NORTH DAKOTA LEGISLATIVE COUNCIL
ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Stanley Township, Cass County, North Dakota, submits the following information to the Advisory Commission on Intergovernmental Relations, a working component of the North Dakota Legislative Council, with respect to the "discussion on extraterritorial zoning authority and generating public involvement in transportation funding decisions" which was the subject of proceedings involving testimony at 1:00 p.m. on Wednesday, January 23, 2008, in Fargo, North Dakota.

It is the intention of the Stanley Township Board of Supervisors to briefly identify certain relevant issues/positions, some of which will be expanded upon in the attachments.

Stanley Township recognizes the primacy of the laws of the State of North Dakota as expressed in the North Dakota Century Code, and encourages the Legislative Assembly to suppress any municipal effort that is designed to, or has the effect of, eliminating property rights and/or civil rights of North Dakota property owners living in areas not yet annexed to any city.

It is Stanley Township's belief that everyone should be reminded of Article VII, § 2 of the North Dakota Constitution:

> **Section 2.** The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.

Our present problem(s) are associated with implementation of meaningful and constitutional zoning regulation near Fargo, North Dakota, which stems, in large part, from past legislative disregard for existing law when enacting new law(s) so that all may mesh. Recognizing the authority of any political subdivision can only come from the State of North Dakota, the State of North Dakota has a responsibility to prevent overlapping, and possible conflicting jurisdiction – or even misappropriation of jurisdiction by another political subdivision.

N.D.C.C. Chap. 40-47, entitled "CITY ZONING", forms the basis for municipal zoning power as granted by the State of North Dakota.

N.D.C.C. Chap. 58-03, entitled "POWERS OF TOWNSHIP AND OF ELECTORS OF THE TOWNSHIP", forms a similar basis for township zoning pursuant to a different grant of authority. In 1975, by enacting N.D.C.C. § 40-47-01.1, the Supreme Court determined that the Legislative Assembly "intended to give cities the power to establish zoning control beyond their corporate limits." Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 587 (N.D. 1978).

Meanwhile, N.D.C.C. Chap. 11-33, entitled "COUNTY ZONING" expressly grants some zoning authority even to the county government, but never within the "zoning or subdivision authority of any city of this state (unless authorized by the city)." N.D.C.C. § 11-33-20.

Three (3) different jurisdictions with obvious different objectives for land use – exacerbated by the possibility of implementation of the different objectives simultaneously – someone gets caught in the middle.

Confusion, and problems associated with different objectives by different political subdivisions – all purporting to act with the power granted by the State of North Dakota -- puts individual rural property owners into an unenviable place that can be likened to a single washcloth in an operating washing machine with an agitator going "heavy load" – it will be whipped around.

When the rural property owner's interest in using his own land also conflicts with any political subdivision – the landowner's assertion or protection of property rights can be at considerable cost.

An added source of agitation exists when "Home Rule" arguments are dumped into the churning machine – in this case the Home Rule Charter of Fargo [Addendum #1] and the Home Rule Charter of Cass County, North Dakota [Addendum #2 {7 pages of a 206 page Subdivision Ordinance effective March 6, 2006[1]].

The rural township landowner/elector, who never had the opportunity to vote for, or against, a member of the municipal government, will still be required to honor the zoning authority of the distant city – and it is real easy for a governing body to ignore a non-resident, and thus, a non-voter.

Stanley Township Supervisor Todd Ellig, also a member of the Cass County Planning Commission, participated in the process of drafting Cass County's Subdivision Ordinance. His personal comments based upon the experience, and a photocopy of an opinion by the Cass County State's Attorney is included as Addendum #5. The documents evidence lack of respect for the role of the township(s) in proper zoning administration, and a willingness to encourage County usurpation of authority under the guise of providing uniformity. Imposition(s) upon landowners is not proper regulation, nor was it a proper exercise of regulatory function authorized by the Legislative Assembly – but they did it anyway. A landowner should not have to hire a lawyer to protect property rights, the political subdivision is charged with the same responsibility.

The lack of representation can get worse – higher building standards can be imposed upon rural landowners, at considerable cost, under the guise of someone planning for the city's future far beyond what the current property owner currently desires, or intends to expend.

There is no known inherent right of any city to expand and assert control over the lands of contiguous rural property owners. If a city [or any political subdivision] wants someone else's land, and can legally use eminent domain to acquire property rights – the political subdivision

---

[1] http://www.casscountynd.gov/departments/planning/documents/Subdivision_Ordinances.pdf

should be compelled to do it directly with payment of just compensation to the owner, rather than obliquely under the guise of exercising "police power".

Against this backdrop, Stanley Township asserts that it has been a good steward of the authority granted it by the State of North Dakota. Stanley Township has been a leader in enacting bylaws, rules, and regulations within its statutory authority so as to positively affect the residents and/or property owners in the township. Stanley Township has long been active in preventing leap-frog development, and the preservation of rural land values and life-style. When Stanley Township has lost control by municipal expansion of its zoning authority over lands not yet annexed to the city, it has stood by and watched persistent municipal jurisdictional neglect, and lack of municipal response to known violations of zoning law(s), building code(s), and sign standards. The City of Fargo wants the control, but acts stand-offish until the property owner seeks to use the property in a manner different than envisioned by City Planners – that never consulted the property owner.

It is particularly galling to see the City of Fargo engage in"ribbon annexation" – with no intention of making the annexed land an immediate recipient of city services. Rather, the City of Fargo recent annexation(s) were done [or initiated] so as to avoid the permit oversight of Stanley Township for Fargo's south-side flood control project that is designed to increase the height of flood waters for rural property owners on the wrong side of the dike.

Interestingly, the permit oversight of Stanley Township [now sought to be avoided by the City of Fargo's ribbon annexation(s) and possible expansion of extraterritorial zoning authority] includes construction standard(s) that would preclude any possibility of constructing the proposed south-side dike. Stanley Township's construction standards, which would preclude the dike's existence, were first suggested by experts from the City of Fargo and Cass County, North Dakota. Constructions standards the City of Fargo wants imposed on others, are standard(s) that it is now unwilling to honor because its dike project would have an insurmountable roadblock. The City of Fargo seeks to extend its extra-territorial authority so that it can control construction standards [Fargo would be able to change the standards, or grant waivers of variances] that are inherent in the legal control of permits arising out of flood plain management and/or the need for building/construction permits.

Stanley Township has witnessed other problems associated with the City of Fargo's exercise of its zoning jurisdiction. A copy of a Legal Brief Arising out of the Hector Appeal from the Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 is attached hereto [Addendum 3; "LEGAL BRIEF"], and incorporated by reference. While the case involves agricultural lands previously annexed, the problems identified in the Legal Brief potentially relate to any land in the extra-territorial area surrounding any municipality having the attitude and proclivity of the City of Fargo.

Stanley Township believes the following points should be understood by the members of the Advisory Commission on Intergovernmental Relations:

1. The City of Fargo has not honored its obligations to create a Municipal Master Plan as required by N.D.C.C. Chap. 40-48.

N.D.C.C. Chap. 40-48 provides the authority for creation of municipal master plans, but it also imposes financial responsibilities upon the city should its master plan involve a public use of private property with respect to specific public purposes. The City of Fargo's present failure to honor the municipal master plan law is discussed in Point One of the LEGAL BRIEF, starting at page 10. The probable reason for non-adherence to the law is the potential cost for purchasing private lands identified for future public use. Instead of honoring the Due Process Clause and right to just compensation provided in two (2) different Constitutions, the City of Fargo seeks to use its platting powers, zoning authority, and special assessment authority to force concessions/dedications upon property owners.

Also, under the statute(s), the City of Fargo does not have the authority to create a precursor for zoning, yet it has done so, which will likely double the permit cost(s) of any property owner seeking zoning change. Further, the City of Fargo's standard is nebulous [when it is even identified by the City Commission], and apparently it can change depending upon the identity of the applicant.

2. The City of Fargo has encouraged leap-frog development by "ribbon annexation".

In the first "ribbon annexation", the platted land owned by Gerald Eid was included in the annexation effort. This platted land has been the subject of several prior attempts at zoning changes within Stanley Township – each development attempt required a zoning change which was denied because it would have allowed leap-frog development. The City of Fargo has apparently made promises to the landowner so as to avoid legal protest requirements associated with the "25% rule" that would stop or stall an annexation [forcing a mediation/arbitration process]. "Gerrymandering" is a dirty political term; a similar process should not be sanctioned by allowing "ribbon annexation" – the statute(s) should be changed to eliminate any possibility of annexation by manipulation of the line(s) and quantity of land so as to avoid the rights of rural property owners. Perhaps annexation should not be allowed except when done in quantities of 640 contiguous acres, or even larger, and then only if there is a written petition for annexation signed by 75% of the affected property owners.

3. The City of Fargo's uses a "discretionary" [and nebulous and changing] standard for zoning in violation of law.

The City of Fargo's uses a vague "discretionary" standard for zoning ["may be approved"] which violates N.D.C.C. § 40-47-03 which establishes the correct criteria for regulation of zoning. See, Point 11 of LEGAL BRIEF, starting at page 32.

As earlier noted, the City of Fargo does not honor its obligation to create a comprehensive

plan based upon the statutes of North Dakota. If it did, the City of Fargo would face payment obligations when landowners take issue with designation of their lands for public roads, or other purposes, without proper exercise of eminent domain/just compensation.

4. The City of Fargo does not honor the intent of N.D.C.C. § 40-51.2-16 that requires the city to "continue to classify as agricultural lands for tax purposes all lands in the annexed area which were classified as agricultural lands immediately before the annexation proceedings until those lands are put to another use."

Similar language appears N.D.C.C. § 40-51.2-06 ["However, the city shall continue to classify as agricultural lands for tax purposes all lands in the annexed area which were classified as agricultural lands immediately before the annexation proceedings until those lands are put to another use."], N.D.C.C. § 40-51.2-07(3) ["However, the city shall continue to classify as agricultural lands for tax purposes all lands in the annexed area which were classified as agricultural lands immediately before the annexation proceedings until those lands are put to another use."], and N.D.C.C. § 57-02-01(1) ["'Agricultural property' means platted or unplatted lands used for raising agricultural crops or grazing farm animals ... shall continue to be assessed as agricultural property until put to a use other than raising agricultural crops or grazing farm animals."].

In the LEGAL BRIEF, at page 13, the words of the Fargo City Planners recognize:

> Section 20-0202.A of the LDC [Fargo's Land Development Code] stipulates that the AG zone district is intended to accommodate agricultural land uses and provide an interim zoning classification for lands pending a determination of an appropriate permanent zoning designation.

In practice, even long-term commercial-zoned sites are changed by Fargo to an agriculture zoning status after annexation [most probably without notice to the landowner].

Despite clear legislative intent to treat agricultural lands as agricultural lands after annexation, the City of Fargo has a somewhat secret practice of actually treating previously annexed "agricultural lands" as commercial property when specially assessing real property. The difference is enormous. A commercial lot would be taxed at $220.00 per linear foot, so an adjacent wheatfield one-half mile long could reasonably expect a tab of $290,000 - is it necessary for the 4 or 5 trips to the field for spring planting, tillage, and fall harvest?

This form of taxation is predicated upon a theory of "benefit" to the real property. A wheatfield next to an arterial road, not zoned for residential use, does not receive a "benefit" that would justify such expenditure. The City of Fargo's Infrastructure Funding Policy is set forth as Addendum #4. It was not known until recently that "agricultural lands" actually means "commercial lands" in Fargo.

Stanley Township would assert that a wheatfield, now brought into a city while zoned for agricultural purposes, does not receive a "benefit" that justifies such enormous charge. The pre-existing section line road, probably graveled, is more than adequate for the agricultural use of the property, yet the City of Fargo will seek to make the agricultural property owner pay for a five lane [when all turning lanes are included, it will be seven lanes wide] arterial road. Not even larger sized farm equipment would justify such concrete construction for agricultural purposes.

## CONCLUSION

Stanley Township believes it has performed its statutory duties appropriately, with proper respect for the property rights of its electors, property owners, and residents. The Township recognizes there may be differences in long-range objectives between the interests of the property owner and a city, but it believes that education of the property owner [so that they will act in their best long-term interests] is superior to any system that uses power and authority as a club.

Stanley Township believes that the extraterritorial zoning authority of the municipalities should be eliminated, or severely restricted. There should be a ban on "ribbon annexation(s)". Annexations should only be done with overwhelming approval by the affected property owners within large contiguous land masses. For lands newly annexed, there should not be the possibility of specially assessing lands zoned for agriculture until appropriately re-zoned for a municipal-type use. If the city desires to put in infrastructure, existing laws will allow for later re-assessment of the benefits – laws presently being ignored in Fargo, North Dakota. N.D.C.C. Chap. 40-23. Municipalities should be reminded of their obligation to impose uniform standards of construction, and not be allowed to use their authority to waive or eliminate standards they impose upon others.

Stanley Township pledges its cooperation in the future – let us jointly restore the public trust and protect the rights of our citizens, residents, electors, and landowners.

Respectfully Submitted,

Stanley Township Board of Supervisors
Jonathan T. Garaas, Attorney