

NO. A08-1988

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State of Minnesota
In Court of Appeals

Beat L. Krummenacher,

Appellant,

v.

City of Minnetonka and JoAnne K. Liebeler,

Respondents.

APPELLANT'S BRIEF

Paul W. Chamberlain (#0016007)
Ryan R. Kuhlmann (#0387775)
CHAMBERLAIN LAW FIRM
1907 Wayzata Boulevard, Suite 130
Wayzata, MN 55391
(952) 473-8444

*Attorneys for Appellant
Beat L. Krummenacher*

George C. Hoff (#45846)
Shelley M. Ryan (#348193)
HOFF, BARRY & KOZAR, P.A.
160 Flagship Corporate Center
775 Prairie Center Drive
Eden Prairie, MN 55344
(952) 941-9220

Attorneys for Respondent City of Minnetonka

James M. Susag (#261038)
LARKIN, HOFFMAN, DALY &
LINDGREN LTD.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Bloomington, MN 55431
(952) 835-3800

Attorney for Respondent JoAnne K. Liebeler

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Statement of the Issues

1. Did the City of Minnetonka's decision to grant a variance to Respondent Liebler for expansion of a legal nonconformity violate the Minn. Stat. § 462.357, subd. 1e(a) which prohibits expansion of legal nonconformities?

The district court affirmed the City's decision and did not address Minn. Stat. § 462.357, subd. 1e(a) in its Order.

Apposite statute:

- Minn. Stat. § 462.357, subd. 1e(a)

2. Was the City of Minnetonka's decision to grant a variance to Respondent Liebler under Minn. Stat. § 462.357, subd. 6(2) unreasonable, arbitrary, or capricious when no hardship can be shown for an addition of new living quarters for a family room, yoga and craft studio, and heating and air conditioning above a grandfathered nonconforming detached garage?

The district court held that the City's decision was not unreasonable, arbitrary, or capricious.

Apposite statute and ordinance:

- Minn. Stat. § 462.357, subd. 6(2)
- Minnetonka City Code § 300.07.1(a)

Apposite cases:

- *Luger v. City of Burnsville*, 295 N.W.2d 609 (Minn. 1980)
- *Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn. App. 2002)
- *Stotts v. Wright County*, 478 N.W.2d 802 (Minn. App. 1991)
- *Castle Design & Development Co., Inc. v. City of Lake Elmo*, 396 N.W.2d 578 (Minn. App. 1986)

3. Is the City of Minnetonka's decision to grant a variance from setback requirements invalid because Respondent Liebler's new construction above the garage would change the structure's use from an uninhabitable accessory garage structure to habitable living quarters with a family room, yoga and craft studio, and heating and air conditioning in violation of Minnetonka City Code § 300.02?

The district court held that the City's decision was not unreasonable, arbitrary, or capricious.

Apposite ordinance:

- Minnetonka City Code § 300.02

4. Did the district court err by refusing to rule on Appellant's motion to compel discovery of the record on appeal and dismissing the appeal without a determination by the trial court of the record on appeal?

In response to Appellant's motion to compel, the district court ordered the parties to submit briefing on whether the City's decision was unreasonable, arbitrary, or capricious. After the parties submitted their briefs, the district court made a threshold decision affirming the City and did not rule on Appellant's motion to compel.

Apposite rules:

- Minn. R. Civ. P. 26
- Minn. R. Civ. P. 34
- Minn. R. Civ. P. 37.01

Apposite cases:

- *Swanson v. City of Bloomington*, 421 N.W.2d 307, (Minn. 1998)
- *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981)

Statement of the Case

Appellant Krummenacher appealed to Hennepin County District Court from the City of Minnetonka's decision to grant a variance to Respondent Liebeler for the expansion of her grandfathered nonconforming garage to add on a new, finished second level with living quarters including a family room, yoga and craft studio, and heating and air conditioning. Appellant, who owns the adjacent property, contests the variance grant on the grounds that (1) Minn. Stat. § 462.357, subd. 1e(a) prohibits expansion of legal nonconformities, and (2) no hardship exists under Minn. Stat. § 462.357, subd. 6(2) that would permit a variance for new construction of living quarters above a detached garage which has been put to reasonable use as a detached garage without living quarters ever since it was originally constructed. Appellant contends the variance grant was unreasonable, arbitrary, and capricious, as well as a violation of state law and city code. Respondents contend the variance is proper.

In response to Appellant's motion to compel discovery, the district court, Hon. John L. Holahan did not rule on the motion and ordered briefing on the appeal based on a threshold ruling by the trial court. On October 22, 2008, after briefing by the parties, the trial court dismissed Appellant's appeal from the City's decision. There was no motion to dismiss and no hearing. Because the October 22, 2008 Order disposed of all claims, the parties stipulated that this case is ripe for appeal and final judgment was entered on November 10, 2008.

Statement of Facts

Appellant Beat L. Krummenacher's property in Minnetonka adjoins property owned by Defendant JoAnne K. Liebeler. (Krummenacher letter to City Planning Division, Apr. 18, 2008; A1.) Liebeler's property includes a three bedroom, two bath home with 2,975 finished square feet and an attached 2-1/2 car garage with office space above the attached garage with a separate entrance for in-home business. (Complaint ¶ 4; A23; Liebeler Answer ¶ 5; A45.) Liebeler's property also includes an additional detached two-car garage. (*Id.*) The detached garage is a legal nonconformity grandfathered from the City of Minnetonka's minimum setback requirement of 50 feet from the front property line, standing only 17 feet from the property line. (Public Hr'g Notice; A112.)

Liebeler seeks to reconstruct the nonconforming detached garage and add on a new, finished second level with living quarters for a family room, a personal yoga and craft studio, heating and air conditioning, and a separate entrance. (Complaint ¶ 7; A23; City Answer ¶ 5; A57.) The garage space and the luxury living space above would have separate entrances and neither would be accessible from the other. (Complaint ¶ 8; A24; City Answer ¶ 6; A57.) The new addition would use the flat top garage as the building foundation for the new construction. (Architectural drawings; A101-02.)

The reconstruction and enlargement of the nonconforming garage by building a second floor family room on top of the existing garage roof requires a variance because the expansion would violate the City of Minnetonka's setback

requirements. (A112.) It would create an expansion of a nonconforming use of a detached garage which cannot be reconstructed without a variance and proof by Liebeler of a hardship to her if she were to comply with the ordinance by confining all building renovations within the dimensions of the existing nonconforming structure. (*Id.*) Liebeler applied to the City of Minnetonka for a variance from the ordinance for the project, Project No. 08016.08a. (Planning Commission Resolution; A138.) The garage project is part of a remodeling project of the Liebeler property which is being filmed by television crews and is to be shown on a television show.

Krummenacher opposes the variance because the nonconforming garage, if enlarged to add the extra luxury living space, would obstruct the easterly view of greenery from his living room, thus diminishing the value of his property.

(Krummenacher letter; A1.) As the nonconforming garage currently stands, it has a flat roof and fits the contour of the land as it is mostly hidden by the side of a hill. (*Id.*) Krummenacher does not oppose repairs to keep the building in good condition so long as its footprint, height, and other dimensions are not increased. (*Id.*) The variance sought, however, would double the height and change the character from garage space to living space, and raise a large wall directly blocking Krummenacher's scenic easterly view. (*Id.*)

Krummenacher built his home on his property and he has lived there for over 19 years. (*Id.*) The existing detached garage on the Liebeler property was built years before Krummenacher began construction of his residence next door

and decades before Liebeler purchased the property. (Sorgatz letter, June 4, 2008; A8.) The garage has had the same footprint and same height since it was originally constructed many years before the setback ordinance was enacted. (Chamberlain letter, May 22, 2008; A4.) The garage existed in its present condition and was grandfathered at the time Liebeler purchased the property in December 2004. Liebeler knew or should have known that any new expanded structure could not be grandfathered. (Sorgatz letter; A8-8a.)

Krummenacher first received notice of Liebeler's plans to construct the enlarged building when he received a letter from the Minnetonka City Planning Commission dated April 8, 2008. (See T. 23; A19.) On May 15, 2008, after a contested hearing, the Commission approved Liebeler's request for the variance. (Resolution; A138-41.) The Commission based its approval on four faulty findings in its May 15, 2008 written report:

1. The Commission found an "undue hardship due to the topography of the site, width of the lot, location of the driveway and existing vegetation" even though the lot already contains a nearly 3,000 square foot home with an attached 2-1/2 car garage in addition to the detached two-car garage.
2. The Commission found "[t]he non-conforming setback is a circumstance that is not common to every similarly zoned property" even though the "unique circumstance" of enjoying grandfathered status is a benefit, not a hardship.
3. The Commission found the new structure "would comply with the zoning ordinance requirements for a detached garage for maximum height and size"—ignoring the fact that the existing garage is a legal nonconformity that cannot be expanded.
4. The Commission found the new structure "would not alter the character of the neighborhood" because "[t]here is also a detached garage on the

property to the east that is set back 17 feet from Ridgewood Road”—ignoring the fact that no living space exists on the second level of the referenced garage or any other detached garage in the neighborhood, and such use of a garage as habitable space is prohibited by the express language of the ordinance.

(*Id.*; A139.) Krummenacher appealed the Commission’s decision to the Minnetonka City Council, and the appeal was heard on June 30, 2008. During the hearing, the city attorney noted the problem with enlarging the size and mass of the structure and warned that “the Council should be very cautious about the issue of expansions of nonconforming uses in terms of the precedents that you set for other applications” (T. 10; A16.) A council member also noted that “if this were a new proposal this close to the road, it wouldn’t be approved[.]” (T. 15; A17.) Nevertheless, the City Council upheld the Commission’s decision based on the above findings. (T. 35; A22.)

Krummenacher appealed from the City’s decision pursuant to Minn. Stat. § 462.361, allowing for review of the decision by appropriate remedy in district court. (Complaint; A23-32.) In district court, Krummenacher served formal discovery requests to each Respondent. (A33; A39.) Respondent Liebeler refused to respond. (Susag letter, July 28, 2008; A53.) Krummenacher made a good faith effort to resolve the discovery matter out of court, but Liebeler’s counsel abruptly responded, “Suffice it to say that I strongly disagree with every aspect of your letter.” (Susag letter, Aug. 1, 2008; A54.)

The City responded but objected to each request and refused to produce any documents other than those that it unilaterally deemed to constitute the

record on appeal before the district court. (A63-64.) Krummenacher moved to compel production of documents from Liebler and the City and sought a ruling that the City may not unilaterally decide the record on appeal. (Letter Motions; A65; A80.) In response to the motions, the court ordered briefing on whether the City's decision was unreasonable, arbitrary, or capricious. (Order; A164.) In its Statement of the Case submitted to this Court, the City incorrectly states, "On September 17, 2008, the District Court denied Plaintiff's motion to compel discovery, finding that the City had produced a clear and verbatim record of its decision" (A197-98.) The statement is false because there was no such denial of the motion. Instead, the court ruled that the city council decisions do not necessarily rest on the verbatim record of the proceedings, but no additional evidence is needed for the court to make a threshold decision. (Discovery Order; A164.) The court ordered that if it determined after review that the municipal body's decision was unreasonable, arbitrary or capricious, then the court will allow discovery and schedule a trial. (*Id.*) There was therefore no determination whatsoever on the discovery motion. (*Id.*) After the parties submitted their briefs, the district court made a threshold decision affirming the City's decision without a hearing and without ruling on Krummenacher's motion to compel. (Order; A187-90.) This appeal follows.

Standard of Review

This Court reviews *de novo* the district court's decision in this case. "In considering zoning cases, an appellate court reviews the decision of the city

council independent of the findings and conclusions of the district court” *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 630 (Minn. App. 2002). A reviewing court examines a city’s action to determine whether it was arbitrary or capricious, or whether the reasons articulated by the city lack validity or bearing on the general welfare, or whether the reasons were legally sufficient and had a factual basis. *Id.* Although a municipality has discretion when considering an application for a variance, “[a] reviewing court will set aside a city’s decision in a zoning variance matter if the decision is unreasonable.” *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 491 (Minn. App. 1995). Reasonableness is measured by standards set out in the city’s ordinances. *Id.*

Summary of the Argument

The City’s decision to grant Liebeler’s variance request is impermissible in three ways. First, the decision violates the prohibition of expansion of legal nonconformities under Minn. Stat. § 462.357, subd. 1e(a). Second, the decision is unreasonable under Minn. Stat. § 462.357, subd. 6(2) because Liebeler cannot show any hardship if no variance is granted for the addition of luxury living quarters above her detached garage. Third, the decision is unreasonable because Liebeler’s new construction above her garage would change the structure’s use from an uninhabitable accessory garage structure to habitable living quarters with a family room, yoga and craft studio, and heating and air conditioning in violation of the City of Minnetonka ordinances. Finally, Appellant contends that it was error for the district court to fail to rule on his motion to compel

production of documents that could either constitute part of the record before the district court on appeal or potentially augment the record on appeal.

Argument

I. The City of Minnetonka's decision to grant a variance to Respondent Liebeler for expansion of a legal nonconformity violated the Minn. Stat. § 462.357, subd. 1e(a) which prohibits expansion of legal nonconformities.

The City of Minnetonka's decision to grant Respondent Liebeler's request for a variance to expand a legal nonconformity should be reversed because it violates Minn. Stat. § 462.357, subd. 1e(a). "*Any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion[.]*" Minn. Stat. § 462.357, subd. 1e(a) (emphasis added).

A property owner's right to continue a legal nonconformity was once limited to only repair and maintenance. In 2004 the legislature for the first time allowed replacement, restoration, or improvement, but it still chose to specifically bar expansion. As such, it is black letter law that a legal nonconformity cannot be expanded in Minnesota. The plain meaning of the statute is indisputable. Further, because state law is superior to municipal law, no variance can be granted pursuant to any ordinance in violation of Minn. Stat. § 462.357, subd. 1e(a).

In this case, Appellant's position is congruent with legislative intent and the plain language of Minn. Stat. § 462.357, subd. 1e(a). While Krummenacher opposes expansion which is disallowed by the statute, he does not oppose "repair, replacement, restoration, maintenance, or improvement" which the statute permits. In fact, he supports repairs to Liebeler's nonconforming garage so long as its dimensions remain the same, as is the legislature's mandate. Rather than simply repairing or restoring the existing structure, however, Liebeler's variance request seeks to expand a nonconforming structure to double its size by adding on a new, finished second level above the existing detached garage. Because the City of Minnetonka's decision to grant a variance allows expansion of a legal nonconformity, the decision directly violates Minn. Stat. § 462.357, subd. 1e(a), and it therefore must be reversed.

If the Court rules in favor of Appellant on this issue and reverses the City's decision pursuant to Minn. Stat. § 462.357, subd. 1e(a), all other issues and arguments raised on appeal are moot.

II. The City of Minnetonka's decision to grant a variance to Respondent Liebeler under Minn. Stat. § 462.357, subd. 6(2) was unreasonable, arbitrary, and capricious because no hardship can be shown for an addition of new living quarters for a family room, yoga and craft studio, and heating and air conditioning above a grandfathered nonconforming detached garage.

A municipality's authority to grant a variance cannot exceed the powers granted by state law under Minn. Stat. § 462.357, subd. 6. Under state law, a municipality is empowered to hear zoning variance requests where strict

enforcement of the zoning ordinance would cause undue hardship such that the property cannot be put to a “reasonable use.” Minn. Stat. § 462.357, subd. 6(2).

Minnetonka City Code § 300.07.1(a) allows a variance only when (1) it is demonstrated that the variance would be “consistent with the spirit and intent” of the ordinance, and (2) strict enforcement of the ordinance would cause “undue hardship” because of circumstances unique to the property. Three criteria must exist for there to be undue hardship:

1. The property cannot be put to a “reasonable use” under the ordinance;
2. The plight of the landowner is due to circumstances unique to the property not created by the landowner, and
3. The variance, if granted, would not alter the essential character of the neighborhood.

Minnetonka City Code § 300.07.1(a)¹ ; Minn. Stat. § 462.357, subd. 6(2).

Economic considerations *shall not* constitute undue hardship if reasonable use of the property exists under the ordinance. Minnetonka City Code

¹ Minnetonka City Code § 300.07.1(a) states in full: “A variance may be granted from the literal provisions of this ordinance in instances where strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration and when it is demonstrated that such actions would be consistent with the spirit and intent of this ordinance. Undue hardship means the property in question cannot be put to a reasonable use if used under conditions allowed by this ordinance, the plight of the landowner is due to circumstances unique to the property not created by the landowner, and the variance, if granted, would not alter the essential character of the neighborhood. Economic consideration alone shall not constitute an undue hardship if reasonable use of the property exists under the terms of this ordinance. Undue hardship also includes, but is not limited to, inadequate access to direct sunlight for solar energy systems.”

§ 300.07.1(a); Minn. Stat. § 462.357, subd. 6(2). Because a variance allows property to be used in a manner forbidden by an ordinance, a “heavy burden” is imposed on an applicant for a variance to show that its grant is appropriate.

Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980).

In this case, none of the criteria for showing hardship are met, as discussed in the following four subsections. First, the garage can be put to a reasonable use as a one-level garage, as it has been for years, without an added second level for living quarters. Second, the landowner has failed to show any “plight” due to unique characteristics of the property. Third, a variance would alter the character of the neighborhood, which would be particularly unfavorable to Kruppenacher. Fourth, the variance is inconsistent with the spirit and intent of the ordinance. Each of the four criteria must be met under Minnetonka City Code § 300.07.1(a) and Minn. Stat. § 462.357, subd. 6(2). If only one of the four criteria is not met, this Court must reverse the City’s decision.

a. There is no “undue hardship” because Liebeler’s detached garage can be—and has been for many years—put to a reasonable use as a garage without living quarters on the second level.

The City erroneously found an “undue hardship” due to the topography of the property, width of the lot, location of the driveway and existing vegetation. (Planning Commission Resolution; A139.) But the existing garage has been used for years, and the characteristics of the lot do not necessitate a yoga studio, craft studio, or family room to be added onto the garage. Decades-long use of the

structure as a one-level garage without living quarters demonstrates that the property has a reasonable use already. The topography, width of the lot, location of the driveway, and existing vegetation do not cause an undue hardship, and no hardship exists that would necessitate a variance to add a second level for living space above the detached garage. Further, the proposed new yoga/craft studio would be a pure luxury addition rather than a remedy for an undue hardship.

In *Mohler*, 643 N.W.2d at 630, property owners sought a variance from the City of St. Louis Park to transform their detached garage into a two level structure with a new playroom and office on the second level. The city approved the variance, and the two-level garage was built. The court, however, reversed the approval of the variance, and the height of the new structure was ordered to be reduced. The court held the city's approval of the variance was unreasonable because (1) the two-level detached garage was out of character with the surrounding neighborhood; (2) the variance did not keep the spirit and intent of the ordinance based on its use and non-use features; (3) living space above the garage was inconsistent with other nearby residents who did not use their garage for similar use; and (4) there was no showing of undue hardship. The court concluded the city failed to comply with the statutory factors required for granting a variance, as well as its own city code.

The instant case involves a similar variance request for a two story building with a garage on the existing lower level and added living space on the upper level, which is out of character with the surrounding neighborhood. The City

ignored the fact that no neighboring properties have a yoga studio or other living area above any detached garage. Further, the substantive requirements in the Minnetonka ordinance are similar to those in the St. Louis Park ordinance applied in *Mohler*. No undue hardship exists that would necessitate a variance for a yoga studio to be added to an existing garage.

In *Stotts v. Wright County*, 478 N.W.2d 802 (Minn. App. 1991), a property owner was denied a variance after constructing a two story boathouse on the footprint of the existing one story boathouse. The court held the county was not estopped from ordering the second level of the boathouse to be removed. This case should be similarly decided, and no second level addition should be allowed to be constructed in violation of the ordinance.

b. No “plight” is caused by any circumstances unique to the property, and any alleged hardship is self-created.

The only “unique circumstance” cited by the City as a basis for its decision is that the “non-conforming setback is a circumstance that is not common to every similarly zoned property.” (Planning Commission Resolution; A139.) But the finding misses the point—the unique circumstance must cause a *plight* in order to justify a variance. Minnetonka City Code § 300.07.1(a). Here, the City mistakenly cites the benefit of enjoying grandfathered status as the unique circumstance, which is not a plight that would justify a variance.

Additionally, in *Castle Design & Development Co., Inc. v. City of Lake Elmo*, 396 N.W.2d 578 (Minn. App. 1986), the court ruled that if an applicant for

a variance purchases property with actual or constructive notice of zoning restrictions, then any hardship is self-created and does not constitute “undue hardship.” Here, Defendant Liebeler knew the condition of the garage when she purchased it, and she was aware it was already non-conforming and could not be reconstructed to be larger. (Sorgatz letter; A8; Seller’s Property Disclosure Statement, lines 53, 54, 75 and 76; A8-a.)

c. An enlarged nonconforming garage would alter the character of the neighborhood.

The City mistakenly found the new garage would not alter the character of the neighborhood. (Planning Commission Resolution; A139.) While repairs to the existing structure could visually enhance the structure, adding a second level above the garage would be out of character for the neighborhood, and it would visually detract from eastern views from Krummenacher’s adjoining property.

The City also mistakenly based its decision on a finding that the detached garage complies with zoning ordinance requirements for size and height. (*Id.*) But that is not the issue. New garage height requirements do not govern what can be built on property 33 feet inside the setback requirements. No other nonconforming garage in the neighborhood exists with a second level for luxury living quarters.

d. The variance departs from the spirit and intent of the ordinance because it impermissibly changes the use of the accessory structure from garage space to living quarters.

A variance is permissible “only when it is demonstrated that such actions will be in keeping with the spirit and intent of the ordinance.” Minn. Stat. § 462.357, subd. 6(2). In this case, the spirit and intent of the ordinance are presumably consistent with state law, and state law disallows expansion of legal nonconformities. Minn. Stat. § 462.357, subd. 1e(a). Additionally, the variance allows for a different kind of use than the ordinance allows for a garage structure. Specifically, the ordinance defines a garage as an *uninhabited* accessory structure used for parking and storage while the variance would allow *habitable* living quarters on a new second level above the garage. Minnetonka City Code § 300.02 (provided in the following Section III). Section III below states in greater detail the reasons why the shift in use of the garage structure violates the ordinance, and it is incorporated by reference herein. Because the variance violates city code, as discussed in Section III as a separate and independent ground for reversal, it likewise departs from the spirit and intent of the ordinance.

Because the applicant cannot meet her burden of satisfying each of the four requirements, a variance is inappropriate. *See Luger*, 295 N.W.2d at 612 (“heavy burden” is on the applicant to show a variance is appropriate). As such, the City’s decision to grant the variance fails to satisfy the requirements of state law and the City’s own code, and its decision is therefore unreasonable.

III. The City of Minnetonka’s decision to grant a variance from setback requirements is invalid because Respondent Liebeler’s new construction above the garage would change the structure’s use from an uninhabitable accessory garage structure to habitable living quarters with a family room, yoga and craft studio, and heating and air conditioning in violation of Minnetonka City Code § 300.02.

The City’s decision violates its own ordinance because the decision changes the use of the structure from a detached accessory garage structure to living quarters with family room, yoga and craft studio, and heating and air conditioning. The Minnetonka Code of Ordinances states the following:

Section 300.02. Definitions. For the purpose of this ordinance, certain terms and words are defined as follows:

...

5. “Accessory structure” - an uninhabited subordinate building or other subordinate structure, including garages, sheds or storage buildings over 120 square feet except as modified in section 300.24, swimming pools, spas, sport courts, and tennis courts located on the same lot as a principal building, the use of which is clearly subordinate to the use of the principal building.

...

62. “Garage” - a detached or attached accessory structure designed or used for the parking and storage of vehicles owned and operated by residents of a principal structure on the same lot.

As defined, a “garage” is an “uninhabited” subordinate structure designed and used for parking and storage of vehicles, and not living space. As the district court correctly found, however, Liebeler seeks to expand her garage “to add on a finished second level with living quarters for a family room, a personal yoga studio and craft studio, heating and air conditioning.” (Discovery Order; A163.) Respondents mistakenly argue that because the addition will have no bed or

bathroom it cannot be “living quarters.” The argument, however, is conflicted by the City’s own definition of “garage” in its ordinance.

The City has demonstrated that it will arbitrarily make a finding so long as it supports the City’s foregone conclusion that it will grant Liebeler’s variance regardless of any legal requirements or the lack of any good faith showing of a hardship. The City’s decision was not made based on sound findings. Instead, unsound findings were deduced after reaching an arbitrary decision, possibly influenced by the fact that Liebeler’s project is to be featured in a television show. While the City may be enamored by the potential positive publicity from the television show, it cannot simply ignore legal constraints by which all other residents must abide. Because the City’s decision violates state statutory requirements, Minnesota case law, and the City’s own code, it is unreasonable, arbitrary, and capricious, and it must be reversed.

IV. The district court erred by refusing to rule on Appellant’s motion to compel discovery of the record on appeal from the City’s decision and dismissing the appeal without a determination by the trial court of the record before it on appeal.

If this Court rules in Appellant’s favor to deny the variance, the argument in this section is moot.

The issue before this Court is whether a municipality has unilateral authority to determine the record before the court on appeal from a municipality decision which precludes any other discovery. Respondents wrongly contend

that the City has the unilateral authority to determine the record on appeal before the court from the City's decision. The court, however, determines the record.

The court—and not a municipal party—determines the record on appeal from a municipality's decision. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 312-13 (Minn. 1998). Specifically, *Swanson* requires that “a district court should establish the scope and conduct of its review of a municipality's zoning decision by considering the nature, fairness and adequacy of the proceeding at the local level and the adequacy of the factual and decisional record of the local proceeding.” *Id.* at 312-13 (emphasis added). *Swanson* explicitly states that meaningful review may require augmentation of the record in district court. *Id.* at 313. “Where the municipal proceeding has not been fair or the record of that proceeding is not clear and complete, *Honn* applies and the parties are entitled to a trial or an opportunity to augment the record in district court. The meaningful review to which parties are entitled requires no less.” *Id.* (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981)). Additional material evidence may be added to the record. *Swanson*, 421 N.W.2d at 313. Further, while *Swanson* and *Honn* may affect admissibility of certain evidence, but they do not limit discovery under Rules 26 or 34. See also *Garrity v. Kemper Motor Sales*, 159 N.W.2d 103, 106 (Minn. 1968) (holding a party cannot “shift the burden” to the opponent to seek a court order compelling answers without violating the rules).

In this case, Appellant sought an order to compel discovery to determine (1) what constitutes the record, (2) whether material evidence has been excluded

from the record by the City without Appellant's knowledge, and (3) whether augmentation of the record is needed on appeal from the City's decision. Respondents failed to comply with Appellant's discovery requests which were served pursuant to Minn. R. Civ. P. 34, leaving Appellant with no choice but to bring his motion to compel under Minn. R. Civ. P. 37.01(b). In response to Appellant's motion, the court ordered the parties to submit briefing as to whether the City's decision was unreasonable, arbitrary, or capricious. After briefing, the court made a threshold decision affirming the City, thus disposing of the lawsuit.

Respondents mistakenly contend that *Swanson* allows the City to unilaterally decide what constitutes the record before the court and there can be no discovery. Only the court, however, has authority to determine what constitutes the record, and Appellant has a right to discovery and a right to seek to augment the record if important information has been wrongly omitted from the record. While this case involves a pet project to be aired in a television show, likely with extensive relevant documentation possessed by both the City and Liebler, Respondents have collectively produced an impossibly thin version of what it alleges to be the full record. Allowing a litigant to unilaterally determine the record on review without discovery is dangerous and allows an open door for impropriety. Further, there would be been no need for Respondents to so adamantly object and defend against Appellant's motion to compel if nothing relevant had been withheld. It is telling that Respondents have never articulated a *reason* to withhold information; they have only argued that Appellant cannot

have full access based on a flawed interpretation of *Swanson* and *Honn*. If no pertinent information or “smoking gun” is being withheld, there is no explanation why the City has funded a legal battle in support of its objection rather than simply withdrawing the objection.

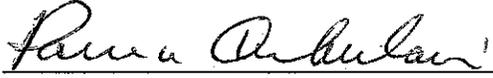
Because Respondents’ objections under *Swanson* and *Honn* are legally invalid, the objections should be overruled and discovery should be ordered with instructions on remand that the court and not the City determine the record.

Conclusion

Appellant respectfully requests that this Court reverse the district court and hold that the City’s decision to grant Respondent Liebeler’s request for a variance was unreasonable, arbitrary, and capricious and invalid. Alternatively, Appellant requests a remand with instructions that his motion to compel discovery be granted and his lawsuit shall proceed to trial.

Respectfully submitted,

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Paul W. Chamberlain, No. 16007
Ryan R. Kuhlmann, No. 387775
Chamberlain Law Firm
1907 Wayzata Blvd., Suite 130
Wayzata, MN 55391
Tel: (952) 473-8444
Fax: (952) 473-3501

*Attorneys for Appellant Beat L.
Krummenacher*