

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20140337
Ward County Civil No. 51-2014-CV-00072**

Robert Hale,)
d/b/a Bullwinkle Builders, Inc.,)
)
Appellant,)
)
vs.)
)
City of Minot,)
)
Appellee.)

APPELLANT’S REPLY BRIEF

Appeal of the Order dated July 30, 2014, of the Honorable Gary
H. Lee, District Court Judge, North Central Judicial District

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II. TABLE OF CITATIONS

Cases

Klindt v. Pemina County Water Res. Bd., 2005
ND 106, 697 N.W.2d 339 ¶14

Other

NDCC Section 43-03-02 ¶11

NDCC Section 43-03-22 ¶11

N.D. Admin Code Section 75-03-34-01(4) ¶7

IBC Section 308.2 ¶2, 6

IBC Section 310.2 ¶2, 7

¶1 **III. RESPONSE TO CITY BRIEF**

¶2 **As to Issue 1: Whether the true intent of the building code or its proper legal interpretation has been misapprehended by the building official in regards to Application of 308.2 and 310.2 International Building Code [IBC] 2009 .**

¶3 At Paras. 1 and 4, the City alleges that Mr. Hale failed to provide all the necessary documents. This is incorrect. This is inaccurate. Hale filed everything initially requested. Only after it was submitted AND Flanagan responded by providing the "Code Study" (prepared by Flannigan) did an issue arise. When Flanagan ignored his own Code Study and requested that Hale provide one, Hale requested that Flannigan provide Hale with the format and the requirements of what a code study was. Mr. Flanagan said there was nothing in writing, there was no written requirement and that it was "whatever he decided it needed to be"! At the end of the hearing Mr. Boughey specifically inquired whether all the documents have been provided, and the City on the

record stated that the only document needed related to a certificate of the architect, which was immediately provided by consent of all parties.

¶4 As to Para 2, the City asserts that the initial building was opened in 1999, but it was actually opened in 2000. In addition, the City alleges that the Code at that time didn't include reference to assisted living facilities; although the Code has more recently included references to assisted living facilities, the Institutional designation would apply ONLY if the persons living there were supervised, and they are not; this is a residential retirement facility that does NOT supervise the persons who rent their rooms, cook their own meals if they want, etc. Moreover, as Hale testified, since 1999/2000 there has NEVER been another assisted living facility in ND required to be constructed as an I-1 – Institutional building, and there have been many constructed, including one in Mandan in the last two years (with an “R” designation)!

¶5 As to Para 3 and 14, the City asserts that the initial foundation permit listed it as an “I” Institutional – this designation was allowed under protest so the foundation could be poured; significantly, there is NO difference in the foundation in regards to an “R” or “I” designation. Hale had hoped that the City would, by the time the significant difference had to be installed the City would withdraw its arguments as to the building being an “I-1” – before Hale had to expend over \$400,000 extra in regards to the electrical wiring required for an “I” building.

¶6 As to Para 10 where the City alleges that the facility is an assisted living facility that “automatically” becomes an “I” building, the City fails again to understand not only the lack of supervision of the residents, but also the fact that Somerset does not provide medical services. The primary basis for the City’s decision that this is an assisted living facility that MUST be designated as an “I” is a TELEPHONE LISTING that has the index title of ASSISTED LIVING and the

existence of a room listed as “med room” in which the meds are placed under lock and key and distributed at meal times to the residents. The facility is not a medical facility and provided NO medical services under the definition of medical services. The City goes on to state that the facility is alleged by Hale not to provide these services; Hale is the owner and testified as to the ACTUAL facts; the City merely countered with assumptions not based on the reality of what actually occurs at the facility. Such a complete ignoring of the actual facts does not constitute a rational mental process and is indeed the basis for this Court to conclude that the City decision was arbitrary, capricious, or unreasonable. At Para. 11 the City blatantly cites to the Code provision, totally ignoring the actual facts that would demonstrate that this provision does NOT apply. The City goes on to assert in the same paragraph that this provision applies because Somerset is responsible for the safety of the residents (what apartment complex does not have some obligation to safety, one might ask).

¶7 At Para. 13, the City boldly applies an inapplicable provision of the North Dakota Administrative Rules to support its untenable position. Somerset through the testimony of Hale provided a copy of the unrefuted requirements that apply to those residents who live at Somerset, requirements that demonstrate that the residents at Somerset are NOT provided the level of services relating to the activities of daily living. **Doc. 31.** at Para. 27 of our original brief,

The few services provided are not commensurate to an assisted living facility as defended by ND law or 310.2 [A. 46] IBC 2009. Although Somerset has a license for assisted living, this is so that the residents, when they need temporary assistance in dressing and bathing, can employ and qualify for their long-term care policy. The residents, by the resident handbook made a part of the rental agreement and by the facts that apply to the services provides, must be mobile, feed themselves, get in and out of bed without assistance, on and off the toilet without personal assistance, manage his or her incontinence, get around and in the apartment on their own, and be able to partially dress themselves (with Somerset helping only with shoes, socks, ted hose, buttons and belts). See Attached Residency Criteria (**Doc. No. 31**). The level of independence of the residents of Somerset and the the few personal care services provided do not warrant application of Institutional designation. Such a designation has

not been applied to any other assisted living facility in North Dakota.

The testimony by Hale clearly shows that the residents of Somerset are not supervised, can come as they go, and have to be capable of independent living, as shown by the residency requirements (Doc. 31):

In order to pass the evaluation, a prospective resident must:

- Be able to come to the dining room for meals; if the distance is too far to walk, he/she must be able to get to the dining room with a walker, scooter, or motorized wheelchair with or without assistance from staff. If a resident must use a wheelchair, they must be able get in and out of it and manipulate it themselves.
- Be able to get in and out of bed and on and off the toilet without personal assistance
- Be able to manage his/her incontinence. Our staff will provide reminders for this if requested.
- Be able to get around in their apartment on their own or with assistive devices.
- Be able to respect the rights and property of other residents.
- Be able to partially dress themselves. We assist with shoes, socks, ted hose, buttons, belts, etc. as requested.

If we are unable to determine if *Somerset Court* is able to provide the services needed by the resident through our normal evaluation process, we may recommend that a resident move in on a 30 day trial basis. If during the trial period we determine

that we are unable to meet the service levels required by the resident, we will notify the resident and/or resident's family members and assist them with an appropriate transition.

If a resident is accepted and later is unable to meet the above criteria, we will inform the resident and/or family members of the options open to them and work with them to find the best solution for the resident.

Residency at *Somerset Court* is month to month. We must receive thirty (30) days notice prior to a resident moving out. Emergencies will be reviewed on an individual basis.

¶8 As to Para. 14 where the City mentions medical “rooms” (plural), the clear intention of an Institutional designation entails medical “rooms” where medical services are provided. Somerset has only one room listed as a “Med Room” and no services are provided there; that is just where the pills are kept. The misconception of this room is further indication of the unreasonableness of the interpretation by the City. The City goes on to incorrectly state “The 2009 IBC specifically identifies assisted living facilities as Institutional.” Such a designation applies ONLY if the residents are supervised!

¶9 As to Para. 14 the City asserts certain alleged safety issues. However, Somerset – as a Residential designation -- has all the “tenant health, fire safety, and egress requirements for Assisted Living Facilities.” The ONLY change (from the “R” designation and the “I” designation) is that the “I” designation REQUIRES conduit electrical wiring, which provides NO additional safety benefits, BUT does add substantial costs to the residents living there with NO benefit!

¶10 As to Para. 14 (5) where the City refers to the license of Somerset as listing it as an assisted living facility, that is the only type of license you can get, and there are many different types of assisted living facilities that provide a myriad of different levels of services; it is the facts that need to be applied (supervised, providing actual medical services) that should be employed to determine the proper Code provisions that apply, not the sophistry of a cold term that applies to many, many different facilities.

¶11 **As to Issue 2: Whether the true intent of the building code or its proper legal interpretation has been misapprehended by the building official in regards to Application of NDCC Section 43-03-02 and 43-03-22.**

¶12 At Para. 1, the City alleges that Mr. Hale failed to provide proper certification by a qualified licensed design profession, but this argument entirely falls if (as argued by Hale) the building should have been considered as a Residential “R” building and not as an Institutional “I” building. This requirement applies only if it is an “I” building.

¶13 **As to Application of the Legal Standard**

¶14 As to Para 7, the City did not act reasonably “for the purpose of achieving a reasoned and reasonable interpretation” under the Klindt standard quoted by the City at Para. 7(citing to Klindt v. Pemina County Water Res. Bd., 2005 ND 106, 697 N.W.2d 339). The City’s decision is arbitrary and capricious and unreasonable. The City, and its Appeals Board that hadn’t net in over

15 years, refused to apply the Code in a fair and appropriate manner, ignoring the requirement that the “patients” (they are not patients, they are residents) be supervised (which they are not). The City treated this facility as if it were a hospital or a nursing home or an assisted living facility that provides medical services and supervises the patients. The facts, the real facts, simply do not support this view or the City’s decision.

**¶15 VIII. CERTIFICATE OF COMPLIANCE ON
WORD COUNT**

¶16 I hereby certify that this brief complies with FRAP 32(a)(8)(A); the word count is 1944 (2058 less 116 Table of Contents and Table of Authorities).

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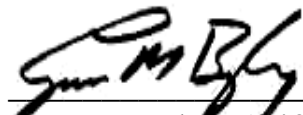
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¶17 IX. CERTIFICATE OF WORD PROCESSING
PROGRAM

¶18 The word-processing program is Microsoft Office Word 2003.

¶50 Dated this 5th day of January, 2015.



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Appellant, has served the following document:

1. Appellant’s Reply Brief

Upon the above named Appellee, City of Minot, by EMAIL on Monday, January 5, 2015, to:

Kelly Hendershot kelly.hendershot@minotnd.org

Dated this 5th day of January, 2015.

_____/s/ Lynn M. Boughey
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