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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Edward P. Ferguson and Lavonna M. Ferguson, Plaintiff–Appellee, vs. City of Fargo, Defendant–Appellant.	Supreme Court No. 20160067

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

BRIEF OF APPELLANT CITY OF FARGO

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I. STATEMENT OF ISSUES

[¶1] Whether the district court erred, as a matter of law, in concluding that City of Fargo Ordinance 4818's provision of a waiver opportunity to platted lots, but not un-platted parcels, is not rationally related to a legitimate government interest and is, therefore, an unconstitutional violation of the equal protection clauses of the constitutions of North Dakota and the United States as applied to the Fergusons and others similarly situated.

II. STATEMENT OF CASE AND COURSE OF PROCEEDINGS

[¶2] Edward and Lavonna Ferguson brought a claim for declaratory judgment against the City of Fargo seeking a determination that City of Fargo Ordinance 4818 was unconstitutional. (Appendix "App." p. 6). The complaint also contained a claim for inverse condemnation. (App. p. 6-7). The Fergusons filed a partial summary judgment motion as to the claim for declaratory relief. (Docket "Doc" ID# 8). The City of Fargo filed a cross motion for summary judgment as to the declaratory judgment claim as well as a motion for summary judgment on the inverse condemnation claim. (Doc ID# 21). A hearing on the summary judgment motions was held on January 4, 2016. (Transcript "Tr." p. 1). At the conclusion of the hearing East Central Judicial District Judge John C. Irby ruled that Ordinance 4818 was unconstitutional. (Tr. p. 49, lines 7-16). The district court determined that the ordinance violated the equal protection clauses of the North Dakota and United States Constitutions because it afforded a setback waiver opportunity to owners of platted lots but not to owners of un-platted parcels. Id.

[¶3] The parties stipulated to dismiss the inverse condemnation claim without prejudice. (Doc ID# 41). The district court entered an order granting the Fergusons'

motion for summary judgment on February 9, 2016. (Doc. ID# 55; App. p. 14-17). Judgment of Dismissal was entered February 10, 2016. (Doc ID# 57; App. p.18). Notice of Entry of Order for Judgment and Judgment was entered February 11, 2016. (Doc. ID# 58). The City of Fargo filed its notice of appeal to this Court on February 23, 2016. (Doc ID# 62; App. p. 19-20). Notice of the declaratory claim challenging the ordinance was provided to the Attorney General pursuant to N.D.C.C. §32-23-11 and N.D.R.App.P. 44. See, Supreme Court Docket May 20, 2016.

III. STATEMENT OF THE FACTS

[¶4] Edward and Lavonna Ferguson (hereinafter referred to as "The Fergusons") purchased the property at issue in this matter in 1996 and it has been occupied since 1998. (Doc ID# 10: Ferguson Aff. ¶5). The property is approximately five (5) acres and adjacent to the Sheyenne River. (Doc ID# 30; Doc ID# 31). The parcel was annexed to the City of Fargo in 2002 but never underwent the City's review and approval process for platted properties. (Doc ID# 10, ¶7). There is an existing house and approximately five (5) other structures on the property. (Doc ID# 10, ¶9; Doc ID# 30; App. p.33).

[¶5] In December 2003, the Fergusons applied to rezone their parcel from agricultural to SR-4 which would allow for increased density including attached and detached houses and duplexes. (Doc ID#s 30-31). In December 2005 they entered into an agreement with the City of Fargo to defer payment of a portion of their property's special assessments and interest until their parcel was put to a use higher than one single family owner occupied residence. (Doc ID# 27, ¶12; Doc ID# 32).

[¶6] The Fergusons do not dispute that the City of Fargo, a political subdivision of the state of North Dakota, has enacted a home rule charter and is governed by a City Commission. (App. p. 4: Complaint, ¶¶4-5). The Fergusons do not dispute that the City Commission has the authority to enact zoning and other requirements for property such as platting, subdivision and building permit approval. Id. ¶¶6-7.

[¶7] The City of Fargo has experienced severe river flooding. After the historic 2009 flood, the Board of Commissioners for the City of Fargo enacted a moratorium on building permits for platted Red River lots which allowed the staff of the Engineering, Planning and Inspections Departments to evaluate requests on a case by case basis. (Doc ID# 23: Minutes, p. 151). The moratorium was amended to apply to newly platted lots along the Wild Rice and Sheyenne rivers as well. Id. p. 151.

[¶8] During the moratorium period, the City Commission worked to develop an ordinance that would limit new construction to safer areas further removed from the water source on land adjacent to the Wild Rice River, the Sheyenne River and the Red River within the City of Fargo and its extraterritorial jurisdiction. (Doc ID #22: Affidavit of April Walker, ¶4). City staff, area developers and others provided input during the ordinance drafting process. Id. NDSU Geology Professor Donald Schwert advised the City Commission that the geological setting of the Sheyenne, Wild Rice and Red Rivers is identical as they flow across the same geology. (Doc ID# 23: Minutes, p.151; Doc ID# 22: Walker Aff., ¶¶5-7). There are soil instability problems (slumping) along the banks of the Sheyenne just as there are along the Wild Rice and Red Rivers. (Doc ID# 23, p. 151). River bank instability is a recognized danger to people and property in the Red River Valley. (Doc ID# 22, ¶7).

[¶9] The Federal Emergency and Management Agency ("FEMA") establishes the floodway for the Sheyenne River. (Doc ID# 22, ¶2). The FEMA floodway for the Sheyenne River is contained to the river's natural channel, as is the applicable floodplain. Id. ¶3.

[¶10] The City's goal in enacting Ordinance 4818[1] was to strictly limit new construction to within a specified distance away from all riverbanks and drains to protect the health and safety of Fargo citizens, protect private property and protect city infrastructure from floodwaters, slumping and the unstable riverbank soils of the Red River Valley. (Doc ID# 22, ¶8). Ordinance 4818, enacted in 2012, applies to all lands along the Red River Valley of the North, the Sheyenne River and the Wild Rice River. (App. p. 25-30). As applied to lands adjacent to the Sheyenne River, the Ordinance prevents new construction within the minimal disturbance zone setback (MDZS), defined as the greater distance of either 175 feet from the centerline of the river, or the floodway, whichever distance creates the greatest amount of setback from the centerline of the river. (App. p. 25). Ordinance 4818 also strictly limits construction in a limited disturbance zone setback (LDZS) which begins at the outer edge of the MDZS and extends an additional 100 feet inland. (App. p. 26).

[¶11] Ordinance 4818 distinguishes between platted river lots and river parcels not platted through the City platting process in its Transitional Provisions to Waterway Setback Restrictions. (App. pp. 28-29). The ordinance contains an exception to the application of the setbacks for platted river lots by providing an opportunity to seek a waiver of the setback restrictions. Id. Un-platted parcels are omitted from the waiver

[1] All references will be to "Ordinance 4818" although it has been codified in the City's Land Development Code § 20-0508.

provision. Waiver applications are subject to review criteria established by the City, including a geotechnical study to test soil stability and may be denied. (Doc ID# 22, ¶14; App. p. 29).

[¶12] The waiver opportunity is afforded to platted lots, and not un-platted parcels, because such lots were reviewed through the City platting/subdivision process and approved by the Planning Department, the Planning Commission and the City Commission. (Doc ID# 22, ¶¶14-15). Subdividing or platting a parcel into blocks and lots is the City's first chance to review proposed applications to determine if roadways, emergency services, utility services and floodplain management requirements can be satisfied. (Doc ID# 27: Gilmour Aff., ¶5). The Planning Department applies the City's Comprehensive Growth Plan, its Land Development Code and other applicable statutes and ordinances when reviewing proposals. (Doc ID# 27, ¶3). To subdivide a larger parcel into smaller lots for sale, an owner or developer must submit a proposed plan of the subdivision "plat" to the Planning Department for approval. Id. ¶¶5-6. The City platting process involves multiple steps and multiple city departments. (Doc ID# 27, ¶¶6-9). To complete a subdivision plat, the owner or developer must engage the services of professionals such as surveyors and engineers. (Doc ID# 27, ¶6). Only after a subdivision plat is approved can the owner or developers move forward to the next step of obtaining building permits. Id. at ¶10.

[¶13] There are approximately 90 un-platted river parcels containing hundreds of acres within the City and its extraterritorial jurisdiction. (Doc ID #27, ¶14). It is unknown when or if un-platted river parcels will be platted into blocks and lots. (Doc ID# 27, ¶17). The number and dimensions of river lots which may result from such platting is

also unknown. Id. There are approximately 290 platted vacant river lots and therefore the number of possible waivers is limited. (Doc ID #22, ¶14; Doc ID# 27, ¶14).

[¶14] In the fall of 2012, the Fergusons approached the Planning Department about seeking a waiver under Ordinance 4818. They were advised that their property was not eligible for a waiver because it was un-platted. (Doc ID# 22, ¶13; App. 33, Ferguson Setbacks). The Fergusons also requested that the City Commission amend Ordinance 4818 to allow un-platted lands to apply for waivers. (Doc ID# 22, ¶16; Doc ID# 25, p. 34). City Engineer April Walker reviewed the Fergusons' request and recommended that the waiver distinction between platted lots and un-platted parcels be maintained in the Ordinance. (Doc ID# 22, ¶16). The City Commission denied the Fergusons' request. (Doc ID# 26, Minutes p. 271-272). The Fergusons commenced this action in August 2015. (App. p. 7).

IV. STATEMENT OF THE STANDARD OF REVIEW

[¶15] This is an appeal of the district court's determination that Ordinance 4818 violates the equal protection provisions of the North Dakota and United States Constitutions. See, N.D. Const. art. I, § 21 and U.S. Const. amend. XIV, § 1. Whether a statute is unconstitutional is a question of law fully reviewable on appeal. Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 96 (N.D. 1990).

[¶16] The district court granted the Fergusons' motion for summary judgment on the declaratory judgment claim determining, as a matter of law, that Ordinance 4818's different treatment of platted and un-platted property with respect to waivers was not rationally related to a legitimate interest of the City. (App. pp. 16-17, ¶¶18-23); See, N.D.C.C. Chapter 32-23. Specifically, the district court determined that whether property

is platted or un-platted does not make it more or less likely to be subject to slumping or flooding and, as such, the distinction between platted and un-platted is not rationally related to the City's goal in preventing new construction on river bank lands subject to soil instability (slumping) and/or flooding. (App. p. 17).

[¶17] The declaratory judgment act is designed to bring an action challenging the constitutionality of statutes and ordinances. See, N.D.C.C. § 32-23-02; Eck v. City of Bismarck, 283 N.W.2d 193, 202 (N.D. 1979). On appeal, this Court reviews the district court's summary judgment determinations de novo on the entire record. Capps v. Anderson, 2014 ND 201 ¶7, 855 N.W.2d 637.

V. LAW AND ARGUMENT

A. Constitutional Challenge to Ordinance 4818.

[¶18] Ordinance 4818, like a state statute, is a legislative act. The City of Fargo has the authority to enact ordinances for the welfare of the municipality. N.D.C.C. §40-04-01. The Fourteenth Amendment to the United States Constitution permits states a wide scope of discretion in enacting laws that affect some groups of citizens differently than they affect others. City of Bismarck v. Materi, 177 N.W.2d 530, 539 (N.D. 1970). On review, the Court will uphold the statute unless its challenger has demonstrated the constitutional infirmity. Best Products Co., Inc. v. Spaeth, 461 N.W.2d. at 96. Whether the statute violates the United States or North Dakota constitutions is a question of law and that is fully reviewable by this Court. Id. (citations omitted). The City maintains the objectives of the challenged Ordinance, and its waiver provision, are legitimate. Further, the City maintains it was reasonable for it to believe that the Ordinance, including the waiver provision afforded to platted lots, would promote these purposes.

B. Rational Basis Standard of Review Applies.

[¶19] Where a statute regulating social or economic matters without using a suspect classification or involving fundamental rights is challenged on equal protection grounds, the Court applies the rational basis standard of review. Hamich, Inc. v. State ex re. Clayburgh, 1997 ND 110, ¶ 31, 564 N.W.2d 640. Under the rational basis test, a legislative classification will be upheld unless it is patently arbitrary and bears no relationship to a legitimate government purpose. Id. at ¶ 32 (citations omitted). The rational basis test has been described as "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classification is neither possible nor necessary." Hamich, 1997 ND 110, ¶ 31, citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1974).

[¶20] Rational basis review of an equal protection challenge does not require that a "legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification; however, there must be an identifiable purpose that may have conceivably or reasonably been that of the government decisionmaker. Id. at ¶32. The equal protection guarantee does not forbid classifications, but simply keeps government decisionmakers from treating differently persons who are in all relevant respects alike. Id. at ¶31, citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). A statute is sustained if any set of facts reasonably may be conceived to justify it. Best Products Co., Inc., 461 N.W.2d at 96. The United States Supreme Court summarized the rational basis test as applied to social and economic legislation that does not infringe upon a fundamental right or affect a suspect group as follows:

> [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that the classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. Furthermore, when a court determines whether a legislative classification is a hostile and oppressive discrimination against a particular class, the challenger must establish that the legislature selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."

Kelo v. City of New London, 843 A.2d 500, 565-66 (2004) aff'd sub nom. Kelo v. City of New London, Conn., 545 U.S. 469 (2005). 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., 1997 N.D. 110, ¶31.

[¶21] The challenged waiver portion of the ordinance impacts the Fergusons' property and therefore involves an economic matter. No suspect classification or fundamental right is at issue. For a time, the Fergusons asserted that an intermediate standard of review applied. However, they have acknowledged that the rational basis standard of review is the standard that unquestionably applies. (Tr. 4, lines 15-16).

C. The Purpose of Ordinance 4818 is to Prevent or Strictly Limit New Construction in the Setback Areas to Reduce Risk of Harm.

[¶22] The existence of flooding and unstable river bank soil justify the City decision to ensure new construction on land adjacent to rivers and drains be moved further away from the unstable soil/water source. (Doc ID# 26, p. 271). Future damage is lessened by requiring that new construction occur further away from the water and unstable river bank soils. The purpose of the ordinance is 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 unstable river bank soils..." (Doc ID# 22, ¶8).

[¶23] Governing is balancing competing interests, resources and needs. An ordinance or statute is not required to address or resolve the entire problem at once. Evils in the same field may be of different dimensions and proportions requiring different remedies. Materi, 177 N.W.2d 530, 543 (citations omitted). Further, reform may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. Id. A legislature may select one phase of one field and apply a remedy there, neglecting the others. Id. A legislative body may take one step at a time and address itself to the phase of the problem which seems most acute. City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976). A legislative body is not required to articulate explicitly its intent in a statutory enactment. State v. Leppert, 2003 ND 15, ¶8, 656 N.W.2d 718, 724; Olson v. Bismarck Parks and Recreation District, 2002 ND 61, ¶11, 642 N.W.2d 864, 868.

1. Platted Land is the product of a review and approval process.

[¶24] The City's decision to provide a waiver opportunity to only platted lots furthers its legitimate goal of requiring that new construction be sited further away from unstable river bank soils and water sources. Additions and subdivisions to cities and towns require plats. N.D.C.C. §40-50-1-01. Specific statutory requirements for platting include, but are not limited to, specifying lot dimensions, location of streets, progressive numbering of lots and blocks and the creation of a plat. Id. (Doc ID# 26, p. 271). The

process resulting in a plat of the addition or subdivision creates a "platted" lot. In addition to the statutory platting requirements, the City reviews plat proposals for compliance with the City's Growth Plan and its Land Development Code. (Doc ID# 27, ¶¶3-9; See also, Doc ID# 29, Planning Department Report for the Osgood First Addition). In reviewing a constitutionally challenged city ordinance, "plat" was determined to be a subdivision plat prepared with the approval of the appropriate government authority. Sellon v. City of Manitou Springs, 745 P.2d 229, 234 (Colo. 1987). Here, the court below recognized that platting is a legal process. (App. p. 16). The City maintains, however, that the lower court failed to recognize that completion of that legal review and approval process confers a status on platted lots that un-platted lots do not have.

2. Platted lots are eligible for building permits.

[¶25] The Ordinance's setbacks apply, primarily, to new construction and new development. Subdivision plat proposals are reviewed for compliance with the Ordinance's setbacks, keeping future construction further from the water source and unstable river back soils. New construction requires building permits. Building permits may be issued only for development on a legal lot. Fargo Land Development Code (LDC) §20-0913 (A). There is an exception to this provision for property outside the City's extraterritorial jurisdiction, but otherwise a legal lot is a lot that is shown on a Subdivision plat that has been filed in the office of the County Register of Deeds. LDC §20-1201(28). Thus, in general, building permits can be issued only for construction on platted lots. In the process of issuing building permits, the setbacks apply to keep new construction further away from the water source and unstable soils. Providing a waiver provision for platted lots recognizes their eligibility status in relation to building permits.

[¶26] The City of Fargo recognized that the Ordinance's setback restrictions would first impact owners of previously platted lots applying for building permits. Therefore, the City chose to provide a waiver provision for platted lots only. This distinction reflects that platted lots are at the front of the line when it comes to obtaining building permits. The platted/un-platted distinction is a reflection between actions previously taken and those yet to come. Lines reflecting such distinctions have met the rational basis standard of review. See, Armour v. City of Indianapolis, 132 S. Ct. 2073, 2082 (2012). Platted lots had already been approved through the statutory and City process to determine if then existing requirements had been satisfied. (Doc ID# 27, ¶5). Owners of platted lots had previously shown their commitment to future building by investing time and money into the platting process, or in purchasing a platted lot. The City recognized the actions previously taken in connection with platted lots and chose to provide them with an opportunity to apply for a waiver of the setback provisions.

[¶27] The waiver provision's availability to platted lots, but not un-platted parcels, is rationally related to the City's goal of safety and reducing harm to people and property caused by new construction on unstable soil near potential flood sources. Some platted lot owners will choose to avoid the expense of commissioning geotechnical experts to support a waiver application and, if possible, site their buildings outside the MDZS and LDZS. Other platted lot owners may have their waiver requests denied because geotechnical testing does not adequately support an acceptable level of safety for the proposed site. Still others may be granted a waiver and will then work with the City to plan the project, ever mindful of the setbacks. All of these scenarios reduce new

construction in the setback zones and reduce the risk of new construction near water sources and on unstable soils.

3. There are a finite number of platted lots.

[¶28] The potential waiver applications which could arise from vacant platted river lots present a significant administrative burden on the City's staff resources. There are 290 vacant platted river lots in Fargo. (Doc ID# 27, ¶14). The City will address waiver applications as necessary recognizing that, in time, they will be resolved because they are finite. But each waiver application will require City staff and engineers to conduct the necessary evaluation of geotechnical data, and likely differing expert opinions, before presenting a recommendation to the City Commission. Limiting the Ordinance's waiver provision to the finite number of platted lots is rationally related to the goal of limiting new construction to areas further removed from the water sources and unstable river bank soils. (Doc ID# 22, ¶14). It also limits the potential number of waiver requests.

[¶29] When a classification does not involve fundamental rights or suspect classes, it does not violate the equal protections clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Holt v. Howard, 806 F.3rd 1129 (8th Cir. 2015). Holt challenged a statute that limited Freedom of Information Act requests to only those incarcerated felons represented by counsel. Id. The statute's classification was upheld on equal protection grounds because it was rationally related to conserving government resources. Id. at 1133. A classification that limits requests of government employees is rationally related to the legitimate purpose of conserving government resources and does not violate equal protection. Id. Easing

administrative burdens can be legitimate purpose. Metropolitan Life Ins. v. Commissioner of Department of Insurance, 373 N.W.2d 399 (N.D. 1985).

[¶30] There are 90 un-platted river parcels containing hundreds of acres. (Doc ID#27 ¶14). It is unknown if or when those parcels will be developed. Permitting un-platted properties to seek waivers, in addition to the 290 potential platted lot waivers, would create an overwhelming administrative burden for the City. The drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Hamich, 564 N.W.2d at 647-648. Perfection in making the necessary classifications is neither possible nor necessary. Id. at 648; Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 316 (1976). The constitution is satisfied if a legislature responds to the practical living facts with which it deals. Materi, 177 N.W.2d at 539. To reach the level of constitutional violation, the varying treatment of groups must be so unrelated to the achievement of any combination of legitimate purposes as to be irrational. Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).

[¶31] Under Ordinance 4818, platted lands have a waiver provision that is not afforded to un-platted parcels. While this classification may not perfectly address the entire problem with new construction on unstable river bank soils near flooding sources, it is a rational distinction to make in light of the completion of the review and approval process of platted lots, and their eligibility for building permits. It is also rational for the City to make a distinction that allows it to conserve its governmental resources.

D. The Waiver Provision Does Not Violate Equal Protection.

[¶32] The Fergusons equal protection challenge is limited to that portion of the ordinance which provides a setback waiver opportunity when platted lots are at issue, but

provides no such opportunity when un-platted parcels are involved. (App. p. 28-30, Subsection E). As shown above, platted lots and un-platted parcels are not similarly situated. Completing the platting process requires an investment of time and money and creates a platted lot approved through City procedures. (Doc ID# 27, ¶15). Platted lots have been through measurable, affirmative steps in the development process. (Doc ID# 22, ¶12; Doc ID# 27, ¶¶5-8). Moreover, platted lots are eligible for building permits. The Fergusons un-platted lot is not similar to platted lots in these relevant respects.

[¶33] "If dissimilarly situated people are treated differently, there is no equal protection violation." Baggs v. City of South Pasadena, 947 F. Supp. 1580, 1584 (M.D. Fla., 1996). The Fergusons maintain their un-platted lot is "similarly situated" to platted lots because it is of the same geologic composition and in the same area as some platted lots. Because platted lots and un-platted parcels are dissimilar with regard to their respective eligibility for building permits, treating them differently is not an equal protection violation.

[¶34] North Dakota has previously found that the existence of waivers for some, and not others, does not necessarily indicate that a legislative decision is unconstitutional. State v. Knoefler, 279 N.W.2d 658, 664 (N.D. 1979). The Court discussed that a law providing an exception to a certain group does not violate equal protection, noting, "[m]erely because there are exceptions [. . .] does not make the [law] unconstitutional. [. . .] It is well established, however, that a statutory classification impinging upon no fundamental interest, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it." Id. (citations omitted). Much like Knoefler, the fact that platted lots are eligible for waivers, while un-

platted parcels are not, does not violate equal protection or make the ordinance unconstitutional.

[¶35] In 10 & Scotia Plaza, LLC v. City of Oak Park, 2013 WL 300906 (E.D. Mich. 2013), building owners claimed an equal protection violation when they sought to lease property to a business that could not get the license required under a city ordinance, despite other similar businesses in the area previously receiving such licenses, or waivers for such licenses, under a similar ordinance. The court there noted:

> Essentially, defendant allowed establishments who were grandfathered to bypass the Ordinance. Plaintiff has not presented any evidence negating every conceivable basis which might support defendant's action and cannot demonstrate that the challenged action was motivated by animus or ill-will. In fact, plaintiff cannot negate defendant's express reason for treating the above businesses differently: they were already operating with [required] licenses before the Ordinance existed.

Id. at *10 (internal citations omitted). This is similar to the situation at hand. Waiver eligible platted lots existed before Ordinance 4818 was enacted.

[¶36] Similarly, in Baggs, the Plaintiffs were denied a flood variance that they had applied for, and then claimed an equal protection violation as others with property near to them had received such variances. Baggs, 947 F. Supp. 1580. "Plaintiffs must first show that they were treated differently than others similarly situated. Next, the Plaintiffs must prove the Defendant intentionally discriminated against them and that the Defendant had no rational basis for doing so." Id. at 1584. The Court ultimately found that the other property owners were not similarly situated as they had taken actions regarding their property that the Plaintiffs had not. This is analogous to the case at hand – other property owners took the step of platting their land or purchasing platted lots.

[¶37] 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. Haugland v. City of Bismarck, 2012 ND 123, ¶42, 818 N.W.2d 660 (N.D. 2012). [I]f a reviewing court can conceive of a reason justifying the choice made by the legislature or government decisionmaker in service of a legitimate end, the statute does not violate the equal protection clause." Id. (citing Materi). It is sufficient if the legislature had any identifiable or conceivable purpose to support a statute. State v. Leppert, 2003 ND 15, ¶18, 656 N.W.2d 718. "Where there are plausible reasons for Congress' action, our inquiry is at an end." F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313, (1993) (citations omitted). An equal protection challenge is not a license for courts to judge the wisdom, fairness or logic of legislative choices. Id.

E. Rational Basis Standard is Satisfied.

[¶38] The platted lot waiver provision of Ordinance 4818 is directly related to the status of the property. This distinction is not based on irrelevant unrelated characteristics of the owners, but rather on a condition of the property itself. "[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. In an equal protection case of this type those challenging the judgment [of the people] must convince the court that the facts on which the classification is apparently based could not reasonably be conceived to be true by the decisionmaker." Gregory v. Ashcroft, 501 U.S. 452, 473 (1991).

[¶39] In Tyler v. City of Coll. Park, 3 A.3d 421 (App. Ct. Maryland 2010), the court determined that a rent control program involving students did not violate equal protection. The court stated:

> [W]e will uphold a statute subject to rational basis review against an equal protection challenge unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court may conclude only that the governmental actions were arbitrary or irrational. We noted that a classification having a reasonable basis does not offend equal protection merely because it is not made with "mathematical nicety" or because in practice it results in some inequality. In addition, we observed that legislative bodies are not required by equal protection to attack all aspects of a problem at the same time; rather, the legislative body may select one phase of a problem and apply a remedy there, neglecting for the moment other phases of the problem.

Id. at 435-36 (citations omitted). In the case at hand, the Ordinance restricts new construction to areas further away from the unstable soil and water sources. While the Ordinance may not be perfectly designed, it is certainly rationally related to that legitimate purpose: reducing river bank building to areas further removed from the perceived harm. The fact that its waiver provision is afforded only to platted lots furthers that interest and logically conserves City resources to that objective.

[¶40] A classification must be one based upon some reasonable grounds, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Christman v. Emineth, 212 N.W.2d 543, 546 (N.D. 1973). Classifications must have regard to differences in character or use of property or governmental relationship and cannot be purely arbitrary. Northwestern Improvement Co. v. State, 220 N.W. 436, 439 (N.D. 1928). In this case, the classification is based on the status of the land as platted, thus approved for development and building permit eligible. Choosing to provide the waiver exception to platted lands reflects that status or character/condition of the land as well as its approved use, all of which are different from

un-platted parcels. The river setbacks will require that new construction take place further away from the sources harm.

[¶41] Applying the criteria for resolving the 290 potential, but finite, waiver requests will further the City's goal of preventing or strictly limiting new construction near water courses and on unstable river bank soils. A waiver request, if made, will be denied or granted. If denied, new construction in the setback areas is prevented on that lot. If a waiver request is granted, the evaluation process itself may inform the site selection and design process. Additionally, addressing the waiver provision on platted properties involves a known number. The selection of platted lots for possible waiver apportions City resources to the building permit eligible lots. The distinction between platted lots and un-platted parcels is justified and rationally related to the City's objectives.

[¶42] "Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination." Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 348 (N.D. 1987) (citations omitted). This Court has stated that it does not sit to subject a legislative body to "intolerable supervision" that is "hostile to the basic principles of our government and wholly beyond the prohibition which the general clause of the Fourteenth Amendment was intended to secure." Knoefler, 279 N.W.2d at 665 (citing Ferguson v. Skrupa, 371 U.S. 726 (1963)).

[¶43] Based on knowledge and experience of its particular circumstances, the City provided a setback restriction waiver opportunity for platted lots. This provision

permits those building permit eligible lots a chance to obtain a waiver which is not afforded to un-platted parcels. While the waiver provision does not uniformly prevent all new construction in the setback zones, it addresses the first step in decreasing such construction in a way that is mindful of the differences in the land being regulated by the provision. Even if there may have been better ways to make the distinction, it would not necessarily indicate that the Ordinance's waiver provision is unconstitutional.

[¶44] Legislation is presumed valid and when there are plausible reasons for legislative action, a court's inquiry is at an end. F.C.C. v. Beach Communications, 508 U.S., 307, 313-314 (1993). The City has shown a rational relationship between Ordinance 4818's waiver provision for platted lots and its legitimate interest in limiting or preventing new construction on unstable river bank soils subject to flooding in order to reduce the risk of harm to people and property.

VI. CONCLUSION

[¶45] The City has shown that the waiver provision of Ordinance 4818 is rationally related to the City's objective in limiting new construction in the setback areas to reduce risk of harm from unstable river bank soils and water sources. Platted lots are different from un-platted parcels and it is rational to treat them differently for purposes of the Ordinance's waiver provision. As such, there is no violation of the equal protection clauses of either the North Dakota or United States constitutions.

[¶46] 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 the 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 31st day of May, 2016.

/s/ Jane L. Dynes
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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 (7)(a) of the North Dakota Rules of Appellant Procedure, that the above Brief of Appellee 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 **5,929**.

Dated this 31st day of May, 2016.

/s/ Jane L. Dynes

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Edward P. Ferguson and Lavonna M. Ferguson, Plaintiff–Appellee, vs. City of Fargo, Defendant–Appellant.	Supreme Court No. 20160067

CERTIFICATE OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned, being first duly sworn, deposes and says that she served the attached **BRIEF OF APPELLANT CITY OF FARGO** and **APPENDIX OF APPELLANT CITY OF FARGO** on May 31, 2016, by sending a true and correct copy thereof by electronic means only to the following e-mail addresses, to-wit:

Michael S. Raum	**Elizabeth L. Alvine**
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To the best of affiant's knowledge, the email addresses above given are the actual email addresses of the parties intended to be so served. The above documents were mailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Robyn L. Tande
Robyn L. Tande

Subscribed and sworn to before me this 31st day of May, 2016.

/s/ Lacey A. Hruby
Lacey A. Hruby, Notary Public
Cass County, North Dakota
(SEAL) Commission Expires: Sept. 21, 2016