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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Western Petroleum, LLC, and Maxum Petroleum Operating Company, Inc., d/b/a Pilot Logistics Services, Appellants, vs. Williams County Board of Commissioners, Appellee.	)	Supreme Court Case No: 20160089 Williams County District Court No. 53-2014-CV-01009

APPEAL FROM JUDGMENT ENTERED ON JANUARY 15, 2016
IN THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,
WILLIAMS COUNTY, NORTH DAKOTA
THE HONORABLE JOSHUA B. RUSTAD
CIVIL NO. 53-2014-CV-01009

BRIEF OF APPELLEE

Randall J. Bakke, #03898
Shawn A. Grinolds, #05407
Smith Bakke Porsborg Schweigert Armstrong
122 E. Broadway Avenue
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
sgrinolds@smithbakke.com
Attorneys for Appellee

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I. STATEMENT OF THE ISSUE

[¶1] There is only one issue properly before this Court in this administrative appeal under N.D.C.C. § 28-34-01:

1. Whether Appellee Williams County Board of Commissioners' ("BOCC") assessment of a civil penalty for $29,635,000 against Appellants Western Petroleum LLC ("Western") and Maxum Petroleum Operating Company d/b/a Pilot Logistics Services ("Pilot") for their admitted violations of Williams County's Temporary Housing Regulations ("Regulations") and the Williams County Zoning Ordinances ("Zoning Ordinance") was arbitrary, capricious, unreasonable, or not supported by substantial evidence.

II. BOCC'S STATEMENT OF RELEVANT FACTS

[¶2] Appellants concede their use of the subject property to house employees in temporary housing units was in violation of the Regulations and the Zoning Ordinance, and that these violations continued for several years from at least September 2012, when the conditional use permit ("CUP") expired. It is only the calculation of the civil penalty at issue.

A. <u>Civil Penalties for Violations of Regulations and Zoning Ordinance</u>

[¶3] Williams County ("County") adopted the Regulations governing temporary housing facilities on September 12, 2011. (Appendix 133-35). Section II(A) of the Regulations provides as follows:

> A. The use of temporary housing camps and incidental commercial and other accessory uses shall be considered conditional uses, and as such a conditional use permit must be obtained from the County Planning & Zoning Administrator, hereinafter "Planning Commission". The

> application will be considered by the Williams County Planning & Zoning Board. Said Board will then make a recommendation to the County Commissioners. The County Commissioners may approve or deny the request for a conditional use permit for temporary housing camps depending upon the compatibility with surrounding land uses and compliance with this title.

(Appendix 133-35). Section VI provides further, in relevant part:

> A conditional use permit for temporary housing camps will be in effect for two years, except in the case of recreational vehicles, when the permit will be in effect for one year. An applicant may request a renewal of the Conditional Use Permit at the end of the permit period. . . . .

Id. Under the Zoning Ordinance, temporary housing camps are not included as Permitted Uses in the Agricultural District, which is what the subject property is zoned, but require a CUP. (Appendix 249, 258-259) (defining Permitted Use and listing Permitted Uses for Agricultural District). In addition, a violation of the CUP requirements in the Regulations is also a violation of the Zoning Ordinance, which sets forth the CUP procedures. (Appendix 255-256).

[¶4] Section X of the Regulations provides for civil penalties for violations of the Regulations, and states, in relevant part, as follows:

> 1. General. It shall be unlawful for any person or organization, whether as owner, lessor, agent, manager, employee, lessee, or occupant, to violate any provision of these regulations. In addition, it shall be unlawful for any person or organization to cause or, with knowledge, permit such violation. A violation of any provision of these regulations shall constitute the maintenance of a public nuisance.
>
> * * *
>
> 3. Civil Penalties. Violations of any provision of these regulations may be enforced through civil proceeding by the State's Attorney or other proper county authorities. **Any person or organization, whether as owner, lessor, agent, manager, employee, lessee or occupant, who violates, causes or, with knowledge, permits a violation of any of the provisions of these regulations shall be subject to a civil penalty of one thousand dollars ($1,000.00) per violation.**

4. Separate Violations. Any person or organization shall be deemed to have committed a separate violation for each and every day during any portion of which any violation of any provision of these regulations is committed, permitted, or continued by such person or organization and shall be subject to the remedies as provided in this section.

* * *

(Appendix 133-35 (bold added)). Essentially identical civil penalties and other remedies for violations were also adopted in Section VII(C) of the Zoning Ordinance. (Appendix 297-98). Section XI of the Regulations provides "There shall be no transferring of a conditional use permit for temporary housing from the original applicant to another person." (Appendix 135.)

[¶5] Since the adoption of the civil penalty provisions of the Regulations and the Zoning Ordinance, County has always interpreted and applied these civil penalty provisions relative to temporary housing units on a per unit per day basis, including with respect to violators Top Notch and Stallion, referred to in Appellants' brief. The reason for this is because a separate violation of the Regulations and Zoning Ordinance occurs with respect to each non-permitted use of each temporary housing unit. In other words, penalties are assessable at $1,000 per day per unit during any period of non-compliance with the Regulations or Zoning Ordinance.

B. Appellants' Violations of Regulations and Zoning Ordinance and BOCC Penalty Assessment

[¶6] On September 6, 2011, BOCC granted a CUP to Western for the use of temporary housing units. (Appendix 205). Pursuant to the CUP approved by BOCC, Western was permitted hookups for 40 RV's and 7 modular units to house employees. (*Id.*). Each modular unit (also referred to as mobile homes) would house 8 employees. (*Id.*) BOCC

authorized the use of the 40 RV's for one year and the use of 7 modular units for 2 years. (*Id.*). The CUP pertained to property zoned for agricultural purposes having a legal description of "Sublot 6 Section 9 SW1/4SE1/4 T156 R95". (*Id.*) At that time and at no time since has Western obtained a CUP for the use of two existing homes located on the property as temporary housing units for its employees, nor did Western seek to have the agriculturally-zoned property re-zoned for commercial/industrial use or obtain a CUP to use the subject property for any commercial or industrial purposes. (*Id.*)

[¶7] It is not disputed the CUP granted to Western expired relative to the 40 RV's on September 6, 2012, and expired relative to the 7 modular homes on September 6, 2013 pursuant to its express terms. Appellants admit continued use of the subject property for temporary housing purposes beyond September 6, 2013 and through at least October 1, 2014. In fact, it is not disputed Appellants used the subject property for temporary housing purposes continuously from September 6, 2011 until at least October 1, 2014.

[¶8] Pilot acquired Western and all of its assets in February of 2012. Appellants concede Pilot is a very large sophisticated corporate organization. (Appendix 77.) At no time did Western or Pilot seek or obtain BOCC's permission to transfer the original CUP from Western to Pilot, whether at the time of the sale of Western's assets to Pilot in 2012, or thereafter. The Western CUP expired, in its entirety, on the date of Pilot's acquisition of Western's assets as a transfer of a conditional use permit for temporary housing is prohibited under Section XI of the Regulations. At all times since September 6, 2011, the CUP documents were on file at the County Planning and Zoning office and available for inspection by Appellants or the public.

[¶9] During the process of reviewing the files of the County Planning and Zoning Department ("PZ Department"), County discovered the CUP issued to Western had expired. As a result, then Planning Director Ray Pacheco sent Western and the record owner Petro West Holdings, LLC, a letter dated January 3, 2014 advising the subject CUP had expired and inquiring whether they wished to continue temporary housing on the subject property and to contact him immediately to explore their options. When no response was received to that letter, Pacheco and other County staff conducted a site visit of the property on January 10, 2014. However, no one in authority was allegedly available and no contact information was offered by employees on site. Pacheco then sent a second letter, dated January 13, 2104. After this second letter, Pacheco finally received a response from Appellants.

[¶10] On or about January 23, 2014, Western submitted to County an incomplete CUP Application for Sublots 6 and 8, and indicating "This property serves as a regional office for Maxum Enterprises, LLC, dba Pilot Logistics Services." As the application was incomplete, the application was returned to Appellants, unfiled. The permit application ("Pilot Application") was submitted to County on March 18, 2014, however, the application was still incomplete because the required filing fee was not included. The application fee was not paid until on or after May 5, 2014. The Pilot Application was placed on the County Planning and Zoning Commission ("PZ Commission") agenda in late May.

[¶11] On May 22, 2014, the PZ Commission recommended approval of Pilot's Application conditioned upon removal of all RV's and mobile homes by October 1, 2014,

and disallowing employees living in the two homes on the property by October 1, 2014. (Appendix 110-11.)

[¶12] A BOCC meeting was held on June 10, 2014 at which Pilot's Application was considered. (Appendix 6-23; 24-44.) A Staff Report prepared by PZ Department planners (Appendix 6-23) was considered by BOCC. The Staff Report explained the applicable Zoning Ordinance and Regulations, findings, and recommendations of PZ Department planners, including, among other things, the following:

- The original CUP was for 40 RV's for 1 year and for 7 modular homes for two years.
- Each modular home had 8 bedrooms housing 56 employees (beds).
- Two additional homes on the property were being used to house employees.
- The property is being used for a commercial/industrial use, but the zoning has never been changed or a CUP granted to allow for this use.
- There was no record of Western or Pilot paying any crew housing fees during the last two years – fees to which the temporary housing camp may have been subject.
- On May 12, 2014, the PZ Department staff conducted a site visit and found Western has, at the time, 30 RV's with an additional 10 RV hook-ups, along with 7 mobile homes and 2 two-story framed houses which are currently being used for employee housing.
- Western has been out of compliance on the 40 RV's/hook-ups from 9/6/12 to 6/10/14.
- Western has been out of compliance on 7 mobile homes since 9/6/13.

- The use of the homes on the property for employee housing was never permitted under a CUP.

The Staff Report included a calculation of non-compliance civil penalties based on the expiration dates under the original CUP through June 10, 2014 as follows:

Non-Compliance Penalties:

$1000.00 Penalty per/day x 277 days x 7 mobile homes =	$1,939,000
$1000.00 Penalty per/day x 642 days x 40 RV's =	$25,680,000
$1000.00 Penalty per/day x 1008 days x 2 homes =	$2,016,000
Total Penalty Fees =	$29,635,000

(Appendix 6.) In the Staff Report, the PZ Department planners recommended BOCC enforce the total assessable penalties. The Staff Report also included the PZ Commission's recommendation for approval of the Pilot Application with the conditions that all RV's and mobile homes be removed from the property by October 1, 2014, and disallowing employees living in the two homes by October 1, 2014. (Appendix 10) A copy of the Staff Report had been provided to Appellants the day before BOCC meeting, on June 9, 2014.

[¶13] As noted above, to the extent the CUP had not already expired in accordance with the time restrictions BOCC placed on the CUP, it technically expired upon its purported transfer from Western to Pilot in February of 2012 as a transfer of ownership of a CUP for temporary housing is prohibited by Section XI of the Regulations.

[¶14] During the June 10, 2014 BOCC meeting, BOCC approved the Pilot Application on the following conditions:

- All RV's and mobile homes be removed from the property by October 31, 2014; and
- Disallowing employees living in the two homes by October 31, 2014.

(Appendix 42.) BOCC also discussed imposition of penalties as recommended in the Staff Report. (*Id*.) BOCC voted in favor of Planning Director Pacheco appointing a committee for the purpose of recommending to BOCC the amount of a compromise penalty to be imposed. (*Id*.) BOCC did not instruct the committee to directly negotiate a penalty compromise with Pilot or Western. (Appendix 71).

[¶15] Following the June 10, 2014 BOCC meeting, Pacheco appointed a committee comprised of Pacheco, Code Enforcement Officer Kameron Hymer, Commissioner Martin Hanson, BOCC Chairman Dan Kalil, and County Special Assistant States Attorney Karen Prout (hereinafter "Penalty Committee"). Pacheco prepared a Memorandum addressed to BOCC dated June 25, 2014 (Appendix 66-67) which summarized the Penalty Committee's discussion and recommendation regarding compromise on the penalty issue. The Penalty Committee noted the total assessable penalty was $29,635,000 based on the same calculations noted in the Staff Report to BOCC. The Memorandum specifically noted the Penalty Committee's recommendation was "in regards to a ***compromise*** of the fines" that were owed by Western /Pilot to County. (Appendix 67) (emphasis added). As a compromise, the Penalty Committee recommended a far lesser civil penalty of $1,885,050 instead be offered. (*Id*.) Appellants have admitted in pending federal litigation between the parties that a copy of the Memorandum was received by counsel for Appellants on June 30, 2014, over a week before BOCC meeting on July 8, 2014, where it was discussed.

[¶16] At the July 8th BOCC meeting, BOCC considered the Memorandum and the Penalty Committee's rationale for its recommendation. Commissioner Hanson, a member of that committee, further explained the Penalty Committee's rationale for the compromise amount they recommended. He explained:

> And -- and part of the rationale was that they -- there was no effort whatsoever made from the time they bought this property to come into compliance. And if it hadn't been for the fact that our planning -- or our building inspector – our-- our code inspector was out there and saw the facilities and knew they were in violation, I seriously doubt that we would have seen them yet; they would have continued to operate in violation.

(Appendix 70.) BOCC also gave Appellants an opportunity to present whatever materials, information, or arguments Appellants deemed necessary relevant to the Memorandum and the Penalty Committee's recommended compromise amount. (Appendix 68-84). Appellants, represented by legal counsel, conceded that they had been violating the Zoning Ordinances for at least 642 days. (*Id*. at 72.) In addition, Appellants' counsel also conceded Appellants were subject to the $1,000.00 per day civil penalty. (*Id*.) Appellants' counsel argued, however, that this penalty should not be applied on a per temporary housing unit basis but on the subject property as a whole. After considering the Memorandum, Commissioner Hanson' statements, the arguments of Appellants' counsel, and discussion amongst BOCC members, the BOCC voted 3-2 in favor of the compromise penalty of $1,885,050, to be paid on or before July 18, 2014. (Appendix 62-63, 68-84). BOCC Commissioners Aberle and Montgomery voted against the reduced compromise penalty, it being their opinion Appellants should be assessed the full penalty. (Appendix 83.) BOCC determined further that in the event the offered compromise penalty was not accepted and paid by July 18, 2014, BOCC would "go back

to the original number" and the full assessable penalty of $29,635,000.00 would have to be paid. (Appendix 63, 81-83.)

[¶17] Appellants did not pay any portion of the offered compromise civil penalty of $1,885,050 before or by the July 18, 2014. As a result, the penalty amount offered in compromise reverted back to the full assessable penalty of $29,635,000.00. In addition, to this day, Appellants have not paid any crew housing fees relative to the subject property, and only recently removed the units this past month after storing them on the subject property in direct violation of the conditions implemented by BOCC in granting the CUP to Pilot on June 10, 2014, requiring all temporary housing units be removed by October 31, 2014. Further, Appellants only commenced the process for rezoning the subject property in August of 2015. All of these requirements were brought to Appellants' attention, via the June 10, 2014 Staff Report to the BOCC, a copy of which was provided to Appellants on June 9, 2014, and the BOCC's discussion at its June 10, 2014 meeting, with Appellants present.

C. State District Judge Rustad Affirms Decision of the BOCC

[¶18] On August 7, 2014, Appellants filed with the Williams County District Court, (Civil No. 53-2014-CV-01009) a *Notice of Appeal* of the July 8, 2014 BOCC decision to impose the civil penalty challenged by Appellants in the present action. In the appeal, Appellants also argued BOCC's assessment of the $29,635,000 civil penalty was arbitrary, capricious and unreasonable as BOCC failed to properly interpret and apply the Zoning Ordinance and Regulations, and specifically, that BOCC erred by assessing the civil penalty on a $1,000 per day "per unit" basis.

[¶19] On January 15, 2016, District Court Judge Rustad issued his *Order Affirming Decision of the Williams County BOCC of Commissioners* (Appendix 172-93.) The State District Court examined the record on appeal (i.e. all evidence presented to BOCC in relation to the civil penalty assessment issue) and heard the arguments of counsel for the parties in relation to Appellants' administrative appeal from the BOCC decision in imposing the $29,635,000 civil penalty. Among other findings, the State District Court concluded BOCC's interpretation and application of the Regulations and Zoning Ordinance and specifically the civil penalty provisions, in assessing the civil penalty against Appellants in the amount of $29,635,000, was not arbitrary, capricious or unreasonable, and was supported by substantial evidence. (Appendix 184-90 at ¶¶ 25, 27-34.)

III. RESPONSE TO APPELLANTS' ALLEGED FACTS

[¶20] Appellants present argument and purported evidence on matters not at issue on this appeal. Further, Appellants misstate and misconstrue the facts. Following is a summary of some of the more blatant misstatements.

[¶21] At no time prior to June 10, 2014 did Pilot possess a valid CUP. Appellants imply as much by referring to both Western and Pilot, collectively, as Pilot. Although Pilot acquired Western and the subject temporary housing facility in 2012, Section XI of the Regulations, enacted prior to Pilot's acquisition of the temporary housing facility, provides "There shall be no transferring of a conditional use permit for temporary housing from the original applicant to another person." Section XI clearly prohibits a transfer of a CUP from the original applicant to another person or entity. Therefore, Pilot's period of noncompliance with the Regulations began as of the date of the transfer

of ownership from Western to Pilot, which it has subsequently been learned through discovery in the pending federal case involving the parties was in February of 2012. This starting date of violation would actually apply across the board to the RV's and mobile homes used for temporary housing purposes.

[¶22] Appellants' assertion that County does not require a CUP for mobile homes utilized for temporary housing on property zoned agricultural is incorrect. A CUP is in fact required for a mobile home utilized on property zoned agricultural if the mobile home is to be used for a temporary period of time to house field-related workers, as the term "Temporary Housing Facility" is defined in the Regulations. (Appendix 133-35.) In such case, the mobile home is being used in a "temporary housing facility." A mobile home utilized as a permanent single family residence is permitted on property zoned agricultural without a CUP. (Appendix 259.) In this case, by Appellants' own admission, the mobile homes were being used to house employees, and were not being used as single family residences. (Appendix 6, 205.) This is further evident by the fact that each of the 7 mobile homes had been "chopped" up into 8 bedrooms to accommodate more employees. (*Id.*)

[¶23] Appellants' assertion they were proactive in trying to address their temporary housing facility violations after being caught is false. County attempted to make contact with Appellants on three occasions in January 2014 – two letters on January 3rd and January 13th and a personal visit to the property on January 10th -- before Appellants would even respond. Although Pilot representatives finally contacted Planning Director Pacheco regarding the noncompliance issue in mid-January 2014, Pilot did not submit a completed application for renewal of the original CUP granted to Western on January 23,

2014. Instead, Pilot only submitted the first two pages of the application without a filing fee and without required supporting documentation. Pilot did not actually submit a complete CUP application to County with the required filing fee until May 5, 2014, over five months after being caught. This is in stark contrast to the rapid and proactive response by other violators, namely Top Notch and Stallion. While Top Notch and Stallion had already removed or were working on removing the violating temporary housing units at the time they came before BOCC, Appellants did nothing to get into compliance before going before BOCC on June 10, 2014. Appellants' claim of being proactive is further undercut by the fact that, although Appellants were told by BOCC to remove their mobile homes and RVs from the property by October 31, 2014 – a fact acknowledged by Appellants at the July 8, 2014 BOCC meeting (Appendix 71) - Appellants only recently had the units removed this past month.

[¶24] BOCC disputes Appellants' assertion their violation of the Zoning Ordinance and Regulations was unintentional, and the weight Appellants attempt to place on this issue. Whether the violation was intentional or not, in the context of this appeal, is irrelevant. Section X of the Regulations provides that "[a]ny person or organization, whether as owner, lessor, agent, manager, employee, lessee or occupant, who violates, causes or, with knowledge, permits a violation of any of the provisions of these regulations shall be subject to a civil penalty of one thousand dollars ($1,000.00) per violation." The Zoning Ordinance contains a similar provision. (Appendix 297-98.) As these provisions show, those who violate the Regulations and the Zoning Ordinance are subject to civil penalties for violations, regardless of intent.

[¶25] BOCC denies it ever actually imposed a civil penalty of less than the full $29,635,000. In fact, both the Staff Report to BOCC and the Penalty Committee Memorandum, copies of which were provided to Appellants, expressly stated that the "Total" penalty or civil penalties were $29,635,000. (Appendix 6, 67.) Although County extended an offer in compromise to Appellants on July 8, 2014 on the penalty issue in the amount of $1,885,050 if paid by July 18, 2014, Appellants rejected such offer by failing to make a timely payment. (Appendix 62-63, 80-83.) As a result, the civil penalty amount reverted back to the full assessable penalty of $29,635,000 in accordance with the civil penalty provisions of the Regulations and Zoning Ordinance. As a practical matter, whether BOCC initially imposed a penalty of $1,885,050 is irrelevant as it is not disputed the civil penalty ultimately imposed was for $29,635,000, and Appellants have not paid any portion of the civil penalty. Only the existing civil penalty of $29,635,000 is properly at issue.

[¶26] County also advised Appellants in writing in May of 2014 of the fact the subject property was in violation of the Zoning Ordinance because it was zoned agricultural and Pilot's use of the property required a change in zoning to commercial/industrial. This violation was brought to Appellants' attention several times, including in the May 22, 2014 Staff Report to the PZ Commission (Appendix 85), in a follow up letter on May 27, 2014 from County, in the June 10, 2014 Staff Report to BOCC (Appendix 6), and a follow up letter on June 12, 2014 from County, copies of which were provided to Appellants. Despite receiving repeated notices of this zoning violation, Pilot did not submit an application to change the zoning on the subject property to County until August of 2015, fifteen (15) months after first being advised of the zoning violation.

[¶27] Appellants were also advised by County of the fact Appellants had not paid any crew housing fees relative to the subject property in the May 22, 2014 Staff Report to the PZ Commission and the June 10, 2014 Staff Report to BOCC. (Appendix 6.) Pursuant to Section VIII of the Regulations, temporary housing camps may be subject to real property taxation or crew housing fees as set forth by County. Between July 2013, and the date Pilot was granted a CUP on June 10, 2014, County assessed annual crew housing fees at $400 per bed for each bed in a temporary housing unit. To date, Appellants have not paid any crew housing fees relative to the temporary housing units. Appellants' portrayal of themselves as diligent and cooperative is false.

[¶28] Appellants also misstate the civil penalty issue in relation to Top Notch and Stallion. Civil penalties against Top Notch and Stallion under the Regulations were also calculated at $1,000 per day per violating unit, just as calculated with respect to Appellants. (Appendix 127-29, 237.) The only difference in treatment pertains to the amounts offered in compromise of the civil penalties by BOCC to Top Notch and Stallion.

[¶29] Appellants spend a great deal of time arguing over how the compromise amount of $1,885,050 was calculated, when in actuality, how a compromise offer is calculated is irrelevant to the issue before this Court. There is no law, rule or regulation which required BOCC to use any specific formula in arriving at an offer constituting a compromise amount. BOCC denies it ever instructed the Penalty Committee to directly negotiate with Appellants in recommending a compromise amount. Appellants brought this issue to the attention of BOCC at its July 8, 2014 meeting, where BOCC affirmed that it was BOCC's intention for the Penalty Committee to recommend a compromise

amount, and no mention was made of negotiating with Appellants prior to BOCC meeting. (Appendix 71.)

[¶30] Although not a proper issue before this Court, BOCC denies Appellants' assertion they were similarly situated with Top Notch and Stallion in all material respects. In addition, whether BOCC treated Appellants differently from other violators relative to the amount of the compromise offered, and whether any such differences in treatment were warranted, are not issues before this Court. Appellants' federal constitutional claims for alleged violation of their equal protection and due process rights are currently the subject of pending litigation in federal court - *Western Petroleum, LLC et al. v. Williams County Board of Commissioners*, United States District Court, Northwestern Division, District of North Dakota, Civil No. 4:14-CV-079. As discussed in the argument below, such matters are outside the scope of this administrative appeal under N.D.C.C. § 28-34-01. Rather, the only proper issue before this Court is whether BOCC rationally interpreted and applied the Regulations and Zoning Ordinance in calculating the civil penalty imposed for Appellants' admitted violations of the Regulations and Zoning Ordinance.

IV. ARGUMENT

A. Standard of Review

[¶31] As recently summarized by this Court:

> A board of county commissioners' zoning decision is a legislative function subject to limited review by a court. In appeals from a zoning decision by a board of county commissioners, the "principle of separation of powers precludes parties from relitigating the correctness and propriety of the county commission's decision and prevents a reviewing court from sitting as a super board and redeciding issues that were decided in the first instance by the county commission. Our standard of review of a board of county commissioners' zoning decision is deferential:

> When considering an appeal from the decision of a local governing body under N.D.C.C. § 28-34-01, our scope of review is the same as the district court's and is very limited. This Court's function is to independently determine the propriety of the [BOCC's] decision without giving special deference to the district court decision. The [BOCC's] decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.
>
> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. On appeal from a decision of a county commission, a reconsideration of evidence is limited to the extent that such evidence was presented to the county commission, and the evidence must be reviewed in light of the commission's decision to determine whether that decision was arbitrary, capricious, or unreasonable. Our standard of review ensures that the court does not substitute its judgment for that of the local governing body which initially made the decision.

Dockter v. Burleigh County BOCC of County Commissioners, 2015 ND 183, ¶8, 865 N.W.2d 836 (citations and quotations omitted).

> Generally, the record is adequate to support the findings and conclusions of the city if it allows [the Court] to discern the rationale for the decision. Further, while the interpretation of an ordinance presents a question of law, fully reviewable on appeal, this Court gives deference to a governing body's reasonable interpretation of its own ordinance.

Hale v. City of Minot, 2015 ND 216, ¶ 5, 868 N.W.2d 872-73 (citations and quotations omitted).

B. <u>The Issue Properly Before The Court</u>

[¶32] The sole issue before this Court is whether BOCC's interpretation and application of the civil penalty provisions of the Regulations and Zoning Ordinance in assessing the $29,635,000 civil penalty against Appellants was arbitrary, capricious or unreasonable, or not supported by substantial evidence. Appellants' arguments as to whether or not Appellants knowingly violated the Regulations or the Zoning Ordinance, whether

Appellants' federal constitutional rights were violated, and how BOCC arrived at the compromise penalty amount rejected by Appellants, have absolutely no relevance to the sole issue before this Court in this administrative appeal proceeding under N.D.C.C. § 28-34-01. *See Gowan v. Ward County Commission*, 2009 ND 72, ¶ 11, 764 N.W.2d 425 (refusing to entertain alleged inverse condemnation claim in context of administrative appeal under N.D.C.C. § 28-34-01); *City of Fargo v. Malme*, 2008 ND 172, ¶ 6, 756 N.W.2d 197 (refusing to turn administrative appeal into a federal civil rights action). There is a separate pending lawsuit in federal court addressing Appellants' other claims. Further, there is no law, rule or regulation which required BOCC to use any specific formula in arriving at an offer constituting a compromise amount.

C. BOCC Civil Penalty Assessment of $29,635,000 Was Not Arbitrary, Capricious, Or Unreasonable, And Was Supported by Substantial Evidence

1. Appellants Concede They Have Violated the Regulations and Zoning Ordinance At Least Since September 2012

[¶33] Appellants concede they violated the Regulations. Pursuant to Section X of the Regulations, quoted in full in BOCC's statement of facts, violations of those regulations "shall" subject violators to a civil penalty of $1,000.00 per violation per day.

[¶34] Appellants also concede they violated the Zoning Ordinance, subjecting them to civil penalties under Section VII(C)(3). *See* Appendix 72. Section VII(C)(3) of the Zoning Ordinance and Section X of the Regulations are essentially identical.

[¶35] It is not disputed the CUP originally issued to Western on September 6, 2011 for temporary housing expired by its own terms on September 6, 2012 with respect to the 40 RV's, and expired on September 6, 2013 with respect to the 7 mobile homes. It is also not disputed that Western or Pilot continued to utilize RV's and the mobile homes on the

subject property for temporary housing purposes for their employees from and after those expiration dates and beyond the date of June 10, 2014, when Pilot requested and was granted renewal of the original CUP for the 40 RV's and 7 mobile homes for temporary housing purposes. As a result, the period of violation with respect to the 40 RV's was at least 642 days, and at least 277 days with respect to the 7 mobile homes. It is also not disputed Appellants utilized two stick frame homes located on the property for temporary housing purposes without a CUP, and the period of noncompliance as to them would have greatly exceeded 642 days.

2. BOCC Reasonably Interpreted the Civil Penalty Provisions of the Regulations and the Zoning Ordinance to Apply Per Day Per Unit

[¶36] At the heart of this dispute is whether a "violation" of the Regulations and the Zoning Ordinance occurs with respect to each non-permitted use (i.e. per unit), or with respect to the real property as a whole. Appellants argue the phrase "per violation" in Section X of the Regulations and Section VII(C)(3) of the Zoning Ordinance refers only to the use of the subject property, as a whole, without a proper permit for temporary housing. According to Appellants, it makes no difference how many temporary housing units were utilized on the subject property. Appellants argue it is the improper use of the land, as a whole, which constitutes a single violation of the Regulations and the Zoning Ordinance for which the penalty is to be imposed. Appellants' argument is flawed.

[¶37] This Court has stated with regard to interpretation of the ordinances of local governing bodies:

> **Our review of a municipality's adoption, interpretation and application of its own ordinances is strictly limited by the doctrine of separation of powers**. **A municipality has broad discretion to determine the manner and means of exercising the powers delegated to it by state law**. Courts will not substitute their judgment for that of the municipality's governing body in interpreting or

> applying ordinances unless an abuse of discretion is clearly shown. To establish an abuse of discretion, it must be shown that the municipality's governing body acted arbitrarily, oppressively or unreasonably.

GO Committee v. City of Minot, 2005 ND 136, ¶ 8, 701 N.W.2d 865 (Citations and quotations omitted) (emphasis added). More recently, the Court stated that:

> **This Court ordinarily defers to a reasonable interpretation of an ordinance by the agency enforcing it**, but an interpretation that contradicts clear, unambiguous language is not reasonable. The interpretation of a zoning ordinance by a governmental entity is a quasi-judicial act, and **a reviewing court should give deference to the judgment and interpretation of the governing body** rather than substitute its judgment for that of the enacting body.

Mertz v. City of Elgin, 2011 ND 148, ¶¶ 4 & 7, 800 N.W.2d 710 (Citations and quotations omitted) (emphasis added).

[¶38] The Regulations and the Zoning Ordinance prohibit the use of temporary housing facilities without a CUP. BOCC, under its authority to interpret its own ordinances, has interpreted and applied the civil penalty provisions of the Regulations and Zoning Ordinance as they relate to temporary housing facilities or units to impose a $1,000.00 penalty per day per unit in violation of the Regulations and Zoning Ordinance. BOCC's interpretation must be given deference if reasonable, and this Court cannot substitute its judgment for that of BOCC where the interpretation is reasonable. In addition, BOCC's consistent calculation of assessable civil penalties under the Regulations and the Zoning Ordinance on a per day per unit basis with respect to other violators, including but not limited to Top Notch Services and Stallion were also a matter of public record prior to BOCC's imposition of civil penalties against Appellants. During the July 8, 2014 BOCC meeting, Appellants' counsel specifically referenced the fact civil penalties had previously been assessed by BOCC against other violators, and argued BOCC should similarly compromise its total penalty assessment as to Appellants. (Appendix 73.) The

total penalties assessable (later compromised) against the other violators were also calculated on a per day per unit basis.

[¶39] BOCC's interpretation of the civil penalty provisions to apply to each temporary housing unit is reasonable because each CUP for temporary housing presented to BOCC is based on the applicant's specific request for particular types of temporary housing units (such as RVs, skid units, mobile homes, modular units, and combinations thereof or other types of housing) and a specific number of temporary housing units. Based on the circumstances, BOCC then either grants a CUP for the particular types of temporary housing units and for the specific number of units requested, grants a CUP for a lesser number of units, or denies the CUP. Because the granting of a CUP is expressly tied to specific types of temporary housing units and a specific number of each type of unit, it is the non-permitted use of even a single temporary housing unit over and above the number granted by the CUP which constitutes a violation of the Regulations and the Zoning Ordinance. Therefore, each use of a temporary housing unit over and above the CUP limit or each use of a unit without a CUP constitutes a separate violation of the Regulations and the Zoning Ordinance. Under Appellants' interpretation of the Regulations and Zoning Ordinance, the assessable civil penalty would be the same regardless of whether a single non-permitted temporary housing unit was utilized on the property, or whether one hundred non-permitted temporary housing units were utilized on the property. Such an interpretation defies logic and would be inequitable.

[¶40] Additionally, to accept Appellants' interpretation would mean no matter how many provisions of the Regulations or the Zoning Ordinance a person violates, if the violations were occurring on the same land the violators would only be subject to a

$1,000.00 per day civil penalty. Such an interpretation is contrary to BOCC's authority over County Zoning under N.D.C.C. Chapter 11-33. According to this Chapter, BOCC is given the following power to regulate property

> For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners of any county may regulate and restrict within the county, subject to section 11-33-20 and chapter 54-21.3, **the location and the use of buildings and structures and the use, condition of use, or occupancy of lands** for residence, recreation, and other purposes.

N.D.C.C. § 11-33-01 (emphasis added). Under this statute, not only is the land itself subject to BOCC's power to regulate, but also each building or structure on the land. Thus, each temporary housing unit represents a building or structure subject to BOCC's authority to regulate in terms of its location and usage. Interpreting the civil penalty provisions to apply to each temporary housing unit not in compliance with the Regulations or the Zoning Ordinance is a reasonable exercise of BOCC's authority to regulate the location and use of buildings and structures within County's zoning jurisdiction. Additionally, both N.D.C.C. Chapter 11-33 and the Zoning Ordinance give BOCC the authority to use "other remedies" to restrain, correct, or abate the illegal use, erection, construction, conversion, or maintenance of **any building or structure** on property within County's zoning jurisdiction. N.D.C.C. §11-33-17 (emphasis added); (Appendix 296-97). BOCC has provided these other remedies to include civil penalties for violations in the amount of $1,000.00 per day per violation, which BOCC has reasonably interpreted to mean on a per unit basis as it applies to temporary housing units.

[¶41] Construing the Regulations and Zoning Ordinance civil penalty provisions to apply to each unit also furthers one of the State-recognized purposes of zoning regulations:

> To regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, the height, number of stories, and size of buildings and structures, the percentage of lot that may be occupied, the size of courts, yards, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.D.C.C. § 11-33-03(3)(emphasis added). By imposing a civil penalty for each violating temporary housing unit BOCC is able to regulate, through the imposition of civil penalties when someone has more than the allowed number of units on property, and better control the amount of the land being occupied, the density of the population not only on the particular property itself but also adjacent areas. This ensures that County services (such as law enforcement, fire, ambulance, other emergency services) are able to provide the necessary services when needed to these areas, and to provide for orderly development and use of the land within the non-urban areas of County. N.D.C.C. § 11-33-03(1).

[¶42] BOCC's interpretation of the civil penalty provisions on a per unit basis is also reasonable because it does not contradict any clear or unambiguous language in the Regulations or the Zoning Ordinance. *See Hamich, Inc. v. State ex rel. Clayburgh*, 1997 ND 110, ¶ 13, 564 N.W.2d 640 ("The administrative construction of a statute by the agency administering the law is entitled to deference if that interpretation does not contradict clear and unambiguous statutory language.").

[¶43] Because BOCC's interpretation of the civil penalty provisions is reasonable, and does not contradict express language in the Regulations or the Zoning Ordinance, BOCC

did not abuse its discretion in interpreting and applying it on a per unit basis in imposing civil penalties on Appellants. Since BOCC did not abuse its discretion, the Court must defer to BOCC's interpretation and uphold BOCC's civil penalty calculation to the extent it applies the $1,000.00 penalty per day per unit to each of Appellants' temporary housing unit that is in violation of the Regulations, the Zoning Ordinance, and the original CUP granted to Western.

[¶44] The North Dakota cases discussed by Appellants are all factually distinguishable from the present case and inapposite. None of the cases cited by Appellants involve interpretation of any regulation or ordinance similar to those at issue in the present case.

[¶45] In *Gullickson v. Stark County Board of County Commissioners*, 474 N.W.2d 890 (N.D. 1991), there was "no evidence" to support the findings required for the grant of the variance at issue under applicable law. In the present case, Appellants admit their violation of the Regulations and Zoning Ordinance, and Appellants never challenged the number of violating units utilized in the calculation of the civil penalty during the July 8, 2014 BOCC meeting, which is when this issue could and should have been raised.

[¶46] *Burlington Northern and Santa Fe Railway Company v. Benson County Water Resource District*, 2000 ND 182, 618 N.W.2d 155, involved interpretation of state law from which the Water District's authority was derived. *Burlington Northern* is distinguishable as the present case involves BOCC's interpretation and application of local law enacted by BOCC. It is well established deference is to be given to a local governing body in relation to its reasonable interpretation of ordinances it has enacted. *Hale v. City of Minot*, 2015 ND 216, ¶ 5, 868 N.W.2d 873 ("this Court gives deference to a governing body's reasonable interpretation of its own ordinance.")

[¶47] In *Klindt v. Pembina County Water Resource Board*, 2005 ND 106, 697 N.W.2d 339, this Court noted "[t]he Board's findings of fact provide no explanation why the Board chose not to assess all of the land it had determined would be benefited from the project." *Id.* at ¶ 20 (underline added). In the present case, the Staff Report presented at the June 10, 2014 BOCC meeting and the Penalty Committee Memorandum presented at the July 8, 2014 BOCC meeting, at which the civil penalty issue was discussed and then decided, explain in detail the civil penalty calculation and the bases upon which the civil penalty was being imposed.

[¶48] In *Hentz v. Elma Township Board of Supervisors*, 2007 ND 19, 727 N.W.2d 276, this Court noted "tree farming" was expressly included within an "agriculture" exception to the zoning ordinance sought to be enforced. *Hentz* simply involved application of express unambiguous terms of the township ordinance at issue in *Hentz*.

[¶49] None of these cases address any issue before this Court, and are inapposite.

3. BOCC Used the Proper Number of Units in Calculating the Compromise Civil Penalty and the Full Civil Penalty

[¶50] Appellants alternatively argue BOCC had no evidence to establish the actual number of temporary housing units utilized by Appellants during the periods of violation on the subject property and could not have accurately calculated the civil penalty amount. The principal problem with Appellants' argument in this regard is they were provided ample notice of BOCC's calculation of the civil penalty on a per unit per day basis, yet Appellants never presented any evidence to establish, nor even asserted, the number of RV's or mobile homes utilized in such calculations were incorrect, either at the June 10, 2014 or July 8, 2014 BOCC meetings. By failing to even assert there was an error as to the number of temporary housing units used in the civil penalty calculations, Appellants

waived any such argument. *See e.g. Dahm v. Stark County Board of County Commissioners*, 2013 ND 241, ¶ 10, 841 N.W.2d 416 ("[o]n appeal from a decision of a county commission, a reconsideration of evidence is limited to the extent that such evidence was presented to the county commission, . . ."). Appellants had an obligation to present to BOCC all evidence and arguments they wanted to be taken into consideration before BOCC made its decision, which they failed to do. (*Id.*) As a practical matter, only the Appellants would have been in possession of information as to the actual number of RV's and mobile homes which were utilized on the property on a daily basis during the period of noncompliance with the Regulations and Zoning Ordinance. The subject property had hook-ups for 40 RVs and 7 mobile homes, and these were the types and number of units requested by and granted to Western in its original CUP in September 2011. Obviously, the number of RV's which may have been on the subject property could easily fluctuate from day to day. Query how County could possibly obtain daily unit counts short of a daily inspection. County simply does not have the resources to inspect every property using temporary housing units, let alone all of the other zoning uses in County, and neither should County be held to a standard to require such inspections. Instead, if Appellants did not have the continued need for 40 RV's and 7 mobile homes, it was Appellants' obligation to seek a reduction to the original CUP as other temporary housing applicants have done. This is necessary because the number and density of units on the property affect the amount of crew housing fees owed for temporary housing units.

[¶51] BOCC penalty calculation was the product of a rational mental process by which the facts and the law relied upon were considered together for the purpose of achieving a

reasoned and reasonable interpretation of applicable law. *See Dahm v. Stark County Bd. Of County Com'rs*, 2013 ND 241 ¶ 8 ("A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation. Such a standard of review ensures that the court does not substitute its judgment for that of the local governing body which initially made the decision."). Giving deference to BOCC's decision and viewing the evidence with that deference in mind, and based on this Court's "very limited" scope of review of BOCC's decision, County requests the Court reject Appellants' request that this Court substitute its judgment for that of BOCC. Because the record here is more than adequate to allow this Court to discern BOCC's rationale for the BOCC's decision, that decision is not arbitrary, capricious, or unreasonable and must be affirmed in its entirety. *Id*. at ¶ 18.

V. CONCLUSION

[¶52] For the foregoing reasons, Williams County Board of Commissioners request the challenged civil penalty assessment be affirmed.

[¶53] Dated this 1st day of July, 2016.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: *s/ Randall J. Bakke*

Randall J. Bakke (#03898)
Shawn A. Grinolds (#05407)
Bradley N. Wiederholt (#06354)
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

rbakke@smithbakke.com
sgrinolds@smithbakke.com
bwiederholt@smithbakke.com

Attorneys for Appellee,
Williams County Board of Commissioners

CERTIFICATE OF COMPLIANCE

[¶54] The undersigned, as attorneys for the Appellees in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that 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 certificate of compliance totals 7,899.

[¶55] Dated this 1st day of July, 2016.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: *s/ Randall J. Bakke*

Randall J. Bakke (#03898)
Shawn A. Grinolds (#05407)
Bradley N. Wiederholt (#06354)
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
sgrinolds@smithbakke.com
bwiederholt@smithbakke.com

Attorneys for Appellee,
Williams County Board of Commissioners

CERTIFICATE OF SERVICE

[¶56] I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES** was on the 1st day of July, 2016, emailed to the following:

ATTORNEY FOR APPELLANTS:

Christopher P. Parrington (#08177)
Kutak Rock, LLP
U.S. Bank Plaza South, Suite 1750
220 South Sixth Street
Minneapolis, MN 55402
christopher.parrington@kutakrock.com

By *s/ Randall J. Bakke*
RANDALL J. BAKKE