

2019 HOUSE JUDICIARY

HB 1173

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1173
1/15/2019
30819

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to costs of appeals of local government decisions.

Minutes:

1

Chairman K. Koppelman: Opened the hearing on HB 1173.

Rep. Kaiser: Introduced the bill. Went over the bill. Many of the corrections here are technical. (:27-4:10) We have a fee structure in place for his copy.

Rep. Magrum: Is the fee paid to the county auditor?

Rep. Kaiser: I am not sure who he had to pay the fee to. He can answer that.

Representative Jones: There is no fiscal note attached. Isn't some of those proceedings that are large are going to be pretty expensive.

Rep. Kaiser: They are really expensive on a major murder trial and the parties don't have to pay for it. In this case I don't think the cost charge had any correlation to what the cost of the transcript would be.

Chairman K. Koppelman: Is there a limit in statute now for what they can charge?

Rep. Kaiser: The citizen has to pay for all additional copies. That makes sense.

Alton Nitshke, Citizen of Bismarck: (Attachment #1) (7:21-12:55) No fiscal note.

Vice Chairman Karls: Why don't you share with our committee your professional background?

Alton Nitshke: Career was a CPA and the last 10-12 years I did business appraisals and I was an expert witness related primarily to evaluations of businesses so I spent a little time in court and got to know a few attorneys on both sides. I practiced for about forty years.

Rep. Magrum: I was following your case. I fought that bill personally.

Alton Nitshke: No. This bill deals just with the appeal of the process or the decision that has been made by the local governing authority. The bill you are talking about is HB 1390 in the last session deals with Section 61-16 and 61-32. Those bills were that the bar that is set in that bill once you have damages I believe is insurmountable. You have to spend lots of dollars under those two statutes once you have damages on your land. This is basically the appeal in coming to their conclusion. The changes I am talking about here basically deal with the right to appealed without having barriers set up that shouldn't be there. There was a meeting that they did not record intentionally, we believe, had they recorded that meeting we would gladly have paid for the recording because we feel several mistakes were made there.

It is the governments job to file their records into the court.

Opposition: None

Hearing closed

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1173
1/15/2019
30842

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to costs of appeals of local government decisions.

Minutes:

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Chairman K. Koppelman: Opened the meeting on HB 1173.

Do Pass Motion Made by Vice Chairman Karls; Seconded by Rep. Satrom

Discussion: None

Roll Call Vote: 14 Yes 0 No 0 Absent Carrier: Representative Jones

Closed

Date: 1-15-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1173

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By KARLS Seconded By SATROM

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	✓		Rep. Buffalo	✓	
Vice Chairman Karls	✓		Rep. Karla Rose Hanson	✓	
Rep. Becker	✓				
Rep. Terry Jones	✓				
Rep. Magrum	✓				
Rep. McWilliams	✓				
Rep. B. Paulson	✓				
Rep. Paur	✓				
Rep. Roers Jones	✓				
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Jones

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1173: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO PASS**
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1173 was placed on the
Eleventh order on the calendar.

2019 SENATE JUDICIARY

HB 1173

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1173
2/27/2019
#32902 (15:30)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 28-34-01 of the North Dakota Century Code, relating to costs of appeals of local government decisions.

Minutes:

1 Attachment

Chair Larson begins discussion on HB 1173.

George Keiser, District 47 Representative, testifies in favor

Representative Keiser: This relates to the cost associated with appeals. If you're an appellant and you want to appeal a decision, it relates to the cost of that. I have a constituent who will talk about his experience. Most of the changes in this bill are technical and grammatical. For example, on the bottom of page 1 line 23, "the entire proceedings before the local governing body". It's not the entire proceedings; the entire "record" is the correct term, and that has been corrected throughout the bill. The significant changes occur on page 1 lines 17-24 where because we have not addressed this properly in statute, a lot of political subdivision groups aren't sure exactly how to interpret it, and we are trying to provide direction to them. The appellant is still required to pay the estimated cost of the record if they request it. What this bill does on line 21 is require the local governing body to prepare without charge the original or certified copy of the entire record. Imagine if you were in a murder trial that lasted 8 months, and you as the person being charged had to pay for the preparation of the entire, official record. That would be an enormous fee. The official copy will be prepared at the cost of the political subdivision, not the person appealing the claim. The reality is in some situations, the charges associated by some entities have been so great that the appellant hasn't proceeded.

Senator Bakke: Is this a single copy of the record?

Representative Keiser: They will prepare the single copy of the record and pay for it. The appellant will have to pay to receive a copy of the official record or the part of the official record that they want.

(5:50) Alton Nitschke, Bismarck citizen, testifies in favor (see attachment #1)

Vice Chairman Dwyer: motions for a Do Pass.

Senator Myrdal: Seconds.

A Roll Call Vote was Taken: 5 yeas, 0 nays, 1 absent. Motion carries.

Vice Chairman Dwyer will carry the bill.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1173
3/6/2019
#33330 (25:31)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 28-34-01 of the North Dakota Century Code, relating to costs of appeals of local government decisions.

Minutes:

2 Attachments

Chair Larson begins discussion on HB 1173. Senator Osland was absent.

Senator Myrdal: Motions to reconsider.

Senator Luick: Seconds.

A Roll Call Vote Was Taken: 5 yeas, 0 nays, 1 absent. Motion carries.

Chair Larson: (see attachment #1) We found some more information. Not that long ago, we passed a bill for administrative hearings and appeals that says an administrative agency shall notify the party appealing the estimated cost of preparation filing the record. Thereafter unless the agency is appealing, the party appealing shall pay the administrative agencies estimated costs required by this subsection. If the actual costs of the preparation in filing of the entire record of the proceedings is greater than the estimated costs, the party appealing shall pay the agency the difference. If the actual costs are less than the estimated costs, the agency shall pay the party appealing the difference. We did legislation specifically for this because we had so many agencies that were being inundated with requests for open records and wanted some relief. Since we didn't have any thorough testimony on this, we should have additional information before we can make an informed decision.

Senator Bakke: What are you reading from?

Chair Larson: This is NDCC 28-32-44. We should get more information from the political subdivision on this.

(3:25) Stephanie Dassinger, ND League of Cities

Dassinger: In regards to the Burleigh County Water Resource case, I had called their attorney to see what he had to say about it. In his opinion, the case was very complicated. The record they prepared was 902 pages, and the cost of preparing that was \$1,050. He said the reason the costs were so high was because they had documents back to 2001 involved in this case. It was several different engineering studies that needed to be compiled. There was a lot of work, pages and information that went into that record.

Senator Myrdal: Do you know if any of these records that far back are available electronically at all?

Dassinger: I don't have that information.

Senator Bakke: What's the average cost, obviously this can't be what all of them are?

Dassinger: I would suspect this is an unusual case. The records usually cost substantially less money and time.

(5:45) Alton Nitschke, Bismarck citizen

Nitschke: The case she's referencing is our case. A lot of the records that were being compiled at that time really had no bearing on our appeal. Statute 28-32 is a separate statute. This statute is primarily being used by workforce safety people or ND DOT. If you look at cases, you'll find that most of those are 15-20 pages with the police report and perhaps other health related reports. I don't think it's compare those two statutes because they're different.

Chair Larson: Right, but they both involve gathering records for an appeal.

Nitschke: Correct, but in the majority of 28-34, the appellant is not charged.

Chair Larson: but it probably would be with as much as it would cost. This is to the cost.

Nitschke: That gets into another issue as to what the charge should be. The two attorneys I talked to, their opinion was that under 28-34 there should not be a charge because the record is supposed to be filed into the court by the appellee. One of the ones you will see come up a lot is Walmart suing the county and in most of those cases, there are few records because they want to reduce their real estate taxes. In those cases, the people with the bulk of the records is the appellant because they're going around all over the country and comparing their store. From what I've seen, what the county provided was very little because they have an analysis of how they came up with it, and that's all they had to do.

Vice Chairman Dwyer: Your situation was an appeal?

Nitschke: Yes, it was an appeal. There was a permit issue, and we appealed that permit to keep the water from draining onto our land. If you read further into the statute, the parties can agree as to how much records are required. In our case, if we'd have had an option, we would have actually only had one meeting. That's all we really wanted, but it was never recorded, so we couldn't get it. They decided they wanted to file everything.

Vice Chairman Dwyer: Did you file an open records request?

Nitschke: No. Open records is completely different. I would agree that if you're asking for open records, you should be paying. In our case, we asked for one or two items in open records and referred to the website.

Vice Chairman Dwyer: Aren't all of the Burleigh County Water Resource District meetings televised and recorded?

Nitschke: Yes, they all were but that one. It was on May 27th at 5pm on a Friday. Someone didn't call the agency that televises and records it.

Vice Chairman Dwyer: If you only needed the summary of that meeting, did you feel like you had to go back further then?

Nitschke: Basically when we filed the appeal, we stated all of the issues that we were appealing. We got the bill and contacted attorneys. They said we shouldn't pay it because it's not permissible under that statute. This bill is clarification of what we understand is the practice currently. Besides the meeting, there were probably a few other things. They had done a study and these people had filed an appeal back in 2001 and none of that we felt was relevant because of the fact that it was so long ago.

Vice Chairman Dwyer: You said you appealed the permit and listed issues. The only issue on appeal would be the permit, right?

Nitschke: That's correct.

Vice Chairman Dwyer: but you said there were other issues that you appealed?

Nitschke: As an attorney, you know you try to cover all the bases. The main thing was the permit itself, then we listed the issues for appealing the permit such as toxic water and that sort of thing.

(13:05) Aaron Birst, Association of Counties (see attachment #2)

Birst: I did not testify this in the House nor when it was in front of your committee. We were well aware that there was pending litigation, and we don't want to insert ourselves into something that is still pending. We did have some concerns when we met with our legislative team, but I'm here to offer some compromise. The record is not very well defined. When you say the record is free of charge, that could entail many things. I would suggest that the political subdivisions should turn over formal findings, meeting minutes and the like, and that should be done without any charge whatsoever. Most of those things can be defined have concerns, but I'm here to offer compromise. The association is the record is not very well defined. When you say the record is free of charge, that can entail many things. I suggest that the political subdivisions without any charge whatsoever. Most of those things could be defined to say there is no charge for that; the subdivision should put that together and file it with the court. Then I think there should be a second tier that says if there are more things in the record that need to be put together, then that would be where the parties can

compromise. Additionally, I think there always should be a safety valve that says if you're indigent or if a judge finds that the amount is ridiculous, you shouldn't have to pay.

Chair Larson: That is in number 3.

Birst: Yes, and that's part of the administrative code. Essentially you're looking at section 2 of the current bill and how that could be reworked. I didn't draft it in proper legislative format, but those are my suggestions. The concept would be that there is no charge for the local subdivision to file "formal proceedings, notices, minutes, findings of facts, formal orders, decision of the local governing body or a transcript, if available". Many counties don't have court reporters, but if that is available, we agree that should be provided free of charge. It would say the other abstracts and records, if requested by the appellant, would be some sort of charge. I have not spoken to the parties, but I think there is an out strategy that can protect both the political subdivisions and the citizens.

Senator Myrdal: Cases can go back decades. Does that language address something that limits it?

Birst: That's exactly why the counties did have concern because for the most part, counties don't have projects that go long periods of time, but there could be some sort of charging mechanism for cases that do.

Vice Chairman Dwyer: You acknowledge that there could be some technicalities corrected in your draft?

Birst: Yes. My concept is formal proceedings where you actually have the governing body taking a position, that would all be free of charge, but anything outside of that would basically be other evidence. That would be a second classification. Many of these appeals, you won't even need to get to that aspect of the 10 years of records. If the litigants feel like there needs to be more, then they would have to pay for those costs. That's the concept.

Vice Chairman Dwyer: Then the appellant could go to court and say, "I think the local body should pay this, not us" and the court could decide.

Birst: That's why I put that in there, to make sure the court would be able to say, "local government, you're out of control here. You can't make someone pay \$10,000". I also put in there that the court would have good faith. There will be a process already going on in the court. As most of you know, the standard civil litigation process is you always upfront the money if you're a loser. This is a little bit different, but I think it's fair to the appellant too, that the government should turn over easy records for them without charge.

Senator Bakke: Has any of this gone to legislative counsel?

Birst: No. You'll have to have them look at this.

Vice Chairman Dwyer: The language might need to be cleaned up a bit before it even goes to legislative counsel.

Senator Bakke: Since we have the individual from the water division here, they could look at this too and see if there's anything in there that they don't agree with to make sure we have a compromise of sorts.

(23:45) Jack Dwyer, Executive Secretary for the ND Water Resource Districts Association

J. Dwyer: I reviewed the amendments and ran them by some of the water resource district managers and their attorneys. We felt that they were workable; we have no issue.

Chair Larson: We'll take some time to work with the amendments. Hopefully this will be amenable for both sides.

Chair Larson ends the discussion on HB 1173.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1173
4/1/2019
#34384 (08:37)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 28-34-01 of the North Dakota Century Code, relating to costs of appeals of local government decisions.

Minutes:

No Attachments

Chair Larson begins discussion on HB 1173.

Vice Chairman Dwyer: This was a bill that related to appeals from the water resource district primarily, but it's appeals of political subdivisions. Under the current law, ultimately if there's a disagreement about who pays, the parties will go to court, and the court will decide. I agreed to take this on, and I've had conversations with the Association of Counties, the League of Cities and various attorneys for water boards and the only instance where there's been an issue, is this one that was brought to us. The prime sponsor is in my district, so I was interested in coming up with a solution, but after having different points of view from all of the different political subdivisions and having this only being an issue in this one instance, I would make a motion that we give this bill a do not pass.

Vice Chairman Dwyer: Motions for a Do Not Pass.

Senator Bakke: Seconds.

Senator Myrdal: This is the one where the couple came in and had to pay. Did we look at amendments for this?

Vice Chairman Dwyer: I have amendments from the League of Cities, from the Burleigh County Water board and legislative council, and they are all proposing a different option. The case in Burleigh County was a deal where the couple asked for records going back 10 years, so the board charged them. If they objected to that, they could have gone to court saying they think it's unreasonable and would like the board to pay them. Instead a bill was brought. Everybody has a different angle on it. The League of Cities wants one thing, the attorney for the Burleigh County Water board proposed a different thing, and legislative counsel offered another idea. It seems like we should just leave the law the way that it is.

Senator Myrdal: The testifiers said that there was a Burleigh County meeting that wasn't recorded. Then they asked for the records, and there wasn't any. I tend to agree to not pass, but it also seems to me there was an issue here. I thought they tried to go to court but couldn't afford it. I hope we're not completely leaving something unaddressed. We may have to revisit this issue the next time around if there's something that's not protecting these people that are dealing with these issues overall.

Chair Larson: In my political subdivision committee, we frequently have people coming with bills that address one problem in one area, and they want to change the state law.

Senator Myrdal: I agree; we have that in many committees. However, I thought we were going to amend it.

Vice Chairman Dwyer: I had agreed to provide amendments. I asked legislative counsel to come up with a proposal that accommodated the incident, but I couldn't get League of Cities or Association of Counties to support those amendments. As we went along, every idea wasn't supported by anyone else, so I wasn't able to reach a consensus amongst anybody. This lead me to conclude that we should not pass the bill. I used to represent the ND Water Resource Districts Association. I reached out to all of the attorneys that I know, and there are a few cases that came up. I asked how they did it, and they said they just put the record together, pay for it and sent it out. They have never had any problems. You can go to court if you have a disagreement on costs; costs are at the discretion of the court's judgement. I wasn't able to come up with a solution that anybody would support.

Senator Bakke: If they really think there's a problem here, they can figure out how they want to fix it during the coming sessions.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent. Motion carries.

Vice Chairman Dwyer will carry the bill.

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1173**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Vice Chairman Dwyer Seconded By Senator Myrdal

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	AB				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Vice Chairman Dwyer

If the vote is on an amendment, briefly indicate intent:

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1173**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☒ Reconsider ☐ _____

Motion Made By Senator Myrdal Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	AB				

Total (Yes) 5 No 0

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1173**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Vice Chairman Dwyer Seconded By Senator Bakke

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Lemm	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Vice Chairman Dwyer

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1173: Judiciary Committee (Sen. D. Larson, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1173 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1173

#1
HB1173
1-15-19
Pg 1

1 Testimony on 1173 Prairie Room 10: 45 .M. 01/15/2019

2

3 Mr. Chairman/Committee members

4 Name/address/

5 Thank you for giving me the opportunity to testify on this bill.

6 The proposed changes in this bill do not affect the intent or structure of Chapter

7 28-34-01 but rather clarify each party's responsibility and obligation. It's basically

8 a housekeeping measure. This statute is used in all appeals from local governing

9 bodies., that includes Workers Safety, ND DOT as well as other local governing

10 bodies.

11 In 2017 my wife and I as downstream landowners (where we live) were ruled

12 against on a drainage project by a development that was upstream from us. The

13 quality of the water expected to be released onto our land by this drainage project

14 was toxic and would have turned the soil on our land into alkali. We had no

15 alternative but to appeal the decision by Burleigh County Water Resource District

16 to grant this permit.

17 Our first shock came when all of the attorneys we contacted had either conflicts of

18 interest or wanted huge sums (\$10,000 and more) for a retainer. Ultimately we

#1
HB 1173
1-15-19
Pg 2

19 ended up preparing and filing the appeal on our own. On the 30th day (line 18)
20 after filing the appeal with the Clerk of Court . We received a bill from BCWRD for
21 *about \$1000* filing the record on appeal into the court. They called it a transcript. We objected
22 to the bill and pointed out there was nothing to transcribe since the items to be
23 filed into the court were already in their files and that the Statute was clear on their
24 obligation to file the records. To make sure we understood the statute, we also
25 contacted two attorneys and explained the situation. Both of these attorneys told
26 us not to pay this and their interpretation was the records are not a transcript
27 according to legal terms. As a side note, Blacks law dictionary defines a (transcript
28 as a handwritten, printed, or typed copy of testimony given orally) audio file being
29 transcribed to provide a written record. I also contacted another person who had
30 filed an appeal with a Water Resource District in another part of North Dakota and
31 asked him if he had to pay for the records filed into the court record. He stated he
32 did not, they were filed by the Water District without question. In an off the record
33 conversation with the opposing counsel, he stated the statute was vague. We
34 believe this statute simply needs more clarity in its language and that is what we
35 are asking for in this bill.

36 We did request a ruling on this area of the statute from the judge but didn't get
37 one.

#1
HB1173
1-15-19
P2 3

38 During this time we also reached out to Burleigh County Water Resource District in
39 response to their technical findings of which we disagreed with on a number of
40 points. By Statute a person is allowed to respond to the technical findings that are
41 determined by the water district and we suggested some changes in their proposal
42 on the drainage project to mitigate potential damages to our property, we were
43 told by Burleigh County Water Resource District that they didn't have to do
44 anything but we could sue them once we had damages. This of course would be an
45 even more expensive venture.

46 Everyone is entitled to the right to an appeal constitutionally and statutorily. We
47 believe this statute should be clear and concise in defining the process. There
48 shouldn't be room for creating an insurmountable barrier to deter or bar anyone
49 from perfecting their appeal. The edits to this bill have been reviewed and
50 approved by legal counsel at the ND Legislative Council.

51 I ask for your support on this bill as it is housekeeping to clarify and make the
52 statute more concise.

53 I'd be happy to answer any questions you might have.

54 H:\HAY Creek Pines\APPEAL TO DISTRICT COURT\TESTIMONY IN 28-34-
55 01\Testimony on 1173.docx

1 Testimony on 1173 Fort Lincoln Room Senate Judiciary committee

2

3 Madam Chairwoman/Committee members of the Judiciary Committee

4 Name/address/

5 Thank you for giving me the opportunity to testify on this bill.

6 The proposed changes in this bill do not affect the intent or structure of

7 Chapter 28-34-01 but rather clarify each party's responsibility and

8 obligation. It's basically a housekeeping measure. This statute is used

9 in all appeals of decisions from local governing bodies., that includes

10 Workers Safety, ND DOT as well as other local governing bodies. (i.e.

11 DHS, Health department County,)There is no fiscal Note to this bill as all

12 costs are between parties or are previously incurred by government

13 under the current statute.

14 If you read through the changes you will note that the statute is clearer

15 with the changes. As an example look at para. 2 line 20 where it states

16 a transcript of the evidence. Blacks Law Dictionary defines transcript
17 as (a handwritten, printed, or typed copy of testimony given orally);
18 You will note the change is more specific to the meaning of transcript.
19 In 2017 my wife and I as downstream landowners (where we live) were
20 ruled against on a drainage project by a development that was
21 upstream from us. The quality of the water expected to be released
22 onto our land by this drainage project was toxic and would have turned
23 the soil on our land into alkali and rendered it sterile. We had no
24 choice but to appeal the decision by Burleigh County Water Resource
25 District to grant this permit.
26 Our first shock came when all of the attorneys we contacted had either
27 conflicts of interest or wanted huge sums (\$10,000 and more) for a
28 retainer. Ultimately we ended up preparing and filing the appeal on
29 our own. On the 30th day (line 18) after filing the appeal with the Clerk
30 of Court . We received a bill of \$1,050 from BCWRD for filing the record
31 on appeal into the court. This was basically copying their file into the

32 court records. They called it a transcript. We objected to the bill and
33 pointed out there was nothing to transcribe since the items to be filed
34 into the court were already in their files and that the Statute was clear
35 on their obligation to file the records. To make sure we understood the
36 statute, we also contacted two attorneys and explained the situation.
37 Both of these attorneys told us not to pay this and their interpretation
38 was the records are not a transcript according to legal terms. As I
39 stated earlier Blacks law dictionary defines a (transcript as a
40 handwritten, printed, or typed copy of testimony given orally) or an
41 audio file being transcribed to provide a written record. I also
42 contacted another person who had filed an appeal with a Water
43 Resource District in another part of North Dakota and asked him if he
44 had to pay for the records filed into the court record. He stated he did
45 not, they were filed by the Water District without question. In an off
46 the record conversation with the opposing counsel, he stated the
47 statute was vague. We believe this statute simply needs more clarity
48 in its language and that is what we are asking for in this bill.

49 I have reviewed a sampling of cases where individuals appealed to the
50 court on decisions against them and noted that in some instances
51 transcripts of testimony were prepared and paid for by the appellant
52 but also noted that in some cases the court actually ordered the
53 appellee to file the records with the court as a separate item.

54 During this time we also reached out to Burleigh County Water
55 Resource District in response to their technical findings of which we
56 disagreed with on a number of points. By Statute a person is allowed to
57 respond to the technical findings that are determined by the water
58 district and we suggested some changes in their proposal on the
59 drainage project to mitigate potential damages to our property, we
60 were told by Burleigh County Water Resource District that they didn't
61 have to do anything our recourse would be to sue them once we had
62 damages. This of course would be an even more expensive venture.

63 Everyone is entitled to the right to an appeal constitutionally and
64 statutorily. We believe this statute should be clear and concise in

65 defining the process. There shouldn't be room for creating an
66 insurmountable barrier to deter or bar anyone from perfecting their
67 appeal. The edits to this bill have been reviewed and approved by
68 legal counsel at the ND Legislative Council.

69 I ask for your support on this bill as it is housekeeping to clarify and
70 make the statute more concise.

71 I'd be happy to answer any questions you might have.

72 H:\HAY Creek Pines\APPEAL TO DISTRICT COURT\TESTIMONY IN 28-34-01\Testimony on 1173.docx

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§ 28-32-44. Agency to maintain and certify record on appeal.

#1
HB 1173
3-6-19

North Dakota Statutes

Title 28. Judicial Procedure, Civil

Chapter 28-32. Administrative Agencies Practice Act

Current through 2017 Legislative Session

re: HB 1173

§ 28-32-44. Agency to maintain and certify record on appeal

1. An administrative agency shall maintain an official record of each adjudicative proceeding or other administrative proceeding heard by it.
2. Within thirty days, or a longer time as the court by order may direct, after an appeal has been taken to the district court as provided in this chapter, and after payment by the appellant of the estimated cost of preparation and filing of the entire record of the proceedings before the agency, the administrative agency concerned shall prepare and file in the office of the clerk of the district court in which the appeal is pending the original or a certified copy of the entire record of proceedings before the agency, or an abstract of the record as may be agreed upon and stipulated by the parties. Upon receiving a copy of the notice of appeal and specifications of error pursuant to subsection 4 of section 28-32-42 and unless the agency is appealing, the administrative agency shall notify the party appealing of the estimated costs of preparation and filing of the record. Thereafter, unless the agency is appealing, the party appealing shall pay the administrative agency the estimated costs required by this subsection. If the actual costs of preparation and filing of the entire record of the proceedings is greater than the estimated costs, the party appealing shall pay to the agency the difference. If the actual costs are less than the estimated costs, the agency shall pay to the party appealing the difference. Any payment for the costs of preparation and filing of the record must be paid into the insurance recovery fund and is appropriated as a refund to the agency for the purposes of defraying the costs of preparing and filing the record. An agency may contract with any person or another agency to prepare and file the record of any proceeding before the agency.
3. The cost of preparation and filing of the record may be waived by the district court upon application by an appellant, showing that the appellant is a low-income person unable to afford these costs. When a waiver is granted, the costs of preparation and filing of the record must be paid by the administrative agency.
4. The agency record of the proceedings, as applicable, may consist of only the following:
 - a. The complaint, answer, and other initial pleadings or documents.
 - b. Notices of all proceedings.

2. The appellee shall prepare and file a single copy of the ~~record~~ formal proceedings on appeal with the court. Within thirty days, or ~~such a~~ longer time as the court by order may direct, after the notice of appeal has been filed in the court, ~~and after the deposit to the court by the appellant of the estimated cost of a transcript of the evidence~~any, the local governing body shall prepare and file, without charge, any formal proceedings which includes any notices, minutes, findings of facts, formal orders or decisions of the local governing body or a transcript, if available, of any testimony taken at any meeting as defined by 44-04-17.1 in the office of the clerk of the court in which the appeal is pending. the original or a certified copy of the entire proceedings The local governing body may further create and file with the court ~~before the local governing body, or such an~~ abstract of the record as may be agreed upon and stipulated by the parties, including but not limited to the pleadings, notices, transcripts of all testimony taken, exhibits, reports, memoranda, exceptions or objections, briefs or any other relevant document. Before creating any additional record, the local political subdivision may require the appellant to deposit with the court the estimated cost of creating the record. The cost of preparation and filing of the record may be waived by the district court upon application by an appellant, showing that the appellant is a low-income person unable to afford these costs and the district court determines the appellant has a good faith basis for their appeal. If the notice of appeal specifies ~~that~~ no exception or objection is made to the local governing body's findings of fact, and ~~that~~ the appeal is concerned only with the local governing body's conclusions based on the facts found by it, the evidence submitted at the hearing before the local governing body must be omitted from the record filed in the court. The court may permit amendments or additions to the record to complete the record.

How section 2 would look.....

2. The appellee shall prepare and file a single copy of the formal proceedings on appeal with the court. Within thirty days, or a longer time as the court by order may direct, after the notice of appeal has been filed in the court, the local governing body shall prepare and file, without charge, any formal proceedings which includes any notices, minutes, findings of facts, formal orders or decisions of the local governing body or a transcript, if available, of any testimony taken at any meeting as defined by 44-04-17.1 in the office of the clerk of the court in which the appeal is pending. The local governing body may further create and file with the court an abstract of the record as may be agreed upon and stipulated by the parties, including but not limited to exhibits, reports, memoranda, exceptions or objections, briefs or any other relevant document. Before creating any additional record, the local political subdivision may require the appellant to deposit with the court the estimated cost of creating the record. The cost of preparation and filing of the record may be waived by the district court upon application by an appellant, showing that the appellant is a low-income person unable to afford these costs and the district court determines the appellant has a good faith basis for their appeal. If the notice of appeal specifies no exception or objection is made to the local governing body's findings of fact, and the appeal is concerned only with the local governing body's conclusions based on the facts found by it, the evidence submitted at the hearing before the local governing body must be omitted from the record filed in the court. The court may permit amendments or additions to the record to complete the record.