STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1573

Gary Grew, petitioner,
Respondent,

vs.

Board of Adjustment of Town of Rice Lake,
Appellant.

Filed August 3, 2010
Affirmed
Stauber, Judge

St. Louis County District Court
File No. 69DU-CV-08-1233

Charles H. Andresen, Kimberly J. Maki, Andresen & Butterworth, P.A., Duluth, Minnesota (for respondent)

Kenneth H. Bayliss, Dyan J. Ebert, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from the district court's order requiring appellant-township to grant respondent's variance application, appellant argues that the district court erred in concluding that the township's decision to deny respondent's variance application was arbitrary and

capricious. Because the decision to deny respondent's variance application was arbitrary and capricious, we affirm.

FACTS

Respondent Gary Grew is the owner of a parcel of land located in Rice Lake Township. The property was originally part of a five-acre parcel of land owned by respondent's brother Jon Grew. Because he was going through a divorce, Jon Grew needed to sell the parcel. Consequently, the brothers discussed the possibility of entering into an agreement whereby Jon Grew would divide the five-acre parcel into two equal parcels of land and then transfer one of the parcels, the vacant parcel, to respondent. In exchange, respondent would clean up the property and remodel the house located on the residue property to prepare it for sale.

Based on their discussions, Salo Engineering was hired to complete a survey of the property that was necessary to facilitate the subdivision. The initial draft survey showed that the property consisted of 4.97 acres, not five acres as believed by respondent and his brother. The draft survey also showed that the two proposed subdivided parcels each consisted of slightly less than 2.5 acres. The township zoning ordinance, however, requires 2.5 acres of area to be a buildable lot in the applicable zone.

After the initial draft survey was completed, respondent brought the survey to the township's zoning administrator Martin Paavola for approval. According to respondent, Paavola told him that he "need[ed] to see . . . 2.5" acres on the survey. Respondent relayed Paavola's comments to the surveyor, who then issued a completed certified survey depicting the two parcels as being 2.5 acre-lots. Respondent subsequently

submitted the revised survey to Paavola for review. Paavola, however, never provided any feedback or comment to respondent regarding the revised survey.

Based on the agreement with his brother, respondent invested $30,000 in the property, which included remodeling the existing house and removing a great deal of garbage and debris from the property. When the remodeling and clean-up was completed, respondent's brother subdivided the property into two parcels pursuant to the Salo survey. He then transferred the undeveloped Parcel 1 to respondent, and sold Parcel 2, which contained the house, to Travis Hamernick.

Shortly thereafter, Hamernick decided to sell Parcel 2. An appraisal performed in conjunction with the sale of the house determined that both Parcel 1 and Parcel 2 were non-conforming because both were slightly less than 2.5 acres in size. To avoid litigation on the issue, respondent transferred 2,435 square feet of his lot to Hamernick to ensure the conformity of Hamernick's lot. Although respondent's lot was non-conforming by virtue of Jon Grew's initial subdivision, the transfer of land to Hamernick exacerbated the non-conformity slightly, resulting in a residue parcel of 2.4 acres.

Because he sought to build a single-family residence on Parcel 1, respondent consulted again with Paavola and filed a variance application with appellant Board of Adjustment of Town of Rice Lake (the board). The variance application stated that "Parcel 1 is non-conforming by ¼ acre." The application also stated that "sewer and water [are] available," meaning that public health and sanitation was not an issue, and there would be no need for a well or septic system.

A public hearing was held on respondent's variance application in January 2008. At the hearing, the board's chairman clarified that respondent's application was for only a .10 acre variance, rather than the one-quarter-acre variance requested in the application. The chairman also noted that to qualify for a variance, respondent must show a hardship unique to the property and not created by the landowner. The chairman further noted that economic considerations do not constitute a hardship.

Testifying in opposition to the variance was a neighboring landowner, Carolyn Roberts. Roberts stated that she opposed the variance because she wanted country living and privacy, which she believed could be affected by the granting of respondent's request for a variance. Roberts also claimed that she was concerned about the value of her property if a home and other structures were built on respondent's property.

After hearing Roberts's testimony, the board focused on the theory that respondent created the non-conformity. By creating the non-conformity, the board indicated that respondent created the hardship. Therefore, the board voted to deny respondent's variance application.

Respondent appealed the board's decision to the district court. Following a bench trial, the district court determined that the board's action in denying respondent's variance application was arbitrary and capricious because the board erroneously applied a "hardship" standard rather than the appropriate "practical difficulties" standard. The district court also determined that the board's action was arbitrary and capricious "even under a hardship analysis." The district court then granted respondent's request for an order compelling the board to grant the lot size variance. 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). This court independently reviews the record to examine whether the municipality's decision was "unreasonable, arbitrary, or capricious." *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997) (reversing denial of conditional use permit as unreasonable, arbitrary, and capricious). A municipal body's action is not arbitrary "when it bears a reasonable relationship to the purpose of the ordinances." *Clear Channel Outdoor Adver., Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004), *review denied* (Minn. May 18, 2004). Because zoning laws are a restriction on private property, the burden of proof for those challenging approval of an application is higher than the burden of proof for those challenging the denial of one. *Sagstetter v. City of Saint Paul*, 529 N.W.2d 488, 492 (Minn. App. 1995). Additionally, decisions to approve an application receive greater deference than those to deny one. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 n.4 (Minn. 2003).

The board argues that under the Rice Lake Township's Zoning Ordinance, the proper standard to be applied to respondent's variance request is the hardship standard. The interpretation of statutes and ordinances presents a question of law that this court reviews de novo. *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997).

"There are two types of variances: use variances and area variances." *In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008). "A use variance permits a use or development of land other than that prescribed by zoning regulations." *In re Appeal of Kenney*, 374 N.W.2d 271, 274 (Minn. 1985). An area variance controls "lot restrictions such as area, height, setback, density, and parking requirements." *Id.* "[U]nlike use variances, area variances do not change the character of the zoned district." *Stadsvold*, 754 N.W.2d at 329 (quotation omitted).

Minn. Stat. § 462.357, subd. 6 (2006), establishes the scope of a municipality's authority to grant variances. According to Minnesota law, a local municipality must evaluate variance requests to determine whether the strict enforcement of an ordinance without the requested variance would cause a property owner to suffer an undue hardship. Minn. Stat. § 462.357, subd. 6(2).

The statutory standard for county variances is different than the standard for municipal variances. *See* Minn. Stat. § 394.27, subd. 7 (2006). Specifically, the statute governing a county's power to grant variances provides:

> Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control in cases when there are practical difficulties or particular hardship in the way of carrying out the strict letter of any official control, and when the terms of the variance are consistent with the comprehensive plan.

Minn. Stat. § 394.27, subd. 7.

Our supreme court has considered the appropriate standard to be applied to an applicant's request for a variance under Minn. Stat. § 394.27, subd. 7. *Stadsvold*, 754

N.W.2d at 327. In *Stadsvold*, the landowners applied for a variance with the county board of adjustment. *Id.* at 326. The board denied the variance on the basis that the landowners showed "no adequate hardship unique to the property." *Id.* On appeal, the supreme court considered the difference between the two standards contemplated in Minn. Stat. § 394.27, subd. 7: the "particular hardship" standard, and the "practical difficulties" standard. *Id.* at 328. The court then looked to other states with statutes containing language similar to section 394.27, subdivision 7, and noted that "[g]iven that we have recognized the different effects of use and area variances," the reasoning of the states "applying a lesser standard to area variance requests" is persuasive. *Id.* at 331. Thus, the court held that "area variances shall be permitted by a county zoning authority when the applicant makes a showing only of 'practical difficulties' under Minn. Stat. § 394.27, subd. 7, whereas an applicant for a use variance must establish particular hardship as set forth in the statute." *Id.* (cautioning that the adoption of a less rigorous standard for area variances is not to say that area variances should be automatic or easy to obtain).

Relying on *Stadsvold*, the district court here concluded that the board applied the wrong standard to respondent's request for an area variance. The district court held that, under *Stadsvold*, the proper standard to be applied to respondent's area variance request was the practical difficulties standard.

The board contends *Stadsvold* is not applicable because *Stadsvold* concerned the application for a variance with a county board of adjustment, while the variance application here was with a municipality. The board argues that unlike the county

ordinance contemplated in *Stadsvold*, which differentiates between the practical difficulties standard and the particular hardship standard, Rice Lake Township's ordinance, which the board claims resembles Minn. Stat. § 462.357, subd. 6, contemplates only the particular hardship standard. Thus, the board argues that because the Rice Lake Township ordinance includes a more stringent standard requiring the establishment of a hardship, the district court erroneously concluded that the board was required to apply the "practical difficulties" standard contemplated in *Stadsvold*.

The ordinance at issue here is a municipal ordinance. It provides:

> (a) The Board of Adjustment may authorize a variance from the terms of this Ordinance which will not be contrary to public interest, where owing to special conditions a *practical difficulty or particular hardship* would be created by carrying out the strict letter of the Ordinance, and when the terms of the variance are consistent with the spirit and intent of this Ordinance and with the Town's land use or comprehensive plan, if any.
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> (b) "Hardship" as used in connection with the granting of a variance means that the property in question cannot be put to a reasonable use under the conditions allowed by this Ordinance; the plight of the landowner is due to circumstances unique to his property not created by the landowner, and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of this Ordinance. No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.
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> . . . .
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> (d) It shall be the burden of the applicant to demonstrate sufficient hardship to sustain the need for a variance. Absent a showing of hardship as provided in Minnesota Statutes and

> this Ordinance, the Board of Adjustment shall not approve any variance.

Town of Rice Lake, Minn., Zoning Ordinance (RLZO) #22 art. VII, § 6.02(D)(2) (1998) (emphasis added).

Respondent argues that the practical difficulties standard is appropriate here because the variance at issue is an area variance, and the applicable municipal ordinance resembles section 394.27, subdivision 7, by containing language referencing both the practical difficulties standard and the undue hardship standard. We disagree. We acknowledge that the ordinance at issue contains language referencing both the practical difficulties standard and the undue hardship standard. But the Minnesota Supreme Court recently held that "the 'undue hardship standard' applies to *all* municipal decisions to grant variances." *Krummenacher v. City of Minnetonka*, __ N.W.2d __, __, 2010 WL 2517702, at 7 (Minn. June 24, 2010) (emphasis added). Although the court recognized that the more stringent undue hardship standard restricts a municipality's authority to grant variances, the court was "unable to interpret [Minn. Stat. § 462.357, subd. 6] to mean anything other than what the text clearly says." *Id.* at *9. Therefore, based on *Krummenacher*, the district court erred by concluding that the practical difficulties standard was the appropriate standard to be applied to respondent's variance application.

Respondent also contends that the board's decision to deny the variance was unreasonable under the hardship standard. We, as did the district court, agree. The three requirements for granting a variance under the hardship standard are (1) lack of reasonable use without the variance; (2) unique circumstances not shared by neighboring

properties and not created by the landowner; and (3) maintenance of the essential character of the locality, despite the variance. RZLO #22 art. VII, § 6.02(D)(2)(b); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 631 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). A variance is permitted only if an applicant demonstrates that all three factors are met. *Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 701 (Minn. App. 2000), *review denied* (Minn. July 25, 2000).

Reasonable Use

Respondent argues that if the variance is not granted, he will suffer a hardship due to the lack of reasonable use for his property. We agree. If the variance is not granted, respondent will not be able to build on his property. This, indeed, constitutes a hardship. In fact, Paavola, acknowledged at the hearing that while he was representing the township, he agreed that respondent "would suffer a hardship without a variance on [the] property" because the inability to build on the lot would render the 2.4 acre lot useless. Thus, respondent has demonstrated that this factor is met.

Unique Circumstances

The board argues that the unique circumstances presented here were created by respondent. Thus, the board argues that its decision is reasonable because respondent cannot satisfy this factor.

We disagree. The record reflects that respondent's brother was the owner of the lot when it was surveyed and divided by his conveyances. Moreover, respondent's brother benefited from the inaccuracy in the survey because he was able to subdivide the original lot, and then sell the lot with the house to Hamernick, and convey the other lot to

respondent as compensation for his services rendered. The record further reflects that respondent believed he was acting in accordance with the local ordinances to ensure that he would be able to build on the residue lot. Respondent and his brother had the lot surveyed, and respondent brought the survey to the township's zoning administrator for approval. When he was told that the lot was non-conforming, respondent went back to the surveyor, who revised the survey. Respondent then went back to Paavola and showed him the revised survey. When Paavola did not provide any comment to respondent regarding the survey, respondent's brother proceeded with the plan to subdivide the lot. Although respondent was involved in creating the minor or de minimis non-conformity, respondent believed he was acting in accordance with the local mandates. And Paavola testified at the hearing that the non-conformity was created by the surveyor, not respondent. Therefore, respondent has demonstrated unique circumstances not shared by neighboring properties and not created by the landowner.

Essential Character of the Neighborhood/Locality

The board also argues that the evidence before it established that the variance would alter the essential character of the locality. We disagree. The only evidence to support the board's argument is a neighboring landowner's claim that she purchased her lot for the "country living" and privacy, and her concern that if the variance was granted, it would adversely affect her privacy and the value of her home. But the ordinance requires a lot size of 2.5 acres in order to build a single-family dwelling on the lot. An approval of respondent's variance request would permit respondent to build a single-

family dwelling on a 2.4 acre lot. A 0.1 acre variation in lot size would not change the essential character of the locality.

Finally, the board stated that it could not consider economic factors in making its determination. But the Rice Lake Township's ordinance provides that "[e]conomic considerations alone shall not constitute a hardship." RLZO #22 art. VII, § 6.02(D)(2)(b). It does not say that economic factors cannot be considered at all. Consideration of the economic factors weighs in favor of respondent because, without a variance, respondent would not be able to build on the lot, making the lot essentially worthless.

Based on our review of the applicable hardship factors, respondent has demonstrated that all of the hardship factors are satisfied. Therefore, we conclude that the board's decision to deny respondent's variance application was arbitrary and capricious.

Affirmed.