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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-127

Mary C. Nesvig,
Respondent,

vs.

Crow Wing County, State of Minnesota,
Appellant,

David W. Trees, et al.,
Defendants.

Filed August 15, 2011
Reversed
Minge, Judge

Crow Wing County District Court
File No. 18-CV-09-5139

Richard W. Greeman, Minneapolis, Minnesota (for respondent)

Jay T. Squires, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and Muehlberg, Judge.*

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

MINGE, Judge

Appellant county challenges the district court's order reversing the local board of adjustment's denial of respondent's after-the-fact variance request. Because the board reviewed the appropriate factors, because the record contains sufficient evidence to support the board's conclusions, and because it is the board's role to weigh the *Stadsvold* factors, we reverse the district court's order and reinstate the board's decision denying the variance request.

FACTS

Respondent Mary Nesvig owns lake property in Crow Wing County. In 1996, she applied to appellant Crow Wing County for a building permit to construct a garage on a site cleared by a previous owner. The permit stated that the garage would "meet all required setbacks," including the county zoning ordinance's setback provision requiring a minimum of 10 feet between any buildings and property lines. Nesvig included with her permit application a sketch indicating that her proposed construction site was 42 feet from the property line shared with defendants David and Kathleen Trees. However, Nesvig did not conduct a survey or have specific knowledge of the location of her property line. The county issued the permit and Nesvig constructed a garage.

In 2001, the Trees hired a contractor to survey their property. The surveyor discovered that Nesvig's garage violated the 10-foot setback requirement and that the southeast corner of Nesvig's garage extended approximately one inch onto the Trees's property. The Trees notified Nesvig of the encroachment in 2002. The Trees offered to

sell about five feet of their property to Nesvig, but Nesvig declined the offer. The parties continued to negotiate without success until 2009, when the Trees complained to the county that Nesvig's garage violated the ordinance.

The county gave Nesvig three options: (1) move the garage to an ordinance-conforming location; (2) demolish the garage; or (3) remove the portion of the garage encroaching on the Trees's property, apply for an after-the-fact setback variance, and then comply with the decision on the variance request. Nesvig took the third option and started by applying for a variance. The county board of adjustment conducted a hearing on the matter and ultimately denied the variance request.

Nesvig sought review of the board's decision in the district court. The district court found that the board's decision was arbitrary and capricious and ordered the county to grant the variance. The county appeals.

D E C I S I O N

A county board of adjustment has "the exclusive power to order the issuance of variances from the terms of any official control." Minn. Stat. § 394.27, subd. 7 (2010). The decision of a board of adjustment is final, except that an aggrieved party may appeal an adverse decision to the district court. *Id.*, subd. 9 (2010). On appeal from the district court's order, we independently review the board's decision without giving deference to the findings and conclusions of the district court. *Town of Grant v. Wash. Cnty.*, 319 N.W.2d 713, 717 (Minn. 1982).

A local board of adjustment "has broad discretion to grant or deny variances, and we review the exercise of that discretion to determine whether it was reasonable."

Kismet Investors, Inc. v. Cnty. of Benton, 617 N.W.2d 85, 90 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000). In reviewing a decision of a county zoning authority, a court must "determine [whether] the zoning authority was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and . . . [whether] the evidence could reasonably support or justify the determination." *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quotation omitted). If there is evidence in the record supporting the decision, a court may not substitute its judgment for that of the zoning authority, even if it would have reached a different conclusion. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983).

When considering a request for an area variance,[1] a county zoning authority "shall" permit the variance "when the applicant makes a showing of 'practical difficulties.'" *Stadsvold*, 754 N.W.2d at 331; Minn. Stat. § 394.27, subd. 7. In determining whether there are practical difficulties, factors to be considered by the board of adjustment include the following:

> (1) how substantial the variation is in relation to the requirement; (2) the effect the variance would have on government services; (3) whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties; (4) whether the practical difficulty can be alleviated by a feasible method other than a variance; (5) how the practical

[1] An area variance "is an exemption from official controls concerning lot restrictions such as . . . setback . . . requirements." *In re Appeal of Kenney*, 374 N.W.2d 271, 274 (Minn. 1985). "A use variance permits a use or development of land other than that prescribed by zoning regulations." *Id.* Here, because Nesvig seeks an exemption from setback requirements, she is seeking an area variance.

> difficulty occurred, including whether the landowner created the need for the variance; and (6) whether, in light of all of the above factors, allowing the variance will serve the interests of justice.

Stadsvold, 754 N.W.2d at 331 (footnote omitted). Economic considerations are within the fourth factor of feasibility. *Id.* at n.5. In situations where a party seeks a variance after already violating a provision of a zoning ordinance, the supreme court recommended considering the following additional factors: (7) the applicant's good faith; (8) the applicant's attempt to comply with the ordinance; (9) the applicant's investment in the construction; (10) whether the construction was completed; (11) whether similar structures existed in the area; and (12) whether the benefit to the public in denying the variance outweighs the burden on the applicant to comply with the zoning ordinance. *Id.* at 333.

Here, the record indicates that the board considered all twelve of the *Stadsvold* factors and concluded that the evidence favored denial of the variance request. The board verbally considered and completed a written checklist that included each *Stadsvold* factor and a summarizing thirteenth factor. The board identified the following four factors as favoring Nesvig's variance request: her good faith (factor 7), her attempt to comply with the ordinance (factor 8), her investment in the property (factor 9), and her completion of construction prior to learning of the violation (factor 10). The board identified the remaining factors as favoring denial, finding that a variance would be substantial because it would completely eliminate the setback requirement (factor 1); lack of a setback would interfere with providing government services (factor 2); allowing a building right up to

the lot line would be a substantial detriment to the value of the Trees's property (factor 3); Nesvig had reasonable available alternatives, including moving the garage to a conforming location on her property at a cost of $5,000 or less (factor 4); Nesvig had created the practical difficulty by not locating her boundary or having a survey prior to constructing the garage (factor 5); Nesvig failed to seek a variance before starting work (factor 8); there are no other setback variances in the area (factor 11); and the benefits to the county from denial were not outweighed by the detriment to Nesvig (factor 12). In summarizing, and after considering all the foregoing factors, the board of adjustment concluded that the interests of justice favored denying the variance request (factor 6).

The district court reversed because of statements by a board member that, even with Nesvig's variance request, her garage would encroach upon the Trees's property. We recognize that this statement was inaccurate; Nesvig's request included a commitment to eliminate the one-inch encroachment, thus eliminating that as a negative consideration. However, this comment appears to only reflect the view of one member of the board—there is no indication that the board itself made such an error or that others shared this member's conclusion. Also, the district court found unpersuasive the conclusion that the variance would have an adverse impact on government services. We agree. There is no rational explanation in the record as to how the variance would adversely affect the provision of government services.

Evaluating the factors, we note that even if the board was mistaken as to public services and encroachment, there are still several denial factors that are supported by the record. The variance would be substantial. It would result in Nesvig's garage being right

up to the Trees's lot line, denying them the benefit of any setback, requiring them to absorb the setback in the use of their own property, and diminishing the useful size of their property. The record indicated Nesvig could move her garage for $5,000 or less, demonstrating that such a solution may be practical. Nesvig failed to use due care in determining the location of lot lines before starting construction, and there was no record of similar nonconforming structures in the community.

This leaves two summary factors: interests of justice (factor 6) and the weighing of the benefits to the county against the detriment to Nesvig (factor 12). The board members made problematic comments in explaining why the detriments to Nesvig did not outweigh the benefits to the county of denying the variance, including the following statement by the board chairman:

> How do we explain that? We struggle with this—this question all the time. The minimum benefits to the county are—no. The answer is no, and—well, there—we don't need an explanation maybe.

The board's difficulty in applying the *Stadsvold* factors to Nesvig's situation is apparent. We, as judges, may also have such a difficulty. Not all of the standard factors are necessarily applicable in every case. Although candor is encouraged, board members should carefully weigh their comments. Untoward comments may indicate that a decision was arbitrary and unreasonable.

In closing, we note that the question before the judiciary on review is not whether the courts would make the same decision as the board. It is not the role of this court or the district court to substitute its judgment for that of the board of adjustment. We simply

review to determine whether the board reasonably weighed the factors and whether the record contains substantial evidence supporting the board's decision. Because we conclude there is adequate support for the board's decision, we reverse the district court's order and reinstate the decision of the Crow Wing County Board of Adjustment denying Nesvig's variance request.

Reversed.

Dated: