

Subject: Grand Forks Four Mile Extraterritorial zoning
From: Sheila Bichler <sheila_bichler@und.nodak.edu>
Date: Tue, 29 Jan 2008 13:42:09 -0600
To: bitco@btinet.net

Hi Brian,

I received your name as someone I could contact and tell my story about Grand Forks four mile extraterritorial zoning. I would not only like to see this four mile zoning state law repealed, but I would like to see it made retroactive so that Grand Forks cannot extend out to four miles. Frankly, it's just silly for a town the size of Grand Forks to take the property rights away from the lawful owners of the property when Grand Forks won't need the property for about 100 years.

My husband and I own 7 ½ acres of land 3.5 miles west of Grand Forks. We purchased the 5 acre house/lot about thirty years ago, and the additional 2/12 acre property lot about twenty years ago. We purchased the 2 ½ acre lot for use as horse pasture and kept the property as an future investment property after we no longer had horses. We paid all our taxes over all the years on time and just considered that extra lot an investment in our future. What a surprise when all of a sudden one day we discovered that Grand Forks now had ALL the rights to our property. We never knew the four mile extraterritorial zoning was coming until Grand Forks just applied it. We immediately panicked because we knew if the city of Grand Forks decided we could not sell our 2 ½ acre lot for a house to be placed on it that it would be worthless. We immediately called the city planning and zoning and were told that "the city would probably allow us to sell our 2 ½ acre lot if it was already platted. (which it was)." We asked the city to send us a letter to that effect and they refused to do it stating "the planning and zoning will change, we don't know what it will be" So, not only did Grand Forks take control over our property but they could NOT even tell us what they intended to do with our property. We were, and are totally at the mercy and whim of Grand Forks. They did not pay the tax or mortgages on this land for the past thirty years. Nor did I ever see anybody from the city out here helping us to mow and keep the property weed free. But they now have control over our property that we have worked and saved for thirty years. And for what? Because in 100 years they might need it?? This is an abusive use of governmental powers and needs to be stopped. We neither had information that Grand Forks could take control of our property, nor do we have any voting rights on any of the city council members that now make the decisions on this use of our land .

Thank you for taking the time to read this e-mail.

Sheila and Scott Bichler
1520 83rd Street South
Grand Forks, ND 58201
701-746-6681

Post hearing comments: March 26, 2008

From: Richard Hammond

Here are some additional matters that need clarification since the last hearing

First, a short history of the Prairie View Subdivision is in order. The subdivision lies about 1 mile east of Bismarck in Section 6 of Apple Creek Township. The subdivision was platted in the early 1960's. Initially, the city of Bismarck came out in the area and purchased 80 acres of land in section 6 of Apple Creek Township and then announced in the paper that this would be the site for the new city sanitary land fill. The article in the paper was the first, and only, notice that any of the neighboring property owners got that they would soon be living adjacent to a sanitary landfill. The city attorney had simply gone out and threatened the widow who owned the property that if she did not sell the property to the city voluntarily, the city would condemn the property and take it and she may end up getting less for her property. Then approximately a dozen neighboring property owners hired an attorney to fight the new planned landfill. There was either no engineering done or very poor engineering done before the site selection. About half of the property was on a hill and the other half was a wide slough and waterway. In short, it was a totally inappropriate place to build a landfill. As an out-of-court settlement, the City of Bismarck agreed to locate the landfill elsewhere if the neighboring landowners were to purchase the land from the city, at the city's cost. This was done. The neighboring property owners were unable to sell the land, so after a couple of years, they subdivided the non-swamp portion into residential lots and began selling the lots in what became the Prairie View Subdivision. The lesson for the committee to understand from this is that the Prairie View Subdivision was only created as an indirect result of the city's actions. This mode of operation of the city in threatening to condemn and take property with no notice to neighboring property owners, is all to typical of the city's usual disrespect for the property rights of others, especially the rights of rural residents. This level of disrespect is directly related to the fact that there is no real, enforceable, connection between the grant of police powers and a required responsible use of those powers.

Located north of, and adjacent to the Prairie View Addition, is an area of irregular sized lots which were sold by metes and bounds in the 1940's and 50's. When one of the owners wanted to construct a building, he was told by the city, that he would not only have to survey and plat his lot, but that the city wanted the entire area platted. The entire area was surveyed and platted by the person who needed the building permit. He received little or no financial help from his neighbors. The area is now known as Barbie's Neighborhood Subdivision. In this subdivision, there is one full 10-acre lot adjacent to the north line of the Prairie View Subdivision. The owner of that 10 acre lot called me and asked what I thought about him subdividing his 10-acre lot and using the roads within the Prairie View Addition for their only access. I told him that the roads within the

Prairie View Subdivision were built to inner subdivision street standards only, not to through street standards, and that we had only one entrance from the west which sometimes plugs with snow. I suggested that he could subdivide and provide us an access to the north and then residents of both subdivisions would benefit by having 2 options for access. I did not hear from him again. Later, I learned that he had sold one acre, adjoining my property by metes and bounds and that the new owner planned to build. I called the Bismarck Department of Inspections and told Mr. Hegedus that they were trying to subdivide the 10-acre lot without going through the formal platting procedure, a procedure which included public hearings to obtain input from neighboring property owners. Mr. Hegedus assured me that no building permit would be issued until the area was formally platted with required notice to adjoining property owners and public hearing. My neighbor also called the department of inspections and was told the same thing. The next thing we saw, was a house being built on the lot. We never received any explanation as to why this person was not required to follow the regulations like everyone else. Attached are copies of the permits issued. The permits only list the metes and bounds. They were given not one, but two building permits. Today, there is a very large out-building on the lot, substantially larger than indicated by the shed permit. This was not a mistake. This was not an oversight. The department of inspections was called by at least two people on this matter. I will leave it to the committee to ask for an explanation from the city representatives. This situation is in contrast to what other residents of Apple Creek Township have testified to before this committee.

Attached is a copy of the published Supreme Court decision in the case **Apple Creek Township v. City of Bismarck**, 1978, (271 NW2d583). This is the case which the city has relied upon to justify and keep their control over the rural area surrounding the city. The case was essentially decided on only two issues. First was the question of legislative intent. There was little question of what the legislature intended. The legislature made this decision based on the cities false assertions on how beneficial would be for all citizens affected. Now, we have the benefit of 20/20 hindsight and can evaluate the extraterritorial authority based upon how it has worked in practice and been applied by those cities who have been given that authority.

Second was the theory expressed in case law that the state has the right to do zoning and therefore the state has the right to delegate that authority to the municipal corporations. The concept that the state has the right to zone may be proper, but to delegate that right such as to allow one group of citizens to control the property of another group of citizens, against their will, and with no recourse, is simply going too far. The 1978 challenge to extraterritorial zoning by Apple Creek Township simply did not address all the relevant issues in the case. There should have been a challenge to this based on both the State and on the U. S. Constitutions.

Article 1, Section 21. of the North Dakota State Constitution states;

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

This simply means that you do not grant one group of citizens the legal right to trample over the rights of another group of citizens. This constitutional provision is part of North Dakota's populist history. This provision is frequently used as a screening test when our legislature is considering proposed bills. The states wherein the U. S. Supreme Court has allowed cities to have their extraterritorial zoning authority, do not have this, or an equivalent provision, in their own respective state constitution. A constitutional challenge to extraterritorial zoning authority will be necessary if the legislature fails us again in this matter.

At a previous hearing, one Bismarck City lobbyist tried to tell the committee about the restraint the city used by delaying the implementation of the increased extraterritorial taking area from 2 miles to 4 miles. The increased limit to 4 miles was approved in 1997 and the City of Bismarck did not exercise that authority until 2003. The full story is; The day before the hearing on the increased limit to 4 miles, was to be held at the capitol, This lobbyist, an employee of the City Planning Office, was in front of the Burleigh County Commission and was asked what the city's position was on the 4-mile extension. He told the county commissioners that the city was neutral and was not taking a position on the bill. The very next day, he was at the hearing at the capitol testifying in favor of the bill on behalf of the city of Bismarck. I wrote to the county commissioners complaining about the lie. The only reason the city waited for 5 years to increase their take to 4 miles was to wait and let the county commissioners cool off and hope there would either be new commissioners on the Board or that the old commissioners would forget this incident. This "wait" had nothing to do with "restraint".

When the original extraterritorial legislation was passed, the legislature relied on the projections and the testimony of the city's lobbyists. All the testimony was simply speculation and predictions as to how beneficial this would be to all citizens. The legislature was mislead. Now, we can look at the arrangement with the advantage of 20/20 hindsight. We can see how the actual applications of this authority has worked, or rather failed. We do not need lobbyists to tell us how great the system will work. Now is the time to listen to the citizens affected by this grant of power how this system has failed and why. Simply put, it is not wise to grant authority or police powers to any board, commission, or political subdivision without providing the citizens affected by that grant of power, a reasonable degree of protection against the abuse, or misuse of that authority. We have no such protection.

In the near future, the legislature will have to review the abuses associated with the city's power to annex property. One city lobbyist has already hinted that if they (cities) lose the extraterritorial zoning authority, the cities will simply use and abuse their annexation authority to accomplish the same purpose. We have to recognize the arrogance that naturally develops when power is granted with no accountability, or when there is no "consent of the governed". The incident wherein the City of Fargo annexed the strip of land 60 feet wide by 3 miles long will tell us more about the character of these people than you could learn from 100 additional witnesses. This isn't rocket science. This only takes a basic understanding of human nature and the fundamental principles of democratic government. The consent of the governed is missing here. One of our county commissioners summed it up correctly when he said that this was a "representational issue".

This situation will not lend itself to a compromise, or half-baked solution of simply moving the line back to the two-mile limit. Most of the abuses by the cities have taken place within the first two miles.

The exhibits presented at a previous hearing by Bismarck's lobbyists were interesting. The description of an inspector driving by a farm and not stopping because he was afraid for his safety. The description of residents telling inspectors to stay off their property. This perverse grant of authority by the legislature has created an atmosphere wherein all degrees of hostility can easily develop, fester, and grow. Hopefully, the legislature will wake up before an unfortunate altercation occurs.

I am concerned about this process and the degree of influence that these special interest lobbyists have been able to exert over the years. My experience has been that even when citizens are heard at committee hearings, we have to go home and back to our jobs, while the paid professional lobbyists will go to work in the hallways and closets to criticize and demonize the citizens who have testified here. In the past, it has been too easy for these lobbyists to pass themselves off as subject matter experts even though they are only paid special interest lobbyists.

One of the major errors that took place in the original passage of the extraterritorial zoning authority was, to equate the opinions expressed by the city planners as though the voters and citizens within the city all agreed with their position. I have discussed this matter with many people who live within the City of Bismarck. The vast majority are not even aware that the city has this authority. When this is explained to them, the majority of the Bismarck residents that I have spoken with, agree with me in that the city should not be exercising zoning authority anywhere outside their corporate boundary. Do not assume that because these lobbyists represent the city planning office that they also represent the majority number of citizens and voters within the city. They do not.

Property Address 108 MULBERRY LA

Location EXTRA TERRITORIAL

Special Flood Hazard NO

Elevation

Architect

Deeded Owner LENGENFELDER, KRIS & REBECCA

Contractor KRIS LENGENFELDER

Contractor Num 1

Nondeeded Owner KRIS LEGENFELDER

Contact Person KRIS

Phone Num

Desc Of Work CONSTRUCT 12' X 20' STORAGE SHED,
FLOATING SLAB, 15' SIDEYARD, 50' REAR,
40' FRONT

Property Number 39-138-79-15-00-111
Addition Name BARBIE'S NEIGHBORHOOD
Legal Desc 1. E 346' OF S 126' OF L 11
3.

Township 39

Section 138

Range 79

2.
4. 517944

Type Of Work 2 - ADDITION

Census Code 0607

Zoning Dist RR - RURAL RESIDENTIAL

Occupancy Group R - RESIDENTIAL

Division 3

Easement

Num Living Units 0

Stories 0

Required Front Yard

Size Eaves 0

Type Const VN

Required Side Yard

Ownership Code 1 - PRIVATE

Required Rear Yard

| | Previous Permit(s) | Current Permit | Total |
|-------------------------|--------------------|----------------|-------|
| Area Main Bldg | 2,028 | 00 | 2,028 |
| Garage Size | 624 | 00 | 624 |
| Total Finished | 1,404 | 00 | 1,404 |
| Total Basement Finished | 00 | 00 | 00 |
| Area Acc Bldgs | 00 | 240 | 240 |
| Num Off Street Parking | 00 | 00 | 00 |
| Area Off Street Parking | 00 | 00 | 00 |
| Total | 2,028 | 00 | 2,028 |

Lot Front Width 126.00
Lot Rear Width 126.00
Avg Lot Width 126.00

Max Bldg Width 100.80
Bldg Width .00

Lot Square Ft 43,596.00
Percent Occupied .05

Cost Less Land 3,000.00
Service Line Size

Water Mtr .75=0 1=0 1.5=0 2=0 3=0 Concrete Work NO

Charges:

Permit Fee 76.15
Road Approach .00

Water Meter .00
Mobile Home .00

Lot Survey .00

TOTAL 76.15 ***

Payment Method Cash

***** NOTICE *****

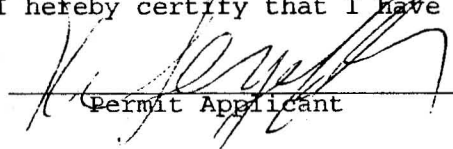
Separate permits are required for electrical, plumbing, and mechanical (HVAC).

This permit becomes null and void if work or construction authorized is not commenced within 180 days, or if construction or work is suspended or abandoned for a period of 60 days at any time after work commenced.

All provisions of applicable codes and ordinances governing this type of work will be complied with whether specified herein or not. Nothing in this permit grants any right or privilege to erect or modify any structure or to use any premises herein described for any purpose or in any manner prohibited by the applicable code or the governing zoning ordinance.

All inspections will be made at request of contractor or owner. Phone 258-2070

I hereby certify that I have read and examined this application and know the same to be true and correct.


Permit Applicant

LYLA HAGEN
Issued By

BILL AUGUSTADT
Building Official

Property Address 108 MULBERRY LA.

Location EXTRA TERRITORIAL

Special Flood Hazard NO
Architect SEC. 6, APPLE CREEK TWP- BARBIES
Deeded Owner LENGENFELDER, KRIS & REBECCA
Contractor KRIS & REBECCA LENGENFELDER
Nondeeded Owner
Contact Person REBECCA

Elevation

Contractor Num 99999

Phone Num

Desc Of Work 1 UNIT HOUSE/ATTACHED GARAGE- 24'X 26'
NO BASEMENT FINISH- 12'X 8' DECK

Property Number 39-138-79-15-00-111 Township 39
Addition Name BARBIE'S NEIGHBORHOOD
Legal Desc 1. E 346' OF S 126' OF L 11
3.

Section 138 Range 79
2.
4. 500442

Type Of Work 1 - NEW
Occupancy Group R - RESIDENTIAL
Num Living Units 1
Size Eaves 24
Ownership Code 1 - PRIVATE

Census Code 0101
Division 3
Stories 1
Type Const VN

Zoning Dist RR - RURAL RESIDENTIAL
Easement
Required Front Yard 40
Required Side Yard 15.0
Required Rear Yard 50

| | Previous Permit(s) | Current Permit | Total |
|-------------------------|--------------------|----------------|-------|
| Area Main Bldg | 00 | 2,028 | 2,028 |
| Garage Size | 00 | 624 | 624 |
| Total Finished | 00 | 1,404 | 1,404 |
| Total Basement Finished | 00 | 00 | 00 |
| Area Acc Bldgs | 00 | 00 | 00 |
| Num Off Street Parking | 00 | 00 | 00 |
| Area Off Street Parking | 00 | 00 | 00 |
| Total | 00 | 2,028 | 2,028 |

| | | | | | |
|-----------------|--------|----------------|--------|------------------|--------|
| Lot Front Width | 126.00 | Max Bldg Width | 100.80 | Lot Square Ft | 43,596 |
| Lot Rear Width | 126.00 | Bldg Width | 72.00 | Percent Occupied | .05 |
| Avg Lot Width | 126.00 | | | | |

Cost Less Land 106,000.00
Service Line Size

Water Mtr .75=0 1=0 1.5=0 2=0 3=0 Concrete Work NO

Charges:

| | | | | | |
|---------------|--------|-------------|-----|------------|------------|
| Permit Fee | 643.85 | Water Meter | .00 | Lot Survey | .00 |
| Road Approach | .00 | Mobile Home | .00 | | |
| | | | | TOTAL | 643.85 *** |

Payment Method Cash

***** NOTICE *****

Separate permits are required for electrical, plumbing, and mechanical (HVAC).
This permit becomes null and void if work or construction authorized is not commenced within 180 days, or if construction or work is suspended or abandoned for a period of 60 days at any time after work commenced.
All provisions of applicable codes and ordinances governing this type of work will be complied with whether specified herein or not. Nothing in this permit grants any right or privilege to erect or modify any structure or to use any premises herein described for any purpose or in any manner prohibited by the applicable code or the governing zoning ordinance.
All inspections will be made at request of contractor or owner. Phone 258-2070
I hereby certify that I have read and examined this application and know the same to be true and correct.

Carrie
Permit Applicant

CARRIE
Issued By

BILL AUGUSTADT
Building Official



APPLE CREEK TOWNSHIP, a Public
Corporation, Plaintiff-Appellant,

v.

CITY OF BISMARCK, a Public Corpora-
tion, Defendant-Appellee.

Civ. No. 9475.

Supreme Court of North Dakota.

Oct. 31, 1978.

Rehearing Denied Nov. 28, 1978.

Township appealed from declaratory
judgment entered by the District Court,

Burleigh County, Benny A. Graff, J., regarding power of city to exercise zoning authority in two-mile area adjoining its corporate limits. The Supreme Court, Paulson, J., held that statute governing territorial authority of zoning regulations enabled city to exercise exclusive zoning control over all territory located within two miles of its city limits, despite fact that same territory was situated within organized township which had already exercised its zoning authority.

Affirmed.

1. Zoning ⇐ 237

Statute governing territorial authority of zoning regulations enabled city to exercise exclusive zoning control over all territory located within two miles of its city limits, despite fact that same territory was situated within an organized township which had already exercised its zoning authority. NDCC 40-47-01.1.

2. Statutes ⇐ 205

A statute must be construed as a whole, with view of arriving at intent of Legislature.

3. Statutes ⇐ 181(1)

Legislature's intent in enacting statute must first be sought from language of statute.

4. Statutes ⇐ 214

If a statute's language is ambiguous or of a doubtful meaning, then resort may be had to certain extrinsic aids.

5. Zoning ⇐ 231

Special provision affecting general zoning authority of a township was in irreconcilable conflict with general provisions setting forth an organized township's zoning authority and therefore special provision controlled over general provisions; in addition, special provision was controlling because it was enacted more recently than were general provisions. NDCC 40-47-01.1, 58-03-11 to 58-03-14.

6. Towns ⇐ 1

Because township was a civil township organized according to statute, it was a "body corporate" according to statute. NDCC 58-02-01, 58-03-01.

See publication Words and Phrases for other judicial constructions and definitions.

7. Zoning ⇐ 233

Term "unincorporated territory" in statute governing territorial authority of zoning regulations was ambiguous and therefore court, in interpreting statute, could consider extrinsic interpretation factors, in addition to statutory language. NDCC 40-47-01.1.

8. Zoning ⇐ 3

Purpose of statute governing territorial authority of zoning regulations was to give zoning control to cities to enable cities to plan for orderly development of their adjacent fringe areas. NDCC 40-47-01.1.

9. Statutes ⇐ 181(2)

Statutes must be construed to avoid ludicrous and absurd results.

10. Zoning ⇐ 233

Legislature, in enacting statute governing territorial authority of zoning regulations, intended to give city power to establish zoning control beyond their corporate limits and intended term "unincorporated territory" contained therein to mean any territory not located within boundaries of another incorporated city. NDCC 40-47-01.1.

See publication Words and Phrases for other judicial constructions and definitions.

Chapman & Chapman, Bismarck, for the appellant; argued by Daniel J. Chapman, Bismarck.

John A. Zuger, City Atty., Bismarck, for appellee.

PAULSON, Justice.

[1] Apple Creek Township has appealed to this court from the Burleigh County District Court's declaratory judgment regard-

Cite as 271 N.W.2d 583

ing the power of a city to exercise zoning authority in the 2-mile area adjoining its corporate limits. The district court held that § 40-47-01.1 of the North Dakota Century Code enables the City of Bismarck to exercise exclusive zoning control over all territory located within two miles of its city limits, despite the fact that the same territory is situated within an organized township which has already exercised its zoning authority. We affirm.

The parties in this case are in general agreement on the facts. The City of Bismarck, an incorporated municipality, has attempted to exercise zoning authority pursuant to § 40-47-01.1, N.D.C.C., in territory situated within Apple Creek Township, an organized township. Apple Creek Township, which had previously established a zoning commission and promulgated regulations within the disputed 2-mile area adjacent to the city of Bismarck, brought an action for a declaratory judgment pursuant to § 32-23-01, N.D.C.C., for an interpretation of § 40-47-01.1, N.D.C.C. The district court, in interpreting § 40-47-01.1, N.D.C.C., ruled that Apple Creek Township was unincorporated territory within the meaning of this statute and the City of Bismarck could establish zoning ordinances in Apple Creek Township territory located within two miles of the Bismarck city limits.

The sole issue for determination by this court involves the interpretation of the term "unincorporated territory" as used in § 40-47-01.1, N.D.C.C., i. e., does the term "unincorporated territory" include all territory not located within an incorporated city or an organized township, or does it include all territory not located within an incorporated city?

Section 40-47-01.1, N.D.C.C., provides in pertinent part:

"Territorial authority of zoning regulations.—Based upon the population of the city . . . the governing body of a city may, by ordinance, extend the application of a city's zoning regulations:

1. To unincorporated territory located within one-half mile of its limits in any direction if it is a city having a population of less than five thousand.

2. To unincorporated territory located within one mile of its limits in any direction if it is a city having a population of five thousand or more, but less than twenty-five thousand.

3. To unincorporated territory located within two miles of its limits in any direction if it is a city having a population of twenty-five thousand or more.¹

Provided, that where two or more non-contiguous cities have boundaries at a distance where there would be an overlap of zoning authority under this section, each city is authorized to control the zoning of land on its side of a line established in proportion to the authority each city has to zone land outside its limits in accordance with this section or pursuant to mutual agreement. The governing body may thereafter enforce such regulation in the area to the same extent as if such property were situated within the city's corporate limits. . . ." [Emphasis added.]

Chapter 1-02, N.D.C.C., contains the rules to be used in interpreting the North Dakota Century Code. Section 1-02-01, N.D.C.C., provides, in part:

"Rule of construction of code.—. . .

The code establishes the law of this state respecting the subjects to which it relates . . . and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice."

See *Hughes v. State Farm Mutual Auto. Ins. Co.*, 236 N.W.2d 870, 882 (N.D.1975); *State v. General Insurance Company of America*, 179 N.W.2d 123, 126 (N.D.1970).

[2,3] As stated in *Horst v. Guy*, 219 N.W.2d 153, 157 (N.D.1974): "A statute must be construed as a whole, with the view of arriving at the intent of the Legisla-

1. § 40-47-01.1(3), N.D.C.C., applies in this case because Bismarck has a population exceeding 25,000.

ture." The Legislature's intent must first be sought from the language of the statute. *Monson v. Nelson*, 145 N.W.2d 892, 898 (N.D.1966).

[4] According to § 1-02-05, N.D.C.C.: "Construction of unambiguous statute.—When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."

However, if a statute's "language is ambiguous or of doubtful meaning, then resort may be had to certain extrinsic aids". *Monson v. Nelson*, *supra* 145 N.W.2d at 898. See *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898, 915 (N.D.1977); *Hughes v. Crime Victims Reparations Board*, 246 N.W.2d 774, 776 (N.D.1976); and *Saetz v. Heiser*, 240 N.W.2d 67, 71-72 (N.D.1976).

Section 1-02-39, N.D.C.C., which lists certain extrinsic aids, provides, in part:

"Aids in construction of ambiguous statutes.—If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.

Another relevant rule of statutory construction is found in § 1-02-38(2), N.D.C.C., which provides:

"Intentions in the enactment of statutes.—In enacting a statute, it is presumed that:

2. The entire statute is intended to be effective.

See *Kuhn v. Beede*, 249 N.W.2d 230, 248 (N.D.1976); *Kotsick v. Carlson*, 241 N.W.2d 842, 845 (N.D.1976); and *Saetz v. Heiser*, *supra* 240 N.W.2d at 72.

In addition, § 31-11-05(23), N.D.C.C., which is a maxim of jurisprudence to be used in the just application of the laws of this State, provides that "The law neither does nor requires idle acts." See *State v. Thorstad*, 261 N.W.2d 899, 901 (N.D.1978); *Hermanson v. Morrell*, 252 N.W.2d 884, 892 (N.D.1977); *State ex rel. Olson v. Thompson*, 248 N.W.2d 347, 352 (N.D.1976); and *State v. Odegaard*, 165 N.W.2d 677, 681 (N.D.1969).

[5] Section 40-47-01.1, N.D.C.C., is in apparent conflict with §§ 58-03-11 to 58-03-14, N.D.C.C., regarding the zoning authority of townships. Sections 58-03-11 to 58-03-14 are general provisions that set forth an organized township's zoning authority. Section 40-47-01.1, however, is a special provision that affects the general zoning authority of a township. According to § 1-02-07, N.D.C.C., when a general provision conflicts with a special provision in another statute, "if the conflict between the two provisions is irreconcilable the special provision shall prevail and shall be construed as an exception to the general provision, . . ." Therefore, because § 40-47-01.1 and §§ 58-03-11 to 58-03-14 are in irreconcilable conflict, § 40-47-01.1, the special provision, is controlling over §§ 58-03-11 to 58-03-14, the general provisions.

In addition, § 40-47-01.1 is controlling because it was enacted more recently than were §§ 58-03-11 to 58-03-14. According to *Kershaw v. Burleigh County*, 77 N.D. 932, 47 N.W.2d 132 (1951), and *Adams County v. Smith*, 74 N.D. 621, 23 N.W.2d 873 (1946), where there is an irreconcilable conflict between statutes it will be presumed that the Legislature intended that the earlier statute should give way to the later one.

[6] In interpreting the meaning of "unincorporated territory" we must first determine whether the term is ambiguous or can be construed only one way. Apple Creek Township asserts that "unincorporated territory" means territory that is not part of a corporate public body. Because Apple Creek Township is a civil township organized according to § 58-02-01, N.D.C.C., it is

Cite as 271 N.W.2d 583

a "body corporate" according to § 58-03-01, N.D.C.C. Apple Creek Township claims that its status as a body corporate excludes it from the definition of "unincorporated territory" and, therefore, the City of Bismarck cannot enact zoning regulations within the township.

The City of Bismarck, on the other hand, asserts that "unincorporated territory" was intended to mean any area outside of an incorporated city. According to the North Dakota Century Code, cities are "bodies politic and corporate" (§ 40-01-02, N.D.C.C.); an organized township is a "body corporate" (§ 58-03-01, N.D.C.C.); and an organized county is a "body corporate" (§ 11-10-01, N.D.C.C.). However, the City's position finds some support in considering the manner in which the three types of "bodies corporate" are formed. Pursuant to the North Dakota Century Code, a county is "organized" (§§ 11-02-01, 11-02-02, N.D.C.C.); a township is "organized" (§ 58-02-01, N.D.C.C.); but a city is "incorporated" (§ 40-02-01, N.D.C.C.).

[7] Because the interpretations of § 40-47-01.1, N.D.C.C., asserted by both parties are plausible, we find that the term "unincorporated territory" is ambiguous. Therefore, we may consider the extrinsic interpretation factors set forth in § 1-02-39, N.D.C.C., in addition to the language of § 40-47-01.1, N.D.C.C.

[8] After considering the available legislative committee reports related to the enactment of § 40-47-01.1, N.D.C.C., it appears that the statute's purpose is to give zoning control to cities to enable cities to plan for the orderly development of their adjacent fringe areas. The statements before the legislative committees of proponents and opponents of the zoning legislation indicate that both sides realized that if the bill [S.B. 2395, 1975 Legislative Assembly] passed, it would give a city complete zoning control in an area surrounding the city and would remove zoning authority in that surrounding area from the adjacent township or county. Because in the most

heavily populated parts of the State cities are surrounded by organized townships, if we were to adopt Apple Creek's definition of "unincorporated territory" such zoning by the cities would be prohibited. The legislative committee reports indicate that the Legislature intended "unincorporated territory" to mean all territory not located within another incorporated city.

[9] In addition, if we were to adopt Apple Creek's interpretation of "unincorporated territory", § 40-47-01.1, N.D.C.C., would be completely ineffective. As stated before, incorporated cities, organized townships, and organized counties are "bodies corporate". Because all land in North Dakota is located within a city, an organized township, or an organized county, according to Apple Creek Township's interpretation all land within the State would be incorporated territory. Therefore, there would be no "unincorporated territory" over which a city could extend its zoning authority and the legislative enactment of § 40-47-01.1, N.D.C.C., would be an idle act and the statute itself would be a nullity. The rules of statutory interpretation and the maxims of jurisprudence militate against such a result. As was stated in *State v. Jelliff*, 251 N.W.2d 1, 7 (N.D.1977), "statutes must be construed to avoid ludicrous and absurd results, . . ."

[10] We conclude that the Legislature, in enacting § 40-47-01.1, N.D.C.C., intended to give cities the power to establish zoning control beyond their corporate limits. We further determine that the Legislature intended the term "unincorporated territory" to mean any territory not located within the boundaries of another incorporated city.² Therefore, we hold that Apple Creek Township is "unincorporated territory" within the meaning of § 40-47-01.1, N.D.C.C., and the City of Bismarck may establish zoning controls over the area of Apple Creek Township, that is located within two miles of the Bismarck city limits, in accordance with the statute.

2. Accord, *City of Olivette v. Graeler*, 338 S.W.2d 827, 833-834 (Mo.1960).

588 N.D. 271 NORTH WESTERN 1

The declaratory judgment of the district court is affirmed.

ERICKSTAD, C. J., and PEDERSON,
VandeWALLE and SAND, JJ., concur.



GARAAS LAW FIRM

ATTORNEYS AT LAW
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Fargo, North Dakota 58103-3796

Jonathan T. Garaas
David Garaas

February 5, 2008

Telephone
Area Code 701
293-7211

Representative Lee Kaldor, Chairman
North Dakota Legislative Council
Advisory Commission on Intergovernmental Relations
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

**RE: Commission Hearing at Fargo, North
Dakota, on Wednesday, January 23, 2008**

Dear Chairman Kaldor:

I am writing as the attorney for Stanley Township, Cass County, North Dakota, and as attorney for the City of Horace, Cass County, North Dakota, to supplement my Commission testimony of Wednesday, January 23, 2008.

CORRECTING THE RECORD

The first area of specific supplementation relates to incorrect information provided by Fargo City Planner James Gilmour when he represented that the City Attorney for Horace, North Dakota, had advised the City of Horace to intentionally breach the extraterritorial agreement between Horace and Fargo.

Mr. Gilmour's statement is not accurate.

No attorney worth his salt would tell anyone to breach a valid contract. That type of legal advice could be regarded as intentional interference with contract – a tort, and the possibility of damages would exist. Hennum v. City of Medina, 402 N.W.2d 327 (N.D. 1987); Peterson v. Zerr, 477 N.W.2d 230 (N.D. 1991). No qualified attorney would give such legal advice.

The undersigned attorney has never been present at any public proceeding, nor has the undersigned ever engaged in any private conversation, where an individual representing Horace, North Dakota – as a council member, city employee, or city attorney – claimed that (a) Horace breached the extraterritorial agreement, or (b) Horace intentionally breached the extraterritorial agreement.

In fact, the position of the City of Horace is just the opposite – the document

["Extraterritorial Zoning Jurisdictional Agreement", a copy of which is attached] has always been honored by the City of Horace. The agreement related to extraterritorial zoning jurisdiction – nothing within the agreement prevented the City of Horace from annexing contiguous lands at the request of the landowner(s).

Therein lies the problem for the City of Fargo – the agreement does not prevent any annexation – it never even mentions the subject.

Under the North Dakota Century Code, the issue of extraterritorial zoning [N.D.C.C. Chap. 40-47] and the right of a municipality to annex ["Municipal Annexation Act of 1969" set forth in N.D.C.C. Chap. 40-51.2] are two (2) separate legal concepts. Even so, N.D.C.C. § 40-51.2-02.2 does provide:

A city may not annex land located within the extraterritorial zoning or subdivision regulation authority of another city by ordinance or resolution unless: (1) Written consent is received from the governing body of the other city; or (2) The annexation is ordered by an administrative law judge in accordance with this chapter.

What the City of Fargo failed to do was to actually extend its extraterritorial authority by ordinance as required by N.D.C.C. §40-47-01.1 to obtain the statutory protection set forth above.

The City of Fargo also fails to understand that the agreement only relates to those lands "where there is an overlap of extraterritorial zoning authority under (N.D.C.C. § 40-47-01.1 so that) the governing bodies of the cities may enter into an agreement regarding the extraterritorial zoning authority of each city." N.D.C.C. § 40-47-01.1(4).

As to the lands annexed to the City of Horace at the written request of approximately 90% of the affected rural landowners [and without any protest after publication and mailing to all affected rural landowners], the City of Fargo has never asserted its extraterritorial zoning authority by any ordinance [also true as of this date], nor did the City of Horace assert any extraterritorial zoning authority greater than that set forth in the 1998 agreement.

When the City of Fargo earlier asserted that the Extraterritorial Zoning Jurisdictional Agreement prevented any annexation by the City of Horace, I did say the agreement was "garbage" as to that subject matter – the document never once addresses the subject of annexation [and State law only contemplates the need for an agreement if the other city is actually asserting its authority].

As to the attached copy of the September 21, 1998, document, a review of the document will not disclose the word, "annexation" anywhere within the document. According to the attorney for Horace at the time, this document was even drafted by Fargo's legal counsel; any ambiguity should

be construed against the City of Fargo.

If the City of Fargo wanted an agreement to preclude annexation of certain lands by the City of Horace, it should have sought such an agreement, *if such an agreement is even legal* – no where known to the undersigned does North Dakota law prevent landowners from seeking annexation to the city of their choice, if the if the rural land is contiguous to the chosen city.

The undersigned attorney believes it is presumptuous of any municipality to believe that it has the right to prevent landowners from requesting annexation to another qualified city, and the City of Horace has not sought to restrict the property and civil rights of its rural neighbors by claiming such power and authority.

Further, for the City of Horace to ignore the petition for annexation by the rural landowners would be (a) a violation of the duty imposed by statute upon the municipality to make an appropriate decision on the subject [N.D.C.C. Chap. 40-51.2], and/or (b) an act disrespectful of one of the greatest rights of any North Dakota citizen as set forth in Article I, § 5 of the Constitution of North Dakota:

Section 5. The citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the powers of government for the redress of grievances, or for other proper purposes, by petition, address or remonstrance.

Fargo may seek to take away the rights of its rural neighbors, the City of Horace does not.

YET ANOTHER “RIBBON ANNEXATION”

The undersigned also desires to update the information with respect to another “ribbon annexation” by the City of Fargo.

I am enclosing a copy of a map disclosing yet another “ribbon annexation” now being proposed by the City of Fargo by special meeting of the Fargo City Commission on January 30, 2008. I have also enclosed the minutes of the 11:00 a.m. special meeting of the Fargo City Commission, and the original e-mail message from City Planner Gilmour sent to attorney Dan Plambeck at 1:57 p.m. – almost three (3) hours later.

According to the Fargo City Planner James Gilmour, landowners approached Fargo in November of 2007 [which would seek to allow yet another “leap-frogging development”] – this time on the other side of land owned by Fred M. Hector located near Briarwood, North Dakota. Mr. Hector owns the S½ of NE¼ of Section 12-138-49, Cass County, North Dakota [and most of the

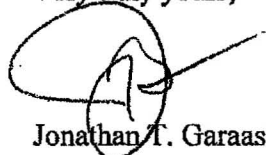
NW¼ of Section 12-138-49, Cass County, North Dakota – a water tower site of approximately 3 acres in the northeast corner of the quarter-section belongs to Cass Rural Water].

After a special meeting of the Fargo City Commission on January 30, 2008, *without notice to all of the affected landowner(s), including Mr. Hector*, City Planner James Gilmour contacted one of Mr. Hector's attorneys [Dan Plambeck] by e-mail to inform him of Fargo's annexation action. In a subsequent telephone call with City Planner Gilmour also involving the undersigned [also an attorney for Mr. and Mrs. Hector], Fargo City Planner Gilmour indicated (a) the existence of a Fargo policy to not give advance notice to the affected rural landowners [and he refused to extend the courtesy of advance notice to the Hectors should Fargo ever seek to annex other Hector lands], and (b) the decision to go forward with this annexation was to prevent the City of Briarwood from further extending its extraterritorial jurisdiction in November, 2008, at the end of the existing extraterritorial zoning agreement.

The undersigned believes the latest "ribbon annexation" should have been made known to the affected rural landowner(s) in advance; and perhaps just as importantly, the City of Fargo should have made known its intent to do another "ribbon annexation" in its testimony before your committee on January 23, 2008. Clearly, the propriety of "ribbon annexations" is an issue to be resolved legislatively in view of the City of Fargo's current use as a sword destroying the legal authority of the township to act.

If you have any questions concerning this matter, please feel free to contact me at any time.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jonathan T. Garaas", written over a circular stamp or seal.

JTG:j

Enclosures

cc: Fred and Earlyne Hector

Stanley Township

City of Horace, North Dakota

**EXTRATERRITORIAL ZONING JURISDICTIONAL AGREEMENT
CITY OF HORACE/CITY OF FARGO**

THIS AGREEMENT is made and entered into by and between the city of Fargo, North Dakota (hereinafter "Fargo") and the city of Horace (hereinafter "Horace").

RECITALS:

WHEREAS, North Dakota Century Code Section 40-47-01.1 permits two cities, whose extraterritorial zoning authority overlaps under said section, to enter into an agreement regarding the extraterritorial zoning authority of each city; and,

WHEREAS, Fargo has or will extend its extraterritorial zoning authority from two miles from the Fargo city limits to four miles from the Fargo city limits; and,

WHEREAS, Horace already has exercised, or in the future may exercise, its zoning authority beyond its city limits; and,

WHEREAS, Fargo and Horace are desirous of entering into such an agreement regarding the extraterritorial zoning authority of each city;

NOW, THEREFORE, IT IS HEREBY AGREED:

1. The extraterritorial jurisdiction of Horace shall be defined as commencing at the northwest corner of Section Seven (7), thence running east along the north section lines of Sections Seven (7) and Eight (8), thence running south along the easterly section lines of Sections Eight, Seventeen, Twenty and the North Half (N½) of Twenty-nine (8, 17, 20 & N½ of 29), thence running west along the south boundary lines of the North Half (N½) of Sections Twenty-nine and Thirty (N½ of 29 & 30), thence north along the westerly section lines of the North Half (N½) of Section Thirty and Sections Nineteen, Eighteen and Seven (30, 19, 18 & 7) to the point of beginning, all of which is in Stanley Township, County of Cass and State of North Dakota.
2. The extraterritorial jurisdiction of Fargo shall extend to the four-mile limit beyond the corporate limits of the city of Fargo, excluding the extraterritorial jurisdiction of Horace as described in the foregoing paragraph.
3. This agreement shall extend for a period of ten (10) years from the effective date hereof and is binding upon the undersigned cities unless the governing bodies of the cities agree to amend or rescind this agreement or unless determined otherwise by an administrative law judge in accordance with Chapter 40-47 of the North Dakota Century Code.
4. The date the last signature is affixed hereunder shall be the effective date of this agreement.

DATED this 21st day of Sept., 1998.

CITY OF HORACE

By: Terry Heiden

Name: Terry Heiden

Title: Mayor

ATTEST:

Thane Korman
City Auditor

DATED this 21st day of September, 1998.

CITY OF FARGO

By: Bruce W. Furness

Name: Bruce W. Furness

Title: Mayor

ATTEST:

Carol Kraft
Carol Kraft, City Auditor

F:\USERS\MUNIVHOR\extraagt.wpd

In response to a question from Commissioner Wimmer about the property directly to the east, Mr. Gilmour said the parcel is not part of Briarwood and is called Walsh subdivision. He said the subdivision does not want to be annexed any sooner than necessary.

Commissioner Coates moved the agreement with Gerald Johnson, Michael Walsh and Connie Walsh to hold them harmless from claims, demands or lawsuits brought against them by any city as a result of their petition for annexation approved.

Second by Wimmer.

Commissioner Williams stated he will not support this request because the future site of the new high school will stretch City infrastructure needs and he does not agree with quickly scheduled special commission meetings.

On call of the roll Commissioners Coates, Wimmer and Walaker voted aye.

Commissioner Williams voted nay.

Absent and not voting: Commissioner Mahoney.

The motion was declared carried.

Resolution Annexing Approximately 153 Acres in Section 12 of Stanley Township into the City of Fargo:

Commissioner Coates offered the following Resolution and moved its adoption:

BE IT RESOLVED BY THE BOARD OF CITY COMMISSIONERS OF THE CITY OF FARGO:

WHEREAS, the City of Fargo, Cass County, North Dakota, is a municipal corporation, organized and existing under the laws of the State of North Dakota, with about ninety-five thousand (95,000) inhabitants; and

WHEREAS, there is contiguous and adjacent to the City of Fargo, a tract or parcel of land hereinafter specifically described, containing approximately 153.38 acres, more or less, which tract or parcel of land is not presently a part of the City of Fargo.

NOW, THEREFORE, BE IT RESOLVED, By the Board of City Commissioners of the City of Fargo, North Dakota, that the boundaries of the City of Fargo be, and they hereby are, extended so as to include and incorporate within the corporate limits of the City of Fargo, Cass County, North Dakota, the following described land:

Parts of the East Half (E 1/2) of Section Twelve (12), Township One Hundred Thirty-eight (138) North, Range Forty-nine (49) West of the 5th Principal Meridian, Cass County, ND, being more fully described as follows:

Beginning at a point on the corporate limit line of the City of Fargo on the West line of the East half of said Section 12, said point located on a line parallel to and 426' South of the North line of said Section 12; thence South along the West line of the East half of said Section 12 a distance of 4857' more or less, to the Southwest (SW) corner of the East half of Section 12; thence East on the South line of the East half of Section 12 a distance of 2064' more or less, to the SW corner of Walsh's First Subdivision; thence North on the West line of Walsh's First Subdivision a distance of 295.00' (platted distance) to the NW corner of Lot 1, Block 1 of Walsh's First Subdivision; thence East along the North line of said Lot 1, Block 1 a distance of 235.00' (platted distance) to the NE corner of said Walsh's First Subdivision and the West line of Chrsan First

Subdivision; thence North along said West line a distance of 962.41' more or less, to the NW corner of Lot 1, Block 2 of said Chrisan First Subdivision; thence East on the North line of said Lot 1, Block 2 a distance of 170' (platted distance) to the NE corner of said Block 2; thence North a distance of 70' (platted distance) to the SE corner of Lot 10, Block 1 of Chrisan First Subdivision; thence West on the South line of said Lot 10, Block 1 a distance of 170' (platted distance) to the SW corner of said Block 1; thence North on the West line of Block 1 a distance of 1204.00' (platted distance) to the NW corner of Lot 1, Block 1 of said Chrisan First Subdivision; thence East along North line of said Block 1 a distance of 169.74' (platted distance) to the NE corner of said Block 1; thence North along the extension of the East line of Block 1 a distance of 100' (platted distance) to the Northeast (NE) corner of Chrisan First Subdivision, said point also the point of intersection with the North line of the SE 1/4 of said Section 12; thence West along the North line of said SE 1/4 a distance of 2160' more or less, to a point on a line parallel to and 300' East of the West line of Section 12; thence North along said line parallel to and 300' East of the West line of Section 12 a distance of 2215' more or less, to a point on a line parallel to and 426' South of the North line of Section 12 and the corporate limit line of the City of Fargo, thence West on said corporate limit line a distance of 300' more or less, to the point of beginning.

Comprising 153.38 acres, more or less.

BE IT FURTHER RESOLVED, By the Board of City Commissioners of the City of Fargo, North Dakota, that this Resolution be published in the official newspaper for the City of Fargo once each week for two successive weeks, and a hearing be held on the 24th day of March, 2008, at 5:15 p.m., in the City Commission Room, City Hall, Fargo, North Dakota.

Second by Wimmer. On the vote being taken on the question of the adoption of the Resolution Commissioners Coates, Wimmer and Walaker voted aye.

Commissioner Williams voted nay.

Absent and not voting: Commissioner Mahoney.

The Resolution was adopted.

Commissioner Wimmer moved that the Board adjourn.

Second by Coates. All the Commissioners present voted aye and the motion was declared carried.

The time at adjournment was 11:10 o'clock a.m.

Jonathan T. Garaas

From: "Dan Plambeck" <dplambeck@stefansonlaw.com>
To: "Jonathan T. Garaas" <jtgaraas@qwest.net>
Sent: Wednesday, January 30, 2008 3:07 PM
Attach: ATT00014.htm; A_1384912 SE D (1).pdf
Subject: [Fwd: Annexation Map]

----- Original Message -----

Subject: Annexation Map
Date: Wed, 30 Jan 2008 13:57:18 -0600
From: James Gilmour <JGilmour@ci.fargo.nd.us>
To: <dplambeck@stefansonlaw.com>

Dan,

This morning, the Fargo City Commission held a special meeting to adopt a resolution to annex property in Section 12 of Stanley Township. This property includes a 300 foot wide and quarter mile long segment of property owned by Fred Hector. A map is attached.

Most of the property is in the southeast quarter of Section 12, and was petitioned in by this property owner.

I'll try to call you later to explain the annexation in more detail.
I'm going to be in some meeting until about 4:00.

Jim Gilmour

[illegible]

CITY ENGINEER'S APPROVAL:

The enclosed plot is hereby approved and issued only as a preliminary report. ~~It is not to be used for any other purpose.~~

Figure 14. 904-met, Day Endures, 1992.

Study of North Carolina

Quantity of Spots

The foregoing instrument was acknowledged before me and my co-minister-deputy-minister, FRANCIS J. [redacted] before me, is a copy of the same and has been duly, lawfully executed and is in full force and effect in the City of Chicago, in the County of Cook, State of Illinois, and I have signed the same on this day and date.

Notary Public, Kansas

by reproductive output per capita per year

CITY COMMISSION APPROVAL:

Approved by the Board of City Commissioners at Chicago, North
Dakota, and ordered that this _____ day of _____
19____.

Parviz M. Ghahramani

1994

State of North Dakota

The foregoing information was substantiated before me this
second day of ~~January~~ February, 1964, by Harold G. Shandor,
Mayor, and Gordon M. Springer, City Auditor, on behalf of the
City of Fargo.

104099 Public Debt Charge

My investigation is of _____

AUTHORITY TAX SECTION:

Discussed how and what arrangements to implement in special circumstances and the importance of special arrangements for the hospital.

Garrett Thompson, Kent County Sheriff

RACOMUNDA CERTIFICATA

is hereby, with my full power and authority, so to certify.

Done at the City of New York, this _____ day of _____, 19____.

In presence of _____

_____ Mayor of the City of New York.

Group A Sales, Gold Canyon, Henderson
Gold Canyon, North Dakota