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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lonny C. Sandahl and Lilian K. Sandahl, Petitioners/Appellants, v. City Council of the City of Larimore, Respondent/Appellee.	SUPREME COURT NO. 20150364 GRAND FORKS COUNTY DISTRICT COURT 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

THE HONORABLE LOLITA G. HARTL ROMANICK

Grand Forks County District Court
Northeast Central Judicial District
Case No. 18-2015-CV-00664

BRIEF OF APPELLEE CITY COUNCIL OF THE CITY OF LARIMORE

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STATEMENT OF ISSUES PRESENTED

[¶1] **Did the district court properly deny the Sandahls' Motion to Submit Additional Evidence because the Sandahls failed to establish good cause why the proposed additional evidence was not presented to the City Council at the March 2, 2015 hearing, was not material, and was duplicative of testimony received?**

[¶2] **Was the decision of the City Council for the City of Larimore arbitrary, capricious, or unreasonable, when the great weight of the evidence supported and demonstrated the property would be an excessive burden to rehabilitate?**

STANDARD OF REVIEW

[¶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." Grand Forks Homes, Inc. v. Grand Forks Bd. of Cnty. Comm'rs, 2011 ND 50, ¶ 8, 795 N.W.2d 381. "A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law." Dahm v. Stark Cty. Bd. of Cty. Comm'rs, 2013 ND 241, ¶ 29, 841 N.W.2d 416 (quoting State v. Ramsey, 2005 ND 42, ¶ 8, 692 N.W.2d 498).

[¶4] In an appeal from the decision of a local governing body, judicial review is limited by the doctrine of separation of powers. Pic v. City of Grafton, 1998 ND 202, ¶ 6, 586 N.W.2d 159 ("Pic II"). While this Court's function is to "independently determine the propriety of the local governing body's decision, . . . [t]he decision of a local governing body must be affirmed unless the local body acted arbitrarily, capriciously or unreasonably, or if there is not substantial evidence supporting the decision." Hector v. City of Fargo, 2009 ND 14, ¶ 9, 760 N.W.2d 108 (citing Graber v. Logan County Water Res. Bd., 1999 ND 168, ¶ 7, 598 N.W.2d 846; Anderson v. Richland County Water Res. Bd., 506 N.W.2d 362, 367 (N.D.1993)). This standard of review ensures that the judgment of the judiciary is not a substitute for that of the local governing body which initially made the decision. Id. (citing Pic II, 1998 ND 202, ¶ 6). The record is adequate to support the findings and conclusions of a local governing body if it allows this Court to discern the rationale for the decision. Id.

STATEMENT OF CASE

[¶5] This matter came before the Larimore City Council (the "City") at a hearing held on March 2, 2015 pursuant to a Notice of Public Hearing In the Matter of "Substandard Building or Substandard Dwelling Unit" Located at 107 Pate Avenue, Larimore, North Dakota (the "Public Hearing"). P-App. 18-31; 41-42[1]. There were four properties addressed at the Public Hearing, three of which the Sandahls owned. P-App. 41-42. The City, by a vote of 5-0, declared the structure located at 107 Pate Avenue unsafe and a dangerous building (the "Building") and, as a result, the Building was required to be torn down. P-App. 46-49. On April 13, 2015, Appellants, Lonny C. Sandahl and Lilian K. Sandahl (the "Sandahls") filed a notice of appeal. P-App. 57-58.

[¶6] On May 13, 2015, the district court issued a briefing schedule. Court Doc. 19. After two continuances that extended the deadline for the appellants' brief until July 10, 2015, the Sandahls filed an appellate brief on July 11, 2015. Court Doc. 24, 28, 31[2]. In addition, the Sandahls filed a motion to submit additional evidence. Court Doc. 34-37; P-App. 62-69. On July 27, 2015, the City filed a response to the motion to submit additional evidence and the district court appellee brief. Court Doc. 41.

[¶7] A hearing on the Sandahls' motion and appeal was held on September 17, 2015. P-App. 71. On September 24, 2015, the district court denied the Sandahls' motion to submit additional evidence and affirmed the City's Order declaring the Building unsafe

[1] The Appellants' Appendix will be cited to as "P-App." followed by the page number. The pages marked as "City 1" through "City 56" are the Record for Appeal pursuant to N.D.C.C. § 28-34-01. The remainder of the Appendix, "City 57" through "City 84," was numbered by the Sandahls for this appeal.

[2] The Certificate of Service notes the district court appellate brief was filed on July 10, 2015, but the Notification of Service received by the City revealed the brief was filed at 12:01:46 a.m. on July 11, 2015.

and dangerous and the judgment was entered on September 25, 2015. P-App. 70-81. The Sandahls filed a Notice of Appeal on December 21, 2015. P-App. 59-61.

STATEMENT OF FACTS

[¶8] As a result of an August 14, 2014 inspection of the Building, the City sent to the Sandahls a Notice of Public Nuisance and Order to Repair or Demolish (the "Repair Notice"). P-App. 2-3; 17. The Sandahls allege they "received Notice of Public Nuisance and Order to Repair or Demolish by the City Council ***without a Hearing***." Appellant Brief, ¶ 6 (emphasis in original). No hearing is required before a notice of this type is sent to a property owner which informs the property owner that the property/building is in violation of the Larimore Municipal Ordinances and if the violation is not corrected within 90 days further action will be taken by the City. See P-App. 1-15.

[¶9] The Sandahls received the Repair Notice on September 13, 2014. P-App. 17. The Repair Notice stated that, pursuant to Larimore Municipal Ordinance §§ 9.0404 and 9.0501, the Building satisfied the definition of a dangerous building and was unfit for human habitation or occupancy. P-App. 2. The Sandahls were also informed the Building constituted a public nuisance, was dangerous to the public health, and under Larimore Municipal Ordinance §§ 9.0411 and 9.0503 the Building was required to "be repaired, vacated, demolished, or said violations discontinued" within 90 days. Id. The 90 day period that allowed the Sandahls to take the appropriate corrective action to repair the Building expired on December 12, 2014 (being 90 days after receipt of the Repair Notice). The Sandahls were further informed, pursuant to Larimore Municipal Ordinance §§ 9.0414 and 9.0506, their failure to comply with the Repair Notice may result in demolition of the Building by the City. P-App. 3.

[¶10] Attached to the Repair Notice was a report from the City building inspector and 43 photographs (the "Repair Report") which outlined the substandard nature of the Building. P-App. 4-15. Of particular note was the overgrown nature of the property; that feral cats were present; the wood trim, windows, siding, and roofing were in complete disrepair; the damaged and sagging roof was indicative of structural issues; the chimney bricks were loose and gapped; windows were broken or boarded up; and the interior appeared to be damaged by moisture[3]. P-App. 4-15. Ultimately, the building inspector noted that the Building was "structurally deficient, and in a state of neglect." P-App. 4.

[¶11] Because the Sandahls failed to take corrective action by December 12, 2014, the City sent to the Sandahls, by certified mail, a Notice of Public Hearing In the Matter of "Substandard Building or Substandard Dwelling Unit" Located at 107 Pate Avenue, Larimore, North Dakota (the "Notice of Public Hearing"). P-App. 19-31. The Sandahls refused three attempts to sign for the letter [being February 5, 2015, February 10, 2015, and February 20, 2015] and the Notice of Public Hearing was returned to the City. Court Doc. 30, p. 16, ln. 19-25. Eventually, on February 27, 2015, Mrs. Sandahl signed for, and received, a copy of the Notice of Public Hearing. Id., p. 16, ln. 25 to p. 17, ln. 2. The Notice of Public Hearing advised the Sandahls the hearing was set for March 2, 2015, regarding their non-compliant and dangerous Building. P-App. 19-31.

[¶12] Like the original Repair Notice, the Notice of Public Hearing stated the Building was a dangerous building, a public nuisance, was dangerous to the public health, was required to be repaired, vacated, demolished, or said violations discontinued by December 12, 2014 and that no corrective action had been taken by the Sandahls. P-App.

[3] The building inspector noted no attempt was made to enter the Building but that he looked in the windows.

19. The Notice of Public Hearing attached the Repair Report, and a subsequent report of inspection with 15 additional photographs ("Report II") which stated the Building "was inspected and there has been no change since the August 2014 inspection." P-App. 33. Report II indicated that snow cover did limit visibility, however, the pictures revealed that the Building was in the same condition. P-App. 34-37.

[¶13] At the March 2, 2015, Public Hearing, testimony was received from the building inspector, the Sandahls, Marv Lafontaine, Bonnie Olson, and Virginia Breeden. The testimony of the building inspector can be summarized as follows:

- The Building is worn down and there has been no activity to attempt repairs. Court Doc. 30, p. 17, ln. 16-25.
- The roof is composed of original wood shakes which are worn, very thin, and falling off in pieces. Id., p. 18, ln. 6-10.
- During the initial inspection, approximately 20 feral cats were on the property—"scattered cats coming out from under the property." Id., p. 18, ln. 11-23.
- The roof has been improperly patched by securing plywood over the wooden shakes and a number of the windows are boarded up. Id., p. 19, ln. 2-19.
- The mortar on the chimney has decayed to the point that the bricks are loose, which creates a dangerous condition. Id., p. 20, ln. 1-11.
- Following the first inspection, no work has been accomplished to repair the deficiencies noted in the Repair Report. Id., p. 20, ln. 19-25.
- It would be a financial burden to rehabilitate the Building. Id., p. 22, ln. 9-23.
- In the professional opinion of the building inspector, the Building constituted a dangerous property and should be demolished. Id., p. 26, ln. 10-16.

[¶14] The testimony of Lafontaine was not relevant or material to the determination that the Building satisfied the definition of a dangerous building because Lafontaine's testimony concerned a totally different structure than the Building at issue—the building located at 124 Pate Avenue, not the subject of this appeal. Id., p. 28, ln. 3 to p. 30, ln. 8.

[¶15] The testimony of the Sandahls is summarized as follows:

- The feral cats just like to hang out around the Building because they can lie in the sun and not be bothered. Id., p. 36, ln. 13 to p. 37, ln. 9. The cats are welcome on her property because they "keep rodents away." Id., p. 37, ln. 21-24.

- The Sandahls had "fairly ambitious" renovations planned for the Building until they found out what it would cost. Id., p. 38, ln. 8-13.

- The Sandahls did speak with a contractor to possibly install a metal roof on the Building, but no estimate or work was completed prior to the Public Hearing. Id., p. 38, ln. 19-22.

- The Sandahls requested more time to come up with funding to accomplish repairs to the Building, even though the City has dealt with the Sandahls and the condition of the Building for years. Id., p. 38, ln. 17 to p. 39, ln. 10; p. 41, ln. 14-19; p. 44, ln. 13-17.

- In an attempt to justify the failure to take action to repair the Building, Mrs. Sandahl stated that she stopped working potatoes in 2010 and it took a long time to recover from the exhaustion. Id., p. 43, ln. 22-24.

- The only reason the City is taking action on this property was because "somebody didn't get to buy the house when he wanted to [and] that person has been complaining ever since." Id., p. 44, ln. 6-8.

[¶16] Bonnie Olson, who was called by the Sandahls, testified she has seen as many as 20 cats around the Building that no one owns. Id., p. 37, ln. 10-18. Although it is unclear how such testimony favored the Sandahls, the City assumed this testimony was given in support of the Sandahls.

[¶17] Showing the Building was a dangerous building, Virginia Breeden testified that she had an opportunity to purchase the Building and was told, at that time, the Building needed to be torn down because of the black mold on the second floor. Id., p. 46, ln. 3-12. Ms. Olson disputed that testimony. Id., p. 46, ln. 16-17.

[¶18] Based upon the testimony and evidence received, City Councilman Schroeder moved to declare the Building "unsafe or a dangerous building." Id., p. 48, ln. 1-2. The

motion[4] was seconded, and passed by a roll call vote of 5-0. Id., p. 48, ln. 5-19.

[¶19] A Finding of Facts and Order in the Matter of "Substandard Building or Substandard Dwelling Unit" Located at 107 Pate Avenue, Larimore, North Dakota (the "Order") was issued by the City consistent with the testimony of the building inspector and the finding of the City. P-App. 47-49. The City held that:

> there has been no appreciable progress in state of the remodel and/or repair [of the Building]. The [B]uilding is structurally deficient and in a state of general neglect. This [B]uilding is deemed an excessive burden to rehabilitate. Furthermore, the condition of the property has been damaged or deteriorated so as to have become dangerous to the health, morals, safety or general welfare of the public and the City.

Id., p. 48 (emphasis added). Pursuant to Larimore Municipal Ordinance §§ 9.0414 and 9.0506, the Sandahls were ordered to demolish the Building within a reasonable time, not to exceed 30 days. Id.

[¶20] The Sandahls' brief contains a significant misstatement of fact. The Sandahls allege "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" but "[n]o such report on the standards of the condition of the Property was presented at the hearing held on March 2, 2015." Appellant Brief, ¶ 9. However, the district court found that the building inspector testimony about his findings was consistent with the two inspection reports in the record and that the City attorney made specific reference to photographs and inspections contained in the council members'

[4] The Sandahls allege the "Mayor in agreement with the Council amended the motion 'to make [the Building] a ***dangerous building***." Appellant Brief, ¶ 12 (emphasis in original). A review of the transcript reveals that the original motion was to tear down the Building, however, after the City was informed the motion was worded improperly, the motion was amended "to read that [the City] declare [the Building] an unsafe or dangerous building." Court Doc. 30, p. 47, ln. 2 to p. 48, ln. 2.

packets. P-App. 75-76, ¶ 8. The district court determined the references to the packets, photographs, and the building inspector's inspection report, as well as the consistency of the building inspector's testimony with the photographs and inspection report, did not support the Sandahls' allegation that no building inspector report was presented at the Public Hearing. Id.

LAW AND ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED THE MOTION TO SUBMIT ADDITIONAL EVIDENCE BECAUSE THE MOTION FAILED TO SATISFY THE REQUIREMENTS OF N.D.C.C. § 28-34-01.

[¶21] On appeal, the Sandahls fail to make a single cognizable argument as to why the district court erred in denying the motion to submit additional evidence. Appellant Brief, ¶¶ 14-15. Rather, after citing applicable standards, the Sandahls make the conclusory statement that "the evidence in the record before the City Council demonstrates that its decision was arbitrary and capricious." Id. at ¶ 15.

[¶22] In the district court, the Sandahls alleged the City "was not provided pertinent information in order to make an informed decision with regards to [the Building]." Court Doc. 36, ¶ 1. The Sandahls then sought admission of the additional evidence pursuant to N.D.C.C. § 28-34-01(3) alleging "[t]he additional evidence is the type of evidence that would have been raised at a Public Hearing, and it is therefore appropriate for the Court to admit. . . ." Id. According to N.D.C.C. § 28-34-01:

> If the court determines on its own motion or if an application for leave to adduce additional evidence is made to the court in which an appeal from a determination from a local governing body is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there are reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the local governing body, or that such evidence is material to the issues involved and was rejected or excluded by the local governing body, the court may order that such

> additional evidence be taken, heard, and considered by the local governing body on such terms and conditions as the court may determine. After considering the additional evidence, the local governing body may amend or modify its decision and shall file with the court a transcript of the additional evidence together with its new or modified decision, if any.

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." Dahm, 2013 ND 241, ¶ 29 (quoting Grand Forks Homes, Inc., 2011 ND 50, ¶ 8). "A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law." Id. (quoting Ramsey, 2005 ND 42, ¶ 8).

[¶23] Importantly, this Court in Dahm recognized that the admission of additional evidence is limited to two situations: (1) when the additional evidence is material and reasonable grounds exist for the failure to present the evidence at the hearing, or (2) when the evidence is material and it was rejected or excluded by the local governing body. Id. The additional evidence presented by the Sandahls does not satisfy these requirements. The additional evidence presented can be best described as:

1) Exhibit A[5]: This exhibit consists of three (3) newspaper clippings from the Larimore Leader/Tribune. P-App. 63-65. Although the first page of Exhibit A is dated February 5, 2015, a cursory review of the paper reveals that each page is from a different version of the newspaper. Id. The first page summarizes the City Council meeting on Monday, February 2, 2015. Id. The second page is a letter to the editor from Mrs. Sandahl. Id. The third page is a letter to the editor from Mike Breeden. Id. Although the dates of the letters to the editor are unclear, all of these letters refer to the March 2, 2015 Public Hearing and request interested members of the public to attend this hearing, and therefore, were drafted before and were available for the March 2, 2015 Public Hearing. Id.
2) Exhibit B: This exhibit appears to be a Finding of Fact and Order from the City of Finley, North Dakota Building Commission. P-App. 67. However, there is no signature on the Order and it appears incomplete.

[5] Exhibit A-C will be referred to as they were labeled at the district court.

Id. A review of the exhibit reveals that the order is from the year 1992. Id.

3) Exhibit C: This exhibit is a handwritten, signed estimate to repair the roof of the Building that was dated April 15, 2015, over a month after the March 2, 2015, Public Hearing. P-App. 69.

[¶24] None of the additional evidence proffered by the Sandahls constitutes material evidence necessary for this Court to review the decision of the City that the Building satisfies the definition of a dangerous building. See Grand Forks Homes, Inc., 2011 ND 50, ¶ 9. Exhibit A is newspaper clippings that are not material because they consist of the opinion of the Sandahls and another property owner within the City that were printed prior to the Public Hearing —none of which dispute the testimony of the building inspector. P-App. 63-65. Exhibit B is a 23 year old, unsigned, Finding of Fact and Order from another North Dakota city made in relation to the unique facts and circumstances of that case which concerned the condition of a building in the City of Finley in 1992. P-App. 67; see also Dahm, 2013 ND 241, ¶ 30 (prior decision of the board on similar subject not material because the "[d]ecisions made in regard to other subdivisions were made in relation to the unique characteristics of those parcels"). Finally, Exhibit C is not material because it was drafted after the Public Hearing and thus the only purpose for creating this document was to attempt to persuade the district court on appeal. P-App. 69.

[¶25] Not only is the evidence not material to the determination of whether the Building constitutes a dangerous building, reasonable grounds do not exist for the failure to present the evidence at the hearing. Dahm, 2013 ND 241, ¶ 29; N.D.C.C. § 28-34-01(3). Exhibits A and B were dated before the Public Hearing and the Sandahls failed to adequately explain the reason this additional evidence was not presented at the Public

Hearing. See N.D.C.C. § 28-34-01(3) (requires the proponent of the evidence establish "that there are reasonable grounds for the failure to adduce such evidence in the hearing"). Similarly, the Sandahls have failed to explain why they were unable to find a contractor or present the City with an estimate for proposed repairs to the Building at the Public Hearing—indeed Exhibit C, the estimate for only repairs to the roof, is dated almost a month and a half after the Public Hearing and over 200 days after the Sandahls received the Repair Notice on September 13, 2014. See Wolt v. Wolt, 2011 ND 170, ¶ 31, 803 N.W.2d 534 (the "report is not the type of 'newly discovered evidence' that could not have been obtained earlier and presented").

[¶26] In addition, Exhibits A-C were not rejected or excluded by the City—they simply were not presented by the Sandahls. Dahm, 2013 ND 241, ¶ 29; N.D.C.C. § 28-34-01(3) (the Court can consider additional evidence if "such evidence is material to the issues involved and was rejected or excluded by the local governing body").

[¶27] In sum, the Sandahls failed to satisfy the requirements of N.D.C.C. § 28-34-01 to submit additional evidence. The evidence was not relevant or material and the Sandahls did not adequately explain the failure to present this evidence to the City at the Public Hearing. Therefore, the district court did not abuse its discretion when it properly denied the Sandahls' motion to submit additional evidence.

II. THE DECISION OF THE LARIMORE CITY COUNCIL WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE BECAUSE IT WAS SUPPORTED BY THE GREAT WEIGHT OF THE EVIDENCE.

[¶28] Initially, the Sandahls' argument on appeal relies on Pic v. City of Grafton, 339 N.W.2d 763 (N.D. 1983) ("Pic I") and City of Minot v. Freelander, 380 N.W.2d 321 (N.D. 1986) which are distinguishable from the facts of this case. In Pic I, this Court

determined that the city council's order requiring removal of buildings was arbitrary, oppressive, or 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 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." Pic I, 339 N.W.2d at 766-67. As will be explained further, the evidence before the City Council in this case was unrefuted and established the structure was beyond any reasonable standard of repair. Furthermore, at the time of Pic I, review of the decisions of local governing bodies was considerably different because the review was conducted prior to the enactment of N.D.C.C. § 28-34-01. See Pic II, 1998 ND 202, ¶¶ 6-11 (this Court outlining the previous review standard).

[¶29] In Freelander, there was no decision by a local governing body as the matter was initiated by the city with the trial court and the building at issue was not a dangerous building, but rather was ordered to be demolished by the trial court based upon an "insanitary condition." Freelander, 380 N.W.2d at 323. Another distinguishing fact is that the issue presented in Freelander was whether the trial court erroneously denied a motion to modify the judgment to allow the homeowner additional time to demonstrate that the house could be made habitable, not whether the city acted in an arbitrary, capricious, or unreasonable manner. Id. at 324-25. In reversing the trial court, this Court stated "insanitary conditions which result in noxious smells that sufficiently annoy the comfort or endanger the health and safety of the neighbors can be properly prohibited, prevented, and corrected by the City," however "destruction of the property is a drastic remedy, and it must necessarily be a remedy of last resort. . . ." Id. at 324. Ultimately,

this Court determined "[t]here is substantial uncontroverted evidence in this case that less drastic alternatives to destruction of the house are available." Id. Here, no such evidence was presented to the City at the Public Hearing which is not surprising since no such evidence exists in this case.

[¶30] According to Larimore Municipal Ordinance § 9.0501, a dangerous building is defined as a building with any or all of the following defects:

* * *

> d. Those which have been damaged by fire, wind, or other causes so as to have become dangerous to life, safety, morals, or the general health and welfare of the occupants or the people of the City.
>
> e. Those which have become or are so dilapidated, decayed, unsafe, unsanitary or which so utterly fail to provide the amenities essential to decent living that they are unfit for human habitation or are likely to cause sickness or disease so as to work injury to the health, morals, safety or general welfare of those living therein.
>
> * * *
>
> g. Those which have parts thereof which are so attached that they may fall and injure members of the public or property.
>
> h. Those which because of their condition are unsafe, unsanitary, or dangerous to health, morals, safety or general welfare of the people of this city.
>
> i. Those buildings existing in violation of any provision of the Building Code, of the fire prevention code, electrical or plumbing codes or of other ordinances of this city.

Larimore Municipal Ordinance § 9.0501. In addition to defining a dangerous building,

> 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 exist in violation to the terms of this article it shall be demolished**. . . .

Larimore Municipal Ordinance § 9.0502 (emphasis added).

[¶31] At the March 2, 2015, Public Hearing, the City was provided with the Repair Notice, the Repair Report with 43 photographs, the Notice of Public Hearing, and the Report II with 15 additional photographs. Court Doc. 30, p. 15, ln. 25 to p. 17, ln. 9. The testimony and evidence revealed that, although the Building has been under a remodel permit for a number of years, the Building is in a general state of abandonment and disrepair with no progress noted in the recent past. P-App. 48; see Larimore Municipal Ordinance § 9.0501(d). The Building's roof has exceeded its service life with indication of structural concerns and portions of the roof have been improperly patched by placement of plywood over the original shakes. P-App. 48; see Larimore Municipal Ordinance § 9.0501(d), (i). The chimney on the Building is in such disrepair as to create a condition under which bricks, or the entire chimney, may fall and/or collapse. P-App. 48; see Larimore Municipal Ordinance § 9.0501(d), (g)-(i).

[¶32] In addition, following a review of the record, the district court found that "the photographic evidence of the exterior of the [Building], coupled with statements of [the building inspector] clearly support the City's determination of the unsound, dangerous condition of the [Building]." P-App. 71-79 (citing Court Doc. 7, p. 5-15; 9, p. 4-14; Doc. 30). Importantly, no repairs were made to the Building following the August 14, 2014, Repair Notice. Court Doc. 30, p. 20, ln. 19-20; P-App 33-37. There are visible holes in

the roof and soffit, windows are broken and boarded up. See Doc. 30, p. 18, ln. 6-10; p. 19, ln. 2-16; P-App. 5-15, 33-37. The City further considered the health hazards created by the Building, noting the building inspector observed approximately twenty feral cats scatter from under the Building through a gap or opening in the foundation. Court Doc. 30, p. 18, ln. 11 to p. 19, ln. 1.

[¶33] The Sandahls failed to present the requisite reliable evidence to dispute the testimony of the building inspector. Although almost six months had passed, the Sandahls did not attempt to address the deficiencies noted by the Repair Report. P-App. 4-15; 33-37. Rather, the Sandahls testified as to why no corrective action was taken—i.e. the Sandahls had "fairly ambitious" renovations planned for the Building until they found out what it would cost, Court Doc. 30, p. 38, ln. 8-13; and they requested more time to acquire the necessary funding, even though the Sandahls admit the City has dealt with the Building's condition for years, Court Doc. 30, p. 38, ln. 17 to p. 39, ln. 10; p. 41, ln. 14-19; p. 44, ln. 13-17. When questioned why the Building had not been repaired in the last two years—Mrs. Sandahl stated that she stopped working potatoes in 2010 and it took a long time to recover from the exhaustion. Court Doc. 30, p. 43, ln. 22-24.

[¶34] At no time was testimony or evidence presented to the City by the Sandahls of the estimated cost of repairs or that the structural deficiencies noted by the building inspector—roof replacement, water damage, holes in or missing soffit, broken/boarded windows, structurally unsound chimney, and foundation—could be repaired. Of importance, the Sandahls note they do not have the required funds to repair the Building or even to ensure the Building does not fall into further disrepair. Court Doc. 30, p. 38, ln. 15-19. In this same testimony, the Sandahls admit the Building is not safe. Id.

[¶35] Rather than presenting evidence at the Public Hearing, the Sandahls attempted to present new evidence to the district court. As discussed, supra, the motion to submit additional evidence not presented at the Public Hearing was properly denied by the trial court. See Appellee Brief, ¶¶ 21-27. Yet, the Sandahls, at the district court and now before this Court, rely extensively on this rejected evidence to support the argument that the decision of the City was arbitrary, capricious, and unreasonable. See Appellant Brief, ¶ 17 (Sandahls rely on an unsigned Finding of Fact and Order from the City of Finley Building Commission from 1992 that is not part of the record to argue the City was required to find damaged to a specific percentage) (see P-App. 67; 71-79); ¶ 20 (reference to the "chronic complainer" is from newspaper article not part of the record) (see P-App. 63-65; 71-79). This evidence, not in the record, must not be considered. Stenvold v. Workforce Safety & Ins., 2006 ND 197, ¶ 14, 722 N.W.2d 365, 368.

[¶36] The evidence in the record established the Building "has been damaged or deteriorated so as to have become dangerous to the health, morals, safety or general welfare of the public and the City." P-App. 48; see Larimore Municipal Ordinance § 9.0501(d)-(e), (g)-(i). On the recommendation of the building inspector, based upon the evidence presented and his professional judgment, the Building was "deemed an excessive burden to rehabilitate." P-App. 48; Larimore Municipal Ordinance § 9.0502. Because the Building "cannot be repaired so that it will no longer exist in violation to the terms of this article it shall be demolished." Larimore Municipal Ordinance § 9.0502(c). The evidence in the record—including the undisputed testimony of the building inspector, the Repair Report, Report II, and numerous pictures—required the City to classify the Building as a dangerous building and order it to be demolished. Larimore

Municipal Ordinance § 9.0502 (a), (c). Even if the Sandahls can direct this Court to more convincing evidence in the record, which they cannot, this would not be a sufficient basis for which to overturn the City's Order without a determination that the City's decision was arbitrary, capricious, or unreasonable. See Am. Crystal Sugar Co. v. Traill Cty. Bd. of Comm'rs, 2006 ND 118, ¶ 5, 714 N.W.2d 851 (reversal is not proper even though the reviewing court finds some evidence more convincing); Pic II, 1998 ND 202, ¶ 11 (citing Smith v. Burleigh County Bd. of Com'rs, 1998 ND 105, ¶ 11, 578 N.W.2d 533; City of Fargo v. Ness, 529 N.W.2d 572, 576 (N.D.1995)).

[¶37] In conclusion, the Sandahls failed to carry the heavy burden required to demonstrate the City's decision was arbitrary, capricious, or unreasonable, or not supported by substantial evidence. The evidence presented to the City showed, and the City properly concluded, the Building was a dangerous building, namely that it is a danger to life, safety, morals, or the general health and welfare of the people of the City. The ordinance requires the Building be demolished because the building inspector, based upon his investigation and years of experience and expertise, concluded the Building was an excessive burden to rehabilitate as required by the ordinance. The Sandahls presented no evidence at the Public Hearing to rebut this evidence or the conclusions reached by the building inspector. Therefore, the City's decision was "the product of a rational mental process by which the facts and law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation" and must be affirmed. See Burlington N. & Santa Fe Ry. Co. v. Benson Cty. Water Res. Dist., 2000 ND 182, ¶ 5, 618 N.W.2d 155 (quoting Graber, 1999 ND 168, ¶ 7).

III. THE CITY'S REQUEST FOR SANCTIONS.

[¶38] According to the North Dakota Rules of Appellate Procedure, this Court "may take appropriate action against any person failing to perform an act required by rule or court order." N.D.R. App. P. 13. This Court has further issued cautions that "parties [must] comply with all the requirements for appellate briefs . . . or expect dismissal." J.P. v. Stark Cty. Soc. Servs. Bd., 2007 ND 140, ¶ 8, 737 N.W.2d 627; see also Bye v. Fed. Land Bank Ass'n of Grand Forks, 422 N.W.2d 397, 399 (N.D. 1988) ("The determination of whether or not to dismiss an appeal for failure to comply with the Rules of Appellate Procedure rests wholly within the discretion of this Court").

[¶39] "This Court applies N.D.R. App.P. 13 as an enforcement tool to encourage compliance with the North Dakota Rules of Appellate Procedure." City of Fargo v. Wonder, 2002 ND 142, ¶ 27, 651 N.W.2d 665. The determination of whether to order sanctions pursuant to Rule 13 for noncompliance with the Rules of Appellate Procedure lies wholly within the discretion of this Court. Id. The City's request for sanctions for failure to adhere to the rules promulgated by this Court, instead of dismissal, recognizes this Court's preference to decide cases on the merit, rather than on technicalities. See Latendresse v. Latendresse, 283 N.W.2d 70, 72 (N.D. 1979).

[¶40] The Sandahls have repeatedly disregarded the timelines and deadlines set forth by the district court, this Court, or the rules of procedure. Although the Sandahls' tardiness was not necessarily prejudicial to the City, it reveals their continued lack of respect for procedural rules that are promulgated to avoid such tactics.

[¶41] The most egregious violation of appellate rules is the Sandahls' reliance on evidence not in the record before the City at the Public Hearing. Court Doc. 34-37; P-

App. 62-69. After consideration of the Sandahls' motion to submit additional evidence, the district court denied the motion, finding that the

> Sandahls failed to establish that the additional evidence they wish to submit is material. In addition, the proposed exhibits 1-3 [newspaper articles] are cumulative of testimony which was provided. Finally, Sandahls also failed to provide any reasonable grounds for failing to adduce the four proposed additional exhibits as evidence at the March 2, 2015 [Public] [H]earing.

P-App. 79, ¶¶ 15-16. Even though the motion was denied and the proposed evidence was rejected by the district court, the Sandahls included this additional evidence in the appendix to the Appellant Brief[6], and erroneously rely on this evidence to support their argument that the City's decision was arbitrary, capricious, and unreasonable. See Appellant Brief, ¶ 17 (discussion of an unsigned Finding of Fact and Order from the City of Finley Building Commission from 1992 that was not part of the record before the City at the Public Hearing); ¶ 20 (reference to "chronic complainer" which was made in newspaper articles not part of the record before the City at the Public Hearing).

[¶42] "Under N.D.R. App. P. 30(a), only items actually in the record may be included in the appendix, and a signature on the appellate brief under N.D.R. App. P. 28 certifies compliance with this rule." Wonder, 2002 ND 142, ¶ 26. As noted by this Court, "[i]nappropriate attempts to supplement the evidentiary record at the appellate level cannot be condoned." Holbach v. Holbach, 2010 ND 116, ¶ 18, 784 N.W.2d 472 (quoting Van Dyke v. Van Dyke, 538 N.W.2d 197, 203 (N.D.1995)); see also Stenvold, 2006 ND 197, ¶ 14 (evidence not in the record may not be considered on appeal).

[6] The City recognizes that it may have been proper to include the proposed evidence in support of the appeal of the district court's denial of the motion to submit additional evidence, but it was not proper to rely on the proposed evidence in the argument to reverse the decision of the City.

[¶43] In consideration of the Sandahls', and the Sandahls' attorney's, disregard for the North Dakota Rules of Appellate Procedure and in order to encourage respect for and compliance with the appellate rules, the City requests an award of sanctions. Deacon's Dev., LLP v. Lamb, 2006 ND 172, ¶ 20, 719 N.W.2d 379; Wonder, 2002 ND 142, ¶ 27; Bublitz v. Tsang, 2000 ND 100, ¶ 4, 617 N.W.2d 131 (awarding double costs on appeal because appellant included materials in his brief that were not part of the district court's record). As such, the City respectfully requests this Court order the Sandahls, and the Sandahls' attorney, to pay double the costs as allowed by the rules.

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CONCLUSION

[¶44] For the foregoing reasons, the City of Larimore requests this Court affirm, in total, the district court's order that denied the Sandahls' motion to submit additional evidence for failure to satisfy the requirements of N.D.C.C. § 28-34-01.

[¶45] The City of Larimore further requests this Court affirm the determination that the Building located at 107 Pate Avenue, Larimore, North Dakota, is a dangerous building that must be demolished within a reasonable time, not to exceed 30 days.

[¶46] Finally, the City of Larimore respectfully requests this Court sanction the Sandahls, and the Sandahls' attorney, for violations of the North Dakota Rules of Appellate Procedure and award the City double its costs in order to encourage respect for and compliance with the appellate rules.

Dated this 16th day of May, 2016.

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CERTIFICATE OF COMPLIANCE

[¶47] The undersigned, as attorney for Appellee in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and the number of words in the above brief, excluding words in the table of contents, table of authorities, and certificate of compliance, totals 6,719 words.

Dated this 16th day of May, 2016.

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