

NO. A08-1988

State of Minnesota
 In Court of Appeals

Beat L. Kruppenacher,

Appellant,

v.

City of Minnetonka and JoAnne K. Liebeler,

Respondents.

APPELLANT'S REPLY BRIEF

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This reply addresses misstatements of fact and law contained in Respondent City of Minnetonka's brief.

Reply to Factual Allegations

Contrary to the City's contention, Appellant did not omit "documents from the City's record" from his appendix. (Resp. Br. at 3, fn. 1.) The bulk of the City's appendix is needlessly duplicative as demonstrated by its triple reproduction of the same March 31, 2008 letter from Respondent Liebler to the City which was already included in Appellant's appendix. (A96; R4; R16; R45.) The City's implication that Appellant's appendix is incomplete or unreliable is therefore false. The record before this Court is improperly narrow as it consists only of finite information unilaterally selected by the City without any discovery.

The City contends that the filming and televising of Respondent Liebler's garage project is irrelevant. (Resp. Br. at 5, fn. 2.) But Liebler and the City's adamant objection to discovery is telling as it indicates rules have been bent to accommodate a pet project. There is no other logical explanation of why the City and Liebler funded a legal battle against discovery, and indeed the City has offered no such explanation in its brief. Additionally, while the City contends the expansion is not "luxury living space," there would be no reason to film and televise an ordinary garage project, and there is no way a "personal yoga and craft studio" can be considered anything but a luxury. (Resp. Br. at 5.) The filming and televising of the project is therefore relevant, yet there has been no discovery of this information.

Further, the City's classification of the yoga studio as ordinary garage space akin to a work bench misses the point. (Resp. Br. at 5-6, 14.) Although the studio level will not have a kitchen or bathroom, the City ignores the fact that unlike a work area inside a garage, the yoga studio would be completely finished, it would have its own separate entrance, and it would be inaccessible from the garage. (Complaint ¶¶ 7 and 8; A23-24; City Answer ¶¶ 5-6; A57.) While the garage is grandfathered and Appellant does not oppose a variance for its restoration, the new studio level is neither grandfathered nor permissible by variance.

Reply Argument

I. As Appellant argued in district court, Minn. Stat. § 462.357, subd. 1e(a) prohibits the City's variance for the expansion of Respondent Liebeler's nonconforming garage.

Citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), the City falsely contends that “[b]y not raising this issue [under Minn. Stat. §462.357, subd. 1e(a)] with the District Court, Plaintiff waived his right to have it heard and decided by this Court.” (Resp. Br. at 8.) Appellant, however, did raise his argument under Minn. Stat. § 462.357, subd. 1e(a) in district court. (A169.) In fact, it was the first argument raised in his brief submitted in response to the September 17, 2008 order that the parties brief the issue of whether the City's decision was unreasonable, arbitrary, or capricious. (*Id.*) As argued below, the plain language of Minn. Stat. § 462.357, subd. 1e(a) bars expansion of legal nonconformities, thus precluding the City's grant of a variance for the expansion of Respondent Liebeler's grandfathered nonconforming garage.

The City's other arguments on this issue are unpersuasive. While the City makes the conclusory assertion that Section 462.357, subd. 1e(a) does not apply or have any consequence to a city's authority, the City fails to cite any case or other legal authority in support of its position. (Resp. Br. at 9.) Likewise, the City's contention that subdivision 1e(b) allows expansion of nonconformities by variance is also misguided. (See Resp. Br. at 8-9.) Subdivision 1e(b) merely provides a narrow exception for a municipality to "by ordinance" permit expansion or impose reasonable regulations "to prevent and abate nuisances and to protect the public health, welfare, or safety." Minn. Stat. § 462.357, subd. 1e(b). Subdivision 1e(b) is thus an exception to protect public interests that cannot be extrapolated in such a manner that would swallow the general rule barring expansion of nonconformities. Further, the City cannot cite any such ordinance that would allow a variance for Respondent Liebeler to expand her nonconforming garage for the purpose of abating a nuisance or protecting the public health, welfare, or safety under subdivision 1e(b). Because the plain language of Minn. Stat. § 462.357, subd. 1e(a) bars the City's grant of a variance for expansion of Liebeler's nonconforming garage, this issue is dispositive and the City's decision in violation of the statute must be reversed.

II. The City's decision to grant a variance is invalid because there is no showing of undue hardship.

A variance requires a showing of undue hardship. Minn. Stat. § 462.357, subd. 6(2); Minnetonka City Code § 300.07.1(a). The following three subsections

briefly reply to the City's arguments with respect to each of the three elements of the undue hardship test under the statute.

a. Liebeler's proposed "personal yoga and craft studio" expansion is not a reasonable use permitting a variance.

The first element of the undue hardship test is whether the property can be put to a reasonable use in compliance with the ordinance. Minn. Stat. § 462.357, subd. 6(2); Minnetonka City Code § 300.07.1(a). As the City points out, in *Rowell v. Bd. of Adjustment of the City of Moorhead*, 446 N.W.2d 917, 922 (Minn. App. 1989), this Court interpreted the "reasonable use" element of the undue hardship test to mean a property owner must show that it seeks a variance to use the property in a reasonable manner that is prohibited by the ordinance. Under *Rowell*, however, Liebeler's proposed "personal yoga and craft studio" expansion above her detached garage is not a reasonable use for a variance. No link can be drawn between "hardship" and "personal yoga and craft studio" under any standard of reasonableness under the statute. See Minn. Stat. § 645.17 ("the legislature intends the entire statute to be effective and certain").

Additionally, the City mistakenly argues Appellant applies the wrong standard of reasonableness by departing from the standard stated in *Rowell*. (Resp. Br. at 9-10.) Appellant's argument, however, is based on a case that specifically applies the *Rowell* standard. (App. Br. at 14-15.) In *Mohler*, this Court ruled that under *Rowell* a proposed playroom/office expansion above a garage was unreasonable. *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 631

(Minn. App. 2002) (citing *Rowell*, 446 N.W.2d at 922). The same is true for Liebeler's personal yoga and craft studio.

The City attempts to distinguish *Mohler* by pointing out a single fact discrepancy, namely that the proposed playroom/office expansion would have exceeded height restrictions which are not involved here. But that argument misses the point. The nonconformity here is the setback violation. While a setback does not create an easement in the strict legal sense, the *Mohler* court recognized the beneficial use of a setback is "light and air may rest undisturbed in the space where structure are prohibited." *Mohler*, 643 N.W.2d at 635-36. As such, the technical difference between height and setback restrictions is irrelevant because Appellant's neighboring property would lose the ordinance's beneficial purpose if Liebeler's variance is allowed.

The City also claims *Stotts v. Wright County*, 478 N.W.2d 802 (Minn. App. 1991) is inapposite because it was an appeal from a municipality's denial of a variance rather than an appeal from an approval. The technical posture, however, is irrelevant. Appellant cites *Stotts* for the basic principle that a luxury second level expansion over a boathouse, or in this case a garage, in violation of an ordinance is unreasonable.

Finally, reasonableness is an objective standard, and it cannot be subjectively determined at the City's whim. The City's alleged standard of "reasonableness *in the City's judgment*" (Resp. Br. at 10) is not objective at all,

but instead would create a carte blanche license to do as the City pleases regardless of statutory or code restrictions.

b. Because Liebeler has shown no “plight” that justifies a variance, the City’s grant is improper.

The second element of the undue hardship test is whether the “plight” of the landowner is due to circumstances unique to the property not created by the landowner. Minn. Stat. § 462.357, subd. 6(2); Minnetonka City Code § 300.07.1(a). Appellant raised two arguments as to this element, one of which the City has failed to rebut, and the second of which Appellant now withdraws.

First, Appellant’s primary argument is that Liebeler can show no “plight” caused by unique circumstances in relation to her proposed personal yoga studio expansion. While the City now argues for the first time that Liebeler’s “plight” is her inability to construct a detached garage that complies with the ordinance, the Planning Commission’s only finding (A139) as to this element was that the “non-conforming setback is a circumstance that is not common to every similarly zoned property.” *See Thiele*, 425 N.W.2d at 582 (holding arguments not raised below are improper on appeal). More importantly, construction of a detached garage elsewhere on the property is not the issue. Instead, the issue is whether the existing garage may be expanded rather than simply restored, the latter of which Appellant does not oppose. Liebeler has no plight because she may restore her garage, and the denial of the luxury expansion is not a plight.

Regarding Appellant's secondary argument, as the City points out, the proposition that any plight would be self-created because Liebeler knew of the nonconformity at the time she purchased the property is inadvertently based on a common law rule which has been overturned. Appellant, therefore, withdraws his argument under *Castle Design & Development Co., Inc. v. City of Lake Elmo*, 396 N.W. 578 (Minn. App. 1986). Nonetheless, Appellant's remaining argument as to the absence of any showing of plight remains unchanged.

c. Liebeler's expansion would be out of character for the neighborhood.

The third element of the undue hardship test is whether the variance, if granted, would alter the essential character of the neighborhood. While the City relies on *In re Kenney*, 374 N.W.2d 271, 274 (Minn. 1985) for the proposition that a setback variance does not change the neighborhood character (Resp. Br. at 13), it misses the point because Appellant does not contest the grandfathered status allowing the setback violation of the existing structure. Instead, the variance at issue is sought to *expand* the nonconformity rather than establish a right to have the existing garage continue as it sits inside the setback. Further, the City's reference to the lone other grandfathered garage in the neighborhood is unpersuasive because that garage has never been expanded to two stories.

III. The district court erred by not ruling on Appellant's motion to compel discovery.

The City contends that the district court denied Appellant's motion to compel and determined the contents of the record on appeal. (Resp. Br. at 16.)

This is not true. The district court did not rule on Appellant's motion, but instead held that city council decisions do not necessarily rest on the verbatim record of proceedings, but no additional evidence is needed for the court to make a threshold decision. (Order; A163-64.) The court also stated that if it determined after review that the City's decision was unreasonable, then it would order discovery and schedule a trial. (A164.) As such, the City's contention that the district court did determine the record is wrong. (Resp. Br. at 16, fn. 6.) There was no determination whatsoever on Appellant's discovery motion.

The City wrongly states that it complied with Appellant's data practices requests for disclosure information. (Resp. Br. at 19.) Appellant essentially requested the City's full file related to Liebeler's project. It was not produced. For example, not a single email was produced. It is not credible that none exist. Also, at the City Council hearing on June 30, 2008, a city engineer contradicted a written flood plain report earlier given to Appellant's counsel by the City. (Transcript at 27-29, 32-33; A20-21.) While the written report stated Liebeler's property was located in a flood plain, thus having the effect of barring the garage expansion under City Code, there must be some documentation supporting the city engineer's conflicting testimony. Yet no supporting documents have been produced. There are significant gaps in the information accessible to Appellant, which is why he brought a motion to compel.

The City's argument that Appellant "points to nothing in the record" to show that something is missing from the record is disingenuous. (Resp. Br. at

18.) The point of Appellant's discovery requests was to determine whether Respondents concealed relevant information that should have been disclosed as part of the record and should augment the record on appeal as permitted by *Swanson* and *Honn*. If nothing relevant has been withheld, the City would concede on the discovery motion. Not doing so indicates the City is either withholding information for a particular purpose or needlessly increasing costs to all involved for no reason.

Conclusion

Appellant respectfully reiterates his request that this Court reverse the district court and hold that the City's decision was invalid, or alternatively, remand with instructions for discovery and a trial.

Respectfully submitted,

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