City. I talked to Ron Strand in Bismarck – in Fargo. I talked to some other building officials. They are in agreement with me, none of them say that I’m wrong [about the I-1 classification].” Doc. No. 38, Tr. at 89:17-22. Likewise, Rapid City Building Inspector wrote Mr. Flanagan a letter and indicated “[a]n assisted living built under the 1997 UBC was classified as an R-1. Following the current adopted code in Rapid City, the 2009 IBC would classify an assisted living an [sic] I-1.” Doc No. 25.

(8) As Mr. Flanagan candidly pointed out, his job as Building Inspector is to enforce the code as it is written at the time of the application. Failure to enforce the code would result in failure for him to complete the obligations of his position:

I’m not capriciously or arbitrarily deciding, “Oh, Mr. Hale, I’m going to pick on you and call your building an I-1.” I don’t like regulations any more than the next guy. I was a general contractor for 20 years. I’ve stood on both sides of my desk. I know what regulations are about. And you have to step back – stand back and understand the intent of the code. And that’s for public safety.

You see, codes were born out of human tragedy. Every line that you ever heard in that book is based on somebody getting hurt, somebody burning up alive, or somebody dying in these buildings, and that’s why we have them. It’s not because I like to over-regulate, that’s not my point.

I [sic] like to see Mr. Hale build his building. But if he wants to build an apartment, then he need to kind of – well, he need get rid of first time CNA’s, his medical assistants, his on-call emergency buttons, that are not usually in an apartment. You don’t see first time CNA staff in apartments.

So that’s where I’m at. And it’s not a personal decision. It’s how I interpret the code.

Doc. No. 38, Tr. at 89:23-90:23.

[¶ 15] The district court affirmed the Board’s decision to affirm Mr. Flanagan’s decision to deny Mr. Hale’s building permit, stating:

In this case, the Board of Appeals' decision to find that the proposed Somerset Court addition was an assisted living facility is supported by sufficient facts as outlined above, and as stated in the written decision. The decision was the product of a rational mental process and must therefore be affirmed. The Board of Appeals was not required to rely on or adopt Bullwinkle's interpretation of Section 308.2 of the IBC, nor was it required to consider only the word "supervised," as advocated by Bullwinkle. Once the Board of Appeals determined that the proposed addition was an assisted living facility, the I-1 classification was required by the IBC and the City of Minot's ordinances.

App. at 31-32, ¶ 20. As indicated by the district court, the decision of the Board was an exercise of discretion that was the product of a rational mental process by which the facts and the law were relied upon and therefore was not arbitrary, capricious, or unreasonable. The Board considered the evidence presented and appropriately found that Somerset Court is an assisted living facility as defined in the 2009 IBC and/or other applicable North Dakota Law and administrative regulations. The district court's *Order* affirming the Board's decision correctly considered and evaluated the vast amount of evidence which clearly supported the Board's unanimous decision.

2. Under the Deferential Standard that Applies, the Decision was not Arbitrary, Capricious, or Unreasonable and there is Substantial Evidence to Affirm the City of Minot Board of Appeals' Affirmation of the Building Official's Requirement for Additional Documentation

[¶ 16] Two issues have also been raised by Hale in this appeal with respect to Flanagan's contentions relating to the appropriateness and sufficiency of documents submitted by Hale with this requested building permit. As a threshold response to these contentions, reference is made to the legal treatise of "The Law of Municipal Corporations," 9A McQuillin Mun. Corp. § 26:227 (3d ed.). In Section 26:227, the following is stated:

It is frequently required that an application for a building permit be accompanied by plans and specifications, and by maps or plats, to be approved by designated officials, and sufficiently detailed in content to enable officials to ascertain whether the contemplated construction will comply with pertinent regulations and laws. A municipality may require that all plans and specifications be prepared by a registered architect or engineer, and it may prohibit under penalty substantial deviations from the plans and specifications.

Failure of an applicant to file plans and specifications as required by ordinance renders the application fatally defective and precludes issuance of a permit by a writ of mandamus.

Similarly, subsections 107.1, 107.2.1, and 107.3 of the 2009 IBC specifically indicate that construction documents would be prepared by a registered design professional where required by statutes of the jurisdiction in which a project was to be constructed, that the construction documents would be of sufficient clarity to show that they conform to the provisions of the IBC and other relevant laws and ordinances or regulations, and all of which would permit the building official to ascertain that the proposed construction project is in accordance with legal requirements. 2009 IBC §§ 107.1, 107.2.1, 107.3; App. at 42.

[¶ 17] The provisions of North Dakota Century Code chapter 43-03 set out definite legal requirements for architectural plans. Subsection 43-03-02(1) specifies that the architect registration provisions of that chapter do not apply to a building not considered to have a primary building code occupancy classification of assembly group A-1, educational group E, high hazard group H, or institutional group I. N.D. Cent. Code § 43-03-02(1); App. at 34. Since the facility proposed by Mr. Hale has been shown to be properly classified in the Group I-1, the submitted plans and/or documents submitted in this matter, which were prepared by an individual who is not a registered designed professional, were not sufficient to enable authorization of the building permit as

requested. The definition of “practice of architecture,” as specified in section 43-03-01(5) of the North Dakota Century Code, emphatically indicates that services, which require expert knowledge and skill, provided to clients involving the erection, enlargement or alteration of any building relating to the safeguarding of the public health, safety, or welfare, and including the making of architectural plans and specifications for buildings, must result and be achieved with architect registration. N.D. Cent. Code § 43-03-01(5). Additionally, section 43-03-22 of the North Dakota Century Code states that the stamp or indicia to be used by the certificate holder in the conduct of the certificate holder’s practice is to be impressed upon the drawings, plans, and other documents prepared by the certificate holder. N.D. Cent. Code § 43-03-22; App. at 34.

[¶ 18] No evidence was presented to the Board indicating that the submitted plans were drawn by a registered architect, nor was any evidence presented indicating the submitted plans were impressed with the stamp or appropriate indications by a lawful certificate holder. Scott Bexell, a registered architect, testified at the hearing that he looked over the submitted plans but did not draw them and could not stamp them since he did not draw the plans. Doc. No. 38, Tr. at 100:19-21, 108:5-109:5.

[¶ 19] Accordingly, recognizing that the drafter of the submitted documentation was not a registered architect, and furthermore, that the submitted plans were not impressed with the stamp or appropriate indications by a lawful certificate holder, Mr. Flanagan correctly determined that the submitted documents were insufficient and the district court’s affirmation of this decision was not arbitrary, capricious, or unreasonable.

3. Under the Deferential Standard that Applies, the Decision was not Arbitrary, Capricious, or Unreasonable and there is Substantial Evidence to Affirm the City of Minot Board of Appeals' Refusal to Grant a Modification or Alternative Method of Construction

[¶ 20] Mr. Hale argues that the Board was arbitrary, capricious, and unreasonable when it did not grant a modification or an alternate method of construction with regard to the proposed Somerset Court project. The City respectfully requests the Court affirm the Board's decision, as it was reasonable and the product of a rational mental process.

[¶ 21] The City emphatically disagrees with Mr. Hale's contentions and reiterates a number of provisions located in the 2009 IBC. First, the language relied upon by legal counsel for Mr. Hale specifically states in the Modification section of Subsection 104.10:

[w]herever there are practical difficulties involved in carrying out the provisions of this Code, the building official shall have the authority to grant modifications for individual cases . . . provided the building official shall first find that special individual reason make the strict letter of this code impractical and the modification is in compliance with the intent and purpose of this code, and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements.

2009 IBC § 104.10 (emphasis added); App. at 40; see also 2009 IBC § 104.11 (stating “[a]n alternative material, design or method of construction shall be approved where the building official finds that the proposed design is satisfactory and complies with the intent of the provisions of this code”); App. at 41. Recognizing that Subsection 101.3 of the 2009 IBC indicates the inherent purpose of such Code is to establish minimum requirements that safeguard the public health, safety and general welfare, as well as to provide safety to life and property from fire and other hazards during emergency situations, this suggested option of modification by Mr. Hale was unsupportable. 2009 IBC § 101.3; App. at 39. Requests for modifications and alternative materials cannot be driven by the mere fact that an applicant wishes to save money or

construction costs, but rather, must be driven and evaluated in the context of the overall IBC purpose in safeguarding the public health, safety and general welfare of citizen residents.

[¶ 22] Mr. Hale made no showing that the requirements of a Group I-1 facility were impractical with respect to his expansion project, nor has it been shown that the use of alternative materials and design are satisfactory and comply with the safety intent provisions of the Code when such requests are based solely on financial considerations. While Mr. Hale now focuses solely on the wiring requirement for an I-1 facility, his prior requests for modification were far more broad: “[t]he Board should, as allowed under the Board’s mandate, approve the [sic] Mr. Hale’s submission, if necessary as an alternative design and method of construction that ‘complies with the intent of the provisions of this code.’” At the hearing before the Board, Mr. Hale requested that the Board accept the designs previously submitted and allow Mr. Hale to build the building as laid out in his submissions. Doc. No. 38, Tr. at 70:5-18. While this request may have included waiving the wiring requirement, it is important to note that the Board’s decision was in response to a far broader request that did not specify particular modifications to grant or reasons to grant such modifications. Even if Mr. Hale had specifically requested the Board grant a modification with sole regard to the wiring requirement, Mr. Hale’s permit still would have been denied based on the preceding sections outlined in this brief.

[¶ 23] Furthermore, the IBC sections referenced by Mr. Hale relate to the building official making these determinations. Under the Board of Appeals section, the Limitations on Authority section for such Board states the following:

An application for appeal shall be based on the claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly

interpreted, the provisions of this code do not fully apply or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of this code.

2009 IBC § 113.2; App. at 43.

[¶ 24] In simplest terms, although the Board of Appeals may “modify” the decisions of a building official in that he misinterpreted the IBC, or that a modification may be granted when there are practical difficulties or the purpose of the Code and such modifications do not lessen health, accessibility, life and safety or structural requirements, none of that criteria in the circumstances of this matter has been met either for an appropriate modification or for an alternative substitution in materials or design. When the primary and focal point of a Group I-1 classification is the aspect of public health, safety and welfare, these primary considerations should not be offset or modified by arguments which are predicated strictly upon financial considerations. Recognizing that these safety factors are paramount in the intent of the IBC, significant justification must be presented to justify a modification or use of alternative construction options. Mr. Hale requested a broad modification and the Board determined (1) that it was not authorized to approve such modification as that was a duty of Mr. Flanagan and (2) that Mr. Hale failed to make a specific request for modification. A review of the record clearly reveals that the decision of the Board was not arbitrary, capricious, or unreasonable.

VIII. RELIEF

[¶ 25] The City of Minot respectfully requests that this Court affirm the district court’s *Order*, dated July 30, 2014, in its entirety.

IX. CERTIFICATE OF COMPLIANCE

[¶ 26] The City of Minot certifies that this brief is submitted in compliance with the North Dakota Appellate Rules of Procedure. The word processor is Microsoft Word and the word count (excluding the table of contents and table of authorities) is 6114.

Dated this 22nd day of December, 2014.

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