
NO. A08-1988

State of Minnesota
 In Supreme Court

Beat L. Krummenacher,

Appellant,

v.

City of Minnetonka and JoAnne K. Liebeler,

Respondents.

APPELLANT'S REPLY BRIEF

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I. Contrary to Respondents' argument, the Minnesota legislature limits cities' authority to grant variances under Minn. Stat. 462.357, subd. 6(2) and subd. 1e(a) to an actual hardship and which does not expand grandfathered nonconformities.

Respondents urge this Court to establish a rule with two standards for a hardship challenge—one for citizens and one for cities. (Resp. Br. at 11.) The City and the Amicus request this Court to effectively rule that “undue hardship” means what municipalities define it to mean—“neither more nor less” in Lewis Carroll fashion—with practically unlimited discretion.

The City admits the Minnesota legislature controls municipal land use rules (Resp. Br. at 9), and the state could enact legislation which cedes all land use and variance oversight to cities. But the state has not done so. Until *laissez-faire* decentralization is adopted in St. Paul to repeal Minn. Stat. § 462.357, limitations of state law constrain cities to follow statutory mandates governing when a city may grant a hardship variance.

Nowhere in the City's brief does it address Appellant's argument that an affirmed court of appeals' rule in this case would shift land control from the state to the city, other than the argument that city rulings are given wide deference by the courts. (Resp. Br. at 8.) That misses the point. Where a case involves a statutory prohibition, the tension is not between the city and the *courts*. Rather it is between the city and the *legislature*. The legislature, and not the courts, undeniably enacts land use rules in Minnesota. Judicial review determines whether a city violated statutes or otherwise acted arbitrarily and capriciously.

While the courts may determine a city's arbitrariness or caprice, no deference is paid to whether a city has violated the statute. The question is determined by statutory construction and not deference to fact finding or municipal judgment, and the courts should pay no deference to the manner a city may interpret a statute, particularly Section 462.357, subs. 6(2) and 1e(a). This Court instead decides statutory interpretation *de novo*. See *State v. Al-Naseer*, 734 N.W.2d 679, 683 (Minn. 2007) ("Statutory interpretation is a question of law that we review *de novo*.")

Respondents obliquely addressed Appellant's argument the city is subordinate to the legislature by arguing legislative intent is shown by the legislature's deference to the court of appeals decision in *Rowell v. Bd. of Adjustment*, 446 N.W.2d 917 (Minn. App. 1989), and the fact this Court denied further review. (Resp. Br. at 10, fn. 9, and 13, 19.) This misinterprets the legislative weight placed on an error-correcting court of appeals decision and the lack of precedent by a denial of further Supreme Court review. Review is discretionary and does not constitute an affirming or endorsement of a decision. Minn. R. Civ. App. P. 117; *Murphy v. Milbank Mut. Ins. Co.*, 388 N.W.2d 732, 739 (Minn. 1986) ("The temptation to read significance into a denial of a petition for further review is best resisted. The denial does not give the court of appeals decision any more or less precedential weight than a court of appeals decision from which no review was sought."); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme

court or the legislature, but it does not fall to [the court of appeals].”) The legislature cannot be presumed to ratify a court of appeals decision. Had the legislature decided to ratify the court of appeals decision, it would have plainly done so (and it did not) in a statutory amendment after the case.

As written, the statute is unambiguously worded to require a showing of undue hardship (subdivision 6(2)) and to prohibit expansion of a grandfathered use (subdivision 1e(a)). Legislative intent is more clearly shown by its specific requirement of hardship and specific prohibition against “expansion,” rather than assuming the legislature tacitly acquiesced to a court of appeals decision. In any event, the construction of subdivisions 6(2) and 1e(a) are clearly before this Court on review, and the City cannot solely rely on prior court of appeals decisions which were not reviewed.

a. The plain language of subdivision 6(2) requires a showing of an actual hardship without a variance and not merely a use that appears “reasonable in the city’s judgment.”

The facts of the instant case (which the Amicus did not address) illustrate the mischief that can occur when the City simply finds “hardship” and cavalierly allows new unrelated construction on the roof of a grandfathered garage on the ground it only must determine if the new building is “reasonable.”

The City proposes a double standard that would insulate municipal decisions from meaningful judicial review. (See Resp. Br. at 11, fn. 10.) The City argues there is a “heavy burden” on a variance applicant to show its grant is appropriate and the heavy burden applies on appeal from a denial of the

application. (*Id.*) Yet when a city approves a variance, Respondent contends it must only show its action was “reasonable in its judgment” without regard to the “heavy burden” required to justify a variance. (Resp. Br. at 13.) If the standard of review is based on what is “reasonable in the city’s judgment,” there is no meaningful judicial review for a citizen who contests a city’s grant of a variance even though the statute imposes a heavy burden to demonstrate an undue hardship justifying a variance. Consistent application of the same undue hardship standard whether the city approved or denied the variance would require a variance decision to be equally applied to citizens or cities. Nothing in the statute justifies a different interpretation of the law which depends solely on the identity of the litigant. Contrary to the City’s argument, the applicant’s statutory burden to demonstrate an undue hardship does not simply disappear on appeal and substitute a “reasonableness” test, as the court tests the “legal sufficiency and factual basis” of the municipality’s decision—i.e., whether the undue hardship test is satisfied. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988).

Interpretation of the “reasonable use” and “unique plight” elements of the undue hardship test are central to this dispute. While the City and Amicus argue a variance applicant must merely show she seeks to use her property in a “reasonable manner in the City’s judgment,” neither the City nor Amicus offer any foreign authority in response to Appellant’s argument that other jurisdictions have interpreted substantively similar “undue hardship” tests to require a

showing of an actual hardship (one that is real, substantial, serious, or of compelling force, as opposed to reasons of convenience, profit, or caprice) such that the property cannot be put to reasonable use without a variance due to a unique plight. See 101A C.J.S. Zoning & Land Planning § 312; *and compare* Minn. Stat. § 462.357, subd. 6(2).

While the Court of Appeals has held the “no reasonable use” prong of the hardship test requires a property owner to show reasonableness of the proposed use, *Rowell*, 446 N.W.2d at 922, there is no reason the requirement of an actual hardship can be ignored. The lower courts’ and City’s flawed interpretation requires no showing of any actual hardship—Respondent Liebeler would suffer no real hardship without the proposed new construction above her detached garage. *But see* Minn. Stat. § 645.17 (“the legislature intends the entire statute to be effective and certain”). No link can be drawn between “hardship” and “personal yoga and craft studio” under any standard of reasonableness. This Court should enforce the plain language of the statute requiring a showing of an actual hardship.

The City’s interpretation of subdivision 6(2) would rewrite the statute. Subdivision 6(2) allows relief from a hardship if the property “cannot” be put to a reasonable use without the variance. The City misconstrues this *negative* element to mean that if any *positive* “reasonable use” is proposed, that alone satisfies the statute’s requirement for reasonableness. Respondents failed to address Appellant’s argument that any number of proposed reasonable uses have

nothing to do with the question of whether the present reasonable use as a garage prevents a finding the property “cannot” be put to any reasonable use.

The City asks for a rule that the statute’s negative element (“*cannot* be put to reasonable use”) be interpreted to permit a variance for “any reasonable use.” If that statutory interpretation is accepted, a city would never have to find whether a property “cannot be put to a reasonable use” without a variance. And the *negative* prohibition of Minn. Stat. §462.357, subd. (6)(2) would simply permit a variance if there is a *positive* finding the proposed use is “reasonable.”

The City and Amicus posit a straw man argument in arguing Appellant’s interpretation is too “rigid” and would require an unlawful taking to justify a variance. (Resp. Br. at 10; Amicus Br. at 5-6.) Appellant, however, does not go so far as to contend a variance may only issue when there would be an unlawful taking or “deprivation of all use” (Resp. Br. at fn. 9) without a variance; instead, the statute on its face requires the applicant to show an actual hardship—which is wholly absent here—such that the property “cannot be put to *reasonable* use” without a variance. The statute permits a variance when there would be deprivation of *reasonable* use, not deprivation of *all* use.

The City argues Appellant’s construction of “no reasonable use” in 6(2) was the same as the Constitution requires and is therefore superfluous. (Resp. Br. 10.) The statute as written does not merely restate the Constitution which may require some use of grandfathered property. The statute adds the word “reasonable” use,

rather than “any” or “all” use whatsoever which would likely offend Constitutional principles of property rights.

b. The existing use of the garage may continue without a variance.

The City also never addressed Appellant’s argument that Liebeler’s garage could be continued to be put to a reasonable use by maintaining its function as a garage in status quo ante for the last 60 years. (T.10, ¶ 19; A6.) Liebeler admits the garage is structurally sound (“good bones”) and has more useful life. (T. 10-11; A6.) The alleged “hardship” is not for the building’s use as a garage—continuing garage use is a given for the existing grandfathered structure. Instead, the alleged “hardship” is Liebeler’s need to construct a new building on top of the garage roof as its foundation. Respondents’ brief never suggests it would be any hardship to continue its present use. Instead, Respondents attempt to divert the Court’s attention to whether new construction unrelated to the garage is reasonable because it otherwise follows the city’s height and size restrictions. (Resp. Br. at 18.) It is a clever deflection but a disingenuous failure to address a key point in the appeal that it is no hardship to renovate the existing garage and continue to use it as a garage.

The “undue hardship” test does not depend on the *proposed future use*. Rather, the test is whether the *existing use* can be reasonably maintained without undue hardship. The City’s brief conflated the two concepts into one and made no distinction between whether Liebeler’s new building is an existing use or a

proposed future use. If that distinction is not appreciated by the rule of this Court, “grandfathered” status would be meaningless. The significance of *proposed* versus *existing* use comes into sharp focus in this case, where even the applicant Liebeler admitted the proposed use of the new building addition was “irrespective” of the existing garage use. (A6.) Her admission is candid and telling, as the only connection between the proposed new family room and the existing garage is that the garage roof would serve as a foundation for the new building.

The City compares the new building to a workbench in a garage (Resp. Br. at 18), and that because the new family room will have no kitchen or toilet, it is “uninhabitable” and therefore qualifies as an accessory garage structure under the Minnetonka ordinance (*id.* at 5, 17). The argument fails by the wording of the City’s own ordinance because the new building cannot be principally for storage of vehicles when the new family room will not be accessible to the garage at all. *See* Minnetonka City Code § 300.02. And in addition to Liebeler’s admission the family room is “irrespective” of the garage, she also admits she plans to “lay out a table and have a buffet in there and have company.” (T. 11, ¶¶ 9, 14-15; A6.)

Although the City claims Appellant’s characterization of the addition as “living quarters” and “luxury living space” is not supported by the record (Resp. Br. at 5), the District Court specifically found “Liebeler seeks to reconstruct the nonconforming detached garage to add on a finished second level with *living quarters* for a family room, a personal yoga and craft studio, heating and air conditioning.” (Discovery Order; A172, ¶ 3) (emphasis added). Further, the City

incorrectly states the “garage is conforming in all respects except the front yard setback.” (Resp. Br. at 3.) In addition to the nonconforming setback, the new construction’s use as “living quarters” (Discovery Order at 2, ¶ 3; A172) would be nonconforming as part of an uninhabited accessory garage structure.

(Minnetonka City Code § 300.02; *see also* App. Br. at 20-21).

c. The plain language of subdivision 1e(a) bars expansion of grandfathered nonconformities.

The legislature amended subdivision 1e(a) to add the limitation “but not including expansion,” which bars expansion of nonconformities except by change by ordinance under 1e(b) (“a municipality may, by ordinance, permit an expansion”). Appellant has argued there is a fundamental difference between granting a variance for one landowner and amending an ordinance for everyone. The City did not address this argument and merely assumed that the language “Except as otherwise provided by law” at the beginning of subdivision 1e(a) allows possible exceptions to the prohibition by variance.

The legislature used the term “by ordinance” in subdivision 1e(b) instead of “by ordinance or variance.” There is no logical reason to add an additional term to the statute as though it were implied by the legislature. To do so would materially change the meaning of the legislative prohibition of expansion of grandfathered nonconformities. Respondents do not argue the statute is ambiguous where judicial construction is indicated. If there were to be an

interpretation consistent with Respondents' argument, that change should be made by the legislature which enacted the law.

Implicit in the City's argument is that the words "but not including expansion" are mere surplusage added by amendment of the statute for no practical reason. If a city may override the legislative change by variance, and do so only on the ground the variance is "reasonable," the legislative prohibition on expansion is ineffectual. But when the statutory language being construed ("not including expansion") is a specific amendment, it has meaning to be respected *a fortiori*, as it could never be an idle act of the legislature to revise a statute.

The dangers of an essentially absolute deference standard of review to what is "reasonable in the city's judgment" without regard to plain statutory requirements under subdivisions 6(2) and 1e(a)—as analyzed above—would be exacerbated by a prohibition against any opportunity for a challenger to test the completeness of the municipal record through discovery on appeal—as analyzed in the following section.

II. A citizen who challenges a city's decision is entitled to discovery of information (which may not have been publicized in municipal proceedings) and an opportunity to test, and potentially augment, the city's record on appeal under *Honn* and *Swanson*.

Respondents (as well as the lower courts) misapply *Honn* and *Swanson* as a *de facto* bar against any discovery on appeal from a municipality variance decision where the municipality unilaterally produces only "a clear, verbatim record of the [municipality] proceedings" as the sole "record" on appeal. (Resp.

Br. at 21; *see also* Discovery Order; A172.) *Swanson*, however, gives municipalities no such right. *Swanson* requires: “[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.” *Swanson v. City of Bloomington*, 421 N.W.2d 307, 312-13 (Minn. 1988). Chief Justice Popovich elaborated:

“[T]rial courts, before denying a full trial, must determine whether the record before the municipality meets this new criterion. A record before a municipality might be fully transcribed, but were the proceedings adequate, fair and complete? This involves determining: were hearing examiners utilized in appropriate proceedings? were witnesses subject to questioning by other parties? was there foundation for opinions expressed? were offers of proof permitted? **were matters outside the record relied on?** were appropriate continuances permitted? was relevant evidence received? were complete contemporaneous findings made to support the municipalities' decision? and other such considerations.”

Swanson, 421 N.W.2d at 315 (Popovich, J., concurring specially) (emphasis added); *see also Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981) (reversing and remanding as result of inadequate record). The test “isn't just verbatim transcripts,” *Swanson*, 421 N.W.2d at 315, but involves consideration of the “adequacy of the factual and decisional record,” *id* at 312-13.

While the City contends the trial court determined the record by finding the City produced a verbatim record of its decision, the trial court did no test for completeness. *See id.* at 313. The limited record advanced

by the City was never tested because the court skipped discovery and issued a *sua sponte* dispositive threshold ruling. Because Appellant did not have equal access to information, he did not have a fair opportunity to contest the completeness of the City's record.

Although the City argues Appellant has failed to identify "specific" deficiencies "with particularity" (Resp. Br. at 23), major deficiencies exist:

- Respondents failed to produce flood plain information, which the City itself claims to exist, and which directly affects the variance request under Minnetonka City Code § 300.07.1(d) ("No variance shall be granted in the wetlands, floodplain or shoreland districts . . .").
- Respondents failed to produce emails which undoubtedly exist.
- Respondents have withheld evidence of the television program which admittedly exists. While the City claims there is "nothing in the record to suggest that this information actually exists or was considered by the City in making its decision" (Resp. Br. at 23), the variance was conditioned on a "construction management plan" concerning traffic, parking, access and hours of operation if the project is "utilized for television production" (Planning Commission Resolution; A149). No "construction management plan" was ever produced.

Such evidence may be determinative. The City's argument Appellant must specifically identify documents requested in discovery (*see* Resp. Br. at 23) would yield a perverse rule—one can only "discover" what is already known. The City

does not argue there are no documents, which would have been simple to state if it were true. Instead, the City plays a shell game antithetical to full disclosure envisioned by Rule 26, Minn. R. Civ. P. Additionally, Respondents' failure to produce the above items belies the City's contention it complied with Appellant's data practices request, which is not part of the record and is improperly included in Respondent's appendix. (Resp. Br. at 23, fn. 17.) The Data Practices Act documents are outside the record and untested. There has been no judicial determination of the completeness of either the "record" advanced by the City or the City's deficient response to Appellant's data practices request. Neither is complete.

In *Swanson*, this Court confronted the problem that "a property owner . . . might withhold part of the relevant evidence, knowing it could be put in when the matter came before the district court on review." *Swanson*, 421 N.W.2d at 312. This case presents the inverse—and equally pernicious—conundrum: a municipality might withhold part of the relevant evidence, knowing it could *not* be put in—or even discovered—when the matter came before the district court on review. Yet the lower courts' rulings would allow a municipality to manufacture its own record, knowing its record will be insulated from any challenge in the absence of discovery on appeal.

The Amicus is concerned the expense of municipalities' recording of proceedings would be "wasted," and that allowing discovery would "abolish record review." Nothing would be wasted in allowing discovery so the district

court, not the municipality, would determine the record on judicial review. A verbatim transcript would necessarily be part of the record for the trial court to review. Potentially adding relevant evidence to the recorded proceedings would only supplement and not substitute the record if the district court determines additional relevant evidence is appropriate for a complete record.

CONCLUSION

Appellant respectfully requests reversal and a holding that the City's decision is invalid based on a violation of Minn. Stat. § 462.357, subs. 6(2) and 1e(a), or alternatively a reversal and remand requiring discovery.

Respectfully submitted,

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