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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20160067

Edward P. Ferguson and Lavanna M. Ferguson,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
	)
City of Fargo,	)
	)
	)
Defendant-Appellant.	)

On Appeal from the Order Granting the Plaintiffs' Motion for Summary Judgment dated February 8, 2016
East Central Judicial District, Cass County, North Dakota
Cass County Case No. 09-2015-CV-02227

The Honorable John C. Irby

BRIEF OF PLAINTIFFS-APPELLEES EDWARD P. FERGUSON AND LAVANNA M. FERGUSON

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STATEMENT OF ISSUES

[1] Whether the district court correctly concluded Defendant-Appellant City of Fargo (the "City") Ordinance 4818's distinction between platted and unplatted land is not rationally related to a legitimate government interest and so violates the Equal Protection clauses of the North Dakota and the United States Constitutions, as applied to Plaintiffs-Appellees Edward and Lavanna Ferguson (the "Fergusons") and others similarly situated.

STATEMENT OF THE CASE

[2] On August 28, 2015, the Fergusons filed a Complaint against the City in the East Central Judicial District Court, challenging the constitutionality of Ordinance 4818 (the "Ordinance") on the basis that the Ordinance violates the Equal Protection clauses of the North Dakota and United States Constitutions. Appendix ("App.") 4-7. The Fergusons also alleged, in the alternative, an inverse condemnation claim. Id.

[3] On October 16, 2015, the Fergusons moved for partial summary judgment on their Equal Protection claim. Docket ("Doc.") ID #8. The City filed a cross-motion for summary judgment on the Equal Protection claim and the inverse condemnation claim. Doc. ID #21. The City primarily argued the distinction created by Ordinance 4818 between platted and unplatted land was rationally related to protecting property and infrastructure from floodwaters, slumping, and unstable riverbank soils. Doc. ID #20.

[4] Following oral argument on the motions on January 4, 2016, the Honorable John C. Irby made several findings of fact and conclusions of law. Transcript ("Tr.") p.49, lines 7-16. The district court ultimately concluded that the Ordinance was unconstitutional as applied to the Fergusons and others similarly situated because the Ordinance's distinction between platted and unplatted lots was not rationally related to a

legitimate government interest. Id. Indeed, the district court concluded that whether land is platted or unplatted does not make the land more or less likely to be subject to slumping or flooding, undercutting the City's rationale for the Ordinance. App. 16, ¶ 20.

[5] The parties stipulated to dismiss the inverse condemnation claim without prejudice, and the district court entered its Order granting the Fergusons' motion for summary judgment on February 8, 2016. Doc. ID #41; Doc. ID #55; App. 14-17. The City filed its Notice of Appeal to the Court on February 23, 2016. Doc. ID #62; App. 19-20. Pursuant to N.D.C.C. § 32-23-11 and North Dakota Rule of Appellate Procedure 44, the Attorney General was provided notice of the constitutional challenge and declined to participate in the action. See North Dakota Supreme Court Doc., May 20, 2016.

STATEMENT OF FACTS

[6] The Fergusons reside in North Dakota and are citizens of the State of North Dakota and the United States of America. App. 4, ¶ 1.

[7] The Fergusons own a parcel of land (the "Property") located at 4103 66th Street South in the City. Id. ¶ 2. The Property borders the Sheyenne River and is partially located within the Minimal Disturbance Zone Setback and/or Limited Disturbance Zone Setback, as described more fully below. Id. ¶ 3; App. 5, ¶ 16. The Fergusons acquired the Property in 1996 and began occupying it in 1998. Doc. ID #10, ¶ 5. The Property is essentially surrounded by the Osgood development, which grew up around the Property. Id. ¶ 6.

[8] The City has enacted a home rule charter and is governed by a city commission. App. 4, ¶¶ 5-7. The City Commission has the authority to enact ordinances to be enforced in the City. N.D.C.C. § 40-05.1-05. As a result of its zoning power, the City has control over land-use requirements over the Property. Id.

[9] Though it is located within the City, the Property has never been platted. Doc. ID #10, ¶ 7. This is mainly because it has never been a part of a subdivision that required platting; rather, the Property was annexed by the City in 2002. Id. As a result, it has a "metes and bounds" legal description rather than a "block and lot" description. Id.

[10] As the City's brief notes, platting is virtually synonymous with subdividing. Appellant Br. ¶ 12. Fargo Land Development Code Articles 20-06 and 20-09 address plats solely in context of subdivision. Article 20-06 describes that the procedure to subdivide takes into account several factors, including streets, street access, and street names, assigning lot and block descriptions, utilities, and easements. Id. Section 20-0907(A)(1) explains clearly why one subdivides, i.e., why one plats:

> Subdivision of land shall be required before any of the following activities occur:
>
> a. The division of land (for any purpose) into two (2) or more parcels; or
>
> b. Development that involves the construction of any public improvements that are to be dedicated to the City.

In sum, the Land Development Code ties an obligation to plat to a need to subdivide.

[11] There is an existing house, as well as several other structures, on the Property. Doc. ID #10, ¶ 9. The existing structures are located on the "river side" of the Limited Disturbance Zone Setback established by the Ordinance, described in detail below. Id., Ex. A. The Fergusons wish to develop the Property further by building a house and another structure. Id. ¶ 11. Some of the current buildings would be left in place. Id. Of the two new buildings, one would be located almost entirely on the "dry side" of the Limited Disturbance Zone Setback. Id. ¶ 12. The other proposed structure

would be located about half on each side, though further from the river than the existing structures. Id. ¶ 13.

[12] On April 16, 2012, the City held its first reading of Ordinance 4818.[1] The language of the Ordinance provided, "This Ordinance shall be in full force and effect from and after its passage, approval and publication." App. 32, § 20-0610(5). The City passed the Ordinance two weeks later on April 30, 2012, and the Ordinance went into effect once published, on May 14, 2012. Id. Thus, the City introduced and passed the Ordinance in less than one month.

[13] The Ordinance establishes a "Minimal Disturbance Zone Setback" ("MDZS") and a "Limited Disturbance Zone Setback" ("LDZS"), both of which are calculated, as is relevant here, by reference to the Sheyenne River. App. 25, § 20-0508(A). Ordinance 4818 curtails construction on all lots in the MDZS and/or LDZS. The Ordinance states, in relevant part:

> No building or structure may be erected, constructed, enlarged or altered within the Minimal Disturbance Zone Setback or within the Limited Disturbance Zone Setback unless such building or structure conforms to the regulations in this section.
>
> ***
>
> MDZS – Sheyenne River. For Parcels that are near the Sheyenne River, the Minimal Disturbance Zone Setback ("MDZS") shall be the greater distance of (a) 175 feet from the center line of the river and (b) the floodway whichever distance creates the greater amount of setback from the center line of the river.

[1] Ordinance 4818 amended sections 20-0501, 0502, 0503, and 0610, and enacted section 20-0508 of chapter 20 of the Fargo Land Development Code. We refer to these sections as the "Ordinance" throughout.

> LDZS. The Limited Disturbance Zone Setback ("LDZS") shall begin at the outer edge of the MDZS and extend an additional one hundred (100) feet on the same line as for the MDZS.

App. 25-26.

[14] While Ordinance 4818 broadly prohibits construction in the MDZS or LDZS, it also sets forth a process by which some, but not all, affected landowners may seek a waiver from the City to allow construction. The Property is partially located in the MDZS and LDZS established by Ordinance 4818. Doc. ID #10, ¶ 4.

[15] Ordinance 4818 creates a tripartite distinction among citizens who own land along waterways. First, owners of lots that were platted as of its effective date, but had not yet been built on, may seek a waiver of the prohibitions on building. App. 29, § 20-0508(E)(2). That process requires the landowner to obtain a geotechnical study of the property to ensure it is safe for construction. Id. As discussed further below, several landowners along the Sheyenne, including on the same block as the Property, have applied for and received waivers.

[16] Second, owners of lots that were platted as of the effective date, but had already been built on, may: (i) enlarge structures away from the river; (ii) remodel them; or (iii) if the properties are destroyed, replace them to the extent of other non-conforming uses under the City's Land Development Code. App. 29-30, § 20-0508(E)(3).

[17] Finally, the Ordinance is silent as to unplatted lots. As a result, all unplatted lots, irrespective of whether or not they have ever been built on, are ineligible for relief from Ordinance 4818, and building on them is entirely banned.

[18] Because the Property was unplatted as of the effective date of the Ordinance, the Fergusons are prohibited from building on it and are ineligible to apply for a waiver. Doc. ID #10, ¶ 14.

[19] After the hearing on January 4, 2016, the district court made several findings of fact based on the evidence in the record. App. 14-17. Critically, the court found that platting is a legal process by which a parcel of land is assigned a lot and block legal description instead of a metes and bounds description, with that description being recognized by the City. Id. ¶ 16. The court further found that platting does not change the character of the land at issue, and whether land is platted or unplatted does not make it more or less likely to be subject to slumping or flooding. Id. ¶¶ 19-20.

STANDARD OF REVIEW

[20] This Court's standard of review for summary judgments is well established:

> A district court's decision on a motion for summary judgment is a question of law that we review de novo on the record. In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record.

Lario Oil & Gas Co. v. EOG Res., Inc., 2013 ND 98, ¶ 5, 832 N.W.2d 49.

[21] In this case, the district court's ultimate conclusion that Ordinance 4818's distinctions are not rationally related to a legitimate government interest is a question of law that this Court reviews de novo.

LEGAL ARGUMENT

I. ORDINANCE 4818 VIOLATES THE EQUAL PROTECTION CLAUSES OF THE NORTH DAKOTA AND UNITED STATES CONSTITUTIONS.

A. Equal Protection and the rational basis review standard.

[22] The citizens of North Dakota and the United States are guaranteed the equal protection of the law. The North Dakota Constitution provides:

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

N.D. Const., art. I, § 21. Section 22 of the same article provides that, "All laws of a general nature shall have a uniform operation." Id. § 22. These two provisions are generally viewed as North Dakota's equivalent to the federal Equal Protection clause of the Fourteenth Amendment. U.S. Const., amend. XIV. That section states: "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the law." Id.

[23] When reviewing whether a law, statute, or ordinance violates Equal Protection, North Dakota follows federal law and applies one of three standards of scrutiny. Arenson v. Olson, 270 N.W.2d 125, 132-33 (N.D. 1978). Here, because Ordinance 4818 does not involve a "fundamental right" and does not discriminate against an "inherently suspect classification," the "rational basis" standard applies. Id.

[24] Under rational basis review, "the general rule is that legislation is presumed to be valid and [a challenge to the law] will not be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne v. Cleburne Living Ctr., 472 U.S. 432, 440 (1985). "[C]ourts will not overturn [government actions] unless the varying treatment of different groups or persons is so

unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000). Generally, the claimant must first show that he or she is similarly situated to others who are being treated differently. Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 136-37 (3d Cir. 2002). If the claimant meets this standard, then the government must show both the interest it seeks to serve and how the distinction serves that interest. Id. (emphasis added).[2]

[25] Importantly, though it is not the highest standard known to the law, rational basis review is still a meaningful standard. As the Fifth Circuit Court of Appeals stated in St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013), rational basis review "does not proceed with abstraction," and its "great deference" "does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it required courts to accept nonsensical explanations for regulation." Id. at 223, 226. Indeed, of the more than 100 cases between 1970 and 1996 in which the United States Supreme Court applied the rational basis standard of review, the Court ruled for the plaintiffs more than 10% of the time. Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans, 32 Ind. L. Rev. 357, 357 (1999). Moreover, courts have in fact invalidated statutes or ordinances on

[2] The City incorrectly states, at paragraph 20 of its brief, that the United States Supreme Court adopted the incredibly severe rational basis standard articulated by the Connecticut Supreme Court in Kelo v. City of New London. 843 A.2d 500, 565-66 (2004) ("[T]he challenger must establish that the legislature selected or reaffirmed a particular course of action at least in part because of, and not merely in spite of, its adverse effects upon an identifiable group."). Appellant Br. ¶ 20. However, the Court did not adopt the language quoted above in Kelo v. City of New London, 545 U.S. 469 (2005); rather, the Court's decision concerned the takings clause and did not consider the equal protection argument.

equal protection grounds where there is no rational relation between the classification and the purpose the classification serves. See, e.g., St. Joseph Abbey, 712 F.3d at 215.

[26] In this case, rational basis review requires this Court to determine, based on the evidence presented and the record on appeal, if the distinction drawn by the City between platted and unplatted property is rationally related to a legitimate state interest. As explained more fully below, and as the district court properly held, these distinctions are not rationally related to a legitimate state interest, and so the district court's order should be affirmed.

B. Ordinance 4818 treats citizens differently.

[27] The record is clear that Ordinance 4818 treats citizens differently; indeed, this is not a disputed point. Under its plain terms, eligibility to apply for a waiver depends solely on whether land was platted or unplatted as of the effective date of the Ordinance. App. 28-30, § 20-0508(E)(2)-(3). As explained in detail below, this distinction is irrational because the character of platted land and unplatted land is otherwise identical.

[28] The City has granted multiple waivers to landowners on the same block and side of the street as the Property. Doc. ID #13, ¶ 2. Specifically, the following waivers were all granted in 2012:

Property Address	Proximity to Ferguson Property
4355 66th Street South	Approximately 7 lots away
4375 66th Street South	Approximately 8 lots away
4385 66th Street South	Approximately 10 lots away
4379 66th Street South	Approximately 9 lots away

Id.

[29] These lots are on the same street as the Property. These lots all border the Sheyenne River. Id. The sole difference is that the lots above were platted as of May 14, 2012, while the Property was not. Therefore, the owners of all of these lots are similarly situated, in that they own virtually contiguous lots bordering the Sheyenne River, yet they are treated differently by Ordinance 4818.

[30] The City must therefore show that this distinction is rationally related to a legitimate government interest by setting forth its justifications. If it does so, then the Fergusons may establish the lack of a rational basis by negating "every conceivable basis which might support the government action[.]" Warren v. City of Athens, 411 F.3d 697, 711 (6th Cir. 2005). We turn now to those asserted bases.

C. The City's proffered reasons for the distinction created by Ordinance 4818 fail.

1. The City did not show that the distinction created by Ordinance 4818 prevents or controls flooding.

[31] The City claims that its goal in enacting Ordinance 4818, including the platted/unplatted distinction, was to prevent or control flooding by strictly limiting new construction along all riverbanks. Appellant Br. ¶ 10. However, the City simply offered no evidence to support its position that this distinction is rationally related to flood control.

[32] To show that Ordinance 4818's distinction between platted and unplatted is rationally related to the City's admittedly legitimate interest in flood control or prevention, one would have expected the City to come forward with evidence in the district court to prove at least the following points: (1) building near the river exacerbates

flooding; (2) this is true even when construction is undertaken on lots on which homes already exist; (3) the MDZS/LDZS requirements will help prevent flooding; and (4) most specifically here, that (4) stopping construction on lots on which homes already exist will assist in achieving this goal. One might have also expected the City to offer evidence, if any existed, that (5) construction on unplatted land has a different effect on flooding, as a geotechnical matter, than construction on platted land. These facts matter because the City's argument is that there is a technical difference between platted and unplatted land, yet it offered no evidence to support that assumption and distinction. The City is silent on all of these points, and the record is thus devoid of any evidence of the City's claims. See N.D. R. App. P. 10(a).

[33] The City relied entirely on affidavits by two employees, April Walker and James Gilmour. Doc. ID #22, #27. Walker's affidavit generally describes the history of the Ordinance, explains why the City chose to structure it as it did, and reviews the history of the Property. Doc. ID #22. The only technical information it contains is a citation to someone who told the City Commission that the entire Red River Valley has similar soils. Id. These statements have little substantive value, and they are inadmissible hearsay in any event. See In re Estate of Stanton, 472 N.W.2d 741, 745 (N.D. 1991) (holding that statements in an affidavit must set forth facts that would be admissible in evidence and hearsay statements will not be considered in deciding a motion for summary judgment). Gilmour's affidavit merely walks through the platting process; it does not have any information about why a building ban helps flood concerns. Doc. ID #27.

[34] This silence is crucial to this Court's review. The City asked the district court, and is now asking this Court, to accept on faith that the distinction drawn by Ordinance 4818 will help control or prevent flooding. However, that has to be proven, both in a general sense – that the MDZS/LDZS helps at all – and specifically that the platted/unplatted distinction is rationally related to that interest. See St. Josephy Abbey, 712 F.3d at 226 (stating rational basis review "does not require courts to accept nonsensical explanations for regulation"). The City simply has not proven anything in this case.

[35] Moreover, the City's argument that Ordinance 4818's distinction controls flooding by preventing construction fails for an even more logical reason: Ordinance 4818 merely prevents some, but not all, construction along riverbanks. Ordinance 4818 is not a building ban; rather, landowners of platted lots have the opportunity to build, while landowners of unplatted lots do not.

[36] The City relies on City of Bismarck v. Materi, 177 N.W.2d 530 (N.D. 1970) and Tyler v. City of College Park, 3 A.3d 421 (Ma. Ct. App. 2010) in support of its assertion that the City is not obligated to enact "perfect" legislation, and that the City may address a problem in piecemeal fashion. While that legal proposition is correct, Tyler and Materi equally stand for the proposition that there must be some proven rational relationship between the ordinance and the government interest, which is lacking here.

[37] In Materi, this Court concluded that a city ordinance that permitted only grocery stores with no more than three employees to do business on Sundays did not violate Equal Protection. 177 N.W.2d at 541. The Court analyzed whether the exemption at issue was "so unreasonable or arbitrary that it constitutes an improper

classification," specifically whether a rational relationship existed between the "size of the business" and the city's interest in allowing citizens a day of rest. Id. at 540-41. The Court found there was a direct and rational relationship between limiting the size of the business allowed to be open on Sundays and allowing citizens a day of rest and recreation, because closing larger businesses would result in more employees having a day of rest. Id. Thus, the Court concluded that the classification was in fact "reasonably necessary to effect the purposes of law." Id. (emphasis added).

[38] Crucially, then, Materi does not mean that any law tending to achieve part of a legislative purpose will be upheld. For example, a law that allowed only businesses with more than five letters in their names to be open Sundays would have achieved the legislative goal at issue in Materi, but only through an arbitrary distinction, and this Court would have struck it down as "so unreasonable or arbitrary that it constitutes an improper classification." As discussed in more detail *infra* Section C.2.-4., the City cannot demonstrate a rational relationship between the distinction created by Ordinance 4818 and the City's interest in controlling or preventing flooding, most fundamentally because prior platting has nothing to do with land's propensity for flooding. Unlike in Materi, then, the distinction here is not "reasonably necessary to effect the purpose" of the Ordinance. Id.

[39] In Tyler, the Maryland Court of Appeals upheld College Park's rent control ordinance because the ordinance was rationally related to College Park's interests in encouraging the availability of affordable housing and improving existing housing in the city. 3 A.3d at 441. In that case, the City offered expert reports and data to show that the City had a rational basis to believe the rent control program would achieve those

ends, even if the distinction was not perfect. Id. at 439-40. As a result, the court concluded that even though the program may not solve every housing problem in College Park, the ordinance was rationally related to the City's legitimate interests. Id. at 441.

[40] The same cannot be said in this case. The City asserts that Ordinance 4818 and the platted/unplatted distinction will help control flooding, but it offers no evidence to support that claim. Indeed, the district court found that platting had no effect on the character of the land or its likelihood to flood.

[41] In short, the Tyler and Materi courts did not simply accept any proffered justification for the classification on faith. Similarly, the district court correctly recognized that the City offered no evidence to show that the platted/unplatted distinction rationally relates to the City's interests in controlling flooding. App. 16, ¶ 20. As Materi recognized, rational basis review does not provide a free pass for the City to pass any legislation creating distinctions among citizens; the constitutions of North Dakota and the United States require that the City must be able to demonstrate the distinction is rationally related to its interests. The City simply cannot do so here.

2. Ordinance 4818 treats similarly-situated landowners differently based on factors unrelated to the character of their land.

[42] Ordinance 4818 treats similarly situated landowning citizens differently (for purposes of land regulation) based on factors unrelated to the character of their land, specifically whether it was platted by a certain date. However, as Judge Irby concluded, "Platting does not change the character of the land at issue," and "whether land is platted or unplatted does not make it more or less likely to be subject to slumping or flooding." App. 16, ¶¶ 19, 20. These facts are critical to the analysis in this case because courts

have been consistently skeptical of laws and ordinances that treat identical land or land use differently for non-land specific reasons.

[43] This Court followed this principle in Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973) and Northwestern Improvement Co. v. State, 220 N.W. 436 (N.D. 1928). In Northwestern Improvement, this Court held that it was arbitrary and unconstitutional to make a distinction for taxing purposes "based upon the severance of ownership of . . . minerals from that of the surface." 220 N.W. at 439. Notably, this Court concluded:

> It is true that all owners of minerals severed from the surface are in the same class, but that is not a classification of property but of persons. The tax is not upon the person but on the property, and it is the property that must be placed in reasonable classes for the purpose of taxation. To be uniform property taxes must be laid with regard to the value, or some other characteristic of the property which justifies a classification. The tax in question is not uniform upon the same class of property[.]

Id. at 439-40 (emphasis added).

[44] In Christman, this Court followed Northwestern Improvement and struck down a statute that required that coal reservations be described with substantial detail, even though coal grants did not require a similarly detailed description. Christman, 212 N.W.2d at 553-56. In each case, this Court essentially held that land had to be treated equally by the government, irrespective of how it was acquired. This is directly on point in this case, because the Ordinance treats identical land differently based on whether it was acquired from a developer who platted it or otherwise.

[45] The United States Supreme Court has similarly invalidated ordinances on equal protection grounds where the law treats identical land differently based on how the land was acquired, as opposed to something relevant about the land. In Allegheny

Pittsburgh Coal Company v. County Commission of Webster County, 488 U.S. 336 (1989), the United States Supreme Court affirmed the invalidation of an ordinance that taxed landowners of otherwise identical property differently based upon the consideration paid for the property and how the landowner acquired the property. The properties were otherwise substantially similar in character and their inherent features. Id. at 340, n.3. As the Court noted, "[T]he total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings," and the distinction drawn by the ordinance based solely on how the landowners acquired their land was irrational and denied the landowners equal protection of the law. Id. at 346.

[46] Similarly, courts are wary of laws that create a distinction between similar uses of land. For example in Cleburne, the United States Supreme Court concluded that a distinction between "group homes" and "apartments" was a false distinction between two similar land uses, so that regulating them differently violated equal protection. 472 U.S. at 452; accord Kirsch v. Prince George's Cnty, 626 A.2d 372, 373-74 (Md. Ct. App. 1993) (holding Prince George's mini-dorm ordinance did not properly differentiate based on the nature of the use of the property).

[47] These cases all teach that regulations of land should be based on the actual character and use of the land, not unrelated factors, and that similar land should be treated similarly. Here, the Fergusons' land, and their desired use of it, is essentially the same as their neighbors, who can seek and have received waivers. The City largely hinges its argument on the premise that the platting process "confers a status on platted lots that unplatted lots do not have" and that the district court failed to recognize this "status."

Appellant Br. ¶ 25. However, as Judge Irby found, platting does not affect the character of the land for the purpose of whether it will flood, which is the City's asserted claim. App. 16, 19.

[48] The City cites Baggs v. City of South Pasadena, 947 F. Supp. 1580 (M.D. Fla. 1996), for the proposition that the Fergusons are not similarly situated to their neighbors because the Property is unplatted. However, Baggs is distinguishable. The plaintiffs there were denied a variance because they failed to retrofit their property in compliance with the City of South Pasadena's flood damage prevention ordinance. Id. at 1584. Initially, it is notable that the plaintiffs had the opportunity to apply for a variance, which the Fergusons do not. Moreover, the Baggs plaintiffs had been given 120 days to comply with the ordinance but failed to do so. Id. at 1582. Here, Ordinance 4818 was passed in less than one month, so the Fergusons, who had no prior need to plat or subdivide their Property, did not have a chance to plat into compliance.[3] If anything, Baggs supports the Fergusons, because it shows how an ordinance of this kind should work, by giving adequate time to comply and a process to seek relief.

[49] The City also argues that the distinction between platted and unplatted land is rational because only platted lots are eligible for building permits. However, the Land Development Code itself recognizes that safe building is possible on both platted

[3] The second case the City cites for the proposition that courts have upheld distinctions between platted and unplatted land simply does not prove what the City wishes it did. In Sellon v. City of Manitou Springs, 745 P.2d 229, 231 (Colo. 1987), the court never considered an equal protection challenge; indeed, the term "equal protection" does not appear in the main section of the opinion. In a footnote, the court rejects an equal protection argument that the ordinance improperly required unplatted lots to be larger than platted lots, but that was not a meaningful part of the opinion and has no force here.

and unplatted lots, an implicit recognition that platting does not change the character of the land at issue. Specifically, the Zoning Administrator may waive the requirement that a lot be shown on a subdivision plat that has been recorded for lots located outside of the City limits or within the City's extraterritorial zoning jurisdiction so long as the lots have sufficient street access, among other things. See Fargo Land Development Code § 20-0913(A). Thus, the relevant question for the building permit waiver is whether those unplatted lots have sufficient street access, which is unrelated to geological or structural character of the land.

[50] Here, the Property is similar to those lots that are not a part of a subdivision plat that can receive a waiver of the subdivision plat requirement. Whereas most lots in the City's limits are designed on a subdivision plat, the City annexed the Fergusons' Property as the City grew around it, so the Property has never been part of a subdivision plat. Moreover, as discussed at length below, *infra* Section C.3., the Fergusons had no reason to plat their Property until Ordinance 4818 was enacted. Similar to the lots that can receive a waiver of the plat requirement, the Property has proper access to roadways and City services, and as the Land Development Code recognizes, the character of the unplatted Property is not inherently different from platted lots that surround it – safe construction is possible on both platted and unplatted land.

[51] Equal protection of the law does not forbid classification, but it does prevent government decisionmakers from treating differently persons who are in all relevant aspects alike, which is precisely the case here. Hamich, Inc. v. State ex rel Clayburgh, 1997 ND 110, ¶ 31, 564 N.W.2d 640. It is undisputed that the Property is the same as their neighbors' property in terms of location, topography, and geography.

Under Ordinance 4818, those neighbors may apply for (and several have received) waivers from the City, while the Fergusons may not even apply, solely because the neighbors' land was platted in May 2012 while the Fergusons' was not. This distinction is inherently irrational, and this Court should affirm the order striking it down.

3. The City's justifications for the distinction created by Ordinance 4818 concern stopping further subdivision, which the Fergusons do not seek to do.

[52] The City's explanations for the distinction created by the Ordinance have nothing to do with preventing construction on single-family unplatted lots (particularly lots with homes on them already). Rather, they focus on stopping further subdivision, which is accomplished through a plat. To that end, the City relied on the Gilmour affidavit. Doc. ID #27. As he explained, a developer must plat "in order to develop multiple lots for sale[.]" Id. ¶ 5. Thus, the real purpose of platting is to determine if land is suitable for subdividing into multiple lots, which implicates attendant issues such as roads, sewers, and other services. As Gilmore stated:

> Subdividing, or platting, is the Planning Department's first chance to review subdivision proposed applications to determine if roadways, emergency services, utility services, and flood plain management requirements can be satisfied.

Id. Thus, the City equates "platting" with "subdividing" by using the terms interchangeably and tying the purpose of platting to evaluating the suitability of land for division.

[53] As noted above, the City offered neither evidence nor argument for the contention that further building on unplatted single-family lots, without subdivision, will affect flooding or that construction on unplatted land has a different effect on flooding, as a geotechnical matter, than construction on platted land. Indeed, the district court

expressly found otherwise. App. 14-17. Gilmour and Walker focus solely on the effect that additional subdivisions could have on the City. This silence is an admission that there is no such evidence, and the only purpose of Ordinance 4818 is to stop further subdivision.[4]

[54] However, the essential fact for the equal protection analysis here, as applied to the Fergusons, is simple: the Fergusons do not seek to subdivide the Property. Their plans do not include any new roads or utilities and would not implicate municipal emergency services, which the City explains is the purpose of platting. They own their homestead, which is a large single-family lot, on which they simply wish to build another home that would be farther from the river than the existing home. In that sense, they are precisely similar to their neighbors: each owns a single-family lot and wishes to construct improvements consistent with single-family uses, without any further subdivision.

[55] Moreover, the Fergusons historically had no reason to plat the Property because, under Fargo Land Development Code § 20-0907(A)(1), platting is required for dividing land into two or more parcels or constructing public improvements.[5] The Fergusons wish only to build an additional structure on the Property; they do not wish to divide the Property into multiple lots or construct public improvements. As such, the Fergusons had no reason to believe that platting would somehow affect their ability to

[4] Ironically, the Ordinance does not actually achieve the City's goal of preventing further subdivision, because it would not by its terms stop a replat of an existing platted lot into multiple lots.

[5] Platting is also required for some lots to receive a building permit, as noted in Fargo Land Development Code § 20-0913(A). However, a wavier procedure exists for unplatted lots outside of the City limits.

build until the City passed Ordinance 4818 and arbitrarily created a need to have platted the land prior to May 2012.

[56] The City does not address this issue. Rather, it simply asserts that it needs to stop the Fergusons from applying for a waiver because it needs to stop further subdivision, ignoring that the Fergusons do not seek to subdivide (and never had any desire to subdivide). The City thus exposes the fatal flaw in its position, which is that it treats similarly situated people differently based on a false equivalence between the Fergusons and someone looking to subdivide land. As applied to the Fergusons, the Ordinance is not rationally related to the interest of stopping subdivisions, because they do not intend to subdivide. There is simply no relationship between what the City wants to avoid and what the Fergusons seek to do.

[57] The City claims that platted land has already been through the City's process "to determine if the requirements for developing such property are satisfied," and that platting allows "owners who had previously shown their commitment to future development" to get waivers. Appellant Br. ¶ 26. These arguments are so closely related that it is difficult to separate them, but together they share several flaws.

[58] First, these arguments reflect the fallacy that the Fergusons (and others like them) should be treated as if they were subdividers. The City's own explanation of platting is that it relates to subdivision, and the Fergusons do not wish to subdivide. Thus, there is no reason they would ever have gone through any sort of review. People like the Fergusons had no prior need to plat their land. The argument is thus irrational on its own terms – had the Fergusons previously platted as a single-family lot, this would not show that they were committed to subdividing, as the City suggests, but rather (at most)

that they were committed to having a single family house, a commitment shown mainly by the continued presence of that house.

[59] As a matter of fact, however, the City did have notice that the Fergusons might have subdivided (though they do not now seek to do so). Doc. ID #27, Ex. E. In 2005, the Fergusons and the City entered into an "Agreement Regarding Special Assessments," a copy of which was attached to Gilmour's affidavit. Id. That Agreement states that the Fergusons or their successors might seek to "convert[] the use of the lot to a higher use than one (1) single-family owner-occupied residential structure." Id., Ex. E, ¶ 7. In that event, the deferral of special assessments would terminate. The City thus had actual knowledge that the Property might be subdivided in the future, which reflects a level of commitment sufficient to give it notice that there was a chance the Property could be subdivided.

[60] Second, the argument falsely asserts that a waiver absent a prior plat might lead to unsafe building. To get a waiver, the Property would first have to go through rigorous geotechnical testing, which would allow the City to make an informed decision. The City does not explain what additional testing would be required to plat that is not covered by testing required for the waiver application. Indeed, because even platted lots need more testing for a waiver under the Ordinance, it is logical to assume that the waiver testing is more rigorous than the plat testing, defeating this argument.

[61] Finally, there is a certain irony in allowing those with a "commitment to further development" to build when the supposed purpose of the Ordinance is to stop further development. To escape this trap, the City relies on "grandfathering" cases that allow the government to treat prior uses differently than future uses. Specifically, the

City looks to 10 and Scotia Plaza, LLC v. City of Oak Park, 2013 WL 300906 (W.D. Mich. 2013), an unpublished, out-of-jurisdiction opinion, in support of its position that Ordinance 4818 is an acceptable form of "grandfathering." In Scotia Plaza, an ordinance limited the number of liquor licenses within a geographic area but grandfathered in those businesses that owned liquor licenses before the ordinance went into effect. Id. The court concluded that new establishments were not similarly situated to the grandfathered establishments because the grandfathered establishments had liquor licenses before the ordinance was passed. Id. Thus, the ordinance was constitutional.

[62] The facts of Scotia Plaza are distinguishable from the facts present in this case for two reasons. First, the Fergusons, unlike the plaintiffs in Scotia Plaza, have recognized and protected rights in the continued use of their property. Cf. City of Fargo v. Harwood Township, 256 N.W.2d 694, 700 (N.D. 1977). Ordinance 4818 actually takes away a right they had, as opposed to preventing them from gaining a new right they did not previously have. Second, the new establishments in Scotia Plaza knew they needed to secure a liquor license prior to the effective date of the ordinance, whereas the Fergusons had no need to plat their property until the Ordinance was passed (and had no time to get platted in the month between introduction and passage). As such, the analysis in Scotia Plaza is irrelevant here.

[63] In sum, the City's real justifications for the distinction created by Ordinance 4818 are to control further subdivision. The means by which Ordinance 4818 attempts to achieve that end are entirely irrational as applied to the Fergusons, because the Fergusons do not seek to subdivide or create additional buildable lots. There is no

rational explanation provided by the City that shows how the distinction is rationally related to achieving its goals.

4. Administrative convenience alone cannot justify the distinction.

[64] Finally, the City attempts to justify Ordinance 4818's distinction by arguing, without any supporting evidence, that the Ordinance conserves government resources. This argument is likewise without merit.

[65] First, there is no evidence in the record to support the City's argument that the distinction drawn by the Ordinance will conserve government resources. There is no evidence to indicate, for example, how long it takes the City to process each waiver, or what government resources are exhausted during the review process. Instead, the City makes another wholly unsupported claim that allowing landowners with unplatted lots to seek waivers would create an "overwhelming" administrative burden. Appellant Br. ¶ 30. The City has no evidence to support its conclusory claim, and this Court may not consider evidence outside the record. See Oien v. Oien, 2005 ND 205, ¶ 11, 706 N.W.2d 81; N.D. R. App. P. 10(a).

[66] An interest in conserving government resources alone can "hardly justify the classification used in allocating those resources." Plyler v. Doe, 457 U.S. 202, 227 (1982). After all, excluding any "arbitrarily chosen group of individuals" always conserves government resources. Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011). An unsupported claim that the distinction conserves government resources cannot support the distinction in this case.

[67] To that end, the City's reliance on Holt v. Howard, 806 F.3d 1129 (8th Cir. 2015) is misplaced. In Holt, the Eighth Circuit Court of Appeals did not conclude

conserving government resources alone provided a justification to allow only inmates represented by counsel to make Freedom of Information Act ("FOIA") requests. The Eighth Circuit was primarily concerned with safety concerns for the victims and the public, as allowing any inmate to make a FOIA request could result in inmates securing information of victims or committing additional crimes. Id. at 1132-33. Thus, conserving government resources from excessive FOIA requests from inmates was not the sole reason why the distinction did not violate the Equal Protection clause, as is the case here once the other reasons are eliminated.

D. The Fergusons have negated all of the City's proffered reasons for the distinction, proving Ordinance 4818 is not rationally related to a legitimate state interest.

[68] As explained above, a plaintiff establishes the lack of a rational basis by negating "every conceivable basis which might support the government action[.]" Warren, 411 F.3d at 711. The Fergusons have met this standard here.

[69] This case is analogous to St. Joseph Abbey. In that case, the Fifth Circuit Court of Appeals held that rules issued by the Louisiana Board of Funeral Directors granting only funeral homes an exclusive right to sell caskets were unconstitutional under rational basis review. St. Joseph Abbey, 712 F.3d at 227. The State Board of Funeral Directors justified the distinction on economic grounds. Id. at 221. However, as the Court of Appeals stated, "[T]he State Board cannot escape the pivotal inquiry of whether there is such a rational basis, one that can now be articled and is not plainly refuted by the Abbey on the record complied by the district court[.]" Id. at 223. Because the Abbey successfully refuted every basis the State Board offered to justify its rules, the Court of Appeals affirmed the district court and concluded the State Board offered no rational

basis for their challenged rules, noting, "We insist only that Louisiana's regulation not be irrational." Id. at 226-27.

[70] Like the plaintiff in St. Joseph Abbey, the Fergusons have plainly refuted all of the City's justifications for the classification created by Ordinance 4818. The City cannot offer any rational justification for the distinction, and as such, the Ordinance fails rational basis review. Thus, the district court's conclusion that the Ordinance is unconstitutional should be affirmed, and the Ordinance should be held unconstitutional as applied to the Fergusons and those similarly situated.

CONCLUSION

[71] As shown above, the district court correctly held that Ordinance 4818 violates the Equal Protection clauses of North Dakota and United States Constitutions. Therefore, the Fergusons respectfully request that this Court affirm the district court's order, declaring the Ordinance unconstitutional.

Dated: June 30, 2016

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Plaintiffs-Appellees Edward and Lavanna Ferguson in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,596.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20160067

Edward P. Ferguson and Lavanna M. Ferguson, Plaintiffs-Appellees, v. City of Fargo, Defendant-Appellant.	)	**CERTIFICATE OF SERVICE**

I certify that on June 30, 2016, the following documents were filed:

Brief of Plaintiffs-Appellees Edward P. Ferguson and Lavanna M. Ferguson

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The above documents were duly served in accordance with the provisions of the North Dakota Rules of Appellate and Civil Procedure.

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