MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2265

2005 SENATE JUDICIARY

SB 2265

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2265

Senate Judiciary Committee

☐ Conference Committee

Hearing Date January 25, 2005

Tape Number	Side A	Side B	Meter #
1	X		2590 - 1520
Committee Clerk Signature	Mona L Solberg		

Minutes: Relating to civil liability of political subdivisions and the state; emergency.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Sen. Trenbeath, Dist 10-Introduced the bill as a prime sponsor. The old doctorate of sovereign immunity where by the state and its subdivisions were free from liability of negligence has been dead for some years. It has been assumed that these governmental entities were relieved of liability to individuals where acts intended to benefit the public; "the public duty doctorate". A recent ND Supreme Court case has destroyed that assumption and suggested a legislative remedy.

Sen. Traynor asked what the thrust of the opinion was. **Sen. Trenbeath** responded a Fargo building inspector who inspected a home and latter was sold. The new owner found the home unlivable.

Doug Bahr - Director, Civil Litigation Division Office of Attorney General gave his testimony - Att. #1.

Sen. Traynor asked if the Fargo case, inspected by city people-being inhabitable, would that in your opinion be considered gross negligence? I do not know all of the details but I would suspect the home owner that sold the house would have the majority of the responsibility. Homeowners sometimes hide issues.

Jerry Hjelmstad, ND League of Cities. - Att #2

Sen. Nelson asked who had the responsibility of a subdivisions outside lightning, if it was not done properly and a crime happened? This would fall under 3212.0. Discussion of a erroneous "flood plain" designation and the State Insurance Funds involvement.

Patricia A Roscoe - Fargo City Attorney's Office (meter 4600) Testified in support of the bill and discussed haw inspectors are limited in what they can do; footings are underground, wires are behind walls...

Terry Trayner - We are also in support of the bill.

Darrell Linnertz, Building Official, City of Minot (meter 5700) Testified in support of the bill Attachment #4

Testimony in Opposition of the Bill:

Glenn A. Elliott - Was against the bill saying it gives the building inspectors an absolute out. Also stated that we change building codes every legislation and it is usually due to "grave yard", someone gets hurt or dies, we make changes. Discussed building fees, negligence and statuary compliance.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Additional Testimony Submitted:

Michael R. Brown, Mayor city of Grand Forks - Att #5

E. Ward Koeser, President, Board of City Commissioners Williston. - Att #6

Sen. Trenbeath made the motion to Do Pass SB 2265 and **Senator Hacker** seconded the motion

all were in favor, motion carries

Carrier: **Sen. Trenbeath**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

FISCAL NOTE

Requested by Legislative Council
03/18/2005

Amendment to: SB 2265

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

There will be a fiscal impact on the Risk Management Fund if SB 2265 is not enacted. Due to a number of factors, that impact is impossible to quantify. The number of lawsuits filed against state employees will increase and those lawsuits will probably not be able to be resolved by dispositive motions but will require a determination by a trier of fact which increases expense of litigation and potential judgment awards.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Jo Zschomler	**Agency:**	OMB
Phone Number:	328-7580	**Date Prepared:**	03/18/2005

FISCAL NOTE

Requested by Legislative Council
01/20/2005

Bill/Resolution No.: SB 2265

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

There will be a fiscal impact on the Risk Management Fund if SB 2265 is not enacted. Due to a number of factors, that impact is impossible to quantify. The number of lawsuits filed against state employees will increase and those lawsuits will probably not be able to be resolved by dispositive motions but will require a determination by a trier of fact which increases expense of litigation and potential judgment awards.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Johanna Zschomler	**Agency:**	Risk Management
Phone Number:	328-7580	**Date Prepared:**	01/21/2005

Date: 1/25/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2265

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen. Trenbeath Seconded By Sen. Hacker

Senators	Yes	No	SenatorsSen. Nelson	Yes	No
Sen. Traynor			Sen. Nelson		
Senator Syverson			Senator Triplett		
Senator Hacker					
Sen. Trenbeath					

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Trenbeath

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

REPORT OF STANDING COMMITTEE

SB 2265: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2265 was placed on the Eleventh order on the calendar.

2005 HOUSE POLITICAL SUBDIVISIONS

SB 2265

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2265

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date March 4, 2005

Tape Number	Side A	Side B	Meter #
1		x	51.0 to end
2	x		3.2 to end
2		x	0.3 to end
3	x		0.4 to 8.1
Committee Clerk Signature			

Minutes: **Rep.Devlin, Chairman** opened the hearing on SB 2265, a bill for an Act to amend and reenact sections 32-12.1-02, 32-12.1-03, and 32-12.2-02 of the North Dakota Century Code, relating to civlil liability of political subdivisions and the state; and to declare an emergency.

Sen. Trenbeath representing District 10 and prime sponsor of the bill explained the background for the bill and expressed his support. We used to operate until several years ago under the concept of Sovereign Immunity from suit (law). That doctrine stems from the old English kings who said you can take action against anybody but me because I am king. Over time it became against our government -- except in certain instances under the Tort Reclaims act which allows you to sue the governments in those instances. Here in North Dakota we held to that doctrine until some thirty years ago the Supreme court struck that down. We have not had the benefit of Sovereign Immunity since that time and we have been able to cover most of our liabilities through insurance. However those insurances were underwritten based on another under common

law called the Public Duty Doctrine. We have been laboring what turns out to be a misapprehension that we were covered under the Public Duty Doctrine so far as actions of employees of government groups and the damage that might result inadvertently from their actions. This bill comes to you specifically as the result of North Dakota Supreme Court decision that -- to paraphrase--' we think the Public Duty Doctrine is probably a good doctrine and very defensible --however it is not part of the law'. That is the duty of the legislature and that is why this bill is before you. In a nut shell it says that services that are designed to accommodate the public are not designed to have any particular effect on anyone individual. If you have police force which is designed for public safety and they fail to show up within the ten minutes that were taken to prevent the crime you new was going to happen-- that police force is not liable to you for not being there in a timely fashion. It is still liable to you for actions of negligence and gross negligence -- an example that came up in the other house -- for instance if a police officer sideswipes your car when he is going to another scene -- of course, there is going to be some liability there.

Note: end of tape 1 Side B

Tape 2 Side A -- (0.3)

Sen. Trenbeath (cont'd) -- (Rep. Herbal, Vice Chairman is just beginning to discuss the Ficek case in which the Supreme Court statement regarding the Public Duty Doctrine mot being in the ND law) It stem from a case in Fargo where a city building inspector had failed to apparently do his 'duty' in regards to a home inspection. The building was inspected some thirty odd years ago when it was being built. Thirty years later by another couple who bought the home it was actually found to be uninhabitable. The city denied liability under the concept that the inspection

was design for any specific individual -- that is when the Supreme Court ruled as they did. It cost that city about $140,000 based on about $100 worth of building certificates. There are several people who follow me who will give more specifics.

Curt Kreun a city of Grand forks employee as a city building inspector. A copy of his prepared remarks is attached.

Rep. Dietrich (3.7) How would this bill effect insurance cots?

Curt Kreun -In all actuality we are going to find out because -- boiler plate law suits are not only about -- we are already being sued -- we have been served with a boiler plate suit -- many of the items listed in the action didn't even pertain to the individual who is trying to sue us -- so we are already trying to determine whether our insurance will cover this defense. If you end up with several law suits your insurance rates are going to go up and/or your attorney costs are going up.

Rep. Ekstrom (4.8) Specifically as to what happened in Fargo -- with regard to your building inspections what is the public perception what a building inspectors supposed to do for them when he arrives to inpsect.

Curt Kreun -- That is difficult to answer -- they work with the contractors to insure that the contstuction is being done right -- they do come you -- the come to the contractor and they work with the contractor to be sure it is done correctly. If you have problem it is not between you and the building inspector but between you and your contractor. A lot of people think that it going to be built perfectly but it is not say that the windows have to be perfectly square or that the floor has to be perfectly level. Some people have higher standards -- but it is O K as long as it is safe, solid and sanitary. So people do have different perceptions of what building inspector should do.

Rep. Ekstrom (7.2) A certificate of occupancy has been issued by the city saying the building

has been inspected -- so therefor if you as a home owner has received a certificate of occupancy saying this home is fit for occupancy -- there is a certain trust and safety issue here -- so I am asking --

Curt Kreun -- in this other law suit there was a great period of time lapsed -- and even as you go -- you have leave the city some leeway because things be change and altered after the fact -- the city can't be held liable as the inspection is good for the point in time that the inspector was there. Things are altered frequently with out a building permit -- could alter the value or the structure. You can be liable for somebody else's actions.

Rep. Koppelman (8.8) Will this bill shift any of the liability from the public sector to private?

Curt Kreun I don't think is changes the responsibility a great deal -- we would still have the responsibility -- we still need to meet all the building code standards. But if the liability shifts more to us then we aren't going to do it -- we can't. Why would we want to take on the liability -- why would you want the city to take that liability.

Rep. Koppelman (9.7) If the bill passes as it stand now -- what if the building inspector messes up and there is a glaring short coming in meeting the code and he doesn't bring to the contractor's attention -- where does the home owner stand when Rep. Herbal, Vice Chairman buys that home -- the contractor has some liability of course but should the city or the building inspector have some liability in that case?

Curt Kreun the bill as I understand it involves more than building inspectors -- police and others -- I don't think it would absolve us of any liability of unreasonable misapplications.

Rep. Zaiser (11.0) How many hours would you say an inspector would have to spend going through a house to check the kind of details that --now that the door has been opened and what would be the cost?

Curt Kreun - I can tell you for sure that the building permits don't cover the cost of the individual -- you have the heating inspector, the cooling, the electrical inspectors and they come through more than once and they spend more than a minimum of an hour each time so -- so they come out many times --contractor call the inspector before they can proceed to another level. They can't cover up another's work like the electrical until its been inspected. They may spend up to 40 or more hours and the building permit is $1800.

Rep. Zaiser (12.1) If this would not be passed --would you see building permits sky rocketing in cost? And would there be added staff time?

Curt Kreun -- as a council member in Grand Forks -- I would recommend that you would back away and not do them -- you can't charge enough -- you can't inspect enough to cover that kind of liability.

Rep. Koppelman (13.0) On page 3 of the bill --reading that section item number 3 - having to do with liability insurance and limitations -- an employee may not be held liable -- then listed the claims - -- then later (in the bill) on page 4 -- it say injuries caused by -------- It kind of look like this is blanket immunity --

Curt Kreun - any professional should have a certain amount of credibility and liability -- you can't absolve yourself from anything and everything -- nobody can do that -- if you are going to do the job it has to be within reality and common sense where that takes place --it is your job to decide that -- but I don't think anybody wants to be held totally harmless.

Douglas Bahr Director of Civil Litigation Section of the Attorney General's office appeared before the committee. A copy of his prepared remarks is attached. As a part of his duties in his position he also counsel's the Office of Risk Management for the State. It was his position that Sen Trenbeath did an excellent job in explaining the bill In response to another question from the committee Mr. Bahr expressed his belief that the effect of this bill would be that it would do nothing to the insurance rates because we always thought we had the protection of the Doctrine of Public Duty.

In response to several questions from committee members Mr. Bahr said an inspector could not be held to assuring the contractor build a building perfectly.

Bruce Furness -- Mayor of Fargo appeared and followed his prepared remarks quite closely. A copy of his prepared remarks is attached. Mayor Furness answered questions about procedure in Fargo; whether or not Fargo would continue to do building inspections if the bill were not passed; and questions of what the costs might be and how much of the department is covered by inspection fees.

Patricia Roscoe Assistant City Attorney for the city of Fargo spoke and answered questions about the Ficek case which she tried in District Court and the appeal before the North Dakota Supreme Court. A copy of her prepared remarks and a copy of the Ficek case summary with the Supreme Court ruling is attached.

Her testimony and the question and answers continued to the end of the tape 2 side A.

Tape 2 Side B

Patricia Roscoe's discourse with the committee continued starting at (3.2)

Jerry Hjelmstad representing the North Dakota League of Cities spoke of their support for the bill. A copy of his prepared remarks is attached.

Darrell Linnertz -- building offical from the city from the city of Minot appeared. A copy of his prepared remarks is attached.

Gary Ficek the person whose family was the subject of the litigation which went all the way to the North Dakota Supreme Court provided a very detailed and exhaustive unwritten discourse of his experiences with the home he purchased in Fargo. A structural engineer ultimately issued an Letter stating the home was unsafe for occupancy due to the fact that no foundation had ever been constructed under one side of the house. Much wrangling and bitterness ensued among the parties to the suit as it progressed through the courts. This discourse with the committee continued to the end of tape two of the record. He obviously was testifying in opposition to the bill.

Tape 3 Side A

Gary Ficek (cont't) to (0.4)

Paula Grossinger registered lobbyist speaking for the North Dakota Trial Lawyers Association spoke in opposition to the bill saying it was nothing but an attempt to bring back sovereign immunity which the people of North Dakota rejected in a referendum.

Rep. Koppelman (4.0) I think the committee need to be clear this bill does not bring back sovereign immunity. The constitution does say though that the legislature shall determine when, how and what standards, etc. For what types of suits may be brought.

Rep. Maragos (5.1) May I call Darrell Linnertz back -- When you issue a building permit

---are building permits given contingent upon reviewing the plans? For the project?

Darrell Linnertz - the plans are usually reviewed before the permit is issued -- on that review and on that permit we have statements that the contractor signs and that the owner signs that they are going to comply with all the applicable regulations -- which means the building codes etc.

Rep. Maragos (6.1) so if a person ends up building a building --say 10' too tall -- He would by virtue of signing that agreement would be liable? -- Rather than saying you shouldn't issued the permit?

Darrell Linnertz --- the language in the building code is such that any code official cannot violate any jurisdictional law, ordinance or code. If it is (the permit) in error it is void.

There being no further testimony for nor against SB 2265, **Rep.Devlin, Chairman** closed the hearing. (8.1)

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2265

House Political Subdivisions Committee

❑ Conference Committee

Hearing Date March 11, 2005

Tape Number	Side A	Side B	Meter #
1	x		27. 5 to 37.6
Committee Clerk Signature	Lawrence R. Gist		

Minutes: In work session **Rep.Devlin, Chairman** opened the discussion on SB 2265. **Rep. Kaldor** (28.1) I do have some reservations about the bill -- I am looking at some amendments -- There have been some other cases where they have used the inspectors as a defense. You have this never land where nobody is responsible for shoddy work.

Rep. Herbel, Vice Chairman (29.2) If you amendments do something that will be successful -- I too have some concern that if we don't do something like this -- we could find that the cities will wash their hands of the inspection process -- why for $144 would a city want to take on that liability.

Rep. Kaldor I am very concerned about that too -- look in that Supreme Court case -- I find that troubling because that inspector was out there 44 times. If it was once but 44 times and didn't notice there was no foundation under one side of the building. That could be a hidden thing a home buyer wouldn't see or notice.

Rep. Herbel, Vice Chairman -- (32.2) Relating back to that we need to recognize that nobody is perfect -- they are going to miss some things but maybe there is something about the word "competence" has to enter in.

Rep. Kaldor --(32.0) The contractor can use inspectors as a defense when they do shoddy work -- my amendment addresses 'shoddy work' .

Rep. Koppelman (32.6) I support the concept of the bill. -- If we put something in the bill that says ---building inspection can not be used as a defense by contractors in a court case -- then we create another problem which is the whole purpose of building inspections is to rely upon when at least -- when the inspector was there that was up to code at that point -- but when we heard the bill an issue was the question of ' public safety doctrine '.

Rep.Devlin, Chairman we will appoint a subcommittee to look at these issues -- on that committee I ask that **Rep. Herbal, Vice Chairman, Rep. Koppelman** and **Rep. Kaldor** report back. End (37.6).

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2265 c

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date March 17, 2005

Tape Number	Side A	Side B	Meter #
1	x		0.6 to 7.5
1	x		26. 6 to 43.5
Committee Clerk Signature	Lauree B. Fink		

Minutes: **Rep.Devlin, Chairman** in work session opened the discussion to receive the report of the subcommittee.

Rep. Herbel, Vice Chairman The subcommittee of Rep. Koppelman, Rep. Kaldor, and myself met --- we met with the League of Cities, the counties were involved, Doug Bahr from the Attorney General's Office, --- I think we have come up with a solution that every one can live with - in House but I am not sure that when it goes back to the Senate -- this deals with the Public Duty Doctrine -- what I am going to do -- I am going to turn over the next portion of this to Rep. Koppelman-- and Rep. Kaldor - -they worked with the Legislative Council to tighten up the -- about the concerns for gross negligence --

Rep. Koppelman (1.6) -- the concern was as you recall -- we want to be sure the cities have the protection they need-- and at the same time we wanted to make sure that we in essence weren't returning to the Sovereign Immunity Doctrine -- Rep. Kaldor and I met with Mr. Bahr -- in the discussion he made a comment that made our eye brows raise on both of us -- the bill really

doesn't contain the Public Duty Doctrine -- all it contains is a mention of gross negligence -- apparently what happened was that coming into the session when this was drafted -- they probably chose that word over the other -- essentially -- it implies that cities and counties have a general duty to provide general services and not a specific duty to anyone individual but in rare cases -- it could be pierced -- that liability shield could be pierced -- if it was really an egregious case -- it must serve a 4 point test for whether the Public Duty Doctrine could be set aside in a specific case -- that has to do with the special relationship -- the 4 points are essentially this -- there would have to be direct contact between a political subdivision and the injured party; there has to be a promise of permanent (?) Duty; there would have to knowledge on the part of the political subdivision their action could cause harm; and, they would have to reasonably reliant by the person upon them -- to illustrate --he gave an example of lady whose husband was off on a fishing trip -- the story continues through several phone calls and nothing by way of information was relayed to the woman-- later her husband was found to have died during the times she was calling -- he might have been saved but the court found that in that case is that their was a specific promise to do something and nothing was at all was done. In case t like those instances we want to make sure the public has some recourse.

Rep. Ekstrom (6. 2) Isn't there an implied liability if they don't enforce the law?

Rep. Koppelman (6.6) I am not an attorney but I suspect that they have the general duty but and to an individual it not specific -- in an individual case.

Rep. Ekstrom (6.9) but in this specific case -- specific individual, if the don't enforce the law?

Rep. Kaldor (7.5) Mr. Bahr will be here in about 1- 15 minutes.

Note: at (8.1) on the tape there is a break in the action on this bill to allow time for the schedule hearing ---

At (26.8) resume discussion on SB 2265 --

Rep. Koppelman (27.0) Mr. Bahr we did have a discussion on the bill earlier -- I basically explained what we did with the Public Duty Doctrine and used a couple of you examples but you could proceed to do a better job than I --

Mr. Bahr -- representing the Attorney General's office --

Rep. Ekstrom (27.6) there is one situation with which we have to deal with for a long time and using it as an example -- the cohabitation statue -- there are individuals who are in the penitentiary who are insisting the State's Attorney broke the law -- by not enforcing the law -- do they have grounds to sue - whoever ?

Mr. Bahr -- I think the response to that is two fold -- with regards to the Public Duty Doctrine -- I don't see why that would impact on that in anyway -- because there is no special relationship - or no requirement -- the more generally thought is that prosecutors have discretionary -- it is called prosecutorial discretion -- in determining whether or not to bring an action -- first of all they have to determine whether there is grounds -- a legal basis and even if there is they have the discretion this or this not an appropriate use of my office's resources -- if the county would prosecute every crime -- they are going to triple their staff -- that is why there are only so many things they can get done -- I don't think there is a basis for bringing a case on that absent something that is not summarily a given -- and I don't think that is directly related to this bill and not an issue. In response to another example by Rep. Ekstrom -- Mr. Bahr could not find a basis for liability for the actions of a building inspector unless there was specific commitments made

that a party was relying on -- again the duty of the building inspector is a general duty -- not a specific duty to anyone individual.

Rep.Devlin, Chairman -- (30.5) Did the cities and the counties look at the language in these proposed amendments and are you comfortable with them?

Gerry Hjelmstad - representing the League of Cities -- Mr. Chairman -- yes and yes.

Rep. Koppelman (31.1) I move the amendments in Lc .0101 and I will note that we need to correct the bill number on the draft. **Rep. Dietrich** seconded the motion. The motion carried on a voice vote.

Rep. Zaiser (32.1) moved a 'Do Pass as amended' for SB 2265. **Rep. Ekstrom** seconded the motion.

Rep. Kretschmar (32.4) I am still going to oppose the bill --I don't think we should adopt the Public Duty Doctrine or whatever it is called -- the issue of Sovereign Immunity was settle in our state by several Supreme Court Cases and our courts would not adopt the Public Duty Doctrine in the Ficek Case and while I agree the Legislature has the right to chose any statute you want in regards to Sovereign Immunity but the people -- in 1996 there was a constitutional amendment on the ballot to reinstate Sovereign Immunity in North Dakota and it was solidly defeated This just a case of the camel getting its nose back into the tent. It is not possible for the Legislature to pass a law for every case that comes along. I think the courts can separated the good from the bad and establish case law.

Rep. Koppelman (34.3) I understand his concern but I think the situation we find here is the court rule and what precipitates law suits is another law suit. The court has said the defense in this case the defense in this case is the Public Duty Doctrine but we don't find it anywhere in

North Dakota law. What precipitated the subcommittees action was the concern that we had gone to far with gross negligence -- I think what we have done is balanced it -- it is necessary to prevent a rash of law suits against cities and counties as a result of the Supreme court case..

Rep. Herbal, Vice Chairman (35.7) Coming at this from a little bit different angle than that -- my concern is that if cities and counties and subdivisions get sued a rash of issues -- we are going to have subdivision who are not going to want to provide that service. --Why would they -- this gives us the opportunity to at least keep some kind of relevance in terms of having some kind of organization -- or inspection -- and providing some type of consistency in how we plan things ---this will assist us in that.

Rep. Ekstrom (36.6) It is highly unlikely that any city or political subdivision will pull back from public protection -- the over riding duty to public protection -- in fire or safety is paramount -- the reason we have minimum code requirements is to protect the public safety.

Rep. Herbal, Vice Chairman (37.9) I guess I am thinking more terms of the inspections part because -- if they don't remove them they are going to have add a fee on to make -- it will make a much greater cost to the public.

Rep. Zaiser (38.8) I just want toe make the case-- I serve on the Judiciary committee with Rep. Kretschmar and I have been on his side on many immunity cases where different groups have come in and ask for immunity but in this case I just feel there is a potential rash of law suits And I do think there is a danger the cities will back off on inspections.

Rep. Kaldor (39.8) I had serious reservations about this legislation before we went into the amendment process -- it is my -- well hopefully we will resist giving blanket immunity to anybody -- I would definitely be opposed to this will without that section -- however I will defer

to **Rep. Kretschmar** -- I am assuming that four pronged test is fairly difficult to prove and puts a heavy burden on the plaintiff.

Rep. Dietrich (41.8) It isn't as worrisome to me that they won't offer the services -- but what worries me is they will give limited services then they will be sued with a exposure of liability

On a roll call vote the motion carried **7 ayes 3 Nays 2 absent. Rep. Herbal, Vice Chairman** Was designated to carry SB 2265 on the floor. (43.5).

Prepared by the Legislative Council staff for
Representative Koppelman
March 17, 2005

PROPOSED AMENDMENTS TO SENATE BILL NO. 2265

Page 4, replace lines 5 through 21 with:

"f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.

(4) Providing or failing to provide fire protection services in the ordinary course of a political subdivision's fire protection operations.

g. "Public duty" does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the political subdivision and the injured party.

(2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm."

Page 7, replace lines 20 through 30 with:

"f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a state's law enforcement operations.

g. "Public duty" does not include action of the state or a state employee under circumstances in which a special relationship can be established between the state and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the state and the injured party.

(2) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the state that inaction of the state could lead to harm.

(4) The injured party's justifiable reliance on the state's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the state, or the state action increases the risk of harm."

Page 8, remove lines 1 and 2

Page 8, line 3, replace "g." with "h."

Page 8, line 4, replace "h." with "i."

Page 8, line 8, replace "i." with "j."

Page 8, line 9, replace "j." with "k."

Page 8, line 11, replace "k." with "l."

Page 8, line 13, replace "l." with "m."

Page 8, line 16, replace "m." with "n."

Page 8, line 18, replace "n." with "o."

Page 8, line 21, replace "o." with "p."

Page 8, line 23, replace "p." with "q."

Page 8, line 25, replace "q." with "r."

Page 8, line 26, replace "r." with "s."

Renumber accordingly

Date: March 17, 2005
Roll Call Vote:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House POLITICAL SUBDIVISIONS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number Rep moved LC .0101, Rep Dietrich 2nd carried his vote

Action Taken

Motion Made By Rep. Zaiser Seconded By Rep. Ekstrom

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman	✓		Rep. Ekstrom		✓
Rep. Herbel, Vice Chairman	✓		Rep. Kaldor	✓	
Rep. Dietrich	✓		Rep. Zaiser	✓	
Rep. Johnson	A				
Rep. Koppelman	✓				
Rep. Kretschmar		✓			
Rep. Maragos	A				
Rep. Pietsch	✓				
Rep. Wrangham		✓			

Total (Yes) 7 No 3

Absent 2

Floor Assignment Rep. Herbel

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

REPORT OF STANDING COMMITTEE

SB 2265: Political Subdivisions Committee (Rep. Devlin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 3 NAYS, 2 ABSENT AND NOT VOTING). SB 2265 was placed on the Sixth order on the calendar.

Page 4, replace lines 5 through 21 with:

"f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.

(4) Providing or failing to provide fire protection services in the ordinary course of a political subdivision's fire protection operations.

g. "Public duty" does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the political subdivision and the injured party.

(2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm."

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any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a state's law enforcement operations.

g. "Public duty" does not include action of the state or a state employee under circumstances in which a special relationship can be established between the state and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the state and the injured party.

(2) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the state that inaction of the state could lead to harm.

(4) The injured party's justifiable reliance on the state's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the state, or the state action increases the risk of harm."

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Page 8, line 21, replace "o." with "p."

Page 8, line 23, replace "p." with "q."

Page 8, line 25, replace "q." with "r."

Page 8, line 26, replace "r." with "s."

Renumber accordingly

2005 TESTIMONY

SB 2265

Testimony Presented on Senate Bill 2265
House Political Subdivisions Committee
Representative William R. Devlin, Chairman

by Patricia Roscoe, Assistant Fargo City Attorney

March 4, 2005

Mr. Chairman and Members of the Committee:

I am Patricia Roscoe, assistant Fargo city attorney. On behalf of the City of Fargo, I respectfully request a "Do Pass" recommendation for Senate Bill #2265.

This bill comes to you as the result of a North Dakota Supreme Court case, Ficek v. Morken, 685 N.W.2d 98 (N.D. 2004). I argued the case on appeal before the Supreme Court. Ficek The Ficeks argued that the City was liable for failing to properly inspect a home during construction. The relevant inspections were performed in 1988. The Ficeks bought the home from the seller/contractor in 1996, then sued the City in 2002. The Ficeks argued, among other things, that the inspector was negligent concerning depth of footings, style of footings, and in inspecting whether the condition of the soil was suitable for building.

The City argued it had no liability because there was no duty between the inspector and the plaintiffs, relying on the public duty doctrine. The public duty doctrine is a well-accepted legal principle based on the concept that when local government exercises its police powers through adoption and enforcement of the building code, or any other city ordinances, the government does so to benefit the public health, safety, and general welfare of the public as a whole. Thus, any duty that arises runs to the public as a whole and not to any individual citizen;

local government does not owe a duty in tort to individual members of the public unless there is a special relationship or if the legislature clearly intended to impose a tort duty for the benefit of the injured party irrespective of any special relationship.

On a rather technical, legal issue, the Supreme Court held that the legislature has already decided, in N.D.C.C. § 32-12.1-03, in what situations political subdivisions will have immunity and that the public duty doctrine could not be reconciled with the legislature's decision in § 32-12.1-03. The Court said that "if the legislature believes certain activities conducted by political subdivisions require more stringent protection than the limitations currently provided in N.D.C.C. § 32-12.1, it may provide that protection."

The proposed legislation which is before you codifies the public duty doctrine, reaffirming the principle that governmental entity does not owe a duty of care to specific members of the public merely because the government chooses to adopt various ordinances, rules, and regulations such as building codes. This principle is appropriate because a city building code simply establishes minimum standards for construction and because inspectors do not insure or guarantee the quality of work.

Unlimited liability

There is no limit to liability, both in terms of time and as to subsequent owners of property. This means that the city can be liable for an inspection that occurred

ten or more years ago, but that has just now been realized, and that this liability runs to any subsequent owner of the property.

In addition, this duty of inspectors can cross over to other areas of ordinance violations and enforcement. For instance, a city could be liable for negligence if someone becomes ill because a food code inspector missed an inspection of a cooling system at a restaurant.

Related Lawsuits

A second lawsuit is pending against the City of Fargo, filed by the same legal counsel in Ficek, alleging negligent inspection of a commercial building. Based on the current status of the case, it appears that the plaintiff's claim against the city relates to drainage issues.

I respectfully request that you give Senate Bill 2265 a "do pass" recommendation.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2004 ND 158

Gary A. Ficek and Rhonda K. Ficek, Plaintiffs and Appellees
v.
James P. Morken and Carol C. Morken, Defendants and The City of Fargo, Defendant and Appellant

No. 20030295

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Georgia Dawson, Judge.
AFFIRMED.
Opinion of the Court by Kapsner, Justice.
Ronald H. McLean (argued) and Timothy G. Richard (appeared), Serkland Law Firm, P.O. Box 6017, Fargo, ND 58108-6017, for plaintiffs and appellees.
Patricia Ann Roscoe, Assistant City Attorney (argued), and Garylle B. Stewart, City Attorney (appeared), Solberg Stewart Miller and Tjon, P.O. Box 1897, Fargo, ND 58107-1897, for defendant and appellant.
Jerald A. Hjelmstad, North Dakota League of Cities, 410 East Front Avenue, Bismarck, ND 58504-5641, for amicus curiae. David L. deCourcy, 5203 Leesburg Pike, Suite 600, Falls Church, VA 22041, and Garylle B. Stewart, City Attorney, Solberg Stewart Miller and Tjon, P.O. Box 1897, Fargo, ND 58107-1897, for amicus curiae International Code Council.

Ficek v. Morken

No. 20030295

Kapsner, Justice.

[¶1] The City of Fargo appealed from a judgment entered on a jury verdict awarding Gary A. Ficek and Rhonda K. Ficek $107,000 plus costs and disbursements in the Ficeks' action against James P. Morken, Carol C. Morken, and the City. We reject the City's invitation to adopt the public duty doctrine because it is incompatible with North Dakota law, and we conclude the district court did not err in instructing the jury that the City had a duty to properly inspect the construction of the Ficeks' residence and to enforce the building codes at the time the house was constructed. We

affirm.

I

[¶2] In 1988 the Morkens began constructing a two-story addition to their home at 1831 Third Street North in Fargo. On June 27, 1988, the City issued the Morkens a building permit listing them as the "Contractor," and James Morken performed much of the construction work by himself, including forming and pouring a new foundation. During the approximately two-year period it took to complete the house, the City's building inspectors visited and inspected the house more than 40 times for compliance with the building code. On June 10, 1990, the City issued the Morkens a certificate of occupancy, certifying that the building met applicable building codes.

[¶3] The Ficeks purchased the house from the Morkens in May 1996, and as time passed, the Ficeks noticed problems with the home's construction. Experts inspected the home and determined it does not comply with the City's building code in several respects. The natural gas piping did not meet code requirements. Windows and roof vents were installed without proper flashing, siding had not been installed and sealed properly, and no vapor barrier existed in most of the interior walls, causing water leaks and condensation to form. The structural supports in the house were significantly overloaded and the house foundation did not have adequate frost depth footings. The structure was built on uncontrolled fill, causing the house to heave and settle in different directions and damaging the structure. In April 2002, a structural engineer advised the Ficeks to either fix the foundation of the house immediately or vacate the residence.

[¶4] The Ficeks brought this action against the Morkens and the City, asserting the City "owed a duty to ensure that all buildings are constructed according to relevant building codes and to properly inspect buildings under construction to ensure the builder is following all relevant building codes," and the City "breached its duty by negligently inspecting and approving the construction of the foundation of the subject residence, as said foundation does not meet the required building code." The Ficeks asserted the Morkens had committed constructive and actual fraud, breach of warranty, negligence, and consumer fraud. The Ficeks also sought equitable rescission and punitive damages from the Morkens.

[¶5] During the trial, the City requested the following instruction based on the public duty doctrine:

MUNICIPAL BUILDING INSPECTION

A municipality has the power, granted to it by law, to provide for the inspection of all building construction within the limits of the municipality.

Duty of Municipality

> Building codes, building permits, and building inspections are devices for the protection of the general public and are not for the specific benefit of an individual. The issuance of a building permit does not make a municipality an insurer against defective construction. Unless there is a special relationship between the plaintiffs and the municipality, the municipality owes no duty of care to insure compliance with the building code.
>
> A special relationship requires that there be direct contact or privity with the public building official who, in response to a specific inquiry, represented that the building complied with the building code, coupled with reasonable reliance on that representation by the plaintiff.

Instead, the district court gave the jury an instruction fashioned after the Ficeks' requested instruction based on Tom Beuchler Constr., Inc. v. City of Williston, 392 N.W.2d 403 (N.D. 1986):

NEGLIGENT INSPECTIONS/APPROVAL--CITY OF FARGO

> The City of Fargo owed a duty to the Ficeks and any other purchaser to properly inspect the construction of the house in this case and to enforce the building codes in force at the time the house was constructed. Because the City can only act through its employees, the City is liable for the negligence of its employees William Eide and Ronald Strand. The City of Fargo is liable for all damages proximately caused by its employees' negligent inspection and approval of the construction of the house as being in compliance with applicable building codes.

[¶6] During closing arguments to the jury, the attorney for the City conceded the City was negligent but argued its negligence was not the proximate cause of the Ficeks' damages. The jury found in favor of the Ficeks on all claims. The jury found the Morkens and the City each 50 percent at fault in causing the Ficeks' damages in the amount of $214,000. The City appealed from the judgment entered against it, inclusive of costs and disbursements, for $133,821.89.

II

[¶7] The sole issue on appeal is whether the district court committed reversible error in instructing the jury that the City owed the Ficeks a duty to properly inspect the construction of the house and to enforce the applicable building codes at the time the house was constructed.

[¶8] Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. Nesvig v. Nesvig, 2004 ND 37, ¶ 12, 676 N.W.2d 73. We review jury instructions as a whole to determine their correctness, and instructions will be allowed if, as a whole, they fairly advise the jury of the law on the essential issues in the case. Rittenour v. Gibson, 2003 ND 14, ¶ 15, 656 N.W.2d 691.

[¶9] Actionable negligence consists of a duty on the part of the allegedly negligent party to protect the plaintiff from injury, a failure to discharge that duty, and a resulting injury proximately caused by the breach of that duty. Groleau v. Bjornson Oil Co., Inc., 2004 ND 55, ¶ 6, 676 N.W.2d 763. To establish a cause of action for negligence, the plaintiff must show the defendant had a duty to protect the plaintiff from injury. Grewal v. North Dakota Ass'n of Counties, 2003 ND 156, ¶ 9, 670 N.W.2d 336. Whether a duty exists is generally a question of law for the court, but if the existence of a duty depends upon the resolution of factual issues, the facts must be resolved by the trier of fact. Iglehart v. Iglehart, 2003 ND 154, ¶ 11, 670 N.W.2d 343. If no duty exists on the part of the alleged tortfeasor, there is no actionable negligence. Diegel v. City of West Fargo, 546 N.W.2d 367, 370 (N.D. 1996).

A

[¶10] The City argues it owed no duty to the Ficeks because of the public duty doctrine.

[¶11] This Court has never adopted, or even specifically addressed, the public duty doctrine. Simply stated, under the public duty doctrine, when a statute or common law "imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort." 1 D. Dobbs, The Law of Torts § 271, at p.723 (2000) (footnote omitted) ("Dobbs"). The judicially-created public duty doctrine is rooted in a mid-19th century United States Supreme Court decision:

> The origin of the public duty doctrine can be traced to South v. Maryland, 59 U.S. (18 How.) 396, 15 L.Ed. 433 (1855). In South, the plaintiff alleged that he was kidnapped and held for a period of four days and released only when he secured the ransom money demanded by his kidnappers. He also asserted that the local sheriff knew that he had been unlawfully detained yet did nothing to obtain his release. The plaintiff sued the sheriff for refusing to enforce the laws of the state and for failing to protect the plaintiff. The circuit court awarded plaintiff a substantial judgment. The Supreme Court reversed and declared that a sheriff's duty to keep the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." 59 U.S. (18 How.) at 403.
>
> The public duty doctrine was apparently accepted by most state courts in the late nineteenth and early twentieth centuries. The leading treatise on tort law during the era stated:
>
> The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the

> duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.

T. Cooley, A Treatise on the Law of Torts 379 (1879). Leake v. Cain, 720 P.2d 152, 155 & n.6 (Colo. 1986).

[¶12] The public policy concerns underlying the public duty doctrine have been summarized in 18 E. McQuillin, The Law of Municipal Corporations § 53.04.25, at p. 199 (3rd ed. 2003) (footnotes omitted) ("McQuillin"):

> Courts give several reasons for the rule. First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Fourth, exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.

[¶13] A majority of jurisdictions appear to adhere to some form of the public duty doctrine. See, e.g., Gordon v. Bridgeport Hous. Auth., 544 A.2d 1185, 1197 (Conn. 1988); Ruf v. Honolulu Police Dep't, 972 P.2d 1081, 1091 n.7 (Hawai'i 1999); Muthukumarana v. Montgomery County, 805 A.2d 372, 395 (Md. 2002); Hoffert v. Owatonna Inn Towne Motel, Inc., 199 N.W.2d 158, 160 (Minn. 1972); Massee v. Thompson, 90 P.3d 394, 403 (Mont. 2004); Beaver v. Gosney, 825 S.W.2d 870, 873 (Mo. App. 1992); E.P. v. Riley, 604 N.W.2d 7, 14 (S.D. 1999); Ezell v. Cockrell, 902 S.W.2d 394, 399 (Tenn. 1995); Taylor v. Stevens County, 759 P.2d 447, 450 (Wash. 1988); Holsten v. Massey, 490 S.E.2d 864, 873 (W. Va. 1997); Annot., Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances, 38 A.L.R.4th 1194, 1197 (1985); Annot., Municipal liability for negligent performance of building inspector's duties, 24 A.L.R.5th 200, 322 (1994); 18 McQuillin § 53.04.25, at p. 194.

[¶14] An exception to the public duty doctrine's immunity provision arises when a "special relationship" exists between the victim and the public official. See Muthukumarana, 805 A.2d at 394-95; Massee, 90 P.3d at 403.

> The public duty rule does not protect a municipality where there was a "special relationship" between a public official

> and a particular individual that gave rise to a duty to that individual separate from the official's duty to the general public. The special relationship rule is not only an exception to the public duty doctrine, but also to the tort principle that a person is not liable for the harm caused by others. Special duties can be grounded in reliance, dependence, or the creation by the public entity of a known risk. Courts have identified a variety of criteria which help identify a special relationship. These criteria include the following: direct contact between municipal agents and the plaintiff; an assumption by the municipality, through promises or actions, of an affirmative duty to act on the plaintiff's behalf; knowledge by the municipal agent that inaction could lead to harm; the plaintiff's justifiable reliance on the municipal agent, occurrence of the injury while the plaintiff is under the direct control of municipal agents, municipal action that increases the risk of harm, and the existence of a statute that imposes a duty to a narrow class of individuals rather than to the public at large.

18 McQuillin § 53.04.25, at pp. 199-203 (footnotes omitted). Under the public duty rule, courts generally hold that services such as inspections mandated by municipal building or fire codes or other inspection laws are services provided to the public in general and are not services rendered to a particular individual. Id. at § 53.04.25, at p. 205; Annot., 24 A.L.R.5th 200, § 24, at p. 322.

B

[¶15] In Tom Beuchler Constr., Inc. v. City of Williston, 392 N.W.2d 403 (N.D. 1986) ("Beuchler I"), the city leased four lots near an airport to a lessee who planned to build a hanger and office complex. The lease contained height restrictions on the development, but the contractor for the project was unaware of the restrictions. The city's building inspector approved the plans. After the project was substantially completed, the city informed the lessee and the contractor that the building was 10 feet higher than allowed under the lease and ordered the lessee to remove the building. The lessee sued the city for negligent issuance of the building permit, and the district court dismissed the action, concluding the building inspector had no duty to check the restrictive covenant in the lease.

[¶16] This Court reversed and remanded, concluding "a building inspector's duty is not limited solely to ensuring compliance with the Uniform Building Code but comports with the general principles of negligence to exercise reasonable care under the circumstances in issuing a building permit. J & B Development Co. Inc. v. King County, 100 Wash.2d 299, 669 P.2d 468 (1983)." Beuchler I, 392 N.W.2d at 405-06. On remand, the city was held liable for damages and this Court affirmed, concluding the law of the case doctrine precluded the city from raising the defense of governmental immunity in the second appeal. See Tom Beuchler Constr., Inc. v. City of Williston, 413 N.W.2d 336, 339 (N.D. 1987) ("Beuchler II"). The public duty doctrine was not mentioned in either Beuchler I or

Beuchler II.

[¶17] In Myers v. Moore Eng'g, Inc., 42 F.3d 452 (8th Cir. 1994), the Eighth Circuit Court of Appeals considered the Beuchler decisions in an appeal from a summary judgment dismissing an action against a city and its building inspector. The trial court had concluded the city, in inspecting buildings and issuing building permits, did not owe the plaintiffs a duty as members of the general public. The plaintiffs argued Beuchler I established that the city, in performing building inspections and in issuing building permits, owed a duty of reasonable care to all future owners and users of the buildings. The Eighth Circuit disagreed, predicted that this Court would adopt the public duty doctrine, and affirmed the summary judgment.

[¶18] The Eighth Circuit agreed with the trial court that "Beuchler is a classic case of special relationship or duty," and noted that J & B Dev. Co., which this Court relied upon for the duty proposition in Beuchler I, had been expressly overruled by the Washington Supreme Court in Taylor, 759 P.2d at 452. Myers, 42 F.3d at 456. The Eighth Circuit stated:

> After reviewing Beuchler and Taylor, the district court concluded that, if presented with the issue raised in this case, the North Dakota Supreme Court would distinguish Beuchler. The facts in Beuchler satisfy the special relationship criteria defined in Taylor and other cases--there was privity of contract, direct personal contact between plaintiff and the building inspector, a specific request for and assurances of compliance, and reasonable reliance on the inspector's assurances and the building permit. Because there was no such special relationship between appellants and the City in this case, the district court concluded that the Supreme Court of North Dakota would adopt the approach of either the majority or concurring justices in Taylor and hold that the City owed no duty to appellants.
>
> We agree with the district court that the Supreme Court of North Dakota would likely construe its decision in Beuchler so as to keep this aspect of municipal tort liability in line with the majority rule that is followed in Minnesota and South Dakota, much as the Supreme Court of Washington in Taylor limited its earlier decision in J & B Dev. Co.

Id. at 456-57.

[¶19] The City urges that we construe Beuchler I as did the Eighth Circuit Court of Appeals in Myers, adopt the public duty doctrine, and conclude as a matter of law that it owed no duty to the Ficeks in this case.

C

[¶20] "While a sizeable number of jurisdictions still adhere to the public duty rule, . . . the trend has been to abolish the rule." Jean W. v. Commonwealth, 610 N.E.2d 305, 312 (Mass. 1993) (Liacos, C.J., concurring) (footnote omitted). See, e.g., Adams v. State, 555 P.2d 235, 241 (Alaska 1976); Ryan v. State, 656 P.2d 597, 599 (Ariz. 1982); Leake, 720 P.2d at 160; Martinez v. City of Lakewood, 655 P.2d 1388, 1390 (Colo. App. 1982); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1015 (Fla. 1979); Wilson v. Nepstad, 282 N.W.2d 664, 674 (Iowa 1979); Maple v. City of Omaha, 384 N.W.2d 254, 260 (Neb. 1986); Schear v. Board of County Comm'rs, 687 P.2d 728, 731 (N.M. 1984); Thompson v. Waters, 526 S.E.2d 650, 652 (N.C. 2000); Wallace v. Ohio Dept. of Commerce, 773 N.E.2d 1018, 1032 (Ohio 2002); Brennen v. City of Eugene, 591 P.2d 719, 725 (Or. 1979); Hudson v. Town of East Montpelier, 638 A.2d 561, 566 (Vt. 1993); Coffey v. City of Milwaukee, 247 N.W.2d 132, 139 (Wis. 1976); Natrona County v. Blake, 81 P.3d 948, 956 (Wyo. 2003). See also Prosser and Keeton on the Law of Torts § 131, at p. 1049 (5th ed. 1984) (footnote omitted) (noting the foundations of the public duty doctrine "may have been eroded in part by a number of decisions that have rejected, discounted or narrowed the scope of that doctrine"); Dobbs § 271, at p. 725 (footnote omitted) (noting "[i]n a few states, contemporary courts have rejected the public duty doctrine altogether"); 18 McQuillin § 53.04.25, at p. 206 (footnote omitted) (noting the "public duty rule has been abrogated or limited in a number of jurisdictions").

[¶21] Courts have relied on several reasons for abrogating or refusing to adopt the public duty doctrine. First, the "major criticism leveled at the public duty rule is its harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor." Leake, 720 P.2d at 159. There has been a "reasoned reluctance to apply a doctrine that results in a duty to none where there is a duty to all." Schear, 687 P.2d at 731. See also Martinez, 655 P.2d at 1390 (recognizing application of the "public duty--special duty dichotomy results in 'a duty to none where there is a duty to all'"); Commercial Carrier Corp., 371 So.2d at 1015 (recognizing "'general duty'-'special duty' dichotomy" and stating it is "circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person"); Jean W., 610 N.E.2d at 313 (noting "[j]udges and commentators criticizing the rule have focused on the unfairness inherent in a rule that results in a duty to none when there is a duty to all, and pointed out the tortured analyses that result when courts seek to avoid such harsh results without squarely facing the underlying problem").

[¶22] Second, courts have said the public duty doctrine "creates needless confusion in the law and results in uneven and inequitable results in practice." Leake, 720 P.2d at 159. See also Ryan, 656 P.2d at 599 (stating "[w]e shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific

individual duty which means recovery. . . . [T]he parameters of duty owed by the state will ordinarily be coextensive with those owed by others"); Jean W., 610 N.E.2d at 313 (noting Massachusetts courts, like "'other courts, have not managed to draw an intellectually defensible line between immune "public" duties and actionable negligence'"); Maple, 384 N.W.2d at 260 (refusing to engage in "'speculative exercise'"); Hudson, 638 A.2d at 566 (noting the public duty doctrine "is confusing and leads to inequitable, unpredictable, and irreconcilable results").

[¶23] Third, courts have reasoned that, "although the doctrine is couched in terms of duty rather than liability, in effect, it resurrects the governmental immunities that have been abrogated or limited by most jurisdictions over the last thirty-five years." Hudson, 638 A.2d at 566. See also Ryan, 656 P.2d at 598 (noting the public duty doctrine "is the old proprietary-governmental distinction in a bright new word-package"); Leake, 720 P.2d at 160 (noting "the effect of the rule is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant"); Schear, 687 P.2d at 731 (holding "the 'public duty-special duty' rule has no viability outside the context of sovereign immunity"); Thompson, 526 S.E.2d at 651 (noting in "some states where sovereign immunity has been either legislatively or judicially abrogated, courts have abandoned the public duty doctrine as another form of sovereign immunity"); Coffey, 247 N.W.2d at 139 (noting the "'public duty"special duty' distinction . . . set[s] up just the type of artificial distinction between 'proprietary' and 'governmental' functions which this court sought to dispose of in" abrogating governmental immunity) Natrona County, 81 P.3d at 954 (noting the "public-duty/special-duty rule was in essence a form of sovereign immunity and viable when sovereign immunity was the rule").

[¶24] Fourth, courts have reasoned "the underlying purposes of the public duty rule are better served by the application of conventional tort principles and the protection afforded by statutes governing sovereign immunity than by a rule that precludes a finding of an actionable duty on the basis of the defendant's status as a public entity." Leake, 720 P.2d at 158. See also Ryan, 656 P.2d at 599 (noting "plaintiffs still must show that a duty was owed to the plaintiff, that this duty was breached, and that an injury was proximately caused by the breach"); Jean W., 610 N.E.2d at 313 (noting concerns over excessive financial burdens are addressed by the language of the tort claims act and "traditional tort principles"); Maple, 384 N.W.2d at 260 (noting "plaintiff still must show that a duty was owed to him, that this duty was breached, and that an injury was proximately caused by that breach"); Wallace, 773 N.E.2d at 1031 (noting "conventional negligence principles already provide some measure of protection against the possibility of the state becoming the de facto guarantor of every injury somehow attributable to the actions of a state tortfeasor" and that a "state defendant, just like any private defendant, remains protected by traditional tort concepts of duty, including foreseeability and pertinent public-policy considerations"); Hudson, 638 A.2d at 566

(noting "concerns over excessive government or public employee liability are baseless considering the limitations on liability afforded by conventional tort principles, various types of official immunity, or exceptions to waivers of sovereign immunity").

[¶25] Fifth, and foremost, numerous courts have ruled that the public duty doctrine is simply incompatible with tort claims acts mandating that suits against public defendants be determined in accordance with rules of law applicable to private persons. In Adams, 555 P.2d at 241-42 (footnote omitted), the court said:

> [W]e consider that the "duty to all, duty to no-one" doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. An application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no "special relationship" between the parties existed. Why should the establishment of duty become more difficult when the state is the defendant? Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.

See also Leake, 720 P.2d at 159 (noting "[i]n apparent contravention of [tort claims] statutes, the public duty rule makes the public status of the defendant a crucial factor in determining liability"); Martinez, 655 P.2d at 1390 (noting the "concept of a public duty cannot stand either with the enactment of the statute abrogating sovereign immunity, nor in instances where there is a common law duty of a public entity to the plaintiff"); Commercial Carrier Corp., 371 So.2d at 1016 (stating "a plain reading of the statute" precludes construction that public duty doctrine survived statute's enactment); Jean W., 610 N.E.2d at 312 (stating "[b]y recognizing that the public duty rule is incompatible with the [tort claims] Act, we align ourselves with most jurisdictions that have squarely considered the issue"); Maple, 384 N.W.2d at 260 (noting "[n]owhere [in tort claims act] is there found an exemption for the exercise of a duty owed to the public generally"); Schear, 687 P.2d at 730, 734 (stating "[n]othing in the [tort claims] statute refers to performance of either public or special duties" and refusing to "breathe new life into a rule which, as a ghost of sovereign immunity, operates as a denial of a cause of action and is inconsistent with . . . [the] Act"); Wallace, 773 N.E.2d at 1028 (holding "the public-duty rule is incompatible with [tort claims statute's] express language requiring that the state's liability . . . be determined 'in accordance with the same rules of law applicable to suits between private parties'"); Brennen, 591 P.2d at 725 (stating "the Legislature specifically provided for certain exceptions under which immunity would be retained, . . . and we find no warrant for judicially engrafting an additional exception onto the statute"); Natrona County, 81 P.3d at 954 (holding the "public duty only rule, if it ever was recognized in Wyoming, is no longer

viable").

[¶26] In rejecting the "superficial appeal" of an argument that a statute mandating governmental liability be determined in accordance with rules of law applicable to suits between private parties is compatible with the public duty doctrine because private persons do not possess public duties, the court in Wallace, 773 N.E.2d at 1026-27, 1028 (footnote omitted), reasoned:

> To accept the state's contention that the public-duty rule is applicable here because it "determines whether a defendant has any duty to begin with" ignores a vital feature of the doctrine that is incompatible with R.C. 2743.02(A)(1). The applicability of the public-duty rule depends upon the public status of the particular defendant raising it as a bar to liability. In other words, only governmental entities and their employees may rely on the rule. It is spurious logic to conclude that a doctrine that is, by definition, available only to public defendants can be consistent with a statute mandating that suits be determined in accordance with rules of law applicable to private parties. . . . Given the unambiguous directive of R.C. 2743.02(A), there is no legal or logical basis to conclude that the public-duty rule, which is by definition unavailable to private litigants, can apply to suits against the state in the Court of Claims.

See also Commercial Carrier Corp., 371 So.2d at 1017 (refusing "to place such a gloss on our waiver statute" because "[t]o do so would be to essentially emasculate the act and the salutary purpose it was intended to serve"); Jean W., 610 N.E.2d at 312 (noting the "fact that a public employee's employment imposes on him an affirmative duty to act where a private person would not have such a duty does no more than identify the source of the duty").

D

[¶27] In Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974), this Court abolished the doctrine of governmental immunity of political subdivisions, concluding the doctrine had a judicial basis and was not mandated by the state constitution. In doing so, this Court "retain[ed] no distinction between governmental and proprietary functions." Id. at 797. In 1977 the Legislature enacted N.D.C.C. ch. 32-12.1 to limit the liability of political subdivisions in the wake of the Kitto decision. See Binstock v. Fort Yates Pub. Sch. Dist., 463 N.W.2d 837, 841 (N.D. 1990). Preceding a list of specific limitations on and exceptions to political subdivision liability, N.D.C.C. § 32-12.1-03(1) provides:

> Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use

> of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant.

This legislation resulted from an interim study by the Committee on Political Subdivisions of the North Dakota Legislative Council, see Nelson v. Gillette, 1997 ND 205, ¶ 32 n.2, 571 N.W.2d 332, and the committee intended that "public employees be held liable for their intentional or malicious acts to make them accountable to the public they serve." Report of the North Dakota Legislative Council, Forty-Fifth Legislative Assembly, 1977, at p. 175.

[¶28] We are persuaded by the reasoning of the minority view and refuse to adopt the public duty doctrine as a part of North Dakota law. Section 32-12.1-03(1), N.D.C.C., specifically provides that political subdivisions are liable for damages caused by an employee's negligence "under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state." The statute contains no exceptions for "public duties," creates no distinction between "public duties" and "special duties," and our review of the statute's legislative history reveals no indication that public duties in general were intended to be excepted from liability. Indeed, N.D.C.C. § 32-12.1-03(3)(d), which specifically excepts a political subdivision from liability for fire protection activities, cuts against such an interpretation. See also N.D.C.C. § 18-10-17.

[¶29] We recognize that J & B Dev. Co., relied upon in Beuchler I, has been overruled by the Washington Supreme Court, but other jurisdictions continue to recognize potential liability under similar circumstances regardless of the public duty doctrine. See Annot., 24 A.L.R.5th 200, § 49, at p. 322, and cases collected therein. Furthermore, the Eighth Circuit Court of Appeals, when predicting in Myers that this Court would adopt the public duty doctrine, did not consider N.D.C.C. § 32-12.1-03(1).

[¶30] We also recognize that good public policy arguments can be made for excepting a political subdivision from liability under the circumstances of this case, but those arguments are more appropriately addressed to the legislature rather than to the judiciary. In Rodenburg v. Fargo-Moorhead YMCA, 2001 ND 139, ¶ 29, 632 N.W.2d 407, we said:

> "Our function is to interpret the statute. . . . 'The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination.'" Stokka v. Cass County Elec. Coop., Inc., 373 N.W.2d 911, 914 (N.D. 1985) (quoting Syllabus ¶ 11, Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943)). The legislature is much better suited than courts to identify or set the public policy in this state. Haff v. Hettich, 1999 ND 94, ¶ 22, 593 N.W.2d 383; Martin v. Allianz Life Ins. Co., 1998 ND 8, ¶ 20, 573 N.W.2d 823. "[T]he legislature 'can do studies, gather evidence, hold

> hearings, and come to a decision' and 'broad public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate' (citations and quotations omitted)." Allianz, 1998 ND 8, ¶ 20, 573 N.W.2d 823.

If the legislature believes certain activities conducted by political subdivisions require more stringent protection than the limitations currently provided in N.D.C.C. ch. 32-12.1, it may provide that protection. See, e.g., Jean W., 610 N.E.2d at 314; Wallace, 773 N.E.2d at 1029.

[¶31] We conclude the public duty doctrine is incompatible with North Dakota law and we refuse to adopt it. The City's sole complaint in this case is that the district court instructed the jury based on Beuchler I rather than on the public duty doctrine. We conclude the challenged jury instruction correctly and adequately informed the jury of the applicable law.

III

[¶32] The judgment is affirmed.

[¶33] Carol Ronning Kapsner
Mary Muehlen Maring
William A. Neumann

VandeWalle, Chief Justice, concurring specially.

[¶34] Because I believe the public duty doctrine is contrary to the wording in N.D.C.C. § 32-12.1-03(1), I concur in the majority opinion. I do so with the understanding, at least my understanding, that a certification a building meets applicable building codes of the issuing governmental entity is not a guarantee there are no defects in that building or, if there are defects, that the issuing governmental entity is not automatically liable. The rhetoric at least, if not the results, in the cases cited at ¶ 24 in the opinion for the Court by Justice Kapsner support that understanding. Cf. Fast v. State, 2004 ND 111, 680 N.W.2d 265 (holding no liability for fall on icy sidewalk).

[¶35] Many of the cases cited in support of the "minority" position, i.e., that no public duty doctrine should be adopted, wax eloquently about the proposition that a governmental entity should not be immune from liability for injury to one of its citizens when liability attaches if the same injury is caused by a private citizen. Section 32-12.1-03(1), N.D.C.C., says as much. It may be that such a formula overlooks the much greater responsibility placed on the governmental entity by statute or the responsibility voluntarily assumed by the governmental entity. I am concerned that if the exposure of the governmental entity, because of its responsibility to protect the public from all manner of perceived ills, is too great the inclination will be to reduce the exposure by reducing the

protections or limiting them to only minimal requirements. Neither is necessarily good public policy in my mind.

[¶36] An example of a comparable situation is found in N.D.C.C. ch. 53-08, which was enacted to encourage landowners to open their land to the public for recreational purposes by limiting the liability of the landowners for injuries. Olson v. Bismarck Parks & Recreation Dist., 2002 ND 61, 642 N.W.2d 864. But see Hovland v. City of Grand Forks, 1997 ND 95, 563 N.W.2d 384 (applying recreational use statute to political subdivision liability statute would circumvent legislature's intent under N.D.C.C. § 32-12.1-03). It may be necessary to reduce the liability to an individual in order to obtain other desirable benefits for the general public. But, it is for the Legislature to weigh conflicting public policy arguments and to enact accordingly.

[¶37] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom

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Att #1

TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL NO. 2265

Douglas A. Bahr
Director, Civil Litigation Division
Office of Attorney General

Same given to the House

January 25, 2005

Senate Bill 2265 amends chapters 32-12.1 and 32-12.2 in response to the Ficek v. Morken, 685 N.W.2d98 (N.D. 2004), decision issued by the North Dakota Supreme Court on August 4, 2004. Chapters 32-12.1 and 32-12.2 address liability of political subdivisions and the State. In the Ficek case, the court held the public duty doctrine is incompatible with North Dakota law.

Simply put, the public duty doctrine provides: **When a statute or common law imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort.** Under the public duty rule, services such as inspections mandated by municipal building or fire codes or other inspection laws are services provided to the public in general and are not services rendered to a particular individual. The public duty doctrine applies to other services, such as law enforcement, parole supervision, licensing, etc.

In Ficek, the Court explained several policy reasons for the public duty doctrine. Some include:

- It is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law;
- The government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them;
- Exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities and the state from passing such laws in the first place; and
- Exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers.

The primary argument against the public duty doctrine is the effect it has on plaintiffs who otherwise would be entitled to recover for their injuries. The Court noted a majority of jurisdictions appear to adhere to some form of the public duty doctrine.

The Court found the public duty doctrine incompatible with North Dakota law because N.D.C.C. ch. 32-12.1 provides when political subdivisions are liable for damages and contains no exceptions for "public duties." Although the Court recognized that good public policy arguments can be made for excepting a political subdivision from liability, it stated those arguments are more appropriately addressed to the legislature rather than

to the judiciary. The Court's function is to interpret the statute, not make policy decisions. The Court explained: "If the legislature believes certain activities conducted by political subdivisions require more stringent protection than the limitations currently provided in N.D.C.C. ch. 32-12.1, it may provide that protection."

Senate Bill 2265 places before the Legislature the opportunity to statutorily adopt the public duty doctrine. Until the Ficek decision, the State and political subdivisions believed the public duty doctrine applied to claims against the State or political subdivisions.

Section 1 adopts two definitions from ch. 32-12.2 and adds them to ch. 32-12.1.

Section 2 first states the general rule that enactment of a law, rule or regulation to protect general health, safety and welfare does not create a duty on the part of the political subdivision. There is corresponding language as to the State in Section 3.

Section 2 next adopts language from ch. 32-12.2 to provide a political subdivision is not liable for a claim based upon its employees' acts or omissions, when exercising due care, in the execution of a valid or invalid law.

Finally, Section 2 identifies a number of public duty type acts and provides a political subdivision is not liable for those acts unless an injury is the result of gross negligence, malfeasance, or willful or wanton misconduct. Some services included are inspecting, licensing, providing law enforcement, and providing fire services. Corresponding language in found in Section 3 with regard to the State, except for fire services. It is noted the possibility of recovery for gross negligence, malfeasance, or willful or wanton misconduct is not intended to impact determinations as to whether an employee is within the scope of employment. This language should not be read as expanding the definition of scope of employment. For purposes of the State, that definition is found in § 32-12.2-01(6). It is anticipated the definition of scope of employment will be amended by HB 1084.

CONCLUSION

THE ATTORNEY GENERAL ENCOURAGES THIS COMMITTEE TO RECOMMEND A "DO PASS" ON SENATE BILL 2265.

Same given to the House

Att #2

To: **Senate Judiciary Committee**
From: **Jerry Hjelmstad, North Dakota League of Cities**
Date: **January 25, 2005**
Re: **Senate Bill No. 2265**

Mr. Chairman and members of the Senate Judiciary Committee, my name is Jerry Hjelmstad and I am here on behalf of the North Dakota League of Cities to testify in support of Senate Bill No. 2265.

This bill makes amendments to two chapters of the North Dakota Century Code. Sections 1 and 2 amend Chapter 32-12.1 relating to liability of political subdivisions. Section 3 of the bill amends Chapter 32-12.2 relating to the liability of the state.

Section 1 of the bill amends the definition portion of the political subdivision liability chapter to provide uniformity in the law. These amendments to three different subsections give these terms the same definitions as provided in the state liability chapter.

Section 2 of the bill provides that no new duty is created when a political subdivision passes a regulation to protect health and safety. It also provides that a political subdivision or a political subdivision employee may not be held liable for injuries relating to inspection, licensing, law enforcement services, or fire protection services. Exceptions are made for gross negligence or wanton misconduct.

Section 3 of the bill provides that no new duty is created when the state passes a regulation to protect health and safety. It also provides that the state or state employee may not be held liable for injuries relating to inspections, licensing, or law enforcement services. Exceptions are again made for gross negligence or wanton misconduct.

Sections 2 and 3 of the bill also eliminate obsolete language relating to potential liability from year 2000 date change problems.

The need for this type of legislation was made clear to us when a recent North Dakota Supreme Court case (Ficek v. Morken, 2004 ND 158, 685 N.W.2d 98) found a city liable for issues relating to inspection under a building code. Up to that time, cities in North Dakota had been operating under the assumption that

the adoption of a regulation such as a building code was meant to provide a general standard to protect the public at large. They did not feel that they would be placed in the position of protecting each individual by being an insurer for the work of the contractor.

The North Dakota Supreme Court in its opinion in that case stated, "We also recognize that good public policy arguments can be made for excepting a political subdivision from liability under the circumstances of this case, but those arguments are more appropriately addressed to the legislature rather than to the judiciary." In a special concurring opinion, Chief Justice VandeWalle stated, "I am concerned that if the exposure of the governmental entity, because of its responsibility to protect the public from all manner of perceived ills, is too great the inclination will be to reduce the exposure by reducing the protections or limiting them to only minimal requirements. Neither is necessarily good public policy in my mind. ... But, it is for the Legislature to weigh conflicting public policy arguments and to enact accordingly."

We believe that the passage of Senate Bill No. 2265 is needed so that political subdivisions and the state may continue to provide regulations designed to protect the health and safety of the general public.

We ask that you recommend a "do pass" on Senate Bill No. 2265.

AH #3

Testimony Presented on Senate Bill 2265
Senate Judiciary Committee
Senate John T. Traynor, Chairman

by Mike Williams, Fargo City Commissioner

January 25, 2005

Mr. Chairman and Members of the Committee:

I am Mike Williams, a member of the City Commission of the City of Fargo. The City of Fargo respectfully requests a "Do Pass" recommendation for Senate Bill #2265, which provides, in part, immunity for claims based on negligent inspections related to building code requirements.

This concept of inspector's liability comes from a lawsuit where homeowners sued the City of Fargo based on an inspection that occurred in 1988, 14 years prior. The plaintiffs bought the home in 1996. The City of Fargo argued that it had no liability under the Public Duty Doctrine, which holds that a governmental entity does not owe a duty to individual citizens simply because the government adopts various ordinances or regulations.

The Supreme Court held that the Public Duty Doctrine was incompatible with North Dakota Century Code section 32-12.1-03. The Court said that "if the legislature believes that certain activities conducted by political subdivisions require more stringent protection than the limitations currently provided in NDCC 32-12.1, it may provide that protection."

This decision has serious ramifications for political subdivisions, including:

- For a $114 building permit, the City of Fargo was found liable for a claim for $130,000
- There is no limit to liability. A city is liable for any negligent inspection whether it occurred 1 day or more than 50 years ago

- There is no limit to liability. A city is liable for any negligent inspection whether it occurred 1 day or more than 50 years ago

- Building officials will be forced to increase building permit fees to cover the risk associated with inspections

- Building officials will require engineer/architect inspection of various phases of construction, increasing cost and length of construction

- Cities will be forced to hire more employees for increased supervision/monitoring of construction, resulting in more expense for inspections departments

- Fargo issued 2300 building permits, approximately 2000 plumbing permits, and 2500 mechanical permits. There are 5 building inspectors (3 residential and 2 commercial). Currently, inspectors are carrying about 1500 permits. At the end of summer 2004, the inspectors were overseeing more than 1800 projects. This translates approximately 20,000 to 30,000 trips to project sites.

- Fargo inspectors are expected to carry 200 to 700 permits at any given

- More supervision/monitoring lengthens construction project, increasing cost

- Political subdivisions might consider abandoning building code requirements or decide not to require permits/inspections for certain construction

- A second lawsuit is currently pending against the City of Fargo, filed by same legal counsel, alleging negligent inspection for drainage requirements of a commercial building.

Senate Bill 2265 should receive a "do pass" recommendation because:

- City building codes are merely a set of rules that establish minimum standards for construction.

Inspectors are not able to inspect and approve every item in every building project. Nor do cities have the resources to allow this.

- It is consistent with the well-accepted principle that adoption or enforcement of a building code or other local ordinances does not create a duty to specific individuals; a city building inspector does not owe a duty of care to a specific homeowner

- The risk of loss is focused on the appropriate party, i.e., the builder, who is the person who is on site daily, who controls the work site, and who is responsible for the construction project and the quality of work

- Compared to an architect and engineer, a city building inspector only visits a construction site for a brief period of time

- Inspections are not random, but are made only in response to a request from the permit holder.

- Inspections only occur at certain steps during construction of a project, including:

  Footings
  Foundation wall
  Framing
  Final inspection

Examples:

Framing Inspection—The inspector can observe most of the components of the framing but not necessarily the connectors used to attach them because they are embedded in the wood of the members.

Final Inspection—By the time of final inspection, everything is complete and all preceding work has been covered with the building's finishes. Work such as the veneer ties that hold brick veneer to the underlying framing of the building likely have not been inspected but yet there are specific building code requirements for size, materials, spacing.

- An inspector does not and cannot know with precision, what work is done before or after the time when the inspection is performed

- A building inspector is not an insurer of the quality of the work. The inspector does not see every nail or how each wall is constructed as compared to the builder or architect and the inspector simply responds to requests from the builder for inspections

- Any injured party has a remedy against the builder who is the person who has control over the construction site and the progress of work.

Other states, including Alaska, Arizona, Colorado, Illinois, Louisiana, Massachusetts, New Jersey, and Ohio have passed legislation giving immunity for building inspections.

Other states continue to recognize the Public Duty Doctrine despite the passage of statutes like N.D.C.C. section 32-12.1, including Minnesota, New York, North Carolina, South Carolina, South Dakota, Vermont, and West Virginia.

I encourage you to give Senate Bill 2265 a "do pass" recommendation.

Att #4

TO: Senate Judiciary Committee

FROM: Darrell Linnertz, Building Official, City of Minot

DATE: 9:30 AM, January 25, 2005

RE: Hearing on Senate Bill 2265

Mr. Chairman and members of the committee, I am Darrell Linnertz, Building Official of the City of Minot. I would like to begin by thanking Chairman Traynor and the committee for allowing me to testify on this bill on behalf of the City of Minot.

The City of Minot has been closely watching the development of this bill through contact with the North Dakota League of Cities.

If this bill were **not** moved to the Senate floor with a "do pass' recommendation from the committee, there would be a serious detrimental effect on the City of Minot as well as other North Dakota cities and North Dakota itself.

Potential lawsuits relating to inspection services are a real threat to the ability of the City of Minot to provide inspection services to its citizens at a level that would be required to reduce potential liability to an acceptable level. Mission statements and staffing of inspection services would have to be expanded to what the City of Minot believes will be an unaffordable level.

Therefore, the City of Minot encourages your committee move this legislation to the floor of the Senate by recommending a "do pass" on Senate Bill 2265.

Thank you again for allowing me to appear before your committee to present this testimony.

#5

OFFICE OF MAYOR
MICHAEL R. BROWN

City of Grand Forks

255 North Fourth Street • P.O. Box 5200 • Grand Forks, ND 58206-5200

(701) 746-2607
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TESTIMONY ON SENATE BILL 2265

Senate Judiciary Committee

Michael R. Brown, Mayor
City of Grand Forks

January 25, 2005

Mr. Chairman and members of the Senate Judiciary Committee, thank you for the opportunity to testify on behalf of the city of Grand Forks in support of Senate Bill 2265.

Senate Bill 2265 is extremely important to both the State and the State's political subdivisions. It effectively institutes a public duty doctrine into State law that is crucial to lessening our statewide entities' exposure to destructive and costly lawsuits.

Grand Forks, as well as the other North Dakota political subdivisions, takes its role as a provider of public service very seriously. The high caliber services in the area of public safety are essential to our communities and, in fact, stand out as some of the reasons why communities across North Dakota enjoy a positive quality of life. The threat of massive exposure to lawsuits could have a negative effect on the people who rely on these services since the overwhelming liability may force the diminishing or even discontinuance of these vital services.

A second concern is, of course, a financial one. The costs incurred by political subdivisions and the State resulting from rising legal action could be considerable. We are all focused on holding down government costs. This would certainly be a move in the wrong direction.

It is time that we establish in State Law a public duty doctrine that allows political subdivisions to provide the necessary services to constituents without undue concern of costly and detrimental lawsuits.

For these reasons, I ask your favorable consideration of Senate Bill 2265 and request a DO PASS recommendation from the committee. Thank you.

#6

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(State Relay)

CITY OF *Williston* NORTH DAKOTA

January 24, 2005

Senate Judiciary Committee
State Capitol
Bismarck ND 58505

RE: SB 2265

Dear Committee Members:

The Board of City Commissioners supports SB2265 and its aim to limit the liability of political subdivisions. A fear of unlimited exposure will inhibit political subdivisions' efforts to provide service in the best interest of their constituents. Political subdivisions, including Cities, are already perceived as having deep pockets and are subject to many frivolous lawsuits. This legislation is an attempt to contain the cost of government and is in the best interest of all taxpayers

We urge a "DO PASS" recommendation for SB 2265.

Sincerely,

E. Ward Koeser
President
Board of City Commissioners
City of Williston

EWK:sks

Testimony Presented on Senate Bill 2265
House Political Subdivisions Committee
Representative William R. Devlin, Chairman

by Bruce Furness, Mayor, City of Fargo

March 4, 2005

Mr. Chairman and Members of the Committee:

I am Bruce Furness, Mayor of the City of Fargo. The City of Fargo respectfully requests a "Do Pass" recommendation for Senate Bill #2265, which provides, in part, immunity for claims based on negligent inspection of construction projects.

The discussion regarding liability of city building inspectors stems from a recent North Dakota Supreme Court case, Ficek v. Morken. In that case, the City of Fargo was found liable for failing to properly inspect a home during construction. The relevant inspections were performed in 1988. The Ficeks bought the house in 1996 and sued the City of Fargo in 2002.

Second lawsuit

A second lawsuit is pending against the City of Fargo, filed by the same legal counsel in Ficek, alleging negligent inspection of a commercial building. Based on the current status of the case, it appears that the plaintiff's claim against the city relates to drainage issues.

Economic Impact/Consequence of Inspector Liability

Inspector liability has serious ramifications for political subdivisions, regardless of size, including:

- For a $114 building permit, the City of Fargo was found liable for a claim for $130,000
- A city is liable to any subsequent purchaser as was the case in the Ficek case.

- There is no limit to liability in terms of time. A city is liable for any negligent inspection whether it occurred 1 day or more than 50 years ago

- Building officials will be forced to increase building permit fees to cover the risk associated with inspections

- Building officials may require engineer/architect inspection of various phases of construction, increasing cost and length of construction

- Cities will be forced to hire more employees for increased supervision/monitoring of construction, resulting in more expense for inspections departments

- Some political subdivisions may even consider abandoning inspections or building permit requirements.

- Rural areas that do not have a designated building inspector, and that struggle to attract construction and growth in their areas, will be severely impacted by any increase in construction costs.

- Fargo issued 2300 building permits, approximately 2000 plumbing permits, and 2500 mechanical permits. There are 5 building inspectors (3 residential and 2 commercial). Currently, inspectors are carrying about 1500 permits. At the end of summer 2004, the inspectors were overseeing more than 1800 projects. This translates approximately 20,000 to 30,000 trips to project sites

- Fargo inspectors are expected to carry 200 to 700 permits at any given

- More supervision/monitoring lengthens construction project, increasing cost

- Political subdivisions might consider abandoning building code requirements or decide not to require permits/inspections for certain construction

Points Supporting Passage

Senate Bill #2265 should receive a "do pass" recommendation because:

- City building codes are merely a set of rules that establish minimum standards for construction

- Inspectors are not able to inspect and approve every item in every building project. Nor do cities have the resources to allow this

- It is consistent with the well-accepted principle that adoption or enforcement of a building code or other local ordinances does not create a duty to specific individuals; a city building inspector does owe a duty of care to a specific homeowner

- The risk of loss is focused on the appropriate party, i.e., the builder, who is the person who is on site daily, who controls the work site, and who is responsible for the construction project and the quality of work

- Compared to an architect and engineer, a city building inspector only visits a construction site for a brief period of time

- Inspections are not random, but are made only in response to a request from the permit holder

- Inspections only occur at certain steps during construction of a project, including:

  Footings
  Foundation wall
  Framing
  Final inspection

Examples:

Framing Inspection—The inspector can observe most of the components of the framing but not necessarily the connectors used to attach them because they are embedded in the wood of the members

Final Inspection—By the time of final inspection, everything is complete and all preceding work has been covered with the building's finishes. Work such as the veneer ties that hold brick veneer to the underlying framing of the building likely have not been inspected but yet there are specific building code requirements for size, materials, spacing

- An inspector does not, and cannot, know with precision, what work is done before or after the time when the inspection is performed

- A building inspector is not an insurer of the quality of the work. The inspector does not see every nail or how each wall is constructed as compared to the builder or architect and the inspector simply responds to requests from the builder for inspections

- Any injured party has a remedy against the builder who is the person who has control over the construction site and the progress of work

Other states, including Alaska, Arizona, Colorado, Illinois, Louisiana, Massachusetts, New Jersey, and Ohio, have passed legislation giving immunity for building inspections.

Other states continue to recognize the Public Duty Doctrine despite the passage of statutes like N.D.C.C. section 32-12.1, including Minnesota, New York, North Carolina, South Carolina, South Dakota, Vermont, and West Virginia.

I encourage you to give Senate Bill #2265 a "do pass" recommendation.

TO: House Political Subdivisions Committee

FROM: Darrell Linnertz, Building Official, City of Minot

DATE: 9:30 AM, January 25, 2005

RE: Hearing on Senate Bill 2265

Mr. Chairman and members of the committee, I am Darrell Linnertz, Building Official of the City of Minot. I would like to begin by thanking Chairman Devlin and the committee for allowing me to testify on this bill on behalf of the City of Minot.

The City of Minot has been closely watching the development of this bill through contact with the North Dakota League of Cities.

If this bill were **not** moved to the House floor with a "do pass' recommendation from the committee, there would be a serious detrimental effect on the City of Minot as well as other North Dakota cities and North Dakota itself.

Potential lawsuits relating to inspection services are a real threat to the ability of the City of Minot to provide inspection services to its citizens at a level that would be required to reduce potential liability to an acceptable level. Mission statements and staffing of inspection services would have to be expanded to what the City of Minot believes will be an unaffordable level.

Therefore, the City of Minot encourages your committee move this legislation to the floor of the House by recommending a "do pass" on Senate Bill 2265.

Thank you again for allowing me to appear before your committee to present this testimony.

March 3, 2005

North Dakota House of Representatives
Political Subdivision Committee

Re: Senate Bill 2265

My name is Gary Ficek and I would urge the House Judiciary Committee to issue a do not pass recommendation on Senate Bill 2265.

It was, apparently, a lawsuit which my wife, Rhonda and I, brought against the builder of our house and against the City of Fargo which spurred this legislation. I would like to share some facts and thoughts with you in the hopes that you will consider the situation of homeowners and potential homeowners in the State even though they are not organized and certainly not as well funded as the city groups that have been pushing their desires and their agendas on this important issue.

A nine person jury, which included taxpaying Fargo citizens, found the City of Fargo responsible for 50% of the fault of the damages we suffered because the house we bought was deemed inhabitable. This, despite our own attorney, arguing that the builder should be found liable for 70% of default and the City of Fargo 30%. The jury was therefore harsher on the City then we had asked them to be.

We did not sue the City of Fargo because we expected it to guarantee that our house was free of construction defects. We sued the City of Fargo because we thought that its building inspection department had been negligent in doing its job. It had allowed a first time house builder to build a house that did not even meet the minimum requirements of the Uniform Building Code, a code it is charged with enforcing.

This was not a case of a door being hung in the wrong direction. This was a case of allowing a house to be built with an insufficient foundation. Instead of a standard concrete block foundation, the City permitted a foundation of submerged wooden beams resting on cement pads approximately a foot in diameter and two to three feet thick on the entire south wall of our house .

No one, and I mean no one, other than the defendant, disagreed with the testimony of our expert witnesses, a structural engineer and an architect, that the system was not even close to being adequate. Not the City's chief building inspector, not the inspector who let this pass, not the builder's own expert witness.

Additionally, the house was permitted to be built on a site with uncontrolled fill and with a foundation so shallow that it did not reach, as required by code, below frost depth.

The cities of North Dakota are now asking in Senate Bill 2265 to be held immune from the negligence of their own building inspecting departments. The cities want the taxpayers to fund building inspection departments who will not be held accountable for their own work. Why should taxpayers want to fund entire building inspection departments with budgets of hundreds of thousands of dollars if the taxpayer cannot have some reasonable assurance that the building inspectors are doing their job? The effect of Senate Bill 2265 is to tell home buyers that the fact that the city building inspection department has certified that a house has been built according to code is meaningless. In each instance, home buyers will need to have their own inspector sign off on a house.

Our experience with a commercial building inspector was that it specifically excluded providing any assurances about the adequacy of foundation systems. Had Senate Bill 2265 been the law of the state when we purchased our home, we would have had to hired a soils engineer, a structural engineer and an architect to have been able to detect, on a forensic basic, all of the major defects that existed in our house. How many home purchasers do that? The cities of North Dakota want you to place that responsibility on the home purchasers.

Less than eight years after we purchased our home, we received a chilling letter from a structural engineer--our house was no longer safe to live in. We were advised that under certain conditions, a heavy snowfall, high winds, the entire house might suffer a catastrophic collapse. My hope is that no home owner in the State of North Dakota has to be told that. That no family has to make immediate plans to evacuate, to endure months of anxiety whenever the wind comes up, whenever it rains, whenever the creaking and settling gets so loud it disrupts sleep. That no one else will face three years of litigation not knowing if the biggest investment of their lives will be wiped out.

Building inspectors for the City of Fargo visited the construction site of our home over forty times. I do not know why they allowed the house to be built when it should have been clear to them that the codes were not being followed. I do know when the severity of the structural defects became clear to us that the City of Fargo responded to our claim with condescension and arrogance. At one meeting with a city employee, we were questioned as to the procedure we had followed as if the procedure was more important than the fact that the house might collapse in, on us, my family or topple over on our neighbor's houses. When mediation was sought, the City of Fargo made a token appearance and took the hard line that it had no responsibilities whatsoever. This despite a North Dakota Supreme Court decision that seemed to suggest that building inspectors could be found liable for negligence.

I do not know what advice the City Attorney gave the City of Fargo in this case. I do not know if the City Commission voted unanimously to take the hard line or if one commissioner was making all of the decisions or if an employee of the city was calling the shots in the litigation. I do know that the City Commission never wanted to meet us to discuss the case despite several requests. They had time to argue for weeks about whether one could grill a hot dog on a downtown street in Fargo, but no time for us.

Perhaps, the arrogance and condescension carried over to the jury trial. Throughout the trial, representatives of the city sat with, joked with and aligned themselves with the builder of the house. During part of the trial, the building inspector who had given approval to the house was seen to be sleeping. At one point, a city witness testified that in reviewing the data he had found a missing inch of depth so that the house's foundation was beneath frost depth in one corner. The missing inch was an inch of air he presumed existed under the foundation.

The proponents of the Bill remind me of the characters in George Orwell's, Animal Farm. The tenet "All animals are created equal" gets amended to "All animals are equal but some are more equal than others." The city wants to be treated as a person so it can have access to the courts when it needs it. But, when it should be held personally responsible for its own actions then it seeks protection. They say we want a guarantee for a $140.00 building permit when all we want is for the professionals, who get paid professional salaries by the taxpayers, do their job in a professional manner.

Thank you for this opportunity to present this testimony.

Gary A. Ficek
3107 Bohnet Boulevard
Fargo, ND 58102
(701) 241-8525
ficeklaw@mcleodusa.net

Dated this ____ day of March, 2005.

GAF:ms

EAPC ARCHITECTS ENGINEERS

3 April, 2002

Gary and Rhonda Ficek
1831 North 3rd Street
Fargo, ND 58102

SUBJ: House inspection

RE--: Report Addendum

FILE: 20016510

Dear Mr. and Mrs. Ficek:

Recently I had a chance to review the reports written by Braun Intertec and Solidification, Inc. regarding the foundation at the south bearing wall of your home.

In our original report, there was some uncertainty regarding the presence of a foundation under the south bearing wall. The Braun Intertec report is very clear that a true foundation is not provided anywhere along the length of the south wall. In general, the Braun report supports our opinions regarding the cause of the distress visible throughout your home.

The lack of a true foundation under the south wall does raise immediate safety issues. It is apparent that the south wall is moving and that this movement is affecting the structural framing. In our previous report, we stated that the home is safe to occupy provided the foundations were remedied as soon as realistically possible. This recommendation assumed that a minimal foundation was present. However, in light of the fact that even a minimal foundation is not present under the south bearing wall, we recommend repairing the foundation immediately or else vacating the residence.

Please contact us if you have any questions.

Sincerely,

Jay Kleven, P.E.
for
EAPC

JRk/jrk

Cc/ Joseph Wetch, Serkland Law Firm