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DECEMBER 9, 2019
STATE OF NORTH DAKOTA

IN SUPREME COURT

STATE OF NORTH DAKOTA

Alton Johnson,	)	
	)	
Appellant,	)	
	)	Supreme Court Case No. 20190318
vs.	)	District Court Case No. 51-2017-CV-00009
	)	
City of Burlington,	)	
	)	
Appellee,	)	

Brief of Appellant

Appeal from Findings of Fact, Conclusions of Law, and Order for Judgment Dismissing Appellant's Appeal filed on August 20, 2019, Order for Judgment filed on August 21, 2019, and Judgment filed on August 21, 2019

ORAL ARGUMENT REQUESTED

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Statement of Issues Presented for Review

[¶1] **Issue 1: Whether the assertions, facts, statements, and the like set forth in the Planning Commission Findings and the City Council Findings that are not reflected in the record should be stricken from the record or otherwise disregarded.**

[¶2] **Issue 2: Whether the recommendation of the Planning Commission and the decision of the City Council to deny Alton's Application were arbitrary, capricious, and unreasonable.**

[¶3] **Issue 3: Whether the recommendation of the Planning Commission and the decision of the City Council to deny Alton's Application are not supported by substantial evidence.**

Oral Argument Statement

[¶4] Oral argument would be helpful to the Court as there are unusual facts and circumstances, a complex procedural history, and issues of first impression.

Statement of the Case

[¶5] The matter before the Court is an administrative appeal. Appellant ("Alton") submitted an *Application/Petition for a Land Use Variance* ("Application") to Appellee, City of Burlington ("City"), requesting a land use variance. App. 20-232, 292-93. A public hearing was held before the Planning Commission on November 29, 2016. See generally App. 253-72. The Planning Commission recommended denying Alton's Application by a vote of 3-2. App. 271-72. A public hearing was held before the City Council on December 5, 2016. See generally App. 273-91. The City Council denied Alton's Application by a vote of 4-0. App. 290. A *Notice of Appeal* was filed with the District Court in Case No. 51-2017-CV-00009 on January 3, 2017 and served upon the City on January 4, 2017 by Alton. App. 10 and 11, respectively.

[¶6] On November 12, 2018, Alton served and filed his *Brief of Appellant*. App. 7-8. Alton discovered the City intended to hold public hearings to establish findings in regard to his Application, and therefore, on December 21, 2018, Alton served a letter on the City

asserting a standing objection to any and all proceedings, findings, documents, and/or the like regarding his Application and notifying the City he was unable to attend the meetings scheduled on December 26, 2018. App. 346-48. On December 26, 2018, the Planning Commission held a meeting and established a *Recommendation on Alton Johnson's Application for a Variance to Allow His Property Located at 144 Ida Avenue, Burlington, North Dakota, to be Used as an Auto Body and Repair* ("Planning Commission Findings") and the City council held a meeting and established *Findings on Alton Johnson's Application for a Variance to Allow His Property Located at 144 Ida Avenue, Burlington, North Dakota, to be Used as an Auto Body and Repair* ("City Council Findings"). App. 337-45. On Friday, January 25, 2019, the City served and filed *Appellee's Motion to Complete the Record on Appeal* requesting the Planning Commission Findings and City Council Findings be added to the record on appeal. App. 331-50. Alton objected to and opposed the City's motion. App. 351-56. The District Court considered the City's motion on February 8, 2019. App. 357. Thereafter, on February 11, 2019, an *Order* was entered by the District Court permitting the City to add the Planning Commission Findings and City Council Findings to the record on appeal and permitting the parties to file supplemental briefs. App. 357.

[¶7] Oral argument was held on May 30, 2019. App. 8. Thereafter, the proposed *Findings of Fact, Conclusions of Law, and Order for Judgment Dismissing Appellant's Appeal*, *Order for Judgment*, and *Judgment* prepared by the City were entered by the District Court verbatim. App. 358-65, 421-28, 429, 430. A *Notice of Entry of Judgment* was served by the City upon Alton, through counsel, on August 22, 2019. App. 431-32. A *Notice of Appeal* was served by Alton upon the City, through counsel, on October 18, 2019.

App. 433-36.

Statement of the Facts

[¶8] In the early 1970s, Alton and his business partner considered opening an auto body and repair shop in several different cities. App. 36, 256. Alton and his business partner approached the City about starting a body shop. App. 34. The City suggested the property located at 144 Ida Avenue legally described as Lots 11 and 12 of Block 4 of Coltons Second Addition ("Property") owned by Dean Signalness. App. 34. On February 5, 1973, at a City Council meeting, the City considered an application for a building permit to construct a building to operate an auto body and repair shop on the Property. App. 23-24, 34, 53, 55, 57, 257. The application was submitted by Alton and his business partner. App. 23-24, 55, 57, 257. The City Council voted to approve a building permit for a body shop and authorized the use of the Property for auto body and repair. App. 23-24, 34, 53, 55, 57, 257. A building permit to build an auto body and repair shop was subsequently issued on February 13, 1973. App. 24, 34, 59, 257. On May 22, 1973, in reliance on the City Council's approval, Alton and his business partner purchased the Property. App. 24, 34, 61-62, 257. Thereafter, Alton and his business partner built the main structure for the body shop. App. 34. The auto body and repair shop began operating on August 1, 1973. App. 24, 57, 257.

[¶9] In 1976, Tim and Darlene Schnaible moved into 122 Ida Avenue which is two houses away from the Property. App. 204-05, 260, 265, 279.

[¶10] On June 7, 1983, at a City Council meeting, the City granted a building permit authorizing Alton to expand his auto body and repair shop. App. 24, 64, 257. There was no opposition to Alton's request. App. 64. Based upon the permission granted by the City,

Alton added a lean-to with two (2) doors and one (1) room to the west side of the building. App. 24-25. The lean-to runs the entire length of the building and is fully enclosed. App. 25.

[¶11] On June 30, 1989, a fire damaged approximately one-third (1/3) of the north side of the building. App. 25, 257. A portion of the building was still usable and was used to dismantle vehicles, store vehicles, store parts, etc. and to perform body work "off and on." App. 25, 257, 287, 288. Alton used a second location for his business office, painting, and for customers to drop off damaged vehicles and to pick up repaired vehicles. App. 25, 257.

[¶12] On April 2, 1990, at a City Council meeting, the City decided Alton should clean up the lot and remove or repair the building since he settled with the insurance company. App. 25, 66, 169. The City allowed Alton to repair the structure. App. 25, 169, 257. There was no opposition to Alton repairing the structure. App. 66. Therefore, Alton repaired and reconstructed the damaged part of the building. App. 25. While the building was being repaired and reconstructed, Alton leased space to other individuals and businesses. App. 25, 257. Further, Alton continued to use the Property to dismantle vehicles, store vehicles, store parts, etc. and to perform body work "off and on." App. 25, 257, 287, 288.

[¶13] In 1991, Alton leased one (1) of the two (2) rooms in the main building to Mountain Metals, a metal recycling/salvage business. App. 25, 257. The other room in the main building and the lean-to were used by Alton to dismantle vehicles, store vehicles, store parts, etc., and to perform body work "off and on." App. 25, 257, 287, 288. He also leased space in the building to other tenants, nearly all of whom used the Property for auto/truck/tractor body and repair. App. 25, 257.

[¶14] On April 28, 1993, at a City Council meeting, Alton appeared in regard to the value

of the Property. App. 25, 66. Pursuant to the meeting Minutes, the City referred to Alton as "[Alton] Johnson, owner of J & J Body Shop." App. 25, 66.

[¶15] On March 3, 2008, at a City Council meeting, a citizen appeared with a business license application to operate a collision and restoration shop, i.e. an auto body and repair shop. App. 25, 68, 259. The auto body and repair shop was to be built on property located on the same street as Alton's auto body and repair shop, i.e. Johnson Street, was to be approximately the same size as Alton's auto body and repair shop, was to be located only located three (3) to four (4) blocks down from Alton's auto body and repair shop, and, based upon the allegations of the City, was to be located in the same alleged zoning district as Alton's auto body and repair shop, i.e. "C-1 Neighborhood Commercial District" ("C-1"). App. 25-26, 68, 259. On April 7, 2008, at a City Council meeting, the City discussed odor from solvents and paint overspray and contacting First District Heal Unit in regard to the same. App. 25-26, 68. The City did not state auto body and repair is not permitted in a C-1 or that a land use variance is required. App. 25-26, 68. On May 5, 2008, at a City Council meeting, the City considered a building permit application to construct a 36 ft. x 55 ft. auto body and repair shop. App. 26, 70. The City reminded the citizen of the necessity of keeping the area neat and free of junk auto and debris. App. 26, 70. The City did not state auto body and repair is not permitted in a C-1 or that a land use variance was required. App. 26, 70. The City voted to approve the building permit for the citizen to build a 55' x 36 auto body and repair shop. App. 26, 70. The City also voted to approve a business license to operate an auto body and repair business on the property. App. 26, 70, 162, 259.

[¶16] In 2012, Alton negotiated the sale of J & J Auto Body Repair which is one (1) of his two (2) auto body and repair businesses. App. 26, 257. Included in the sale was the

second location located at 11321 Highway 2 and 52 West, Burlington, ND 58722. App. 26. He continued to own and operate J & J Auto and continued to use the Property for auto body and repair subsequent to the sale. App. 26.

[¶17] On December 1, 2012, the sale of J & J Auto Body Repair closed and Alton began using only the Property for auto body and repair. App. 26, 257. On December 3, 2012, a City Council meeting was held. App. 26, 72. A neighboring couple whom Alton has had disagreements, who have complained to the City in the past regarding Alton's use of the Property and who moved to the neighborhood in which the Property is located after the Property began being used for auto body and repair, namely Tim and Darlene Schnaible, appeared and raised concerns regarding the use of the Property. App. 26, 61, 72, 227-28, 265, 281, 282. The City Auditor stated the Property is zoned C-1. App. 72. The City determined "[a] letter will be drafted to the owner of the property with a copy of the C-1 Neighborhood Commercial ordinance enclosed." App. 26, 72.

[¶18] On March 4, 2013, a City Council meeting was held. App. 26, 74. Burlington police officer Crabb relayed information he received from Alton regarding business use of the Property. App. 26, 74. The City elected to send a letter to Alton. App. 26, 74. Alton received a letter from the City dated March 12, 2013 stating, in relevant part, "[t]he property is zoned C-1 Neighborhood Commercial, thus, a body shop is not an allowed usage." App. 26, 76.

[¶19] On May 6, 2013, a City Council meeting was held. App. 27, 80. Pursuant to the meeting Minutes, the City Council reviewed an opinion from the City Attorney which stated auto body and repair was a permissible non-conforming use, alleged the use had been discontinued, and "…the only way to initiate that kind of use again would be to obtain

a variance, which would take approval by the planning commission…The city does not have to allow Johnson to re-start his body shop business without obtaining a variance." App. 27, 80. The City elected to send a cease and desist letter to Alton. App. 27, 80.

[¶20] Alton received a letter from the City Attorney dated May 16, 2013 stating autobody and repair was a permissible nonconforming use, alleging the use had been discontinued, and stating "…the property needs to conform with zoning ordinances, unless a variance is granted by the planning commission. Consequently, if you intend to start a body shop on the above property, you need to apply for a variance with the Burlington Planning Commission prior to doing so." App. 27, 80.

[¶21] On September 3, 2013, a City Council meeting was held. App. 27-28, 86. The City directed the Burlington Police Chief to serve a cease and desist order upon Alton for using the Property for auto body and repair. App. 27-28, 86. A cease and desist order dated September 10, 2013 was served upon Alton. App. 28, 88, 257. The cease and desist order stated Alton could request a hearing on the same. App. 28, 88, 257. Therefore, on September 19, 2013, Alton, through counsel, served a letter upon the City via fax and email requesting a hearing on the City's cease and desist order. App. 28, 93-94.

[¶22] On September 25, 2013, the City Attorney sent a letter to Alton, through counsel, stating there is no hearing process and "[y]our client has the option of applying for a variance with the planning commission, or ceasing the zoning violation…[i]f you would like information as to how to apply to the planning commission for a variance, please contact the city clerk." App. 28, 96.

[¶23] On October 10, 2013, Alton commenced Case No. 51-2013-CV-01148 in response to the City's cease and desist order. App. 28, 258. Thereafter, on October 14 and 15, 2013,

a *Restraining Order* was signed by the Honorable William W. McLees and filed by the Clerk of Court, respectively, against the City. App. 28, 98. On March 8 and 9, 2015, an *Order on Motions for Summary Judgment* was signed by the Honorable Stacy J. Louser[1] and filed by the Clerk of Court, respectively. App. 29. The Court denied Alton's *Motion for Partial Summary Judgment*, granted the City's *Motion for Summary Judgment*, and dismissed all of Alton's claims without prejudice holding Alton was required to apply for a land use variance to exhaust his administrative remedies. App. 29. Thereafter, the Court entered an Order for Judgment and Judgment. App. 29.

[¶24] On May 4, 2015, a City Council meeting was held. App. 29, 181. The Meeting Minutes state, in relevant part: "Kremer moved to instruct NDIRF to move forward with a request to have the property cleaned up and the body shop closed once the 60 day period is expired, Hoover seconded, motion carried on a unanimous roll-call vote." App. 29, 181.

[¶25] On July 22, 2015, the District Court entered an *Order on Motion for Reconsideration, to Alter, Amend, and Correct Judgment and for Rule 54 Certification.* App. 29. The Court, in relevant part, stated "[t]he Restraining Order remains in effect," determined Alton is required to apply for a land use variance to exhaust his administrative remedies, and ordered the Judgment be amended to dismiss Alton's unlawful interference with a business claim with prejudice. App. 29. An Amended Judgment was subsequently entered on July 29, 2015. App. 30.

[¶26] On November 9, 2015, Alton mailed a letter to the City requesting information in regard to applying for a variance. App. 30, 183-84. The City did not respond in any regard. App. 30, 213-15. On May 1, 2016, Alton mailed a second letter to the City following up in

[1] Judge Louser was appointed to the case after Judge McLees retired.

regard to the first letter. App. 30, 190. The City did not respond in any regard. App. 30, 213-15. On June 30, 2016, the City commenced a second lawsuit, namely Case No. 51-2016-CV-01751. App. 31. In the Complaint, the City alleged Alton did not apply for a land use variance. App. 31. On October 18, 2016, a third letter requesting information regarding the variance procedure, legal standard, and the administrative review/appeal process and five (5) copies of Alton's Application and the exhibits accompanying the same were mailed and emailed to the City from Alton, through counsel. App. 17-232, 292-93. The City did not respond in any regard. App. 213-15. On November 3, 2016, a fourth letter was sent to the City via facsimile transmission and email requesting information necessary to apply for a land use variance and following up in regard to Alton's Application. App. 296-97. See also *supra.* The City did not respond in any regard. App. 213-15. On November 7, 2016, the undersigned traveled to Burlington and intended to appear at the City Council meeting scheduled that evening at 7:00 o'clock p.m. with Alton as the City failed to respond, in any regard, to Alton's letters and Application. App. 213-15. After learning that Alton intended to appear at the City Council meeting, at 3:27 p.m., the City finally responded to Alton, through counsel, via email. App. 211, 213-15

[¶27] The Planning Commission held a public hearing on November 29, 2016. See generally App. 253-72. Alton's Application included statements from Dennis Schalesky who was on the City Council in 1973 when the City granted Alton permission to use the Property for auto body and repair, Bob Johnson who was Alton's business partner in 1973 when the City granted Alton permission to use the Property for auto body and repair, Greg Bryantt who leased a part of the Property for his metal salvage and recycling business, namely Mountain Metals, for more than twenty (20) years, Rod Hanna who worked for

Alton for fourteen (14) years, John and Sherry Skees who are residents of the City of Burlington, and statements from Alton. App. 20-40, 55, 57, 200, 202, 225, 256. Alton presented the information in his Application through counsel. See generally App. 253-72.

[¶28] It was explained that since the Property began being used for auto body and repair in 1973, there were three (3) complainants. App. 258. Neighbor Vic Selfors complained to the City regarding the Property in 1974. App. 258. Neighbors Dale and Renee Mellgren complained to the City regarding the Property in 1981, however, the issue was resolved between Alton and Dale and Renee Mellgren thereafter. App. 258. Neighbors Tim and Darlene Schnaible complained to the City regarding the Property in 1981, 2012, 2013, and 2016. App. 258. See also generally App. 253-72, 273-91. All of the complaints regarded "cleaning up" the Property. App. 163, 258. Mountain Metals had considerable exterior storage for more than twenty (20) years. App. 200, 258. No complaints were received regarding the use of the Property during the more than twenty (20) years it was used by Mountain Metals. App. 200, 258.

[¶29] It was also explained that Alton relied on the permission he received from the City to locate his business in Burlington, to purchase the Property, to build an auto body and repair shop, to build an addition to the auto body and repair shop, to repair and rebuild the portion of the building damaged by fire, and to sell his second auto body and repair business location. App. 258. He relies on auto body and repair for his income and livelihood and is relying on the sale of the Property for auto body and repair for his retirement. App. 258-59, 261. The Property is worth considerably less if it cannot be used for auto body and repair and can only be used as a C-1 use. App. 259, 261.

[¶30] Two neighbors appeared at the hearing to oppose Alton's Application. Neighbor

Tim Schnaible appeared at the public hearing and made numerous vague statements regarding the past, alleged the Property was rezoned which is contrary to City records, questioned who was going to monitor the use of the Property, and stated a body shop should not be in an alleged residential area. App. 260, 265, 269. Neighbor Dean Reiter stated his "biggest concern is…the history, is fire." App. 260. He alleged auto body shops use chemicals, torches, and "…all kinds of stuff in there" and it is next to his house. App. 260. He alleged "Mountain Metals was all metal" and did not use "…any chemicals or anything like that there. They didn't bother me." App. 260-61.

[¶31] Alton stated "body shops don't hardly ever use torches anymore, and Mountain Metals use to use torches all the time to melt down lead and so and so forth or such and such parts. So that was in there also." App. 261. The building has proper ventilation. App. 261. Vehicles are not currently being painted on the Property as Alton subcontracts with another auto body and repair shop to paint the vehicles. App. 261, 262. If the Property was sold, Alton would like the future owner to be able to use the Property to paint vehicles. App. 262. If Alton did perform some painting on the Property, he would "…make sure everything is right." App. 261. The undersigned explained it would be necessary for the use of the Property to comply with applicable law, e.g. nuisance laws, OSHA rules, etc., even if a variance is granted. App. 267. If there is any type of paint booth, its specifications would be code compliant. App. 261. Alton stated auto body and repair shops are much better now than when he used the Property as his primary location in the past as most paints are no longer hazardous. App. 262. He stated lead-based paints have been eliminated so "…the stuff now is pretty safe — Most all of it is very safe." App. 262. Paint booths are completely ventilated and contained. App. 262. Alton stated "[t]he fumes aren't hazardous

like they used to be, and I'm probably not going to be doing a whole lot of painting." App. 262.

[¶32] Planning Commission Chairwoman Jost read a letter from the Burlington Fire Department which stated: "[a]s long as the fire codes and the City codes are followed…[listing safety precautions]… As long as no short cuts are granted or allowed, the fire department has no problem on the principal of having the body shop in town." App. 234, 261. Commissioner Grosche stated he was concerned about the use of the Property by future owners, there is nobody to check to make sure the use is compliant, and it should be checked by somebody. App. 266. He later explained there is currently no way to monitor the use of the Property for auto body and repair. App. 267. Commissioner Moberg discussed an article about a Supreme Court case in Iowa that regarded a city encompassing a pig farm. App. 269. He explained the Supreme Court said "Who was here first?" App. 269. Mr. Schnaible argued with Commissioner Morberg. App. 269.

[¶33] Burlington resident Pat Schmidt spoke in favor of Alton's request. App. 270. He stated Alton will only be working on a couple of cars and if the fire department said it is okay and Alton abides by the rules, he does not see anything wrong with it. App. 270. Mr. Schnaible argued with Mr. Schmidt. App. 270. After a discussion regarding the zoning designation of the Property, the undersigned explained the two (2) neighbors who appeared and opposed granting a land use variance purchased their property after the Property began being used for auto body and repair. App. 263, 264. It was also explained that in addition to purchasing property next to an existing auto body and repair shop, the property they purchased was also next to the railroad, next to a main road, and near downtown. App. 264.

[¶34] Commissioner Grosche moved to deny the application for a variance. App. 271. In

support of his motion, he stated it is a rezoning issue and Alton should take various safety precautions because "…if you were in Minot, you'd have to do that. That's just the way it is." App. 271. The motion was seconded by Commissioner Hoover who is the member of the City Council who sits on the Planning Commission and who lives within 150 feet of the Property. App. 255, 271. Commissioner Grosche and Commissioner Hoover voted in favor of the motion. App. 271. Commissioner Moberg and Commissioner Rynstad voted against the motion. App. 271. Commission Chairwoman Jost broke the tie by voting in favor of the motion stating it is a rezoning issue and various safety precautions should be taken. App. 272. The motion to deny Alton's Application passed by a vote of 3-2. App. 271-72.

[¶35] On December 2, 2016, Alton provided proposed land use variance conditions to the City, through counsel, to address the concerns expressed at the Planning Commission public hearing. App. 294-95.

[¶36] The City Council held a public hearing on December 5, 2016. See generally App. 273-91. The undersigned explained the primary basis of Alton's request. App. 275-77. It was explained Alton will suffer a hardship, practical difficulty, and an injustice if his Application is not granted as: a) he relied in good faith on the representations of and approvals from the City to establish his business in Burlington, to purchase the lot, to build an auto body and repair shop, to add an addition to his auto body and repair shop, to repair and rebuild a portion of the auto body and repair shop, and to sell his second auto body and repair business location; b) the use of the Property for auto body and repair is Alton's livelihood, the sale of the Property for auto body and repair is a part of his retirement, and the value of the Property is significantly less if it is sold as a C-1 use rather than for auto

body and repair; c) the City granted a de facto variance for another body shop under nearly identical circumstances in 2008; d) the two (2) neighbors who oppose Alton's request, namely Tim Schnaible and Dean Reiter, purchased their residences, which are near the railroad tracks, downtown, and a main road, after the Property began being used for auto body and repair and then complain about being next to an auto body and repair shop; and e) the uses of property along Johnson Street are, in order, multiple family housing, fire department, vacant lot, residence, business, residence, business, business, and business. App. 275-77. It was explained a C-1 allows parking lots and gas stations which would create the same issues as auto body and repair. App. 288. Further, it was explained that Alton provided conditions that could be imposed that address the concerns discussed at the Planning Commission public hearing. App. 277, 278, 283-84, 286, 288, 294-95.

[¶37] Burlington resident Sherry Skees appeared and spoke in favor of Alton's Application. App. 279. She was present at the Planning Commission public hearing. App. 279. She commented on the neighbors not liking Alton and other businesses have hazardous materials and hazardous waste so Alton would be no different. App. 279. Mr. Schnaible and Mr. Reiter appeared and opposed Alton's Application. App. 279-80. Mr. Schnaible requested the City Council accept the recommendation of the Planning Commission, made vague statements about the use of the Property in the past, and commented on the conditions prepared by Alton. App. 279-80. Mr. Reiter stated he had "concerns about it" and the City Council should "look at the history." App. 281. Planning Commission Chairwoman Jost stated she thinks it is a rezoning issue. App. 280.

[¶38] The undersigned reiterated the two (2) complaining neighbors came after the fact. App. 281. It was explained: a) when the complaining neighbors purchased their residences,

the location of the auto body and repair shop on the Property and the storage of flammable materials already existed; b) it appears to be a "not in my backyard issue;" c) Alton established a business in Burlington which the City encouraged; d) Alton provided employment for and other economic benefits to the community; e) Tim and Darlene Schnaible have a personal history and personal issues with Alton with confrontations years ago; and f) the City should not allow a zoning procedure to be a means to accomplish a personal end at the public's expense. App. 275-76, 281. Thereafter, Mr. Schnaible stated "[Alton], I don't really know what our personal issues were other than a time or two I asked you to clean up your property." App. 281. When Alton attempted to respond, Mr. Schnaible argued with Alton and interrupted Alton while he was attempting to speak. App. 282. Councilmember Cannon asked Alton if he would like to finish what he was saying and Alton explained the history between Mr. Schnaible and him. App. 282.

[¶39] City Council President Kremer discussed the use of the Property by other tenants, the prior city council, a body shop in Minot, use of the Property by future owners for businesses other than auto body and repair, responsibility for conducting inspections and enforcement, exterior storage, and the conditions proposed by Alton. App. 283-84, 285. Councilperson Cannon inquired about the ordinances when Mountain Metals used the Property. App. 284-85. Councilperson Anderson discussed exterior storage by Mountain Metals and the statements made by Mr. Schnaible and Mr. Reiter. App. 285. Mayor Kabanuk stated "[t]here was a lot of torching that went on at Mountain Metals I know." App. 285.

[¶40] Resident, former City Councilperson, and current City employee Jack Anderson stated "[Mountain Metals] put up a fence to hide what he had behind the fence, to hide all

the debris." App. 286. He was on the City Council when the other body shop was approved in 2008. App. 286. He stated the body shop approved in 2008 would have a specialized paint booth so there would be no fumes which is why everyone agreed to it, would have storage bins, and the state fire marshal would conduct inspections so the City would not need to conduct inspections. App. 286. The undersigned explained that when Mountain Metals used a portion of the Property, Alton continued to use the Property to dismantle vehicles, store vehicles, and store parts and performed body work "off and on." App. 287, 288. It was explained Alton has some of the best explosion-proof containers available which are military grade that he purchased from the air force base. App. 286. Councilperson Cannon inquired: "[s]o all of the precautions that he mentioned at the previous auto body had set back in 2008, that's what you would do, the same precautions?" App. 287. In response, Alton stated he will comply with all of the precautions, he lives by the laws, he does not plan to paint as he subcontracts painting so there are no fumes in any event, torching is hardly ever used, he does not work with "that hazardous stuff," and if there was hazardous stuff, he would certainly implement safety measures because he would be exposed firsthand. App. 287. The undersigned explained the Minutes from the City Council meetings held in regard to the other body shop referenced fumes, however, did not indicate that any restrictions or requirements were imposed. App. 287. It was explained that, in any event, if there were any restrictions or requirements, the same restrictions and requirements could be imposed in regard to the use of the Property for auto body and repair. App. 287.

[¶41] After discussing the pending civil case initiated by the City, the City elected to meet in executive session. App. 287, 288. Upon returning from executive session, Councilperson

Hoover, who is the member of the City Council who sits on the Planning Commission and who lives within 150 feet of the Property, moved to accept the recommendation of the Planning Commission and deny Alton's Application. App. 290. Council President Kremer seconded the motion. App. 290. The motion passed by a vote of 4-0. App. 290.

Standard of Review

[¶42] An appeal from the decision of a local governing body pursuant to N.D.C.C. §28-34-01 is limited. Hentz v. Elma Tp. Bd. of Supervisors, 2007 ND 19, ¶4, 727 N.W.2d 276 (citations omitted). The decision of a local governing body must be affirmed "…unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision." Id. (citation omitted). The Court looks at the record on appeal as a whole and does not rely solely on written findings in reviewing the decision of a local governing body. Hagerott v. Morton County Bd. of Com'rs., 2010 ND 32, ¶¶21-22, 778 N.W.2d 813.

Argument

[¶43] **Issue 1: The assertions, facts, statements, and the like set forth in the Planning Commission Findings and the City Council Findings that are not reflected in the record should be stricken from the record or otherwise disregarded.**

[¶44] Pursuant to N.D.C.C. §40-47-04(3): "[t]he governing body of a city, a city zoning commission, and a board of adjustment shall state the grounds upon which any request for a zoning amendment or variance is approved or disapproved, and written findings upon which the decision is based must be included within the records of the governing body, commission, or board." N.D.C.C. §40-47-04(3).

[¶45] The Planning Commission Findings and City Council Findings were considered and approved at meetings held on December 26, 2018, more than two (2) years after the public

hearings were held, after the appeal had been filed, and after Alton had served and filed his appellate brief setting forth his legal arguments on appeal. Further, the composition of the Planning Commission and the City Council on December 26, 2018 was different than the composition of the Planning Commission and the City Council at the time the public hearings were held in 2016. Paragraphs 27 through 32 of the Planning Commission Findings and paragraphs 25 through 30 of the City Council Findings cite sections of the Zoning Ordinance that were not cited, referenced, or discussed by the Planning Commission or the City Council, respectively, at the public hearings. Further, paragraphs 33 and 34 of the Planning Commission Findings and paragraphs 31 and 32 of the City Council Findings include findings and conclusions that were not cited, referenced, discussed, or established by the Planning Commission or the City Council, respectively, at the public hearings. The foregoing renders the Planning Commission Findings and City Council Findings arbitrary, capricious, and unreasonable.

[¶46] **Issue 2: The recommendation of the Planning Commission and the decision of the City Council to deny Alton's Application were arbitrary, capricious, and unreasonable.**

[¶47] "A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." Hentz at ¶4. "[A] governing body's failure to correctly interpret and apply controlling law constitutes arbitrary, capricious, and unreasonable conduct." Id.

[¶48] The City failed to correctly interpret and apply controlling law. Pursuant to N.D.C.C. §40-47-09, in relevant part:

> [i]f there is **practical difficulty** or **unnecessary hardship** in the way of carrying out the strict letter of the ordinance, the board, in passing upon an

> appeal, may vary or modify any of the regulations or provisions of the ordinance relating to the **use**, construction, or alteration of buildings or structures or the **uses of land** so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

N.D.C.C. §40-47-09 (emphasis added).

[¶49] The transcripts of the public hearings demonstrate the City failed to correctly interpret and apply controlling law. As set forth therein, the City failed to cite, discuss, or even reference controlling law, i.e. the practical difficulty and unnecessary hardship legal standards applicable to variances, at the public hearings. In regard to the Planning Commission public hearing, there was some discussion regarding implementing safety precautions, however, there is no indication the Planning Commission was interpreting or applying the unnecessary hardship or practical difficulties legal standards rather than just discussing the implementation of safety precautions in general. Further, the basis of the Planning Commission's decision to recommend denying Alton's Application included a determination that Alton should seek to rezone the Property rather than seek a land use variance. The latter is not part of or relevant to the unnecessary hardship or practical difficulties legal standards analysis. In regard to the City Council public hearing, there was some discussion regarding painting and fumes, exterior storage, hazardous materials, neighbors, and persons driving by, however, there is no indication the City Council was interpreting or applying the unnecessary hardship or practical difficulties legal standards rather than just discussing the aforementioned topics in general. Further, the City Council also discussed use by prior tenants, the prior city council, a body shop in Minot, use of the Property by future owners for purposes other than auto body and repair, responsibly for the cost of inspections, and responsibility for conducting inspections. The aforementioned are not part of or relevant to the unnecessary hardship or practical difficulties legal standards

analysis.

[¶50] The minutes of the meetings at which the public hearings were held also demonstrate the City failed to correctly interpret and apply controlling law. In regard to the Planning Commission Minutes, the Minutes indicate the basis of the Planning Commission recommendation is "improper zoning." See App. 233. The latter is not part of or relevant to the unnecessary hardship or practical difficulties legal standards analysis. The Planning Commission Minutes state: "[Planning Commissioner] Jost mentioned that one of her reasons for voting against the variance was that it would be hard to ensure that Johnson complied with the fire safety concerns of the Burlington Fire Department and that he didn't expand his business and create a greater hazard to the neighborhood." App. 233. However, the foregoing was not stated by Planning Commissioner Jost as demonstrated by the Planning Commission transcript. See App. 253-72. In regard to the City Council Minutes, the City Council Minutes do not state the basis of the City Council's decision to deny Alton's Application. See App. 253-72.

[¶51] Even if it is determined the Planning Commission Findings and the City Council Findings may be considered, both Findings demonstrate the City failed to correctly interpret and apply controlling law. First, although both the Planning Commission Findings and City Council Findings state "[s]ection 18-2502 - Relief from the strict application of the requirements for subdividing a tract of land that of an unusual size and slope that would result in real difficulties, substantial hardship, or injustice," app. 340, 344-45, neither the Planning Commission nor the City Council otherwise cite, discuss, or even reference the unnecessary hardship or practical difficulty legal standards. Second, paragraphs 27 through 32 of the Planning Commission Findings and paragraphs 25 through 30 of the City Council

Findings cite sections of the Zoning Ordinance that were not cited, referenced, or discussed at the public hearings. Further, paragraphs 33 and 34 of the Planning Commission Findings and paragraphs 31 and 32 of the City Council Findings include findings and conclusions that were not cited, referenced, discussed, or established at the public hearings. Third, the legal standard is absolute, i.e. the legal standard is whether there *will* or *will not* be an adverse effect on neighbors. The legal standard is not whether the use or application *may* have an adverse impact on neighboring properties as determined by the City. App. 340, 345. Further, the legal standard is not whether neighbors have stated opposition, neighbors have stated general safety and nuisance concerns, it is in the best interest of the community to allow auto body and repair, etc. Fourth, the unnecessary hardship legal standard consists of four (4) parts as set forth above. The adverse impact on neighbors and the public are just two (2) parts of the analysis and both parts favor Alton. Fifth, the use of the categorical terms "safety" and "nuisance(s)," app. 340, 345, when describing concerns are just as likely, if not more likely, to regard nuisance laws, fire codes, building codes, safety and health laws, and the like and not the unnecessary hardship and practical difficulties legal standards. Sixth, there is no indication the Planning Commission or the City Council was interpreting or applying the unnecessary hardship or practical difficulties legal standards rather than just engaging in a general discussion or just establishing general conclusions. Lastly, the City does not identify, explain, or cite that which constitutes "applicable law" or "the criteria for relief from 'C-1' zoning district use requirements." App. 340, 345.

[¶52] The North Dakota Supreme Court has considered economic factors when rendering decisions regarding variances. See Dockter v. Burleigh County Bd. of Com'rs., 2015 ND 183, ¶13, 865 N.W.2d 836 (stating land use will "bolster economic development" and

"[t]he record supports economic benefits to the community as a whole for the general welfare of the community…"); Gullickson v. Stark County Bd. of County Com'rs., 474 N.W.2d 890, 893 (N.D. 1991) (considered the impact of a mobile home on the value of other property in the subdivision). The use of the Property for auto body and repair has provided economic benefits to the community, including, however, not limited to the employment of individuals many of whom rented places to live, bought homes, and used other local businesses in Burlington, the generation of income tax, sales tax, and property tax, the provision of autobody and repair services, and the provision of affordable transportation through the repair and sale of automobiles. Granting the variance will allow Alton to continue to provide the aforementioned benefits to the community. In sum, the economic impact on the community should be considered.

[¶53] The economic impact on the applicant should also be considered when rendering a variance determination in order to balance the goals of land use planning/zoning and individual property rights. The issue of whether the economic impact on an applicant is a relevant consideration in a variance proceeding appears to be an issue of first impression in North Dakota. Other jurisdictions have determined the economic impact on an applicant is a relevant consideration in variance proceedings. See e.g. City of Detroit v. City of Detroit Bd. of Zoning Appeals, 339018 (M.I. Ct. App. 2018) (Board of Zoning Appeals did not err when it granted the use variance based on economic hardship); CCS Investors, LLC v. Brown, 977 A.2d 301, 316 (D.E. Sup. Ct. 2009) (land use variance factor: "the land cannot yield a reasonable return if used only for the permitted use"); Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 62 (N.Y Sup. Ct. 2000) (land use variance factor: "the land in question cannot yield a reasonable return if used only for a

purpose allowed by the Zoning Resolution"); Minn. Stat. §462.357, Subd. 6(2) (acknowledging "economic considerations"); etc. The City did not consider the economic impact on Alton if a variance is not granted. Alton relied in good faith on the representations of and approvals from the City to establish his business in Burlington, to purchase the Property, to build an auto body and repair shop, to add an addition to his auto body and repair shop, to repair and rebuild a portion of the auto body and repair shop, and to sell his second auto body and repair business location. He relies on the auto body and repair shop for his income and livelihood and is relying on the sale of the Property for auto body and repair for his retirement. Also, the Property is worth considerably less if it cannot be used for auto body and repair and can only be used as a C-1 use. Further, Alton would incur considerable time and expense to convert the Property to a C-1 use. In sum, the economic impact on Alton should be considered.

[¶54] Lastly, at set forth below, Alton demonstrated an unnecessary hardship. Given the same, the City failed to correctly interpret and apply controlling law.

[¶55] **Issue 3: The recommendation of the Planning Commission and the decision of the City Council to deny Alton's Application are not supported by substantial evidence.**

[¶56] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Dockter at ¶8 (citation omitted).

[¶57] The decision of the City to deny Alton's Application is not supported by substantial evidence. A reasonable mind would not accept as adequate the evidence, or lack thereof, upon which the City relied in support of its decision to deny Alton's Application. Conversely, substantial evidence supports the finding of an unnecessary hardship and the issuance of a land use variance.

[¶58] Although Gullickson is factually dissimilar to the case at bar, e.g. only one lot was at issue in Gullickson, the zoning ordinance in Gullickson expressly prohibited land use variances, etc., it is one of the only cases that discusses the unnecessary hardship standard. Gullickson, 474 N.W.2d at 892. The discussion was based solely upon secondary sources from 1971, 1976, 1979, and 1985. Id. The Court stated:

> A variance 'is invoked to avoid the confiscatory effect that would follow a literal enforcement of some term of a zoning ordinance operating to deprive an owner of all beneficial use of his land.' 3 E. Yokley, Zoning Law and Practice Sec. 21-2 (4th ed. 1979). A variance is intended to waive the strict letter of the zoning ordinance while preserving its spirit and purpose. Id. A failure to establish a prerequisite to a variance is fatal. Id. 'The burden of proof is on the applicant to establish that his land is uniquely affected resulting in unnecessary hardship.' Id. at Sec. 21-6. It is widely recognized that one important requirement for a variance is 'that the hardship must come from circumstances unique to a particular lot, or perhaps a few, and at any rate not from circumstances general in the neighborhood.' 5 Williams Am. Land Plan. Sec. 142.01 (1985 Rev). '[T]he unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner himself.' 82 Am.Jur.2d, Zoning and Planning Sec. 275 (1976). These general rules relate the limited role of a variance in administration of an ordinance that regulates zoning.
>
> Zoning ordinances usually contain well-defined standards for granting a variance. 'A variance is proper only if there is 1. no adverse effect on public, 2. no adverse effect on neighbors, and 3. the property has characteristics making it eligible for a variance. All standards must be met.' D. Hagman, Urban Plan. & Land Dev. Control Law Sec. 106 (1971). 'Even though there is no adverse effect on the public, or even if the public is benefited, neighboring property may be adversely affected by a variance. If so, the variance should not be issued.' Id. at Sec. 108. A variance should not confer special privileges that are not enjoyed by neighboring property. Id. 'The terms unique, special, exceptional and extraordinary and the like suggest that a variance is proper only where the property is somehow different from other property, particularly adjacent property. Legislative changes are the appropriate vehicle for a change which would affect a large number of properties.' Id. at Sec. 109. 'If a parcel is not unique but is disadvantaged by a zoning restriction equally with other property in the area, issuance of a variance is improper.' Id. These widely recognized standards for a variance are reflected in the zoning ordinance of Stark County.

Id. The danger of allowing neighbor complaints and opinions to serve as a basis to grant or deny a variance has not been previously addressed in North Dakota. However, the latter

has been addressed in North Dakota's sister state, South Dakota. In Hines, the South Dakota Supreme Court stated, in relevant part:

> [¶15.] We have condemned this type of arbitrary decision-making in the past. In Cary v. City of Rapid City, 1997 SD 18, 559 N.W.2d 891, we struck down a statute that rested 'the ultimate determination of the public's best interest' with a group of neighbors. Id. ¶23. There we reasoned, 'The ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners.' Id. Because the Constitution protects a landowner's right to use land for any legitimate purpose, we are wary of decisions that are based on 'whims of neighboring landowners.' Id. ¶22. This is so because their decisions may be lacking 'any standards or guidelines,' leading to decisions that may be arbitrary or capricious. Id. Worse, their opinions may be wholly self-serving…[¶16.]…The discretion of a board to decide such matters however is not limitless. To base a decision solely on the opinion of neighbors was arbitrary and beyond its jurisdiction…We find no showing in the record of any independent thought on the part of the board. Because the board did not fulfill its duty to follow the guidelines of the city ordinance and make a public interest determination on behalf of the entire city, this case must be remanded to the board for a proper determination…

Hines v. Board of Adjustment of City of Milner, 2004 SD 13, ¶16, 675 N.W.2d 231. Alton urges the Court to not establish a precedent that allows the opinions and complaints of a small group of neighbors, in this case two neighbors, both of whom moved to the area after the Property began being used for auto body and repair and one who has a long contentious history with Alton, to serve as the sole or primary basis to grant or deny a variance. The factors delineated in Gullickson are analyzed herein below.

1. The property is uniquely affected and different from other property and does not confer special privileges.

[¶59] Substantial evidence was provided by Alton demonstrating the Property is uniquely affected and different than other property. First, the Property is the only property located on Johnson Street used for business that is located between two (2) residences also located on Johnson Street. Second, the Property is the only property on Johnson Street with residences located on three (3) sides. Third, the Property is the only property on Johnson

Street located next to two (2) lots (located South of the Property on Johnson Street) that are allegedly designated C-1, however, are used as Residential. Fourth, there are only two properties along Johnson Street that are not zoned C-1. The two properties are located directly north of the Property, namely a residence and a vacant lot, and are zoned Residential. The order of uses along Johnson Street starting from the north and moving south are: multiple family housing (C-1), fire department (C-1), vacant lot (R), residence (R), business (the Property, allegedly C-1), residence (C-1), business (C-1), business (C-1), and business (C-1). Fifth, the City expressly authorized the Property to be used for auto body and repair, expressly authorized the construction of a body shop, expressly authorized the expansion of the body shop, and expressly authorized the repair of the body shop. Sixth, only one neighboring residence faces the Property, namely the residence north of the Property. The latter residence only partially faces the Property and a solid wood fence screens the side yard and rear yard so the side yard and rear yard are unable to view the Property. Seventh, the residences south of the Property face away from the Property. Only garages face the Property. Eighth, the residences of the two (2) neighbors who appeared at the public hearings are located west of the Property and do not face the Property. Further, the addition to the main structure on the Property and a solid steel panel fence run along the west property line screening the Property from the view of the two (2) neighbors. Ninth, no relevant evidence was provided disputing or disproving the foregoing or demonstrating the Property is not uniquely affected or it is not different from other property. Lastly, a variance would not confer any special privileges on the Property as the City has already permitted the Property to be used for auto body and repair and the use is a permissible non-conforming use. Further, the City has allowed other property in the same alleged zoning

district, i.e. C-1, to be used for auto body and repair. See *supra.*

2. There is no adverse effect on the public.

[¶60] Substantial evidence was provided demonstrating there will be no adverse effect on the public. Alton testified the painting systems and paint are significantly better and safer than in the past. He testified he has some of the best explosion proof containers available to store hazardous materials and torches are hardly ever used anymore. Furthermore, the Burlington Fire Department issued a written statement stating it does not oppose the Property being used for auto body and repair.

[¶61] Two (2) community members spoke in favor of Alton's Application, namely Pat Schmidt and Sherry Skees. At the Planning Commission public hearing, Mr. Schmidt testified Alton would not be running an auto body and repair shop on a large scale, and because the Fire Department approved of it, he did not see anything wrong with it. At the City Council public hearing, Ms. Skees testified that many businesses have hazardous materials and Alton is no different. Mr. and Mrs. Skees also submitted a letter which states: "[a]t a City Council Meeting in The City of Burlington, ND we, JOHN R SKEES & SHERRY A SKEES, in 2014 did hear the following statement: A city council member stated they heard [Alton] Johnson was bringing his business back to Burlington. Jerome Gruenberg (then the mayor of Burlington) stated: He ([Alton]) is not bringing his business back here." App. 225.

[¶62] The only statements at the public hearings that may be construed to specifically regard the public is one (1) statement made by Council President Kremer and one (1) statement made by Mr. Schnaible. When discussing exterior storage by prior tenants at the City Council public hearing, Council President Kremer stated "[w]ell, then what do we do

then if the next person wants to put different businesses in there like what was done from -- I understand there was repair shops, there was storage, there was a trucker, and Mountain Metals. Frankly, it's been an eye sore until just lately. And I can see that it's not just the neighbor's concern, it's **anybody driving by** the way it was…." (emphasis added). App. 283. At the Planning Commission public hearing, when discussing "what we had," Mr. Schnaible stated: "[a]nd for the neighbors, we don't want that, and I don't think **the community** wants that either." App. 260. It appears Mr. Schnaible was referring to exterior storage. At the City Council public hearing, the City Council acknowledged exterior storage is no longer an issue. Council President Kremer stated "[f]rankly, it's been an eye sore **until just lately**. And I can see that it's not just the neighbor's concern, it's anybody driving by the way it **was**…." App. 283. Further, Councilmember Cannon stated "Mountain Metals, I remember driving by there thinking, yeah, that's an eye sore. **I drive by there now and don't even notice it**." (emphasis added). App. 285. The exterior storage issue, i.e. "nuisance concern," is no longer an issue as Mountain Metals has discontinued using any portion the Property.

[¶63] The City Council made a few statements regarding fumes. At the City Council public hearing, President Kremer stated "I talked to a body paint man in Minot this morning and he said, frankly, **he's not right in a residential zone but he's close to it**, he said, 'I don't know how we get by with our painting and our fumes,' and I said, **'I don't know anything about that.'** Now, I'm just saying that. **I'm not saying they got this problem**." (emphasis added). App. 283. Councilmember Anderson stated "[b]ut I think some of the more pressing concerns from the neighbors, **I could be wrong**, Mountain Metals just dealt with the scrap metal, and while it looked bad, it wasn't as hazardous as far as fumes,

chemicals, flammable materials, et cetera, et cetera. **Again, I could be wrong, but that's just a guess.**" App. 285. The statements in regard to fumes are inconclusive at best. Further, the standards established by the City of Minot are not applicable to the City of Burlington.

[¶64] It is imperative to note the City has authorized an auto body and repair shop under nearly identical facts and circumstances in 2008. The auto body and repair shop was to be built on property located on the same street as Alton's auto body and repair shop, i.e. Johnson Street, was to be approximately the same size as Alton's auto body and repair shop, was to be located only located three (3) to four (4) blocks down from Alton's auto body and repair shop, and, based upon the allegations of the City, was to be located in the same zoning district as Alton's auto body and repair shop, i.e. C-1. Moreover, the auto body and repair shop approved in 2008 would not just be close to the neighboring structure, it would be attached to it.

[¶65] The Property has been continuously used for auto body and repair since 1973, and therefore, there will be no change in the use if a variance is granted. Further, the alleged safety concerns were present when the City approved the Property to be used for auto body and repair and approved the construction of an auto body and repair shop in 1973, when the City approved the expansion of the auto body and repair shop in 1983, and when the City approved the repair of the auto body and repair shop in 1990. The only difference between then and now is the materials and processes are much better and safer now.

[¶66] As the City granted a de facto variance under nearly identical facts and circumstances and expressly granted permission for the Property to be used for auto body and repair and for Alton to build, expand, and repair his auto body and repair shop, the City should be estopped from denying Alton's Application. The doctrine of estoppel has

previously been applied in zoning proceedings. See e.g. Buegel v. City of Grand Forks, 475 N.W.2d 133, 135 (N.D. 1991); Minch v. City of Fargo, 297 N.W.2d 785, 790 (N.D. 1980). See also e.g. City of Fargo, Cass County v. Harwood Tp., 256 N.W.2d 694, 700 (N.D. 1977).

[¶67] "Filling stations," i.e. gas stations, are allowed in a C-1 zoning district. Zoning Ordinance, 18-1202. App. 305. "Filling stations," i.e. gas stations, are allowed to store and dispense fuel, oil, and accessories, lubricate automobiles, and repair and replace minor parts and accessories. Zoning Ordinance, 18-301. App. 299. Gas stations generally store a considerable amount of hazardous materials and dispense hazardous materials that release fumes on site. A gas station is located along Johnson Street just a few blocks down from the Property. Further, other uses permitted in a C-1 zoning district store and use potentially hazardous materials and release odor/fumes, e.g. greenhouse, household appliance repair, dry cleaning, clinic, etc. Zoning Ordinance, 18-1202. App. 305-06. A C-1 zoning district also allows parking lots, and thus, vehicles are permitted to be parked on property zoned C-1. Zoning Ordinance, 18-1202. App. 305. In any event, the size of the Property and structure limit the amount of activity that can occur on the Property.

[¶68] Lastly, Alton proposed conditions that could have been imposed on the variance and was amenable to revising the same to address any of the alleged concerns. Therefore, any alleged concerns regarding fumes, fire, or exterior storage, i.e. "nuisance concern(s)," could have been addressed by conditions. Further, the alleged concerns are already addressed by fire code, health and safety codes, nuisance laws, including the nuisance section of the Burlington City Ordinances, and the like and Alton testified he would ensure everything is legal and complaint with the applicable codes. He also testified he will take

the same actions taken by and required of the body shop that was approved by the City in 2008.

3. <u>There is no adverse effect on neighbors.</u>

[¶69] Substantial evidence was not presented demonstrating there will be an adverse effect on neighbors. The analysis of the second prong set forth above is also applicable to the third prong. Rather than restating the analysis of the second prong, the same is incorporated herein by reference. Only that which has not previously been addressed will be set forth in the analysis herein.

[¶70] Only two (2) neighbors spoke against Alton's Application, namely Mr. Schnaible and Mr. Reiter. A member of the public who was present at the Planning Commission meeting, namely Sherry Skees, testified at the City Council meeting that the neighbors do not like Alton. With the exception of one neighbor who did not contest Alton's Application, all of the neighbors, including Mr. Schnaible and Mr. Reiter, acquired their residences after the Property began being used for auto body and repair. Further, Mr. Schnaible has a contentious history with Alton and is combative with anyone who opposes him.

[¶71] In regard to the testimony provided by Mr. Schnaible, Mr. Schnaible only provided vague statements regarding the alleged history of J & J Body shop. At the Planning Commission public hearing, he stated, in relevant part: "…we know what we had;" "…we all know what we had;" "…if we don't study and learn from what we had, we're going to get what we had again;" "[a]nd for the neighbors, we don't want that, and I don't think the community wants that either;" "…what it's going to be again;" "…what it was;" "…what it's going to be;" "[s]o again, as individuals, think about it, would you want to be a neighbor to the old J and J Body Shop? Would you want it in your backyard? I hope you think about

that when you make your decision;" and "…I moved in in 1976, and I hardly noticed J and J Body Shop. It was a very neat and clean business, but I can tell you, as the years went by, it didn't turn out that way." App. 265, 269. At the City Council meeting, he stated, in relevant part "…there's not a whole lot we can say to you other than we have lived there. We know the history of J and J Body Shop and we really don't want to see that history repeated. It's a lot that should not have a variance for a C2 commercial business, and that's what a body shop is." App. 279. The testimony provided by Mr. Schnaible has little, if any, probative value. It appears Mr. Schnaible was referring to exterior storage. It is imperative to note that no complaints, which would include complaints from Mr. Schnaible, were received by the City regarding Mountain Metals, a metal recycling and salvage business that used a portion of the Property from 1990 to 2013, i.e. 23 years, and had considerable exterior storage. Further, Mr. Reiter has exterior storage, including an old automobile. App. 44. Mr. Schnaible did not complain about Mr. Reiter's exterior storage which is visible from Mr. Schnaible's property, and rather, only complains about Alton's alleged exterior storage which is not visible from Mr. Schnaible's property.

[¶72] In regard to the testimony from Mr. Reiter, Mr. Reiter failed to demonstrate he possesses personal knowledge of the materials and processes used by Alton. Mr. Reiter's statements in regard to the same appear to be based on speculation. Further, the speculative allegations were addressed and rebutted. The Burlington Fire Department issued a written statement stating it does not oppose the Property being used for auto body and repair. Moreover, as previously stated, Alton testified the painting systems and paint are significantly better and safer than in the past, he would ensure everything is legal and complaint with the applicable codes, torches are hardly ever used anymore, and he uses

some of the best explosion proof containers available to store materials. Neither Mr. Reiter nor anyone else provided evidence demonstrating the new materials and processes used by Alton create any of the alleged concerns or otherwise demonstrating the alleged concerns will materialize. Mr. Reiter did not express concerns specific to the Property, and rather, only expressed concerns regarding body shops in general which, as previously stated, appear to be based upon speculation. Lastly, Mr. Reiter has exterior storage, including an old automobile. App. 44. Therefore, if his reference to "history" in his testimony regards exterior storage, Mr. Reiter's should be prohibited from complaining in regard to the same. App. 260, 281.

4. The characteristics of the property make it eligible for a variance.

[¶73] The statements, determinations, and actions of the City demonstrate the Property is eligible for a variance. First, a letter was sent to Alton from the Burlington City Attorney dated May 16, 2013 stating Alton is required to apply for a land use variance. Second, a letter was sent to Alton from the Burlington City Attorney dated October 25, 2013 stating Alton's only options are to discontinue using the Property for auto body and repair or apply for a land use variance. Third, the City argued Alton is required to apply for a land use variance to exhaust his administrative remedies in Case No. 51-2013-CV-01148. Fourth, Alton requested information regarding the legal standard applicable to land use variances on four (4) occasions. Specifically, Alton, personally and through counsel, sent a letter to the City requesting information regarding the applicable legal standards on November 9, 2015, May 1, 2016, October 18, 2016, and November 3, 2016. At no time did the City state a land use variance is not authorized by the Zoning Ordinance. Fifth, the City commenced a second lawsuit, namely Case No. 51-2016-CV-01751, and argued Alton failed to apply

for a land use variance. Sixth, Alton submitted an Application and numerous exhibits to the City. The City did not state the Property is not eligible for a land use variance in response to the same. Seventh, a public hearing on Alton's Application was scheduled by the City and held before the Planning Commission on November 29, 2016. At the Planning Commission public hearing, the City did not state the Property is not eligible for a land use variance. Eighth, a public hearing on Alton's Application was scheduled by the City and held before the City Council on December 5, 2016. At the City Council public hearing, the City did not state the Property is not eligible for a land use variance. Ninth, the Minutes of the Planning Commission meeting held on November 29, 2016 do not state the Property is not eligible for a land use variance. Tenth, the Minutes of the City Council meeting held on December 5, 2016 do not state the Property is not eligible for a land use variance. Lastly, the Planning Commission Findings and the City Council Findings do not state the Property is not eligible for a land use variance.

[¶74] In sum, the statements, determinations, and actions of the City demonstrate the Property is eligible for a land use variance. Further, the foregoing is also an admission the Property is eligible for a land use variance. In addition to the statements, determinations, and actions of the City demonstrating the Property is eligible for a land use variance, the characteristics described in factor one (1) above, i.e. the uniquely affected factor, also demonstrate Property is eligible for a land use variance. Rather than restating the characteristics, the same are incorporated herein by reference.

5. Economic Factors

[¶75] Substantial evidence was provided demonstrating the use of the Property for auto body and repair has and will continue to have a positive economic effect on the public,

including the neighbors, if a variance is granted and the denial of a variance will have a negative economic effect on Alton. Rather than restating the economic analysis set forth above, Alton incorporates the same herein by reference.

Conclusion

[¶76] Alton respectfully requests the Court: 1) Reverse the decision of the District Court and order the City to issue a land use variance; 2) Award to Tony the attorney's fees and costs he incurred on appeal; and 3) Grant any other relief this Court deems just and proper.

[¶77] DATED this 9th day of December, 2019.

/s/ Brian C. Balstad
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ATTORNEY FOR APPELLANT

Certificate of Compliance

[¶78] I hereby certify the Brief of Appellant complies with the page limitation. The Brief of Appellant is thirty-eight (38) pages in length excluding the Certificate of Compliance.

[¶79] DATED this 9th day of December, 2019.

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ATTORNEY FOR APPELLANT

IN SUPREME COURT

STATE OF NORTH DAKOTA

Alton Johnson,	)	
	)	
Appellant,	)	
	)	Supreme Court Case No. No. 20190318
vs.	)	District Court Case No. 51-2017-CV-00009
	)	
City of Burlington,	)	
	)	
Appellee,	)	

CERTIFICATE OF SERVICE

[¶1] I, **Brian C. Balstad**, an attorney licensed to practice law in the State of North Dakota, hereby certify a true and correct copy of the following documents:

1. **Brief of Appellant; and**
2. **Appendix of Appellant**

were duly served upon:

Scott K. Porsborg and Brian D. Schmidt
Smith Porsborg Schweigert Armstrong Moldenhauer & Smith
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460

via the North Dakota Supreme Court Odyssey Serve & File System using the email addresses published in the online attorney directory on the North Dakota Supreme Court website for Scott K. Porsborg and Brian D. Schmidt, namely sporsborg@smithporsborg.com and bschmidt@smithporsborg.com, respectively, on the 9th day of December, 2019.

[¶2] DATED this 9th day of December, 2019.

/s/ Brian C. Balstad
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