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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Richard Dahm, Appellant, vs. Stark County Board of Commissioners, Appellee.	))))))))))	Supreme Court No. 20130238

Appeal from Order Denying Motion to Submit Additional Evidence and Affirming Denial of Zoning Application entered
on May 31, 2013 and Judgment entered on June 5, 2013
Civil No. 45-2012-cv-00716
County of Stark, Southwest Judicial District
Honorable Zane Anderson, Presiding

REPLY BRIEF OF APPELLANT RICHARD DAHM

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LAW AND ARGUMENT

I. The District Court Abused its Discretion in Denying the Motion to Submit Additional Evidence.

A. The Evidence is Material.

[¶ 1] Evidence regarding developments surrounding Duck Creek is material. In its denial of the Application, the County Board claimed that Duck Creek was not "compatible with the environmental characteristics of the site, as well as complement the location." (App. 72) Duck Creek is located between a nearly identical subdivision and a planned higher density mixed residential and commercial area. (*See* App. 184, 255–59.) The County Board denies this fact with no supporting evidence. *See* Appellee's Brief, ¶ 25 ("[Duck Creek] would create a relatively higher density development in the country."). Dahm sought to submit evidence that will allow the district court to actually assess whether Duck Creek complements the location, without relying on the County Board's unsupported statements. Accordingly, evidence regarding surrounding developments is material to this Court's review of whether the Duck Creek Project complements the location.

[¶ 2] Evidence regarding the approval of other applications in 2011 and 2012 is also material.[1] The County Board claims this evidence is immaterial because "these other decisions were made in relation to unique characteristics of those particular parcels of land and the associated requests." Appellee's Brief, ¶ 38. However, the "unique characteristics" of land are irrelevant. The purpose of this evidence is to show that the

[1] The County Board incorrectly asserts that Dahm has asked the Court to examine zoning applications "dating back to 1975." Appellee's Brief, ¶ 38. Dahm seeks to submit evidence regarding approvals of applications dating back to July 2011. (App. 185.)

County Board held other applications to such a low standard that the Board was not even aware of the characteristics of the land due to deficiencies in the applications, and simply approved rezoning and plats based on very little information. In contrast, the Application was subjected to a rigorous review. The additional evidence tends to prove that the Commission treated the Application in an arbitrary and capricious manner.

[¶ 3] Finally, evidence regarding conflicts of interest is material. On appeal from a local governing body's decision, the district court must determine whether the body "acted arbitrarily, capriciously, or unreasonably . . . ." *See* N.D.C.C. § 28-34-01. A decision is arbitrary where it is "founded on prejudice or preference" rather than fixed rules and procedures. *See* Black's Law Dictionary p. 42 (3rd ed. 2006). Dahm seeks to submit evidence that tends to prove the County Board's, particularly Commissioner Hoff's and Commissioner Elkin's, decision was based on prejudice or preference, rather than the fixed rules of the Original Ordinance. The County Board's argument that the Commissioners' conflicts fall outside of the parameters of Section 44-04-22 of the North Dakota Century Code is inapposite. Dahm has never claimed that the Commissioners have a conflict of interest that required recusal from considering the Application. Rather, their conflicts led to an arbitrary and capricious decision that was based, in part, on their interests in other residential developments. Therefore, Section 44-04-22 has no application to this case. Because the County Board has not disputed the accuracy of the additional evidence, and it tends to prove the County Board's decision on the Application was arbitrary and capricious, the district court abused its discretion in denying the motion to submit additional evidence.

B. Dahm was Justified in Not Presenting the Evidence to the County Board.

[¶ 4] This Court should permit additional evidence because there were two grounds for the failure to adduce the evidence at the proceedings before the Zoning Commission. First, Dahm was not in possession of the evidence, as there was no reason for Dahm to be aware of unrelated applications or the Commissioners' prior dealings at the time the Application was submitted. Further, Dahm could not have known that he should submit any evidence regarding the standard applied to other applications, because it was impossible for him to know that the Application would be subjected to a higher standard prior to the actual hearing on the Application.

[¶ 5] Second, even if Dahm did have knowledge that he was being treated unfairly, or that Commissioners Hoff and Elkin had conflicts of interest, it would not have been prudent for Dahm to address such issues at a public hearing. The County Board claims that this is analogous to a situation where a litigant before a district court requests a new judge on the grounds of apparent judicial bias. Appellee's Brief, ¶ 36. However, there is no analogous remedy for a property owner facing a county body. The County Board cannot reasonably argue that Dahm could have sought a "replacement" zoning board. Because there were reasonable grounds for Dahm's failure to adduce the additional evidence at the public hearings, and the evidence is material to the appeal, the district court abused its discretion in refusing to consider the additional evidence.

II. <u>The County Board's Decision was Arbitrary, Capricious, and Unreasonable.</u>

A. Plat Approval is Mandatory Where the Requirements are Met.

[¶ 6] Where a plat complies with a county's subdivision regulations and "makes appropriate provisions" for public health, safety, etc., "such plat shall be finally

approved." N.D.C.C. § 11-33.2-12. The County Board argues that approval of a plat that meets the listed requirements is not mandatory, despite the "shall" language, because Dahm "failed to satisfactorily address several of the considerations." Appellee's Brief, ¶ 30. Dahm has argued that where a party does satisfy the listed requirements, plat approval is mandatory. The County Board has not refuted this argument by stating that approval is not mandatory where a party does not satisfactorily address the requirements. The County Board also argues that approval is not mandatory because Dahm was seeking preliminary, and not final, plat approval. *Id.* at ¶ 30. It is illogical to state that final approval, but not preliminary, is mandatory when it is impossible to reach the final plat stage before obtaining preliminary plat approval.

[¶ 7] In short, once the applicable regulations are complied with, it becomes the "mandatory duty" of the zoning authority to approve a subdivision plat. *See* 83 Am. Jur. 2d Zoning and Planning § 462; *see also Tippecanoe Cnty. Area Plan Comm'n v. Sheffield Developers, Inc.*, 394 N.E.2d 176, 180 (Ind. App. 1979); *Akin v. South Middleton Twp.*, 547 A.2d 883, 884 (Pa. 1988); *Richardson v. City of Little Rock Planning Comm'n*, 747 S.W.2d 116, 117–18 (Ark. 1988); *Kaufman v. Planning and Zoning Comm'n of City of Fairmont*, 298 S.E.2d 148, 158 (W.Va. 1982); *Projects Am. Corp. v. Hilliard*, 711 S.W.2d 386, 389 (Tex. App. 1986).

B. The County Board Ignored the Evidence.

[¶ 8] The County Board's decision was arbitrary, capricious, and unreasonable because the County Board ignored the evidence. A decision is "arbitrary, capricious, or unreasonable" where it is not 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." *Klindt v. Pembina Cnty. Water Res. Bd.*, 2005 ND 106, ¶

12, 697 N.W.2d 339, 345 (N.D. 2005) (citations omitted); *see also Hagerott v. Morton Cnty. Bd. of Comm'rs*, 2010 ND 32, ¶ 7, 778 N.W.2d 813, 817. A decision to deny a claim is arbitrary where the governing body has ignored evidence that supports the claim. *See Mahon v. U.S. Dept. of Agric.*, 485 F.3d 1247, 1260 (11th Cir. 2007); *see also Cleveland Constr. v. NLRB*, 44 F.3d 1010, 1016 (D.C. Cir. 1995) ("ignoring of evidence" is grounds for finding an action arbitrary and capricious); *Nat. Res. Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (an agency rule is arbitrary and capricious where the agency "ignores important arguments or evidence"). The deference to a governing body's decision "must end" when the body acts arbitrarily with regard to the facts. *Mahon*, 485 F.3d at 1261.

[¶ 9] In this case, the County Board continually ignored the evidence before it, and based its denial on the repeated erroneous statements that such evidence was not submitted. In his principal brief, Dahm meticulously noted each of the County Board's concerns, and individually addressed each by citing to the Application. *See* Appellant's Brief, ¶¶ 32–36. Rather than respond, the County Board, as it did at the rezoning hearings and before the district court, simply pretends the evidence was never presented. *See e.g.*, Appellee's Brief, ¶ 6 (repeating that several items were absent from the Application without addressing the facts to the contrary set forth in Appellant's Brief). The County Board states: "Throughout his brief, Dahm cites to his application as supporting the rezoning and undermining the County's decision. Of course Dahm's application provides information he believes supports the application." *Id.* at ¶ 21. Yet, the County Board never asserts that any particular items of evidence do not support Dahm's position. Rather, the Board asserts that the evidence was never presented. *See*

id. at ¶ 6. The County Board's failure to acknowledge the evidence before it through the zoning process, district court proceedings, and this appeal, compels the conclusion that the County Board acted arbitrarily in denying the Application.

C. The County Board Departed from Precedent.

[¶ 10] A governing body's decision may also be considered arbitrary and capricious where the governing body treats "similarly situated" persons differently. *Mahon*, 485 F.3d at 1260. In other words, a "silent departure from precedent," where an applicant is treated differently from past applicants is arbitrary and capricious. *Cleveland Const.*, 44 F.3d at 1016.

[¶ 11] The County Board admits that "past projects may have been approved with less information than Dahm has presented." Appellee's Brief, ¶ 22. However, the County Board does not feel that this is relevant, and claims that "Dahm's argument is not that he satisfied what is required to rezone the property, but that others have not done in the past." *Id.* This argument fails for two reasons. First, as set forth in the record and in Dahm's principal brief, Dahm has satisfied what is required to rezone the property, the County Board has simply ignored the evidence Dahm presented. Second, the County Board admits that it has failed to treat similarly situated applicants the same, and that it departed from precedent in requiring additional information from Dahm. (*See also* App. 118 ("I'm kind of wondering whether we're stepping up our game here at a time when nobody's had any prior notice"); *id.* at 120 (stating that the "threshold has effectively been put at a level that's much higher than we used"). As admitted by the County Board, it applied a new, higher standard to Dahm than it had applied to similar applicants. The County Board silently departed from precedent and its decision should be overturned.

CONCLUSION

[¶ 12] Appellant Richard Dahm respectfully requests this Court reverse the district court's denial of his Motion to Submit Additional Evidence and the County Board's denial of the Application for zoning amendment and preliminary plat approval.

DATED this 5th day of November, 2013.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on November 5, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. REPLY BRIEF OF APPELLANT RICHARD DAHM;

and served the same electronically as follows:

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