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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alton Johnson,	)	
	)	
Appellant,	)	
vs.	)	
	)	
City of Burlington,	)	
	)	Supreme Court No. 2019 0318
Appellee,	)	District Court Case No. 51-2017-CV-9

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT DISMISSING APPELLANT'S APPEAL FILED AUGUST 20, 2019, ORDER FOR JUDGMENT FILED AUGUST 21, 2019, AND JUDGMENT FILED AUGUST 21, 2019.

THE DISTRICT COURT OF WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DOUGLAS L. MATTSON, PRESIDING

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

Scott K. Porsborg, ND Bar ID #04904
sporsborg@smithporsborg.com
Brian D. Schmidt, ND Bar ID #07498
bschmidt@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Appellee, City of Burlington

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STATEMENT OF THE ISSUE

Whether the City Council's decision denying Johnson's variance application was arbitrary, capricious, or unreasonable.

ORAL ARGUMENT STATEMENT

Johnson requested oral argument on this issue; therefore, the City also requests oral argument to address any arguments raised by Johnson. Further, based on the unique procedural history of this appeal, oral argument will be beneficial to focus on the material issues submitted for appellate review.

I. STATEMENT OF THE CASE

[¶1] This is an appeal from the district court's Judgment dated August 21, 2019, which affirmed the City of Burlington's decision to deny Johnson's variance application. Johnson purchased a parcel of land located at 144 Ida Ave., in Burlington, North Dakota where he opened an auto body and repair shop on August 1, 1973. Johnson's body shop was a non-conforming use when the City zoned the property C-1 Neighborhood Commercial and the City believed his use of that property was "grandfathered in." However, a fire damaged the north side of Johnson's building in 1989. After the fire, Johnson moved his business office to another location and leased the existing building to a scrap metal company, a bee-hive operation, 3 different truckers, and various other businesses until 2013.

[¶2] Johnson intended to move his auto body and repair shop back to 144 Ida Ave., after the leases with his other tenants expired in 2013. However, the adjacent landowners protested Johnson's use of the property for auto body and repair as it was not an allowed use in a C-1 district. The City informed Johnson that he could not use the property for a use not permitted by the zoning ordinances in 2013. Johnson sued the City and obtained an Ex Parte Restraining Order that prohibited the City from disallowing his use of the property while litigation was pending. Johnson's lawsuit was ultimately dismissed without prejudice and those proceedings were completed in 2016. However, pursuant to the district court's order, the restraining order remained in effect.

[¶3] Johnson applied for a land use variance in October 2016 requesting he be allowed to operate his auto body and repair shop in a C-1 district. As part of his application he submitted numerous documents and stated he wished to obtain a variance

so he could sell the property to fund his retirement. His application was considered by the City's Planning Commission which, after a public hearing, recommended it be denied for numerous stated reasons. Johnson's application then went before the City Council. After review of Johnson's lengthy application, public testimony, and Johnson's presentation, the City Council unanimously voted to accept the Planning Commission's recommendation and deny Johnson's application.

[¶4] Johnson appealed the City Council's decision to the district court. After briefing and oral argument, the district court affirmed the City Council's decision and entered judgment dismissing Johnson's appeal. Johnson now appeals the district court's judgment. The City Council's decision to deny Johnson's variance application is in accordance with the law, is a product of a rational mental process, and should be affirmed.

II. STATEMENT OF FACTS

[¶5] Johnson purchased a parcel of land located at 144 Ida Avenue, Burlington, North Dakota where he started an auto body and repair shop on August 1, 1973. AA 57. 144 Ida Avenue is zoned as C-1 Neighborhood Commercial (AA 42); however, the City acknowledged Johnson's "body shop was a non-conforming use when the zoning ordinance was initially passed, so it was essentially 'grandfathered in', (sic) which means that it could continue as a body shop in spite of not conforming with the zoning ordinance." AA 80.

[¶6] In 1989 a fire damaged the north side of Johnson's building. AA 25. After the fire, Johnson moved his business office to another location and leased a portion of his building at 144 Ida Avenue to Mountain Metals from 1990 to May 2013. Id; AA 200. Mountain Metals bought scrap metal and provided a roll-off for the public to discard metal

items that would not be accepted by the garbage company. AA 200. Mountain Metals kept materials both inside and outside of the building. Id. Mountain Metals shared the west end of the property with "a bee-hive operation, 3 different truckers, one auto body repair person, a tune-up shop, and brothers who raced cars." Id. Johnson built a lean-to on the side of the building to store auto parts. Id. During the last two years of Mountain Metal's lease, it assumed responsibility for all utilities and used the back part of the building as well. Id.

[¶7] Once it became apparent that Mountain Metals would leave, adjacent landowners, Tim and Darlene Schnaible, expressed concerns to the City Council about the future use of 144 Ida Ave. because it was zoned C-1 Neighborhood Commercial. AA 72. The matter was discussed by the City Council at its March 4, 2013, meeting and a letter was issued to Johnson indicating his "property is zoned C-1 Neighborhood Commercial, thus, a body shop is not an allowed usage." AA 76.

[¶8] The City consulted attorney, Jim Nostdahl, about Johnson's property and his opinion was presented at the May 6, 2013, City Council meeting. AA 80. Nostdahl opined that once the body shop was discontinued and Mountain Metals went into the building, Johnson's property ceased its status as a non-conforming use and the "city does not have to allow Johnson to re-start his body shop business without obtaining a variance." Id. Nostdahl informed Johnson by letter dated May 16, 2013, that if he intended to start a body shop on the premises he needed "to apply for a variance with the Burlington Planning Commission prior to doing so." AA 82.

[¶9] Burlington's Chief of Police notified Johnson that he was in violation of the Burlington City Ordinances by operating an auto repair and body shop at that location. AA

88. Johnson's attorney sent correspondence to the City indicating he wished to contest the decision. AA 93-94. The City attorney issued Johnson a September 25, 2013, letter indicating he had the option to apply for a variance or cease the zoning violation. AA 96.

[¶10] Johnson obtained an Ex Parte Restraining Order on October 14, 2013, which prohibited the City "from preventing the use of the real property…located at 144 Ida Avenue…for auto body repair." AA 98. The Ex Parte Restraining Order was entered as Index # 25 in Alton Johnson v. City of Burlington, Ward County Case No. 51-2013-CV-01148 ("Johnson 1"). The final filing in Johnson 1 occurred on September 21, 2016[1]. See Johnson v. City of Burlington, Ward County Case No. 51-2013-CV-1148, Index # 241.

[¶11] On October 18, 2016, Johnson submitted an application for land use variance with various attachments labeled Exhibit 1-38[2]. AA 17-200.

[¶12] The Planning Commission of the City of Burlington published notice "[t]o consider a variance request by Alton Johnson on behalf of J & J Auto, 144 Ida Avenue to allow the property to be used for auto body and repair" at its November 29, 2016, meeting.

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[1] While not relevant to the merits of this appeal, the proceedings in Johnson 1 do put context to the timeline of this action and will be briefly explained for the Court's information. In Johnson 1, Johnson sued the City claiming his use of the property was a non-conforming use, the City was estopped from refusing to allow him to use and enjoy his property for auto body and repair, the City waived its right to assert any zoning violations against him, the City should be liable on the grounds of inverse condemnation, the zoning ordinance was invalid and unconstitutional, violation of the open records act, unlawful interference with business, and he also asserted a variance was not required for him to continue operation of his auto body and repair shop. Johnson 1 at Index # 2. The district court granted summary judgment and dismissed Johnson's claims without prejudice. Id. at Index # 183. The district court later amended that judgment to dismiss Johnson's unlawful interference with business claim with prejudice. Id. at Index # 183. That order also held the Ex Parte Restraining Order remained in effect. Id.

[2] A list of all exhibits Johnson attached to his variance application is found at AA 17-18. Johnson's application and the attached exhibits 1-38 are found at AA 17-201.

AA 230, 232. Johnson and his attorney provided a general overview of the variance request to the Planning Commission. AA 233, 256-260. Multiple members of the public spoke at the meeting and objected on various grounds citing concerns about Johnson's motives in applying for the variance and safety issues with respect to allowing an auto body shop to operate in a C-1 district. AA 255-272. The Planning Commission recommended the City Council deny Johnson's variance application. AA 233, 272.

[¶13] The City Council considered Johnson's variance application at its December 5, 2016, meeting. AA 251. Johnson's attorney restated the history of Johnson's ownership of 144 Ida Ave. and asserted Johnson "relied upon the City's permission throughout the years in establishing, expanding, et cetra" his business. AA 275-278. He also explained that Johnson owned three different auto body repair business throughout the years, but now has only one. AA 276. Further, Johnson planned to "sell this property as part of his retirement." Id. Lastly, he asserted it would be unjust to deny Johnson's variance because the Council granted permission for an auto body repair shop to operate on Johnson Street in 2008 and the individuals who complained about Johnson's business moved to the area after it was established. AA 276-277. He also discussed proposed variance conditions with the Council. AA 277.

[¶14] Multiple members of the community made statements at the meeting. First, Sherry Seeks appeared before the Council and noted many of Johnson's neighbors did not like him and there "was a lot about hazardous materials and hazardous waste, which really surprised [her], because there shouldn't be any business practically that isn't involved in hazardous material and hazardous waste. So Tony would not be an exception to that." AA 279.

[¶15] Tim Schnaible, who lived a "couple buildings down from the proposed variance lot" stated he was "here on behalf of neighbors to request Council to accept the recommendation of the Planning Commission, and that is to not grant a variance." Id. He elaborated that "[a]s far as us neighbors, as I said at the Planning Commission meeting, 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….Council, I would highly recommend that you accept the…recommendation of your Planning Commission as they thoroughly went through this." AA 279-280.

[¶16] Darla Jost of the Planning Commission opined Johnson should apply for a zoning change instead of a variance. AA 280. She noted "if you grant this and he does by chance sell the property to somebody else and do something else, we're going to be back at the same thing again. That property is not zoned for this or a lot of things so we're going to be back doing the same thing again." Id.

[¶17] Dean Reiter, who is "one of the closest neighbors" to Johnson's shop, presented to both the Planning Commission and City Council. AA 260,281. Reiter explained to the Planning Commission his concern lied with the chemicals auto body shops use and the history of fire at Johnson's property. AA 260. Reiter estimated Johnson's building was "less than six feet from [his] garage." AA 281. He also explained his concerns to the City Council about the variance and agreed with Schnaible that the variance should be denied. Id.

[¶18] After Reiter presented to the Council, Johnson's attorney acknowledged this appears to be "a typical 'not in my backyard' issue," there were personal issues between

the Schnaibles and Johnson, and the Council should not "allow a zoning procedure to be a means to accomplish a personal end at the public's expense." Id.

[¶19] Schnaible explained he had no personal issues with Johnson other than previously requesting he clean up the property. Id. Schnaible acknowledged he believed Johnson should fence his property, had no personal issues with him, "but J and J Body Shop just hasn't been a very good neighbor." AA 282. Johnson responded that Schnaible has held a grudge against him for "25 years or so" because Johnson did not fence his property. Id.

[¶20] City Council president, Rod Kremer, noted he did not "have a preference against Mr. Johnson or the neighbors" and lived in Burlington his whole life. AA 282. He further elaborated:

> This particular property has been through things that a lot of people didn't like…I talked to a body paint man in Minot this morning and he said…"I don't know how we get by with our painting and fumes"…I'm not saying they got this problem….I guess my point is, if this variance were granted and it went back to a body shop, I think Tony's intention is to sell. Is that what --
>
> ALTON JOHNSON: Yes. Eventually. I --
>
> ROD KREMER: Well, then what do we do then if the next person wants to put a different business 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. Is the new tenant going to be clean?...I'm just saying there's a lot of these here proposed variance things….I just don't think it's a good idea.

AA 283.

[¶21] After additional discussion with respect to various terms Johnson's counsel proposed to the City with respect to the variance request, Kremer stated:

> It's sold down the road to someone else, Tony sells it as a body shop, he's just doing what he wants to do, the next guy comes along, and that's not

> Tony's fault, what's to stop him from doing something like Mountain Metals did? I'm not saying that could happen, but what's going to stop it? Because nothing stopped it last time.

AA 285.

[¶22] After an executive session with its attorney, the City Council unanimously passed a motion to accept the recommendation of the Planning Commission and deny Johnson's application for a variance. AA 289-290.

[¶23] Johnson filed his Notice of Appeal with the district court on January 3, 2017. AA 10. The Notice provides that Johnson "appeals the decision of the City of Burlington…to deny his Application/Petition for a Land Use Variance…." Id. The City filed its Certificate of Record on Appeal on February 2, 2017[3]. Index # 10. The record was subsequently amended to include meeting transcripts and additional information presented before the City Council and relevant to the issue on appeal. AA 357. After briefing and oral argument, the district court issued its August 20, 2019, Findings of Fact, Conclusions of Law, and Order for Judgment. AA 421-428. The district court specifically affirmed the City Council's decision to deny the variance finding in part:

[3] A review of the district court docket will indicate the timeline of this appeal is substantially longer than a typical appeal from a local governing body decision. The delay was due to two specific reasons: 1) a substantial delay in procuring a legible and complete transcript of the City's meetings; and 2) unsuccessful efforts by counsel to resolve disputes between parties. The length of these delays, while not ideal, was well-communicated between the parties and the Court was kept abreast of both parties' efforts to obtain a transcript and explore potential avenues for resolution in both this matter and the companion case between the parties referenced in Johnson's brief as City of Burlington v. Alton Johnson, Ward County Case No. 51-2016-CV-01751 ("Johnson 2").

As with Johnson 1, Johnson 2 is not relevant to the merits of this appeal. However, in Johnson 2, the City seeks an injunction prohibiting Johnson from violating its zoning ordinances by operating a auto repair and body shop in a C-1 district. Johnson reasserted his claims in Johnson 1 as counterclaims in Johnson 2. Johnson 2 is still pending.

> Further, there is relevant evidence a reasonable mind might accept as adequate to support the City's conclusion. The transcripts reveal that neighboring landowners spoke against Johnson's request before both the Planning Commission and the City Council. The record reflects that neighboring landowners were concerned about potential adverse effects on their property if Johnson's application were granted. As explained in Gullickson, when a neighboring property "may be adversely affected by a variance" the variance "should not be issued." Id. at 892. Further, the City Council expressed concerns with the enforcement of proposed variance terms and expressed legitimate concerns about the Subject Property's impact on neighboring landowners and the public. This Court cannot say the record on appeal shows the City's decision to deny Johnson's variance application was arbitrary, capricious, or unreasonable.

AA 428.

[¶24] Judgment affirming the City's decision and dismissing Johnson's appeal was entered on August 21, 2019, and a Notice of Entry of Judgment was filed on August 22, 2019. AA 430-431. Johnson filed his Notice of Appeal on October 22, 2019. AA 433.

III. LAW AND ARGUMENT

A. Standard of Review

[¶25] Johnson filed his appeal pursuant to N.D.C.C. § 28-34-01. AA 10. "In an appeal from the decision of a local governing body under N.D.C.C. § 28-34-01, our scope of review is the same as the district court's review and is very limited. Our function is to independently determine the propriety of the decision, without according any special deference to the district court's decision, and unless the local governing body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence to support the decision, it must be affirmed." Tibert v. City of Minto, 2006 ND 189, ¶ 8, 720 N.W.2d 921. A "zoning decision is a legislative function subject to limited review by a court." Dockter v. Burleigh County Bd. of County Com'rs, 2015 ND 183, ¶ 8, 865 N.W.2d 836. In appeals from a zoning decision by a local governing body, "the 'principal of separation of

powers precludes parties from relitigating the correctness and propriety of the [city council's] decision and prevents a reviewing court from sitting as a super board and redeciding issues that were decided in the first instance by the [city council]." Id. "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." Id. (quoting Hagerott v. Morton Cnty. Bd. of Comm'rs, 2010 ND 32, ¶ 7, 778 N.W.2d 813). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Dahm v. Stark Cnty. Bd. of Cnty. Comm'rs, 2013 ND 241, ¶ 10, 841 N.W.2d 416.

> On appeal from a decision of a [city council], a reconsideration of evidence is limited to the extent that such evidence was presented to the [city council], and the evidence must be reviewed in light of the [council]'s decision to determine whether that decision was arbitrary, capricious, or unreasonable. Our standard of review ensures that the court does not substitute its judgment for that of the local governing body which initially made the decision.

Dockter, 2015 ND at ¶ 8, 865 N.W.2d 836 (internal citations omitted).

B. The City's Decision to Deny Johnson's Variance Application was Not Arbitrary, Capricious, or Unreasonable.

[¶26] The issue on appeal is whether the City's decision to deny Johnson's application for a variance to operate an auto body shop in a C-1 Neighborhood Commercial district was arbitrary, capricious, or unreasonable. The Burlington City Ordinances do not authorize the operation of an auto body shop in areas zoned C-1 Neighborhood Commercial. AA 298-330.

[¶27] This Court previously 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.'" Gullickson v.

Stark County Bd. of County Com'rs, 474 N.W.2d 890, 892 (N.D. 1991) (quoting 3 E. Yokley, *Zoning Law and Practice* § 21-2 (4th ed. 1979). Its purpose is to "waive the strict letter of the zoning ordinance while preserving its spirit and purpose." Id. However, an applicant must establish the necessary prerequisites in order to obtain a variance. Id.

[¶28] "The burden of proof is on the applicant to establish that his land is uniquely affected resulting in unnecessary hardship." Id. (citation omitted). One 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. [T]he unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner himself." Id. (internal citations and quotations omitted). "A variance is proper only if there is 1. No adverse effect on public, 2. No adverse effect on neighbors, *and* 3. The property characteristics making it eligible for a variance. All standards must be met." Id. (quoting D. Hagman, *Urban Plan. & Land Dev. Control Law* § 106 (1971) (emphasis added). Even if the public receives a benefit, but a "neighboring property may be adversely affected by a variance…the variance should not be issued." Id.

> A variance should not confer special privileges that are not enjoyed by neighboring property. 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. 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. (internal citations and quotations omitted).

[¶29] "An unauthorized variance is the equivalent of spot zoning." Id. at 894. "Spot zoning is the singling out of a lot or a small area for discriminatory or different

treatment from that accorded surrounding land which is similar in character." Id (quotation omitted). "[A]n unjustified variance can undermine the essential purpose of zoning: … to rationally coordinate land-use planning to promote orderly development and preservation of property values." Id (quotation omitted). "A spot variance that is in conflict with the relevant standards of the zoning ordinance is arbitrary, capricious, or unreasonable." Id. at 895.

i. Johnson Did Not Establish His Lot was Uniquely Affected Resulting in an Unnecessary Hardship.

[¶30] As explained above, Johnson must prove his lot is uniquely affected by the zoning ordinance and it results in an unnecessary hardship to the property, not the owner. Id. at 892. The burden of proving unnecessary hardship "is heavy; the reasons for granting a variance must be substantial, serious, and compelling." 83 Am. Jur. 2d Zoning and Planning § 732. The standard for unnecessary hardship is rigorous and the reasons presented by Johnson are insufficient to satisfy this element.

[¶31] Johnson's application "requested the City grant a land use variance that allows the Property to continue being used for auto body and repair." AA 37. Specifically, Johnson's application asserted he plans to use "the Property for auto body and repair and to sell the Property for auto body and repair as part of [his] retirement." AA 34. Johnson admitted to the City Council that he intends to sell the property as an auto body shop at the City Council meeting. AA 283. Essentially, Johnson alleges the denial of the variance will cause him personal hardship and he prefers to use his property as an auto body shop as opposed to a use permitted in a C-1 district.

[¶32] "Disappointment in the use of property does not constitute exceptional difficulty or unusual hardship. Moreover, interference with the owner's desires or plans

for the particular property is not sufficient to entitle the owner to a variance." 83 Am. Jur. 2d Zoning and Planning § 726. "Variances cannot be personal in nature and may be based only upon property conditions; the identity of a particular user of land is irrelevant. It follows that the unnecessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner; mere personal hardship does not constitute sufficient ground for the granting of a variance regardless of how compelling or how far beyond the control of the individual applicant." Id. Johnson's disappointment in the use of his property is not an unnecessary hardship. Further, the C-1 zoning's impediment on his desire or plan for his particular property is insufficient to satisfy the required burden of proof.

[¶33] Johnson argues the property is unique because it "is the only property located on Johnson Street used for business that is located between two (2) residences also located on Johnson Street. that is between two residences," it is the only property on Johnson Street with residences located on three sides, is the only property on Johnson Street located adjacent to two lots designated C-1, and there are only two properties along Johnson Street not zoned C-1. App. Br. at pp. 28-29. This Court previously found these arguments lack merit. "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." Gullickson, 474 N.W.2d at 892. "In order to prove that the physical circumstances of the property justify a zoning variance, the party seeking the variance must demonstrate that circumstances are unique or peculiar to the property in question and not a condition common to the neighborhood or zoning district." 83 Am. Jur. 2d Zoning and Planning § 751.

[¶34] There is no evidence that the physical condition of Johnson's property is unique to the surrounding area. Johnson's lot is approximately the same size as the other lots in Colton's 2nd Addition which are also zoned C-1. AA 42. There is no evidence that the natural composition of the property is unique to the surrounding area and it must be used as an auto body shop. Johnson's desire to utilize the property as an auto body and repair shop is insufficient to satisfy the unnecessary hardship standard. Therefore, the City's decision should be affirmed.

ii. The Evidence Demonstrates a Variance May Have an Adverse Effect on the Public

[¶35] Under Gullickson, a variance cannot be granted if the evidence shows an adverse effect on the public. Gullickson, 474 N.W.2d at 892. There were various issues raised throughout the proceedings with respect to a potential adverse effect on the public if Johnson's variance was granted. First, the City Council acknowledged if Johnson's variance application were granted, public funds may need to be expended to ensure conformity. AA 283. Second, Johnson admitted his request for a variance is necessitated in part because he wants to sell the property as an auto body and repair shop to another entity. AA 34, 283. As Councilman Kremer noted, "who's going to pay for the inspections? Who is going to enforce this on a daily basis? Just who is going to do all this?" AA 283.

[¶36] Further, community members raised various concerns with respect to fumes and the property's fire history from when it was previously used as an auto body and repair shop. The City's planning commission acknowledged that property zoned C1 is not intended for "sandblasting cars and painting cars." AA 267. Allowing a variance for this

type of business had the potential of an adverse effect on the public and Johnson cannot satisfy this requirement.

iii. Neighboring Properties May Be Adversely Affected by a Variance.

[¶37] A variance should not be issued if it may have an adverse impact on a neighboring property. Gullickson, 474 N.W.2d at 892. Here, two neighboring property owners appeared before both the Planning Commission and the City Council to contest the variance.

a. Tim Schnaible Brought Concerns to the City as a Neighboring Landowner

[¶38] At the Planning Commission hearing, Tim Schnaible explained he live two houses to the west of Johnson's property. AA 260. Schnaible explained to the Commission that

> [T]here's reasons it was rezoned C1 after J and J Body Shop moved west of town, and that's the City didn't want that type of operating in a residential area again…I think the reasons are very obvious. We can say what we want, "Tony's not going to do any painting. Well, maybe we'll do some painting. There won't be any harmful chemicals. Well, you know there could be some harmful chemicals…Who is going to monitor this?...is this up to the neighbors to monitor this? Do one of us need to go over there every other day to see what's going on? No. That shouldn't have to happen. And this type of an operation should not be in a residential area…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…I'm just at the point where we really, really want a recommendation to the City Council of no variance. This is not a business that should be in that area.

AA 265.

[¶39] Schnaible further stated:

> It's always hard to say no. It really is. I sat on this planning commission for 25 years, and I know that it's very difficult to say no. I want each of you to just remember what I said, think about the history of J and J Body Shop,

> learn from that history, understand what it's going to be again. There's no reason to believe it won't turn back into what it was when it was a full fledged, Tony's only operation, before he moved west of town. There's no reason to believe if history is telling us that's what it's going to be…So, 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.

AA 269.

> [¶40] Further, at the City Council Meeting, Schnaible stated:
>
> I'm here on behalf of neighbors to request the Council to accept the recommendation of the Planning Commission, and that is to not grant a variance…As for us neighbors, as I said at the Planning Commission meeting, 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 C2 commercial business, and that's what a body shop is. So again, I just think it's where it's at. Council, I would highly recommend that you accept the decision or the recommendation of your Planning Commission as they thoroughly went through this.

AA 279-280. Schnaible also explained he has no personal issues with Johnson; however, "J and J Body Shop just hasn't been a very good neighbor." AA 282.

b. Johnson's Next Door Neighbor had Substantial Safety Concerns

[¶41] Dean Reitter, whose garage is "less than six feet" from Johnson's building also spoke before the Planning Commission and City Council. AA 260-261, 266, 281. During the Planning Commission meeting Reiter explained his "biggest concern with an auto body shop next to me is the history, is fire. The building is very close to my house, and if the fire starts, the wind blows out of the northwest, it's blowing my way. There's chemicals used in auto bodies. There's torches, all kinds of stuff in there, and it's right next to a house. Very close. That was my biggest concern about not having a variance for moving an auto body back into it." AA 260. Reiter also explained to the City Council that

he had concerns and did not want to repeat everything but "Tim Schnaible said it the best, is look at it really close, look at the history before you make your decision. Thank you." AA 281.

[¶42] Both Schnaible and Reiter voiced safety concerns about allowing an auto body and repair to operate adjacent to their homes. The use of chemicals and fire concerns clearly pose the possibility of adverse effects on neighboring landowners. Notably, the permissible uses for C-1 Neighborhood Commercial District zoning include residential, parking lot, clinic, filling station, floral shop or greenhouse, laundromat, offices, retail stores, tailor, dressmaker, catering, household appliance repair, bakery, barbershop, bank, beauty parlor, art studio, restaurant, and accessory building and use. AA. at 305-306. This was noted by Commissioner Grosche who observed "C1 is typically selling clothing, you know. It's not sandblasting cars and painting cars." AA 267.

[¶43] Put simply, an auto body and repair shop is not suited for a C-1 district under the City's ordinances and the neighbors justifiably stated valid objections to Johnson's variance application. As a result, Johnson cannot show the variance will have "no adverse effect on neighbors" and the City's decision should be affirmed.

iv. The Property Characteristics Do Not Make It Eligible for a Variance.

[¶44] As noted in Gullickson, the property must have characteristics which make it eligible for a variance. Johnson properly acknowledged to the district court that "the Zoning Ordinance…does not have a variance procedure or legal standard specific to the facts and circumstances…." Index # 58 at ¶ 92. This is fatal to Johnson's appeal under Gullickson.

[¶45] The City's zoning ordinances are codified in Chapter 18 of the Burlington City Code. AA 298-328. Section 18-401 provides that various districts within the City are identified in order to "classify, regulate and restrict the location of business, trades, industries, and residences, and other land uses and the location of buildings designed for specific uses…" AA 302. Under this section, "C-1" is identified as a "Neighborhood Commercial District." Id. The official zoning map identified Johnson's property as "C-1." AA 42. Pursuant to Article XII, Section 18-1202, an auto body and repair shop is not a permissible use in a Neighborhood Commercial District. AA 305-306.

[¶46] Variances are only authorized by the following city ordinances:

Section 18-2201(4): This allows for a "variance from height, area, yard, parking or loading provisions of this regulation." (AA 314).

Section 18-2502. "**Variations and Exceptions:** Whenever the tract to be subdivided is such unusual size or slope or is surrounded by such development or unusual conditions that the strict application of the requirements contained in these regulations would result in real difficulties or substantial hardships or injustices, the Commission may vary or modify such requirement so that the land may be developed in a reasonable manner, but so that, at the same time, the public welfare and interests of the City and surrounding area be protected and the general intent and spirit of these regulations is preserved. In no case shall any variance, modification or waiver be more than a minimum easing for the requirements; in no case shall it have the effect of reducing the traffic capacity of any major or secondary street; in no case shall it be in conflict with existing zoning regulations. In granting variances, modifications or waivers, the Planning Commission may require such conditions, as will in its judgment, secure substantially the objectives of the standards and requirements as affected." (AA 319).

Section 18-2601: Authorizing a grant of relief from the requirements of the Flood Protection Ordinances codified under Article XXVI to permit construction in a manner that would otherwise be prohibited by Article XXVI. (AA at pp. 320-322).

[¶47] Section 18-2201(4) is inapplicable because it does not allow for a variance from permitted uses, but only allows relief from the height, area, yard, parking or loading provisions of the ordinances. Johnson's application does not seek relief from any height, area, yard, parking or loading provision; therefore, he is not eligible for a land use variance under this 18-2201(4).

[¶48] Section 18-2502 is inapplicable because it only applies when a tract of land is to be subdivided. It does not authorize a land use variance for a previously subdivided tract. While the requirements for a variance under Section 18-2502 mirror those established in Gullickson, it contains no authority allowing Johnson to obtain a variance to use his property in a manner not authorized by existing zoning regulations. Specifically, Section 18-2502 provides that "[i]n no case shall any variance, modification, or waiver…be in conflict with existing zoning regulations." AA 319. Section 18-2502 merely provides authority to adjust specific requirements in a new subdivision when it falls within the exceptions stated in that section. Therefore, Johnson is not eligible for a land use variance to use his property as a C-2 use when it has already been zoned C-1 under Section 18-2502.

[¶49] Section 18-2601 provides no authority for Johnson to obtain a land use variance. Section 18-2601 only applies to a variance from the Flood Protection Ordinances codified as Article XXVI. The conditions for a variance from the Flood Protection Ordinances are found in Section 18-2609 and clearly only apply to flooding issues. AA 326. Johnson cites no ordinance that authorizes the City or this Court to grant the relief he sought from the City or seeks in this appeal. Further, Johnson acknowledges that his application does not fit into the variance ordinances. Index # 58 at ¶ 92. Therefore,

Johnson's property does not have the characteristics making it eligible for a variance under the City's ordinances and the City Council's decision should be affirmed.

C. Johnson's Remaining Arguments are Inapplicable and Unnecessary in the Appellate Review of this Appeal.

[¶50] As shown above, the City's decision to deny Johnson's variance application is supported by both fact and law. Under this Court's limited scope of review, it must be affirmed. Nonetheless, Johnson erroneously argues the City is estopped from denying Johnson's variance application and also argues the City's written findings should be stricken from the record. These arguments are misplaced and do not have any impact on whether the City's decision was arbitrary, capricious, or unreasonable.

i. The City is Not Estopped from Denying Johnson's Variance Application

[¶51] Johnson argues the City is estopped from denying his variance application because it previously granted a building permit to another business in 2008. Johnson asserts this amounted to a *de facto* variance. Johnson cites no authority for the proposition that the City granted a "de facto" variance by allowing another property to obtain a building permit and business license in 2008. First, there is no evidence that situation involved any type of variance application. Second, Johnson cannot contest the City's 2008 decision now. See N.D.C.C. § 28-34-01(1) ("The notice of appeal must be filed with the clerk of the court within thirty days of the decision of the local governing body.") Rakowski v. City of Fargo, 2010 ND 16, ¶ 11-13, 777 N.W.2d 880 (holding failure to timely appeal the decision of a local governing body renders that decision final and not subject to collateral attack). Since Johnson did not appeal the 2008 decision within thirty days, he cannot collaterally attack it in this proceeding.

[¶52] Nonetheless, Johnson argues that since the City approved a building permit and business license for a body shop approximately three or four blocks down from Johnson's auto body shop in an area zoned C-1 Neighborhood Commercial in 2008, the City either ignored its own zoning ordinance or granted a de facto variance. Index # 58 at ¶ 98.

[¶53] Johnson cites no authority for the existence of a "de facto" variance. As explained above, there is no ordinance indicating Johnson's property has the characteristics required for a variance. "An unauthorized variance is the equivalent of spot zoning." Gullickson, 474 N.W.2d at 894. "[W]e believe that an unauthorized variance…contrary to express directions of the applicable zoning ordinance, is unreasonable spot zoning." Id. "[A]n unjustified variance 'can undermine the essential purpose of zoning:…to rationally coordinate land-use planning to promote orderly development and preservation of property values." Id. at 894-895 (quoting City of Fargo, Cass County v. Harwood Twp., 256 N.W.2d 694, 697 (N.D. 1977). Under binding precedent, the City lacked the authority to grant Johnson's variance application. In fact, had it done so, it would have likely engaged in illegal spot zoning.

[¶54] However, Johnson asserts that since the City granted a building permit to another business in 2008, it is estopped from denying his variance application. This argument lacks merit. As a general rule, "estoppel is available against governmental entities, although it should not be applied freely." Buegel v. City of Grand Forks, 475 N.W.2d 133, 135 (N.D. 1991). Estoppel against the government "must be applied on a case-by-case basis with a careful weighing of the inequities that would result if the doctrine is *not* applied versus the public interest at stake and the resulting harm to that interest if the

doctrine *is* applied." Id. Notably, this Court has not applied estoppel as a means of forcing a governmental entity to grant a variance.

[¶55] Johnson erroneously argues this Court previously applied the doctrine of estoppel in zoning proceedings in Buegel, Minch v. City of Fargo, 297 N.W.2d 785 (N.D. 1980), and City of Fargo, Cass County v. Harwood Tp., 256 N.W.2d 694 (N.D. 1977). While the doctrine of estoppel against the government was discussed in these cases, it was not applied to estop the local governing body from denying a variance application.

[¶56] In Buegel, John Buegel planned a business venture consisting of a retail gun store, a gunsmithing shop, and a commercial firing range. Id. at 134. As part of the firing range, Buegel planned to rent automatic weapons to the public. Id. In June 1989, Buegel received a building permit authorizing the construction of a firing range in the basement of a building he purchased and remodeled. Id. City residents raised concerns over the use of automatic weapons, the City amended the ordinance regulating commercial firing ranges and prohibited the use of all automatic weapons. Id. Buegel sued the City for inverse condemnation and to enjoin the City from enforcing the amended ordinance against him. Id. After a bench trial, the district court found the amended ordinance was a proper police-power regulation and enforceable against Buegel. Id. However, it also held the City was estopped from asserting the rule denying compensation for a reduction in the value of property as a result of the enactment of the amended ordinance. Id. On appeal, the Court affirmed the district court's findings and held the amended ordinance was enforceable against Buegel, but the City was estopped from asserting the rule of noncompensation normally applicable to police-power regulations. Id. at 135-136. Specifically, the Court held:

> The trial court found that the City gave Buegel a conditional-use permit after a review process initiated by Buegel and during which Buegel disclosed his intent to use and rent automatic weapons in his commercial firing range. Buegel made substantial expenditures which he would not have made but for the City's approval of the conditional-use permit. The City altered the permit during its original term by amending the ordinance regulating commercial firing ranges and did not support that alteration by making a record of changed circumstances or the existence of a public hazard unknown and not considered during the original permit process. This record supports the trial court's conclusion that the City was estopped from denying damages in these unique circumstances.

Id. at 136.

[¶57] In Buegel, the Court specifically warned this opinion should not be "read as saying that a city must always compensate an affected landowner when the city changes an ordinance altering a use permit in response to changed circumstances which raise safety concerns not identified at the time of the city's original action, or as a result of additional information warranting a different response to a previously identified risk…Finally, this opinion does not affect a city's power to impose new restrictions upon, or even refuse to renew, a license at the end of its term." Id. at 135.

[¶58] As in Buegel, the Court in Minch, held that estoppel may be applicable in an inverse condemnation action. Minch, 297 N.W.2d. at 790. Further, in Harwood Tp. the City purchased land located outside of its city limits in Harwood Township for use as a sanitary landfill. Harwood Tp., 256 N.W.2d.at 695. Harwood Township denied the City's petition to rezone the land to permit the use of a sanitary landfill. Id. The City commenced a declaratory judgment action to determine whether the Harwood Township zoning regulations applied to the property in question. Id. On appeal the Court held:

> Whether or not the ordinance itself is unreasonable, arbitrary, or discriminatory is, of course, a different question and one that is not properly before us. Fargo did not appeal from the zoning commission's denial of the conditional use permit or amendment, nor contend that the commission's

> action was arbitrary. For this reason, several of the other issues raised on this appeal are not proper matters for our consideration, including whether the ordinance was deficient on its face, or whether the commissioners acted in an arbitrary or biased manner in denying the conditional use permit. In this appeal from a declaratory judgment action we are asked only to decide whether the Harwood Township zoning ordinance is applicable to Fargo's proposed landfill site, not whether the ordinance itself is legally sufficient.

Id. at 700. The Court affirmed the district court's determination that Harwood Township's zoning ordinances applied to the City of Fargo. Id. 695, 700.

[¶59] None of these cases stand for the proposition the City is estopped from denying a variance application. Again, this is an appeal from a decision of a local governing body and the separation of powers limits this court's review as to whether the City's decision was arbitrary, capricious, or unreasonable. Under Gullickson, the burden is clearly on the applicant to show a variance will have no adverse effect on the public, no adverse effect on neighbors, and the property has characteristics making it eligible for a variance. Gullickson, 474 N.W.2d at 892. As explained above, the evidence show Johnson was unable to meet his burden and the City's decision should be affirmed.

ii. The District Court Did Not Err is Allowing the City to Amend the Record to Include Written Findings.

[¶60] The City issued written findings pursuant to N.D.C.C. § 40-47-04(3) which provides the "governing body of a city, a city zoning commission, and a board of adjustment[4] 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." The

[4] Cities have discretion to create a board of adjustment. N.D.C.C. § 40-47-01. Burlington did not create a board of adjustment.

city and city zoning commission approved written findings which merely summarize the transcripts and information in the record to ensure full compliance with N.D.C.C. § 40-47-04. Since these written findings became records of the governing body and zoning commission, it was appropriate for the district court to allow their addition to complete the record on appeal. See N.D.C.C. § 28-34-01(2) ("court may permit amendments or additions to the record to complete the record.")

[¶61] Further, this Court previously found it appropriate for a local governing body to issue written findings after a notice of appeal was filed in Gowan v. Ward County Commission, 2009 ND 72, 764 N.W.2d 425. In Gowan, the Court specifically found the following:

> Gowan objects to the Commission's written findings because they were issued, at his behest, after he filed the notice of appeal to district court. Section 11-33-01[5], N.D.C.C., provides the "board of county commissioners and a county zoning commission 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 board or commission." Under N.D.C.C. § 28-34-01(2), the "court may permit amendments or additions to the record to complete the record." Gowan requested that the record be completed, and his request was satisfied. The written findings merely summarize the testimony at the Commission meetings. Gowan's argument is without merit.

Id. at ¶ 10.

[¶62] Here, the written findings did not change the City's decision, they were issued for the sole purpose of ensuring compliance with N.D.C.C. § 40-47-04(3). It would

[5] N.D.C.C. § 11-33-01 mirrors N.D.C.C. § 40-47-03(3) as it provides the following in relevant part: "The board of county commissioners and a county zoning commission 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 board or commission." N.D.C.C. § 11-33-01.

be nonsensical to remand the case for written findings on the same decision that was already on appeal. This would have been a substantial waste of judicial and local government resources. As a result, the City gave notice it was going to have a meeting to issue written findings on its decision to deny Johnson's variance, provided Johnson the opportunity to submit a statement about the written findings, received Johnson's written statement, and included it all in the record on appeal. Further, Johnson was provided ample opportunity to brief the issue below and explain any disagreement he had with the City's written findings. Clearly, he cannot establish any prejudice resulted from the City's written findings as they merely streamlined the appeal process into one appeal as opposed to a potential remand and a second appeal on the merits.

[¶63] In this appeal, the City's written findings were produced as a procedural necessity under N.D.C.C. § 40-47-04(3). Further, a reviewing court looks at the record on appeal as a whole and does not solely rely on written findings in reviewing the decision of a local governing body. See Hagerott, 2010 ND 32 at ¶¶ 21-22. (lack of written findings does not render a decision arbitrary, capricious, or unreasonable). Nonetheless, the written findings merely recited the information received by the planning commission, city council, and the applicable ordinances. The district court did not error by allowing the record to be completed with the City's written findings as well as Johnson's objection to them. Further, any possible prejudice was cured by the district court's decision to allow the parties to submit supplemental briefs to address the written findings. As in Gowan, Johnson's objection to the City's written findings is without merit and certainly cannot render City's decision to deny his variance to be arbitrary, capricious, or unreasonable.

iii. North Dakota Law Allows Local Governing Bodies to Consider Statements of the Public.

[¶64] Johnson argues the City's decision to deny his variance application was arbitrary, capricious, or unreasonable because it heard and considered statements of neighboring landowners and the public. As with most issues in the public forum, the City heard and considered statements from members of the public both for and against the variance application. See Hagerott, 2010 ND at ¶ 20, 778 N.W.2d 813 (affirming decision where "[t]he record reflects the Commission also heard statements from several people favoring Berger's permit and from several people opposing the permit…There were serious disagreements between the individuals appearing before the Commission about whether the feedlot was appropriate for the area, and the Commission considered all statements and arguments in reaching its decision….")

[¶65] Clearly, there is nothing precluding the City from considering public statements when reaching its decision. Johnson's reliance on nonbinding precedent from South Dakota in Hines v. Board of Adjustment of City of Milner, 2004 SD 13, ¶16, 675 N.W.2d 231 is misplaced. In Hines, the South Dakota Supreme Court simply found the City of Miller's board of adjustment failed to follow the test delineated in its own ordinances when it denied a variance application. Id. at ¶ 16. The court found the record did not show "any independent thought on the part of the board" and remanded the case for proper consideration of the factors of the City's ordinances. Id. at ¶ 16. Additionally, it appears the appellate procedure for contesting local governing body decisions in South Dakota is substantially different from North Dakota's process. Hines was considered pursuant to certiorari and the South Dakota Supreme Court only looked at whether the board of adjustment had jurisdiction and whether it acted in accordance with the authority

conferred upon it. Id. at ¶ 10. Hines is not applicable as it considered substantially different facts and law.

[¶66] Even if Hines applied (which it does not), the record reflects the City's decision makers had independent thought in reaching its decision. The decision was not based solely upon the statements of neighboring landowners. There was substantial information placed before the City Council. The City's decision was the result of a rational mental process based on the information before it. Put simply, under North Dakota law, the City acted appropriately and in compliance with the law when it denied Johnson's variance application. Therefore, the judgment of the district court should be affirmed.

IV. CONCLUSION

[¶67] For the aforementioned reasons, the City's decision was not arbitrary, capricious, or unreasonable and the judgment of the district court, which affirmed the City's decision, should be affirmed.

Dated this 7th day of January, 2020.

SMITH PORSBORG SCHWEIGERT ARMSTRONG MOLDENHAUER & SMITH

By */s/ Brian D. Schmidt*

Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
Brian D. Schmidt, ND ID # 07498
bschmidt@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701)258-0630

Attorneys for Appellee, City of Burlington

CERTIFICATE OF COMPLIANCE

[¶68] The undersigned certifies the above brief is in compliance with N.D.R.App.P.32(a)(7)(A) and the total number of pages of the brief is 34 pages.

Dated this 7th day of January, 2020.

SMITH PORSBORG SCHWEIGERT ARMSTRONG MOLDENHAUER & SMITH

By */s/ Brian D. Schmidt*

Scott K. Porsborg (ND Bar ID # 04904)
sporsborg@smithporsborg.com
Brian D. Schmidt, ND ID # 07498
bschmidt@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701)258-0630

Attorneys for Appellee, City of Burlington

CERTIFICATE OF SERVICE

[¶69] I hereby certify that on the 7th day of January, 2020, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via Electronic Filing and mailed and emailed as follows:

Brian C. Balstad
Attorney at Law
112 University Drive N, Suite 105
Fargo, ND 58102

bbalstad@balstadlawfirm.com

By */s/ Brian D. Schmidt*
BRIAN D. SCHMIDT

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 13, 2020
STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE

[¶69] I hereby certify that on the 13th day of January, 2020, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via Electronic Filing and emailed as follows:

Brian C. Balstad
Attorney at Law
112 University Drive N, Suite 105
Fargo, ND 58102

bbalstad@balstadlawfirm.com

By */s/ Brian D. Schmidt*
BRIAN D. SCHMIDT