This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0542

Thomas Tulien,
Appellant,

vs.

City of Minneapolis,
Respondent,

Black Tree, LLC, d/b/a Yellow Tree Development,
Respondent.

Filed January 11, 2021
Reversed
Hooten, Judge

Hennepin County District Court
File No. 27-CV-19-15592

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Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and Halbrooks, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this appeal from the district court's grant of summary judgment for respondents City of Minneapolis (City) and Black Tree LLC, d/b/a Yellow Tree Development (Yellow Tree), appellant Thomas Tulien argues that the district court erred by concluding that the Minnesota municipal planning act (MPA), Minnesota Statutes sections 462.351-.365 (2018), allows the City to provide its planning commission, rather than its board of adjustments, with the authority to review and grant variances from the local zoning code when an applicant submits multiple land-use requests. Tulien also argues that the City granted five variances and a conditional use permit without a reasonable basis. We reverse.

FACTS

This case is an appeal by Tulien from the district court's grant of summary judgment for respondents. Tulien lives in a house in the Whittier neighborhood of Minneapolis, across an alley from the corner of Blaisdell Avenue and 26th Street West, where Yellow Tree proposed to build a six-story, mixed-use office and residential apartment building (the project). The project deviated from the height, size, and layout zoning requirements of the OR2 district where the building was to be constructed.[1] Yellow Tree submitted to the

[1] OR2 means High Density Office Residence District. Minneapolis Code of Ordinances § 547.20 (2018). "The office residence districts are established to provide an environment of mixed residential, office, institutional, and where appropriate, small scale retail sales and service uses designed to serve the immediate surroundings. These office residence districts may serve as small to medium scale mixed use areas within neighborhoods, as higher density transitions between downtown and residential neighborhoods, or as freestanding institutions and employment centers throughout the city." MCO § 547.10 (2018).

City's Planning Commission several applications to deviate from those zoning requirements, including seven variances and a conditional use permit (CUP) to exceed the building height limit for the property.[2]

City planners at the Minneapolis Department of Community Planning and Economic Development (CPED) first reviewed Yellow Tree's applications. CPED reviews every application for a land use permit and then recommends to the City whether it should grant or deny the application. Minneapolis, Minn., Code of Ordinances (MCO) §§ 415.20(a)(4) (2013), 525.120(b)(1) (2015). After reviewing Yellow Tree's applications, CPED recommended that the Planning Commission deny the variance requests because they appeared to be "driven solely by economic considerations by the financial viability of the project" and were "out of scale with the standards of the zoning code and policy guidance of the comprehensive [development] plan." CPED also recommended that the Planning Commission deny the CUP because it risked injuring the use and enjoyment of surrounding property, failed to comply with the comprehensive plan, would shadow surrounding residential property throughout the year, was out of scale with surrounding properties, and inconsistent with the character of the surrounding uses.

In addition to CPED's recommendation, the Planning Commission received input from Whittier residents and Yellow Tree leading up to and during its meeting to decide the applications. The Whittier Alliance Neighborhood Association and 11 neighborhood

[2] Variances are granted to allow a person to use property in a way that does not conform to the specific requirements of the zoning ordinance. Minn. Stat. § 462.357, subd. 6(2) (2018); *see also Arcadia Dev. Corp. v. City of Bloomington*, 125 N.W.2d 846, 851 (1964).

residents expressed their support for the project through a combination of written comments before the meeting and brief speeches during it. Six other residents, including Tulien, commented in opposition to the project. Yellow Tree and DJR Architecture, which designed the project, provided explanations for the applications and answered commissioners' questions during the meeting. CPED staff also attended the meeting to answer the commissioners' questions. After hearing from the residents, project developers, and city staff, the Planning Commission rejected CPED's recommendations and approved all of Yellow Tree's applications.

Tulien appealed the Planning Commission's decision to the City Council's Standing Committee on Zoning and Planning (Zoning Committee). Before the Zoning Committee heard the appeal, Yellow Tree modified the project to eliminate two variance requests, changed another variance request, and reduced the building height in the CUP. Nine residents commented to the Zoning Committee in support of Tulien's appeal and in opposition to the project. The Zoning Committee recommended that the full City Council deny Tulien's appeal and approve Yellow Tree's applications. The City Council followed those recommendations.

Tulien then appealed to the district court, contending that the Planning Commission lacked the statutory authority to grant the variances, and the City lacked a rational basis to grant the variances and CUP. Both sides moved for summary judgment, which the district court granted for the City and Yellow Tree. Tulien then appealed to this court.

DECISION

Tulien appeals from the district court's grant of summary judgment to the City and Yellow Tree, contending that the City's decision to grant the variances and the CUP was unreasonable, arbitrary, and capricious, and that the district court erred in its interpretation of the MPA, Minnesota Statutes sections 462.354 and .357, subdivision 6 (2018).

I. The City's decisions to grant the variances were unreasonable, arbitrary, and capricious.

Tulien contends that the City lacked a rational basis to grant the variances. The City and Yellow Tree respond that the City gave legally sufficient and factually supported reasons for granting the variances, so its decision had a reasonable basis. A zoning authority must have a reasonable basis for all zoning decisions. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981). We review the zoning authority's decision independent of the findings and conclusions of the district court. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006). We will reverse the decision as unreasonable, arbitrary, and capricious if the articulated reasons for the decision were legally insufficient or factually unsupported. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75–76 (Minn. 2015). The party challenging the zoning decision bears the burden of proving it was legally insufficient or factually unsupported. *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 492 (Minn. App. 1995). After reviewing the record before the City and the City's findings, we conclude that the City acted unreasonably, arbitrarily, and capriciously when it granted the variances.

The City approved the following five variances for the project:

1) Reduce the required number of loading/unloading parking spaces from one to zero.

2) Reduce the distance that balconies on the building must be set back from the rear yard property line from 15 feet to 10 feet.

3) Increase the percentage of the lot that the building is allowed to cover from 70 percent to 77.7 percent.

4) Reduce the distance that the building must be set back from the front yard property line along 26th Street West from 19.7 feet to one foot.

5) Reduce the distance that the building must be set back from the front yard property line along Blaisdell Avenue from 33.5 feet to one foot.

The City was required to articulate findings under three factors to establish a reasonable basis to grant each variance, the first factor being that

> [p]ractical difficulties exist in complying with the ordinance because of circumstances unique to the property. The unique circumstances were not created by persons presently having an interest in the property and are not based on economic considerations alone.

MCO § 525.500(1) (2011); *see also* Minn. Stat. § 462.357, subd. 6(2) ("'Practical difficulties,' . . . means . . . the plight of the landowner is due to circumstances unique to the property not created by the landowner."). Tulien challenges only the City's findings for the practical difficulty factor, so we confine our review to those findings.

Our case law instructs that a practical difficulty finding requires multiple components. The "circumstances unique to the property" must be features or characteristics of the property or its surroundings, not the operation of the zoning code on the property; also, the finding must explain how those circumstances make it difficult for the property owner to conform their proposed use to the zoning requirement from which they seek to vary. *See Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 702 (Minn. App.

2000), *review denied* (Minn. July 25, 2000) (holding that the city made a legally sufficient finding of practical difficulties when it explained that the property's location at the end of a cul-de-sac, as well as the stand of trees and significant grade change of 44 feet on the property, limited the owner's ability to create house pads and lot lines in compliance with the zoning code); *State ex rel. Neighbors for E. Bank Livability v. City of Minneapolis*, 915 N.W.2d 505, 517–18 (Minn. App. 2018), *review denied* (Minn. Aug. 7, 2018) (holding similarly when the city explained that permanent structures on either side of a proposed apartment building physically limited the lot size and ability to build horizontally on the property in compliance with the zoning code); *Sagstetter* 529 N.W.2d at 492 (holding similarly when the city found that "soil conditions and a sewer main prohibited excavation that would allow [the project] to comply with the 30 foot height limitation in the ordinance"). Relatedly, we have upheld a local government's denial of a variance when it finds no unique characteristics or features of the property or surrounding area. *See, e.g.*, *Cont'l Prop. Grp., LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693, at *5 (Minn. App. Apr. 18, 2016) (affirming a city's finding of no unique circumstances when the property shared the same physical characteristics as similar properties in the immediate area). The circumstance need not be limited to the physical characteristics or features of the property itself, but may include those of the surrounding area so long as they cause the property owner practical difficulties complying with the zoning code. *See Neighbors for E. Bank Livability*, 915 N.W.2d at 517–18. With this law in mind, we now turn to the City's findings for each variance.

A. The City's practical difficulty findings for the minimum loading variance and the minimum rear yard setback variance were legally insufficient.

For the minimum loading variance and the minimum rear yard setback variance, the City found that "a practical difficulty exists due to the current zoning code, which makes it difficult to create a contemporary apartment building on this site which would meet all of those standards." One of the planning commissioners reinforced this finding during the hearing, saying,

> As it relates to practical difficulty, these [variances] relate to the intensity of development, location of the building. There are practical difficulties associated with the current zoning code. I think whether it's the R5 or OR2 district, it's difficult to fit a contemporary building on a site like this or elsewhere in the city and meet all of those [zoning] standards.

We read this finding to say that the zoning code is the unique circumstance of the property that made it difficult for Yellow Tree to build its project on the property or elsewhere in the city.

The City's finding is legally insufficient because it does not point to a circumstance unique to the property. The fact that "the current zoning code . . . makes it difficult to create a contemporary apartment building on this site" is not a circumstance unique to the property. The City found that Yellow Tree had practical difficulties building its project in compliance with the zoning code because the zoning code made it difficult to build the project at the site. Under this circular reasoning, all requests for variances from the zoning code automatically have a practical difficulty because the zoning code prevents the proposed use. It destroys the requirement that a practical difficulty be due to a

circumstance unique to the property. The circumstance unique to the property must be a feature or characteristic which—by its existence—causes the property owner difficulty conforming their proposed use to the zoning code. Here, the zoning code applied to the project site did not cause Yellow Tree's difficulty conforming the project to the zoning code. Beyond the illogical nature of this finding, we find no caselaw suggesting that the zoning code can be a circumstance unique to the property. As explained above, our caselaw confirms that the circumstance must be some feature or characteristic of the property or surrounding area, not the generally applicable zoning code.

We are not convinced by the City's argument that this finding actually describes the unique circumstance that the *building site* could not meet all the standards in the zoning code. The language of the finding clearly describes the zoning code as the circumstance unique to the property, not the building site's inability to comply with the code. The City points to nothing in the record that supports its alternative interpretation of this language. Even if we accepted the City's interpretation, the finding would still fail to point to any feature or characteristic of the property or surrounding area, or explain how it creates a practical difficulty.

This finding fails to identify any features or characteristics of the property or surrounding area that caused Yellow Tree practical difficulties in building its project with one loading space and a 15-foot rear yard setback as required by the zoning code. The finding is legally insufficient. This was the City's sole practical difficulty finding for these variances, so the City's decisions to grant these variances were unreasonable, arbitrary, and capricious.

B. The City's practical difficulty finding for the maximum lot coverage variance was legally insufficient.

The City made two practical difficulty findings for the variance to increase the maximum lot coverage. The first was the legally insufficient finding discussed above, which we hold to be insufficient for this variance as well. The second finding was that practical difficulties exist for Yellow Tree complying with the lot coverage requirement because "[c]ity policies that call for active ground floor uses and the amount of parking and circulation space needed to meet the minimum parking requirement . . . result[] in a building footprint that is larger than what is allowed in the OR2 zoning district." The zoning code governs active ground floor uses and the design of parking areas. *See, e.g.*, MCO § 535.60 (2009) (Active Ground Floor Functions); MCO ch. 541 (2000–2019) (Off-Street Parking and Loading). The finding explains that specific requirements of the zoning code forced Yellow Tree to design a project with a building footprint larger than that allowed in the OR2 zoning district. We again reject the City's argument that this finding actually refers to the building site being unable to meet the zoning requirements. As with the previous finding, this one focuses entirely on difficulties created by the zoning code that prevent Yellow Tree from building its project as designed, which are not circumstances unique to the property. This finding is legally insufficient because it fails to establish a circumstance unique to the property. The City failed to provide any legally sufficient reasons to grant this variance, so its decision was unreasonable, arbitrary, and capricious.

C. The City's practical difficulty findings for the front yard setback variances were legally insufficient.

The City made the same findings for both variances to reduce the front yard setbacks. The first was the legally insufficient finding discussed in II.A., which we hold to be insufficient for these variances as well. The City also found that

> practical difficulties exist in complying with the front yard setback requirement due to the unique circumstance of having two front yards, one along Blaisdell Avenue and one along 26th Street. The residential structure to the north, which sets the established front yard requirement along Blaisdell, is uniquely situated with a setback that greatly exceeds the district minimum setback. The minimum front yard setback requirement in the OR2 zoning district is 15 feet. However, based on the established placement of adjacent buildings, the site is subject to an increased front yard setback of 19.7 feet along 26th Street and 33.5 feet along Blaisdell Avenue. . . . The presence of two front yards, each with established setbacks that exceed the district minimum, limits the amount of buildable area on site and creates a practical difficulty.

Though the finding identifies a unique circumstance of two front yards, it still fails because this circumstance does not create practical difficulties for Yellow Tree to comply with the front yard setbacks.

The finding says that Yellow Tree's practical difficulty complying with the front yard setbacks arises because the front yard setbacks on the property exceed the 15 feet normally required in the OR2 zoning district, excessively limiting the area on which Yellow Tree is allowed to build. The logical solution would be to grant variances reducing the setbacks to the 15 feet normally required in an OR2 district, which would eliminate the excessive setbacks and increase the buildable area. But the variances here reduce both setbacks to one foot, suggesting that Yellow Tree would still encounter a difficulty even if

the property were zoned for the normal 15-foot setbacks. The variances greatly exceeded the difficulty found by the City, meaning this finding does not legally support those variances.

In addition to the disconnection between the finding and variances, the City's finding is legally insufficient because it points to the zoning code as the source of the practical difficulty. The two front yards and surrounding buildings mentioned in the finding may be unique circumstances, but they do not themselves reduce the buildable area. Instead, the zoning code increases the front yard setbacks because of those circumstances, which reduces the buildable area. The finding says that the front yard setbacks established by the zoning code reduce the buildable area, which creates Yellow Tree's practical difficulty complying its project with the front yard setbacks established by the zoning code. It is the zoning setbacks themselves that constrain the buildable area. The zoning code is not a circumstance unique to the property, and the City cannot point to the operation of the zoning code as the source of Yellow Tree's practical difficulty justifying the variance from the zoning code. This finding is legally insufficient because it fails to identify a practical difficulty due to circumstances unique to the property. The City failed to provide any legally sufficient reason to grant these variances, so its decisions were unreasonable, arbitrary, and capricious.

II. The City's decision to grant the CUP was unreasonable, arbitrary, and capricious.

Tulien contends that the City lacked a reasonable basis for granting the CUP applications because the record does not provide sufficient factual support. We review the

City's grant of the CUP applications under the same standards as the variances. *See Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). The Planning Commission must make findings under six factors before granting a CUP. MCO § 525.340 (2019); *Neighbors for E. Bank Livability*, 915 N.W.2d at 510 n.12. The City need not make each finding explicit, so long as we can determine that the "order granting a CUP . . . demonstrate[s] the board's conclusion that the proposal has satisfied each of the zoning ordinances conditions for approval." *Schwardt*, 656 N.W.2d at 389. We conclude that, of the six required factors, the City failed to consider possible injuries to the use and enjoyment of nearby property, so it could not have reached any conclusion on that factor. MCO § 525.340(2) ("The conditional use will not be injurious to the use and enjoyment of other property in the vicinity . . . .").

We examine the City's order and the record for any indication that the City considered the possible injury to the use and enjoyment of nearby property. *See Schwardt*, 656 N.W.2d at 389. Despite evidence suggesting that injuries were possible, this record is devoid of any indication that the City considered and rejected those possible injuries. The City's resolution and the minutes from the hearings fail to discuss or even hint at this finding. If the record contained no evidence that the CUP risked injuring the use and enjoyment of surrounding property, the City would not need to discuss those nonexistent injuries, and we could infer that their grant was legally sufficient. But here, the Planning Commission and City Council were aware that the increased building height permitted by the CUP might impact the use and enjoyment of surrounding property. Two residents submitted comments that the building's height would cause it to shadow their property

throughout the year, and the height of the building's party deck would injure their private use of their backyards by allowing people on the deck to look down into their backyards. Yellow Tree's shadow study shows that the project will shadow neighboring houses throughout the year. The CPED highlighted the shadow study in its report to the Planning Commission. Also, Yellow Tree's project proposal shows that the party deck on the upper floors faces the backyards of the neighboring houses, allowing views into those backyards. In the face of this evidence, the City needed to consider and reject those possible injuries before it could reach any conclusion on this factor. The record fails to show that the City gave any consideration to those injuries or the finding generally, so we can only conclude that the City failed to give the consideration legally required. The City's failure to consider this required factor renders its reasons for granting the CUP legally insufficient, and its decision unreasonable, arbitrary, and capricious.

III. Statutory Preemption Argument

Tulien also argues that the MPA, Minnesota Statutes sections 462.354 and .357, subdivision 6, preempts the City's process for approving variances through the Planning Commission. The district court held otherwise in its summary judgment. On appeal, Tulien indicates that he was injured by this variance approval process because he "has a right to have decisions affecting him made by the correct body as provided by the MPA," and the City violated that right with its illegal process. Tulien stops at the step of asking us to interpret the statute differently than the district court, but he does not explain what relief he could experience through this different interpretation. To the extent Tulien makes

this argument in support of us reversing the variances and CUP, we need not address it because we reverse on other grounds.

IV. Conclusion

The City failed to find any legally sufficient practical difficulties to support its decisions to grant the variances and failed to consider whether the CUP would impact the use and enjoyment of surrounding property as required by the MCO and MPA. We reverse the variances and CUP as unreasonable, arbitrary, and capricious.

Reversed.