

No. A11-1155

STATE OF MINNESOTA

IN COURT OF APPEALS

Daniel S. Ortell,

Respondent,

vs.

City of Nowthen,

Appellant.

APPELLANT'S BRIEF AND ADDENDUM

Daniel S. Ortell – PRO SE
Respondent
428 Constance Boulevard NW
Andover MN 55304

James J. Mongé, III - #029200X
Attorney for Appellant
League of Minnesota Cities
145 University Avenue West
St. Paul MN 55103
651-281-1271

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
LEGAL ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SCOPE OF REVIEW	5
ARGUMENT	5
I. THE DISTRICT COURT ERRED WHEN IT HELD THAT RESPONDENT’S NONCONFORMITY COULD BE CONTINUED BECAUSE UNDER THE PLAIN LANGUAGE OF MINN. STAT. § 462.357 SUBD. 1E RESPONDENT’S NONCONFORMITY WAS DISCONTINUED WHEN HE FAILED TO APPLY FOR A BUILDING PERMIT WITHIN 180 DAYS OF ITS DESTRUCTION.....	5
II. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE LANGUAGE OF MINN. STAT. § 462.357 SUBD. 1(E) IS AMBIGUOUS, THIS COURT SHOULD STILL REVERSE THE DISTRICT COURT BECAUSE THE INTENT OF THE LEGISLATURE WAS TO DISCONTINUE NONCONFORMITIES WHEN THEY ARE DESTROYED AND NO BUILDING PERMIT IS APPLIED FOR WITHIN 180 DAYS.....	10
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brayton v. Pawlenty</i> , 781 N.W.2d 357 (Minn. 2010)	6, 11
<i>Buss v. Johnson</i> , 624 N.W.2d 781 (Minn. App. 2001)	1, 9
<i>County of Freeborn v. Delmon Claussen</i> , 295 Minn. 96, 203 N.W.2d 323 (1972)..	1, 8, 12
<i>County of Lake v. Courtney</i> , 451 N.W.2d 338 (Minn. App. 1990).....	1, 5, 8, 12
<i>Krummenacher v. City of Minnetonka</i> , 783 N.W.2d 721 (Minn. 2010)	1, 5, 6, 7
<i>Phelps v. Commonwealth Land Title Ins. Co.</i> , 537 N.W.2d 271 (Minn. 1995).....	6
<i>Taylor v. LSI Corp. of America</i> , 796 N.W.2d 153 (Minn. 2011).....	5
STATUTES	
Minn. Stat. § 462.357 subd. 1(e)(2009)	1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13
Minn. Stat. § 462.357 subd. 6 (2010).....	2
Minn. Stat. § 645.17 (2010)	11
Minn. Stat. § 462.357 subd. 1(e)(2002)	11
OTHER AUTHORITIES	
2004 Minn. Laws Ch. 258 § 2.....	12
Nowthen Zoning Code § 305 (7)(C).....	9

LEGAL ISSUES

Did the District Court err when it held that a house that did not conform with the front-yard setback requirements of a city's zoning ordinance, could be continued pursuant to Minn. Stat. § 462.357 subd. 1e, even though it was destroyed to the extent of greater than 50 percent of the estimated market value as indicated on the records of the county assessor at the time of the damage and no building permit was applied for within 180 days of when the house was damaged?

How was issue raised below: The issue was raised in Respondent's Complaint and discussed in the City's memorandum of law in support of its motion for summary judgment and the District Court's Order Granting Summary Judgment.

Ruling below: The district court held that Respondent's nonconformity could continue even though he failed to apply for a building permit within 180 days of the destruction of his nonconforming house.

Apposite cases: *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010); *County of Freeborn v. Delmon Claussen*, 295 Minn. 96, 203 N.W.2d 323 (1972); *Buss v. Johnson*, 624 N.W.2d 781 (Minn. App. 2001); *County of Lake v. Courtney*, 451 N.W.2d 338 (Minn. App. 1990).

Apposite statutes: Minn. Stat. § 462.357 subd. 1e (2009).

STATEMENT OF THE CASE

Respondent Daniel Ortell owns property located at [REDACTED] in the City of Nowthen. The house on the property did not comply with the minimum front-yard setback requirements of the City's zoning ordinance. However, because the house was constructed before the City's zoning ordinance became effective, it was a permitted nonconforming structure pursuant to Minn. Stat. § 462.357 subd. 1e(a) (2009). In November 2007, the house collapsed while Respondent was replacing the roof. The County Assessor's records show that greater than 50 percent of the value of the house was destroyed. Respondent never applied for a building permit to rebuild the house. Therefore, pursuant to Minn. Stat. § 462.357 subd. 1e(a) his nonconformity may not be continued.

On January 8, 2010, over two years after the house collapsed, Respondent submitted an application for a variance from the front-yard setback requirement of the City's zoning ordinance. The City denied Respondent's application because he failed to establish undue hardship under Minn. Stat. § 462.357 subd. 6 (2010).

Respondent appealed the City's variance denial to District Court. The City brought a motion for summary judgment asserting that the City had a rational basis for its decision to deny Respondent's variance request. Respondent filed no written response to the City's motion paperwork. The District Court granted partial summary judgment to the City holding that the City had a rational basis to deny Respondent's variance request. However, the District Court also granted partial summary judgment to Respondent. The District Court held that it was not necessary for Respondent to obtain a variance because

the nonconforming house could be continued even though no building permit had been applied for over 180 days after its destruction. The District Court remanded the case to the City for consideration of whether the nonconformity was discontinued for a period of more than one year. The City appeals the District Court's grant of partial summary judgment in favor of Respondent.

STATEMENT OF FACTS

Respondent Daniel Ortell owns a seven acre parcel located at [REDACTED] in Nowthen, Minnesota (hereinafter "the Property"). App. 6, 10. The house on the Property did not comply with the minimum front-yard setback requirement in the City's zoning ordinance. The City's zoning ordinance provides for a minimum front-yard setback of 150 feet from the centerline of collector or arterial roads which include all roads under county or state jurisdiction.¹ App. 212, Nowthen Zoning Ordinance § 305 (7) (C); App. 260, Nowthen Zoning Map. The house was only 92 feet from the centerline of Cleary Road which is a county road. App. 14. However, because the house was constructed before the City's Zoning Ordinance became effective, it was a permitted nonconforming structure.

In September 2007, Respondent applied for and obtained a building permit to re-roof and re-side the house. App. 6-8, 76-77. In November 2007, while the roof was being replaced, the house collapsed. App. 10, 76-78. On November 30, 2007, the City Building Official drove by the house and observed that it had been completely destroyed.

¹ The City of Nowthen began enforcing the Burns Township Zoning Ordinance when it was incorporated in May 2008. App. 284.

App. 14, 76-77. The County Assessor's records show that greater than 50% of the value of Plaintiff's house was destroyed. App. 161-62, 171. Respondent has never applied for a building permit to rebuild the house. App. 11, 159, 168.

On January 8, 2010, over two years after the house collapsed, Respondent submitted an application to the City for a variance from the front-yard setback requirement of the zoning ordinance so that he could rebuild the house. App. 11-13. The City denied Respondent's variance application on May 11, 2010. App. 191-194, 196-99.

Respondent initiated this lawsuit challenging the City's denial of his variance application. App. 1-5. The City brought a motion for summary judgment asserting that it had a rational basis to deny Respondent's variance application. Add. 12. The District Court granted summary judgment to the City holding that it properly denied Respondent's variance application.² Add. 24. However, the District Court also granted partial summary judgment to Respondent. The District Court held that it was not necessary for Respondent to obtain a variance because the nonconforming house could be continued even though no building permit had been applied for over 180 days after its destruction. Add. 22. The District Court remanded the case to the City for consideration of whether the nonconformity was discontinued for a period of more than one year. The City appeals the District Court's grant of partial summary judgment in favor of Respondent.

² Respondent does not challenge the District Court's decision to affirm the City's denial of Respondent's variance application.

SCOPE OF REVIEW

The City appeals the District Court's decision to grant partial summary judgment to Respondent. When reviewing a grant of summary judgment, the appellate court considers whether there are any genuine issues of material fact and whether the lower court erred in its application of law. *Taylor v. LSI Corp. of America*, 796 N.W.2d 153, 155-56 (Minn. 2011). "The construction of a statute is a question of law that [appellate courts] review de novo." *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010). Appellate courts give no deference to district courts' conclusions when reviewing questions of law. *County of Lake v. Courtney*, 451 N.W.2d 338, 340 (Minn. App. 1990).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT RESPONDENT'S NONCONFORMITY COULD BE CONTINUED BECAUSE UNDER THE PLAIN LANGUAGE OF MINN. STAT. § 462.357 SUBD. 1E RESPONDENT'S NONCONFORMITY WAS DISCONTINUED WHEN HE FAILED TO APPLY FOR A BUILDING PERMIT WITHIN 180 DAYS OF ITS DESTRUCTION.

The District Court held that under Minn. Stat. § 462.357 subd. 1e Respondent's nonconformity may continue forever even though it was destroyed and Respondent failed to apply for a building permit within 180 days. Under the Court's analysis the only limitation on Respondent's ability to continue the nonconformity is the City's ability to impose reasonable conditions upon a zoning or building permit. However, this is a misinterpretation of the plain language of Minn. Stat. § 462.357 subd. 1e.

This case involves the interpretation of a statute. The courts' goal when interpreting statutes is to "ascertain and effectuate the intention of the legislature." *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010) (citing Minn. Stat. § 645.16). When interpreting the language of a statute, the court first determines "whether the statute's language, on its face, is clear or ambiguous." *Krummenacher*, 783 N.W.2d at 726 (quoting *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)). If the law is clear and free from ambiguity then the plain meaning of the statute's words controls the court's interpretation. *Krummenacher*, 783 N.W.2d at 726 (citing Minn. Stat. § 645.16 (2010); *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) ("Where the intention of the legislature is clearly manifested by plain unambiguous language . . . no construction is necessary or permitted.")).

The language of Minn. Stat. § 462.357 subd. 1e(a) is clear and unambiguous. It provides that

(a) Except as otherwise provided by law, 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, unless:

* * *

(2) any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the county assessor at the time of damage, and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a zoning or building permit in order to mitigate any newly created impact on adjacent property or water body.

* * *

(b) Any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy.

(Reproduced at Add. 2.)

The plain language of the statute provides that a nonconformity “may be continued” “*unless*” it is “destroyed by fire or other peril to the extent of greater than 50 percent of its estimated market value as indicated in the records of the county assessor at the time of damage and no building permit is applied for within 180 days of when the property is damaged.” Minn. Stat. § 462.357 subd. 1e(a). If the property owner does not apply for a building permit within 180 days of the damage, “Any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy.” Minn. Stat. § 462.357 subd. 1e(b). In *Krummenacher*, the Supreme Court of Minnesota explained

The statute allows the municipality to require a nonconformity to be discontinued when it is discontinued for a period of more than one year *or is destroyed by fire or other peril to the extent of greater than 50 percent of its market value, and no building permit has been applied for within 180 days of when the property is damaged.*

Krummenacher, 783 N.W.2d at 726 n. 5 (emphasis added).

The District Court discounted the Minnesota Supreme Court’s interpretation of Minn. Stat. § 462.357 subd. 1e(a) and adopted its own erroneous interpretation. The District Court held that the language “In this case, a municipality may impose reasonable conditions upon a zoning or building permit in order to mitigate any newly created impact on adjacent property or water body” gives property owners a perpetual right to continue a destroyed nonconformity subject only to the imposition of reasonable

conditions which a municipality can only impose if no building permit is applied for within 180 days.

However, under the plain language of the statute, a destroyed nonconformity may not be continued if a building permit is not applied for within 180 days of its destruction. The District Court's interpretation ignores language in Minn. Stat. § 462.357 subd. 1e(a) providing that a nonconformity "may be continued . . . *unless* . . . [it] is destroyed by fire or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the county assessor at the time of damage, and no building permit has been applied for within 180 days of when the property is damaged."

(Emphasis added.). If a building permit is not applied for within 180 days of its destruction, the nonconformity is discontinued and any subsequent use or occupancy of the land must be conforming. Minn. Stat. § 462.357 subd. 1e(b). Since the nonconformity is discontinued after 180 days pass without an application for a building permit, there would be nothing to "impose reasonable conditions upon". Thus, the language "In this case" clearly refers to the case in which a building permit is applied for within 180 days of when the property is damaged.

Furthermore, the District Court's interpretation is contrary to public policy. "The public policy behind [the nonconformity doctrine] is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction. This in turn will lead to uniform use of the land consistent with the overall comprehensive zoning plan." *County of Freeborn v. Delmon Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972) *see also Courtney*, 451 N.W.2d at 341 fn 1 (public policy favors the elimination of

nonconforming structures as well as uses); *Buss v. Johnson*, 624 N.W.2d 781, 786 (Minn. App. 2001). However, the District Court's interpretation prevents the gradual elimination of nonconformities because it permits a nonconformity to be continued forever, regardless of whether a building permit has been applied for within 180 days of destruction. Under the Court's interpretation, a nonconformity that was destroyed 25 or 50 years ago could be continued by simply rebuilding it. That is an absurd result that does not promote the uniform and consistent use of land that public policy seeks to achieve.

Under the plain language of Minn. Stat. § 462.357 subd. 1(e), Respondent's nonconformity expired and was discontinued when he failed to obtain a building permit within 180 days after the house was destroyed. Respondent's house was an existing nonconformity. It violated the front-yard setback requirement of Nowthen Zoning Code § 305 (7)(C) because it was located less than 150 feet from the centerline of Cleary Road. App. 14, 212, 260. The record is undisputed that sometime prior to November 30, 2007, a construction accident destroyed greater than 50 percent of the estimated market value of the house as indicated in the records of the county assessor. App. 161-62, 171. It is also undisputed that Respondent failed to apply for a building permit within 180 days after the construction accident destroyed the house.³ App. 11, 159, 168. Under the plain language of Minn. Stat. § 462.357 subd. 1(e)(a)(2) the passage of time extinguished any claim to continue Respondent's nonconformity sometime before May 31, 2008 and as a result,

³ The record is clear that Respondent has never applied for a building permit to rebuild the house. App. 11, 159, 168.

under Minn. Stat. § 462.357 subd. 1(e)(b) any subsequent use of Respondent's property must be conforming.

The District Court's decision granting partial summary judgment to Respondent should be reversed because the City properly required him to apply for a variance from the front-yard setback after his nonconformity had been discontinued.

II. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE LANGUAGE OF MINN. STAT. § 462.357 SUBD. 1(E) IS AMBIGUOUS, THIS COURT SHOULD STILL REVERSE THE DISTRICT COURT BECAUSE THE INTENT OF THE LEGISLATURE WAS TO DISCONTINUE NONCONFORMITIES WHEN THEY ARE DESTROYED AND NO BUILDING PERMIT IS APPLIED FOR WITHIN 180 DAYS.

As discussed in Part I above, it is the City's position that the language of Minn. Stat. § 462.357 subd. 1(e) is clear and unambiguous. However, even if this Court finds that the language of the statute is subject to more than one interpretation, it should still reverse the District Court because the intent of the legislature was to discontinue nonconformities when they are destroyed and no building permit is applied for within 180 days.

When the meaning of the language of a law is not plain but ambiguous, the Court may ascertain the intent of the legislature by considering:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be obtained;
- (5) the former law, if any, including other laws upon the same or similar subjects;

- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretation of the statute.

Brayton, 781 N.W.2d at 364 (*citing* Minn. Stat. § 645.16 (2006)). Additionally, in ascertaining the intention of the legislature the court presumes the legislature does not intend a result that is absurd or unreasonable and intends to favor the public interest over any private interest. Minn. Stat. § 645.17.

Minn. Stat. § 462.357 subd. 1e's history establishes that the legislature intended nonconformities to be discontinued when no building permit has been applied for within 180 days of destruction. The first version of the statute was enacted in 2001 and provided

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 or maintenance, but if the nonconformity or occupancy is discontinued for a period of more than one year, *or any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its market value, any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy.*

Minn. Stat. § 462.357 Subd. 1e (2002) (emphasis added) (reproduced at Add. 28). Under the 2002 version of Minn. Stat. § 462.357 subd. 1e, a nonconformity that was destroyed could not be continued -- period. The 2002 language is clear that if a nonconformity was destroyed any subsequent use or occupancy of the land or premises had to conform to the zoning ordinance.

A 2004 amendment added the language at issue in this case “and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a building permit in order to mitigate any newly created impact on adjacent property.” 2004 Minn. Laws Ch. 258 § 2 (reproduced at Add. 9). The amendment language allows property owners to continue a nonconformity if they apply for a building permit within 180 days of destruction. However, the District Court interpreted the amendment language to allow a nonconformity to continue forever, even though no building permit has been applied for many years after the nonconformity was destroyed. That interpretation is entirely unreasonable. It is inconceivable that the legislature would enact a statute that provided for the immediate discontinuance of destroyed nonconformities in 2001 and then amend that statute in 2004 to allow nonconformities to continue forever. Clearly the District Court erred in interpreting Minn. Stat. § 462.357 subd. 1e to allow a nonconformity to continue even though it had been destroyed and no building permit had been applied for within 180 days.

The District Court’s interpretation frustrates the public policy favoring gradual elimination of nonconformities and the uniform and consistent use of land pursuant to a comprehensive zoning plan. *See County of Freeborn v. Delmon Claussen*, 295 Minn. at 99, 203 N.W.2d at 325; *Courtney*, 451 N.W.2d at 341 fn 1. The consequence of the District Court’s interpretation will be that nonconformities will continue on in perpetuity even if they have been destroyed for many years. It allows nonconformities to be resurrected many years after they have been destroyed. Such an absurd result favors

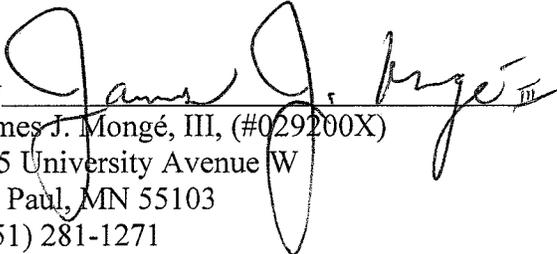
private interests over the public interest and is certainly not what the legislature intended. Therefore, the District Court's decision to grant summary judgment in favor of Respondent should be reversed.

CONCLUSION

The District Court erred as a matter of law when it determined that Respondent could continue his nonconformity even though he had failed to apply for a building permit within 180 days of its destruction as required by under Minn. Stat. § 462.357 subd. 1e. As a result, the District Court's decision to grant partial summary judgment in favor of Respondent should be reversed.

Dated: *July 21, 2011*

LEAGUE OF MINNESOTA CITIES

By 
James J. Mongé, III, (#029200X)
145 University Avenue W
St. Paul, MN 55103
(651) 281-1271
Attorney for City of Nowthen