



CITY OF GRAND FORKS

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OFFICE OF CITY ATTORNEY

E-MEMORANDUM

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From: Daniel L. Gaustad (dan@grandforkslaw.com)

Re: Mural at North Dakota Vision Services/School for the Blind

Date: July 9, 2025

A. INTRODUCTION

I am writing to provide information regarding the North Dakota Vision Services/School for the Blind mural matter that is currently set for review by the Planning and Zoning Commission at its meeting at 5:30 p.m. on July 9, 2025, and the City Council at its July 21, 2025 meeting.

As understood, a substantially completed mural has been installed along the entire north-facing exterior wall of an accessory building along 6th Avenue North. No application was submitted, nor approval given, prior to the installation this mural. Once this work was brought to the attention of the planning department, a stop work order was issued by the Department of Public Safety. Evidently some additional work was allowed to be done on the mural, but such authorization was rescinded shortly thereafter. As I understand, since then, no further work has been performed to complete the mural, however, changes to the mural, assuming it would be permitted to stay at its present location, would be needed.

Review of the applicable ordinances reveals the location of the mural violates City Ordinance § 18-301(3)(M)(4) because it is on a building that directly abuts a public right-of way – namely 6th Avenue North.

I write to provide information I intend to share with the Planning and Zoning Commission this evening, and which I will likewise share with the City Council with respect to the current request – to approve the mural in its current state and location (subject to finalizing and corrective work to the mural as noted in the staff report).

First, as noted, it is undisputed the North Dakota Vision Services/School for the Blind did not apply for or otherwise seek approval of the mural prior to work beginning. I understand that this was an oversight on their part and an honest mistake. There is no evidence or even suggestion that their actions were anything but an unfortunate oversight.

Second, City Ordinance § 18-0301(3)(M) was amended in July, 2023 to permit murals in residential districts, but only on school and church buildings. The amendment added a provision where such school or church murals located in residential districts are required to be approved by the City Council, after recommendation from Planning and Zoning, with a number of specifications to be evaluated (namely size, location, lighting plan, maintenance plan and fines should maintenance not occur). No other changes to the City Code § 18-0301(3)(M) relating to the requirements for the installation of murals were amended.¹

As currently drafted, there are a number of requirements for a mural to be installed – in a permitted location, including on school and church buildings. The most significant for purposes of this memo is that a “mural is not installed on any exterior wall of a building directly abutting a public right-of-way, excluding alleys.” City Code § 18-0301(3)(M)(4). Also, in speaking with Ryan Brooks, when the amendment was discussed in July, 2023, the discussion with respect to the location of murals on schools and churches that would be permitted focused on assuring murals in residential districts would not face public streets – such discussion is consistent with the provision that murals are not to be on an exterior wall abutting a public right-of-way.

This request by North Dakota Vision Services/School for the Blind to approve the nearly completed mural is being made after the fact, which itself poses some issues because it could lead to some precedence as to others, taking action that ignores City Code provisions (and not just under this ordinance but other ordinances), and then coming in to seek approval of the conduct. This memo is not intended to address that issue because I view that as a policy decision and can be handled on a more case by case basis, depending on the particular circumstances that are presented.

¹ It should be noted the online version of the City Code does not have the 2023 amendments incorporated – it is unclear why the online version has not been updated. Nonetheless, had North Dakota Vision Services/School for the Blind, reviewed the online version of the ordinance (which I understand they did not) the mural would not have been allowed since the property is not in a business or industrial district. Thus, the fact the updates are not online has no effect on the issues currently presented. Put another way, had North Dakota Vision Services/School for the Blind reviewed the online version of the ordinance, (which they did not) it would have shown no mural would have been allowed because under the online version it provides for murals being allowed only in business or industrial districts, and the North Dakota Vision Services/School for the Blind is not within a business or industrial district. However, with the July, 2023 amendment, a mural would be allowed since it is on a school building, provided the other requirements already existing under the ordinance are met.

However, by reviewing the application at this point, one must effectively go back in time, and determine whether the mural in its present location would have even been permitted. As the staff report notes, the location chosen violates City Code § 18-0301(3)(M)(4) since the mural is on an exterior wall of the building abutting 6th Avenue North, and in turn, I understand approval of this location would not have been provided had an application been submitted. Rather, the North Dakota Vision Services/School for the Blind would have been advised to apply for an alternative building wall location.

B. VARIANCE

I understand some consideration for a variance for this mural, and in particular, a variance to the location requirement under City Code § 18-0301(3)(M)(4) to be granted.

The first concern is that the language of City Code § 18-0301(3)(M)(4) makes no reference to a variance, waiver, exception or exemption of this provision. Further, in speaking with the Planning Department, had North Dakota Vision Services/School for the Blind come in to seek approval of the mural at this location, it would have been denied.

Even aside from this problem in the language of the mural ordinance, a variance under these circumstances may not be applicable given the standard set out in other provisions of the City Code and case law relating to the granting of variances in planning and zoning matters.

For example, the Planning and Zoning Commission may recommend variances from subdivision regulations “when, in its opinion, undue hardships may result from strict compliance.” City Code § 18-0912(1). There are number factors described in this City Code for such variances. However, no variance can be recommended unless the Planning and Zoning Commission finds:

- (A) That there are special circumstances or conditions affecting said property such that the strict application of the provisions of this chapter would deprive the applicant of the reasonable use of his land.
- (B) That the variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner.
- (C) That the granting of the variance will not be detrimental to the public welfare or injurious to other property in the territory in which said property is situated.
- (D) That the granting of the variance will not conflict with the intent of the Grand Forks Comprehensive Plan.

Likewise, the Board of Adjustments has authority to grant variances of any provisions of the entire Land Development Code (Article XVIII of the City Code). City Code § 18-0602. Variances that may be granted by the Board of Adjustment are to “vary or modify the strict application of any of the regulations or provisions contained in this chapter in cases in which there are no practical difficulties or unnecessary hardships in the way of such strict application.” City Code § 18-0602(1). However, “no variance or modifications of the uses permitted within a district shall be allowed” to be granted by the Board of Adjustments. *Id.* Further, like variances that may be recommended by the Planning and Zoning Commission, the variances that may be granted by

the Board of Adjustments must meet certain requirements, including “proof of unique circumstances,” the existence of “special circumstances or conditions . . . which circumstances or conditions are peculiar to such land or buildings and do not apply generally for such land or buildings in the neighborhood . . .” City Code § 18-0602(4). Also, there must be proof of unnecessary hardship, which “cannot be self-created” but rather “the hardship must result from the application of [the Land Use Development Code – being Article XVIII of the City Code].” City Code § 18-0602(5).

Also, the North Dakota Supreme Court has issued decisions with respect to the granting of variances – being Gullickson v. Stark Cnty. Bd. of Cnty. Comm’rs, 474 N.W.2d 890 (N.D. 1991) and Johnson v. City of Burlington, 2020 ND 81, 942 N.W.2d 816.² The Stark County case is the seminal case in North Dakota relative to determine whether the issuance of a variance is arbitrary, capricious, or unreasonable. The North Dakota Supreme Court has explained “a variance ‘is invoked to avoid the confiscatory effect that would follow a literal enforcement of some term of a zoning ordinance operating to deprive an owner of all beneficial use of his land.’” Gullickson v. Stark Cnty. Bd. of Cnty. Comm’rs, 474 N.W.2d 890, 892 (N.D. 1991). Further, the Court has explained, that “one important requirement for a variance is ‘that the hardship must come from circumstances unique to a particular lot, or perhaps a few, and at any rate not from circumstances general in the neighborhood [and the] unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner himself.’” Id. (citations omitted). Finally, the Court, observed the following with respect to variances:

Absent a uniform and rigorous standard, it is apparent that even a well-intentioned zoning board “by piecemeal exemption which ultimately changes the character of the neighborhood * * * [may create] far greater hardships than that which a variance may alleviate” (Matter of Otto v. Steinhilber, 282 N.Y. 71, 77–78, 24 N.E.2d 851, supra). Unjustified variances likewise may destroy or diminish the value of nearby property and adversely affect those who obtained “residences in reliance upon the design of the zoning ordinance” (*id.*, at p. 78, 24 N.E.2d 851). These evils, not unlike those associated with the universally condemned practice of spot zoning, have been zealously guarded against by this court.

Id. at 894.

Significantly, in this particular case (and somewhat similar to the present situation), the property owner installed a mobile home, after receiving a permit to do so, but it was later discovered mobile homes were not permitted in the particular zoning district. Id. at 891. After it was discovered the mobile home was not permitted, the County, after the fact, approved a variance for the mobile home. Id. Neighbors then appealed that decision, and the North Dakota Supreme Court reversed, concluding the granting of the variance provided “a privilege unavailable to other occupants of the same zoning district.” Id.

² The Stark County case is relied on and quoted extensively in the City of Burlington case, and therefore, this memo discusses the Stark County case in detail.

Thus, based on the foregoing, a variance may not be applicable given the standard that exists for granting them as outlined in City Code and case law.

C. CONDITIONAL USE PERMIT

I have also reviewed whether this mural could be granted a conditional use permit. Like the variance, this is problematic because a condition use permit is dedicated for “uses that are authorized by [the Land Development Code] that normally would be ‘permitted uses’ but may require special planning consideration due to their circulation and access requirements, operational characteristics, proximity to other similar uses, impact on neighborhood property, etc., and which therefore may need special conditions imposed to control these factors, to protect the public health, safety, and welfare and to assure compliance and harmony with the comprehensive plan of the city.” City Code § 18-0701.

Here, as already noted, the placement of the mural at its current location is not one that would be permitted.

Furthermore, a condition use is one where the Planning & Zoning Commission has found “that the establishment, maintenance, or conducting of the use for which a conditional use permit is sought will not under the circumstances of the particular case be detrimental to the health, safety, morals, comfort, convenience or welfare of the persons residing or working in the area adjacent to such use, or to the public welfare, or injurious to property or improvements in the area adjacent to such use.” City Code § 18-0703(1). This may be problematic when considering the City Council’s discussion surrounding the change to allow murals in residential districts paid particular attention to murals not facing other property.

D. ALTERNATIVE

An alternative the Planning & Zoning Commission and City Council may wish to consider is to postpone a decision on this matter to allow for my office to work with the Planning Department to develop an amendment to City Code § 18-0301(3)(M) that would provide more flexibility and a lower threshold than is required for a variance or conditional use permit. For example, language being added that would authorize more discretion to be exercised by Planning & Zoning Commission and the City Council, and without the heavy burden imposed for a variance (as discussed above) that would likewise be based on objective criteria, such as distance from the public right-of-way or approval from abutting property owners. These are simply examples, but the thrust of the amendment would allow for the Planning & Zoning Commission to recommend, and the City Council to consider, a waiver or exemption without necessarily having to meet the high evidentiary threshold and criteria required when granting a variance.