

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joe A. Schmidt, Kelly P. Buettner-Schmidt, Barry)	
D. Hoffer, Susan L. Hoffer, Michael A. Lucy,)	Supreme Court
Nancy A. Lucy, Steve P. Muus, Fae M. Self, Gene)	Case No: 20160088
E. Nettleton, Lori J. Nettleton, Clyde Houge,)	Ward County District
Janelle Houge, Jon Anderson, John Seier, Julie)	Court No. 51-2014-CV-01433
Seier, Rick Hulm,)	
)	
Appellants,)	
)	
vs.)	
)	
City of Minot, Minot City Council, and)	
Minot Planning Commission,)	
)	
Appellees.)	

APPEAL FROM JUDGMENT ENTERED ON JANUARY 5, 2016
IN THE DISTRICT COURT, NORTH CENTRAL JUDICIAL DISTRICT,
WARD COUNTY, NORTH DAKOTA
THE HONORABLE BRUCE HASKELL
CIVIL NO. 45-2013-CV-00304

BRIEF OF APPELLEES

Randall J. Bakke, #03898
Shawn A. Grinolds, #05407
Smith Bakke Porsborg Schweigert Armstrong
122 E. Broadway Avenue
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
sgrinolds@smithbakke.com
Attorneys for Appellees

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Although the District Court granted summary judgment dismissing Appellants' claims on the expressed basis of standing, the District Court's legal analysis reveals its basis for dismissal was actually premised upon two separate legal theories – specifically, that the District Court lacked subject matter jurisdiction to review the challenged decision of the City Council, and that Appellants lacked standing to enforce alleged violations of City's Zoning Supplement by First Western Bank & Trust. Therefore, the issues for review by this Court are appropriately framed, as follows:

1. Whether the District Court lacked subject matter jurisdiction under N.D.C.C. § 28-34-01 to review the decision of the Minot City Council to uphold the Minot Planning Commission's grant of the two challenged variances to First Western Bank & Trust.
2. Whether the District Court correctly determined Appellants lack standing to privately enforce First Western Bank & Trusts alleged violations of ordinances contained in the City of Minot's Zoning Supplement.
3. Whether the District Court's prior determination in a separate lawsuit (not an administrative appeal) involving a subset of the current litigants, involving a challenge to different granted variances than at issue in the present case, and grounded on numerous independent legal bases, any one of which alone would have supported the prior determination, has preclusive effect as to the current administrative appeal.

II. RESPONSE TO APPELLANTS' NATURE OF THE PROCEEDINGS

[¶ 2] City disputes Appellants' assertion in paragraph 5 of Appellants' Brief that Appellants' appeal from the City Council's decision to uphold the Planning Commission's grant of the challenged variances is allowed by N.D.C.C. § 28-34-01, as discussed in the argument below.

III. RESPONSE TO APPELLANTS' STATEMENT OF FACTS

[¶ 3] With respect to the allegations in paragraph 9 of Appellants' Brief, upon discovering First Western Bank & Trust ("FWBT") had submitted its prior variance application based upon "net square footage" calculations, City staff informed FWBT that it would need to request a variance for parking stalls based on gross square footage. (Doc. 18 at p. 8.)

[¶ 4] In paragraphs 13 and 20 of Appellants' Brief, Appellants inappropriately reference material expressly excluded from the Record on Appeal by the District Court, specifically docket entries 60 and 65. (Doc. 75 [excluding, among other exhibits, exhibits K and P (docs. 60 and 65)].) City denies any materials, other than those included in the Record on Appeal, and as otherwise allowed into the record by the District Court, were presented to the City Council for consideration.

[¶ 5] City disputes the following factual allegations contained in paragraph 20 of Appellants' Brief: "[t]he variances have resulted in increased traffic in their residential area, increased on-street parking, congested streets, impaired views and damage to property" and "[t]he increased street parking has caused concern for emergency vehicle access, safety issues for children and pedestrians, and has interfered with public works

vehicles removing snow removal to the extent that there was no snow removal during the winter of 2014-2015.”

IV. ARGUMENT

A. Applicable Standard of Review

[¶ 6] The only issues before this Court involve determinations as to subject matter jurisdiction, standing, and preclusion. Determinations on all of these issues involve questions of law, and are reviewed on appeal de novo. *See Hagerott v. Morton County Board of Commissioners*, 2010 ND 32, ¶ 9, 778 N.W.2d 813, 818 (determinations of standing involve questions of law and are reviewed de novo); *Rolette County Social Service Board v. B.E.*, 2005 ND 101, ¶ 6, 697 N.W.2d 333 (determinations of subject matter jurisdiction involve questions of law and are reviewed de novo); *Chapman v. Wells*, 557 N.W.2d 725, 728 (N.D. 1996)(Res judicata is a question of law reviewed de novo (citations and quotations omitted)).

B. The District Court Lacked Subject Matter Jurisdiction To Review The City Council’s Decision

[¶ 7] Appellants appealed to the District Court pursuant to N.D.C.C. § 28-34-01 from the City Council’s challenged decision to uphold the Planning Commission’s grant of the subject variances. (App. 6.) Section 28-34-01 provides, in relevant part, “[t]his section, to the extent that it is not inconsistent with procedural rules adopted by the North Dakota supreme court, governs any appeal provided by statute from the decision of a local governing body,” (emphasis added). As discussed below, the District Court lacked

subject matter jurisdiction¹ to review the challenged decisions under § 28-34-01 as there is no statutory authorization for such review. Contrary to Appellants' argument, City's Planning Commission was not required to act as a board of adjustment when it granted the challenged variances at issue, and the statutory appellate procedures applicable to boards of adjustment have no application in this case.

[¶ 8] Chapter 40-05.1 of the North Dakota Century Code provides for home rule in cities. Section 40-05.1-05 provides, in relevant part, as follows:

If a majority of the qualified voters voting on the charter at the election vote in favor of the home rule charter, the charter is ratified and is the organic law of the city, and extends to all its local and city matters. **The charter and the ordinances made pursuant to the charter in such matters supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict with the charter and ordinances and must be liberally construed for such purposes. . . .**

N.D.C.C. § 40-05.1-05 (bold added). City of Minot is a home rule charter city and the challenged variances granted FWBT pertain to property located within the territorial limits of the City. A copy of the Home Rule Charter of City of Minot, North Dakota last amended June 14, 2011 ("Charter") is attached to the Brief of Appellants at A-001 through A-010. Pursuant to Article 2 of the Charter, "[s]ubject to the limitations imposed by the state constitution, state law, and this charter, all powers of the city shall be vested in the elected governing body." The City Council is the City of Minot's elected governing body. Article 2 of the Charter provides further "[a]ll powers of the city shall be exercised in the manner prescribed by this charter, or if the manner be not prescribed, then in such manner as may be prescribed by ordinance."

¹ In *Grand Forks Homes v. State ex. Rel. State Bd. Of Equalization*, 2011 ND 65, ¶ 22, 795 N.W.2d 335, this Court noted district courts may obtain subject matter jurisdiction to review decisions of local governing bodies pursuant to N.D.C.C. § 28-34-01.

[¶ 9] Article 3 of the Charter provides further, in relevant part:

The city shall have all powers granted to municipal corporations by the constitution and laws of this state and by this charter, together with all the implied powers necessary to carry into execution all powers granted.

Among its enumerated powers, which may be implemented by ordinance subject to the limitations specified in the charter, shall be the following:

* * *

- g. To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.

* * *

- k. To provide for zoning, planning, and subdivision of public or private property within the city limits; . . .

* * *

The enumeration of particular powers by this charter shall not be deemed to be exclusive, and in addition to the powers enumerated herein or implied hereby, or appropriate to the exercises of such powers, it is intended that the city shall have and may exercise all powers which under the constitution and laws of this state, it would be competent for this charter specifically to enumerate.

(Charter [doc. 16] at Art. 2.) In other words, pursuant to Article 2, the City Council has the power to provide for zoning, planning and subdivision of public and private property within the city limits, and to provide for the adoption, amendment and repeal of ordinances in relation thereto.

[¶ 10] Article 6 of the Charter grants the City Council plenary and implied powers as follows:

The governing body shall have plenary power to enact and make all property and necessary ordinances, resolutions and orders to carry out and give effect to the express and implied powers granted in this charter to the end that a complete, harmonious and effective municipal government may be initiated, installed,

operated and maintained in the city, and thereby protect and safeguard the rights, interests, safety, morality, health and welfare of the city and its inhabitants.

(Charter [doc. 16] at Art. 6.) “Plenary powers” include “[a]uthority and power as broad as is required in a given case.” Black’s Law Dictionary 1154 (Sixth ed. 1990). Further, Article 9 of the Charter provides “[t]he powers of the city under this charter shall be construed liberally in favor of the city, and the specific mention of particular powers in the charter shall not be construed as limiting in any way the general power stated in this charter.”

[¶ 11] In accordance with the Charter, the City of Minot adopted a Code of Ordinances, City of Minot, effective April 17, 1972 (“Minot Code”), and Zoning Supplement to the City of Minot Code of Ordinances (“Zoning Supplement”). Relevant provisions from the Minot Code in effect when the City’s challenged decision was made, specifically chapters 29 and 30, are attached to the Appellants’ Brief at A-017 through A-027. Zoning Supplement § 29-7 entitled “Powers of the Planning Commission” provides, in part, “In addition to the powers of the Planning Commission as set forth in this zoning ordinance as well as any other powers prescribed by law, the Planning Commission may grant variances with the same power and authority as the Board of Adjustment. . . .” Although City abolished the Board of Adjustment prior to the grant of the challenged variances at issue, 29-7 expressly notes the grant of power therein was in addition to any other powers of the Planning Commission as otherwise set forth in the zoning ordinance. Pursuant to chapter 30 of the Zoning Supplement, City expressly granted the Planning Commission the authority to grant variances, without reference to any board of adjustment, pursuant to § 30-02, and provided procedures in relation thereto, including an appellate

procedure pursuant to § 30-06. City did not incorporate any state statutory provisions pertaining to boards of adjustment. The establishment and maintenance of a board of adjustment has always been discretionary under state law. *See* N.D.C.C. § 40-47-07 (“The governing body may provide for the appointment of a board of adjustment consisting of” (underline added)). City’s repeal of chapter 26 of the Zoning Supplement, previously providing for a Board of Adjustment, evidences the City’s intention not to utilize a board of adjustment, and to not incorporate any statutes pertaining to boards of adjustment, including any statutes pertaining to appeals from decisions of boards of adjustment. As correctly noted by the District Court, the City Council’s decision on appeal from the Planning Commission’s decision on a variance request is final – no judicial appeal has been authorized. *See* Zoning Supplement § 30-06(c)(A-027)(“The City Council shall conduct a public hearing and make the final determination . . . by majority vote of the City Council.”); N.D.C.C. § 28-34-01 (governing appeals “provided by statute” from the decision of a local governing body) . City has not authorized judicial appellate review in this context, and the District Court therefore properly concluded it lacked subject matter jurisdiction to review the City Council’s decision under N.D.C.C. § 28-34-01.

[¶ 12] In addition, the issue of waiver has no application in the context of subject matter jurisdiction. Pursuant to N.D. R. Civ. P. 12(h)(3), “[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” (emphasis added). As explained by this Court:

Issues involving subject matter jurisdiction cannot be waived and can be raised sua sponte at any time. The question of subject matter jurisdiction is a question of law, which we review de novo, when jurisdictional facts are not in dispute.

For a court to issue a valid order or judgment, the court must have jurisdiction over both the subject-matter of the action and the parties. Subject-matter jurisdiction is the court's power to hear and determine the general subject involved in the action, while personal jurisdiction is the court's power over a party. Although a party may waive the right to object and voluntarily submit to the personal jurisdiction of the court, subject-matter jurisdiction is derived from the constitution and the laws, and cannot be conferred by agreement, consent or waiver.

For subject-matter jurisdiction to attach, the particular issue to be determined must be properly brought before the court in the particular proceeding. The court may raise the absence of subject-matter jurisdiction at any stage of the proceedings. A judgment or order entered without the requisite jurisdiction is void.

Investors Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 57, 785 N.W.2d 863, 880-81 (citations and quotations omitted). Subject matter jurisdiction cannot be waived or consented to by the parties. Dismissal of Appellants' appeal for lack of subject matter jurisdiction is appropriate. Whether the District Court framed its dismissal of Appellants' claims on the basis of subject matter jurisdiction is largely irrelevant. The District Court could not grant itself subject matter jurisdiction, and the District Court's analysis of the fact the City had not authorized judicial review of the City Council's decisions at issue under N.D.C.C. § 28-34-01 evidences a subject matter jurisdiction analysis by the District Court and a basis for the District Court's dismissal of Appellants' claims, independent of the issue of standing.

C. The District Court Properly Determined Appellants Lack Standing To Enforce Alleged Violations of the Zoning Supplement

[¶ 13] The District Court correctly determined the City has not authorized private enforcement of alleged violations of the Zoning Supplement, and as a result, Appellants lack standing to enforce an alleged violation of the Zoning Supplement. As correctly analyzed by the District Court, although this Court previously noted in *Munch v. City of Mott*, 311 N.W.2d 17 (N.D. 1981) that N.D.C.C. § 40-47-12 does not directly authorize

private enforcement of municipal ordinances, a municipality may, at its discretion, expressly authorize private enforcement through an ordinance, as was the case in *Munch*. No such authorization of private enforcement of City's Zoning Supplement is found in any City ordinance.

[¶ 14] Chapter 40-47 of the North Dakota Century Code generally governs City Zoning, to the extent not inconsistent with any home rule city charter or ordinances enacted in accordance therewith. Section 40-47-12, entitled "Instituting action to restrain, correct, or abate violations", provides as follows:

If any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or if any building, structure, or land is used in violation of this chapter or of any ordinance or other regulation made under the authority conferred by this chapter, the proper local authorities of the city, in addition to other remedies, may institute any appropriate action or proceeding.

(emphasis added). Unlike the City of Mott, at issue in *Munch*, the City of Minot is a home rule charter city which has claimed for itself any and all powers it could potentially claim for itself, as discussed above, and has expressly provided for internal enforcement of its Zoning Supplement. In the context of the issues in the present case, Section 40-47-12 is not in conflict with the City Zoning Supplement. Regardless of its applicability, there is no City ordinance granting a private right of enforcement of the Zoning Supplement, which contains the ordinances allegedly violated by FWBT. Instead, Zoning Supplement § 30-1(a) authorizes the City Planner and or staff to administer and enforce the Zoning Supplement. In addition, Zoning Supplement § 30-1(b) further authorizes the building official to "[i]nitiate in the name of the city any appropriate actions or proceedings against any violator of this title, as provided by law."

[¶ 15] The District Court correctly determined Appellants' lack standing to enforce the Zoning Supplement.

D. The District Court's Decision in *Schmidt et al. v. City of Minot et al.*, Ward County District Court, State of North Dakota, Civil No. 51-2014-CV-00452, Does Not Have Preclusive Effect In Relation To Any Issue Presented In This Appeal

[¶ 16] The District Court's prior decision granting City's motion for summary judgment in a civil declaratory judgment action entitled *Schmidt et al. v. City of Minot et al.*, Ward County District Court, State of North Dakota, Civil No. 51-2014-CV-00452 ("Lawsuit"), does not have preclusive effect as to any issue presented in this administrative appeal. The prior Lawsuit did not involve an administrative appeal under N.D.C.C. § 28-34-01, involved a subset of the plaintiffs involved in the present administrative appeal, involved a request for declaratory relief to overturn three different variances granted FWBT by the City Council (variances not at issue in this administrative appeal). The District Court's decision in the prior action was founded upon numerous independent bases, any one of which justified the grant of summary judgment in favor of City. The District Court determined 1) an order for declaratory judgment was not available to the plaintiffs in that action as the plaintiffs were seeking redress for the past actions of the City, and not requesting the Court declare the rights, status or legal relations of the parties, and there was no continuing violation of the plaintiffs' rights, 2) the doctrine of laches applied due to the inequity to First Western Bank and Trust which would result should FWBT be required to remove the improvements it made, 3) FWBT's reliance upon City's granting of the variance requests then at issue was reasonable, and 4) the plaintiffs had an adequate remedy available at law in the form of an injunction, which they failed to timely pursue. In other words, there

were numerous independent bases supporting the District Court's grant of summary judgment in the prior action, and the District Court's further reference to the appeal process found at N.D.C.C. § 28-34-01 was unnecessary to the outcome. *See Vanover v. Kansas City Life Ins. Co.*, 438 N.W.2d 524, 526 (N.D. 1989)(adopting comment (i) of *Restatement (2d) of Judgments*, § 27 (1982), which provides in relation to issue preclusion "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone."). *See, also Baker Elec. Co-op, Inc. v. Chaske*, 23 F.3d 1466, 1475(8th Cir. 1994)(citing *Vanover* for proposition North Dakota has adopted comment i to the *Restatement (Second) of Judgments* § 27, and applying comment (i) in rejecting assertion of preclusion in subsequent action). As a result, the District Court's reference in the Lawsuit to the plaintiffs failure to timely appeal under N.D.C.C. § 28-34-01 from the granted variances then at issue does not have preclusive effect as to any issue raised on appeal in the present administrative appeal. As discussed above, subject matter jurisdiction cannot be waived or consented to.

V. CONCLUSION

[¶ 17] For the foregoing reasons, Appellees City of Minot , Minot City Council, and Minot Planning Commission request the challenged decision of the District Court be in all things affirmed.

CERTIFICATE OF COMPLIANCE

[¶ 18] The undersigned, as attorneys for the Appellees in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 3,223.

Dated this 12th day of May, 2016.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: s/ Randall J. Bakke
Randall J. Bakke (ND #03898)
Shawn A. Grinolds (ND #05407)
122 E. Broadway Ave.
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
sgrinolds@smithbakke.com

Attorneys for Appellees, City of Minot,
Minot City Council, and Minot Planning
Commission

CERTIFICATE OF SERVICE

[¶ 19] I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES** was on the 12th day of May, 2016, emailed to the following:

ATTORNEY FOR APPELLANTS:

Beth A. Baumstark (#04835)
Derrick Braaten (#06394)
Baumstark Braaten Law Partners
109 North 4th Street, Suite 100
Bismarck, ND 58501-4004
beth@baumstarkbraaten.com
derrick@baumstarkbraaten.com

By s/Randall J. Bakke
RANDALL J. BAKKE