20140337
FILED
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NOVEMBER 26, 2014
STATE OF NORTH DAKOTA

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 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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¶6 Issue 5: Whether alternate materials or methods of construction ought to be allowed under 104.11, "Alternative materials, design and methods of construction and equipment."

¶7 IV STATEMENT OF THE CASE

¶8 Robert Hale is building an expansion to his already existing residential elderly apartment complex. The original building was built with as an R-2 designation and rents apartments to active senior citizens who are required to be mobile, persons who come and go as they please and come down to eat at the residential dining facility, dress themselves, and do the normal everyday activities. On September 13, 2013, Mr. Hale applied to the City of Minot for a Residential designation. **A. 5.** He was told verbally that the City was going to insist on Institutional-1 designation; Mr. Hale submitted the application showing I-1 under protest so that building of the foundation and other preliminary building could begin, with everyone acknowledging that the provisional I-1 designation was used so building could begin but Mr. Hale's application was for Residential zoning. **A. 5.** The City denied his to

consider the zoning for the expansion as an R-2 and instead applied an Institutional-1 designation. By insisting on an Institutional-1 designation, the added requirements relating to the electrical wiring in the building is substantially more complex and resulted in Mr. Hale having to expend an additional $400,000 that is not necessary under the applicable codes; indeed, the record shows that the 2009 Code at issue is changing or has been changed to allow the wiring suggested in the original application. The City nonetheless refused to apply this upcoming change (through the rules that allow modification) and insisted that the designation be Institutional-1.

¶9 The City's denial was issued by Mitch Flanagan, Building Official, City of Minot by his one-page memo dated December 2, 2013. **A. 6.** In accordance with City Ordinance 9-1 and 9-2, Section 113, on December 5, 2013, Robert Hale, doing business as Bullwinkle Builders, Inc., appealed the decision of the City of Minot to its Board of Appeals. **A. 7-14.** On December 20, 2013, the City's Board of Appeals held an administrative hearing, received evidence and arguments of

counsel, and subsequently affirmed the City Engineer's decision in writing, applying Institutional-1 instead of Residential-2. The hearing was recorded and subsequently transcribed. **Doc. No. 38 & 99.**

¶10 On January 22, 2014, Mr. Hale appealed the City's Board of Appeals decision to the district court, the Honorable Gary Lee presiding. **A. 22.** On July 14, 2014, the district court heard arguments and issued a decision on July 30, 2014, affirming the City Board of Appeals. **A. 23-32.** Mr. Hale then appealed to the North Dakota Supreme Court on September 26, 2014, by filing his notice of appeal. **A. 33.**

¶11 V. STATEMENT OF THE FACTS

¶12 This appeal is brought under section 28-34-01, which provides the following:

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

> conservation district, or other political subdivision. Each appeal is governed by the following procedure:
>
> > 1. The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.

The standard that applies for appeals from local governing bodies is as follows:

> "When considering an appeal from the decision of a local governing body under N.D.C.C. § 28-34-01, our scope of review is the same as the district court's and is very limited. This Court's function is to independently determine the propriety of the [Board's] decision without giving special deference to the district court decision. The [Board's] decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. 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."

Grand Forks Housing Authority v. Grand Forks Board of County Commissioners, 2010 ND 245, ¶ 6, 793 N.W.2d 168, *quoting* Hagerott v. Morton County Bd. Comm'rs, 2010 ND 32, ¶ 7, 778 N.W.2d 813 (citations omitted).

¶13 VI. ARGUMENT

¶14 Mr. Hale asserts that the City misinterpreted Section 308.2 IBC 2009 and incorrectly concluded that the independent residential facility at issue is a facility that is "a supervised residential environment that provides personal care services" – the residents are not "supervised" and as such 308.2 does not apply. **A. 44, Doc. No. 19 at 6.**

¶15 The evidence that the residents are tenants and not supervised is clear and any contrary conclusion is not supported on the record and is unreasonable, arbitrary, and capricious. The record clearly shows the following:

- the tenants are unsupervised,
- there is no supervision of the tenants by Somerset,
- there are two types of assisted living facility as to care provided, supervised and independent living facility (such as at Somerset),
- Code provision 308.2 relates to supervised facilities and does not apply to independent residential entities,
- Somerset is a residential facility.

Doc. 38, T. 46, 48-49, 50, 52.

¶16 In addition, the few services provided are not commensurate to an assisted living facility as defended by ND law or 310.2 IBC 2009. **A. 46, Doc. No. 19 at 8.** Moreover, 310.2 also requires that the residents are being "supervised" while receiving personal care services and that the facility is responsible at all times for the residents' safety. **A. 46, Doc. No. 19 at 8.** Mr. Hale's facility is not any of the facilities defined in 310.2 (residential board and care facilities, assisted living facilities, halfway houses, group homes, congregate care facilities, social rehabilitation facilities, alcohol and drug abuse centers and convalescent facilities).

¶17 As a result of this misconstruction of the IBC 2009 to the facts at issue, the City incorrectly zoned the expansion as **Institutional-1** instead of **Residential-2** (the correct designation and the designation of the existing facility – which is merely being expanded with identical independent apartments). Mr. Hale further notes that for zoning and construction purposes, the expansion of the existing facility should consider the facility as an apartment complex for retired person who remain independent, mobile and receive very few

services (distribution of medications, meals at its in-house restaurant, and 24-hour emergency call system) and not the services provided at an assisted living facility (which focuses on many daily needs, including dressing, bathing, transferring , and other services NOT provided at the facility at issue).

¶18 Retirement/Assisted Living Facilities (such as the one at issue here) are apartments. These facilities are not institutions in any sense of the word, particularly any traditional sense of the term. As of today, to our knowledge (and Mr. Hale has looked carefully in both North and South Dakota – with a single exception) no retirement/assisted/independent living facility has been - UNTIL NOW - labeled as INSTITUTION for purposes of designation and being required to, for example, be wired entirely with conduit or MC Cable rather than romex cable. This mandate alone on the average sized retirement/assisted living facility will impose an additional cost of between $250,000 and $350,000.

¶19 Mr. Hale is presently building the expansion to his pre-existing R-2 building as an Institutional-1 structure (as required

by the City and disputed through this appeal), even though he strongly believes that the correct designation should have been Residential-2, as is the present structure. The only difference this will cause with this building is the type of wiring that will be required in an "institutional" designated building. All other "institutional" requirements are already fully met in the current design, and this was acknowledged during the hearing. The wiring required pursuant to the "institutional" designation **has nothing to do with safety**. It has only to do with the ease of future rewiring. This is because conduit –wiring makes it quicker and easier to rewire during remodeling. In Mr. Hale's application the building is a residential, not a commercial building and unlike in commercial buildings there is little to no rewiring due to remodeling.

¶20 Further, it is noted on the record that in June of 2014 the State is planning to even change this by adopting the use of what is called MC Cable. This is a method of accommodating the same as conduit but with a new product that is a prewired flexible cable. This option was developed to save cost relative to conduit. However, neither serves any purpose in residential

structures. Finally, there is no other jurisdiction in ND that requires an "institutional" designation for retirement/assisted living facilities. This designation will result in an added cost to Mr. Hale of over $400,000! These costs will, unfortunately, have to be passed on to the residents of this facility – an unnecessary and wasteful expense for everyone.

¶21 The building is presently going up and the installation of the wiring at issue is scheduled for right now. The City does not seem to understand that any further delay will result in justice being totally denied and leaving Mr. Hale with just a damage suit against the City for its failure to provide the proper designation or in the alternative the proper variance which would allow the wiring proposed by Mr. Hale to be installed as designed by the architects.

¶22 Finally, the evidence provided below shows that the added requirement and added expense is not necessary given the other fire safety construction methods employed. Moreover, the evidence shows that NO OTHER elderly residential apartment complex in North Dakota has had

to use this added form of writing, including one recently built and opened in Mandan.

¶23 There has been NO retirement/assisted living facility constructed/permitted in North Dakota that has been mandated (for 3 story or less) to be Institutional and thus have institutional wiring. There is no valid reason to do so. Moreover, if this requirement is sustained by the Court then every other similar facility in Minot - every new, expanded or remodeled retirement/assisted living facility - will be required to be built as an institutional facility and incur the significant yet unnecessary and dubious benefits while imposing significant additional and newly imposed costs. The added cost to build or expand these facilities will, unfortunately, result in added costs to the present and future residents of such facilities, despite the fact that those residents are not supervised, are receiving a modicum of services (meals and distribution of medication) as is provided in truly institutional facilities.

¶24 The Board of Appeals agreed with the inspector, concluding that some sort of medical services were being provided even though there was absolutely no evidence of that

being the case, and indeed that the opposite was true: If someone needs medical assistance, we transport them to a clinic or call 911. **A. 16-17, Doc. No. 38, T. 65.** The sole basis for the Board's blatantly incorrect conclusion (which is totally contrary to the evidence received) is a reference to a "medical room" at Sheet A10 room IB adjoining "medical room" 1C. **A. 16, Doc. No. 44 at 2.** The "medical" room is merely the residential services office where there is a desk and where the medications are locked up! As described (and is totally uncontroverted by the evidence) no medical services are provided at the residential living facility. It is called on the plans a medical room only because that is where the meds are kept. The care the tenants receive is not personal care as envisioned by the code sections mentioned. **Doc. No. 38, T. 66, 69, 70.**

¶25 The Board goes on to note that there are two housekeeping rooms on each floor. **A. 16, Doc. No. 44 at 2.** Residents have the option of paying for Somerset staff to clean their rooms and change their linens, though many do this on their own by using the residential washer and dryers. The

definitions applied in the Code for an Institution do not in any way refer to housekeeping issues, expect if this is intended as evidence of "personal care services." However, the Board (just like the City) totally ignored the two-part test for finding Somerset as Institutional designation: 1) that the occupants "live in a *supervised* residential environment, and 2) that "provides personal care services." **308.2, A. 44.** The essential element that the occupants are "supervised" is not only ignored, but the evidence is clear that the residents are NOT supervised, that they come and go as they please and live in an apartment setting. The Board's conclusion is not supported by a proper reading of the the Code and is not supported by the evidence presented.

¶26 The Board next refers to the safety aspects underlying the 2009 Code **A. 17, Doc. No. 44 at 3**, but fails totally to recognize the undisputed fact that the wiring requirement in the 2009 Code is going to be changed this upcoming June to allow the use of MC Cable (currently not permitted) exactly what Mr. Hale and his architects propose, if this appeal fails!

¶27 Mr. Hale continues to assert that the City and the Board of Appeals has misinterpreted Section 308.2 IBC 2009 [**A. 44]**.

1) The City has incorrectly concluded that the independent residential facility at issue is a facility that is "a **supervised** residential environment that provides personal care services" – the residents are not "supervised" and as such 308.2 [**A. 44**] does not apply. The residents come and go as they please, and are not controlled by the employees of Somerset. They have a full kitchen in every apartment; they can cook their own meals or choose to eat at the dining room which provides a full menu, just like a restaurant.
2) 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.
3) The facility is not responsible at all times for the residents' safety. The residents must be able to get out of the building if there is an emergency on their own. They must be able to get to the dining room on their own.

Although there is an emergency call service button, if the resident needs any type of medical assistance either the on-call (not on site) nurse is brought in or 911 is called and the resident is assisted by professional medical personnel.

4) Mr. Hale's facility is not an assisted living facility as defined in 310.2 [**A. 46**]. It is licensed as assisted living and advertised as having assisted living to allow for eligibility for long-term care policies. Because the residents **are not supervised and independent** by definition they facility for purposes of the code is not an assisted living facility. The City fails to include the other advertisement in the 2012 Minot phonebook that lists Somerset under "Retirement & Life Care Communities and Homes." **Doc. No. 32**.
5) Because the residents do not receive any more than two ADL's (daily living assistance) and only on a temporary basis, 310.2 [**A. 46**] does not apply. The residents are leasing apartments and R-2 is the correct designation.
6) In South Dakota Rapid City has amended specifically the IBC to include assisted living facilities. However, everywhere else in South Dakota, the assisted living facilities considered and designated R-2.

¶28 Much of this issue is probably moot because Mr. Hale, at the request to do so at the hearing, provided immediately following the hearing a copy of the designs requested that were prepared by "a registered design professional". The only aspect that is not moot is the added expense incurred by Mr. Hale to have "a registered design professional" re-draw the exact same drawing that were submitted and should have been accepted from the start since this requirement should not have applied to

Mr. Hale because the building relates to "rental apartment units that do not exceed three stories in height," and are exempted in the code itself. 43-03-02, subdivision (b)(3) [**A. 34**].

¶29 The City and the Board of Appeals have applied Section 43-03-02, subdivision (b)(2) instead of (b)(3) [**A. 34**], precisely because of conclusion 1, that the building is designated Institutional. In addition, the City and the Board of Appeals improperly refused to consider the building at issue as "rental apartment units" which specifically allows the plans for a three story structure to be drawn by the professional person who Mr. Hale hired to prepare the plans. This was the same person, by the way, who drew the original Somerset building plans!

¶30 Mr. Hale first asserts that the requirements of Section 43-03-02 [**A. 34**]– by an exemption in the statute itself -- does not apply to this project because the facility falls under exception (b)(3), "Rental apartment units that do not exceed three stories in height exclusive of a one-story basement [43-03-02(b)(3)]." [**A. 34**] The building, at the suggestion of one of the City engineers, was re-drawn from a four-story to a three-story building to allow this exception to apply! Now the City asserts

that the facility is excepted out of this exception because the building has been designated by the City per Mr. Flanagan as **Institutional-1**. As noted above, this designation as Institutional-1 is in error and should not have been applied by the City or the Board of Appeals.

¶31 Mr. Hale next asserts that even if his project is not exempted under 43-03-02(b)(3) [**A. 34**], the documents *were* properly prepared by a design profession (Ken Roll) under the direction and supervision of an architect and were properly certified by an architect (Bexell), and the requirement that the architect himself physically prepare the documents (as opposed to supervise and certify them) makes no sense and was arbitrary and capricious. **Doc. No. 38, T. 52.** The evidence received at the hearing is that Mr. Bexell has submitted the exact same documents, prepared by a non-design professional and certified by Mr. Bexell in other projects to the City and the City accepted this process and his certification as in full compliance with Section 43-03-02 [**A. 34**].

¶32 The City and the Board of Appeals continued to apply 43-03-02, subdivision (b)(**2**) instead of (b)(**3**). [**A. 34**]

1) As can be seen from a review of the plans themselves, including C-1 through C-4, all horizontal and vertical fire rated assemblies and their locations are shown on the floor plans. The requirement of these items being designed by a registered professional is based entirely on Flanagan's conclusion that Institutional applies instead of Residential (Issue 1).
2) Mitch Flanagan, when delineating his reasoning to Mr. Boughey that only a registered professional can draw the plans, specifically acknowledged that this requirement is being applied to Mr. Hale ONLY because of his conclusion (Issue 1) that the facility is delineated as Institutional, and if it were delineated as Residential this requirement would not exists as to this project.
3) The facility properly falls under exception (b)(3), "Rental apartment units that do not exceed three stories in height exclusive of a one-story basement [43-03-02(b)(3)]. The building, at the suggestion of one of the City engineers, was re-drawn to a three-story building to allow this exception to apply! As noted above, this designation as Institutional-1 is in error.
4) Mr. Hale continues to assert that the documents *were* properly prepared by a designer (Ken Roll) under the direction and supervision of an architect and that were properly certified by an architect (Bexell), and the requirement that the architect himself physically prepare the documents (as opposed to supervise and certify them) is unreasonable and not necessary in any case. Mr. Bexell was hired at the suggestion of Mitch Flanagan. Mr. Bexell has submitted the exact same documents, prepared by a designer and certified by Mr. Bexell in other projects to the City and the City accepted this process and his certification as in full compliance with Section 43-03-02.

¶33 The City admits that it has no written "administrative guidelines" in regards to what is necessary for a code study, and

can point to no written "industry standard" as to what is required, and instead Mr. Flanagan asserts that the requirement is left entirely to his own discretion. **Doc. 33, Item 3**. Mr. Hale asserts that according to the IBC 2009 all that is required is "the plans must be of sufficient clarity to show in detail that the proposed work will comply with the code." Everyone acknowledged at the hearing that the plans were sufficient and there were no problems with the plans except the request to have them "re-drawn" by the architect. **Doc. No. 38, T. 70-73.** The information supplied by Mr. Hale is sufficient and complied with the purpose of the code and demonstrates that "the proposed work will comply with the code." The issue of the code study being prepared by "a registered design professional" is dealt with in regards to the second reason for denial listed immediately above.

¶34 The City Code provision that creates the Board of Appeals and lists its powers and function (at Section 113 subd. 2--[**A. 35-38]**) specifically allows the Board to apply Section 104.10 of the IBC [**A. 40**] and approve modifications where "special individual reason makes 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." **A. 40, Doc. No. 35 at 2 and Doc. No. 19 at 2.** In other words, Subsection 104.10 of the IBC has been adopted as part of the role of the Board in resolving code issues. Section 104.10 allows the Board of Appeals to apply reasonableness and the application of the spirit of the code where appropriate:

> 104.10 Modifications. Wherever 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, upon application of the owner or owner's representative, provided the *building official* shall first find that special individual reason makes 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. The details of action granting modifications shall be recorded and entered in the files of the department of building safety.

A. 40, Doc. No. 19 at 2. The City and the Board of Appeals refused to allow a modification even though the type of wiring proposed by Mr. Hale as an alternative to conduit (MC Cable) and his architects will be approved this June. However, Mr.

Hale's designers have demonstrated that the safety concerns of using romex impair no safety in any manner and are alleviated by the type of fire suppression system that Mr. Hale is employing. **Doc. No. 38, T. 101, 111-112.**

¶35 The Board of Appeals relied primarily on the designation of Somerset as an "assisted living" facility in the telephone directory **A. 17, Doc. No. 44 at 6** even though a traditional assisted living facility provides a plethora of personal care assistance, something that the record showed does not occur at this residential living facility where the renters must be ambulatory and not subject to daily care needs. The exception requested should have been granted by the City and the Board of Appeals. The Board was indeed asked to approve the specific modifications [**A. 20],** which was to allow the type of wiring used in an R-2 building instead of an Institutional building. The Board of Appeals erred in not doing so.

¶36 Mr. Hale asserts that the Code Study has been prepared -- by Mitch Flanagan himself.

1) On September 11, 2013, via email, Mitch Flanagan informed Robert Hale that he had looked at the plans and completed a preliminary Code study, and attached an

eight-page code study to his email to Robert Hale. **Doc. 33, Item 3**. The Code study has been completed, and it was completed by Flanagan himself.

2) Robert Hale has provided a certification dated November 25, 2013, by a registered design professional Scott Bexell (the professional suggested by Flanagan). Mr. Bexell has stated that this use of a certificate by him is sufficient for industry standards and has been previously accepted as sufficient by the City.
3) Robert Hale, at Flanagan's request, had the plans re-drawn to comport with Flanagan's requests. See C-1, C-2, C-3, and C-4. These additional plans show all elements of the information needed to show "sufficient clarity to show in detail that the proposed work will comply with the code."
4) Flanagan admitted to Mr. Boughey that **there are no written administrative guidelines** and that he decides what is sufficient: It is what I decide - My criteria – no code or regulation – nothing in writing – "whatever we normally use" – "whatever I need to understand what is being done " – "up to me – If I decide it is enough and what I need" **Doc. 33, Item 3**.
5) The issue of the code study being prepared by "a registered design professional" is dealt with in regards to the second reason for denial listed immediately above.

¶37 By the same token, the City Code provision that creates the Board of Appeals and lists its powers and function (at Section 113 subd. 2, **A. 35-38**) specifically allows the Board of Appeals to apply Section 104.11 of the IBC which allows the City and the Board of Appeals to approve a "proposed design is satisfactory and complies with the intent of the provisions of this code." **A. 41, Doc. No. 35 at 2 and Doc. No. 19 at 3.** In

other words, Subsection 104.11 of the IBC has been adopted as part of the role of the Board of Appeals in resolving code issues. Section 104.11 [**A. 41]** allows the Board of Appeals, to apply reasonableness and the application of the spirit of the code where appropriate:

> 104.11 Alternative materials, design and methods of construction and equipment. The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code, provided that any such alternative has been *approved.* An 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, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, *fire resistance,* durability and safety.

A. 41, Doc. No. 19 at 3.

¶38 The Board should have, as allowed under the Board's mandate, approved 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." **Doc. No. 19 at 3.** The requested use of alternative materials, design and methods of construction should have been granted by the City

and the Board of Appeals. The Board was indeed asked to approve the specific alternative **Doc. 38, T. 70** and Hale appeal brief **Doc. 17 at 4-5** and reply brief **Doc. 30 at 5**, which was to allow the type of wiring used in an R-2 building instead of a Institutional building. The Board of Appeals erred in not doing so.

¶39 Implications of Applying Institutional to non-Supervised Retirement-Living Facilities The consequence of the requirements that are being proposed by the City Building Department are novel, significant and will dramatically impact the provision and cost of the provision of assisted living housing. As everyone knows the largest growing segment of the housing market is housing for the baby-boomer generation. Specifically the Retirement/Assisted/Independent Facilities in Minot will be dramatically impacted if these facilities are required to be classified as "Institutional" facilities. Unfortunately, designation as “institutional” will provide NO additional safety or other benefits only significant additional costs.

¶40 We need to note there are a variety of designations that

have been identified by building professionals. We have true "Institutional" facilities such as Basic Care, Nursing, Memory Care, Rehabilitation, hospitals etc. Simply lumping an entire segment of housing "Assisted/Retirement/Independent Living Facilities" and labeling the as "Institutional" rather than carefully and properly looking at who these occupants are will do great disservice to our aging population.

¶41 There is, of course the argument that costs should not be a major consideration or possibly any consideration when it comes to life safety. To some degree that may be correct. However, there are building codes and safety construction steps that have been developed to balance in an appropriate manner cost, benefit and safety. That was one of the major advances we saw with the adaption of the International Building Code. Significantly, the building at issue has an NFPA 13 fire suppression and fire detection and alarm system. **Doc. No. 38, T. 51-52, 111-112.** In addition the Facility itself has 24-hour staffing, and exits have been located and designed to facilitate evacuation in the case of any emergency. State regulations ensure that residents of

retirement/assisted living facilities practice escape in the case of an emergency - not only fire but natural disasters and other emergency situations.

¶42 Lastly, it should be noted that Mr. Hale has a three story facility in South Dakota, whose retirement/assisted living facilities are overseen and directed by the state Health Department. South Dakota recognizes the IBC and does not mandate "Institutional" designation and the consequential mandates and fiscal impacts of such a designation. To date there are no North Dakota jurisdictions that have done what the City of Minot is now attempting to do. It is our hope that the interpretations we have made and other permitting jurisdictions -- including this one until now have made will prevail.

¶43 Result of the City Denial to Mr. Hale. Mr. Hale notes what is most probably obvious but needs to be said: The City's actions in making Mr. Hale provide unnecessary additional information, documents, and revisions in order to placate the building official and the City's denial itself has, is, and will cost Mr. Hale substantial added expense in regards to the building of this expansion. The present facility is properly designated

Residential-2 and this expansion, even under the new IBC 2009, should have been given the same designation. A fair reading of the code and a fair application of the type of residents and the type of facility at issue should result in approval of the project as a Residential not an Institutional facility and acceptance of the information provided and prepared at significant additional expense to Mr. Hale.

¶44 VII. CONCLUSION

¶45 Mr. Hale requests that the Court reverse the decision of the district court affirming the City of Minot's Board of Appeals decision.

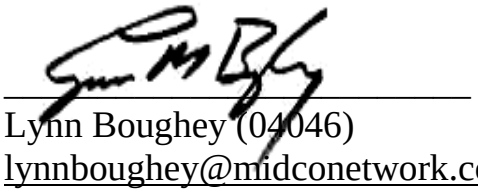
¶46 VIII. CERTIFICATE OF COMPLIANCE ON WORD COUNT

¶47 I hereby certify that this brief complies with FRAP 32(a)(7)(A); the word count is 5878.

¶48 IX. CERTIFICATE OF WORD PROCESSING PROGRAM

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

¶50 Dated this 26th day of November, 2014.



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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, has served the following document:

1. Appellant's Brief
2. Appellant's Appendix

Upon the above named Appellee, City of Minot, by EMAIL on Wednesday, November 26, 2014, to:

Kelly Hendershot kelly.hendershot@minotnd.org

Dated this 26th day of November, 2014.

__/s/_Lynn M. Boughey_____
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