

FARGO CITY COMMISSION AGENDA
Monday, April 6, 2009 - 5:00 P.M.

CITY COMMISSION MEETINGS ARE BROADCAST LIVE ON TV FARGO (Channel 99). They are rebroadcast at 7 p.m. each Thursday and again at 8:00 a.m. each Saturday and are also included in our video archive at www.cityoffargo.com/commission.

- A. Pledge of Allegiance.
- B. Roll Call.
- C. Approve Order of Agenda.
- D. Minutes (Regular Meeting, March 23, 2009).

*** Consent Agenda - Approve the Following ***

- a. 2nd reading, waive reading and final adoption of the following Ordinances; 1st reading, 3/23/09:
 - (1) Relating to Breaches of Peace and Order.
 - (2) Relating to Imposition of a Sales, Use and Gross Receipts Tax (Infrastructure Capital Improvements).
- b. Resolution extending the Mayor's emergency proclamation for additional two-week periods through May 1, 2009.
- c. Fire Department budget adjustment in the amount of \$16,959.31 for F-M Haz Mat training.
- d. Traffic Safety Contract Amendment with the NDDOT for the Safe Communities Program (CFDA No. 20.600).
- e. Receive and file report on a zone change granted on 4/21/08 for 922 40th Street North.
- f. Request from the National Day of Prayer Committee to hang banners in the skyway from April 28 to May 7, 2009.
- g. Bid award for custodial services at the Main Library to McFarland Hanson in the amount of \$161,640.00 for 3 years.
- h. Change Order Number 002 from Function Furniture for an increase of \$1,560.52.
- i. Applications for Games of Chance:
 - (1) Fargo South High School for a raffle on 4/18/09.
 - (2) Krogen, Anderson, Draeger Benefit for a raffle on 8/22/09; Public Spirited Resolution.
 - (3) Raffle date change for the Evan Krogen Benefit Fund to 4/25/09.
- j. Site Authorization for Delta Waterfowl at the Best Western Doublewood Inn on 4/29/09.
- k. Applications for tax exemptions for improvements made to buildings:
 - (1) Nick and Rachel Kjonaas, 3720 Fairway Road NE (3-year).
 - (2) Martin and Barbara Berlinger, 1661 American Way (3-year).
 - (3) Michael and Gail Schutz, 1610 7th Avenue South (5-year).

- I. Yearly quote from Butler Machinery Company in the amount of \$55,877 for rental of a 230 HP crawler tractor at the Landfill.
- m. Yearly quote from Butler Machinery Company in the amount of \$49,332 for rental of a 200 HP crawler tractor at the Landfill.
- n. Bills.
- o. Contracts and bonds for Improvement District Nos. 5855 and 5864.

* * * Regular Agenda * * *

1. Resolution Providing for the Issuance of \$13,665,000 City of Fargo Refunding Improvement Refunding Bonds, Series 2009A.
2. Recommendation to allow the issuance of permits for flood-related repairs and equipment replacement without charging permit fees.
3. Public Hearings - 5:15 p.m.:
 - a. CONTINUE TO 4/20/09 - This was the time and date set for a hearing on a petition requesting a zoning change from MR-3, Multi-Dwelling to LC, Limited Commercial on Lots 10 and 11, Block 14 of Kirkham's 2nd Addition; however, the Planning Commission continued its hearing to 4/8/09 and the Commission will need to continue its hearing to 4/20/09 (1404 12th Ave. N.).
 - b. CONTINUE TO 4/20/09 - This was the time and date set for a hearing on a petition requesting a zoning change from LI, Limited Industrial to UMU, University Mixed Use on Lots 25 through 34 of Great Northern 2nd Addition; however, the Planning Commission continued its hearing to 4/8/09 and the Commission will need to continue its hearing to 4/20/09 (1812, 1820, 1828 and 1840 Dakota Dr. N.).
 - c. Application filed by Cooper House, LP and the Fargo Housing and Redevelopment Authority for a property tax exemption or payment in lieu of tax (PILOT) for property at 414 11th Street North where the applicant will construct a low income housing project.
4. Appeal of the February 11, 2009 Planning Commission decision to deny the appeal of a staff decision to approve the FM City Development project on 12th Avenue North.
5. Recommendation to urge establishment of a Red River Valley Authority.
6. Flood update.
7. Legislative update.

People with disabilities who plan to attend the meeting and need special accommodations should contact the Commission Office at 241-1310 or TDD 241-8258. Please contact us at least three business days in advance of public meetings to give our staff adequate time to make arrangements.

Minutes are available on the City of Fargo Web site at www.cityoffargo.com/commission

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Commissioner _____ introduced the following Resolution and moved its adoption:

RESOLUTION PROVIDING FOR THE ISSUANCE OF
\$13,665,000 CITY OF FARGO
REFUNDING IMPROVEMENT REFUNDING BONDS, SERIES 2009A

WHEREAS, the City of Fargo, North Dakota (the "Issuer") by resolutions has heretofore authorized the issuance of certain definitive improvement warrants (the "Warrants") of the Issuer, which Warrants are outstanding at the date of this Resolution providing for the issuance of \$13,665,000 Refunding Improvement Refunding Bonds, Series 2009A, (the "Resolution"); and

WHEREAS, the Issuer has by resolutions, heretofore adopted, authorized the issuance of its Refunding Improvement Bonds of 2001, Series A, dated September 1, 2001 (the "Series 2001A Bonds") and its Refunding Improvement Bonds of 2001, Series B (the "Series 2001B Bonds") dated December 1, 2001, said bonds referred to cumulatively as the "Prior Bonds"; and

WHEREAS, the Issuer, through the issuance of the Refunding Bonds (as defined in Section 1 below) for the purpose of refunding the May 1, 2010 through May 1, 2019 maturities of the Series 2001A Bonds and the May 1, 2010 through May 1, 2019 maturities of the Series 2001B Bonds can reduce the debt service thereon; and

WHEREAS, a bid has been received as follows:

<u>BIDDER</u>	<u>TRUE INTEREST COST</u>
_____	_____ %

for the purchase price of \$ _____.

NOW, THEREFORE, be it resolved by the governing body of the Issuer as follows:

Section 1. Authorization and Sale. There is hereby authorized to be issued a series of bonds designated the Issuer's Refunding Improvement Refunding Bonds, Series 2009A in the total amount of \$13,665,000 (the "Refunding Bonds") for the purpose of refunding the outstanding Bonds. The sale of the Refunding Bonds is hereby awarded to _____ (the "Purchaser") by this resolution.

Section 2. Terms. The Refunding Bonds shall initially be dated April 15, 2009. Refunding Bonds issued upon exchange or transfer after May 1, 2009, shall be dated as of the interest payment date next preceding their issuance, or if the date of such issuance shall be on an interest payment date as of the date of such issue; provided, however, that if interest on the Refunding Bonds shall be in default, the Refunding Bonds

shall be dated as of the date to which interest has been paid in full on the Refunding Bonds being transferred. The Refunding Bonds shall be issued in fully registered form in denominations of \$5,000 or any multiple thereof, of single maturities. The Refunding Bonds shall be numbered in consecutive numerical order from R-1 upwards as issued and shall mature on May 1 in the years and in the amounts and shall bear interest at the rates set forth in the Schedule of Maturities and Interest Rates attached hereto as Attachment 1.

Interest on the Refunding Bonds and, upon presentation and surrender thereof, the principal thereof shall be payable in lawful money of the United States of America by check or draft by the City Auditor of the City of Fargo as Paying Agent, or his successor. Interest shall be payable on May 1 and November 1 in each year, commencing May 1, 2009, to the holder of record on the close of the 15th day (whether or not a business day) of the immediately preceding month. Interest on the Refunding Bonds shall cease at maturity or on a date prior thereto on which they have been duly called for redemption unless the holder thereof shall present the same for payment and payment is refused.

The Refunding Bonds shall be payable from the Issuer's Series 2009A Refunding Improvement Refunding Bond Fund (the "Refunding Fund") into which will be deposited payments of the principal and interest on the Warrants held as assets of the Refunding Fund. The Warrants held by the Refunding Fund as security are payable from the funds which derive their revenues from the levy and collection of special assessments against benefited property and certain other revenues.

Section 3. Redemption. The Refunding Bonds maturing on or after May 1, 2018, may be redeemed prior to their respective maturity dates, at the option of the Issuer, on May 1, 2017, and on any date thereafter, at a price equal to the principal amount plus accrued interest. Redemption may be in whole or in part, and if in part, at the option of the Issuer and in such manner as the Issuer shall determine and within a maturity by lot as selected by the registrar. Not less than thirty days prior to the date specified for redemption and prepayment of any of the Refunding Bonds the Issuer will cause notice of the call thereof to be sent by mail to the Bond Registrar, Paying Agent and registered owner of the Refunding Bonds to be redeemed in whole or in part at the address shown on the registration books of the Registrar.

Section 3.1. Term Bonds. The Refunding Bonds maturing in the year ____ shall be known as Term Bonds. The Term Bonds are subject to mandatory sinking fund redemption in part by lot at a Redemption Price equal to 100% of the principal amount thereof, together with accrued interest to the Redemption Date on May 1 of the following years and in the following principal amounts:

Redemption Date	Principal Amount
<u>May 1</u>	
	\$
	\$

Giving effect to the sinking fund redemption schedule, \$_____ in principal amount of the Term Bonds will mature May 1, _____. Within ten (10) days before the thirtieth (30th) day prior to such Redemption Date, the Bond Registrar will proceed to select for redemption (by lot in such manner as the Bond Registrar may determine) from all outstanding Term Bonds a principal amount of such Term Bonds equal to the aggregate principal amount of such Term Bonds redeemable on the Redemption Date, and will call such Term Bonds or portions thereof (\$5,000 in principal amount of any integral multiple thereof) for redemption on such Redemption Date and give notice to such call pursuant to the redemption provisions contained herein.

In the event that part but not all of the Term Bonds are purchased or redeemed at the option of the Issuer, the Bond Registrar shall redeem the Term Bonds in inverse order of maturity and mandatory Redemption Date and by lot within any maturity or mandatory Redemption Date.]]]

Section 4. Transfer. The Refunding Bonds are transferable upon the books of the Issuer at the principal office of the Bond Registrar, the City Auditor of the City of Fargo, by the registered owner thereof in person or by his attorney duly authorized in writing upon surrender thereof together with a written instrument of transfer satisfactory to the Bond Registrar, duly executed by the registered owner or his attorney; and may also be surrendered in exchange for Refunding Bonds of other authorized denominations. Upon such transfer or exchange the Issuer will cause a new Refunding Bond or Refunding Bonds to be issued in the name of the transferee or registered owner, of the same aggregate principal amount, bearing interest at the same rate and maturing on the same date, subject to reimbursement for any tax, fee or governmental charge required to be paid with respect to such transfer or exchange. No transfer of Refunding Bonds shall be required to be made during the 15 days next preceding an interest payment date, nor during the 45 days next preceding the date fixed for redemption of such Refunding Bonds.

The Issuer and the Bond Registrar may deem and treat the person in whose name any Refunding Bond is registered as the absolute owner thereof, whether the Refunding Bond is overdue or not, for the purpose of receiving payment and for all other purposes, and neither the Issuer nor the Bond Registrar shall be affected by any notice to the contrary.

Section 5. Execution and Delivery. The Refunding Bonds shall be printed under the supervision and at the direction of the City Auditor, executed by the manual or facsimile signature of the Mayor, sealed with the Issuer's official seal, and attested to by the manual or facsimile signature of the City Auditor and delivered to the holder at closing upon receipt of the purchase price plus any accrued interest. The Refunding Bonds shall not be valid or become obligatory for any purpose or be entitled to any security or benefit under this Resolution until the Certificate of Authentication thereon shall have been executed by the Bond Registrar by manual signature of one of its authorized representatives. The Refunding Bonds shall be reproduced in substantially the

form attached to this Resolution as Attachment 2.

Section 6. Establishment of Refunding Fund. There is hereby created the Issuer's Series 2009A Refunding Improvement Refunding Bond Fund which shall be maintained by the City Auditor as a separate and special fund for the sole purpose of payment of principal and interest on any outstanding Refunding Bonds and shall be maintained until all balances of principal and interest on the Refunding Bonds are fully paid;. There is hereby appropriated to the Refunding Fund all of the funds heretofore appropriated for the payment of the Prior Bonds, subject to the prior lien of the Prior Bonds and the unrefunded portion of the bond issues being refunded, upon such funds until they have been fully paid or redeemed. All payments of principal and interest made on the Warrants shall be credited to the Refunding Fund and shall be used and applied in payment of the principal and interest on the Refunding Bonds as such principal and interest become due after May 1, 2009, or for the redemption of the Refunding Bonds when and as the same are redeemable by their terms.

Section 7. Retirement of Prior Bonds. The proceeds of the Refunding Bonds, less certain amounts required to pay costs of issuance, and certain other funds now on hand and available are hereby irrevocably appropriated to the payment of the Prior Bonds and, simultaneously with the delivery of the Refunding Bonds herein authorized, shall be deposited into a separate account by the Issuer irrevocably pledged to provide for payment of the principal amount of the 2010 through 2019 maturities of the Series 2001A Bonds to be called for redemption prior to maturity on May 1, 2009 and to provide for the payment of the principal amount of the 2010 through 2019 maturities of the Series 2001B Bonds to be called for redemption prior to maturity on May 1, 2009. The City Finance Director is authorized to enter into an agreement with a qualified financial institution to serve as an escrow agent to hold such funds and make the appropriate payments thereof, if the same is deemed to be necessary or appropriate by the Finance Director.

Section 8. Transfer of Taxes. It is hereby found, determined and declared that the Warrants held as assets of the Issuer's Refunding Improvement Bonds of 2001, Series A Bond Fund and Issuer's Refunding Improvement Bonds of 2001, Series B Bond Funds shall, simultaneously with the issuance of the Refunding Bonds herein authorized, be immediately transferred and deposited into the Refunding Fund created hereby. The Warrants shall be held in trust for the holders of the Refunding Bonds subject only to the prior lien in favor of the holders of the Prior Bonds until they are fully paid or redeemed.

Section 9. Covenants and Agreements of the Issuer. The Issuer hereby covenants and agrees with the holders from time to time of the Refunding Bonds:

- a. That the Warrants are validly issued and the special assessments are validly levied for the payment of the costs of the improvements and are payable in years and amounts required by law and that it will use due diligence to collect the Warrants and to levy and collect the special assessments and, to the extent provided in the resolutions authorizing their issuance, to impose and collect service charges, appropriated for their

payment.

- b. That it will preserve and enforce for the benefit of the holders from time to time of the Refunding Bonds all the rights, powers and privileges reserved to holders of the Warrants and all of the covenants of the Issuer as provided in the resolutions authorizing the same.
- c. That the Issuer recognizes its obligations under the provisions of Section 40-26-08 of the North Dakota Century Code that whenever all special assessments, utility revenues and taxes, if any, appropriated and theretofore collected for the improvements for which the Warrants were issued are insufficient to pay principal or interest when due on such Warrants, this governing body is required by law to levy a tax upon all taxable property within the City for the payment of such deficiency. The Issuer is also authorized, in its discretion, to levy such a tax if at any time a deficiency is deemed likely to occur within one year. Such taxes may be levied without limitation as to rate or amount, and the Issuer covenants and agrees that all collections thereof will be credited to the Refunding Fund subject only to the prior lien thereon of the Bonds until the Bonds have been fully paid or redeemed from the Escrow Fund.
- d. In the event the monies in the Refunding Fund should at any time be insufficient to make payments of principal and interest then due on the Refunding Bonds and any additional Bonds payable from the Refunding Fund, said monies shall be first used to pay the interest then accrued on all such Refunding Bonds outstanding, and the balance shall be applied in payment of the principal of the Refunding Bonds in order of their maturity dates, and pro rata in payment of the principal amount of Refunding Bonds maturing on the same date; and the Issuer reserves the right and privilege of refunding any of such matured Refunding Bonds for the payment of which monies are not at the time available by issuing new Bonds payable from the Refunding Fund, which Bonds, shall be on a parity with those, theretofore issued as to interest charges thereon, but the maturity thereof shall be subsequent to the maturity of all Bonds payable from the Refunding Fund and then outstanding, which are not so refunded.

Section 10. Discharge. When all of the Refunding Bonds, and the interest thereon have been discharged as provided in this paragraph, all pledges, covenants and other rights granted by this Resolution shall cease. The Issuer may discharge all Refunding Bonds and interest due on any date by depositing with the paying agent on or before that date a sum sufficient for the payment thereof in full; or if any Refunding Bond or interest thereon should not be paid when due, the same may nevertheless be discharged by depositing with the paying agent a sum sufficient for the payment thereof in full with interest accrued from the due date to the date of such deposit. The Issuer may also discharge all prepayable Refunding Bonds called for redemption on any date when they are prepayable according to their terms, by depositing with the paying agent on or before

that date a sum sufficient for the payment thereof in full, provided that notice of the redemption thereof has been duly given as provided herein. The Issuer may also discharge all Refunding Bonds at any time by irrevocably depositing in escrow with the paying agent, for the purpose of paying all principal and interest due on such Refunding Bonds prior to a date upon which all of the same will be prepayable according to their terms, and paying all remaining Refunding Bonds on that date, a sum of cash and securities of the types described in Section 40-27-13 of the North Dakota Century Code in such aggregate amount, bearing interest at such rates and maturing or callable at the holder's option on such dates as shall be required to provide funds sufficient for this purpose provided that notice of the redemption of all prepayable Refunding Bonds on or before such date has been duly given as required herein.

Section 11. Arbitrage. The Issuer covenants and agrees with the holders from time to time of the Refunding Bonds that it will not take or permit to be taken by any of its officers, employees or agents, any action which would cause the interest on the Refunding Bonds to become subject to taxation under the Internal Revenue Code of 1986 (the "Code"), and Regulations, Amended Regulations and Proposed Regulations issued thereunder, as now existing or as hereinafter amended or proposed and in effect at the time of such action.

Section 12. Continuing Disclosure. The City Auditor is hereby authorized to execute, on behalf of the Issuer, the Continuing Disclosure Certificate attached as Attachment 3 to this Resolution.

Section 13. Other Proceedings. The officers of the Issuer and the County Auditor are authorized and directed to prepare and furnish to the attorneys passing on the legality of the Refunding Bonds, certified copies of all proceedings, ordinances, resolutions and records and all such certificates and affidavits and other instruments as may be required to evidence the legality and marketability of the Refunding Bonds, and all certified copies, certificates, affidavits and other instruments so furnished shall constitute representations of the Issuer as to the correctness of all facts stated or recited therein.

Section 14. Repealer. All prior Resolutions and other acts or proceedings of this governing body which are in any way inconsistent with the terms of this Resolution are hereby amended to the extent necessary to give full force and effect to this Resolution.

Nothing herein contained shall be deemed to modify, amend, violate, repudiate or repeal any provision or covenant contained in any Prior Bond, or any resolution pursuant to which any Prior Bond has been issued and is outstanding, to the extent that a modification, amendment, violation, repudiation or repealer would impair the obligation or contract owed to any holders of such Prior Bonds or would otherwise be invalid or ineffective.

Section 15. Book-Entry Only System.

- a. Notwithstanding the provisions of this Resolution regarding registration, ownership, transfer, payment and exchange of Refunding Bonds, unless the Issuer determines to permit the exchange of Depository Bonds (as designated in (6c) below) for Refunding Bonds in the denominations provided in Section 3, the Refunding Bonds shall be issued as Depository Bonds in denominations of the entire principal amount of a particular maturity; such Refunding Bonds to be registered in the name of the Bond Depository (as defined in (g) below) or its nominee. The Refunding Bonds shall be solely in the denominations of the entire principal amount of each particular maturity except as provided in paragraph (b) or (c).
- b. Upon (i) a determination by the Issuer that the Bond Depository is no longer able to carry out its functions or is otherwise determined unsatisfactory by the Issuer in its sole discretion, or (ii) a determination by the Bond Depository that the Refunding Bonds are no longer eligible for its depository services, or (iii) a determination by the Issuer that the Bond Depository has resigned or discontinued its services for the Refunding Bonds, the Issuer shall either (i) designate a substitute Bond Depository in accordance with paragraph (d), or (ii) provide for the exchange of Depository Bonds for Refunding Bonds in the denominations provided in Section 3.
- c. If the Issuer determines to provide for the exchange of Depository Bonds for Refunding Bonds in the denominations provided in Section 3, the Issuer shall so notify the Bond Depository for notification of the beneficial owners thereof and provide for such exchange.
- d. Any substitute Bond Depository shall be a "clearing corporation" as defined in North Dakota Uniform Commercial Code, North Dakota Century Code, Section 41-08-02, and shall be a qualified and registered "clearing agency" as provided in Section 17A of the Securities Exchange Act of 1934, as amended. The substitute Bond Depository shall provide for (i) immobilization of the Depository Bonds, (ii) registration and transfer of beneficial ownership of interests in the Depository Bonds by book entries made on records of the Bond Depository and participating entities, and (iii) payment of principal of, premium, if any, and interest to the Bond Depository participating entities and beneficial owners.
- e. So long as the Refunding Bonds are Depository Bonds, the following provisions shall apply. The principal of the Refunding Bonds shall be payable when due in next day funds to the Bond Depository, initially Cede & Co. as nominee of the Depository Trust Company at The Depository Trust Company, Muni Redemption Department, 55 Water Street, 50th Floor, New York, New York 10041, Attn: Collection Supervisor, (or such other nominee or address as the Depository shall specify in writing to the

Issuer) and if the payment is of only part of the principal hereof, the Issuer shall mail by first class mail to the Bond Depository a written statement of the principal amount paid as to the Refunding Bonds of each maturity outstanding following such payment, and upon such payment the Bond Depository as registered owner may in its discretion make a notation on a register of partial payments attached to the Refunding Bond of the principal amount paid, provided that the Bond Depository may at its option surrender the Refunding Bonds for exchange for a Refunding Bond registered with the new principal amount and provided the Refunding Bond shall be surrendered for payment upon redemption in full or at maturity. Such notation if made by the Bond Depository, shall be for reference only, and may not be relied upon by any other person as being in any way determinative of the principal amount of the Refunding Bonds outstanding. Interest is payable in next day funds from the Issuer to the Bond Depository or its nominee, at its address as it appears on the bond registration books of the Issuer. Each payment of interest and/or principal shall specifically separate such payment amount by CUSIP number identification provided to the Bond Depository. The transfer permitted pursuant to Section 13 of this Resolution shall occur only with respect to Refunding Bonds of a minimum denomination of the remaining principal amount of an entire maturity thereof so long as the Refunding Bonds are Depository Bonds. Upon a partial redemption of a Refunding Bond which results in the stated amount thereof being reduced, the Bond Depository, or its nominee, may in its discretion make notation on a register of partial payments attached to the Refunding Bond of such redemption, stating the amount so redeemed. Such notation, if made by the Bond Depository, or its nominee, shall be for reference only, and may not be relied upon by any other person as being in any way determinative of the principal amount of the Refunding Bond outstanding. The Bond Depository, or its nominee, may surrender the Refunding Bond to the Issuer (with, if the Issuer so requires, a written instrument of transfer in form satisfactory to the Issuer duly executed by the Bond Depository, or its nominee, or his attorney duly authorized in writing) and the Issuer shall execute and deliver to the Bond Depository, or its nominee, without service charge, a new Refunding Bond of the same series having the same stated maturity and interest rate and of the authorized denomination in aggregate principal amount equal to and in exchange for the unredeemed portion of the principal of the Refunding Bond so surrendered.

- f. "Depository Bonds" shall mean Refunding Bonds which pursuant to an Issuer determination are available to the beneficial owners thereof only in book entry form (with no delivery of physical certificates except to the Depository) pursuant to a book entry system operated by the Depository.
- g. "Bond Depository" shall mean Depository Trust Company or any substitute depository pursuant to (d) above.

- h. In the event of any solicitation from and voting by holders of the Refunding Bonds, the Issuer may establish a record date or from time to time record dates, which date of establishment shall be not less than fifteen (15) days prior to such record date and upon establishment said record date shall immediately be transmitted to the Bond Depository for such purpose and such other policies and procedures as may be necessary or helpful in soliciting, evidencing and counting such consents or revocations thereof and do not violate or are not in conflict with the provisions of the Bond Resolution. The record date shall be that date on which the registered owner to which any mailing of a solicitation is sent are determined, but shall not give the registered owner of the Refunding Bonds any rights to vote upon ceasing to be a registered owner. Additional record dates may be established to solicit subsequent registered holders.
- i. The Mayor or City Auditor is authorized and directed to execute and deliver a global Letter of Representation to Depository Trust Company in substantially the form presented at this meeting, if not previously filed, and such other documents in connection with the book entry only system for the Refunding Bonds as required from time to time by Depository Trust Company.

Section 16. In the event that any transfer or exchange of Refunding Bonds is permitted under Section 15 hereof, such transfer or exchange shall be accomplished upon receipt, by the Bond Registrar from the registered owners thereof of the Refunding Bonds to be transferred or exchanged, of appropriate instruments of transfer to the permitted transferee. In the event Refunding Bond certificates are issued to holders other than Cede & Co., its successor as nominee for DTC as holder of all the Bonds, or other securities, depository as holder of all the Bonds, the provisions of the Resolution shall also apply to, among other things, the printing of such certificates and the method of payment of principal of and interest on such certificates.

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ATTEST:

CITY OF FARGO

City Auditor

Mayor

The motion for the adoption of the foregoing Resolution was duly seconded by
Commissioner _____. On roll call vote, the following Commissioners voted aye:
_____. The following
Commissioners voted nay: _____. The following were absent and not voting:
_____, so the motion carried and the Resolution was duly adopted.

CITY OF FARGO
STATE OF NORTH DAKOTA

\$13,665,000

REFUNDING IMPROVEMENT REFUNDING BONDS, SERIES 2009A

SCHEDULE OF MATURITIES AND INTEREST RATES

<u>Year</u>	<u>Amount</u>	<u>Interest Rate</u>	<u>Year</u>	<u>Amount</u>	<u>Interest</u>
2010	\$1,455,000	_____ %	2016	\$1,340,000	_____ %
2011	1,455,000	_____	2017	1,330,000	_____
2012	1,375,000	_____	2018	1,325,000	_____
2013	1,365,000	_____	2019	1,325,000	_____
2014	1,350,000	_____			
2015	1,345,000	_____			

Principal Due May 1 in each year.

ATTACHMENT 2

Unless this certificate is presented by an authorized representative of The Depository Trust Company, a New York corporation ("DTC"), to the City or its agent for registration of transfer, exchange, or payment, and any certificate issued is registered in the name of Cede & Co. or such other name as is requested by an authorized representative of DTC (and any payment is made to Cede & Co. or to such other entity as is requested by an authorized representative of DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL inasmuch as the registered owner hereof, Cede & Co., has an interest herein.

UNITED STATES OF AMERICA
STATE OF NORTH DAKOTA

CITY OF FARGO

REFUNDING IMPROVEMENT REFUNDING BOND, SERIES 2009A

No. _____ \$ _____

<u>RATE</u>	<u>MATURITY</u>	<u>DATE OF ORIGINAL ISSUE</u>	<u>CUSIP</u>
%	May 1, _____	April 15, 2009	

REGISTERED OWNER:

PRINCIPAL AMOUNT: _____ DOLLARS

KNOW ALL MEN BY THESE PRESENTS that the City of Fargo, Cass County, North Dakota, (the "Issuer") acknowledges itself to be specially indebted and for value received promises to pay to the registered owner specified above or registered assigns, the principal amount specified above, but only from its Series 2009A Refunding Improvement Refunding Bond Fund on the maturity date specified above, with interest thereon from the date hereof at the annual rate specified above, payable on May 1 and November 1 in each year, commencing November 1, 2009, to the holder of record on the close of the 15th day (whether or not a business day) of the immediately preceding month, all subject to the provisions referred to herein with respect to the redemption of the principal of this Bond before maturity. The interest hereon and, upon presentation and surrender hereof, the principal hereof are payable in lawful money of the United States of America by check or draft by the City Auditor of the City of Fargo as Paying Agent, or its successor.

This Bond is one of an issue in the aggregate principal amount of \$13,665,000 all of like date and tenor except as to serial number, maturity date, interest rate, and redemption privilege issued, pursuant to the Resolution adopted by the governing body of the Issuer (the "Resolution") for the purpose of current refunding of two prior bond issues: the May 1, 2010 through May 1, 2019 maturities of the Issuer's Refunding Improvement Bonds of 2001, Series A, dated September 1, 2001 (the "Prior Bonds"), in full conformity with the Constitution and laws of the State of North Dakota and the May 1, 2010 through May 1, 2019 maturities of the Issuer's Refunding Improvement Bonds of 2001, Series B, dated December 1, 2001.

Bonds of this issue maturing on or after May 1, 2018, may be redeemed prior to their respective maturity dates, at the option of the Issuer, on May 1, 2017, and on any date thereafter, at a price equal to the principal amount plus accrued interest. Redemption may be in whole or in part, and if in part, at the option of the Issuer and in such manner as the Issuer shall determine and within a maturity by lot as selected by the registrar. Not less than thirty days prior to the date specified for redemption and prepayment of any of the Bonds the Issuer will cause notice of the call thereof to be sent by mail to the Bond Registrar, Paying Agent and registered owner of the Bonds to be redeemed in whole or in part at the address shown on the registration books of the Registrar.

[[[Bonds maturing in the year ____ shall be known as Term Bonds. The Term Bonds are subject to mandatory sinking fund redemption in part by lot at a Redemption Price equal to 100% of the principal amount thereof, together with accrued interest to the Redemption Date on May 1 of the following years and in the following principal amounts:

Redemption Date <u>May 1</u>	Principal <u>Amount</u>
	\$
	\$

Giving effect to the sinking fund redemption schedule, \$ _____ in principal amount of the Term Bonds will mature May 1, _____. Within ten (10) days before the thirtieth (30th) day prior to such Redemption Date, the Bond Registrar will proceed to select for redemption (by lot in such manner as the Bond Registrar may determine) from all outstanding Term Bonds a principal amount of such Term Bonds equal to the aggregate principal amount of such Term Bonds redeemable on the Redemption Date, and will call such Term Bonds or portions thereof (\$5,000 in principal amount of any integral multiple thereof) for redemption on such Redemption Date and give notice to such call pursuant to the redemption provisions contained herein.

In the event that part but not all of the Term Bonds are purchased or redeemed at the option of the Issuer, the Bond Registrar shall redeem the Term Bonds in inverse order of maturity and mandatory Redemption Date and by lot within any maturity or mandatory

Redemption Date.]]]

In the event this Bond is called for prior redemption, not less than 30 days prior to the date specified for redemption and prepayment of any of the bonds, the Issuer will cause notice of the call thereof to be sent by mail to the Bond Registrar, Paying Agent and registered owner of the Bond to be redeemed in whole or in part at the address shown on the registration books of the Registrar. The Bonds to be redeemed shall be selected by the Bond Registrar in the manner prescribed in the Bond Resolution.

This Bond shall not be valid or become obligatory for any purpose or be entitled to any security or benefit under the Resolution until the Certificate of Authentication hereon shall have been executed by the Bond Registrar by manual signature of one of its authorized representatives.

As provided in the Resolution and subject to certain limitations set forth therein, this Bond is transferable upon the books of the Issuer at the principal office of the Bond Registrar, by the registered owner hereof in person or by his attorney duly authorized in writing upon surrender hereof together with a written instrument of transfer satisfactory to the Bond Registrar, duly executed by the registered owner or attorney; and may also be surrendered in exchange for Bonds of other authorized denominations. Upon such transfer or exchange the Issuer will cause a new Bond or Bonds to be issued in the name of the transferee or registered owner, of the same aggregate principal amount, bearing interest at the same rate and maturing on the same date, subject to reimbursement for any tax, fee or governmental charge required to be paid with respect to such transfer or exchange. The Issuer and the Bond Registrar may deem and treat the person in whose name this Bond is registered as the absolute owner hereof, whether this Bond is overdue or not, for the purpose of receiving payment and for all other purposes, and neither the Issuer nor the Bond Registrar shall be affected by any notice to the contrary.

So long as the Bonds are Depository Bonds (as defined in the Resolution), the following provisions shall apply. The principal of the Bonds shall be payable when due in next day funds to Cede & Co. as nominee of the Depository Trust Company (the "Bond Depository") at The Depository Trust Company, Muni Redemption Department, 55 Water Street, 50th Floor, New York, New York 10041, Attn: Collection Supervisor, (or such other nominee or address as the Bond Depository shall specify in writing to the Issuer) and if the payment is of only part of the principal hereof, the Authority shall mail by first class mail to the Depository a written statement of the principal amount paid as to the Bonds of each maturity outstanding following such payment, and upon such payment the Bond Depository as Holder may in its discretion make a notation on a register of partial payments attached to the Bond of the principal amount paid, provided that the Bond Depository may at its option surrender the Bonds for exchange for a Bond registered with the new principal amount and provided the Bond shall be surrendered for payment upon redemption in full or at maturity. Such notation, if made by the Bond Depository, shall be for reference only, and may not be relied upon by any other person as being in any way determinative of the principal amount of the Bonds Outstanding. Interest is payable in next day funds from the Issuer to Cede & Co. as nominee of the

Depository Trust Company, at its address as it appears on the bond registration books of the Authority. Each payment of interest and/or principal shall specifically separate such payment amount by CUSIP number identification provided to the Bond Depository. The transfer permitted pursuant to Section 13 of the Resolution shall occur only with respect to Bonds of a minimum denomination of the remaining principal amount of an entire maturity thereof so long as the Bonds are Depository Bonds. Upon a partial redemption of a Bond which results in the stated amount thereof being reduced, the Bond Depository may in its discretion make notation on a register of partial payments attached to the bond of such redemption, stating the amount so redeemed. Such notation, if made by the Bond Depository, shall be for reference only, and may not be relied upon by any other person as being in any way determinative of the principal amount of the Bonds Outstanding. The Bond Depository may surrender a Bond to the Authority (with, if the Issuer so requires, a written instrument of transfer in form satisfactory to the Issuer duly executed by the Bond Depository or its attorney duly authorized in writing) and the Issuer shall execute and deliver to the Bond Depository of such Bond, without service charge, a new Bond having the same stated maturity and interest rate and of the authorized denomination in aggregate principal amount equal to and in exchange for the unredeemed portion of the principal of the Bond so surrendered.

IT IS HEREBY CERTIFIED, RECITED, COVENANTED AND AGREED that all acts, conditions and things required by the Constitution and laws of the State of North Dakota to be done, to exist, to happen and to be performed precedent to and in the valid issuance of this Bond have been done, do exist, have happened and have been performed in regular and due form, time and manner as so required; that the Issuer has duly created the Series 2009A Refunding Improvement Refunding Bond Fund as a separate and special fund and has appropriated thereto all of the funds heretofore appropriated for the payment of the Prior Bonds, subject to the prior lien of the Prior Bonds and the unrefunded portions of the bonds being refunded, upon such funds until they have been fully paid and redeemed; that the Issuer has appropriated the proceeds of the Bonds of this issue, together with other funds now on hand and available for the purpose, and has invested such funds in obligations of the United States or certain agencies thereof in such amounts, maturing on such dates, and earning interest at such rates as are required to provide funds sufficient to pay when due the interest to accrue on each Refunded Bond to its maturity or, if prepayable, to the earliest prior date on which it may be called for redemption, and to pay and redeem the principal amount of each such Bond at maturity, or if prepayable, at its earliest redemption date, and to provide funds sufficient to pay when due the interest to accrue, and any principal payments, on the Refunding Bonds until the Redemption Date and has irrevocably placed such funds and securities in escrow for this purpose; that the assets appropriated to the Series 2009A Refunding Improvement Bond Fund consist of special improvement warrants and special assessments validly issued and levied for the payment of the cost of improvements benefiting special improvement districts of the Issuer, which warrants and assessments are payable in the years and amounts required by law; that it will use diligence to collect said improvement warrants and special assessments and, in the event of a deficiency in any of the improvement district funds for the payment of the warrants drawn thereon, or if such warrants have been refunded, the Refunding Improvement Bonds issued to refund the

warrants, the Issuer is further required to levy a tax on all taxable property within the City for the payment and discharge of such deficiency, without limitation as to rate or amount; that all collections of special assessments, and any deficiency taxes, are required to be credited to said Series 2009A Refunding Improvement Refunding Bond Fund and applied in payment of the principal of and interest on the Bonds of this issue, subject only to the prior lien thereon of certain of the Prior Bonds until such Bonds have been fully paid and redeemed; all as more fully stated in the Resolution, to which reference is hereby made for further details and other covenants of the Issuer with respect thereto; and that the issuance of this Bond has not caused the indebtedness of the Issuer to exceed any constitutional or statutory limitation of indebtedness.

IN WITNESS WHEREOF, the City of Fargo, North Dakota, by its governing body, has caused this Bond to be executed in its behalf by the manual or facsimile signatures of the Mayor and City Auditor, and sealed with its official seal.

CITY OF FARGO

Mayor

(SEAL)

City Auditor

CERTIFICATE OF AUTHENTICATION

This is one of the Bonds
Delivered pursuant to the
Resolution mentioned within.

CITY AUDITOR OF THE CITY
OF FARGO
200 North Third Street
Fargo, ND 58102

By: _____
Authorized Representative

Dated: _____

FORM OF CERTIFICATE AS TO BOND COUNSEL OPINION

We certify that attached is a full and correct copy of the text of the legal opinion of Bond Counsel on the issue of Bonds which includes the within Bond, rendered as of the date of delivery of and payment for the Bonds.

(FACSIMILE)
City Auditor

(FACSIMILE)
Mayor

The following abbreviations when used in the inscription on the face of this Bond, shall be construed as though they were written in full according to applicable laws or regulations:

- TEN COM - as tenants in common
- TEN ENT - as tenants by the entireties
- JT TEN - as joint tenants with right of survivorship and not as tenants in common
- UTMA - ACT _____ Custodian _____
(Cust) (Minor)

under Uniform Transfer to Minors Act _____
(State)

Additional abbreviations may also be used.

ASSIGNMENT

FOR VALUE RECEIVED the undersigned hereby sells, assigns and transfers unto

the within Bond and all rights thereunder, and hereby irrevocably constitutes and appoints _____ attorney to transfer the within Bond on the books kept for registration thereof, with full power of substitution in the premises.

Dated: _____

Please insert social security or other identifying number of Assignee:

NOTICE: The signature of this Assignment must correspond to the name as it appears upon the face of the within Bond in every particular, without alteration, enlargement or any change whatsoever.

Signature Guaranteed: NOTICE:
Signature(s) must be guaranteed by a member of a major stock exchange or a commercial bank or trust company.

ATTACHMENT 3

CONTINUING DISCLOSURE CERTIFICATE

This Continuing Disclosure Certificate (the "Disclosure Certificate") is executed and delivered by the City of Fargo, North Dakota (the "Issuer") in connection with the Issuer's \$13,665,000 Refunding Improvement Refunding Bonds, Series 2009A (the "Bonds"). The Bonds are being issued pursuant to Authorizing Resolutions adopted by the governing body of the Issuer on April 6, 2009 (the "Resolutions"), and delivered to the Purchaser on the date hereof. The Issuer hereby covenants and agrees as follows:

Purpose of the Disclosure Certificate. This Disclosure Certificate is being executed and delivered by the Issuer for the benefit of the Owners of the Bonds in order to assist the Participating Underwriters within the meaning of SEC Rule 15c2-12(b)(5) (the "Rule") in complying with the Rule. This Disclosure Certificate constitutes the written undertaking required by the Rule.

Definitions. In addition to the defined terms set forth in the Resolution, which apply to any capitalized term used in this Disclosure Certificate unless otherwise defined in this Section, the following capitalized terms shall have the following meanings:

"Annual Report" means any annual report provided by the Issuer pursuant to, and as described in Section 3 and 4 of the Disclosure Certificate.

"EMMA" means the Electronic Municipal Market Access system established by the MSRB with the support of the United States Securities and Exchange Commission, or any successor system, which can be accessed at the date hereof at www.emma.msrb.org.

"Financial Statements" means audited or, if unavailable, unaudited general purpose financial statements of the Issuer prepared in accordance with generally accepted accounting principals, as in effect from time to time or as required to be modified as a matter of law. If unaudited financial statements are provided, audited financial statements will be provided when and if available.

"Fiscal Year" means the fiscal year of the Issuer.

"Final Official Statement" means the deemed final official statement dated April ____, 2009, plus the addendum which constitutes the final official statement delivered in connection with the Bonds, which is available from the MSRB.

"Issuer" means the City of Fargo, North Dakota, which is the obligated person with respect to the Bonds.

"Material Event" means any of the events listed in Section 5(a) of this Disclosure Certificate which has been determined to be material pursuant to Section 5(b) of this Disclosure Certificate.

"MSRB" means the Municipal Securities Rulemaking Board located at 1900 Duke Street, Suite 600, Alexandria, VA 22314.

"NRMSIR" means any nationally recognized municipal securities information repository as recognized from time to time by the SEC for purposes of the Rule.

"Owner" means the person in whose name a Bond is registered or a beneficial owner of such a Bond.

"Participating Underwriter" means any of the original underwriter(s) of the Bonds (including the Purchaser) required to comply with the Rule in connection with the offering of the Bonds.

"Repository" means each NRMSIR and each SID, if any.

"Rule" means SEC Rule 15c2-12(b)(5) promulgated by the SEC under the Securities Exchange Act of 1934, as the same may be amended from time to time, and including written interpretations thereof by the SEC.

"SEC" means Securities and Exchange Commission.

"SID" means any public or private repository or entity designated by the State of North Dakota as a state information depository for the purpose of the Rule. As of the date of this Disclosure Certificate, there is no SID.

Provision of Annual Financial Information and Financial Statements.

- (a) The Issuer shall, not later than 12 months after the end of each Fiscal Year, commencing with the year ending December 31, 2009, to EMMA an Annual Report which is consistent with the requirements of Section 4 of this Disclosure Certificate and which shall include the CUSIP numbers for the all outstanding Bonds and such other identifying information as may be required from time to time by the Rule. The Annual Report may be submitted as a single document or as separate documents comprising a package, and may cross-reference other information as provided in Section 4 of this Disclosure Certificate; provided that the Financial Statements of the Issuer may be submitted separately from the balance of the Annual report.
- (b) If the Issuer is unable or fails to provide to EMMA an Annual Report by the date required in subsection (a), the Issuer shall send a notice of that fact to EMMA.

Content of Annual Reports. The Issuer's Annual Report shall contain or incorporate by reference the annual Financial Statements and information similar to that set forth in the following sections of the Final Official Statement:

- (i) City Property Values.
- (ii) City Indebtedness.
- (iii) City Tax Rates, Levies and Collections.

Reporting of Material Events.

- (c) This Section 5 shall govern the giving of notices of the occurrence of any of the following events if material with respect to the Bonds:
 - (i) Principal and interest payment delinquencies;
 - (ii) Non-payment related defaults;
 - (iii) Unscheduled draws on debt service reserves reflecting financial difficulties;
 - (iv) Unscheduled draws on credit enhancements reflecting financial difficulties;
 - (v) Substitution of credit or liquidity providers, or their failure to perform;
 - (vi) Adverse tax opinions or events affecting the tax-exempt status of the security;
 - (vii) Modification to rights of security holders;
 - (viii) Bond Calls;
 - (ix) Defeasances;
 - (x) Release, substitution, or sale of property securing repayment of the securities; and
 - (xi) Rating changes.
- (d) Whenever the Issuer obtains knowledge of the occurrence of an above listed event, the Issuer shall as soon as possible determine under applicable legal standards if such event would constitute material information for holders of the Bonds (a "Material Event"), and if so promptly file a notice of such occurrence with each Repository (or to the MSRB and the SID, if any) until June 30, 2009 and, thereafter, to EMMA; provided, that any event under subsections (a)(8)(9) or (11) will always be deemed to be material.
- (e) Notwithstanding the foregoing, notice of Material Events described in subsections (a)(8) and (9) need not be given under this subsection any earlier than the notice (if any) of the underlying event is given to holders of affected Bonds pursuant to the Resolution.
- (f) If the Issuer determines that it has failed to give notice of a Material Event as set forth above or to file the Annual Report in a timely fashion as required herein, the Issuer shall promptly file a notice of such occurrence in such occurrence in the same manner as described in (b) above.
- (g) The Issuer shall file each notice of a Material Event and each notice

required by subsection (d) of this Section 5 with the CUSIP numbers for all outstanding Bonds specified and such other identifying information as may be required from time to time by the Rule.

Termination of Reporting Obligation. The Issuer's obligations under this Disclosure Certificate shall terminate upon the legal defeasance, prior redemption of payment in full of all the Bonds.

Agent. The Issuer may, from time to time, appoint or engage a dissemination agent to assist it in carrying out its obligations under this Disclosure Certificate, and may discharge any such agent, with or without appointing a successor dissemination agent.

Amendment: Waiver. Notwithstanding any other provision of this Disclosure Certificate, the Issuer may amend this Disclosure Certificate, and any provision of this Disclosure Certificate may be waived, if such amendment or waiver is supported by an opinion of nationally recognized bond counsel to the effect that such amendment or waiver would not, in and of itself, cause the undertakings to violate the Rule. The provisions of this Disclosure Certificate may be amended without the consent of the Owners of the Bonds, but only upon the delivery by the Issuer to EMMA of the proposed amendment and an opinion of nationally recognized bond counsel to the effect that such amendment, and giving effect thereto, will not adversely affect the compliance of this Disclosure Certificate and by the Issuer with the Rule.

Additional Information. Nothing in this Disclosure Certificate shall be deemed to prevent the Issuer from disseminating any other information, using the means of dissemination set forth in this Disclosure Certificate or any other means of communication, or including any other information in any Requested Report or notice of occurrence of a Material Event, in addition to that which is required by this Disclosure Certificate. If the Issuer chooses to include any information in any Requested Report or notice of occurrence of a Material Event in addition to that which is specifically required by this Disclosure Certificate, the Issuer shall have no obligation under this Disclosure Certificate to update such information or include it in any future Requested Report or notice of occurrence of a Material Event.

Default. In the event of a failure of the Issuer to comply with any provision of this Disclosure Certificate, any Owner of the Bonds may take such actions as may be necessary and appropriate, including seeking mandate or specific performance by court order, to cause the Issuer to comply with its obligations under this Disclosure Certificate. A default under this Disclosure Certificate shall not be deemed an event of default with respect to the Bonds and the sole remedy under this Disclosure Certificate in the event of any failure of the Issuer to comply with this Disclosure Certificate shall be an action to compel performance.

Beneficiaries. This Disclosure Certificate shall inure solely to the benefit of the Issuer, the Participating Underwriters and Owners from time to time of the Bonds, and shall create no rights in any other person or entity.

IN WITNESS WHEREOF, I have executed this Disclosure Certificate in my official capacity effective the _____ day of April, 2009.

CITY OF FARGO, NORTH DAKOTA

Steven Sprague
City Auditor

(2009A)

CERTIFICATE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I, Steven Sprague, the duly appointed City Auditor of the City of Fargo, North Dakota, do hereby certify that attached hereto is a full, true and correct copy of the Resolution adopted by the governing body of the City of Fargo at the meeting held on April 6, 2009, and that such Resolution is now a part of the permanent records of the City of Fargo, North Dakota, as such records are filed in the office of the City Auditor.

Dated this ____ day of April, 2009.

City Auditor

(SEAL)



Fargo Inspections

City of Fargo
200 Third Street North
701-241-1561
fax 701-241-1526

2

Memorandum

DATE: April 1, 2009
TO: Mayor Walaker and Board of City Commissioners
FROM: Ron C. Strand, Inspections Administrator
SUBJECT: Permit fees waiver for flood repair

A necessary part of our individual property owners' recovery will include our assistance in the form of repair and replacement permits for structures, plumbing, and mechanical work. After a couple of our flood events during the past several years the decision was made by the Commission to waive permit fees for these flood-related permits. At those times permits were still required and obtained but no fees were charged.

With those precedents in mind I am respectfully requesting **that the City Commission direct the inspections department to issue permits for flood-related repairs and equipment replacement without charging the permit fees otherwise required.**



30

ASSESSMENT DEPARTMENT

April 2, 2009

Board of City Commissioners
City Hall
Fargo, ND 58102

Dear Commissioners:

Attached is a copy of an application made by Cooper House, LP & the Fargo Housing & Redevelopment Authority for a property tax exemption or payment in lieu of tax (PILOT) according to N.D.C.C. Chapter 40-57.1. The exemption requested is for a property to be located at 414 11th St. N. where the applicant will construct a low income housing project.

The Tax Exempt Review Committee has met to consider this application. There were no written or verbal protests submitted at the time the committee met and none have been filed to date.

The committee feels this project meets the necessary criteria to be eligible for an exemption. The committee recommends approval of a 15 year, \$0 payment in lieu of taxes. The committee recommends that after the third year of full operation, the project remit at least 5% of collected annual rents as a total in lieu payment provided for, in part, under N.D.C.C. 23-11-29.

SUGGESTED MOTION:

Approval of a 15 year, \$0 payment in lieu of tax for the building and that after the third year of operation, the project pay in lieu payments to total no less than 5% of collected annual rents.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Hushka".

Ben Hushka
Tax Exempt Review Committee

APPLICATION FOR PROPERTY TAX INCENTIVES FOR
NEW OR EXPANDING BUSINESSES
Pursuant to N.D.C.C. Chapter 40-57.1

RECEIVED
FEB 13 2009
FARGO ASSESSOR

Project Operator's Application To City of Fargo
City or County

File with the City Auditor for a project located within a city; County Auditor for locations outside city limits.

A representative of each affected school district and township is included as a non-voting member in the negotiations and deliberation of this application.

This application is a public record

Identification Of Project Operator

1. Name of project operator Fargo Housing Authroity - Manager / Cooper House

2. Address of project 414 11th Street North Limited Partnership
owner
City Fargo County Cass

3. Mailing address of project operator PO Box 430
City Fargo State ND Zip 58107

4. Type of ownership of project
 Partnership Subchapter S corporation Individual proprietorship
 Corporation Cooperative Limited liability company

5. Federal Identification No. or Social Security No. 26-2573929

6. North Dakota Sales and Use Tax Permit No. N/A

7. If a corporation, specify the state and date of incorporation ND 4/29/2008

8. Name and title of individual to contact Lynn Fundingsland, Executive Director
Mailing address PO Box 430
City, State Zip Fargo, ND 58107 Phone No. 701-478-2525

Project Operator's Application For Tax Incentives

9. Indicate the tax incentives applied for and terms. Be specific.

Property Tax Exemption Payments in Lieu of Taxes

_____ Number of Years 2010 Beginning Year 2025 Ending Year

_____ Percent of exemption 5% Amount of annual payments
(Attach schedule if payments will vary)

10. Which of the following would better describe the project for which this application is being made:

New business project Expansion of an existing business project

Description of Project Property

11. Legal description of project real property Lots Seven (7), Eight (8), and all of Nine (9) except the South Six (6) Feet thereof in Block Thirtyfive (35), of Robert's Second Addition to the city of Fargo, Situate int the County of Cass, and the State of North Dakota.

12. Will the project be owned or leased by the project operator? Owned Leased

If the answer to 12 is leased, will the benefit of any incentive granted accrue to the project operator?

Yes No

If the property will be leased, attach a copy of the lease or other agreement establishing the project operator's benefits.

13. Will the project be located in a new structure or an existing facility? New Existing

If existing facility, when was it constructed? N/A

If new construction, complete the following:

a. Estimated date of commencement of construction of the project covered by this application 5/2009

b. Description of project to be constructed including size, type and quality of construction 43 unit, 4 story apartment building with community room and services for the homeless

c. Projected number of construction employees during the project construction 25

14. Approximate date of commencement of operations for this project 1/2010

15. Estimated market value of the property used for this project:

a. Land \$ 96,000

b. Existing buildings and structures for which an exemption is claimed \$ 0

c. Newly constructed buildings and structures when completed \$ 3,400,000

d. Total \$ 3,496,000

e. Machinery and equipment \$ 0

16. Estimate taxable valuation of the property eligible for exemption by multiplying the market values by 5 percent:

a. Land (not eligible) 

b. Eligible existing buildings and structures \$ 0

c. Newly const buildings & structures when completed \$ 170,000

d. Total taxable valuation of property eligible for exemption (Add lines b & c) \$ 170,000

e. Enter the consolidated mill rate for the appropriate taxing district \$ 455.43

f. Annual amount of the tax exemption (Line d multiplied by line e) \$ 77,423.10

Description of Project Business

Note "project" means a newly established business or the expansion portion of an existing business. Do not include any established part of an existing business.

17. Type of business to be engaged in: Ag processing Manufacturing Retailing
 Wholesaling Warehousing Services

18. Describe in detail the activities to be engaged in by the project operator, including a description of any products to be manufactured, produced, assembled or stored (attach additional sheets if necessary).

Manage permanent supportive housing affordable to homeless and pre-cariously housed individuals.

19. Indicate the type of machinery and equipment that will be installed _____

20. Projected annual revenue, expense, and net income of the project for each year for the first five years.

Year	<u>15 year proforma attached</u>				
Annual Revenue	_____	_____	_____	_____	_____
Annual Expense	_____	_____	_____	_____	_____
Net Income	_____	_____	_____	_____	_____

21. Projected salary and number of new positions added by the project and estimated annual payroll

# Jobs Added	<u>4.5</u>	_____	_____	_____	_____
Estimated Payroll	<u>\$157,500</u>	_____	_____	_____	_____

Number of positions in the initial year in the following hourly salary categories (DO NOT INCLUDE BENEFITS):

# Current Positions	New Positions Under \$7.50	New Positions \$7.50-\$9.00	New Positions \$9.01-\$11.00	New Positions \$11.01-\$13.00	New Positions \$13.01-\$15.00	New Positions Over \$15.00

Previous Business Activity

22. Is the project operator succeeding someone else in this or a similar business? Yes No

23. Has the project operator conducted this business or any other location either in or outside of the state?

Yes No

24. Has the project operator or any officers of the project received any prior property tax incentives? Yes No

If the answer to 22, 23, or 24 is yes, give details including locations, dates, and name of former business (attach additional sheets if necessary). see attached list

Business Competition

25. If any similar business being conducted by other operators in the municipality? Yes No

If YES, give name and location of competing business or businesses _____

Percentage of Gross Revenue Received Where Underlying Business Has ANY Local Competition _____ %

Property Tax Liability Disclosure Statement

26. Does the project operator own real property in North Dakota which has delinquent property tax levied against it?
 Yes No

27. Does the Project operator own a greater than 50% interest in a business that has delinquent property tax levied against any of its North Dakota real property? Yes No

If the answer to 26 or 27 is yes, list and explain _____

Use only when reapplying

28. The project operator is reapplying for property tax incentives for the following reason(s):

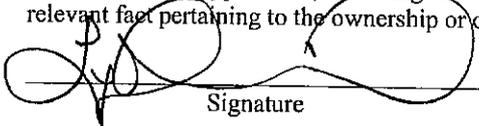
To present additional facts or circumstances which were not presented at the time of the original application

To request continuation of the present property tax incentives because the project has:
 Moved to a new location Had a change in project operators

Change in project operation or additional capital investment of more than 20%

To request an additional annual exemption for the year of _____ on structures owned by a governmental entity and leased to the project operator. (See N.D.C.C. 40-57.1-04.1)

I, Lynn Fundingsland, do hereby certify that the answers to the above questions and all of the information contained in this application, including attachments hereto, are true and correct to the best of my knowledge and belief and that no relevant fact pertaining to the ownership or operation of the project has been omitted.


Signature

Executive Director
Title

1.15.09
Date

Certification of Governing Body (To be completed by the Auditor of the City or County)

The municipality shall, after granting any property tax incentives, certify the findings to the State Tax Commissioner and Director of Equalization by submitting a copy of the project operator's application with the attachments.

The governing body, on the _____ day of _____, 20____, granted the following:

Property Tax Exemption

Payments in lieu of taxes

_____ Number of Years

_____ Beginning year _____ Ending Year

_____ Percent of exemption

_____ Annual payment (Attach schedule if payments vary)

Auditor

FARGO HOUSING AND REDEVELOPMENT AUTHORITY (FHRA)
1/14/2009

No.	Property	Ownership and/or Management*	Number of Buildings	Number of Residential Units	Number of Commercial Units	Total Number of Units	Project Type	Location City
1	14-1 High-Rise	O&M	1	249	0	249	Public Housing - Elderly/Disabled	Fargo
2	14-2 New Horizons	O&M	1	98	0	98	Public Housing - Fully Accessible/Elderly/Disabled	Fargo
3	14-3 Madison	O&M	77	91	0	91	Public Housing - Family	Fargo
4	14-3 Madison	O&M	1	0	1	1	Daycare	Fargo
5	14-4 25th Avenue	O&M	14	28	0	28	Public Housing - Family	Fargo
6	14-5 30-31 Avenue	O&M	13	26	0	26	Public Housing - Family	Fargo
7	14-6 Pioneer	O&M	1	46	0	46	Public Housing - Elderly/Disabled	Fargo
8	14-7 34th Avenue	O&M	20	40	0	40	Public Housing - Family	Fargo
9	Brownstone	M	1	2	1	3	Low-Income/Affordable	Fargo
10	Social Club	M	1	0	1	1	Commercial	Fargo
11	SRO	O&M	1	22	0	22	SRO	Fargo
12	Burrel	O&M	1	30	0	30	Mod-Rehab	Fargo
13	Dakota Life	O&M	1	3	0	3	Low-Income/Affordable	Fargo
14	Supportive Housing	O&M	2	4	0	4	Low-Income/Affordable	Fargo
15	Colonial Manor	O&M	1	12	0	12	Mod-Rehab	Fargo
16	Graver Annex	O&M	1	10	1	11	Low-Income/Affordable	Fargo
17	Church Townhomes	M	2	8	0	8	LIHTC	Fargo
18	220 Broadway	M	1	5	2	7	LIHTC	Fargo
19	Herald Square	M	1	9	4	13	LIHTC	Fargo
20	Graver Inn	M	1	60	3	63	LIHTC	Fargo
21	Sisters Path	M	1	12	0	12	LIHTC	Fargo
22	Bluestem Townhomes	M	6	30	0	30	LIHTC	Fargo
23	Bluestem Homes	M	19	30	0	30	LIHTC	Fargo
24	Sunrise North	M	1	43	0	43	LIHTC	Fargo
Totals:			169	858	13	871		

* O&M = Owned & Managed by the FHRA

* M = Managed by the FHRA

BEYOND SHELTER, INC.
1/14/2009

No.	Projects/Properties	PIS Year	Number of Buildings	Number of Residential Units	Number of Commercial Units	Total Number of Units	Project Type	Location City
1	Brownstone	2000	1	2	1	3	Low-Income/Affordable	Fargo
2	Social Club	2000	1	0	1	1	Commercial	Fargo
3	Church Townhomes	2001	2	8	0	8	LIHTC - New Construction/Family	Fargo
4	220 Broadway	2002	1	5	2	7	LIHTC-Historic Rehab/Commercial	Fargo
5	Herald Square	2002	1	9	4	13	LIHTC-Historic Rehab/Commercial	Fargo
6	8th Street Condos	2003	1	4	0	4	Condos - New Construction/For Sale	Fargo
7	Graver Inn	2004	1	60	3	63	LIHTC-Historic Rehab/Commercial	Fargo
8	Sisters Path	2004	1	12	0	12	LIHTC - New Constr/Supportive Hsg	Fargo
9	Serenity Apartments	2005	1	18	0	18	LIHTC - New Construction/Senior	West Fargo
10	Bluestem Townhomes	2006	6	30	0	30	LIHTC - New Construction/Family	Fargo
11	Bluestem Homes	2007	19	30	0	30	LIHTC - New Construction/Family	Fargo
12	Lawson View Townhomes	2008	2	32	0	32	LIHTC - Acq/Rehab/Preservation	Aberdeen, SD
13	Sunrise North	2008	1	43	0	43	LIHTC - New Construction/Senior	Fargo
14								
15								
16								
17								
Totals:			38	253	11	264		

Cooper House apartments

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Revenues															
Rental Income	\$ 230,712	\$ 235,326	\$ 240,033	\$ 244,833	\$ 249,730	\$ 254,722	\$ 259,819	\$ 265,016	\$ 270,316	\$ 275,722	\$ 281,237	\$ 286,861	\$ 292,569	\$ 298,451	\$ 304,420
Vacancy	\$ 57,678	\$ 16,473	\$ 16,802	\$ 17,138	\$ 17,481	\$ 17,831	\$ 18,187	\$ 18,551	\$ 18,922	\$ 19,301	\$ 19,687	\$ 20,080	\$ 20,482	\$ 20,892	\$ 21,309
Interest on Reserves	\$ -	\$ 1,546	\$ 1,759	\$ 1,869	\$ 1,974	\$ 2,076	\$ 2,173	\$ 2,265	\$ 2,352	\$ 2,434	\$ 2,510	\$ 2,579	\$ 2,643	\$ 2,699	\$ 2,748
Reserves	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Laundry	\$ 1,800	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400	\$ 2,400
EGJ	\$ 174,834	\$ 222,900	\$ 227,390	\$ 231,964	\$ 236,623	\$ 241,370	\$ 246,205	\$ 251,129	\$ 256,146	\$ 261,255	\$ 266,460	\$ 271,760	\$ 277,159	\$ 282,658	\$ 288,256
Expenses															
Management Fees	\$ 13,987	\$ 17,832	\$ 18,191	\$ 18,557	\$ 18,930	\$ 19,310	\$ 19,696	\$ 20,090	\$ 20,492	\$ 20,900	\$ 21,317	\$ 21,741	\$ 22,173	\$ 22,613	\$ 23,061
Administration	\$ 6,000	\$ 6,180	\$ 6,365	\$ 6,556	\$ 6,753	\$ 6,956	\$ 7,164	\$ 7,379	\$ 7,601	\$ 7,829	\$ 8,063	\$ 8,305	\$ 8,555	\$ 8,811	\$ 9,076
Accounting	\$ 500	\$ 515	\$ 530	\$ 546	\$ 563	\$ 580	\$ 597	\$ 615	\$ 633	\$ 652	\$ 672	\$ 692	\$ 713	\$ 734	\$ 756
Legal	\$ 5,000	\$ 5,150	\$ 5,305	\$ 5,464	\$ 5,628	\$ 5,796	\$ 5,970	\$ 6,149	\$ 6,334	\$ 6,524	\$ 6,720	\$ 6,921	\$ 7,129	\$ 7,343	\$ 7,563
Asset Manager	\$ 1,000	\$ 1,030	\$ 1,061	\$ 1,093	\$ 1,126	\$ 1,159	\$ 1,194	\$ 1,230	\$ 1,267	\$ 1,305	\$ 1,344	\$ 1,384	\$ 1,425	\$ 1,469	\$ 1,513
Office Supplies/Postage	\$ 400	\$ 412	\$ 424	\$ 437	\$ 450	\$ 464	\$ 478	\$ 492	\$ 507	\$ 522	\$ 538	\$ 554	\$ 570	\$ 587	\$ 605
Printing	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Advertising	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555	\$ 1,555
Compliance Monitoring Fees	\$ 12,900	\$ 13,287	\$ 13,686	\$ 14,096	\$ 14,519	\$ 14,955	\$ 15,403	\$ 15,865	\$ 16,341	\$ 16,832	\$ 17,337	\$ 17,857	\$ 18,392	\$ 18,944	\$ 19,512
Replacement Reserves	\$ 1,537	\$ 1,583	\$ 1,630	\$ 1,679	\$ 1,730	\$ 1,781	\$ 1,833	\$ 1,890	\$ 1,947	\$ 2,005	\$ 2,065	\$ 2,127	\$ 2,191	\$ 2,257	\$ 2,324
Computer Equip. Service & Fee	\$ 1,300	\$ 2,472	\$ 2,546	\$ 2,623	\$ 2,701	\$ 2,782	\$ 2,866	\$ 2,952	\$ 3,040	\$ 3,131	\$ 3,225	\$ 3,322	\$ 3,422	\$ 3,524	\$ 3,630
Phone/Internet	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Maintenance	\$ 1,500	\$ 2,060	\$ 2,122	\$ 2,185	\$ 2,251	\$ 2,319	\$ 2,388	\$ 2,460	\$ 2,534	\$ 2,610	\$ 2,688	\$ 2,768	\$ 2,852	\$ 2,937	\$ 3,025
Exterminating	\$ 1,500	\$ 2,060	\$ 2,122	\$ 2,185	\$ 2,251	\$ 2,319	\$ 2,388	\$ 2,460	\$ 2,534	\$ 2,610	\$ 2,688	\$ 2,768	\$ 2,852	\$ 2,937	\$ 3,025
Grounds/Snow Removal	\$ 31,530	\$ 48,719	\$ 50,181	\$ 51,666	\$ 53,237	\$ 54,834	\$ 56,479	\$ 58,173	\$ 59,918	\$ 61,716	\$ 63,567	\$ 65,474	\$ 67,438	\$ 69,462	\$ 71,545
Maintenance & Operation	\$ 2,025	\$ 2,781	\$ 2,864	\$ 2,950	\$ 3,039	\$ 3,130	\$ 3,224	\$ 3,321	\$ 3,420	\$ 3,523	\$ 3,629	\$ 3,737	\$ 3,850	\$ 3,965	\$ 4,084
Elevator	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Utilities	\$ 35,475	\$ 46,719	\$ 50,181	\$ 51,666	\$ 53,237	\$ 54,834	\$ 56,479	\$ 58,173	\$ 59,918	\$ 61,716	\$ 63,567	\$ 65,474	\$ 67,438	\$ 69,462	\$ 71,545
Electric & Gas	\$ 8,869	\$ 12,160	\$ 12,545	\$ 12,921	\$ 13,309	\$ 13,708	\$ 14,120	\$ 14,543	\$ 14,980	\$ 15,429	\$ 15,892	\$ 16,369	\$ 16,860	\$ 17,365	\$ 17,886
Water, Sewer & Garbage	\$ 77,423	\$ 8,709	\$ 8,960	\$ 9,014	\$ 9,169	\$ 9,327	\$ 9,486	\$ 9,648	\$ 9,811	\$ 9,977	\$ 10,145	\$ 10,314	\$ 10,486	\$ 10,660	\$ 10,836
Fixed Expenses	\$ 16,500	\$ 16,995	\$ 17,505	\$ 18,030	\$ 18,571	\$ 19,128	\$ 19,702	\$ 20,293	\$ 20,902	\$ 21,529	\$ 22,175	\$ 22,840	\$ 23,525	\$ 24,231	\$ 24,958
Real estate tax in-lieu-of Insurance	\$ 219,500	\$ 192,753	\$ 196,204	\$ 203,811	\$ 209,580	\$ 215,515	\$ 221,621	\$ 227,903	\$ 234,366	\$ 241,016	\$ 247,857	\$ 254,896	\$ 262,136	\$ 269,590	\$ 277,256
Total Operating Expenses	\$ 5,228	\$ 4,589	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Net Annual Operating Income	\$ (44,666)	\$ 30,146	\$ 29,186	\$ 28,153	\$ 27,043	\$ 25,855	\$ 24,584	\$ 23,227	\$ 21,780	\$ 20,240	\$ 18,603	\$ 16,864	\$ 15,021	\$ 13,068	\$ 11,002
- soft debt service	\$ -	\$ 15,073	\$ 14,593	\$ 14,076	\$ 13,522	\$ 12,927	\$ 12,292	\$ 11,613	\$ 10,890	\$ 10,120	\$ 9,301	\$ 8,432	\$ 7,510	\$ 6,534	\$ 5,501
- operating/service reserve	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Annual Cash Flow	\$ (44,666)	\$ 15,073	\$ 14,593	\$ 14,076	\$ 13,522	\$ 12,927	\$ 12,292	\$ 11,613	\$ 10,890	\$ 10,120	\$ 9,301	\$ 8,432	\$ 7,510	\$ 6,534	\$ 5,501



February 13, 2009

Ben Hushka, Assessor
404 4th Avenue North
Fargo, ND 58102

RE: Application for PILOT

Dear Mr. Hushka,

Please find enclosed an application for property tax incentives for a new affordable housing development in Fargo.

The Fargo Housing and Redevelopment Authority's non-profit partner Beyond Shelter, Inc. (BSI) will be the General Partner in the project ownership entity called Cooper House Limited Partnership. The development is designed to serve people who are homeless and will provide permanent housing and services. The income of tenants in this project is anticipated to be below 30% of area median income. The development will be managed and operated by the Fargo Housing Authority.

The development will consist of a four story building with 43 efficiency and one bedroom apartments. All units will have their own kitchens and bathrooms. One unit will be set aside for a service provider or caretaker. The building will be served by an elevator. There will be several offices for management and service providers. A community room will be available to tenants and for group meetings and sessions sponsored by service providers. A common laundry room will be available to tenants. The site is located two blocks from a bus stop and within walking distance to service providers, thrift stores, and groceries.

This development will not support any debt. Financing for construction will come from Low Income Housing Tax Credit equity, the Otto Bremer Foundation, the HUD Supportive Housing Program, the Affordable Housing Program (AHP) of the Federal Home Loan Bank of Des Moines, the City of Fargo HOME program, the Fargo Housing and Redevelopment Authority, and Beyond Shelter, Inc. The operating budget will be expected to incur some expense related to services in addition to the third party providers that will come in.

We appreciate your and the tax committee's consideration of this request. Please feel free to give me a call with any questions regarding this request.

Sincerely,

Lisa Rotvold

cc: Lynn Fundingsland, Fargo Housing and Redevelopment Authority

enclosure



City of Fargo Staff Report			
Title	Appeal of the Zoning Administrator's Decision	Date	10-03-08 As updated 12-03-08, 02-02-09, & 03-19-09
		Staff Contact	Jim Hinderaker
Appellant	William F. Rakowski	Representation	Jonathon Garaas
Status	Planning Commission Review: 10-08-08 as continued to 12-10-08 and 02-11-09 City Commission Review: 03-23-09		
Record	Note: Due to the volume of the complete appeal record, the City Commission packet contains an abbreviated form of the complete record regarding said appeal. A complete record will be on hand during the public hearing. Also, the complete record regarding this appeal is available for review in the Planning Department prior to the 03-23-09 meeting.		
Executive Summary	<p>Regarding the appeal filed by William F. Rakowski of the issuance of a building permit for Phased II of the FM City Development project located at 12th Ave N, numerous issues are raised by the counsel (Jonathan Garass) of the appellant that staff contends are without merit. The primary issue surrounding this appeal stems from the April 9, 2008 Planning Commission decision to reduce the total number of required parking spaces for Phase II of the FM City Development project. Mr. Garass and Mr. Rakowski, who were both in attendance during the April 9, 2008 public hearing, failed to file a timely appeal of the Planning Commission decision. Since that time, every attempt has been by Mr. Rakowski, through counsel, to circumvent that decision by interjecting opposition into the various stages of the project, culminated with the filing of this appeal of the issuance of the building permit. An action that is baseless and without merit</p> <p>The balance of this report provides a timeline of events and summarizes the action of the various Boards that have heard parts of this appeal. In addition, staff has reviewed each of the issues, as based on a letter from counsel dated November 12, 2008, and found that all are baseless and without merit. Finally, the recommendation of staff, in accordance with FMC/LDC §20-0910(E)(4), is for the City Commission to review the appealed Site Plan decision as a new matter. After considering the matter, the City Commission shall act to approve or deny the original application. The procedure shall be the same as required of the original action before the Zoning Administrator.</p>		
Analysis of Appeal			
<p>On September 2, 2008, William F. Rakowski, owner of property located at 1424-1426 12th Ave N, Fargo, filed an appeal to the Board of Adjustment stemming from the issuance of a building permit for property located at 1434 12 Ave N, Fargo. The Building Permit (No BL20081741) was issued by the city on August 25, 2008. The appellant asserts that the permit was issued without meeting all of the conditions of FMC/LDC Article 20-07. In essence, the appellant contends that Building Permit No. BL20081741 should not have been issued due to insufficient parking.</p> <p>Upon receipt and review of the appeal, staff questioned whether the Board of Adjustment (as requested by the appellant) actually had jurisdiction to review the appeal. The appellant contends that the "administrative decision" to issue Building Permit was done in error because the permit application did not meet all required condition precedent set forth in Article 20-07 of the Land Development Code. He specifically cited that the requirements of FMC/LDC §20-0701(E)(4), Off-Site Parking, were not met.</p> <p>On September 8, 2008, staff informed the appellant's representative, Jonathan Garaas, that the Zoning Administrator is responsible for determining compliance with parking requirement and that the</p>			

review of the same is part of a Site Plan review as governed by FMC/LDC §20-0910. To that end, decisions made under the Site Plan review process are appealable to the Planning Commission. Although staff has made every effort to walk Mr. Garaas through the Building Permit Application review process, a process that clearly assigns Site Plan review (including review of parking standards) to the Zoning Administrator, Mr. Garaas continues to insist that the Board of Adjustment has jurisdiction in this case.

On October 8, 2008, the Planning Commission found that they in fact did have jurisdiction to hear the subject appeal. The Planning Commission also found that the appellant did have standing to appeal. The Planning Commission also heard testimony regarding the appeal but tabled the hearing until December 10, 2008 in order for the city to provide the complete record to the appellants counsel. Counsel in turn was to provide a detailed list of the issues on appeal.

On October 28, 2008, the Board of Adjustment held a hearing, at the request of staff, to also review and determine which governing body had jurisdiction to hear the subject appeal. The Board of Adjustment found that they did not have jurisdiction as that authority was specifically granted to the Planning Commission and Board of City Commissioners.

On December 1, 2008, the Board of City Commissioners, on appeal from the October 28, 2008 Board of Adjustment decision, held a hearing to review and determine which governing body had jurisdiction to hear the subject appeal. The Board of City Commissioners upheld the Board of Adjustment's decision.

On December 10, 2008, the appeal was continued by the Planning Commission to February 11, 2009.

On February 11, 2009, the Planning Commission determined the site review process was accomplished by staff in an appropriate fashion following the requirements of the Land Development Code. In a 7-1 decision, the Commission moved to deny the appeal.

Issues of Appeal - Review

In a letter addressed to the Chairman of the City of Fargo Planning Commission, John Q. Paulsen, dated November 12, 2008 and included in the December 2008 Planning Commission review packet, the counsel for the appellant identifies the issues raised on appeal. Note: The items listed below are cut and paste from said letter. Staff response follows.

1. Many of the documents most recently submitted continue to have deficiencies in photocopying. For the time being, Mr. Rakowski makes no further comments concerning the deficiencies except that it may evidence continuing efforts to obfuscate issues, or lack of initial accurate review of submitted documents.

Staff has made every attempt to ensure that counsel has a complete and accurate record. In regard to photocopying deficiencies, staff will attempt to work with the appellants counsel to clarify any and all deficiencies prior to the December 10, 2008 hearing.

2. Please be reminded that the building official performs a higher duty than merely passing on the sufficiency of building plan adherence to Fargo's building code – the Building Official is prevented from issuing a building permit without conformity "in all respects to the provisions of the Land Development Code and the building code." Indeed, FMC § 20-0913(B) indicates this dual role apparently overlooked or ignored:

"The Building Official shall be responsible for conducting reviews to determine if intended uses, buildings or structures comply with all applicable regulations and standards, including the building code. The Building Official shall not issue a building permit unless the plans, specifications and intended use of such building or structures or part thereof conform in all respects to the provisions of the Land Development Code and the building code."

Please be reminded that FMC § 20-0106(B) also provides:

"If the provisions of this Land Development code are inconsistent with one another, or if they conflict with provisions found in other adopted ordinances or regulations of the City, the more restrictive provision will control." [bolding for emphasis]

Under FMC § 20-1203(A)(1)(a), "(w)hen the principal uses of a development fall within different use categories, each principal use is classified in the applicable category and each use is subject to all applicable regulations for that category." In this case the MR-3 zoning category regulations must be honored, even if the ground floor is regarded as Limited Commercial.

Please be further reminded that FMC § 20-0303(C) also provides:

"All requirements of a C-O district are in addition to and supplement all other applicable standards and requirements of the underlying zoning district." Reducing the number of parking spaces would not be within any of the 6 areas of possibly authorized "(r)estrictions and conditions imposed by a C-O district under FMC § 20-0303(C)(1-6). A C-O district has to be created by ordinance – **not by the Planning Commission.** See FMC § 20-

0303(D). "Parking spaces" are not an identified Use Category under FMC § 20-1203.

In an effort to expedite the Building Permit review process, the city of Fargo implemented a Plan Routing system. Prior to its implementation, the building permit review process was frustrating at best and at times, due to miscommunication between the applicant and the various review agencies, difficult to document the final outcome. The Plan Routing process streamlined the review process. An applicant simply submits a complete application to the Inspections Department and the Inspections Department in turn routes the various plan sets to the review agencies for review and determination of compliance.

So, while yes, as cited in §20-0913(B) of LDC/FMC, the Building Official is responsible for ensuring that the applicable provisions of the LDC and building code are adhered with, responsibility for portions of the review are delegated to various departments in accordance with their area of expertise. For example, the Health Department is responsible for the review and determination of compliance related to health code issues. The Engineering Department is responsible for the review and determination of compliance related engineering issues such as storm water detention. And, the Planning Department is responsible for the review and determination of compliance related to site plan issues such as, dimensional standards, parking, landscaping, and residential protection standards.

In regards to your assertion that the subject development must adhere to the MR-3 zoning category

regulations due to the fact that the development contains multiple principal uses, commercial and residential, is just plain wrong. FMC/LDC §20-1203(A)(1)(a) stipulates in part, "(w)hen the principal uses of a development fall within different use categories, each principal use is classified in the applicable category and each use is subject to all applicable regulations for that category." The term "category" is a reference to the Use Category of Table 20-0401 of Article 20-04 of the LDC. Table 20-0401 contains a list of different Use Categories including residential. The Zoning Administrator simply follows the matrix of Table 20-0401 to the corresponding zoning district to determine if said use is a permitted use by right, a conditional use, use subject to specific conditions or a use that is not allowed.

In this particular case, the subject property is zoned Limited Commercial with a Conditional Use Permit that allows for residential uses. By again using the matrix of Table 20-0401 and cross referencing the multiple principal uses (Retail Sales/Service and Residential – Household Living) with the Limited Commercial zoning district you will note that Retail Sales/Service is a use by right and that Residential – Household Living is a conditional use. Since both of these principal uses are permitted under the Limited Commercial zoning district (residential living as conditionally approved), the subject property must adhere to the minimum dimensional standards of the Limited Commercial zoning district and not that of the MR-3 zoning district.

In regards to your contention that the city is not authorized to reduce the number of parking spaces with the use of Conditional Overlay district, you are correct. The reduction in the number of parking spaces was reviewed and approved by the Planning Commission with the use of an Alternative Access Plan as applied via a Conditional Use Permit, which, in accordance with FMC/LDC §20-0909(C), the Planning Commission has final decision authority. On April 9, 2008, the Planning Commission approved an Alternative Access Plan reviewed in accordance with the Conditional Use Permit Review procedures of FMC/LDC §20-0909. This approved Alternative Access plan reduced the number of required off-street parking spaces to a minimum of 33 spacing. Of note, the approved Alternative Access Plan did not require any Off-Site Parking. In other words, FMC/LDC §20-20-0701(E)(4) is not applicable.

3. It is important to note Fargo's Land Development Code was passed by ordinance -- it has the force and effect of law. Under Fargo's Land Development Code, the Off-Street and On-Site parking space requirements were established by way of specific ordinance requirement. FMC Article 20-07; specifically, FMC §20-0701(B). Under FMC § 20-0701(D), "Except as expressly stated in this section [§ 20-0701], all required off-street parking spaces must be located on the same lot as the principal use." An "Alternative Access Plan" does not provide any opportunity to alter the ordinance's on-site parking requirements because of the built-in limitation set forth in FMC § 20-0701(E)(4) which superimposes a higher standard for residential uses [and certain commercial uses];

"Off-site parking may not be used to satisfy the off-street parking standards for residential uses (except for guest parking), restaurants, convenience stores or other convenience-oriented uses. Required parking spaces reserved for persons with disabilities may not be located off-site."

Please be reminded that FMC § 20-0701(A)(3) provides that "(e)xisting parking and loading spaces may not be reduced below the minimum requirements established in this section." The Planning Commission never had the right to reduce the number of parking spaces mandated by ordinance – it only had the ability to change the location where the required number of parking spaces attributable to certain use categories were possibly located under an Alternative Access Plan approved in conformity with FMC § 20-0701(E). Since the number cannot be reduced, there should be at least 78 [40 residential and 38 commercial] parking spaces, and perhaps as many as 103 [40 residential and 63 commercial] parking spaces, provided for in the plans.

In regards to your contention that an "Alternative Access Plan" does not provide any opportunity to alter the ordinance's {FMC/LDC Article 20-07; specifically, FMC/LDC §20-0701(B)} on-site parking requirements because of the built in limitation set forth in FMC/LDC §20-0701(E)(4), you again are simply wrong. Specifically, FMC/LDC §20-0701(E) stipulates that, "(a)n Alternative Access Plan represents a

proposal to meet vehicle parking and transportation access needs by means other than providing parking spaces on-site in accordance with the Off-Street Parking Schedule of Sec. 20-0701-B. Applicants who wish to provide fewer off-street parking spaces than required pursuant to Sec. 20-0701-B must secure approval of an Alternative Access Plan, in accordance with the standards of procedures of this section.”

In this case, the Planning Commission approved a reduction of required number of parking spaces to a minimum of 33 parking spaces; and, in contrast to your repeated suggestion to the contrary - Off-Site Parking was not required. While you may not agree with the Planning Commission decision or that they even had the authority to grant the Alternative Access (which I might add would have been the appropriate time to file an appeal regarding the parking reduction) the Zoning Administrator is obligated to uphold their decision. So in the final analysis regarding compliance with the parking standards of the FMC/LDC, the Zoning Administrator upheld the actions of the Planning Commission and accurately substituted the standards of FMC/LDC §20-0701 for the approved Alternative Access Plan.

4. The City of Fargo is reminded there exists a definite distinction between an ordinance and a resolution of a governing body of a municipality – a resolution is not a law. Mitchell v. City of Parshall, 108 N.W.2d 12, 14-15 (N.D. 1961).

Mini Mart, Inc. v. City of Minot, 347 N.W.2d 131, 137-138 (N.D. 1984) makes clear:

“Section 40-11-09, N.D.C.C., is, in effect, a codification of the general rule that ‘a municipal ordinance cannot be amended or repealed by a mere resolution. To accomplish that result a new ordinance must be passed.’ (authorities cited).”

In the context of the Fargo Planning Commission’s attempt to alter the on-site parking space requirements imposed by way of the City of Fargo’s ordinance – not even the Fargo City Commission could do so by resolution, how could the Fargo Planning Commission hope to do so?

Moreover, a regulation also cannot alter an ordinance’s provisions. Once the City of Fargo decided to make zoning an ordinance rather than a regulation, the City of Fargo lost virtually all “flexibility” – if such is desirable.

In regards to your reminder to the City of Fargo that there exists a definite distinction between an ordinance and a resolution of a governing body of a municipality, I thank you for your acute observation; however, the Planning Commission did not usurp the authority of an existing ordinance with the adoption of the aforementioned Conditional Use Permit (Resolution) to reduce the number of off-street parking spaces required for the subject property. I remind you that FMC/LDC §20-0701(E) is an ordinance of the City of Fargo. This ordinance specifically grants, “(a)pplicants who wish to provide fewer off-street parking spaces than required pursuant to Sec. 20-0701-B...”, the opportunity to “... secure approval of an Alternative Access Plan, in accordance with the standards of this section.” In accordance with FMC/LDC 20-0701(E)(1)(b)(2), “Alternative Access Plans that propose a reduction of more than 25 percent or more than 25 off-street parking spaces require review and action by the Planning Commission, in accordance with the Conditional Use Permit Review procedures of Sec. 20-0909.” In other words, a existing ordinance, adopted by the Fargo Board of City Commission, authorizes the Planning Commission to review and take action to reduce the off-street parking standards of FMC/LDC 20-0701(B)(1). Therefore, the Planning Commission acted within their authority.

5. Further, should you assert that the Fargo City Commission allows you to ignore the ordinance by giving the Planning Commission the discretion to alter the on-site parking requirements, such concept would be unconstitutional. To allow the Planning Commission to perform the legislative function of the Fargo City Commission would be an unconstitutional delegation of legislative power. In re Garrison Diversion Conservancy District, 144 N.W.2d 82, 92 (N.D. 1966). The same situation exists with respect to the role of Building Official – such power cannot legally exist.

As the prior act of the Fargo Planning Commission to ignore the City of Fargo's ordinance was unlawful, it was a *void act*.

This is a legal question that will need to be addressed by the City Attorney's Office.

6. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to setbacks:

OPTION #1: Limited Commercial with a residential density allowed even greater than MR-3 [using Residential District Standards].

- A. The building to be constructed does not have adequate sideyards. The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate the existence of an Interior Side Minimum Setback of 10 feet. Less than 5 feet exists under the plans presented to the building official.
- B. The building to be constructed does not have adequate front yards. The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate the existence of an Front Minimum Setback of 25 feet. The plans presented to the building official would appear to only provide 20 feet.

- C. The building to be constructed is too large for the lot(s). The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate a Maximum Building Coverage of 35%. The plans presented to the building official would appear to approximate 44%.
- D. The building to be constructed is too large for the lot(s). The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate Minimum Open Space of 35%. The plans presented to the building official would appear to approximate less than 10%, if any qualifies. Under FMC § 20-1202(43), no part of any road, parking area, driveway, or other area intended for vehicular travel can be considered as Open Space. See also, FMC § 20-0504(F).

OPTION #2: Limited Commercial with a residential density allowed even greater than MR-3 [using only Nonresidential District Standards – see discussion starting at #8 below].

- A. The building to be constructed does not have adequate sideyards. The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for LC under FMC § 20-0502 mandate the existence of an Interior Side Minimum Setback of 5 feet. Less than 5 feet exists under the plans presented to the building official.

In regards to your contention that the building official should not have issued a building permit due to the fact that the Dimensional Standards for MR-3 under FMC/LDC §20-0501 are not met, I must remind you that the subject property is not zoned MR-3 but rather is zoned Limited Commercial with a Conditional Use Permit that allows residential living. Any improvements to the subject property must adhere to the minimum dimensional standards of the Limited Commercial zoning district because that is the applicable zoning district.

- 7. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Setback Averaging standards of FMC § 20-0504(D)(2). No attempt to secure a waiver from the Board of Adjustment was attempted, nor was the "greater front setback" standard utilized.

In regards to your contention that the building official should not have issued a building permit due to the fact that no attempt was made to secure a waiver from the Board of Adjustment relating to the Setback Averaging standards of FMC/LDC §20-0504(D), I can only respond by stating that the applicant never applied for Setback Averaging nor requested that the review by the City of the setbacks of the project be based on Setback Averaging. Furthermore, the Zoning Administrator never reviewed the site plan based on Setback Averaging. Therefore, I contend your argument about Setback Averaging is moot.

8. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 10 feet for all Off-Street Parking Spaces.
9. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 10 feet for all Driveways.
10. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 15 feet for all Principal Buildings.
11. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 20 feet for all Dumpsters. FMC § 20-0704(C) also required complete screening. The original trash site seems to have now disappeared in later plans.
12. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704(E). The landscape buffer has either a minimum width of 10 feet [with plants in addition to the Open Space plant requirements], or a minimum of 20 feet [with other plant standards]. Neither standard has been met, and, in addition, FMC § 20-0704(E)(4) prohibits such 10 foot or 20 foot landscape buffer from having any parking area or physical land improvement such as a driveway.

Even the Planning Department recognized that the Parking Lot buffer was a "Minimum Required: 20' (Width) (and a) Planting Requirement() (of) 1 medium tree/25 linear ft." Contrary to the assertion of the Planning Department's reviewer, the developer's actual proposed parking was not only adjacent to the right of way, but actually on the right of way existing in favor of Mr. Rakowski – not supposedly possible.

In regards to your contention that the building official should not have issued a building permit due to the fact that the Residential Protection Standards of FMC/LDC §20-0704 were not adhered with, I must point out the fact that Residential Protection Standards are not applicable in this case. FMC/LDC §20-0704(A)(2) stipulates that Residential Protection Standards apply to, "a. All multi-dwelling development when such development occurs on a site located within 150 feet of any SR or MHP zoning districts; and b. All nonresidential development when such development occurs on a site located within 150 feet of any SR, MR or MHP zoning districts." The nearing SR, MR or MHP zone district to the subject property is over 200 feet away. Therefore, the Residential Protection Standards of FMC/LDC §20-0704 were not applicable.

13. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Parking Lot Perimeter Landscaping set forth in FMC § 20-0705(D). The Buffer Standard setting a Buffer Width of either 4 feet [hedgrows (continuous shrubs)] or 6 feet [Berm with maximum slope of 3:1 + 1 small tree per 25 linear feet] has not been met.

In regards to your contention that the building official should not have issued a building permit due to the fact that Parking Lot Perimeter Landscaping standards of FMC/LDC §20-0705(D) were not met, I must point out that the Parking Lot Perimeter Landscaping standards of FMC/LDC §20-0705(D) are not applicable. In accordance with FMC/LDC §20-0705(D)(3), "(p)arking lot perimeter buffers shall be located between adjacent street rights-of-way and off-street parking areas and all vehicle circulation areas within the front setback...". The subject properties' parking lot is located in the rear yard, the parking lot is not adjacent to street rights-of-way, and there is no vehicle circulation area within the front setback. Therefore, the Parking Lot Perimeter Landscaping standards of FMC/LDC §20-0705(D) are not applicable.

14. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to the actual parking lot spaces included in the design. My 2002 Chevrolet Trailblazer has a width of an approximate 7 feet [mirror to mirror], and with one open door, a width in excess of 10'. The original June, 2008, design submitted only provided for 28 parking spaces having a parking space width of 9' (and various lengths) with zero

perimeter buffer on the west side and only 1' on the east side [and also a trash site], but more recently the blueprints have either eliminated the dimensions of the parking spaces altogether or used a parking space width of 8.5' with zero perimeter buffer on the west side and only 1' on the east side [also with elimination of the trash site]. Some of the photocopying deficiencies come into play with respect to this issue. Mr. Rakowski suggests that such small size should certainly conflict with "accepted construction standards in the industry" for off-street parking and loading areas. FMC § 20-0701(G); FMC § 20-0701(K) mandates a 10' width and a 25' length for loading spaces while FMC § 20-0701(I) mandates a minimum of 8' width and 20 feet length for stacking areas - the proposed length requirements are also inadequate under such standards.

In regards to your contention that the building official should not have issued a building permit due to the fact that the size of the parking spaces provided conflict with "accepted construction standards in the industry" for off-street parking and loading areas, I must point out that the Land Development Code does not specifically address the minimum standards in regards to the length or width of a parking stall. However, the Zoning Administrator did determine that the proposed 8.5 feet wide x 18.5 feet long parking stall was acceptable and within the range of approved parking stall sizes in other projects within the City of Fargo. In accordance with FMC/LDC §20-0701(K), Retail Sales and Service land uses with a gross floor area between 5,000 and 25,000 square feet require one (1) off-street loading space that is at least 10 feet wide and 25 feet long. As a matter of practice, the Zoning Administrator permits the use of the parking drive aisle to also serve as the Off-Street Loading Space.

- A. Photocopy of recorded May 9, 1963, easement favoring Mr. Rakowski. The principal building and the parking lot intrude into the area so as to violate the easement requirements, and also, act to prevent full use of the easement area by Mr. Rakowski. The parking lot curb cannot be within the sideyard under the terms of FMC § 20-0504(D)(1). Dimensional standards have been disregarded in many respects.
- B. Photocopy of a May 22, 2008, letter from the Fargo City Attorney ["I fail to understand your purpose for continuing to insist that a document 'must exist' when it has been freely acknowledge that there is no such written instrument."] indicating the non-existence of any agreement for parking on NDSU's "T" Lot – which had to exist in recordable form prior to any application for a building permit. No building permit application should have even been considered, much less approved. See above.

In regards to the easement of record, the City of Fargo, in accordance with FMC/LDC §20-0106(C) does not enforce private agreements. And, in regards to the "document" that you insist must exist because of the action of the Planning Commission on April 9, 2008 to approve an Alternative Access Plan, which you contend in accordance with FMC/LDC §20-0701(4)(d) must be recorded with the Register of Deeds, the reason this document does not exist and was not recorded with the Register of Deeds is due to the fact the one was never required. The Planning Commission action of April 9, 2008 was for an Alternative Access Plan; however, the plan did not contain a provision for Off-Street Parking. In accordance with FMC/LDC §20-0701(E)(2), the Planning Commission was authorized to consider and approve *any* alternative to providing off-street parking. The Board, based on the information provided, simply reduced the number of required spaces to 33-spaces. No additional off-street parking was required.

Decision of Appeal

In accordance with FMC/LDC§20-0910(E)(4) the Planning Commission or Board of City Commissioners shall consider the appealed Site Plan decision as a new matter without requirement for a public hearing. After considering the matter, the Planning Commission or Board of City Commissioners shall act to approve or deny the original application. The procedure shall be the same as required of the original action before the Zoning Administrator.

CITY OF FARGO
FARGO, NORTH DAKOTA
BUILDING PERMIT

DATE 8/21/2008
PERMIT NO. BL20081741

SPECIAL FLOOD HAZARD FLOOD PROTECTION ELEVATION _____

SPECIAL FLOOD HAZARD PERMITS SHALL BE CONSTRUCTED IN ACCORDANCE TO THE FLOOD PROOFING CODE OF THE CITY OF FARGO.

PERMIT ADDRESS 1430 12 AVE N South Campus Plaza, Phase 2

ADDITION 1640

LEGAL DESCRIPTION

LOT 16 THRU 18 & PT OF VAC ALLEY BLK 14 ADDN# 1640 (Kirkhams 2nd) ADDITIONAL INFO: *7/16/08 COMB/ FR 08-06 01-1640-2000-000, 01-1640-02010-000 & 01-1640-02020-000

TOWNSHIP _____

OWNER	<u>FM CITY DEVELOPMENT LLC</u>	PHONE	<u>7890</u>	VENDOR	<u>34415A</u>
CONTRACTOR	<u>Meridian Commercial Construction, LLC</u>	<u>356-0397</u>	<u>7890</u>	LICENSE#	
ADDITIONAL CONTRACTORS	<u>MAGNUM ELECTRIC</u>	<u>2368753</u>	<u>2850</u>		
	<u>SA Mechanical Inc</u>	<u>281-9100</u>	<u>6858</u>		
	<u>Precision Plumbing, Inc.</u>	<u>701-238-1753</u>	<u>4485</u>		
	<u>NOVA FIRE PROTECTION</u>	<u>282-0268</u>	<u>2243</u>		

ARCHITECT OR DESIGNER David Bauman & Northern Plains
WORK CLASS INM

DESCRIPTION OF WORK

Construct three story multi-use building. Building contains 16 dwelling units on floors 2 & 3 and future commercial use on the main level. Foundation previously permitted. It is the responsibility of the permit holder to verify the existence of any covenants or easements on this property. This permit is for an insulated shell and support facilities only on the first floor. Issuance of this permit shall not imply approval for any future fit-up or use of this building. No interior fit-ups shall take place until plans, reviews and additional permits are approved. All work to comply with all applicable requirements of the City of Fargo including the 2006 Fargo Building Code.

VALUATION \$2,025,000.00 PLAN FEE \$0.00 PERMIT FEE \$8,424.00 TOTAL FEE \$8,424.00
INVESTIGATION FEE \$0.00

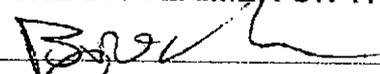
BLDG. SQ. FT. 31581 HEIGHT 42 NUMBER OF STORIES 3 OCCUP. GROUP R-2
WIDTH _____ DEPTH _____ NUMBER OF UNITS 16 OCCUP. LOAD 108

TREATED PLATES	<u>Required</u>	FOUNDATION	<u>Existing</u>
SMOKE DETECTORS	<u>Required</u>	ROOF	<u>Asphalt</u>
WINDOW AREA	<u>Min 8% of GFA</u>	HEATING	_____
EXITS REQUIRED	<u>2</u>	BASEMENT	_____
FIRE SPRINKLERS	<u>NFPA 13</u>	FIREPLACES	<u>NA</u>

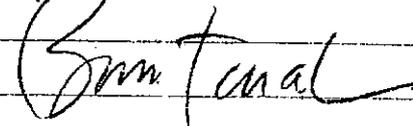
ZONE LC LOT SIZE 24000
FRONT YARD 10 SIDE YARD 5 REAR YARD 15 STREET _____ MAX. LOT COVER 55
Lot Width Front 160 Lot Depth1 150
Lot Width Back 160 Lot Depth2 150 NOTICE

SEPARATE PERMITS ARE REQUIRED FOR ELECTRICAL, PLUMBING, HEATING, AIR CONDITIONING, PARKING LOTS AND SIGNS.

PLEASE BE SURE TO READ THE DISCLAIMER ON THE REVERSE SIDE OF THIS PERMIT.

Signature of Contractor or Authorized Agent  _____ Date _____

Signature of Owner (If owner builder) _____ Date _____

Signature of Issuer  _____ Date 8/21/08

CITY OF FARGO
FARGO, NORTH DAKOTA
BUILDING PERMIT

DATE 8/21/2008
PERMIT NO. BL20081742

SPECIAL FLOOD HAZARD FLOOD PROTECTION ELEVATION _____

SPECIAL FLOOD HAZARD PERMITS SHALL BE CONSTRUCTED IN ACCORDANCE TO THE FLOOD PROOFING CODE OF THE CITY OF FARGO.

PERMIT ADDRESS 1430 12 AVE N South Campus Plaza, Phase 2

ADDITION 1640

LEGAL DESCRIPTION

LOT 16 THRU 18 & PT OF VAC ALLEY BLK 14 ADDN# 1640 (Kirkhams 2nd) ADDITIONAL INFO: *7/16/08 COMB/ FR 08-06 01-1640-2000-000, 01-1640-02010-000 & 01-1640-02020-000

TOWNSHIP _____

OWNER FM CITY DEVELOPMENT LLC PHONE _____ VENDOR 7890 LICENSE# 34415A
CONTRACTOR Meridian Commercial Construction, LLC 356-0397
ADDITIONAL CONTRACTORS _____

ARCHITECT OR DESIGNER David Bauman & Northern Plains
WORK CLASS ICP

DESCRIPTION OF WORK

Construct asphalt parking lot. The parking lot must comply with all provisions as stated in the Land Development approval. Provide accessible parking spaces along with required signage. All work to comply with all applicable requirements of the City of Fargo and the 2006 Fargo Building Codes.

VALUATION \$70,000.00 PLAN FEE \$0.00 PERMIT FEE \$574.00 TOTAL FEE \$574.00
INVESTIGATION FEE \$0.00

BLDG. SQ. FT. _____ HEIGHT _____ NUMBER OF STORIES _____ OCCUP. GROUP R-2
WIDTH _____ DEPTH _____ NUMBER OF UNITS _____ OCCUP. LOAD _____
TYPE CONSTRUCTION VB

TREATED PLATES _____ FOUNDATION _____
SMOKE DETECTORS _____ ROOF _____
WINDOW AREA _____ HEATING _____
EXITS REQUIRED _____ BASEMENT _____
FIRE SPRINKLERS NEPA 13 FIREPLACES _____

ZONE LC LOT SIZE 24000
FRONT YARD 10 SIDE YARD 5 REAR YARD 15 STREET _____ MAX. LOT COVER 55
Lot Width Front 160 Lot Depth1 150
Lot Width Back 160 Lot Depth2 150 NOTICE

SEPARATE PERMITS ARE REQUIRED FOR ELECTRICAL, PLUMBING, HEATING, AIR CONDITIONING, PARKING LOTS AND SIGNS.

PLEASE BE SURE TO READ THE DISCLAIMER ON THE REVERSE SIDE OF THIS PERMIT.

Signature of Contractor or Authorized Agent [Signature] Date 8-25-08

Signature of Owner (If owner builder) _____ Date _____

Signature of Issuer [Signature] Date 8/21/08

BEFORE THE FARGO CITY COMMISSION

William F. Rakowski,

Adjacent Landowner,

vs.

NOTICE OF APPEAL

City of Fargo, Inspections Department and/or
FM City Development, LLC,

Building Permit Holder & Issuer.

William F. Rakowski has previously filed a Notice of Appeal(s) [all of which are hereby incorporated by reference] from the various decisions of the Board of Adjustment or the Planning Commission, and William F. Rakowski hereby appeals from the Planning Commission's void and invalid decision of February 11, 2009, denying his appeal arising out of an earlier determination that the Planning Commission had jurisdiction because the City of Fargo's planning staff believed William F. Rakowski was appealing from an approval of a site plan review performed by other planning staff – Mr. Rakowski had never filed such an appeal [a site plan review was not mandatory under the City of Fargo's ordinances].

Mr. Rakowski is merely following through with the City Commission's earlier mandate that he appeal through the Planning Commission [which has been appealed to the District Court of Cass County, North Dakota].

The City Commission should be aware that the underlying process has disclosed multiple violations of Fargo's Land Development Code – all of which have been also ignored for reasons never explained. As part of this appeal, Mr. Rakowski will identify two (2) instances of disregard for the City of Fargo's Land Development Code:

1. The City of Fargo ignored its higher Residential Protection Standards arising out of “nonresidential development, whether public or private”. FMC § 20-0704(A)(1). These standards apply to “(a)ll nonresidential development when such development occurs on a site located within 150 feet of any SR, MR or MHP zoning districts.” The actual commercial/residential building has multiple residential uses [sixteen (16) three (3) bedroom residential apartments] established on the second and third floor. Certainly such multiple residence structures are within 150 feet of the nonresidential development on the first floor used commercial. Moreover, exactly 50 feet away to the east there exists other multiple residential uses previously zoned by the City of Fargo which is being ignored. My February 5, 2009, “POSITION OF RAKOWSKI” is attached hereto, and incorporated by reference.
2. Planning Staff’s presentation of February 11, 2009, involved 10-15 minutes of presentation and explanation concerning the landscaping requirements of the Land Development Code – including a schematic drawing disclosing the actual presence of three (3) large trees on the berm of the 160’ lot facing 12th Avenue North. These three large trees were identified as requirements to meet the mandatory standard of one (1) tree for each fifty (50) linear feet – but there is no obligation to round-up to the fourth (4th) tree [due to the extra ten (10’) feet of front lot]. Mr. Rakowski suggested that the fourth (4th) tree could be, and should be included; he suggested a weeping willow because the present circumstances were so sad. Unfortunately for the City of Fargo’s planning staff, the trees supposedly in existence that were required to meet site plan requirements – do not exist. I have attached pictures

taken on February 20, 2009, showing the presence of only one (1) large tree, one (1) small tree, and one (1) telephone pole that used to be a tree but no longer qualifies – the site plan should have failed for want of a tree. See specifically, FMC § 20-0902 as the applicant did not meet its burden, in this respect and in others.

An appeal of an administrative decision [in this case the Building Official] is authorized, and controlled by FMC § 20-0916. Theoretically, the appeal from the Planning Commission's decision to deny the appeal of Mr. Rakowski would also be controlled by FMC § 20-0916, but nothing within the ordinance provides for an appeal from the Planning Commission's decision [probably because they never should have been involved in an appeal of an administrative decision in the first place].

Hence, Mr. Rakowski appeals to the Board of City Commissioners under FMC § 20-0801 and/or FMC § 20-0901, and any others that exist. Mr. Rakowski still asserts that only the Board of Adjustment had jurisdiction in the appeal from the action of the Building Official, and then on to the City Commissioners. FMC § 20-0916.

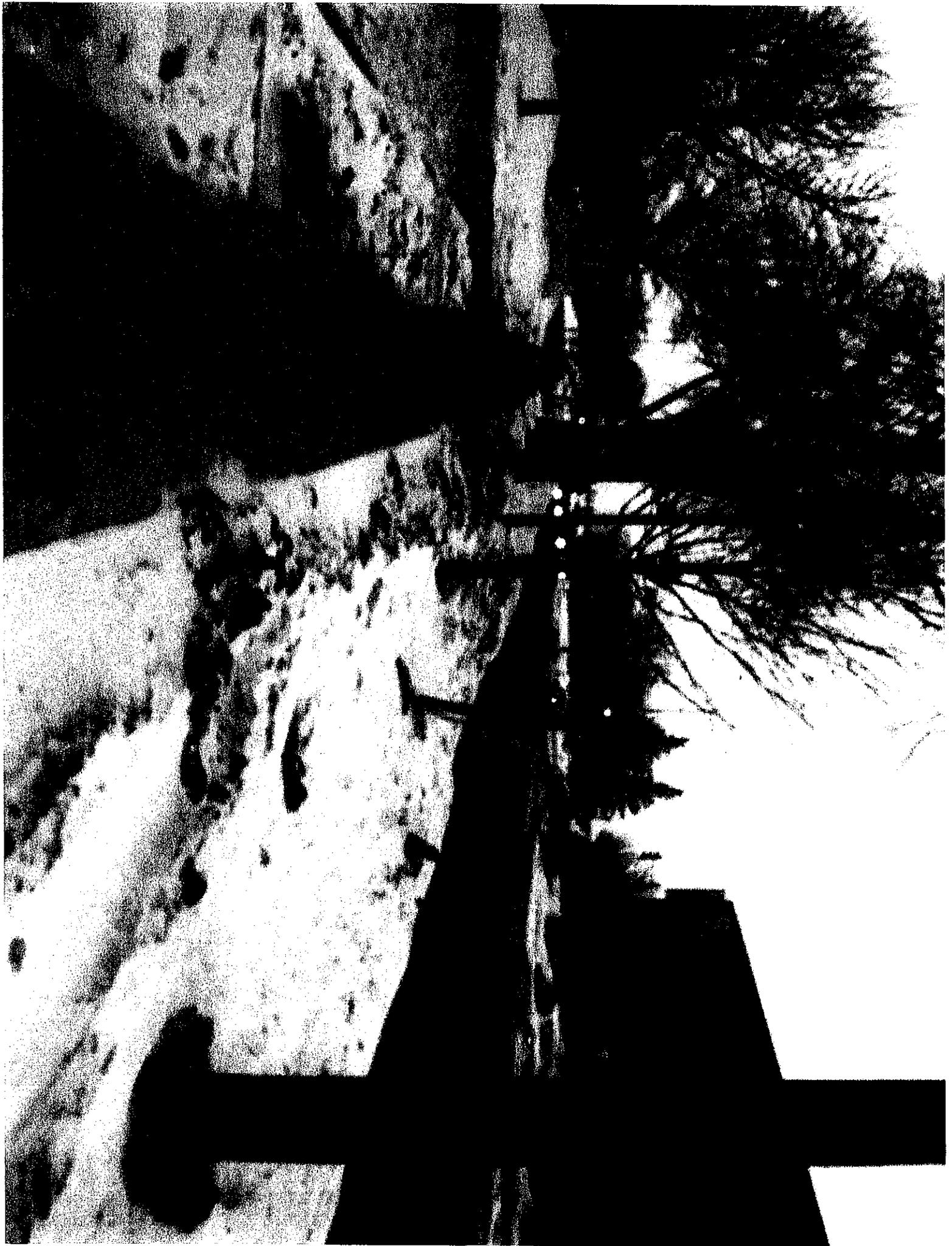
Dated this 20th day of February, 2009.

GARAAS LAW FIRM.



Jonathan T. Garaas
Attorneys for Rakowski/landowner
Office and Post Office Address:
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103-3796
Telephone: (701) 293-7211
North Dakota Bar ID#03080









BEFORE THE FARGO PLANNING COMMISSION

William F. Rakowski,

Adjacent Landowner,

vs.

POSITION OF RAKOWSKI

City of Fargo, Inspections Department and/or
FM City Development, LLC,

Building Permit Holder & Issuer.

William F. Rakowski reiterates his long-standing position(s) that (a) an appeal of an administrative decision [in this case the Building Official's administrative decision to issue a building permit] is authorized, and controlled by FMC § 20-0916, (b) the structure proposed to be built never required a Site Plan Review under FMC § 20-0910(A)(1-7), and (c) that the Planning Commission does not have jurisdiction [this process will result in a determination that will be null and void for want of jurisdiction].

It is RAKOWSKI'S intent to briefly respond to a City of Fargo Staff Report "updated 12-03-08" which was provided to attorney Garaas on Monday, December 8, 2008, shortly after 8:00 a.m. by Mr. Hinderaker.

RAKOWSKI'S first responds to the last four (4) sentences of the Staff Report's Analysis of Appeal, which establishes everyone has been duped:

"The Planning Commission action of April 9, 2008 was for an Alternative Access Plan; however, the plan did not contain a provision for Off-Street Parking. In accordance with FMC/LDC §20-0701(E)(2), the Planning

Commission was authorized to consider and approve *any* alternative to providing off-street parking. The Board, based on the information provided, simply reduced the number of required spaces to 33-spaces. No additional off-street parking was required.”

RAKOWSKI concedes that the Planning Commission can “consider” any Alternative Access Plan, but it cannot “approve” any Alternative Access Plan that seeks to provide the 40 required residential “off-street” parking spaces any place other than “on-site”. The Fargo Planning Commission has no right to “reduce() the number of required spaces to 33-spaces” because the Off-Street Parking Schedules set forth in FMC § 20-0701(B) [“the minimum off-street parking requirement for each use category defined in this Land Development Code”] are fixed by law.

In the quoted Staff Report [citing as its authority, FMC/LDC §20-0701(E)(2)], the word “*any*” is italicized — just as it is italicized in the Land Development Code. The Staff Report epitomizes the error of taking something out of context. The **actual context of the cited ordinance** [having the force and effect of law until changed by proper action of the Fargo City Commission] is as follows:

“A number of specific access alternatives are described in this subsection. Decision-makers are, however, authorized to consider and approve *any* alternative to providing off-street parking spaces on the site of the subject development if the applicant demonstrates to the satisfaction of the decision-making body that the proposed plan will do at least as good of a job protecting surrounding neighborhoods, maintaining traffic circulation patterns and promoting quality urban design than would strict compliance with otherwise applicable off-street parking standards.”

As is clear by the actual words of this ordinance, the Alternative Access Plan does not authorize reduction of the number of parking spaces, merely the location – it need not be “on

the site of the subject development if the applicant demonstrates to the satisfaction of the decision-making body that the proposed plan will do at least as good of a job when judged against three (3) separate standards set forth in the law. RAKOWSKI concedes under certain circumstances the Off-Street parking spaces can be satisfied “off-site” – but never any required Off-Street parking spaces resulting from residential uses. FMC § 20-0701(E)(4)(a) specifically prohibits approval of certain “off-site” parking:

“4. Off-Site Parking

Off-street parking spaces may be located on a separate lot from the lot on which the principal use is located if approved as part of an Alternative Access Plan and if the off-site parking complies with the all (sic) of following standards.

a. Ineligible Activities

Off-site parking may not be used to satisfy the off-street parking standards for residential uses (except for guest parking), restaurants, convenience stores or other convenience-oriented uses. Required parking spaces reserved for persons with disabilities may not be located off-site.”

When City Staff and a representative of North Dakota State University previously appeared before this body representing that an agreement existed for the use of NDSU’s “T” Lot by tenants and patrons of the structure to be constructed, the undersigned presumed that such representation would not be made unless true. Now we know that no such agreement exists, nor has it ever existed [except for the possibility of NDSU students or teachers residing in the building could possibly rent space in the “T” Lot provided they entered into separate contract with NDSU – not involving developer] . The Building Official is prohibited from issuing a building permit until the recordation of the non-existent agreement [FMC § 20-

0701(E)(4)(d)] which should be impossible. Everyone was duped; for the City Staff to now assert that RAKOWSKI has no appellate rights because everyone was earlier successfully duped should be summarily rejected. No man [or even a municipality] may set up his own fraud or inequity as a ground of action or defense. *Talbot v. Jansen*, 3 U.S. 133, 158 (1795).

RAKOWSKI had the right to rely upon Fargo's ordinances that prohibit issuance of a building permit until complete adherence to the Land Development Code's requirements. The Staff Report inaccurately represents that "appellant contends that Building Permit No. BL20081741 should not have been issued due to insufficient parking." Staff Report of 12-03-08, page 1. RAKOWSKI actually appeals because the required document has not been recorded with the County Recorder as required by law and the Building Official violated his duty.

Lest there be any dispute, FMC § 20-0701 required any Alternative Access Plan using lands "not under the same ownership as the principal use served" to be in the form of a written agreement and "(a)n attested copy of the agreement between the owners of record must be submitted to the Zoning Administrator for recordation on forms made available in the Planning Department." FMC § 20-0701(E)(4)(d). Moreover, the actual "Alternative Access Plan must be submitted in a form established by the Zoning Administrator and made available to the public. At a minimum, such plans must detail the type of alternative proposed and the rationale for such a proposal." FMC § 20-0701(E)(1)(a).

Where is the form containing the proposed Alternative Access Plan, and the required rationale? Why was it not produced as part of this record? The answers to both questions are

provided by Fargo City Attorney in his letter of May 12, 2008, a copy of which is attached. Please note that Fargo City Attorney Erik R. Johnson, in response to RAKOWSKI'S request for public records, has recognized the following with respect to the Alternate Access Plan, which, in the instant case, may now be regarded as a fiction:

RAKOWSKI RECORD REQUEST	CITY ATTORNEY RESPONSE [paraphrased]
<p>1. A written agreement for an off-site parking area in North Dakota State University's "T" Lot which is "attested" to by the "owners of record" of "T" Lot and the "owners of record" of Lots Sixteen (16), Seventeen (17) and Eighteen (18), Block Fourteen (14), Kirkham's 2nd Addition to the City of Fargo. The written agreement is the document required to exist according to FMC § 20-0701(E)(4)(d).</p>	<p>None provided; does not exist.</p>
<p>2. A copy of the Planning Department's form(s) which contain the written agreement referenced in #1 above required to be "submitted to the Zoning Administrator for recordation". The form is the document required to exist according to FMC § 20-0701(E)(4)(d).</p>	<p>None provided; does not exist.</p>
<p>3. A copy of the <i>submitted</i> "Alternative Access Plan" that represents a proposal to meet vehicle parking and transportation access needs by means other than providing parking spaces on-site in accordance with the Off-Street Parking Schedule of Sec. 20-0701-B. The submitted "Alternative Access Plan" is a document required to exist according to FMC § 20-0701(E).</p>	<p>None provided; does not exist.</p>

<p>RAKOWSKI RECORD REQUEST</p>	<p>CITY ATTORNEY RESPONSE [paraphrased]</p>
<p>4. A copy of the “Alternative Access Plan(.)” submitted in the form established by the Zoning Administrator which details “the type of alternative proposed and the rationale for such a proposal.” The submitted “Alternative Access Plan” is a document required to exist according to FMC § 20-0701(E)(1)(a).</p>	<p>None provided; does not exist.</p>
<p>5. As to the copy of the “Alternative Access Plan(.)” submitted in the form established by the Zoning Administrator [referenced in #4 above], please provide a copy of that which was “made available to the public.” The public has a right to such document according to FMC § 20-0701(E)(1)(a), and as part of your response, please provide a copy of the document used to inform the public of the existence of such “Alternative Access Plan(.)”. Please also provide a list of the names of those members of the public that received such “Alternative Access Plan(.)”. The submitted “Alternative Access Plan” is a document required to exist according to FMC § 20-0701(E)(1)(a).</p>	<p>Copy of Notice of Hearing purportedly published does not include any reference an “Alternative Access Plan”, nor does the purported letter to any “Property Owner”.</p>

<p>RAKOWSKI RECORD REQUEST</p>	<p>CITY ATTORNEY RESPONSE [paraphrased]</p>
<p>6. If the Alternative Access Plan proposed a reduction of no more than 25 percent or 25 parking spaces, please provide a copy of any document that identifies the decision of the Zoning Administrator [authorized to review and act on such Alternative Access Plan], and a copy of the “written notice of the request” that was mailed “to all property owners within 150 feet of the subject property at least 10 days before the Zoning Administrator takes action on the plan.” As part of this request, please provide a list of the names of the property owners within 150 feet of the subject property that received such written notice. The documents requested must exist if action by the Zoning Administrator took place according to FMC § 20-0701(E)(1)(b)(1).</p>	<p>N/A</p>
<p>7. If the Alternative Access Plan proposed a reduction of more than 25 percent or more than 25 parking spaces, please provide a copy of any document that identifies the “review and action by the Planning Commission, in accordance with the Conditional Use Permit Review procedures of Sec. 20-0909.” The documents requested must exist if action by the Planning Commission took place according to FMC § 20-0701(E)(1)(b)(2). As part of this request, please provide the following required by FMC § 20-0909:</p>	

<p>RAKOWSKI RECORD REQUEST</p>	<p>CITY ATTORNEY RESPONSE [paraphrased]</p>
<p>(7)A. A copy of the City Planner’s report on the Alternative Access Plan as required by FMC § 20-0909(B).</p> <p>(7)B. A copy of the minutes of the public hearing of the Planning Commission meeting that acted upon the Alternative Access Plan as required by FMC § 20-0909(C). As part of your response to this request for documents, please provide a copy of the Notice given by the Planning Commission as required by FMC § 20-0901(F). Furthermore, please provide copy of the “written notice by first class mail to all owners of the subject property and all property owners within 300 feet of the subject property. The notice shall be deposited in the U.S. mail at least 15 days before the first scheduled public hearing.” As part of this request, please provide a list of the names of the property owners within 300 feet of the subject property that received such written notice. Please provide a copy of the published notice of such hearing, if so published. The documents requested must exist if action by the Planning Commission took place according to FMC § 20-0909(C-E).</p>	<p>7A & 7B. The City of Fargo’s Staff Report of 3/31/08 from Nicole Crutchfield was attached, as were the proposed minutes of the Fargo Planning Commission meeting of April 9, 2008. The Staff Report was not based on developer’s “Application for Conditional Use Permit” or the “Application for Tax Increment Financing” – neither document submitted by the developer referenced an “Alternate Access Plan”. Moreover, (a) the developer erroneously represented that “(a)dditional parking will be in the adjacent ‘T’: Lot.” and (b) the minutes reflect that NDSU’s representative falsely “stated there is a contractual agreement between the applicant and NDSU for parking in the T lot.”</p>

RAKOWSKI RECORD REQUEST	CITY ATTORNEY RESPONSE [paraphrased]
<p>8. In the public presentation last evening, a comment was made about peak hours of parking used by the NDSU commuters. If “Shared Parking” was ever utilized as the basis for the Alternative Access Plan, please provide all documents associated with such application, including the mandatory “shared parking analysis .. that clearly demonstrates the feasibility of shared parking.” All of the required documents, notices, studies, and agreements are set forth in FMC § 20-0701(E)(5). The documents requested must exist if action by the Planning Commission took place according to FMC § 20-0701</p>	<p>Believes no such document exist.</p>

Comments about Site Plan Review

As to the claimed Site Plan Review, please review FMC § 20-0910 which identifies the seven circumstances when “(t)he Site Plan review procedures of this section shall apply ..” None of the seven (7) criteria apply to the proposed structure.

The City of Fargo erroneously asserts that we have appealed from the action of the Zoning Administrator. In fact, there has never been “(a) complete application for Site Plan Review” under FMC § 20-0910 – to this very date. If there had been “(a) complete application for Site Plan Review” it should have been supplied to the Fargo Planning Commission as part of this appeal. The reason that the undersigned can say there never has been “(a) complete application for Site Plan Review” under FMC § 20-0910 – to this very date – is because of the following:

- A. FMC § 20-0910(B) indicates that the “Site Plan Review shall be submitted to the Zoning Administrator **in a form established by the Zoning Administrator**” [emphasis added]. Fargo’s Planning Staff has previously asserted that the document that is relied upon relates to a “Building Permit Application (which) includes a Plan Routing Application that must be submitted to the Building Official at the time of Building Permit application.”

The undersigned is aware that similar language is included in another submitted Staff Report amended "11-26-08" ["A complete application (for a Building Permit) includes a Plan Routing Application (a.k.a., a Site Plan). The Plan Routing Application is then routing (sic) to, among others, the Planning Department. This department then conducts a 'Site Plan' Review for compliance of the LDC – including parking standards." The undersigned is fully aware that Fargo's Land Development Code do not allow the Building Official to perform the functions of the Zoning Administrator. If the Building Official wants input from any municipal department – so be it – the Building Official does not legally have the right to change Fargo's ordinances – it would be an unconstitutional delegation of power as set forth in prior documents.

- B. No fee for a Site Plan Review was paid by the developer, so even if "(a) complete application for Site Plan Review" under FMC § 20-0910 once existed, and has been lost, Fargo's ordinances prohibit the Zoning Administrator from acting – "No application will be processed until the application is complete and the required fee has been paid." FMC § 20-0910(B).
- C. If the Zoning Administrator approved the non-existent document, there would have been a violation of FMC § 20-0910(D) which says "**(a) Site Plan application may not be approved unless the Zoning Administrator finds that the proposed project complies with all applicable provisions of this Land Development Code** and with all adopted plans and policy documents of the City." [emphasis added]. The letter dated November 12, 2008, addressed to Planning Commission Chairman Paulsen is hereby incorporated by reference. Please pay particular attention to the items starting with ¶ 6, on page 4. *The Zoning Administrator, if he acted, acted in complete disregard for the ordinances of the City of Fargo that required significantly larger buffer or landscaping distances due to the approved residential Conditional Use.*

Please be reminded, should the City of Fargo assert that it has now included some of the undersigned's letters, why has it failed to include the responses from City of Fargo representative(s) including a letter from City Attorney Erik R. Johnson writing: "Therefore, in response to your various requests, there is no agreement for off-site parking in existence as would be suggested under either L.D.C. §§ 20-0701.E.4.d or 20-0701.E.5.d - that is undisputed."; May 16, 2008, letter to Garaas, page 3 of 3. Why did the City of Fargo fail to include a letter from Fargo City Attorney Erik R. Johnson dated May 22, 2008, recognizing "it has been freely acknowledged that there is no such written instrument (as required by FMC § 20-0701(E)(4)(d))."

The non-existence of the required documents preclude the Building Official from issuing a Building Permit. The Zoning Administrator, purporting to act with respect to a site plan review, is under the same type of prescriptions in that there must be complete adherence to Fargo's law(s). The non-existence of the required documents would also mean that parking requirements [residential off-street parking spaces requirements must be located on-site – no alternate site access agreement can exist for residential and certain commercial parking space requirements] so Fargo's Land Development Code was ignored by its Zoning Administrator. The Zoning Administrator had to know that the Building Official could not issue a Building Permit, nor could either of them waive ordinance requirements imposed by City Commission as law to be enforced uniformly.

Additional Comments to Analysis of Appeal

I have attached a photocopy of the City of Fargo Staff Report with language marked in orange marker with comments (A through FF, inclusive). My brief comments are as follows:

- A. The Staff Report inaccurately paraphrases the RAKOWSKI appeal.
- B. The Staff Report inaccurately paraphrases the RAKOWSKI appeal.
- C. This information is not properly before the Planning Commission.
- D. This information is not properly before the Planning Commission, and it is an inaccurate description of the authority of the City Commission.
- E. This letter was done pursuant to RAKOWSKI'S promise so to do – it does not concede or confer jurisdiction upon the Fargo Planning Commission.
- F. The City of Fargo has not “implemented a Plan Routing system” by ordinance. RAKOWSKI has no appeal from the methodology used by the Building Official in performing his duties – his choice to send materials to the Planning Department or the Fire Department may be commendable, but no appeal will exist in favor of RAKOWSKI [or anyone else] should such non-mandatory gesture take place, nor may the Building Official cause the appellate procedure set by law be changed to the Planning Commission by instituting such routing process. No provision of the Land Development Code suggests the need for, or existence of, a “Plan Routing system” involving the Planning Department.
- G. Who cares why the Building Official created his system seeking information – it is not required by law, nor would RAKOWSKI have an appeal for violation of the non-mandatory process.

- H. See comment G. Moreover, this developer did not submit any Alternate Access Plan, nor a rationale. Nor did this developer submit the Site Plan review application, or fee, as noted above. No work should have been done on a missing or incomplete application.
- I. If a “delegation” has occurred, it would be an illegal delegation of authority. See legal principles previously advanced. Moreover, even if the Building Official did seek outside expertise, the buck still stops on his desk, and RAKOWSKI has an appeal to the Board of Adjustment from his administrative decision.
- J. The various examples set forth cannot change the ordinance making the Building Official responsible for issuance of building permits – but only if in full compliance with the Land Development Code and the building code.
- K. The Staff Report should look further into the ordinance. It actually references the “Use Categories” of FMC § 20-1203 [see, FMC § 20-0401(A) which also provides that “the provisions of Sec. 20-1203 will control”], and any landowner must meet all requirements of each principal use when “the principal uses of a development fall within different use categories. FMC § 20-1203(A)(1)(a). There is no question that both commercial and residential use categories have been advanced for this developer’s structure. “Each” principal use has “applicable regulations for that category” that need to be honored.
- L. This Staff Report comment flies in the face of the Land Development Code. See comments to K. The residential use of the property is a given, and the standards of a residential principal use must be complied with as the more restrictive.
- M. The City of Fargo concedes the law, and then incorrectly states “the city has not reviewed nor approved a Conditional Overlay regarding the subject property.” Nicole Crutchfield’s Staff Report of 3/31/08 claims otherwise – the Existing Zoning is “LC, Limited Commercial with Overlay”. Even the Renewal Plan Tax Increment Financing District No. 2008-01 dated March 31, 2008, submitted to the Fargo City Commission by Planning Director Jim Gilmour recognizes “(t)he property is zoned LC, Limited Commercial with a Conditional Overlay.” See, Subsection 1.4, Description of TIF District.
- N. The Staff Report inaccurately sets forth the law – a Conditional Use Permit is not the method for approval of an Alternative Access Plan. The ordinance merely says that the same procedures be followed. FMC § 20-0701(E)(1)(b)(2). The procedures of FMC § 20-0909 would include an application, payment of a fee, review by the City Planner, preparation of a report, a public hearing, with public

notice [written notice and newspaper notice], and a decision. No where is it said that the Planning Commission can issue a Conditional Use Permit for the number of parking spaces.

O. No Alternate Access Plan was ever presented, nor the rationale. How could it be approved if not in existence? Fargo's Land Development Code required the on-site parking – no one yet has the authority to waive the ordinance's requirements. See, RAKOWSKI'S response to the last four (4) sentences of the Staff Report's Analysis of Appeal, which establishes everyone has been duped.

P. See comments to O.

Q. What the law establishes as to number and location of parking spaces, let no man put asunder – particularly when the law says it is impossible to make the mandatory parking spaces “off-site” for residential, and certain commercial, uses.

R&S. See comments to O, P, and Q, among others.

T. The “Sergeant Schultz defense” does not apply; the Zoning Administrator has no right, nor duty, to uphold an illegal act, nor a null and void action by another.

U. The Staff Report forgets the limitation – no off-site parking spaces can be used to satisfy residential parking requirements, and also, certain commercial parking requirements. The word “alternative” suggests “offering a choice”, but in this case the law says that choice is somewhat limited – any residential parking spaces must still be on-site. FMC § 20-0701(E)(4)(a). The Planning Commission had to act without authority – it cannot change the ordinances for the legal reasons advanced.

V. We are still waiting for the City Attorney to address the legal issue – the answer was due in November, 2008, under the agreement to provide a response to those issues raised by RAKOWSKI.

W. Omitted by error of Garaas.

X. See comments to R&S.

Y. The developer's failure to honor Fargo's Land Development Code, and the Zoning Administrator's failure to do his job of ensuring proper setback does not make the argument moot – it makes it certain that error was committed.

- Z. Staff Report forgets that developer's first phase – a mere 50 feet away – allows for multi-residential use. All of the setbacks relating to Residential Protection Standards of FMC § 20-0704 apply – non-compliance means someone did not do their job to protect RAKOWSKI.
- AA. FMC § 20-0705(D)(1), in the ordinance entitled “Parking Lot Perimeter Landscaping”, clearly states its applicability: “All off-street parking areas shall be subject to the Parking Lot Perimeter Landscaping standards of this subsection. . .” I assume “all” means “all”, even under Fargo’s use of language.
- BB. The Staff Report asserts that FMC § 20-0705(D)(3) somehow excuses non-compliance. The Staff Report is erroneous. There exists no access to the developer’s parking lot except by way of the right of way created by easement in favor of one (1) of three (3) lots owned by the developer – over RAKOWSKI’S land. There is no right of access to NDSU’s “T” Lot, or the other adjacent land owned by North Dakota. The City of Fargo has prohibited access to the parking lot from 12th Avenue. RAKOWSKI’S land is the only right of way that exists, and it should be used as the line for measurement under this subsection. There is also an obligation for the buffer between “off-street parking areas and all vehicular circulation areas within the front setback” – RAKOWSKI’s off-street parking areas should also be considered to force the creation of the buffer at the correct width. None of the buffer can be traveled upon, so the building has been inappropriately placed. Please keep in mind, this buffer requiring plants only is in addition to the necessary landscaping. FMC § 20-0705(D)(2)
- CC &
- DD. The Staff Report is erroneous. Fargo’s Land Development Code does establish minimum standards in regard to the length or width of a parking stall when used for loading or stacking. FMC § 20-0705(I) & (K). The standard cited by RAKOWSKI applies to the size of parking spaces, and if, as suggested by the Staff Report that “the Zoning Administrator permits the use of the parking drive aisle to also serve as the Off-Street Loading Space”, then the Zoning Administrator violates Fargo’s law and usurps the authority of the City Engineer. FMC § 20-0705(K).
- EE. The Staff Report errs in not looking at the sentence immediately before the referenced portion of FMC § 20-0106(C). While the ordinance provides “(t)he City does not enforce private agreements or maintain a record of such agreements,” the sentence immediately prior states, “If the provisions of a valid, enforceable private agreement impose a greater restriction than this Land

Development Code, the provisions of the private agreement will control.” Even the City of Fargo has to respect property rights of RAKOWSKI in the east 5 feet which will be compelled to be set aside for access rights under the valid, recorded easement.

FF. If the Board is misinformed, or uninformed [“The Board, based on the information provided ..”], its obligations to follow the law do not diminish. Moreover, the Board had no right to “simply reduce() the number of required spaces to 33-spaces.” Only the City Commission can change the ordinance in accordance with due process of law. Even if an Alternative Access Plan is capable of being approved, the Planning Commission could not allow less than 40 residential parking spaces “on-site” [and additional parking spaces for special types of commercial use which must be located “on-site”]. See all prior discussions.

RAKOWSKI continues to assert that only the Board of Adjustment has jurisdiction in the appeal from the action of the Building Official. FMC § 20-0916.

Dated this 5th day of February, 2009.

GARAAS LAW FIRM



Jonathan T. Garaas
Attorneys for Rakowski/landowner
Office and Post Office Address:
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103-3796
Telephone: (701) 293-7211
North Dakota Bar ID#03080

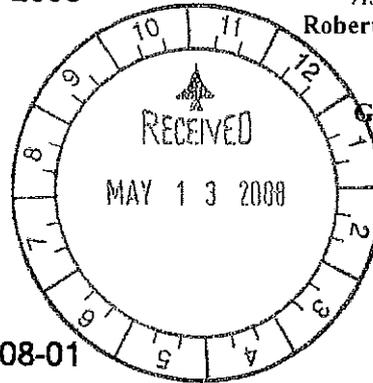


Office of the City Attorney

May 12, 2008

City Attorney
Erik R. Johnson
Assistant City Attorney
Robert L. "Butch" McConn, Jr.

City Prosecutors
Gordon A. Dexheimer
Scott O. Diamond



Jonathan Garaas
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
Fargo, ND 58103-3796

Re: **May 5 Agenda Item #4(b) - TIF District 2008-01**
Your client: **Rakowski**

Dear Mr. Garaas:

This letter is in response to yours of May 6, 2008 addressed to the Fargo City Commission. As of my preparation of this letter the City Commissioners have not called a special meeting as you request. The Planning Department has; however, prepared copies of the documents that you requested in the event the action was not "...immediately nullified by such special meeting process. ..." This letter is in response to your request for such records, listed item for item, below:

YOUR REQUEST : 1. A written agreement for an off-site parking area in North Dakota State University's "T" Lot which is "attested" to by the "owners of record" of "T" Lot and the "owners of record" of Lots Sixteen (16), Seventeen (17) and Eighteen (18), Block Fourteen (14), Kirkham's 2nd Addition to the City of Fargo. **The written agreement is the document required to exist according to FMC § 20-0701(E)(4)(d).**

RESPONSE:

Enclosed herewith is a letter from Andrew Noah to Rick Johnson, General Counsel, enclosing a copy of a Construction Easement and Permit Agreement dated August 15, 2007 between FM City Development, LLC and North Dakota State University. This agreement pertains, more particularly, to Lots 12, 13 and 14, and that part of the vacated alley adjacent thereto, in Block 14, Kirkham's 2nd Addition to the City of Fargo; but it is an agreement between NDSU and the owner of Lots 16, 17 and 18.

YOUR REQUEST: 2. A copy of the Planning Department's form(s) which contain the written agreement referenced in #1 above required to be "submitted to the Zoning Administrator for recordation". **The form is the document required to exist according to FMC § 20-0701(E)(4)(d).**

RESPONSE:

The Application for Conditional Use Permit is enclosed herewith. [The Application for Conditional Use Permit did not contain the written agreement referenced in #1 above, but is submitted herewith nonetheless.] Please note that the Application for Conditional Use Permit incorporated by reference an Application for Tax Increment Financing. Enclosed with the Application for Conditional Use Permit is the Application for Tax Increment Financing; however, the enclosed copy does not include certain proprietary, commercial and financial information that was submitted as part of the TIF process but is exempt from public disclosure pursuant to N.D.C.C. § 44-04-18.4.

YOUR REQUEST: 3. A copy of the *submitted* "Alternative Access Plan" that represents a proposal to meet vehicle parking and transportation access needs by means other than providing parking spaces on-site in accordance with the Off-Street Parking Schedule of Sec. 20-0701-B. **The submitted "Alternative Access Plan" is a document required to exist according to FMC § 20-0701(E).**

RESPONSE:

See response to item 2, above.

YOUR REQUEST: 4. A copy of the "Alternative Access Plan(.)" submitted in the form established by the Zoning Administrator which details "the type of alternative proposed and the rationale for such a proposal." **The submitted "Alternative Access Plan" is a document required to exist according to FMC § 20-0701(E)(1)(a).**

RESPONSE:

See response to item 2, above.

YOUR REQUEST: 5. As to the copy of the "Alternative Access Plan(.)" submitted in the form established by the Zoning Administrator [referenced in #4 above], please provide a copy of that which was "made available to the public." The public has a

right to such document according to FMC § 20-0701(E)(1)(a), and as part of your response, please provide a copy of the document used to inform the public of the existence of such "Alternative Access Plan(.)". Please also provide a list of the names of those members of the public that received such "Alternative Access Plan(.)". **The submitted "Alternative Access Plan" is a document required to exist according to FMC § 20-0701(E)(1)(a).**

RESPONSE:

Enclosed is the Notice of Hearing that was published in the Forum on March 24 and March 31, 2008. The enclosure also includes the mailing list reflecting the individuals and addresses that received the Notice of Hearing. Also enclosed is the City of Fargo's staff report for the Planning Commission public hearing held in April, 2008.

YOUR REQUEST: 6. If the Alternative Access Plan proposed a reduction of no more than 25 percent or 25 parking spaces, please provide a copy of any document that identifies the decision of the Zoning Administrator [authorized to review and act on such Alternative Access Plan], and a copy of the "written notice of the request" that was mailed "to all property owners within 150 feet of the subject property at least 10 days before the Zoning Administrator takes action on the plan." As part of this request, please provide a list of the names of the property owners within 150 feet of the subject property that received such written notice. **The documents requested must exist if action by the Zoning Administrator took place according to FMC § 20-0701(E)(1)(b)(1).**

RESPONSE:

The proposed reduction was of more than 25 percent or more than 25 parking spaces - therefore N/A.

YOUR REQUEST: 7. If the Alternative Access Plan proposed a reduction of more than 25 percent or more than 25 parking spaces, please provide a copy of any document that identified the "review and action by the Planning Commission, in accordance with the Conditional Use Permit Review procedures of Sec. 20-0909." **The documents requested must exist if action by the Planning Commission took place according to FMC § 20-0701(E)(1)(b)(2).** As part of this request, please provide the following required by FMC § 20-0909:

- A. A copy of the City Planner's report on the Alternative Access Plan as required by FMC § 20-0909(B).
- B. A copy of the minutes of the public hearing of the Planning Commission meeting that acted upon the Alternative Access Plan as required by FMC § 20-0909(C). As part of your response to this request for documents, please provide a copy of the Notice given by the Planning Commission as required by FMC § 20-0901(F). Furthermore, please provide copy of the "written notice by first class mail to all owners of the subject property and all property owners within 300 feet of the subject property. The notice shall be deposited in the U.S. mail at least 15 days before the first scheduled public hearing ." As part of this request, please provide a list of the names of the property owners within 300 feet of the subject property that received such written notice. Please provide a copy of the published notice of such hearing, if so published. The documents requested must exist if action by the Planning Commission took place according to FMC § 20-0909(C-E).

RESPONSE TO A:

See response to item 5, above.

RESPONSE TO B:

See response to item 5, above. In addition, draft copies of the minutes of the Planning Commission (neither minutes have been approved as of today's date) are enclosed. When the City Commission meeting draft minutes are prepared, I will supplement this response with a copy of those minutes.

YOUR REQUEST: 8. In the public presentation last evening, a comment was made about peak hours of parking used by the NDSU commuters. If "Shared Parking" was ever utilized as the basis for the Alternative Access Plan, please provide all documents associated with such application, including the mandatory "shared parking analysis ... that clearly demonstrates the feasibility of shared parking." All of the required documents, notices, studies, and agreements are set forth in FMC § 20-0701(E)(5). **The documents requested must exist if action by the Planning Commission took place according to FMC § 20-0701(E)(5).**

RESPONSE:

It's unclear what documents you are requesting in this item 8; however, the undersigned believes there are no documents that respond to your request.

Also, for your information, enclosed herewith is a copy of the Conditional Use Permit that was granted by the Fargo Planning Commission and was recorded April 18, 2008 as Document 1231650. Also enclosed is a site plan prepared by Northern Plains Design reflecting the proposed building and proposed parking spaces on site.

The cost for this document disclosure is \$9.75 (39 x \$.25/page). Please make a check payable to the City of Fargo and remit to the address below. I will see that it is submitted to our Auditor's office.

Sincerely,



Erik R. Johnson

ERJ/jmf
Enclosures

NILLES LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW

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• Also Licensed in South Dakota
+ Also Licensed in Montana

oLicensed in California and New Hampshire Only

September 25, 2007

Rick D. Johnson, J.D., LL.M.
General Counsel
PO Box 5011
North Dakota State University
Fargo, ND 58105

OFFICE OF GENERAL COUNSEL
RECEIVED

OCT 05 2007

NDSU

RE: FM City Development, LLC/NDSU
Our file no. 06-494.001

Dear Rick:

Enclosed is a copy of the Construction Easement and Permit Agreement between NDSU and FM City Development, LLC dated August 15, 2007, recorded August 31, 2007, as document no. 1212792.

Sincerely,



Andrew L.B. Noah
ALBN/tw
Enc.

cc: Roger Gilbertson (w/ copy of enc.)

1



COPY

CONSTRUCTION EASEMENT AND PERMIT AGREEMENT

THIS AGREEMENT is entered into this 15th day of August, 2007, between THE STATE OF NORTH DAKOTA and the NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION, for the use and benefit of NORTH DAKOTA STATE UNIVERSITY, whose post office address is P.O. Box 5227, Fargo, North Dakota 58105, herein collectively called "NDSU", and FM CITY DEVELOPMENT, LLC, a North Dakota limited liability company, whose post office address is 901 28th Street South, Fargo, North Dakota 58103, herein called "FM City", and is made upon the following terms and conditions:

WHEREAS, NDSU is the owner of the property described on Exhibit "A" attached hereto (the "NDSU Property"), upon which is located a parking lot as depicted on Exhibit "C" attached hereto; and

WHEREAS, FM City is the owner of the property described on Exhibit "B" attached hereto (the "FM City Property"), upon which a mixed commercial/residential building is to be constructed; and

WHEREAS, FM City desires to have a construction easement for access and ingress/egress and limited overnight storage over a portion of the NDSU Property for the benefit of the FM City Property, and NDSU has agreed to grant such construction easement in accordance with the terms and conditions of this Agreement; and

WHEREAS, FM City desires to have NDSU allow residents of the FM City Property to purchase parking permits for the parking lot located on the NDSU Property, and NDSU has agreed to sell said parking permits in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the covenants, conditions, easement, and license granted herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, the parties agree as follows:

1. EASEMENT AREA. The Easement Area covered by this Agreement includes an area approximately 20' x 150' as depicted on the site map attached hereto as Exhibit "C".
2. CONSTRUCTION EASEMENTS. NDSU does hereby grant and convey to FM City, its agents and contractor, a Temporary Construction Easement for access and ingress/egress and storage over the Easement Area relative to the construction of the initial improvements on the FM City Property. The Temporary Construction Easement granted herein shall terminate on the earlier of: a) the date on which FM City gives NDSU written notice terminating the Temporary Construction Easement; or b) January 31, 2008, unless extended in writing by NDSU. During the term of this easement, FM City, its agents or contractor shall have the right to install and maintain a temporary fence along the perimeter of the Easement Area. In conjunction with the



installation of the temporary fence, NDSU will remove the parking lot barriers along the east side of the Easement Area so that FM City, its agents, and contractor can access the Easement Area from the public street that runs along the east edge of the Easement Area. Any damage to the parking lot from the temporary fencing must be repaired by FM City.

NDSU acknowledges that it is likely that following the construction of the initial improvements on the FM City Property, additional improvements will be constructed on the FM City Property. NDSU does hereby agree to grant FM City additional construction easements over the NDSU Property as mutually agreed upon for any future construction of improvements on the FM City Property or adjacent property that may be developed by FM City, provided FM City is not in default on the terms of any current or previous easement. The storage shall be confined to the far northeast corner of "T" Lot, as depicted on Exhibit "C". FM City shall, after termination of the Temporary Construction Easement, restore the Easement Area to as near its original condition as reasonably possible and remove therefrom all debris, spills, and equipment resulting from or used in connection with FM City's construction and access to the Easement Area.

This will supposedly cover the debris with T but see Exhibit C

3. MAINTENANCE OF EASEMENT AREA. NDSU, at its sole expense, shall keep and maintain the Easement Area in good repair and shall keep the Easement Area well lighted at all times, and free from snow, ice, debris and other obstructions. NDSU shall operate and maintain the Easement Area in compliance with all applicable laws and regulations. Notwithstanding the foregoing, during any time that FM City, its agents, or contractor is using the Easement Area for construction purposes, then FM City, at its sole expense shall maintain (except for lighting) the Easement Area.

4. INDEMNIFICATION. FM City hereby agrees to hold harmless and indemnify NDSU from any and all claims, damages, suits, penalties and liabilities arising out of FM City's use of the Temporary Construction Easement.

5. INSURANCE.
a. FM City shall secure and keep in force during the term of this Agreement and FM City shall require all subcontractors, prior to commencement of an agreement between FM City and the contractor, to secure and keep in force during the term of this Agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence. The amount of any deductible or self-retention is subject to approval by NDSU.
- 2) Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.

- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all areas of operation that apply to the performance of this contract.
- b. The insurance coverages listed above must meet the following additional requirements:
- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of FM City.
 - 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by NDSU. The policies shall be in form and terms approved by NDSU.
 - 3) NDSU will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by FM City in excess of the minimum requirements set forth above. The duty to indemnify NDSU under this Agreement shall not be limited by the insurance required in this Agreement.
 - 4) NDSU and its officers and employees shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as an additional insured. NDSU shall have all the benefits, rights and coverages of an additional insured under these policies.
 - 5) The insurance required in this Agreement, through a policy or endorsement, shall include:
 - a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against NDSU;
 - b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned NDSU representative;
 - c) a provision that any attorney who represents NDSU under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
 - d) a provision that FM City's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by NDSU and that any insurance, self-insurance or self-retention maintained by NDSU shall be in excess of FM City's insurance and shall not contribute with it;
 - e) cross liability/severability of interest for all policies and endorsements;
 - f) The legal defense provided to NDSU under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for NDSU is necessary;
 - g) The insolvency or bankruptcy of the insured FM City shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured FM City from meeting the retention limit under the policy.
 - 6) FM City shall furnish a certificate of insurance to the undersigned NDSU representative prior to commencement of this Agreement. All endorsements shall be provided as soon as practicable.



7) Failure to provide insurance as required in this Agreement is a material breach of contract entitling NDSU to terminate this Agreement immediately.

c. If FM City's insurance carrier cannot provide the insurance requirements listed above, FM City will be required to purchase a project-specific insurance policy on behalf of NDSU including but not limited to an Owner's Protective Liability insurance policy or a Project Management Protective Liability insurance policy with an occurrence limit of not less than \$1,000,000 and an aggregate of \$2,000,000. Said insurance shall be kept in force until the project is accepted by NDSU.

6. AGREEMENT TO PURCHASE PARKING PERMITS. NDSU acknowledges that the building to be constructed on the FM City Property will include 14 three-bedroom apartment units, a significant number of which will likely be leased to NDSU students/faculty/staff. To accommodate these students/faculty/staff and the limited parking available on the FM City Property, NDSU hereby agrees to allow NDSU students/faculty/staff who are residents of the apartment units located on the FM City Property to purchase parking permits for the parking lot located on the NDSU Property, which is currently identified as "T" Lot. This agreement shall be limited to one "T" Lot parking permit per NDSU student/faculty/staff residing on the FM City Property. NDSU acknowledges and agrees that any NDSU student/faculty/staff that resides on the FM City Property shall be entitled to purchase one parking permit for the parking lot located on the NDSU Property, notwithstanding any rules or regulations NDSU may have relative to priority to purchase parking permits for parking lots located on campus, provided, however, that said student/faculty/staff are otherwise in compliance with NDSU parking regulations:

*No Length of
Agreement
so go on
forever!*

NDSU agrees that the size and configuration of the parking lot on the NDSU Property and the ratio of permits sold relative to the available parking spaces on the parking lot shall not be changed in any manner that will materially affect the Agreement.

7. BINDING EFFECT. This Agreement shall be appurtenant to the FM City Property and the NDSU Property and shall inure to the benefit of, and bind the respective successors and assigns of the parties to this Agreement.

8. MODIFICATION. No change or modification of this Agreement shall be valid unless the same be in writing and signed by all of the parties to this Agreement.

9. GOVERNING LAW. The Agreement and all acts and transactions pursuant to or relating hereto, and all rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the State of North Dakota.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

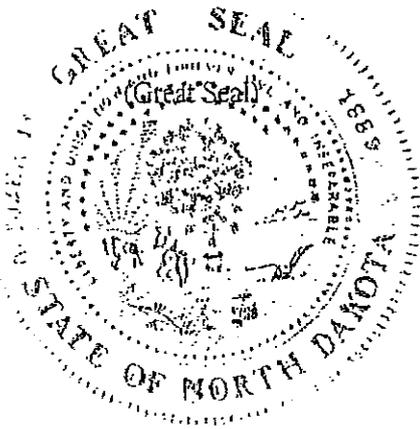


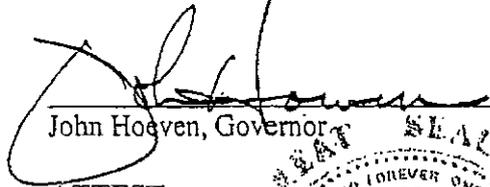
1212792
Page: 5 of 12
08/31/2007 11:38A

HILLES LAW FIRM

EASE 83.00

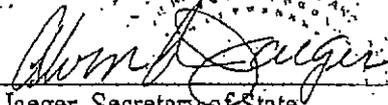
THE STATE OF NORTH DAKOTA





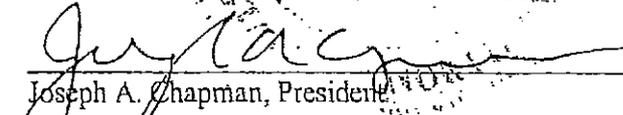
John Hoeven, Governor

ATTEST:



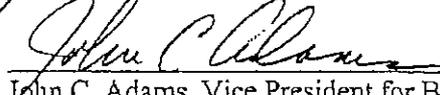
Alvin A. Jaeger, Secretary of State

NORTH DAKOTA STATE UNIVERSITY



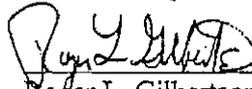
Joseph A. Chapman, President

ATTEST:



John C. Adams, Vice President for Business & Finance

FM CITY DEVELOPMENT, LLC

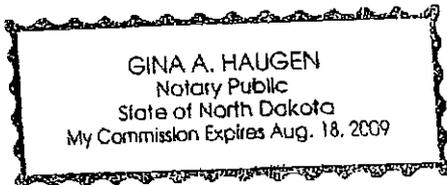


Roger L. Gilbertson, President

STATE OF NORTH DAKOTA

COUNTY OF CASS

The foregoing instrument was executed before me this 16th day of August, 2007, by Joseph A. Chapman, the President ~~for Business and Finance~~ of North Dakota State University, on behalf of the University.





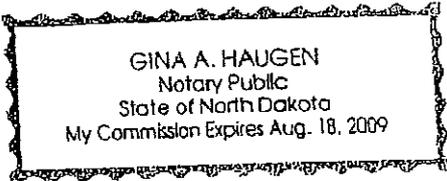
Notary Public
My commission expires August 18, 2009



STATE OF NORTH DAKOTA

COUNTY OF CASS

The foregoing instrument was executed before me this 16th day of August, 2007, by John C. Adams, the Vice President for Business and Finance of North Dakota State University, on behalf of the University.

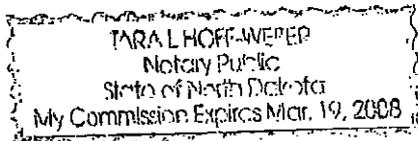


Gina A. Haugen
Notary Public
My commission expires
August 18, 2009

STATE OF NORTH DAKOTA

COUNTY OF CASS

The foregoing instrument was executed before me this 15th day of August, 2007, by Roger L. Gilbertson, the President of FM City Development, LLC, a North Dakota limited liability company, on behalf of the company.



Tara L. Hoff-Weber
Notary Public



1212792
Page: 7 of 12
08/31/2007 11:38A

Exhibit "A"

All of Block 1 and Block 2 and the 20' wide vacated alley between Blocks 1 and 2, all in Barrett's Addition to the City of Fargo, situate in the County of Cass and the State of North Dakota.

And

Lot 1, Block 5, William G. Johnson Addition to the City of Fargo, situate in the County of Cass and the State of North Dakota.

And

All that land dedicated as Cass County Drain #3 located between Blocks 5 and 6 of William G. Johnson Addition to the City of Fargo, situate in the County of Cass and the State of North Dakota.



1212792
Page: 8 of 12
08/31/2007 11:38A

NILLES LAW FIRM

EASE 63.00

Exhibit "B"

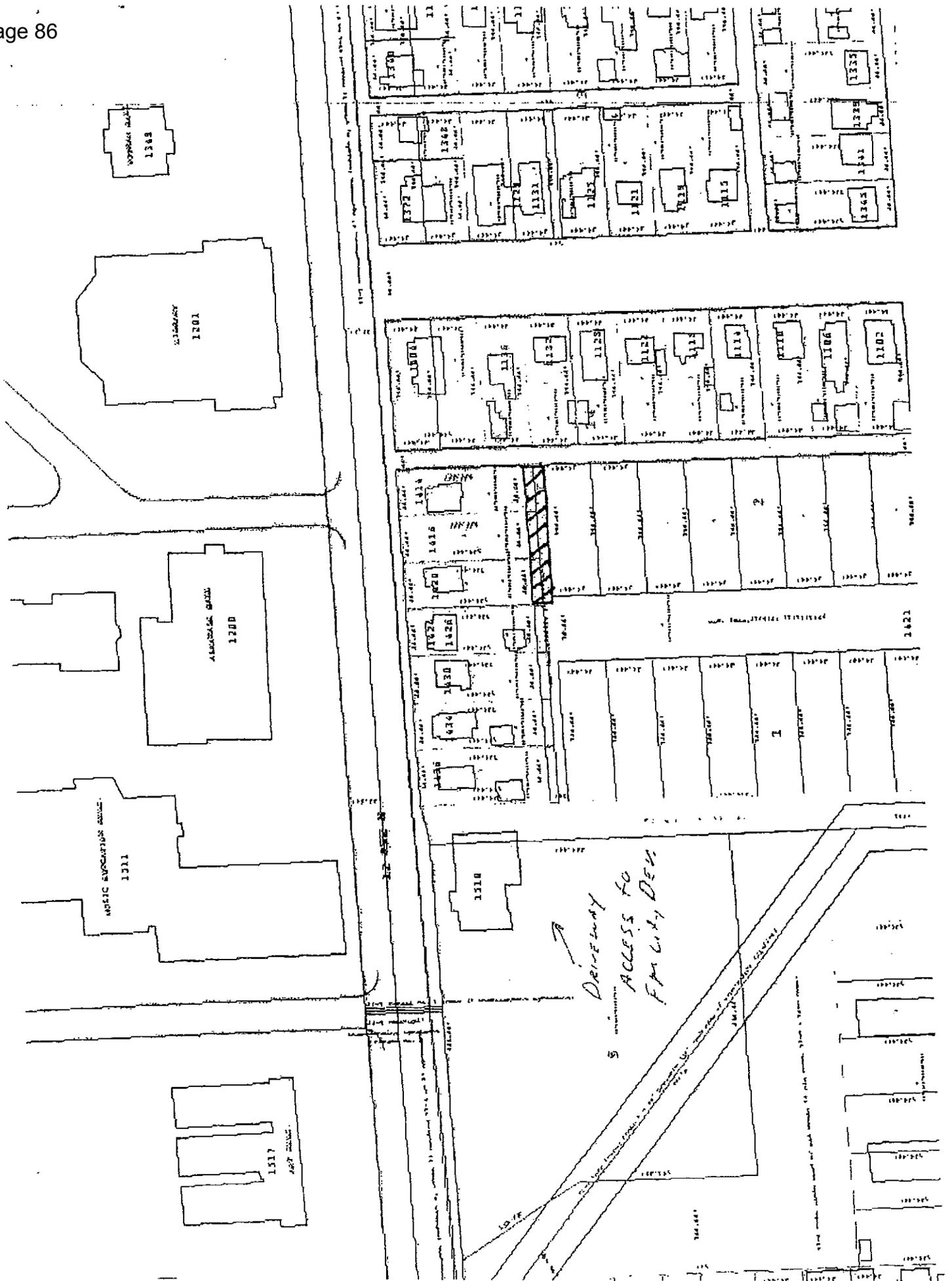
Lots 12, 13, and 14, and that part of the vacated alley adjacent thereto, in Block 14, Kirkham's Second Addition to the City of Fargo, situate in the County of Cass and the State of North Dakota.



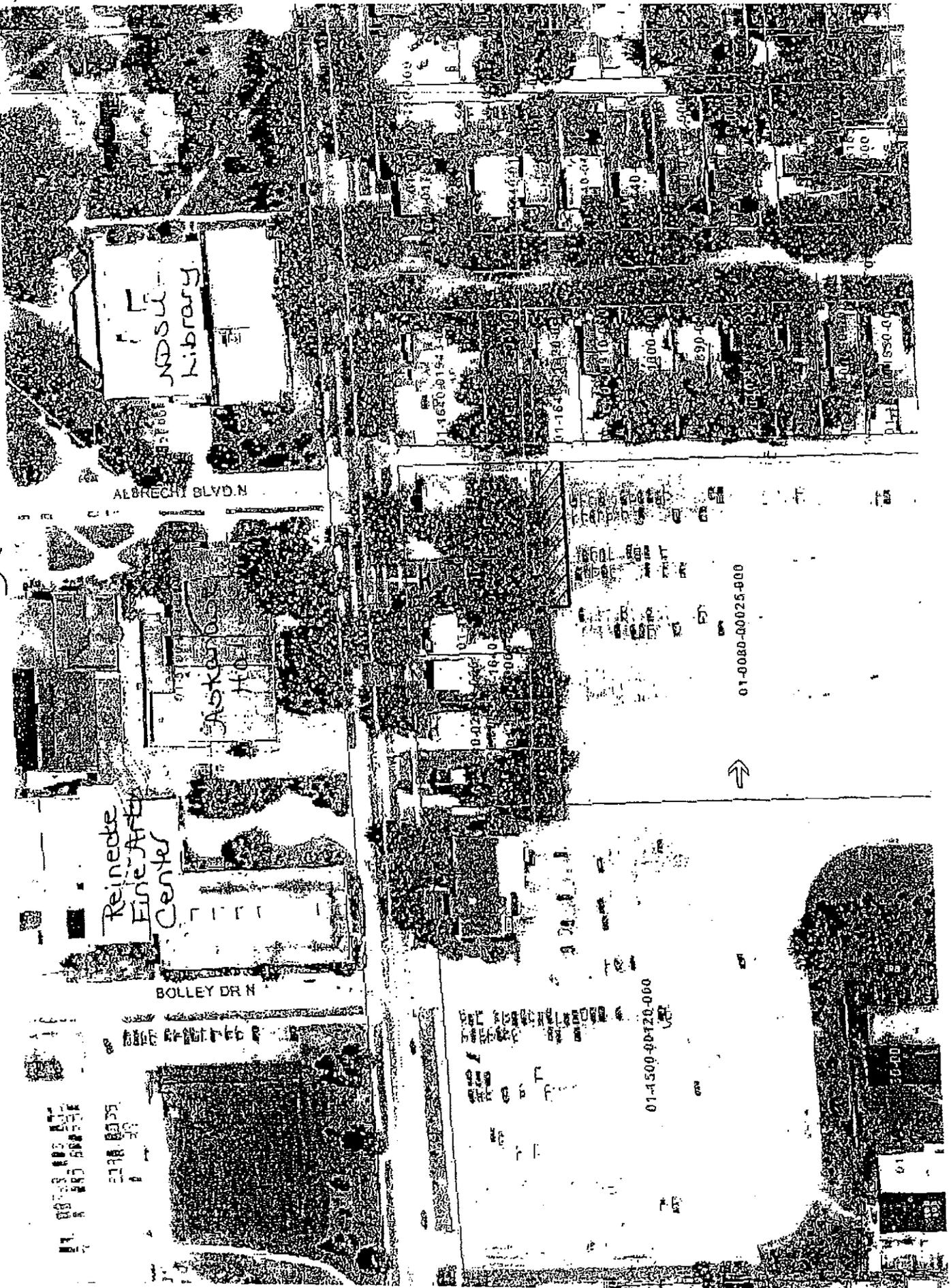
1212792
Page: 9 of 12
08/31/2007 11:38A

Exhibit "C"

[attach site map with easement area marked with cross-hatched lines]



N



NDSU Library

ALBRECHT BLVD. N

Reinolds
Fine Arts
Center

BOLLEY DR. N

Astoria
Hotel

01-1500-00720-060

01-0080-00025-000





1212792
Page: 12 of 12
08/31/2007 11:38A

RECORDER'S OFFICE, CASS COUNTY, ND 08/31/2007 11:38AM
I CERTIFY THAT THIS INSTRUMENT WAS FILED FOR RECORD THIS DATE.
JEWEL A. SPIES, COUNTY RECORDER

by Teresa A. Kelly Dep 1212792



Subject property address: 1430, 1434 and 1436 12th Ave N

Legal description of subject property: Kirkham's 2nd, Lots 16-18
Block 14

Zoning district of subject property (e.g. SR1, MR3, GC): LC

Name of Owner: FM City Development Telephone: _____
701-729-7677

#2

Address 515 Southwood Dr.
Fargo ND 58103

Application is hereby made by the above-named owner of the subject property to the Planning Commission of the City of Fargo for a Conditional Use Permit (by the process set forth in §20-0907 of the Land Development Code). I understand that the Planning Commission may not approve the Conditional Use Permit unless it finds that all of the following criteria have been satisfied:

1. the proposed conditional use complies with all applicable provisions of the land development code and will conform to the general intent and purpose of the land development code;
2. the proposed conditional use at the specified location will contribute to and promote the welfare or convenience of the public;
3. the proposed conditional use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located;
4. the location and size of the conditional use, the nature and intensity of the operation involved in or conducted in connection with it, and the location of the site with respect to streets giving access to it are such that the conditional use will not dominate the immediate neighborhood so as to prevent development and use of neighboring property in accordance with the applicable zoning district regulations. In determining whether the conditional use will dominate the immediate neighborhood, consideration shall be given to:
 - a. The location, nature and height of buildings, structures, walls, and fences on the site; and
 - b. The nature and extent of proposed landscaping and buffering on the site.
5. adequate utility, drainage, and other such necessary facilities and services have been or will be provided at the time of development; and

6. adequate access roads or entrance and exit drives will be provided and be so designed to prevent traffic hazards and to minimize traffic congestion in public streets.

The applicant believes that a Conditional Use Permit should be granted for the following reasons (attach additional pages if necessary):

Please see TIF Application.

Lined area for providing reasons for the Conditional Use Permit.

Please enclose a nonrefundable fee of \$185.

DATED this 18th day of March, 2008.

Jerome Jackson

Signature of owner/applicant

(Address of applicant if different from owner) 2865 Lilac Lane
Fargo, ND 58102

Return application to the City of Fargo, Planning and Development Department, 200 North
Page 9th Street, Fargo, ND 58102. Telephone: (701) 241-1474.

FOR PLANNING OFFICE USE ONLY:

Major Home Occupation _____

Date filed: 3/10/00 Nonrefundable fee paid \$ CH 003199

Planning Office Contact Person Nicole

VI. APPLICATION FOR TAX INCREMENT FINANCING

A. APPLICANT INFORMATION

Name of Corporation/Partnership

FM City Development

Address

515 Southwood Dr, Fargo, ND 58103

Primary Contact

Jeremy Carlson and Roger Gilbertson

Address

515 Southwood Dr, Fargo, ND 58103

Phone 701-361-3616 Jeremy/ 701-729-7677 Roger

Email: Jeremy.Carlson@axa-advisors.com / roger58103@hotmail.com

On a separate sheet, please provide the following:

- Brief description of the corporation/partnership's business, including history, principal product or service, etc.... The Corporation was form approximately 18 months ago. It was formed with the intent of construction and operating commercial/ mixed use buildings.
- Brief description of the proposed project. Attach as Exhibit B.
- List names of officers and shareholders/partners with more than five percent (5%) interest in the corporation/partnership.

- A but-for analysis. Attach as Exhibit D.

Attorney Name: Andy Noah, Nilles

Address : 18 Floor, Radisson Tower

Phone 237-5544
Email

Fax

Accountant Name :Kent Busek

Address: 4840 Amber Valley Parkway, Suite a

Phone: 701-356-7867
Email: Kent@taxstop.biz

Fax

Contractor Name: Meridian Commercial Construction

Address: 4804 Amber Valley Pkwy S, Fargo, ND 58104

Phone : 701-356-0397
Email

Fax

Engineer Name : Moore Engineering

Address

Phone
Email

Fax

Architect Name

Address

Phone
Email

Fax

B. PROJECT INFORMATION

The project will be:

Downtown Redevelopment: New Construction
 Rehabilitation Expansion

Industrial or Commercial Greenfield: New Construction
 Expansion

Commercial Redevelopment: New Construction Rehabilitation

Industrial Redevelopment: New Construction Rehabilitation

Other Mixed Use

The project will be:
Space Owner Occupied Leased

If leased space, please attach a list of names and addresses of future lessees and indicate the status of commitments or lease agreements. Attach as Exhibit E.

Project Address 1430, 1434 and 1436 12 Avenue

Legal Description: Kirkham's 2nd, Lots 16-18, Block 14

New industrial development which will result in additional private investment in the area.

Enhancement or diversification of the city's economic base.

The project contributes to the fulfillment of the City's Strategic Plan for Economic Development.

Removal of slum and/or blight or the rehabilitation of a high profile or priority site.

Other:

D. SOURCES & USES

SOURCES	NAME	AMOUNT
Bank Loan		\$2,791,240
Other Private Funds		\$ 0
Equity		\$697,810
Fed Grant/Loan		\$ 0
State Grant/Loan		\$ 0
Tax Increment		see proforma
ID Bonds		\$
TOTAL		\$3,489,050

USES	AMOUNT
Land Acquisition	\$423,750
Site Development	\$326,250
Construction	\$ 2,467,750
Machinery & Equipment	\$0
Architectural & Engineering Fees	Included in Construction

Legal Fees	\$ 10,000
Interest During Construction	\$101,300
Debt Service Reserve	Personnel Lines
Contingencies	\$160,000
TOTAL	\$3,489,050

E. ADDITIONAL DOCUMENTATION

Applicants will also be required to provide the following documentation.

_____ A) Written business plan, including a description of the business, ownership/management, date established, products and services, and future plans

B) Financial Statements for Past Two Years
Profit & Loss Statement
Balance Sheet

C) Current Financial Statements
Profit & Loss Statement to Date
Balance Sheet to Date

_____ D) Two Year Financial Projections

F) Personal Financial Statements of all Major Shareholders

Profit & Loss
Current Tax Return

 G) Letter of Commitment from Applicant Pledging to Complete
During the Proposed Project Duration

 X H) Letter of Commitment from the Other Sources of Financing,
Stating Terms and Conditions of their Participation in
Project

 X I) Application fee of \$5000

Note: All Major shareholders may be required to sign personal guarantees if up front financing of the project is required.

If the applicant has asked for public financial participation from other entities, please provide a description of the said participation, the time frame for such participation on the attendant project, the name of the entity providing public financial participation and entity contact information.

The undersigned certifies that all information provided in this application is true and correct to the best of the undersigned's knowledge. The undersigned authorizes the City of Fargo to check credit references and verify financial and other information. The undersigned also agrees to provide any additional information as may be requested by the City after the filing of this application.

Applicant Name FM City Development Date 3/13/08

By 

EXHIBIT A

Description of the corporation or partnership

.... The Corporation was form approximately 18 months ago. It was formed with the intent of construction and operating commercial/ mixed use buildings.

EXHIBIT B

Description of the proposed project

The project is a 3 story (10,650 SF per floor) building. The first floor is commercial space and the second and third will have apartments (8 apartments each). The site will have 32 parking stalls. Additional parking will be in the adjacent "T": Lot.

EXHIBIT C

Names of officers and shareholders/partners with more than five percent (5%) interest in the corporation/partnership.

Roger Gilbertson and Jeremy Carlson each own 50%

EXHIBIT D

But-for analysis

EXHIBIT E

Prospective Lessees We have no signed commercial leasrs at this time.

12th Avenue Project
Phase Two
Fargo, North Dakota

North

12 AVE NORTH

N87°29'00"E

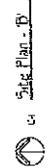
Proposed Building
(31,953 sf)

16 parking spaces

16 parking spaces

Existing Building

PRELIMINARY.
NOT FOR
CONSTRUCTION.



Date	February 2009
Project	0083
Sheet	
Scale	
Author	
Checked	
Drawn	



Site

NOTICE OF HEARING

Notice is hereby given that the Fargo Planning Commission will conduct a Public Hearing in the City Commission Chambers, City Hall, Fargo, North Dakota, on Wednesday, April 9, 2008, at 9:00 o'clock a.m., to consider recommending to the Fargo City Commission approval or denial of a Petition requesting a Conditional Use Permit to allow for a Parking Reduction and to allow for residential uses within LC, Limited Commercial zoning districts for Lots 16, 17, and 18, Block 14, and part of vacated alley of **Kirkham's 2nd Addition** to the City of Fargo, Cass County, North Dakota.

The above-described tract of land is located at 1430, 1434, and 1436 12th Avenue North.

Additional information can be obtained by viewing the project file located at the City of Fargo Planning Department, 200 3rd Street North, Fargo, ND, Monday through Friday, 8:00 a.m. to 4:30 p.m.

Any person interested may appear at the Hearing and be heard.

John Q. Paulsen
Chair
(March 24 and 31, 2008)

INSTRUCTIONS TO THE FORUM:

Please publish as a legal on Monday, March 24 and 31, 2008.

I will need an affidavit of publication.

Bill to: City Auditor's Office

Attn: Michelle

P.O. Box 2083

Fargo, ND 58107

Please call Kristi at 476-4131 with any questions

#5



PLANNING AND DEVELOPMENT
200 Third Street North
Fargo, North Dakota 58102
Phone: (701) 241-1474
Fax: (701) 241-1526
E-Mail: planning@cityoffargo.com
www.cityoffargo.com

March 24, 2008

Dear Property Owner,

Notice is hereby given that the Fargo Planning Commission will conduct a Public Hearing in the City Commission Chambers, City Hall, Fargo, North Dakota, on Wednesday, April 9, 2008, at 9:00 o'clock a.m., to consider recommending to the Fargo City Commission approval or denial of a Petition requesting a Conditional Use Permit to allow for a Parking Reduction and to allow for residential uses within LC, Limited Commercial zoning districts for Lots 16, 17, and 18, Block 14, and part of vacated alley of **Kirkham's 2nd Addition** to the City of Fargo, Cass County, North Dakota.

The above-described tract of land is located at 1430, 1434, and 1436 12th Avenue North.

Additional information may be obtained by viewing the project file located at the City of Fargo Planning Department, 200 3rd Street North, Fargo, ND, Monday through Friday, 8:00 a.m. to 4:30 p.m.

Any person interested may appear at the Hearing and be heard. For any questions or comments before that time, please feel free to contact me at 701.297.7782 or ncrutchfield@cityoffargo.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Nicole Crutchfield".

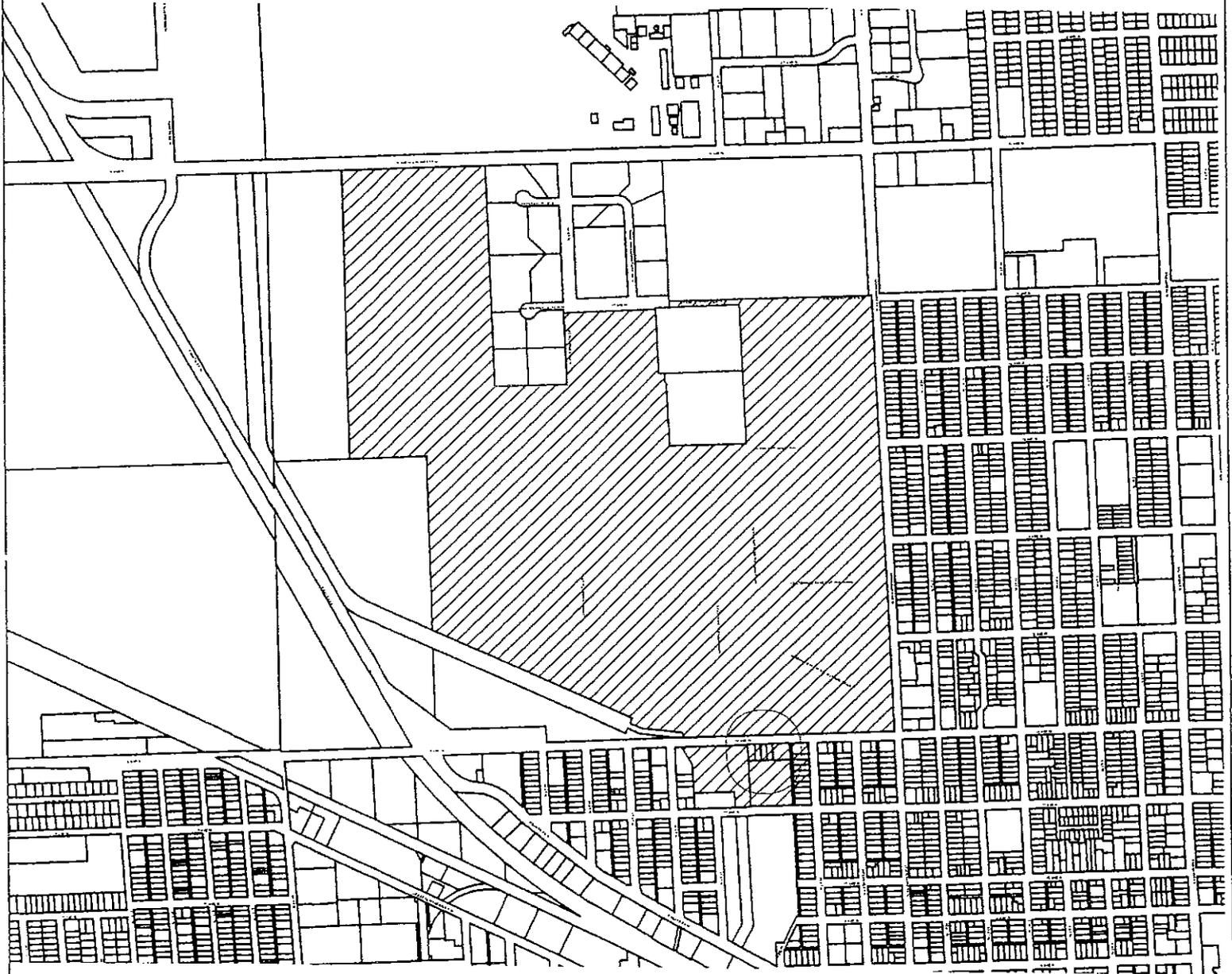
Nicole Crutchfield
Planner



10

T:\Planning_Planning Commission\Property Owner Mail List\2008\04-April\Kirkhams 2nd Add.xls

CT OWNER1	OWNER2	MAILADDR	MAILCITY	MAILST	MAILZIP	MAILZIP2
1 COLVILLE, THOMAS P & JOANN L		1136 14 ST N	FARGO	ND	58102	
2 COYKENDALL, JAMES B IV		1118 14 ST N	FARGO	ND	58102	
3 FM CITY DEVELOPMENT LLC		515 SOUTHWOOD DR S	FARGO	ND	58103	
4 FM CITY DEVELOPMENT LLC		901 28 ST S STE B	FARGO	ND	58103	
5 GROVER, RONALD J		1122 14 ST N	FARGO	ND	58102	
6 NDSU	C/O VICE PRESIDENT BUSINESS & FINANCE	BOX 5227 NDSU	FARGO	ND	58105	
7 NORTHLAND EDUCATORS FEDERAL CREDIT UNION		1404 12 AVEN	FARGO	ND	58102	
8 PIKALEK, THOMAS J & ROSE MARIE		1114 14 ST N	FARGO	ND	58102	
9 RAKOWSKI, WILLIAM F	C/D RASKOWSKI, GLADYS LIFE ESTATE	911 10 ST S	FARGO	ND	58103	
10 TOFTE, ERIC		BOX 14902	GRAND FORKS	ND	58203	4902



These data are provided on an "AS-IS" basis, without warranty of any type, expressed or implied, including but not limited to any warranty as to their performance, merchantability, or fitness for any particular purpose.

Kirkham's 2nd Add.

1:16,294

03-19-2008

This map is not a substitute for accurate field surveys or for locating actual property lines and any adjacent features



City of Fargo Staff Report				
Item No:	2008-04-10		Date:	3/31/08
Title:	Kirkham's 2nd Addition		Staff Contact:	Nicole Crutchfield
Location:	1430, 1434, 1436 12 th Ave North			
Owner(s)/Applicant:	FM City Developments	Engineer:		
Reason for Request:	Conditional Use Permit for Residential and Alternative Access Plan for reduced parking			
Status:	Planning Commission Public Hearing			
Existing		Proposed		
Land Use:	Residential apartments in converted houses	Land Use:	Multidwelling structure with retail commercial on the first floor	
Zoning:	LC, Limited Commercial with Overlay	Zoning:	No Change	
Uses Allowed:	Allows colleges, community service, daycare centers of unlimited size, health care facilities, parks and open space, religious institutions, safety services, offices, off premise advertising signs, commercial parking, retail sales and service, self service storage, vehicle repair, limited vehicle service.	Uses Allowed:	Allows colleges, community service, daycare centers of unlimited size, health care facilities, parks and open space, religious institutions, safety services, offices, off premise advertising signs, commercial parking, retail sales and service, self service storage, vehicle repair, limited vehicle service.	
Maximum Density Allowed:	LC, Limited Commercial does not allow residential without a Conditional Use Permit. There is no stated maximum density for residential. There is maximum building coverage of 55%.	Maximum Density Allowed:	LC, Limited Commercial does not allow residential without a Conditional Use Permit. There is no stated maximum density for residential. There is maximum building coverage of 55%.	
Area Plans:	The Roosevelt-NDSU Neighborhood Plan was approved in June of 2004. The plan states as one of the recommendations, "to encourage and nurture high quality, small, unique neighborhood commercial ventures along the "neighborhood's gateway corridors"			
Schools and Parks:	The project is primarily intended for college students, faculty and staff at NDSU. The campus is adjacent to this project. The campus and city provide many options for parks, green space, and pedestrian and bike trails within this area.			
Staff Analysis:	<p>The developer's goal is to construct the second phase of a mixed use project that targets college students and employees at NDSU. In March 2007 the Planning Commission and City Commission approved a zone change to LC with a Conditional Overlay. In addition a Conditional Use Permit was granted for the first phase to accommodate reduced parking and residential uses. The applicant has now applied for a second conditional use permit for the next phase of construction, in order to accommodate similar needs. The two conditions being requested are: 1) to allow for residential living and 2) an alternative access plan for reduced parking. Tandem with this application the applicant has submitted a Tax Increment Financing (TIF) application. The TIF Application proposal is a separate item for review. This staff report will focus on the Conditional Use Permit. With each approval criteria listed below, there is a separate item each for residential living and reduced parking.</p> <p>The details of the second phase project includes 16, 3-bedroom apartments and 3 commercial spaces approximately 3166 SF each, or a total of 9,500 SF of first floor retail. NDSU preliminarily will lease the first floor until the university's future phases are completed.</p> <p style="text-align: center;"><u>The following is a list of criteria, which must be determined satisfied in order for a Conditional Use Permit to be approved</u></p> <ol style="list-style-type: none"> 1. Does the proposed conditional use comply with all applicable provisions of the LDC and will it conform to the general intent and purpose of this LDC? <ol style="list-style-type: none"> A. Parking Reduction CUP: The developer intends to provide 33 parking spaces. <p style="text-align: center;">The parking ratios required per the Land Development Code are as follows:</p>			

Residential living : 2 per unit + 25% for guest parking = 40 spaces
General Retail: 1 stall per 250 SF= 38 spaces (if the retail is a restaurant then the parking requirement could increase to 63 spaces or a total of 21 spaces per retail space). The proposal is a requested reduction of minimally 45 parking spaces.

The main purpose of the reduction is to accomplish a higher density of residential units and to utilize the fact that residents and retailers can park at the University T Lot after regulated hours. During the regulated hours of the T Lot, half of the provided parking is reserved for residents and half of the provided parking is reserved for retailers. This is the same arrangement used for the first phase of the applicant's development. The retailers and residents are aware of the parking situation prior to lease arrangements. In addition, staff believes this concept is supported due to the close proximity to the University since many patrons and residents will not have cars or will be taking advantage of alternative transportation. Staff supports this goal.

Based on Section 20-0701 of the LDC, a parking reduction of more than 25 percent of the required off street parking requires review and action by the Planning Commission in accordance with the Conditional Use Permit Review procedures. **(Criteria Satisfied)**

- B. Residential Use within LC CUP:** As with the first phase of development, residential living is only permitted in Limited Commercial with the approval of a conditional use permit. The applicant is proposing 16 dwelling units. This project includes three lots, 24, 000 SF total. The number of units per acre equals 29. This is higher than the MR-3 standard density. However, staff believes this higher density is warranted in a University mixed use setting. **(Criteria Satisfied)**

2. Will the proposed conditional use at the specified location contribute to and promote the welfare or convenience of the public?

Staff suggests that the reduction in parking and increase in density, in conjunction with a mixed use development will promote the economic vitality of the neighborhood and the NDSU campus and therefore contribute to the welfare and convenience of the public.

- A. Parking Reduction CUP:** Staff finds that this proposed parking reduction would not have a negative impact on the welfare/convenience of the public. Parking is available at the University T Lot and the use of vehicles by the customers and students are at a different demand than the standard LDC requirements. In addition, the proposed project is on the MAT transit line. **(Criteria satisfied)**
- B. Residential Use within LC CUP:** Staff finds that the proposed residential use within LC zoning would not have a negative impact on the welfare/convenience of the public. The proposal supports the need for additional student housing within close proximity of the University. **(Criteria satisfied)**

Staff has received concerns from the abutting owner, Mr. Bill Rakowski. Mr. Rakowski owns 1424-1426 12th Ave N, currently a vacant duplex. His main concerns stem from access and trespassing issues. Currently there is a shared driveway on the west side of his property. This driveway is shared with the petitioner's eastern most property line. To accommodate the driveway there is an easement that straddles the property line, with 5' on Mr. Rakowski's property and 5' on the petitioner's property. The petitioner's building will be at least 5' from the property line since it needs to accommodate the required 5' building setback. The petitioner does not plan on using this driveway for access to his

property. His access will be from the T Lot. The trespassing issues are raised due to conflicts Mr. Rakowski had with the construction crews of the first phase.

3. Will the proposed conditional use cause substantial injury to the value of other property in the neighborhood in which it is to be located?

A. Parking Reduction CUP: Staff has no data or experience to indicate that the parking reduction will have a negative impact on property values in the neighborhood. With the shared parking agreement the owner has developed with NDSU, staff believes the parking needs are accomplished. Tenants are made aware of the parking availability prior to signing leases. The project is also abutting a major arterial that doesn't allow on-street parking so no additional obstacles are created on 12th Ave. **(Criteria satisfied)**

B. Residential Use within LC CUP: Staff has no data or experience to indicate that the proposed residential use will have a negative impact on property values in the neighborhood. The proposal is conducive to the student housing located within the neighborhood. **(Criteria satisfied)**

4. Is the location and size of the conditional use, the nature and intensity of the operation conducted in connection with it, and the location of the site with respect to streets giving access to it such that the conditional use will not dominate the immediate neighborhood so as to prevent the development and use of the neighboring property in accordance with the applicable zoning district regulations? In considering this criteria, location, nature, and height of buildings, structures, walls, and fences on the site are to be considered, as well as the nature and extent of proposed landscaping and buffering on the site.

A. Parking Reduction CUP: The proposed parking reduction will not dominate the immediate neighborhood or prevent any other sites from being used, in the manner allowed by the zoning. On a typical school day, the surrounding neighborhood is already surrounded by on street parking from university students. This issue is to be addressed during the University master plan study (currently in process) and a parking fine program. The Conditional Overlay already in place as part of the original rezoning takes into account design standards. The overlay requires the applicant to follow the DMU, Downtown Mixed Use architectural standards. The owner is committed to constructing a project very similar to the first phase. **(Criteria satisfied)**

B. Residential Use within LC CUP: Staff has no data or experience to indicate that the proposed residential use will have a negative impact on property values in the neighborhood. The Conditional Overlay, as mentioned above, takes into account design standards. The overlay requires the applicant to follow the DMU, Downtown Mixed Use architectural standards. The owner is committed to constructing a project very similar to the first phase. **(Criteria satisfied)**

5. Are adequate utility, drainage, and other such necessary facilities and services provided or will they be at the time of development?

A. Parking Reduction CUP: Yes, adequate utility and drainage features are in place. The proposed construction plans for the addition will be required to be reviewed by staff from Planning, Inspections, Fire, and Engineering. **(Criteria satisfied)**

B. Residential Use within LC CUP: Yes, adequate utility and drainage features are in place. The proposed construction plans for the addition will be required to be

	<p>reviewed by staff from Planning, Inspections, Fire, and Engineering. (Criteria satisfied)</p> <p>6. Have adequate access roads or entrances and exit drives been provided and are they designed to prevent traffic hazards and to minimize traffic congestion in public streets?</p> <p>A. Parking Reduction CUP: Yes access and entrance/exit drive areas are adequate to serve the property. The access is provided for this phase directly from the University T Lot. (Criteria satisfied)</p> <p>B. Residential Use within LC CUP: Yes access and entrance/exit drive areas are adequate to serve the property. The access is provided for this phase directly from the University T Lot. (Criteria satisfied)</p>
<p>Staff Recommendation:</p>	<p>Suggested Motion: "To accept the findings and recommendations of staff and hereby approve of the Conditional Use Permit as it meets the approval criteria of Section 20-0909.D (1-6) of the Land Development Code."</p>
<p>Planning Commission Decision:</p>	<p>April 9, 2008</p>

Item #11: Hearing on a Petition requesting a Conditional Use Permit to allow for a Parking Reduction and to allow for residential uses within LC, Limited Commercial zoning districts for Lots 16, 17, and 18, Block 14, and part of vacated alley of Kirkham's 2nd Addition. (Located at 1430, 1434, and 1436 12th Avenue North) (FM City Development): APPROVED

Review of Renewal Plan for proposed redevelopment of 1430, 1434, and 1436 12th Avenue North. Recommendation on whether the Renewal Plan is consistent with other City plans: APPROVED

(11:06 a.m.) Ms. Crutchfield stated the developer's goal is to construct the second phase of a mixed use project that targets college students and employees at NDSU. She said the two conditions being requested are 1) to allow for residential living, and 2) an alternative access plan for reduced parking.

City Forester Scott Liudahl, stated he appreciates the improvements to the area and asked that the mature trees be considered as part of the plan in order to minimize the impact of construction on them.

Bill Rakowski, adjacent property owner, stated his opposition to the proposal.

Mr. Bruce Franz, NDSU Facilities Director, stated this is a win-win-win situation between the private sector, the neighborhood, and NDSU. He said he has heard only positive comments about the project from students. In response to a comment by Mr. Rakowski, Mr. Franz stated there is a contractual agreement between the applicant and NDSU for parking in the T lot.

Chair Paulsen stated he feels this project adds to the beautification of the area and fits well with the beauty of the campus and atmosphere.

Mr. Vigasaa moved the findings and recommendations of staff be accepted and the Conditional Use Permit be approved as it meets the approval criteria of Section 20-0909.D (1-6) of the Land Development Code. Second by Ms. Ulferts-Stewart. On call of the roll Members Slagle, Vigasaa, Ulferts-Stewart, Fremstad, Palmes, and Paulsen voted aye. Absent and not voting: Brodshaug, Morrau, Ruth, and Wiley. The motion was declared carried.

Ms. Fremstad moved that it be recommended to the City Commission that the Renewal Plan is consistent with plans of the City of Fargo. Second by Mr. Vigasaa. On call of the roll Members Vigasaa, Ulferts-Stewart, Fremstad, Slagle, Palmes, and Paulsen voted aye. Absent and not voting: Members Brodshaug, Morrau, Ruth, and Wiley. The motion was declared carried.

Item #14: Hearing on a Petition requesting a Zoning Change from AG, Agricultural to GC, General Commercial on a portion of Section 11, Township 138 North, Range 49 West. (Located at 3340 64th Avenue South) (Fred M. Hector and Earlyne L. Hector): APPROVED

Jim Hinderaker reviewed the petition and stated no comments have been received. He said staff is supportive that the approval criteria have been met.

The Petitioner declined commenting on the application.

Mr. Vigasaa moved the findings and recommendations of staff be accepted and approval be recommended to the City Commission of the zoning change from AG, Agricultural to GC, General Commercial, as the proposal complies with the adopted Area Plan, Section 20-0906.F (1-4) and all other applicable requirements of the Land Development Code. Second by Ms. Ulferts-Stewart. On call of the roll Members Fremstad, Slagle, Vigasaa, Ulferts-Stewart, Palmes, and Paulsen voted aye.

Absent and not voting: Members Brodshaug, Morrau, Ruth, and Wiley. The motion was declared carried.

Item #15: Hearing on a Petition requesting a Zoning Change from AG, Agricultural to LC, Limited Commercial on a portion of the Southwest Quarter of Section 18, Township 138 North, Range 48 West. (Located at 8452 South University Drive) (Randy Schneider): CONTINUED TO MAY 14, 2008

Jim Hinderaker summarized the staff report and noted a protest petition was submitted. He reviewed the history of the application and stated the petitioner has met with staff in an effort to address all of the concerns raised previously by staff, the Planning Commission and the neighborhood. He stated the proposed zoning land use matches the Growth Plan and a conditional overlay will be established to ensure that the proposed commercial development is compatible and in keeping with the existing neighborhood by established site specific standards for use, building appearance, signage and landscaping. Mr. Hinderaker stated the two issues to be considered by the Board are: 1) is this an appropriate land use, and 2) are services such as fire protection, flood protection, water services, and sewer services in place. He stated staff is recommending approval.

There was discussion regarding the Growth Plan including pockets of commercial use within the primarily residential designations in the area.

Randy Schneider, applicant, stated he took comments and concerns raised by staff and the Planning Commission and retooled the development. He stated he is doing this by the book.

Dr. Jim Carlson, 1649 Round Hill Drive, stated his opposition to the project citing flood concerns.

Dale Ziegler, 1630 Round Hill Drive, brought forth his concerns. He stated his apprehension with placing a construction company in the area and said that elevating the land will force water to the north.

Todd Olsen, 944 76th Avenue South, stated his concerns regarding flood protection and drainage.

Richard Thomas, 404 River Drive South, said he is concerned with the impact of flooding. He said he would like to see this area developed as a residential area.

LeRoy Kornelius, 1232 76th Avenue South, stated a parcel is zoned commercial to the north of this, and asked if it fulfills the commercial percentage.

Discussion by the Board ensued regarding flood control issues.

Mr. Slagle moved denial be recommended to the City Commission of the revised zoning change and Conditional Overlay on the basis that the proposal does not comply with approval criteria number two; the necessary public services, facilities, and programs are not in place at this time. Second by Ms. Fremstad.

Mr. Slagle withdrew the motion. Ms. Fremstad withdrew the second.

Mr. Slagle moved to deny the proposal based upon approval criteria number two, services, on the basis that it does not comply with the Comprehensive Plan. Second by Ms. Fremstad.

Jonathan Garaas, Stanley Township Attorney, objected to the recommendation to deny.



1231650

Page: 1 of 3

04/18/2008 01:00P



Conditional Use Permit

On this 9th Day of April, 2008

The City of Fargo
Planning Commission

Hereby grants a:

Conditional Use Permit

To allow for:

- 1) An Alternative Access Plan to reduce the number of required parking spaces to a minimum of 33 parking spaces. The 33 parking spaces are intended to allow for 10,700 SF of commercial space on the first floor and 16, 3 bedroom apartments on the remaining two floors.
- 2) Residential uses within LC, Limited Commercial zoning district.

This Conditional Use Permit applies to the properties located at:
1430, 1434, and 1436 12th Avenue North
Lots 16, 17, and 18, Block 14, and part of vacated alley,
Kirkham's 2nd Addition.

CERTIFICATE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

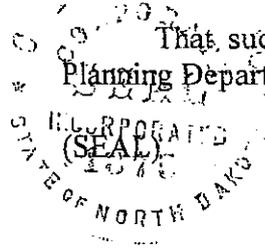
I, John Q. Paulson, the duly appointed, qualified and acting Chair of the Planning Commission of the City of Fargo, North Dakota; and

I, Steven Sprague, the duly appointed, qualified and acting City Auditor of the City of Fargo, North Dakota,

DO HEREBY CERTIFY:

That the foregoing is a full, true, and correct copy of the original Conditional Use Permit, which was duly approved by the Planning Commission of the City of Fargo, North Dakota, at the regular meeting of the Planning Commission held on the 9th day of April, 2008, at which meeting all members of the board were present and all members present voted in favor of the approval of the Conditional Use Permit, and

That such Conditional Use Permit is now a part of the records of the City of Fargo Planning Department.

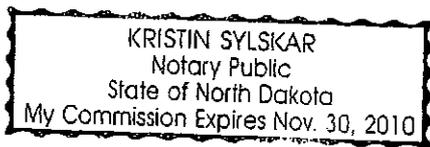


[Handwritten Signature]
John Q. Paulson, Planning Commission Chair
City of Fargo, North Dakota

ATTEST:

[Handwritten Signature]
Steven Sprague, City Auditor

On this 9th day of April, 2008, before me Kristin Sylskar, a Notary Public in and for Cass County in the State of North Dakota, personally appeared JOHN Q. PAULSON, known to me to be the Chair of the Planning Commission and STEVEN SPRAGUE, known to me to be the City Auditor of the City of Fargo, a municipal corporation under the laws of the State of North Dakota, and they acknowledged to me that they executed the foregoing instrument.



[Handwritten Signature]
Kristin Sylskar
Notary Public
Cass County, North Dakota
My Commission Expires: 11-30-2010



1231650
Page: 3 of 3
04/18/2008 01:00P

CITY OF FARGO DEPT OF PLANNING & CUPER 16.00

RECORDER'S OFFICE, CASS COUNTY, ND 04/18/2008 01:00PM
I CERTIFY THAT THIS INSTRUMENT WAS FILED FOR RECORD THIS DATE.
JEWEL A. SPIES, COUNTY RECORDER

by Teresa A. Kerby Dep 1231650



City of Fargo Staff Report			
Title	Appeal of the Zoning Administrator's Decision	Date	10-03-08 As updated 12-03-08
Appellant	William F. Rakowski	Staff Contact	Jim Hinderaker
Status	Planning Commission Review: 10-08-08 as continued to 12-10-08	Representation	Jonathon Garaas
Record	Note: Due to the volume of the complete appeal record, the Planning Commission packet contains an abbreviated form of the complete record regarding said appeal. A complete record will be on hand during the public hearing. Also, the complete record regarding this appeal is available for review in the Planning Department prior to the December 10, 2008 hearing.		
Executive Summary	<p>Regarding the appeal filed by William F. Rakowski of the issuance of a building permit for Phased II of the FM City Development project located at 12th Ave N, numerous issues are raised by the counsel (Jonathan Garass) of the appellant that staff contends are without merit. The primary issue surrounding this appeal stems from the April 9, 2008 Planning Commission decision to reduce the total number of required parking spaces for Phase II of the FM City Development project. Mr. Garass and Mr. Rakowski, who were both in attendance during the April 9, 2008 public hearing, failed to file a timely appeal of the Planning Commission decision. Since that time, every attempt has been by Mr. Rakowski, through counsel, to circumvent that decision by interjecting opposition into the various stages of the project, culminated with the filing of this appeal of the issuance of the building permit. An action that is baseless and without merit</p> <p>The balance of this report provides a timeline of events and summarizes the action of the various Boards that have heard parts of this appeal. In addition, staff has reviewed each of the issues, as based on a letter from counsel dated November 12, 2008, and found that all are baseless and without merit. Finally, the recommendation of staff, in accordance with FMC/LDC§20-0910(E)(4), is for the Planning Commission to review the appealed Site Plan decision as a new matter. After considering the matter, the Planning Commission shall act to approve or deny the original application. The procedure shall be the same as required of the original action before the Zoning Administrator.</p>		
Analysis of Appeal			
<p>On September 2, 2008, William F. Rakowski, owner of property located at 1424-1426 12th Ave N, Fargo, filed an appeal to the Board of Adjustment stemming from the issuance of a building permit for property located at 1434 12 Ave N, Fargo. The Building Permit (No BL20081741) was issued by the city on August 25, 2008. The appellant asserts that the permit was issued without meeting all of the conditions of FMC/LDC Article 20-07. In essence, the appellant contends that Building Permit No. BL20081741 should not have been issued due to insufficient parking.</p> <p>Upon receipt and review of the appeal, staff questioned whether the Board of Adjustment (as requested by the appellant) actually had jurisdiction to review the appeal. The appellant contends that the "administrative decision" to issue Building Permit was done in error because the permit application did not meet all required condition precedent set forth in Article 20-07 of the Land Development Code. He specifically cited that the requirements of FMC/LDC §20-0701(E)(4), Off-Site Parking, were not met.</p> <p>On September 8, 2008, staff informed the appellant's representative, Jonathan Garaas, that the Zoning Administrator is responsible for determining compliance with parking requirement and that the review of the same is part of a Site Plan review as governed by FMC/LDC §20-0910. To that end, decisions made under the Site Plan review process are appealable to the Planning Commission.</p>			

(A)

(B)

2/8/09

Although staff has made every effort to walk Mr. Garaas through the Building Permit Application review process, a process that clearly assigns Site Plan review (including review of parking standards) to the Zoning Administrator, Mr. Garaas continues to insist that the Board of Adjustment has jurisdiction in this case.

On October 8, 2008, the Planning Commission found that they in fact did have jurisdiction to hear the subject appeal. The Planning Commission also found that the appellant did have standing to appeal. The Planning Commission also heard testimony regarding the appeal but tabled the hearing until December 10, 2008 in order for the city to provide the complete record to the appellants counsel. Counsel in turn was to provide a detailed list of the issues on appeal.

~~On October 28, 2008, the Board of Adjustment held a hearing, at the request of staff, to also review and determine which governing body had jurisdiction to hear the subject appeal. The Board of Adjustment found that they did not have jurisdiction as that authority was specifically granted to the Planning Commission and Board of City Commissioners.~~

~~On December 1, 2008, the Board of City Commissioners, on appeal from the October 28, 2008 Board of Adjustment decision, held a hearing to review and determine which governing body had jurisdiction to hear the subject appeal. The Board of City Commissioners upheld the Board of Adjustment's decision.~~

Issues of Appeal - Review

~~In a letter addressed to the Chairman of the City of Fargo Planning Commission John Q. Paulsen, dated November 12, 2008 and included in the December 2008 Planning Commission review packet, the counsel for the appellant identifies the issues raised on appeal. Note: The items listed below are cut and paste from said letter. Staff response follows.~~

1. Many of the documents most recently submitted continue to have deficiencies in photocopying. For the time being, Mr. Rakowski makes no further comments concerning the deficiencies except that it may evidence continuing efforts to obfuscate issues, or lack of initial accurate review of submitted documents.

Staff has made every attempt to ensure that counsel has a complete and accurate record. In regard to photocopying deficiencies, staff will attempt to work with the appellants counsel to clarify any and all deficiencies prior to the December 10, 2008 hearing.

C

D

E

2. Please be reminded that the building official performs a higher duty than merely passing on the sufficiency of building plan adherence to Fargo's building code - the Building Official is prevented from issuing a building permit without conformity "in all respects to the provisions of the Land Development Code and the building code." Indeed, FMC § 20-0913(B) indicates this dual role apparently overlooked or ignored:

"The Building Official shall be responsible for conducting reviews to determine if intended uses, buildings or structures comply with all applicable regulations and standards, including the building code. The Building Official shall not issue a building permit unless the plans, specifications and intended use of such building or structures or part thereof conform in all respects to the provisions of the Land Development Code and the building code."

Please be reminded that FMC § 20-0106(B) also provides:

"If the provisions of this Land Development code are inconsistent with one another, or if they conflict with provisions found in other adopted ordinances or regulations of the City, the more restrictive provision will control." [bolding for emphasis]

Under FMC § 20-1203(A)(1)(a), "(w)hen the principal uses of a development fall within different use categories, each principal use is classified in the applicable category and each use is subject to all applicable regulations for that category." In this case the MR-3 zoning category regulations must be honored, even if the ground floor is regarded as Limited Commercial.

Please be further reminded that FMC § 20-0303(C) also provides:

"All requirements of a C-O district are in addition to and supplement all other applicable standards and requirements of the underlying zoning district." Reducing the number of parking spaces would not be within any of the 6 areas of possibly authorized "(r)estrictions and conditions imposed by a C-O district under FMC § 20-0303(C)(1-6). A C-O district has to be created by ordinance - not by the Planning Commission. See FMC § 20-

0303(D). "Parking spaces" are not an identified Use Category under FMC § 20-1203.

~~In an effort to expedite the Building Permit review process, the city of Fargo implemented a Plan Routing system. Prior to its implementation, the building permit review process was frustrating at best and at times, due to miscommunication between the applicant and the various review agencies, difficult to document the final outcome. The Plan Routing process streamlined the review process. An applicant simply submits a complete application to the Inspections Department and the Inspections Department in turn routes the various plan sets to the review agencies for review and determination of compliance.~~

(F)
(G) (H)

So, while yes, as cited in §20-0913(B) of LDC/FMC, the Building Official is responsible for ensuring that the applicable provisions of the LDC and building code are adhered with, ~~responsibility for portions of the review are delegated to various departments in accordance with their area of expertise.~~ For example, the Health Department is responsible for the review and determination of compliance related to health code issues. The Engineering Department is responsible for the review and determination of compliance related engineering issues such as storm water detention. And, the Planning Department is responsible for the review and determination of compliance related to site plan issues such as, dimensional standards, parking, landscaping, and residential protection standards.

(I)
(J)

In regards to your assertion that the subject development must adhere to the MR-3 zoning category

regulations due to the fact that the development contains multiple principal uses, commercial and residential, is just plain wrong. FMC/LDC §20-1203(A)(1)(a) stipulates in part, "(w)hen the principal uses of a development fall within different use categories, each principal use is classified in the applicable category and each use is subject to all applicable regulations for that category." ~~The term "category" is a reference to the Use Category of Table 20-0401 or Article 20-04 of the LDC. Table 20-0401 contains a list of different Use Categories including residential.~~ The Zoning Administrator simply follows the matrix of Table 20-0401 to the corresponding zoning district to determine if said use is a permitted use by right, a conditional use, use subject to specific conditions or a use that is not allowed.

(K)

In this particular case, the subject property is zoned Limited Commercial with a Conditional Use Permit that allows for residential uses. By again using the matrix of Table 20-0401 and cross referencing the multiple principal uses (Retail Sales/Service and Residential – Household Living) with the Limited Commercial zoning district you will note that Retail Sales/Service is a use by right and that Residential – Household Living is a conditional use. ~~Since both of these principal uses are permitted under the Limited Commercial zoning district (residential living as conditionally approved), the subject property must adhere to the minimum dimensional standards of the Limited Commercial zoning district and not that of the MR-3 zoning district.~~

(L)

~~In regards to your contention that the city is not authorized to reduce the number of parking spaces with the use of Conditional Overlay district, you are correct. However, please note, the city has not reviewed nor approved a Conditional Overlay regarding the subject property. The reduction in the number of parking spaces was reviewed and approved by the Planning Commission with the use of an Alternative Access Plan as applied via a Conditional Use Permit, which, in accordance with FMC/LDC §20-0909(C), the Planning Commission has final decision authority. On April 9, 2008, the Planning Commission approved an Alternative Access Plan reviewed in accordance with the Conditional Use Permit Review procedures of FMC/LDC §20-0909. This approved Alternative Access plan reduced the number of required off-street parking spaces to a minimum of 33 spacing. Or note, the approved Alternative Access Plan did not require any Off-Site Parking. In other words, FMC/LDC §20-0701(E)(4) is not applicable.~~

(M)

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(O)(P)

3 It is important to note Fargo's Land Development Code was passed by ordinance – it has the force and effect of law. Under Fargo's Land Development Code, the Off-Street and On-Site parking space requirements were established by way of specific ordinance requirement. FMC Article 20-07; specifically, FMC §20-0701(B). Under FMC § 20-0701(D), "Except as expressly stated in this section [§ 20-0701], all required off-street parking spaces must be located on the same lot as the principal use." An "Alternative Access Plan" does not provide any opportunity to alter the ordinance's on-site parking requirements because of the built-in limitation set forth in FMC § 20-0701(E)(4) which superimposes a higher standard for residential uses (and certain commercial uses):

"Off-site parking may not be used to satisfy the off-street parking standards for residential uses (except for guest parking), restaurants, convenience stores or other convenience-oriented uses. Required parking spaces reserved for persons with disabilities may not be located off-site."

Please be reminded that FMC § 20-0701(A)(3) provides that "(e)xisting parking and loading spaces may not be reduced below the minimum requirements established in this section." The Planning Commission never had the right to reduce the number of parking spaces mandated by ordinance – it only had the ability to change the location where the required number of parking spaces attributable to certain use categories were possibly located under an Alternative Access Plan approved in conformity with FMC § 20-0701(E). Since the number cannot be reduced, there should be at least 78 (40 residential and 38 commercial) parking spaces, and perhaps as many as 103 (40 residential and 63 commercial) parking spaces, provided for in the plans.

~~In regards to your contention that an "Alternative Access Plan" does not provide any opportunity to alter the ordinance's (FMC/LDC Article 20-07, specifically, FMC/LDC §20-0701(B)) on-site parking requirements because of the built-in limitation set forth in FMC/LDC §20-0701(E)(4), you again are simply~~

(Q)

Wrong. Specifically, FMC/LDC §20-0701(E) stipulates that, "(a)n Alternative Access Plan represents a proposal to meet vehicle parking and transportation access needs by means other than providing parking spaces on-site in accordance with the Off-Street Parking Schedule of Sec. 20-0701-B. Applicants who wish to provide fewer off-street parking spaces than required pursuant to Sec. 20-0701-B must secure approval of an Alternative Access Plan, in accordance with the standards or procedures of this section."

(R)

In this case, the Planning Commission approved a reduction of required number of parking spaces to a minimum of 33 parking spaces, and, in contrast to your repeated suggestion to the contrary, "Off-Site Parking was not required." While you may not agree with the Planning Commission decision or that they even had the authority to grant the Alternative Access (which I might add would have been the appropriate time to file an appeal regarding the parking reduction) the Zoning Administrator is obligated to uphold their decision. So in the final analysis regarding compliance with the parking standards of the FMC/LDC, the Zoning Administrator upheld the actions of the Planning Commission and accurately substituted the standards of FMC/LDC §20-0701 for the approved Alternative Access Plan.

(S)

(T)

4. The City of Fargo is reminded there exists a definite distinction between an ordinance and a resolution of a governing body of a municipality - a resolution is not a law. Mitchell v. City of Parshall, 108 N.W.2d 12, 14-15 (N.D. 1961).

Mini Mart, Inc. v. City of Minot, 347 N.W.2d 131, 137-138 (N.D. 1984) makes clear:

"Section 40-11-09, N.D.C.C., is, in effect, a codification of the general rule that 'a municipal ordinance cannot be amended or repealed by a mere resolution. To accomplish that result a new ordinance must be passed.' (authorities cited)."

In the context of the Fargo Planning Commission's attempt to alter the on-site parking space requirements imposed by way of the City of Fargo's ordinance - not even the Fargo City Commission could do so by resolution, how could the Fargo Planning Commission hope to do so?

Moreover, a regulation also cannot alter an ordinance's provisions. Once the City of Fargo decided to make zoning an ordinance rather than a regulation, the City of Fargo lost virtually all "flexibility" - if such is desirable.

In regards to your reminder to the City of Fargo that there exists a definite distinction between an ordinance and a resolution of a governing body of a municipality, I thank you for your acute observation; however, the Planning Commission did not usurp the authority of an existing ordinance with the adoption of the aforementioned Conditional Use Permit (Resolution) to reduce the number of off-street parking spaces required for the subject property. I remind you that FMC/LDC §20-0701(E) is an ordinance of the City of Fargo. This ordinance specifically grants "(a)pplicants who wish to provide fewer off-street parking spaces than required pursuant to Sec. 20-0701-B the opportunity to secure approval of an Alternative Access Plan, in accordance with the standards of this section." In accordance with FMC/LDC 20-0701(E)(1)(b)(2), "Alternative Access Plans that propose a reduction of more than 25 percent or more than 25 off-street parking spaces require review and action by the Planning Commission, in accordance with the Conditional Use Permit Review procedures of Sec. 20-0909." In other words, a existing ordinance, adopted by the Fargo Board of City Commission, authorizes the Planning Commission to review and take action to reduce the off-street parking standards of FMC/LDC 20-0701(B)(1). Therefore, the Planning Commission acted within their authority.

(U)

(U)

5 Further, should you assert that the Fargo City Commission allows you to ignore the ordinance by giving the Planning Commission the discretion to alter the on-site parking requirements, such concept would be unconstitutional. To allow the Planning Commission to perform the legislative function of the Fargo City Commission would be an unconstitutional delegation of legislative power. In re Garrison Diversion Conservancy District, 144 N.W 2d 82, 92 (N.D. 1966). The same situation exists with respect to the role of Building Official - such power cannot legally exist.

As the prior act of the Fargo Planning Commission to ignore the City of Fargo's ordinance was unlawful, it was a *void act*.

~~This is a legal question that will need to be addressed by the City Attorney's Office.~~



6 The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to setbacks:

OPTION #1: Limited Commercial with a residential density allowed even greater than MR-3 [using Residential District Standards].

- A. The building to be constructed does not have adequate sideyards. The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate the existence of an Interior Side Minimum Setback of 10 feet. Less than 5 feet exists under the plans presented to the building official.
- B. The building to be constructed does not have adequate front yards. The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate the existence of an Front Minimum Setback of 25 feet. The plans presented to the building official would appear to only provide 20 feet.

- C. The building to be constructed is too large for the lot(s). The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate a Maximum Building Coverage of 35%. The plans presented to the building official would appear to approximate 44%.
- D. The building to be constructed is too large for the lot(s). The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for MR-3 under FMC § 20-0501 mandate Minimum Open Space of 35%. The plans presented to the building official would appear to approximate less than 10%, if any qualifies. Under FMC § 20-1202(43), no part of any road, parking area, driveway, or other area intended for vehicular travel can be considered as Open Space. See also, FMC § 20-0504(F).

OPTION #2: Limited Commercial with a residential density allowed even greater than MR-3 [using only Nonresidential District Standards – see discussion starting at #8 below].

- A. The building to be constructed does not have adequate sideyards. The property is zoned Limited Commercial with a residential density allowed even greater than MR-3. The Dimensional Standards for LC under FMC § 20-0502 mandate the existence of an Interior Side Minimum Setback of 5 feet. Less than 5 feet exists under the plans presented to the building official.

In regards to your contention that the building official should not have issued a building permit due to the fact that the Dimensional Standards for MR-3 under FMC/LDC §20-0501 are not met, I must remind you that the subject property is not zoned MR-3 but rather is zoned Limited Commercial with a Conditional Use Permit that allows residential living. Any improvements to the subject property must adhere to the minimum dimensional standards of the Limited Commercial zoning district because that is the applicable zoning district.

- 7. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Setback Averaging standards of FMC § 20-0504(D)(2). No attempt to secure a waiver from the Board of Adjustment was attempted, nor was the "greater front setback" standard utilized.

In regards to your contention that the building official should not have issued a building permit due to the fact that no attempt was made to secure a waiver from the Board of Adjustment relating to the Setback Averaging standards of FMC/LDC §20-0504(D), I can only respond by stating that the applicant never applied for Setback Averaging nor requested that the review by the City of the setbacks of the project be based on Setback Averaging. Furthermore, the Zoning Administrator never reviewed the site plan based on Setback Averaging. Therefore, I contend your argument about Setback Averaging is moot.

(X)

(4)

8. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 10 feet for all Off-Street Parking Spaces.
9. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 10 feet for all Driveways.
10. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 15 feet for all Principal Buildings.
11. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704. Minimum Setback from Abutting Side or Rear Lot line of Protected District shall be 20 feet for all Dumpsters. FMC § 20-0704(C) also required complete screening. The original trash site seems to have now disappeared in later plans.
12. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Residential Protection Standards of FMC § 20-0704(E). The landscape buffer has either a minimum width of 10 feet [with plants in addition to the Open Space plant requirements], or a minimum of 20 feet [with other plant standards]. Neither standard has been met, and, in addition, FMC § 20-0704(E)(4) prohibits such 10 foot or 20 foot landscape buffer from having any parking area or physical land improvement such as a driveway.

Even the Planning Department recognized that the Parking Lot buffer was a "Minimum Required: 20' (Width) (and a) Planting Requirement() (of) 1 medium tree/25 linear ft." Contrary to the assertion of the Planning Department's reviewer, the developer's actual proposed parking was not only adjacent to the right of way, but actually on the right of way existing in favor of Mr. Rakowski - not supposedly possible.

In regards to your contention that the building official should not have issued a building permit due to the fact that the Residential Protection Standards of FMC/LDC §20-0704 were not adhered with, ~~I must point out the fact that Residential Protection Standards are not applicable in this case. FMC/LDC §20-0704(A)(2) stipulates that Residential Protection Standards apply to:~~ ~~a. All multi-dwelling development when such development occurs on a site located within 150 feet of any SR or MHP zoning districts; and~~ ~~b. All nonresidential development when such development occurs on a site located within 150 feet of any SR, MR or MHP zoning districts.~~ The nearing SR, MR or MHP zone district to the subject property is over 200 feet away. Therefore, the Residential Protection Standards of FMC/LDC §20-0704 were not applicable.

(Z)

- 13. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to Parking Lot Perimeter Landscaping set forth in FMC § 20-0705(D). The Buffer Standard setting a Buffer Width of either 4 feet [hedgerow (continuous shrubs)] or 6 feet [Berm with maximum slope of 3:1 + 1 small tree per 25 linear feet] has not been met.

In regards to your contention that the building official should not have issued a building permit due to the fact that Parking Lot Perimeter Landscaping standards of FMC/LDC §20-0705(D) were not met, I must point out that the ~~Parking Lot Perimeter Landscaping standards of FMC/LDC §20-0705(D) are not applicable.~~ In accordance with FMC/LDC §20-0705(D)(3), "(p)arking lot perimeter buffers shall be located between adjacent street rights-of-way and off-street parking areas and all vehicle circulation areas within the front setback...". The subject properties' parking lot is located in the rear yard, the parking lot is not adjacent to street rights-of-way, and there is no vehicle circulation area within the front setback. Therefore, the ~~Parking Lot Perimeter Landscaping standards of FMC/LDC §20-0705(D) are not applicable.~~

AA

BB

- 14. The building official should not have issued a building permit due to the following violations of the City of Fargo's Land Development Code relating to the actual parking lot spaces included in the design. My 2002 Chevrolet Trailblazer has a width of an approximate 7 feet [mirror to mirror], and with one open door, a width in excess of 10'. The original June, 2008, design submitted only provided for 28 parking spaces having a parking space width of 9' [and various lengths] with zero

perimeter buffer on the west side and only 1' on the east side [and also a trash site], but more recently the blueprints have either eliminated the dimensions of the parking spaces altogether or used a parking space width of 8.5' with zero perimeter buffer on the west side and only 1' on the east side [also with elimination of the trash site]. Some of the photocopying deficiencies come into play with respect to this issue. Mr. Rakowski suggests that such small size should certainly conflict with "accepted construction standards in the industry" for off-street parking and loading areas. FMC § 20-0701(G); FMC § 20-0701(K) mandates a 10' width and a 25' length for loading spaces while FMC § 20-0701(F) mandates a minimum of 8' width and 20 feet length for stacking areas - the proposed length requirements are also inadequate under such standards.

In regards to your contention that the building official should not have issued a building permit due to the fact that the size of the parking spaces provided conflict with ~~"accepted construction standards in the industry" for off-street parking and loading areas.~~ I must point out that the Land Development Code does not specifically address the minimum standards in regards to the length or width of a parking stall. However, the Zoning Administrator did determine that the proposed 8.5 feet wide x 18.5 feet long parking stall was acceptable and within the range of approved parking stall sizes in other projects within the City of Fargo. In accordance with ~~FMC/LDC §20-0701(K), Retail Sales and Service and uses with a gross floor area between 5,000 and 25,000 square feet require one (1) off-street loading space that is at least 10 feet wide and 25 feet long.~~ As a matter of practice, the Zoning Administrator permits the use of the parking drive aisle to also serve as the Off-Street Loading Space.

CC

DD

- A. Photocopy of recorded May 9, 1963, easement favoring Mr. Rakowski. The principal building and the parking lot intrude into the area so as to violate the easement requirements, and also, act to prevent full use of the easement area by Mr. Rakowski. The parking lot curb cannot be within the sideyard under the terms of FMC § 20-0504(D)(1). Dimensional standards have been disregarded in many respects.
- B. Photocopy of a May 22, 2008, letter from the Fargo City Attorney ["I fail to understand your purpose for continuing to insist that a document 'must exist' when it has been freely acknowledge that there is no such written instrument."] indicating the non-existence of any agreement for parking on NDSU's "T" Lot - which had to exist in recordable form prior to any application for a building permit. No building permit application should have even been considered, much less approved. See above.

In regards to the easement of record, the City of Fargo, in accordance with FMC/LDC §20-0106(C) does not enforce private agreements. And, in regards to the "document" that you insist must exist because of the action of the Planning Commission on April 9, 2008 to approve an Alternative Access Plan, which you contend in accordance with FMC/LDC §20-0701(4)(d) must be recorded with the Register of Deeds, the reason this document does not exist and was not recorded with the Register of Deeds is due to the fact the one was never required. The Planning Commission action of April 9, 2008 was for an Alternative Access Plan; however, the plan did not contain a provision for Off-Street Parking. In accordance with FMC/LDC §20-0701(E)(2), the Planning Commission was authorized to consider and approve any alternative to providing off-street parking. The Board, based on the information provided, simply reduced the number of required spaces to 33 spaces. No additional off-street parking was required.

EE
FF

Decision of Appeal

In accordance with FMC/LDC §20-0910(E)(4) the Planning Commission or Board of City Commissioners shall consider the appealed Site Plan decision as a new matter without requirement for a public hearing. After considering the matter, the Planning Commission or Board of City Commissioners shall act to approve or deny the original application. The procedure shall be the same as required of the original action before the Zoning Administrator.

BEFORE THE FARGO PLANNING COMMISSION

William F. Rakowski,

Adjacent Landowner,

vs.

**AFFIDAVIT OF SERVICE
BY MAIL**

City of Fargo, Inspections Department and/or
FM City Development, LLC,

Building Permit Holder & Issuer.

State of North Dakota
County of Cass

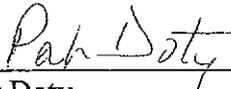
Pat Doty, being first duly sworn on oath, deposes and says that Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the 5th day of February, 2009, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: POSITION OF RAKOWSKI.

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

James Hinderaker
City of Fargo Planning and Development
200 Third Street North
Fargo, ND 58102

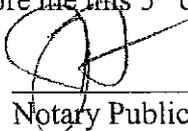
To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Pat Doty

Subscribed and sworn to before me this 5th day of February, 2009.

JONATHAN T GARAAS
Notary Public
State of North Dakota
My Commission Expires Oct. 25, 2009



Notary Public



OFFICE OF THE CITY ADMINISTRATOR
Pat Zavoral

6

April 2, 2009

City Commission
City Hall
200 Third Street North
Fargo, ND 58102

Dear City Commissioners,

As you know, the City of Fargo, along with cooperating agencies, have been working toward a permanent solution for flood problems experienced in Fargo. The Red River of the North and its contributing tributaries and watershed area encompass areas lying in Minnesota, North Dakota and South Dakota.

It appears appropriate to suggest that the federal government assist the City of Fargo by creating an appropriate governing body to take control and jurisdiction over the Red River watershed area for the purpose of addressing water quality issues in the Red River. This would include regulation and control of the retention and flow of water on the Red River.

Enclosed is a Resolution for your consideration that would urge the United States Congress to establish such a body as an agency of the federal government for these purposes. A draft resolution similar to this has been prepared for consideration by the North Dakota State Legislature.

SUGGESTED MOTION: To approve the adoption of the proposed resolution.

Sincerely,

A handwritten signature in black ink that reads "Pat Z".

Patrick J. Zavoral
City Administrator



Commissioner _____ introduced the following Resolution and moved its adoption:

RESOLUTION
BOARD OF CITY COMMISSIONERS OF THE
CITY OF FARGO, NORTH DAKOTA

A resolution urging Congress to establish the Red River Valley Authority as an agency or authorized board of the federal government for the purpose of the regulation and control of water quality of the Red River and regulation and control of the retention and flow of water, including retention by dams or retention ponds or other areas, and of drainage on the Red River.

WHEREAS, the Red River of the North and its contributing tributaries and watershed have experienced repeated problems with massive dangerous and destructive flooding which flooding has caused or seriously threatened the health, safety and welfare of citizens along the Red River and caused damage to the property of the citizens of federal, state and local government; and,

WHEREAS, the repeated flooding and threat of flooding has required an extraordinary level of time, money and resources of state, local and federal government in fighting and recovering from the repeated floods which, in terms of financial impact, may exceed \$200,000,000 for the flood event of spring 2009 and which cumulatively over the past 12 years is estimated to have had a financial impact in the hundreds of millions of dollars; and,

WHEREAS, there exists certain regulatory conflicts between urban and rural areas and between different states affected by the Red River and its contributing tributaries such that water quality and quantity concerns are not being consistently addressed, regulated and enforced; and,

WHEREAS, the states of Minnesota, North Dakota and South Dakota are affected by and therefore have an interest in the control of volume and flow of water and the retention of water in the Red River as well as the quality of water in the Red River; and,

WHEREAS, there are differences in the procedures and regulations of Minnesota, North Dakota and South Dakota pertaining to the governance and procedures establishing rules for the control of water quality, water flow, water retention and the enforcement of those laws and rules; and

WHEREAS, the circumstances described in this resolution constitute a matter of interstate concern which the federal government is uniquely able to address;

NOW THEREFORE, IT IS HEREBY RESOLVED BY THE BOARD OF CITY COMMISSIONERS OF THE CITY OF FARGO:

That the City Commission of the City of Fargo urges the Congress of the United States to establish the Red River Valley authority as an agency or authorized board of the federal government for the purpose of the regulation and control of water quality of the Red River and regulation and control of the retention and flow of water, including retention by dams or retention ponds or other areas, and of drainage on the Red River; and

BE IT FURTHER RESOLVED, that the Congressional Act establishing the Red River Valley authority provide a process for the President of the United States to appoint the members of the board consisting of not more than nine members and with all but two members being residents of the area serviced by the Red River Valley authority and with a provision that requires the President to consider recommendations from public officials such as the governors of the states of Minnesota, North Dakota and South Dakota; individual citizens; individuals representing business, industry, labor, electric power distribution, the environment, cities, and service organizations; and the Congressional Delegations of the states of Minnesota, North Dakota, and South Dakota in selecting qualified members to serve on the board; and

BE IT FURTHER RESOLVED, that the Fargo City Auditor forward copies of this resolution to the President of the United States; the governors of Minnesota, North Dakota, and South Dakota; and to each member of the Minnesota, North Dakota, and South Dakota Congressional Delegations.

ATTEST:

CITY OF FARGO

City Auditor

Mayor