
In the Supreme Court State Of North Dakota

Lonny C. Sandahl and,
Lilian K. Sandahl,
Appellants,

v.

City Council of
City of Larimore
Appellee.

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Supreme Court Case No. 20150364

[Dist. Ct. No. 18-2015-CV-00664]

**Appeal from Order Denying Motion to Submit Additional Evidence and Order
Affirming Appellee's Order for Demolition entered on September 24, 2015 and
Judgment entered on September 25, 2015**
Civil No. 18-2015-CV-00664 County of Grand Forks,
Northeast Central Judicial District
Honorable Lolita G. Hartl Romanick, Presiding

BRIEF OF APPELLANT LONNY C. SANDAHL &, LILIAN K. SANDAHL

Dated this 25th day of April, 2016.

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¶ 3] JURISDICTIONAL STATEMENT

¶ 3] This Court holds jurisdiction over this proceeding pursuant to Article VI, Section 2 of the Constitution of North Dakota and 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).

¶ 4] STATEMENT OF THE ISSUES

- A. The District Court committed error by holding that the Sandahls failed to establish that the City acted in an arbitrary or capricious manner
- B. The District Court committed error by holding the City's Findings of Fact and Order are supported by the weight of the evidence and the Findings of Fact Support the Conclusions of Law Set forth in the City's Order requiring demolition of Sandahls' property at 107 Pate Avenue, Larimore, ND
- C. The District Court committed error by holding that Sandahls also failed to provide any reasonable grounds for failing to adduce the four proposed additional exhibits as evidence at the March 2, 2015 hearing
- D. The District Court committed error by holding that the Sandahls' failed to establish that the additional evidence they wish to submit is material. In addition, the proposed exhibits 1-3 are cumulative of testimony, which was provided.
- E. (1) Whether or not the City Council acted arbitrarily or unreasonably in determining that the buildings located at 107 Pate Avenue were substandard; and (2) Whether or not the City Council acted arbitrarily or unreasonably in ordering the removal of that building.

¶ 5] STATEMENT OF THE CASE

On September 13, 2014, Sandahl received Notice of Public Nuisance and Order to Repair or Demolish by the City of Larimore ("Notice"). (See, the Appellants' Appendixate stamped City and page number, City pp. 2-17 ("Appx."), pp. 2-17). The Notice requested pursuant to § 9.0411 and § 9.0503 indicated the structure unit was a public nuisance and dangerous to public health and shall be repaired, vacated, demolished, or said violations discontinued as provided by § 9.0412 and § 9.0502 of Municipal Ordinances of the City of Larimore. Said property is more properly described as follows:

107 Pate Ave
Larimore, ND 58251

(the "Property"). (Appx. p. 2.).

On February 4, 2015, Notice of Public Hearing regarding the disposition of the status of the Property and other properties were to be held. (Appx. p. 18).

On March 2, 2015, a Public Hearing regarding the Property, along with two other properties held at the same time, were heard in front of the City Council, wherein the Inspector recommended that the Property be demolished. The Order for Demolition In the matter of "Substandard Building or Substandard Dwelling Unit" Located At 107 Pate Avenue, Larimore, North Dakota signed on March 5, 2015, indicates that the City Council of the City of Larimore received a report from the building inspector. No such report on the standards of the condition of the Property was presented at the hearing held on March 2, 2015. (Appx p. 39, 46-54).

On April 13, 2015, the appellants filed notice to district court. **Doc ID #1** in Case No. 18-2015-CV-00664. (Appx. p. 57). On July 10, 2016, Appellants filed a motion to submit additional evidence, three exhibits (Exhibits A, Exhibits B, and Exhibits C), in

addition, a Brief on Appeal from the City Council's decision to demolish the Property. Appellee filed a Response brief, and the district court denied the motion for additional evidence, and affirmed the City Council's Order to Demolish.

On December 28, 2015, Sandahl filed a Notice of Appeal to this Court. (Appx. pp. 60-61). Sandahl seeks a reversal of both the district court's and the City Council's decisions in this matter. The district court's decision to deny the Sandahl's Motion to Submit Additional Evidence was in error because the documents the Sandahl sought to admit are strong evidence that influenced the City Council in a biased, unreasonable, and arbitrary nature in their decision to demolish the Property. Further, the City Council's decision to demolish the Property was arbitrary, capricious, and unreasonable, because neither the building inspector's report, the minutes of the City Council meeting, the notice of final determination, nor the testimony of the witnesses at the City Council hearing provide evidence that might clearly establish that the structures were beyond repair under any reasonable standard which the City Council might choose to apply.

[¶ 6] STATEMENT OF FACTS

I. Record and Proceedings Before the City Council of the City of Larimore ("City Council").

[¶ 6] On September 13, 2014, Sandahl received Notice of Public Nuisance and Order to Repair or Demolish by the City Council *without a Hearing* ("Notice"). (Appx. pp. 2-17). The Notice requested pursuant to § 9.0411 and § 9.0503 indicated the structure unit was a public nuisance and *dangerous to public health* and shall be repaired, vacated, demolished, or said violations discontinued as provided by § 9.0412 and § 9.0502 of Municipal Ordinances of the City of Larimore. Said property is more properly described as follows:

107 Pate Ave
Larimore, ND 58251

(the "Property"). (Appx p. 2.) The Notice requested *such repairs or demolition must be complied with within 90 days.* (*Id.*) Along with the Notice, a superficial Property Condition Inspection was submitted by City Inspector Richard L. Parsons (Inspector) with no investigation of the integrity of the interior of the Property “as no attempt was made to enter the (P)roperty”. (Appx. p. 4.)

[¶ 7] On February 4, 2015, Notice of Public Hearing regarding the disposition of the status of the Property and other properties were to be held. (Appx. p. 18).

[¶ 8] On February 19, 2015, an additional superficial Inspection with pictures taken of the snow covered Property was made by the Inspector and that “no change” was noticed because “(s)now cover did limit visibility.” (Appx. p. 33-37).

[¶ 9] On March 2, 2015, a Public Hearing regarding the Property, along with three other properties held at the same time, was heard in front of the City Council, wherein the Inspector recommended that the Property be demolished. The Order for Demolition In the matter of “Substandard Building or Substandard Dwelling Unit” Located At 107 Pate Avenue, Larimore, North Dakota signed on March 5, 2015, indicates that the City Council of the City of Larimore received a report from the building inspector. No such report on the standards of the condition of the Property was presented at the hearing held on March 2, 2015. (Appx. p. 39, 46-54).

II. Supplemental Evidence Submitted to the District Court.

[¶ 10] On February 5, 2015, the Larimore Leader/Tribune -- Official Newspaper for the City of Larimore, ND School District No. 44, and The Emerado, ND School District No. 127 (“Leader”) published the announcement of a “public hearing . . . March 2nd

regarding the fate of several parcels of property, including the property at 123 Terry Avenue, owned by Ed Larson, and three lots, 109, 113 and 124 Pate Avenue, owned by Lonnie and Lilian Sandahl, **that are subject of a number of complaints from neighbors**". (*emphasis added*). (Appx p. 63).

[¶ 11] On February 12, Lilian Sandahl wrote in the Leader a response correcting the typographical error of 107 Pate Ave, rather than 109 Pate Ave, that there was "only one person" who complained about the Property (later dubbed the "**chronic complainer**"), and that "(w)inter has temporarily stopped . . . work" and "**will resume as soon as the weather permits**". (*emphasis added*). Please, take Judicial Notice that the temperature on February 19, 2015, the day of the report of the further inspection, was a mean temperature of -6 °F, max temperature 11 °F, and min Temperature -23 °F in Larimore, ND. Subsequently, Mike Breeden, who lived at 103 Pate Ave in Larimore ND, made an admission in the Leader that he was the "**chronic complainer**", that he lived next door to the Property, and that he had "purchased one lot, (103 Pate Ave), instead of two (103 and 107 Pate Ave, adjacent properties) that (he) was intending to". Essentially, Breeden could make one contiguous property by owning both 103 and 107 Pate Ave. (Appx. pp. 64-65). At the Hearing, Mike Breeden's wife Virginia Breeden testified to the City Council in this exchange:

MAYOR FEGTER: Okay. Before we take this into a vote, is there anybody else that would like to voice *their* opinion?

MS. BREEDEN: I do.

MAYOR FEGTER: Please state your name, please, for the record?

MS. BREEDEN: **I'm Virginia Breeden**. We live next door.

MAYOR FEGTER: Virginia Breeden.

COUNCIL MEMBER: Why don't you come up here, ma'am.

MAYOR FEGTER: Just the issues of the house, ma'am, please.

MS. BREEDEN: Yeah, this is what I've got to say. *We had -- okay, we had a, we had a chance to buy all three lots there at one time. Well, we didn't want them and we were going to buy the two and the lady that sold said, she said there's a lot of black mold upstairs so if you're going to buy this, I won't charge you for the house, but I'll charge you for the lot as long as you tear down the house. And we, right at that time, we didn't want to do it so we bought one lot.* There is black mold up there. I've been up there. That's all I want to say.

MAYOR FEGTER: All right. Thank you. Anyone else from the audience want to voice a quick opinion?

MS. OLSON: *The last time I was in there there wasn't any* (black mold).

MS. BREEDEN: Well, I don't know when you were there but when they were moving out it was black mold 'cause I had to put a mask on. I'm not going to argue about it.

MAYOR FEGTER: All right.

MS. BREEDEN: It's not worth arguing about.

See, the Transcript of Hearing on March 2, 2015 p. 45, ln 13-25 and p. 46, ln 1-23. (*emphasis added*).

This testimony coincides with the “*chronic complainer*”, their aspirations to own the Property, and their lack of either ability or intention to “tear down the house”, but acquire the Property via other means at little to no cost to Breeden. The unreasonable evaluation of the facts before the Council led to unacceptable means in evaluating whether the Property existed in violation of the terms of Ordinance.

[¶ 12] Under Larimore City Ordinance § 9.0502 Standards for Repair, Vacation or Demolition:

The following standards *shall* be followed in substance by the Building Inspector and the Governing Body in ordering repair, vacation or

demolition:

- a. If the "dangerous building" can reasonably be repaired so that it will no longer exist in violation of the terms of this article it shall be ordered repaired.
- b. If the "dangerous building" is in such condition as to make it dangerous to the health, morals, safety, or general welfare of its occupants it shall be ordered to be vacated.
- c. In any case where a **"dangerous building" is fifty (50) percent damaged or decayed or deteriorated from its original value or structure, it shall be demolished, and in all cases where a building cannot be repaired so that it will no longer exists in violation to the terms of this article it shall be demolished.** In all cases where a "dangerous building" is a fire hazard existing or erected in violation of the terms of this article or any ordinance of the city or statute of the State of North Dakota, it shall be demolished.

Id. (emphasis added).

The Mayor in agreement with the Council amended the motion “to make (the Property) a **dangerous building**”. See, the Transcript of Hearing on March 2, 2015 p. 48, ln 1-6. In the Findings of Facts there is no record of a “**percent damaged or decayed or deteriorated**” as per required of Larimore City Ordinance § 9.0502 Standards for Repair, Vacation or **Demolition** and was Ordered to “demolish” the Property without a finding whether the Property could be **repaired so that it will no longer exist() in violation to the terms of this article.** (Appx. pp. 47-49). Building Commission City of Finley in Finley, North Dakota 58230 has a similar, if not *identical*, Ordinance, wherein there was a finding of fact that “dangerous building as defined by the ordinances of the City of Finley in that the building, exclusive of the foundation, “**shows 33 % or more damage or deterioration of the supporting member or members, and/or 50% or more damage or deterioration of the non-supporting enclosing or outside wall or covering.**” (Appx. p. 67). A reasonable Inspector would have examined the interior of the “dangerous

building” to evaluate whether the Property was fifty (50) percent damaged or decayed or deteriorated from its original value or structure. However, more importantly a reasonable inspector would have made a determination as to whether the Property could have been repaired so that it will no longer exists in violation of the Ordinance. Council chose a unique time in the jurisdiction of the District of North Dakota, winter. As mentioned earlier, inclement weather limited the ability to repair the Property, let alone find the proper personnel to do so. (Appx. 67). Sandahl had the proper means to repair the properties, namely the Property in question. Respectfully submitted was the quote given to Sandahl by Marvin LaFontaine a major component of the supporting structure of the Property, the roof. LaFontaine did testify that he was in the process of fixing all three properties of Sandahl, but winter had impeded his ability to continue. Reduced to the essentials, Sandahl was able to seek, find, and pay for a contractor who would repair the roof of the Property. (Appx. p. 69).

[¶ 13] LAW AND ARGUMENT

I. Standard of Review

[¶ 13] Any person "aggrieved by a decision" of a City Council 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.

[¶ 14] 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. Leever's 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).

[¶ 15] Here, the evidence in the record before the City Council demonstrates that its decision was arbitrary and capricious. Additionally, the arbitrary nature of the decision is further demonstrated by the pecuniary interests of a number of parties, including the adjacent neighbors Mike and Virginia Breeden, one who testified on behalf of the benefits of demolishing of 107 Pare Avenue potentially in order to avoid the cost of leveling the property at no cost should they purchase the adjacent lot. See, the Transcript of Hearing March 2, 2015.

III. The Standard to Meet in order to Demolish a Privately-Owned Property is Statutory and therefore an Objective Standard.

[¶ 16] Under Larimore City Ordinance § 9.0502 Standards for Repair, Vacation or Demolition:

The following standards *shall* be followed in substance by the Building Inspector and the Governing Body in ordering repair, vacation or demolition:

- d. If the "dangerous building" can reasonably be repaired so that it will no longer exist in violation of the terms of this article it shall be ordered repaired.
- e. If the "dangerous building" is in such condition as to make it dangerous to the health, morals, safety, or general welfare of its occupants it shall be ordered to be vacated.
- f. In any case where a "dangerous building" is fifty (50) percent damaged or decayed or deteriorated from its original value or structure, it shall be demolished, and in all cases where a building cannot be repaired so that it will no longer exists in violation to the terms of this article it shall be demolished. In all cases where a "dangerous building" is a fire hazard existing or erected in violation of the terms of this article or any ordinance of the city or statute of the State of North Dakota, it shall be demolished.

Id. (emphasis added).

The Mayor in agreement with the Council amended the motion “to make (the Property) a dangerous building”. See, the Transcript of Hearing on March 2, 2015 p. 48, ln 1-6. In the Findings of Facts there is no record of a “percent damaged or decayed or deteriorated” as per required of Larimore City Ordinance § 9.0502 Standards for Repair, Vacation or Demolition and was Ordered to “demolish” the Property without a finding whether the Property could repaired so that it will no longer exists in violation to the terms of this article. (Appx. pp. 47-49).

[¶ 17] Building Commission City of Finley in Finley, North Dakota 58230 has a similar,

if not *identical*, Ordinance, wherein there was a finding of fact that “dangerous building as defined by the ordinances of the City of Finley in that the building, exclusive of the foundation, “shows 33 % or more damage or deterioration of the supporting member or members, and/or 50% or more damage or deterioration of the non-supporting enclosing or outside wall or covering.” (Appx. p. 67). The calculation of the damage sustained to the structure of the building has historical significance as to the application of the whether a building is deemed fit to be demolished and will be discussed at length later in this brief.

[¶ 18] The Larimore City Ordinance § 9.0502 Standards for Repair, Vacation or Demolition are not arbitrary and have reasonability is their historical construction in the City’s Code. The Court states,

This court has, in the past, reviewed actions taken by municipal authorities under the authority granted by city ordinances enacted pursuant to Section 40-05-02 (24), N.D.C.C. In *Soderfelt v. City of Drayton*, 79 N.D. 742, 59 N.W.2d 502 (1953), the City of Drayton, following notice and hearing, issued an order that a certain building be removed or demolished. The owner of the building appealed this order to the district court contending that the action of the city council was arbitrary, unfair, and unreasonable. The issue in *Soderfelt, supra*, as in the instant case, was whether or not the building was repairable. This court framed the question in the following manner:

“ . . . whether the evidence at the hearing before the city council was sufficient to warrant the city council in concluding that the building had deteriorated to such a degree that it was beyond repair, or whether the city council abused its discretion in ordering its removal and demolition.”

Id. at 510.

Section 3 of the ordinance in *Soderfelt* contained the following subsections:

“(a) If the substandard building or structure can reasonably be repaired so that it will no longer exist in violation of the terms of this ordinance it shall be ordered repaired.”

* * * *

"(c) In any case where a substandard building or structure is 50% damaged or decayed, or deteriorated from its original value or structure, it shall be demolished and in all cases where a building cannot exist in violation of the terms of this ordinance it shall be demolished."

The Drayton City Council made specific findings of fact, supported by substantial evidence, that the building in question had deteriorated more than 50% of its value. The council's determination was therefore affirmed by this court. In the instant case, neither the building inspector's report, the minutes of the city council meeting, the notice of final determination, nor the testimony of the City's witnesses at the district court hearing provide evidence that might clearly establish that the structures were beyond repair under any reasonable standard which the City might choose to apply.

In the case of *Russell v. City of Fargo*, 28 N.D. 300, 148 N.W. 610 (1914), the plaintiff brought an action to obtain a decree declaring Chapter 13 of the Consolidated Ordinances of the City of Fargo null and void. The particular feature of the ordinance which was challenged provided that

"It shall be unlawful to repair any frame building within the fire limits of the city, when such building shall have been damaged by the elements or decay to the extent of 50 per cent. of such building exclusive of the foundation thereof." *Id.* at 613.

In upholding this ordinance we stated that:

"The authorities indicate that there must be some method of determining whether changes made in an old structure are sufficient to constitute a rebuilding or the erection of a new structure, and such provisions are based on the supposition that there is a point somewhere between a perfect or safe building and one which cannot be made safe as to fire, etc., without complete demolition and a rebuilding. Both the Legislature and the city council have fixed that point at 50 per cent. deterioration above the foundation, evidently taking the view that, where it has deteriorated more than half in value, that is, has so deteriorated that on a reconstruction, the building will be more new than old, it is the erection of a new building, rather than the repairing of an old one (citation omitted), but an arbitrary prohibition is invalid." *Id.* at 615.

Ordinance No. 327 fixes no "point somewhere between a perfect or safe building and one which cannot be made safe . . . without complete demolition and rebuilding". The ordinance invests the decision of whether to repair or destroy in the complete discretion of the city council.

Pic v. Grafton, 339 N.W.2d 763, 766-767 (N.D. 1983).

Here, the City Council acted arbitrarily, capriciously, or unreasonably by not following in substance by the Building Inspector and the Governing Body in ordering repair, vacation or demolition. The Notice of Public Nuisance and Order to Repair or Demolish indicates § 9.0502 Standards for Repair, Vacation or Demolition mandating that repair be part of the remedy. There was discussion at the Hearing of repair. See, the Transcript of Hearing on March 2, 2015. Yet, no findings of fact or conclusions of law incorporated the “*percent damaged or decayed or deteriorated*” as per required of Larimore City Ordinance § 9.0502 Standards for Repair, Vacation or *Demolition*. In fact, in the brief Building Inspection reported on February 19, 2015, the City of Larimore Inspector admits that The City Inspector even admits “(s)now cover did limit visibility” in his Building Inspection for the City Council to base their findings in the subsequent hearing. (Appx. p. 33).

[¶ 19] VI. The Decision Of The County Board Was Arbitrary, Capricious, And Unreasonable Because No Suggestion Of Repairs Or Alterations Were Made.

[¶ 19] Since, the no value has been found by the City Council, then an arbitrary, capricious and unreasonable conclusion would logically follow; however, the conclusion has drastic consequences due to the nature of the property as is here. The destruction of 107 Pate Ave is the conclusion of law by the City Council, and without proper steps, it must me a means of last resort. The Court states,

But destruction of the property is a drastic remedy, and it must necessarily be a remedy of last resort "unless the property is of such nature that its use or possession cannot be other than for evil." *Pic v. City of Grafton*, 339 N.W.2d 763, 766 (N.D. 1983). In *Pic* we quoted from the *Minnesota case of York v. Hargadine*, 142 Minn. 219, 223, 171 N.W. 773, 775 (1919), which held that where repairs or alterations can be made to eliminate the danger to surrounding property and to persons, "such repairs or alterations should be ordered rather than a tearing down of the building." We went on to state in *Pic* that a State's police

power "cannot be extended by the authority which is entrusted with its exercise to an arbitrary misuse of private rights." *Pic **stands for the proposition that where less drastic means are available to correct or alleviate the problem, destruction of private property deemed a nuisance is an arbitrary act that is prohibited as a matter of law.*** (emphasis added).

Minot v. Freeland, 380 N.W.2d 321, 324 (N.D. 1986).

After two notices to repair, no evaluation of such repairs or alterations were to be ordered, and a final determination by the City Council to demolish 107 Pate Ave, the drastic remedy is reached as an arbitrary, capricious, and unreasonable first resort, rather than last.

[¶ 20] 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 City Council's Notices, Hearings, Findings of Fact and Conclusions of law was not founded on reason or fact, as it was triggered by the "chronic complainer", aided in testimony to their benefit, and unreasonably concluded that 107 Pate Ave be demolished for the sake of the purported health, safety, and morals of the City of Larimore.

[¶ 21] CONCLUSION

[¶ 21] Appellant Lonny C. Sandahl and, Lilian K. Sandahl respectfully requests this Court reverse the district court's order denying the motion to submit additional evidence and reverse the order affirming the appellee's order for demolition entered on September 24, 2015 and judgment entered on September 15, 2015.

Dated this 25th day of April, 2016.

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In the Supreme Court
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Supreme Court Case No. 201S0364

[Dist. Ct. No. 18-2015-CV-00664]

RULE 25(c)(1)(D) N.D.R.APP.P. CERTIFICATE OF ELECTRONIC SERVICE

[¶22] Pursuant to Rule 25(c)(1)(D) of the North Dakota Rules of Appellate procedure, the undersigned counsel for the appellant on this 14th day of April, 2016, electronically transmitted:

1. BRIEF OF APPELLANT LONNY C. SANDAHL &, LILIAN K. SANDAHL

to Counsel for Respondent:

Clerk of the Supreme Court:

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Dated this 25th day of April, 2016.

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