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JANUARY 21, 2020
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
	)	Nature of Proceedings: Administrative Appeal
City of Burlington,	)	
	)	
Appellee,	)	

Reply Brief of Appellant

Appeal from Findings of Fact, Conclusions of Law, and Order for Judgment Dismissing Appellant's Appeal signed by the Honorable Douglas L. Mattson on August 15, 2019 and filed by the Clerk of the North Central Judicial District Court on August 20, 2019, the Order for Judgment signed by the Honorable Douglas L. Mattson on August 20, 2019 and filed by the Clerk of the North Central Judicial District Court on August 21, 2019, and the Judgment signed and filed by the Clerk of the North Central Judicial District Court on August 21, 2019

ORAL ARGUMENT REQUESTED

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Standard of Review

[¶1] In the Standard of Review section of its *Brief of Appellee* ("City's Brief"), the City relies heavily on the standard of review set forth in Dockter and states, inter alia, "[a] 'zoning decision is a legislative function subject to limited review by a court.'" City's Brief, ¶25 (citing Dockter v. Burleigh County Bd. of County Com'rs, 2015 ND 183, ¶8, 865 N.W.2d 836). It is imperative to note Dockter was a rezoning case. A decision on an application to rezone property is a legislative decision. Conversely, a decision on an application for a variance is not a legislative function, and rather, is a quasi-judicial function. The former function creates law whereas the latter function interprets existing law. See Bigwood v. City of Wahpeton, 1997 ND 124, ¶10, 565 N.W.2d 498 (stating "[e]nactment of municipal ordinances are legislative functions, but interpretations of these ordinances by the municipality's governing body are quasi-judicial acts…"). Given the foregoing, the decision of the City is not accorded significant deference as argued by the City.

Argument

[¶2] **Issue 1: The City's decision to Deny Alton's Application was arbitrary, capricious, and unreasonable.**

[¶3] At the outset, it is imperative to note the City authorized Property to be used for auto body and repair in 1973. The City authorized the expansion of the body shop and the rebuilding of a portion of the body shop. The City also authorized another property allegedly zoned C-1 with nearly identical facts and circumstances as Property to be used for auto body and repair in 2008. The foregoing, individually and collectively, renders the City's decision arbitrary, capricious, and unreasonable.

A. Property is uniquely affected resulting in an unnecessary hardship.

[¶4] First, the use of Property is related to the land itself. The City expressly authorized the use of Property for auto body and repair in 1973. The City also allowed the body shop to be expanded and repaired. Evidence was provided demonstrating Property has been continuously used for auto body and repair since 1973 which was not rebutted. The foregoing is related to the land itself and is true regardless of the identify of a particular user. Second, evidence was provided demonstrating Property is less valuable if it cannot be used for auto body and repair, and rather, may only be used as a C-1 use. The foregoing is related to the land itself and is true regardless of the identify of a particular user. Third, the only argument that specifically regards Alton himself is he will lose retirement income if Property cannot be sold for auto body and repair. The latter is a consequence of the manner in which Property may be used. Further, Alton has argued economic factors should be considered. Fourth, Property is not disadvantaged by a zoning restriction equally with other property in the area. The City did not expressly authorize other property in the area to be used for auto body and repair. Alternatively stated, C-1 restrictions impose a greater disadvantage on Property as Property has been expressly authorized to be used for auto body and repair. Lastly, Property is otherwise uniquely affected. See *Brief of Appellant*, ¶59.

B. The evidence demonstrates a variance will not have an adverse effect on the public.

[¶5] The City essentially argues that because it does not have someone to enforce its Zoning Ordinance and there may be a cost to enforce its Zoning Ordinance, the variance should be denied. Alton should not be penalized for the City's unwillingness, voluntary inability, and otherwise failure to perform its municipal functions, namely to implement and enforce its Zoning Ordinance.

[¶6] The City argues "community members" raised concerns regarding "fumes and the property's fire history…" City's Brief, ¶36. First, only one community member expressed concern regarding fumes and fire, namely neighbor Dean Reiter. The only other community member who spoke against the variance was neighbor Tim Schnaible. The two neighbors are addressed herein below. Second, two (2) community members spoke in favor of the variance, namely Pat Schmidt and Sherry Skees. Further, Mr. and Mrs. Skees also submitted a letter on Alton's behalf. App. 225. Third, there is not a "history of fire" at Property. One (1) fire occurred on June 30, 1989 that damaged approximately one-third (1/3) of the north side of the building. No evidence was presented demonstrating the fire was related to auto body and repair. In any event, the Burlington Fire Department was amenable to Property being used for auto body and repair. Fourth, no evidence or testimony was presented at the public hearings demonstrating there have been any complaints, issues, or the like regarding the use of Property for auto body and repair since Alton began solely using Property for auto body and repair in 2012. Conversely, two City Council members acknowledged exterior storage is no longer an issue now that Mountain Metals is no longer using a portion of Property. Lastly, the public will not otherwise be adversely impacted. See *Brief of Appellant*, ¶¶60-68.

C. Neighboring properties will not be adversely affected.

[¶7] As previously stated, two neighbors, namely Tim Schnaible and Dean Reiter, spoke against the variance. In regard to Mr. Schnaible, he acquired his property after Property began being used for auto body and repair. Further, Mr. Schnaible has had personal issues with Alton as demonstrated by past facts and circumstances and Mr. Schnaible's behavior at the Planning Commission and City Council meetings. Mr. Schnaible and his wife,

Darlene Schnaible, complained to the City regarding the appearance of Property in 1981. App. 227, 258. Mountain Metals, a metal salvage and recycling business, used a portion of Property from 1991 to May of 2013 and had considerable exterior storage. No complaints were made regarding the use of Property during the more than twenty (20) years it was used by Mountain Metals for metal recycling and salvage. App. 227, 258. However, on December 3, 2012, i.e. two (2) days after the sale of the second auto body and repair location closed, Mr. and Mrs. Schnaible were back before the City Council raising concerns regarding the use of Property. App. 72, 228. Further, in 2013, Ms. Schnaible filed an affidavit with the Court in Case No. 51-2013-CV-01148 making unfounded allegations regarding Alton's alleged use of Property. App. 258. The concerns alleged by Mr. Schnaible at the Planning Commission and City Council meetings were vague, lacked probative value, and included information that is false. Mr. Schnaible testified Property was rezoned C-1, however, the latter contradicts the record and admissions of the City. App. 160, 265, 266. Lastly, the City admitted any complaints received regarding Property, which includes the complaints made by Mr. and Mrs. Schnaible, all regarded "cleaning up" the same. The latter is a nuisance issue, not a zoning issue, and specifically, not a variance issue.

[¶8] In regard to Mr. Reiter, first, Mr. Reiter acquired his residence after Property began being used for auto body and repair. Second, Mr. Reiter did not provide any evidence demonstrating that chemicals, fumes, or torching have been or will be an issue, and rather, only made allegations regarding body shops in general. Mr. Reiter failed to demonstrate he has personal knowledge of the contents located and activities that take place in the structure located on Property. Alton testified torching is hardly ever used anymore and he would

take the same precautions as the body shop approved in 2008. App. 287. Mountain Metals engaged in a significant amount of torching. App. 285. However, no concerns were expressed and no complaints were made regarding torching by Mr. Reiter or anyone else during the more than twenty (20) years Mountain Metals used a portion of Property. It was not until Alton began solely using Property for auto body and repair that the issue of torching was raised by Mr. Reiter. In any event, the neighbors will not otherwise be adversely impacted. See *Brief of Appellant*, ¶¶69-72.

D. The characteristics of Property render it eligible for a variance.

[¶9] First, the City previously determined the Zoning Ordinance authorizes the variance requested as demonstrated by the City's statements, actions, and representations. See *Brief of Appellant*, ¶73. It was not until this matter was appealed the City began to argue otherwise. As between the statements and actions of the City and arguments made for the first time on appeal, the former should govern. Second, there is no provision of the Zoning Ordinance that prohibits the variance requested, expressly or otherwise. Third, the arguments of Alton or counsel for Alton are not dispositive of the issue. Lastly, the variance requested is authorized pursuant to N.D.C.C. §40-47-09.

[¶10] **Issue 2: Granting a variance will merely preserve the status quo, granting a variance will not result in spot zoning, the City should be estopped from denying a variance, the District Court erred in not striking or excluding matters in the Findings that are not reflected in the record, and Alton is not arguing the City may not consider statements of the public.**

A. Granting a variance will merely preserve the status quo, granting a variance will not result in spot zoning, and the City should be estopped from denying a variance.

[¶11] The City states "there is no evidence [the approval of the auto body and repair shop in 2008] involved any type of variance application." City's Brief, ¶25. Alton agrees. Based

upon the records maintained by the City, the body shop approved in 2008 was not required to apply for a variance despite being allegedly zoned C-1. The latter demonstrates that auto body and repair is a permissible use of property allegedly zoned C-1. Granting Alton's variance request will merely preserve the status quo. Further, contrary to that alleged by the City, Alton is not contesting the approval of the body shop in 2008.

[¶12] The City argues that granting Alton's request for a variance would result in spot zoning citing Gullickson v. Stark County Bd. of County Com'rs, 474 N.W.2d 890, 894 (N.D. 1991). It is imperative to note only two (2) cases have been decided since Gullickson that examine the issue of spot zoning, namely Bigwood and Dockter. Like Bigwood and Dockter, the case at bar is distinguishable from Gullickson in regard to spot zoning. First, the property in Gullickson regarded a single lot. As was the case in Bigwood and Dockter, this case does not regard a single lot. The case at bar regards two (2) contiguous lots. Second, the placement of a mobile home on the property in Gullickson was for the sole benefit of the property owner. As was the case in Bigwood and Dockter, the case at bar is not for the sole benefit of the property owner, i.e. Alton. The use of 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. Third, the issue in Gullickson regarded a mobile home. The case at bar regards a business. Fourth, the owner of the property in Gullickson did not have a valid permit to place a

mobile home on the property. Conversely, the City expressly authorized the use of Property for auto body and repair, issued a valid building permit to build an auto body and repair shop on Property, authorized the expansion of the auto body and repair shop, and authorized the repair of a portion of the auto body and repair shop. Fifth, the City has acknowledged auto body and repair was a non-conforming use. The use of the property in Gullickson for a mobile home was not a permissible nonconforming use. Sixth, the zoning ordinance in Gullickson had "well-defined standards for granting a variance," Gullickson, 474 N.W.2d at 892, whereas the Zoning Ordinance in this matter does not. Lastly, the Zoning Ordinance in the case at bar does not prohibit the variance requested.

[¶13] Lastly, Buegel, Minch, and Harwood demonstrate estoppel may be applied against local government. Buegel v. City of Grand Forks, 475 N.W.2d 133, 136 (N.D. 1991); Minch v. City of Fargo, 297 N.W.2d 785, 790 (N.D. 1980); City of Fargo v. Harwood Twp., 256 N.W.2d 694, 700 (N.D.1977). Further, the elements of estoppel have been satisfied as the City expressly authorized Property to be used for auto body and repair. Relying upon the same, Alton elected to establish his business in Burlington, purchased Property, and built a body shop. Further, the City expressly authorized Alton to expand and rebuild a portion of the body shop. Thus, relying upon the same, Alton expanded and rebuilt a portion of the body shop. Further, Alton continuously used Property for auto body and repair in reliance upon the City's prior authorization and representations. The City now argues auto body and repair is not allowed and the latter is the basis for denying his request for a variance to Alton's detriment.

B. The District Court erred in not striking or excluding matters in the Findings that are not reflected in the record.

[¶14] First, contrary to that alleged by the City, Alton is not arguing the Findings should

be stricken from the record. City's Brief, ¶24. Rather, Alton is arguing the assertions, facts, statements, and the like set forth in the Findings that were not presented, discussed, or the like at the public hearings held in 2016 should be stricken and disregarded. Neither N.D.C.C. §40-47-04 nor Gowan authorizes the inclusion of such assertions, facts, statements, and the like in the Findings. Gowan v. Ward County Commission, 2009 ND 72, 764 N.W.2d 425. Second, Gowan is distinguishable from the case at bar. In Gowan, the appellant requested the record be completed. Id. at ¶10. In the case at bar, Alton did not request the City establish findings, argue the City failed to establish findings, or the like. Further, in Gowan, "[t]he written findings merely summarize the testimony at the Commission meetings." Id. The written findings in the case at bar include assertions, facts, statements, and the like that were not presented, discussed, or the like at the public hearings held in 2016. Lastly, the City asserts the Findings that include assertions, facts, statements, and the like that were not presented, discussed, or the like at the public hearings held in 2016 is not prejudicial. Adding grounds and reasoning for its decision that were not presented, discussed, or the like at the public hearings held in 2016 is prejudicial. Moreover, allowing Alton to submit a supplemental brief does not cure the same. The City cites Hagerott for the proposition that a "lack of written findings does not render a decision arbitrary, capricious, or unreasonable." City's Brief, ¶63 (citing Hagerott v. Morton County Bd. of Com'rs., 2010 ND 32, ¶¶21-22, 778 N.W.2d 813). Given the same, there would be no harm in striking and disregarding the assertions, facts, statements, and the like that were not presented, discussed, or the like at the public hearings held in 2016.

C. Alton is not arguing the City may not consider statements of the public.

[¶15] Contrary to that alleged by the City, Alton is not arguing the statements of

neighboring landowners and the public may not be heard and considered. City's Brief, ¶64. Alton is arguing the opinions and complaints of two neighbors should not be permitted to serve as the basis to deny his request for a variance given the opinions and complaints are suspect, both neighbors moved to the area after Property began being used for auto body and repair, one neighbor has a long contentious history with Alton, inter alia.

[¶16] **Issue 3: There is not substantial evidence to support the City's decision.**

[¶17] The decision of a local governing body must be affirmed unless: 1) the local body acted arbitrarily, capriciously, or unreasonably; **or** 2) there is not substantial evidence to support the decision. Hentz v. Elma Tp. Bd. of Supervisors, 2007 ND 19, ¶4, 727 N.W.2d 276. Alton demonstrated there is not substantial evidence to support the City's decision and there is substantial evidence to grant a variance. Further, Alton argued the same in his *Brief of Appellant*. The City did not respond to or oppose the same in the City's Brief. Rather, the City only argued its action are not arbitrary, capricious, or unreasonable. The latter is an admission that Alton's argument is meritorious.

Conclusion

[¶18] Alton respectfully requests the Court grant the relief requested in his *Brief of Appellant*.

[¶19] DATED: January 21st, 2020.

/s/ Brian C. Balstad

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Certificate of Compliance

[¶20] I hereby certify the Reply Brief of Appellant complies with the page limitation. The Brief of Appellant is twelve (12) pages in length excluding the Certificate of Compliance.

[¶21] DATED this 21st day of January, 2020.

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Appellant,	)	
	)	Supreme Court Case No. No. 20190318
vs.	)	District Court Case No. 51-2017-CV-00009
	)	Nature of Proceedings: Administrative Appeal
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 document:

1. **Reply Brief of Appellant**

was duly served upon:

Scott K. Porsborg and Brian D. Schmidt
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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 21st day of January, 2020.

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