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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1548**

Jordan Community Action Group, et al.,
Respondents,

vs.

The City of Jordan,
Appellant.

**Filed April 9, 2012
Reversed
Cleary, Judge**

Scott County District Court
File No. 70-CV-10-30197

Phillip R. Krass, Rachel R. Myers, Malkerson Gunn Martin LLP, Minneapolis,
Minnesota (for respondents)

Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant City of Jordan challenges the district court order granting summary judgment in favor of respondents Jordan Community Action Group, Michelle Bisek, Christa Oldsberg, and Heidi Lawrie. The district court determined that appellant's resolution granting a conditional-use permit (CUP) to Ballard-Sunder Funeral Home

(Ballard-Sunder) to operate a crematory within its funeral home was null and void. The district court also rejected respondent's argument on cross-appeal that installation of a crematory was an unlawful expansion of a non-conforming use.¹ We conclude that appellant correctly interpreted its own zoning ordinance to include a crematory within the definition of a funeral home. We also conclude that appellant's decision to issue a CUP to Ballard-Sunder to operate a crematory within its funeral home was reasonable, not arbitrary or capricious, because it was supported by the evidence presented to the planning commission and the city council. Finally, we hold that the granting of the CUP did not constitute an expansion of a non-conforming use. For these reasons, we reverse.

FACTS

On June 15, 2010, Ballard-Sunder applied for a CUP to install and operate a crematory as part of its existing operations. Ballard-Sunder is a funeral home located in the C-1 Neighborhood Business District of Jordan. According to appellant's zoning ordinances, an applicant must complete a CUP application and submit it to appellant, who will forward it to appellant's planning commission. The planning commission must hold a public hearing on the application and will send a report to the city council for its consideration. Then the city council will grant or deny the CUP.²

¹ The district court also granted respondents' motion to strike from the record appellant's submission of exhibits issued after appellant had granted the CUP. Appellant does not challenge that portion of the district court's decision.

² The city ordinances lay out specific findings the city council must make before it grants a CUP. The CUP ordinance states:

Subd. 4. Conditional Use Permits.

Appellant's planning commission held a public hearing on Ballard-Sunder's CUP application on July 13, 2010. At the hearing, a city planner presented information he had

A. Criteria for Approval. In granting a conditional use permit, the Council shall consider the advice and recommendations of the Planning Commission and the effect of the proposed use upon the comprehensive plan and the health, safety, morals and general welfare of occupants on surrounding lands. Among other things, the Council shall make the following findings where applicable.

1. The use will not create an excessive burden on existing parks, schools, streets and other public facilities and utilities which serve or are proposed to serve the area.

2. The use will be sufficiently compatible or separated by distance or screening from adjacent agricultural or residentially zoned or used land so that existing homes will not be depreciated in value and there will be no deterrence to development of vacant land.

3. The structure and site shall have an appearance that will not have an adverse effect upon adjacent residential properties.

4. The use in the opinion of the Council is reasonably related to the overall needs of the City and to the existing land use.

5. The use is consistent with the purposes of this Chapter and the purposes of the zoning district in which the applicant intends to locate the proposed use.

6. The use is not in conflict with the comprehensive plan.

7. The use will not cause traffic hazard or congestion.

8. Existing business nearby will not be adversely affected because of curtailment of customer trade brought about by intrusion of noise, glare, or general unsightliness.

Jordan, Minn., Land Use Regulation (Zoning) (Jordan LUR) § 11.11, subd. 4(A) (2009). The Jordan Land Use Regulations are adopted into the city code by reference in § 154.01, but not included in full text. For that reason, they are referenced by regulation number herein.

compiled regarding the requirements for granting a CUP under appellant's zoning ordinances. The planning commission also heard comments from community members regarding their concerns about the impact and effects of a crematory. The planning commission unanimously recommended granting the CUP with certain conditions.³

On July 19, 2010, appellant's city council addressed the CUP application at its council meeting. The council found that the eight requirements for granting a CUP under Jordan LUR § 11.11, subd. 4A, had been met. Like the planning commission, the council also heard comments and concerns from community members about the impact of the crematory in the community. The council approved the planning commission's recommendation to grant the CUP by a 3-2 vote. On August 2, 2010, the council approved Resolution 8-23-2010, which adopted findings of fact and granted the CUP to Ballard-Sunder.

Respondents, a community action group and three individuals opposed to the grant of the CUP, filed a complaint seeking a declaratory judgment and injunctive relief. Respondents moved for a temporary restraining order, and that motion was denied by the district court on December 16, 2010. Respondents then moved for summary judgment. The district court granted summary judgment in favor of respondents, holding that

³ The conditions included that:

Emissions must not exceed 20 [p]ercent opacity; [c]ombustors must be equipped with afterburners that maintain flue gases at 1,200 degrees Fahrenheit for at least 0.3 seconds; [a]sh must be stored and transported in a way that avoids its becoming airborne; [and] [t]he applicant is not able to conduct cremations for the other funeral homes.

appellant's adoption of Resolution 8-23-2010 "was not reasonable and constituted an unauthorized and unlawful amendment of the [o]rdinance." This appeal followed.

DECISION

There are two decisions of appellant's city council to be reviewed here. The first is the council's interpretation of the zoning ordinance to include a crematory within the definition of a conditional-use funeral home. The second is the council's decision, based on its interpretation of the ordinance, to grant a CUP to Ballard-Sunder to operate a crematory.

Appellant argues that it properly interpreted its own zoning ordinance, which includes a funeral home as a conditional use in a C-1 Neighborhood Business District, to include a crematory. Respondents argue that a funeral home and a crematory are separate and distinct entities, and therefore a crematory is not a permitted or conditional use in the C-1 district.⁴

"[T]he court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked." *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn. 1988) (quotation omitted). "The Minnesota legislature has delegated to municipalities the power to determine and plan the use of land within their boundaries." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 174 (Minn. 2006) (quotation omitted). "[A] zoning statute or ordinance is one which, by definition,

⁴ Appellant's city council mistakenly identified the zoning district as C-2 in Resolution 08-23-2010, and the district court partially based its decision on this mistake, claiming that appellant's actions amounted to rezoning the parcel. However, both parties agreed at oral argument that identifying the parcel as C-2 was simply a mistake.

regulates the building development and uses of property.” *Id.* at 172 (quotation omitted). “Zoning ordinances must be consistent with the Minnesota Constitution and statutes.” *Wedemeyer v. City of Minneapolis*, 540 N.W.2d 539, 541 (Minn. App. 1995). “When reviewing a zoning determination, appellate courts review directly the municipality’s determination without any regard for the district court’s conclusions.” *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 19 (Minn. App. 2003). “[T]he question is whether the city council’s decision was reasonable or whether it was unreasonable, arbitrary or capricious.” *Swanson*, 421 N.W.2d at 314. “A municipality’s determination is reasonable when the stated reasons for its decision are legally sufficient and have a factual basis.” *Citizens*, 672 N.W.2d at 19.

“A municipality’s decision to grant or deny a conditional use permit or variance is a quasi-judicial decision that should be afforded great deference.” *Id.* at 22–23. “[I]n special use permit cases, ‘reasonableness’ is measured by the standards set out in the local ordinance” *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982).

“Interpretations of . . . existing local zoning ordinances are questions of law that this court reviews de novo.” *Clear Channel Outdoor Adver., Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. May 18, 2004); *see also Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). “A zoning ordinance should be construed (1) according to the plain and ordinary meaning of its terms, (2) in favor of the property owner, and (3) in light of the ordinance’s underlying policy goals.” *Clear Channel*, 675 N.W.2d at 346 (quotation

omitted). “Plain meaning presumes the ordinary usage of words that are not technically used or statutorily defined, relies on accepted punctuation and syntax, and draws from the full-act context of the statutory provision.” *Opay v. Experian Info. Solutions, Inc.*, 681 N.W.2d 394, 396 (Minn. App. 2004). “We must give weight to the interpretation that, while still within the confines of the term, is least restrictive upon the rights of the proper owner to use his land as he wishes.” *Frank’s*, 295 N.W.2d at 608–09.

Construe an Ordinance According to Its Plain and Ordinary Meaning

Appellant’s zoning ordinances do not include a specific definition of a “funeral home.” Appellant maintains that its interpretation that a funeral home includes a crematory is consistent with the definitions found in Minn. Stat. §§ 149A.01–.98 (2010), the statutes regulating mortuary science and disposition of dead bodies. The purpose of chapter 149A is to regulate “the removal, preparation, transportation, arrangements for disposition, and final disposition of dead human bodies for purposes of public health and protection of the public.” Minn. Stat. § 149A.01, subd. 1. Because appellant’s ordinances do not specifically define “funeral home” and municipal zoning ordinances must be consistent with Minnesota statutes, the statutory definitions regulating the disposition of dead bodies inform the land use decisions made by appellant. *See City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 6 (Minn. 2008) (“[A] city cannot enact a local regulation that conflicts with state law . . .”).

Cremation is one of many forms of final disposition of a dead human body. Minn. Stat. § 149A.02, subd. 16, defines “final disposition” as “the acts leading to and the entombment, burial in a cemetery, or cremation of a dead human body.” Accordingly,

any reference to “final disposition” in other sections of chapter 149A necessarily incorporates this definition and includes cremation as one of the forms of final disposition. *See id.*, subd. 1 (stating that, for purposes of chapter 149A, “the terms defined in this section have the meanings given them”).

Appellant’s ordinance provides for a “funeral home,” which is not specifically defined in the statutes. However, Minn. Stat. § 149A.02, subd. 20, defines “funeral establishment” as “any place or premise devoted to or used in the holding, care, or preparation of a dead human body for final disposition or any place used as the office or place of business of any person that provides funeral goods or services to the public.” Minn. Stat. § 149A.02, subd. 23, defines “funeral services” as “any services which may be used to: (1) care for and prepare dead human bodies for burial, cremation, or other final disposition; and (2) arrange, supervise, or conduct the funeral ceremony or the final disposition of dead human bodies.” Because cremation is a final disposition of a dead human body, and because the funeral services performed by a funeral establishment include *conducting* the final disposition, conducting cremations is one of the services permitted to be offered by a funeral establishment.

Respondents compare appellant’s ordinances with those examined in another case decided by this court. In that case, two businesses wanted to obtain a special-use permit (SUP) to build an asphalt plant on rurally-zoned property. *Prior Lake Aggregates, Inc. v. City of Savage*, 349 N.W.2d 575 (Minn. App. 1984). Prior Lake Aggregates operated a sand and gravel pit. Northwest Asphalt manufactured asphalt and wanted to enter into an agreement with Prior Lake that would allow Northwest to operate an asphalt plant on

Prior Lake's land, and in return, Northwest would buy its gravel from Prior Lake. After being denied a permit, the two businesses argued that they were entitled to a SUP because the city's zoning ordinance allowed SUPs for uses similar in nature to the permitted uses in the rurally-zoned area. One such permitted use allowed mining, excavation, and land reclamation. The two businesses contended that production of asphalt was included in the definition that allowed mining, excavation, and land reclamation. The court held that "[c]onstruing the terms 'mining', 'excavation' and 'land reclamation' according to their plain and ordinary meaning and construing them strictly against the city, we cannot find that they include the processing and production of road base materials." *Id.* at 578.

Respondents compare the facts in *Prior Lake* to appellant's contention that cremation is included in the definition of a funeral home. Respondents' reliance on *Prior Lake* is misplaced because the definitions under Minn. Stat. § 149A.02 functionally include a crematory as part of a funeral establishment, which is where one may conduct the final disposition of a dead human being. In this case, a crematory is not defined as similar to a funeral home, or something in addition to a funeral home, it is included in the statutory definition.

Construe an Ordinance in Favor of the Property Owner

In a similar zoning case, a city was interpreting its own zoning ordinance in the context of rezoning certain properties and issuing building permits. *Frank's*, 295 N.W.2d 604. In *Frank's*, a retail store wished to build on land that was zoned I-1 for industrial use. The city rezoned the land to B-1 for limited business use including "medical and dental services, business and professional offices, hospitals, sanitoriums and rest homes,

private clubs or lodges, beauty parlors, greenhouses, and lawn and garden centers.” *Id.* at 605 n.2. Frank’s Nursery Sales primarily sold lawn and garden products, but also sold some craft items, which amounted to no more than 18% of its total national sales. *Id.* at 605 n.1.⁵ The city claimed that the ordinance excluded from the definition of “lawn and garden” any establishments that sold other items. The court found that the plain meaning of a “lawn and garden” center “does not seem to exclude stores that primarily sell horticultural items but sell some other items as well.” *Id.* at 608. The court determined that the ordinance could be interpreted to include a store like Frank’s as a “lawn and garden” center, and that weight should be given to an interpretation that “is least restrictive upon the rights of the property owner to use the land as he wishes.” *Id.* at 608–09.

In the present case, the city and property owner favor the same interpretation of the ordinance. The interpretation that the definition of a funeral establishment under Minn. Stat. § 149A.02, subd. 20, includes a crematory construes the ordinance in favor of the property owner because it allows Ballard-Sunder to use its land as it wishes. Appellant construed its ordinance in favor of Ballard-Sunder when it determined that a crematory is included in a funeral home.

⁵ The city amended the definition of “lawn and garden” center in the ordinance to exclude any store that sold products other than lawn and garden products, even if the other products were not the store’s primary business. The city made this amendment after the rezoning but before Frank’s applied for a building permit. The city eventually conceded that the amendment was invalid, but still argued that “even the pre-amendment ordinance can be interpreted to exclude a store like Frank’s that sells some other than lawn and garden items” *Id.* at 607.

Construe an Ordinance in Light of the Underlying Policy Goals

The purpose of the C-1 Neighborhood Business District is set forth in appellant's ordinances. The C-1 district "is established to allow commercial uses complementary to and in close proximity to residential uses. The primary emphasis is on local retail facilities such as grocery and convenience stores." Jordan LUR § 11.35, subd. 1 (2009). Respondents argue that the permitted uses in the C-1 district are retail stores and shops that produce few goods. Respondents further argue that the gruesome aspects of cremation, such as the incineration and pulverization of dead human bodies, are not meant for this district. However, these aspects are no less unpleasant than what already happens in a funeral home when embalming a dead human body, including breaking bones, sewing skin, and tearing muscles. Such practices of a funeral establishment are already allowed in the C-1 district because they are part of the operations of Ballard-Sunder. Therefore, allowing other means of final disposition, like cremation, will not be adverse to the underlying policy.

In *Frank's* the court found that the store, as a high-volume retail center, may have fit better in the B-2 retail zone, but nothing in the definition of a B-1 zone excluded it.

Frank's, 295 N.W.2d at 609. The court noted:

It is Frank's size and operating style, the "supermarket" approach complained of by the council and residents, not the limited presence of other than lawn and garden items, that is the actual concern of the city. Thus, it does not contravene the intent of the ordinance to include within the phrase "lawn and garden" center a store like Frank's.

Id. Similarly, although in this case some neighbors might have an aversion to the cremation process, the conditional use allows a funeral home to prepare for and conduct the final disposition of human bodies.

Appellant's city council correctly interpreted the zoning ordinance when it determined that a crematory is included in the definition of a funeral home. Because a crematory conducts the final disposition of a dead human body, and such a service is allowed in a funeral home, a crematory is included in the definition of a funeral establishment and allowed in the C-1 district.

Was the grant of the CUP reasonable?

Because we determine that appellant properly interpreted its ordinance to include a crematory within the definition of a funeral home, the second issue to address is whether the decision to grant the CUP to Ballard-Sunder was reasonable. Because the district court categorized appellant's granting of the CUP as an unlawful amendment of the ordinance, it never reviewed the reasonableness of appellant's decision. However, this court can still review the granting of the CUP because we look at the municipal decision, not the district court's determination. *Citizens*, 672 N.W.2d at 19.

As discussed above, appellant's zoning ordinances provide criteria for approving a CUP, as well as a detailed procedure that must be followed. In the present situation, appellant's planning commission held a public meeting on July 13, 2010, to discuss the proposed CUP. At that meeting, a city planner presented information collected after Ballard-Sunder had submitted its CUP application. Also at that meeting, the planning commission discussed other crematories in Minnesota and complaints received about

those crematories. The planning commission reviewed Ballard-Sunder's responses to the CUP application and members of the public commented and asked questions. Mr. Ballard, owner of Ballard-Sunder, and Mr. Koch, mortician investigator for the Minnesota Department of Health, were present and answered community members' questions. The planning commission unanimously agreed to recommend that the city council approve the application. On July 19, 2010, the city council also held a public meeting and heard comments and concerns from community members. The city council approved the application and issued Resolution 8-23-2010. In Resolution 8-23-2010, the city council made findings of fact that the application met all of the requirements of the ordinance and granted the CUP to Ballard-Sunder in accordance with the procedures required by the ordinance.

In a similar case, a citizens' group objected to a city council's granting of a CUP to a supportive housing facility for homeless men and women. *Citizens*, 672 N.W.2d 13. The court first reviewed the interpretation of the applicable housing law and then reviewed whether the city's decision to grant a CUP to the housing facility was reasonable. The citizens' group argued that granting the CUP was "arbitrary, capricious, and unreasonable because [the citizens' group] presented sufficient evidence that [the housing facility] would be detrimental to the public health, safety, comfort, or general welfare," and that therefore, the granting of the permit did not conform to the applicable ordinances. *Id.* at 22–23. The court found that the housing facility had presented sufficient evidence for the city to make all the findings required of it. The city had incorporated the findings of the planning department, and the planning department's

report detailed the basis for each finding required by the ordinances. Because the city found that there was sufficient evidence to make the findings, as required by its own ordinances, it granted the CUP. The court held that this grant was reasonable. *Id.* at 23.

In other cases, courts have looked to what a city's ordinances require to determine whether a grant or denial of a special use permit was reasonable and not arbitrary or capricious. *See Swanson*, 421 N.W.2d at 314 (“The city council’s finding of a likelihood of substantial environmental damage is thus supported by the evidence and provides a rational bases for the municipal decision. Such a finding is sufficient reason, under the ordinance, for denying the plat application.”); *White Bear*, 324 N.W.2d at 177 (“We not only find this reasoning persuasive but hold that the grounds assigned constitute a rational basis for the council’s decision. Such grounds fall well within the criteria set forth in the zoning code.”); *R.L. Hexum & Assocs., Inc. v. Rochester Twp., Bd. of Supervisors*, 609 N.W.2d 271, 277 (Minn. App. 2000) (“[W]e conclude that the township board’s issuance of the CUP is reasonable and not arbitrary or capricious. There is ample evidence in the record that the sprayfields would not be inconsistent with the policies and purposes of the interim ordinance.”)

Here, the city council’s grant of a CUP to Ballard-Sunder was not arbitrary or capricious; it was reasonable. Appellant’s planning commission and city council followed the procedures outlined in its ordinances for granting a CUP. Further, there is sufficient evidence in the record that the city council thoroughly reviewed the application

of Ballard-Sunder and made the required findings of fact.⁶ Because there is sufficient evidence that the city council determined that the application met all of the requirements of the zoning ordinance, the city was reasonable, not arbitrary or capricious, in granting the CUP to Ballard-Sunder.

Was the grant of the CUP an expansion of a non-conforming use?

The district court determined that appellant had properly interpreted its ordinance defining non-conforming uses to exclude the subject parcel and had properly categorized the subject parcel as conforming.

Appellant's code defines a "non-conforming use" as a "use of land, buildings, or structures legally existing on the effective date of this Chapter which does not comply with the regulations herein governing the zoning district in which such use is located. Any use which has been allowed as a conditional use shall not be considered non-conforming." Jordan LUR § 11.02(125) (2009).

"Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2010). In ascertaining legislative intent, courts presume that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable," and "the legislature intends the entire statute to be effective and certain." Minn. Stat. § 645.17 (2010). These principles of construction address state statutes, not

⁶ Appellant presented further evidence supporting its decision to the district court. However, because that evidence was not presented to the city council, and the court reviews the evidence as it was presented at the time of the application, the district court granted respondents' motion to strike the additional evidence from the record. There was sufficient evidence presented to the planning commission and city council to determine that the grant of the CUP was not arbitrary and capricious.

zoning ordinances. However, the “rules that govern the construction of statutes are applicable to the construction of ordinances.” *Smith v. Barry*, 219 Minn. 182, 187, 17 N.W.2d 324, 327 (1944).

Respondents and appellant agree that Ballard-Sunder never previously applied for a CUP under appellant’s ordinances. Respondents argue that the funeral home is an existing non-conforming use, while appellant argues it is a conforming use because funeral homes have been allowed as conditional uses under the C-1 district. Respondents assert that Jordan LUR § 11.02(125) should be interpreted to mean that any use which has not been granted a CUP is a non-conforming use. However, that interpretation is contrary to the rules of statutory construction detailed above. The code defines a “conditional use” as a “use of property which is not a permitted use or accessory use and which requires approval by the Council.” Jordan LUR § 11.02(44) (2009). A conditional use can be both allowed (because conditional uses are listed in the zoning ordinances for the C-1 district) and it can be approved by the granting of a CUP. Section 11.02(125) therefore should be interpreted to refer to conditional uses which, while allowed by ordinance, may or may not have been approved by the granting of a CUP, such as Ballard-Sunder. Ballard-Sunder does not fall under a non-conforming use because a funeral home is a conditional use in the C-1 district.

This interpretation of the ordinance is also the least restrictive upon the property owner because Ballard-Sunder may then apply for a CUP for the crematory without first having to apply for a CUP for its existing operations. Moreover, simultaneously listing a certain land use in appellant’s zoning ordinances as a conditional use, but also

considering a parcel of land employing that use as non-conforming, is contradictory. A funeral home is a conditional use under the C-1 district, so it is already consistent with the overall comprehensive zoning plan.

Consequently, we reverse the district court's order granting summary judgment to respondents and reinstate appellant's August 2, 2010, granting of the CUP to Ballard-Sunder with the conditions imposed.⁷

Reversed.

⁷ In reinstating Resolution 8-23-2010, we do so with the understanding that the parties agree that the zoning district involved is C-1, not C-2, and that the reference in the resolution to the parcel as existing in the C-2 zoning district was a mistake by the city council, and not an attempt to illegally rezone the property.