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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1376

Rod Harris, et al.,
Appellants,

vs.

City of Wabasha,
Respondent.

Filed June 8, 2010
Affirmed
Peterson, Judge

Wabasha County District Court
File No. 79-CV-09-119

William L. French, Rochester, Minnesota (for appellants)

Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a summary judgment, appellants argue that respondent-city's decision to grant a zoning variance was arbitrary and capricious. We affirm.

FACTS

Steve and Carol Scott intend to build a twin home on a parcel of land that encompasses four lots in the City of Wabasha. The lots are smaller than a typical lot in the district, and three of the lots are narrowed by a right-of-way line created by a railroad alignment, which makes the parcel wedge-shaped, rather than rectangular. The lots are within an R-2 Medium Density Residential and S-3 Shoreland Overlay District and are subject to setback and impervious-coverage requirements. The city's zoning ordinance requires 25-foot front and rear setbacks and five-foot side and corner side-street setbacks. Wabasha, Minn., City Code § 305.06, subd. 5(F) (2010). Also, the zoning ordinance allows up to 40% of impervious-surface coverage per lot. Wabasha, Minn., City Code § 305.06, subd. 12(F)(3)(f) (2010). Due to the shape of the parcel, the building envelope (the area on which setbacks allow construction) is reduced to as little as eight feet at one end. The Scotts' proposed twin home would violate both the setback requirement and the impervious-surface coverage limit of the zoning ordinance; the home would be 17 feet from the rear property line, 22.5 feet from the front property line, and 4.5 feet from the side property line, and one lot would have 43% impervious coverage.

The Scotts applied to the city seeking a variance. Appellants Rod and Kathy Harris, who own adjacent property, objected to the variance. Their objection is based on the fact that their view of the Mississippi River would be obstructed if the planned twin home is built. At a public hearing on the variance request, the Wabasha Board of Adjustment (BOA) heard comments from the Scotts and from appellants' attorney. The BOA approved the variance.

Appellants appealed the BOA decision to the Wabasha City Council, which remanded the issue to the BOA for findings. The BOA again approved the variance and supported its decision with findings that address each of the five criteria that must be met for a variance to be granted under Wabasha City Ordinance § 305.04, subd. 5(C) (2010). The city council upheld the BOA decision, and appellants brought an action in the district court, requesting that the district court reverse the grant of the variance and award damages. The city moved for summary judgment, and the district court granted the motion. This appeal followed.

D E C I S I O N

"When reviewing a zoning determination, appellate courts review directly the municipality's determination without any regard for the district court's conclusions." *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 19 (Minn. App. 2003). There is a rebuttable presumption that a city's actions are proper. *Arcadia Dev. Corp. v. City of Bloomington*, 267 Minn. 221, 226, 125 N.W.2d 846, 850 (1964). An appellate court reviews "zoning actions to determine whether the zoning authority was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether the evidence could reasonably support or justify the determination." *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quotations omitted). "Whether a local zoning body's decision is reasonable is measured against the standards set forth in the applicable ordinance." *Id.* The fact that this court may have arrived at a different conclusion from that of the local zoning authority does not invalidate the authority's determination if it acted in good faith

and within the broad discretion accorded it by statutes and the relevant ordinance. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983). A party challenging the grant of a zoning variance has the burden of showing that the grant was unreasonable. *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 492 (Minn. App. 1995).

Citing *Zylka v. City of Crystal*, 283 Minn. 192, 167 N.W.2d 45 (1969), appellants argue that the absence of contemporaneous findings by the BOA when it first approved the variance request is prima facie evidence that the BOA acted in an arbitrary and capricious manner. Appellants contend that the arbitrary and capricious nature of the BOA's initial approval irrevocably tainted everything that came after it in the process. In *Zylka*, a city planning commission, without preserving any record of its proceedings, making any findings of fact, or giving any reason for its decision, recommended to the city council that it deny an application for a special-use permit. *Zylka*, 283 Minn. at 193, 167 N.W.2d at 47. The city council reviewed the recommendation and, without making any findings of fact or giving any reasons for its decision, denied the application. *Id.* The supreme court determined that "the failure of the council to record any legally sufficient basis for its determination at the time it acted made a prima facie showing of arbitrariness inevitable." *Id.* at 198, 167 N.W.2d at 50.

Unlike the proceedings in *Zylka*, when the BOA's initial decision was appealed to respondent's city council, the council remanded the variance request to the BOA for findings. The BOA then made findings that address the criteria for granting a variance under the ordinance, and the city council affirmed the BOA's decision to grant the variance. Appellants provide no analysis and cite no evidence to support their assertion

that the BOA's initial failure to make findings irrevocably tainted the later proceedings; they simply claim that as newcomers to Wabasha, they "did not have even a fighting chance against a long-standing member of the community" and that the BOA's agenda was to grant the variance no matter what. These unsupported claims are not sufficient to meet appellants' burden of showing that granting the variance was unreasonable.

Appellants argue that because there were other reasonable uses for the Scotts' property, the Scotts did not demonstrate that an "undue hardship" existed for their property, as required for granting a variance under Wabasha, Minn., City Code § 305.04, subd. 5(c). The ordinance provides that the BOA will not issue a variance unless it finds that "[t]he property in question cannot be put to a reasonable use if used under conditions allowed by the official controls because of the particular physical surroundings, shape, or topographical conditions of the specific property involved, a particular hardship to the owner as distinguished from mere inconvenience." Wabasha City Ordinance § 305.04, subd. 5(C)(1). This court has previously explained that the phrase "cannot be put to a reasonable use" does not mean that a property owner must show that the land cannot be put to any reasonable use without the variance and, instead, requires "a showing that the property owner would like to use the property in a reasonable manner that is prohibited by the ordinance." *Rowell v. Bd. of Adjustment*, 446 N.W.2d 917, 922 (Minn. App. 1989), *review denied* (Minn. Dec. 15, 1989).

The BOA found that "[t]he lot configuration includes angled front property line . . . causing the building envelope to narrow to under 60 feet depth for 80 feet in length" and that "[a] single family attached residence occupying the space proposed is a

reasonable use and it would be unreasonable to require that the property owner constructs something less on this property." Appellants do not directly challenge these findings and, instead, argue that granting the variance will reduce the value of their property. But with respect to whether granting the ordinance will be injurious to other property in the neighborhood, the BOA found that "[t]he proposed location of the new structure compared to the building envelope allowed in the ordinance, including building height of up to 35 feet allowed, will not substantially affect other property owners" and that "[t]he proposed structure could rather be considered to be an asset to the neighborhood." In light of these findings, appellants' assertion that granting the variance will reduce the value of their property is not sufficient to meet their burden of showing that granting the variance was unreasonable.

Finally, appellants argue that another reason why granting the variance was arbitrary and capricious is that the variance is premised on a lot split, and the status of the lot split is unclear. But appellants did not raise this issue below, and we have not found anything in the record that would permit us to evaluate the impact that any proposed lot split would have on the decision to grant the variance. Therefore, we will not address this issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)).

Affirmed.