

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>Edward P. Ferguson and Lavonna M. Ferguson,</p> <p>Plaintiff–Appellee,</p> <p>vs.</p> <p>City of Fargo,</p> <p>Defendant–Appellant.</p>	<p>Supreme Court No. <u>20160067</u></p>
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**Appeal from Judgment dated February 10, 2016, and Order dated February 8, 2016
Cass County District Court, East Central Judicial District, No. 09-2015-CV-02227**

REPLY BRIEF OF APPELLANT CITY OF FARGO

Jane L. Dynes (ND #04495)
Ronald H. McLean (ND #03260)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: (701) 232-8957
jdynes@serklandlaw.com
rmclean@serklandlaw.com
**ATTORNEYS FOR APPELLANT
CITY OF FARGO**

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A. Ordinance 4818 satisfies the Rational Basis Standard of Review.

[¶1] North Dakota follows the federal law and applies the rational basis standard of review where “a statute regulates social or economic matters without using suspect classifications or involving fundamental rights.” Hamich, Inc. v. State ex rel. Clayburgh, 1997 ND 110, ¶31, 564 N.W.2d 640, 647-48 (N.D. 1997). “Under the rational basis test, a legislative classification will be upheld unless it is patently arbitrary and bears no rational relationship to a legitimate government purpose. . . . [I]f a reviewing court can conceive of a reason justifying the choice made by the legislature or government decision maker in service of a legitimate end, the statute does not violate the equal protection clause.” Haugland v. City of Bismarck, 2012 ND 123, ¶42, 818 N.W.2d 660 (N.D. 2012).

[¶2] A successful equal protection challenge requires that a plaintiff:

. . . show that (1) it was treated differently from others who were similarly situated and (2) there is no rational basis for the difference in treatment. . . .

10 & Scotia Plaza, LLC v. City of Oak Park, 2013 WL 300906 at *9 (E.D. Mich. 2013) (internal citations omitted); Warren v. City of Athens, 411 F.3d 697, 710-711(6th Cir. 2005). The Fergusons have failed to meet their burden of negating all possible bases for the difference in treatment contained in Ordinance 4818.

[¶3] The City has shown the Fergusons’ un-platted parcel is not similarly situated to platted lots and there are rational bases for treating platted lots and un-platted parcels differently and which further the City’s purposes in enacting Ordinance 4818.

B. The Fergusons’ un-platted river parcel is not similarly situated to area platted river lots.

[¶4] The Ferguson property is un-platted and has never been subjected to the City’s platting review and acceptance process. The Fergusons did not engage the

expertise of surveyors or engineers to develop a proposed plat for their property. They did not invest time or money to develop a proposed plat application or complete the plat review process. The properties to which the Fergusons claim to be similarly situated were all examined and approved through the City's platting review process.

[¶5] While the Fergusons do not currently seek to subdivide their property, they have acknowledged that they may subdivide it in the future. Doc ID# 37: Pl. Reply Brief, ¶5. The Ferguson property is zoned for multiple dwellings. Doc ID# 27, ¶11; Doc ID# 30; Doc ID# 31. Indeed, the Fergusons initially requested a waiver opportunity based on their desire to build multiple single family duplexes on their property. *See*, <http://www.cityoffargo.com/CityInfo/CityCommission/2013Minutes> (Minutes of Fargo Board of City Commission February 4, 2013 and July 2, 2013). The Fergusons continue to use their property as a single family residence. A landowner who merely hopes to use his property in a certain way in the future has no protection against zoning changes with prohibit such use. City of Fargo v. Harwood Township, 256 N.W.2d 694, 700 (N.D. 1977).

1. The Fergusons' property does not have a "Legal Lot" relationship with the City of Fargo.

[¶6] Building permits may only be issued for legal lots. Fargo Land Development Code (LDC) §20-0913(A). A legal lot is a lot shown on a subdivision plat that has been filed in the office of the County Registrar of Deeds. LDC §20-1201(28). The distinction between platted lots and un-platted parcels regards the difference in character of the properties' relationship to the City. Legitimate legislative classification must have regard to differences in character or use of property but also have regard to differences in the governmental relationship and cannot be purely arbitrary. Northwestern Improvement Co. v. State, 220 N.W. 436, 439 (N.D. 1928). Ordinance 4818's

classification regards the properties' differing relationships to the City as created through the City of Fargo's platting process. Status as platted or un-platted is a characteristic of the property, based on government relationship. In light of Ordinance 4818's focus on limiting new construction in its setback areas on property eligible for building permits, this classification is not arbitrary.

2. The distinction conserves government resources.

[¶7] There are 290 vacant platted river lots and 90 un-platted river parcels containing hundreds of acres within the City of Fargo and its extraterritorial jurisdiction. Doc ID# 27, ¶14. Platted lots are legal lots eligible to apply for building permits. The Fergusons' property is not a legal lot and is not eligible for a building permit. The Ordinance's distinction between platted and un-platted does not involve fundamental rights or a suspect classification. As such, it does not violate equal protection because there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. See, Holt v. Howard, 806 F.3d 1129 (8th Cir. 2015).

[¶8] The 290 platted lots and, potentially, 290 waiver applications for the City to review, must be investigated and resolved. Reducing that number by eliminating waiver requests for the 90 un-platted parcels clearly results in reducing the number of potential waivers. Further, there is no doubt it will take staff time to obtain and review geotechnical data and make recommendations to the City Commission on each waiver application. Reducing the number of potential waivers reduces the demand on staff time. Easing administrative burdens can be a legitimate purpose. Metropolitan Life Ins. v. Commissioner of Department of Insurance, 373 N.W.2d 399, 407 (N.D. 1985). If the court can conceive of a reason justifying the government's choice in the service of a legitimate end, the statute does not violate equal protection. Hamich, 1997 ND 110 ¶32,

564 N.W.2d at 648. Clearly, there are plausible reasons to support a determination that the City's purpose in creating the distinction between platted lots and un-platted properties was in part to conserve resources.

C. The goal of Ordinance 4818 is to prevent or limit new construction to areas further removed from the dangers of unstable soils, rivers and drains.

[¶9] Despite the Fergusons' repeated assertions, the purposes of Ordinance 4818 did not include preventing flooding or stopping subdivision. Fergusons' Brief ¶¶ 31-35, 38, 40-41 (flooding) and ¶¶ 56, 58-61, 63. The City's purpose in enacting Ordinance 4818 was: ". . . to strictly limit, or entirely prevent, new construction within a specified distance from all river banks and drains to protect the health and safety of its citizens, protect private property and protect City infrastructure from floodwaters, slumping and the unstable river bank soils of the Red River Valley." City of Fargo Brief, ¶10. The risk of harm from unstable soil, slumping and floodwaters is clearly reduced when limited new construction is kept further away from the harms' sources. The distinction which provides a waiver opportunity to platted lots but not un-platted parcels is rationally related to the City's purposes of first addressing the waiver applications for those legal lots eligible for building permits.

CONCLUSION

[¶10] The City has shown that Ordinance 4818's waiver provision is rationally related to the City's objective to prevent or limit new construction in the setback areas to reduce the harm from unstable river bank soils, slumping and floodwater sources. The character of a platted lot's relationship to the City is different from that of an un-platted parcel. The distinction between platted and un-platted furthers the City's goals by allowing it to first address the potential waiver applications for the platted lots that are eligible to apply for building permits.

[¶11] The City of Fargo respectfully requests that the district court be reversed and that this Court determine that Ordinance 4818, including its distinction between platted lots and un-platted parcels for purposes of its waiver provision, does not violate the equal protection clauses of either the North Dakota or United States constitutions and is, therefore, constitutionally sound.

Dated this 14th day of July, 2016.

/s/ Jane L. Dynes

Jane L. Dynes (ND #04495)

Ronald H. McLean (ND #03260)

SERKLAND LAW FIRM

10 Roberts Street | PO Box 6017

Fargo, ND 58108-6017

Phone: (701) 232-8957

jdynes@serklandlaw.com

rmclean@serklandlaw.com

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, City of Fargo, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and 32(8)(a) 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, certificate of service and this certificate of compliance, totals **1,331**.

Dated this 14th day of July, 2016.

/s/ Jane L. Dynes

Jane L. Dynes (ND #04495)

Ronald H. McLean (ND #03260)

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