STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0482

In re the Matter of: Jill Moore, et al.,
Respondents,

vs.

Commissioner of Morrison County Board of Adjustment,
Appellant.

Filed December 13, 2021
Reversed
Bryan, Judge

Morrison County District Court
File No. 49-CV-20-807

Kristine M. Erickson, Rosenmeier Law Office, Little Falls, Minnesota (for respondents)

Jason J. Kuboushek, Andrew A. Wolf, Iverson Reuvers, Bloomington, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Bryan, Judge.

SYLLABUS

In 2011, the legislature amended the state's zoning statutes, adding a list of mandatory factors for zoning authorities to consider when applying the practical difficulties standard. 2011 Minn. Laws. ch. 19, § 1, at 1; Minn. Stat. § 394.27, subd. 7 (2020). This amendment partially superseded the holdings in *In re Kenney*, 374 N.W.2d 271, 275 (Minn. 1985), and *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008), which listed discretionary factors for zoning authorities to consider in the absence of a specific statutory definition of the practical difficulties standard.

OPINION

BRYAN, Judge

After Morrison County Board of Adjustment (the board) denied respondents' variance request, respondents appealed to the district court, which reversed the denial.[1] On appeal to this court, respondents argue that appellant acted unreasonably for two reasons. First, respondents contend that the denial of their variance request was not based on legally sufficient criteria because the board failed to apply each of the *Kenney*/*Stadsvold* factors. Contrary to this argument, we conclude that the board relied on legally sufficient criteria when it applied the statutory definition of the practical difficulties standard, and it did not err as a matter of law. Second, respondents contend that the denial of the variance request was not sufficiently supported as a factual matter. We also disagree with this argument and conclude that the board's decision had an adequate factual basis in the record. We reverse the district court and reinstate appellant's denial of the variance request.

FACTS

On March 13, 2020, respondents and landowners Jill and James Moore (the Moores) requested that the board grant an after-the-fact variance. The variance would allow the

[1] On appeal from the district court's order, this court independently reviews the zoning authority's decision, not the decision of the district court, and we review the zoning authority's decision without any deference to the district court. *Town of Grant v. Washington County*, 319 N.W.2d 713, 717 (Minn. 1982); *see also Kismet Invs., Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000), *rev. denied* (Minn. Nov. 15, 2000) ("[A]ppellate review is based on the record of the board's proceedings, not the district court's findings or conclusions."). In addition, the party seeking review of the decision bears the burden of showing that the zoning authority acted unreasonably. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 387 (Minn. 2003). For this reason, we address respondents' arguments challenging the zoning authority's decision.

Moores to maintain the size and configuration of a new deck that they built to replace a previous deck on their lakeshore property. After a hearing, the board denied the Moores' variance request. The Moores challenged the denial in district court, and the district court reversed the board's denial. Appellant Commissioner of the Morrison County Board of Adjustment appeals.

The evidence presented at the hearing before the board established the following undisputed facts. In 2015, the Moores bought a parcel of land on the shore of Fish Trap Lake, in Morrison County, Minnesota. At the time of the purchase, the parcel contained an original structure (built in 1935), a deck along the south side of the original structure, a large patio along the north side of the original structure, an addition on the west side of the original structure, and a deck along the east, or lakeside, of the original structure. There is no record that the lakeside deck was ever previously permitted or that a variance was ever requested, and the parties acknowledge the nonconforming nature of the lakeside deck and other structures at the time the Moores purchased the property.[2] The parties refer to the original structure and the addition as "the cabin."

At the time that the Moores purchased the property, the lakeside deck extended from the cabin towards the lake by 7.3 feet, within the shore impact zone. In addition, the lakeside deck was connected by stairs descending toward the lake. The Moores calculated the square footage of the existing lakeside deck, including the stairs, to be 212 square feet in size. In 2016, the Moores applied for and were granted a land use permit to replace the

[2] Given the issue on appeal, we need not address the conformity or nonconformity of the original structure or other features of the property.

lakeside deck. The Moores specifically requested permission to replace the lakeside deck with a new deck that would be "the same size" as the old, unpermitted deck. Despite a requirement that the variance application include a sketch of the proposed deck, the Moores did not include one. The board granted the permit without reviewing any proposed configuration of the deck.

The Moores thereafter made several improvements to the property. In relevant part, they constructed a new lakeside deck that was configured differently than the previous lakeside deck. Instead of having a deck that extended 7.3 feet toward the lake with descending stairs, the Moores removed the stairs and constructed a deck that extended 10 feet toward the lake, farther into the shore impact zone than the previous deck. The Moores also replaced the southside deck with a patio. In November 2019, after receiving a complaint regarding unpermitted work on the property, a site investigator identified several potential zoning violations. The Moores corrected many of these violations, and in March 2020, the Moores requested the following after-the-fact variances to allow the remaining zoning violations: (1) a variance to continue the patio on the south side of the cabin, within the shore impact zone; and (2) a variance to continue the lakeside deck, within the shore impact zone.[3] In their application, the Moores explained that they "were unaware that [they] needed a permit to relocate the [deck] from one side of the cabin to the other," that

[3] The board denied both requests, and the Moores appealed only the denial of the variance request related to the lakeside deck to the district court. We need not address the decision to deny the variance request relating to the location of the southside patio or any dispute relating to the surfaces of the new decks and patios. We only address the board's decision relating to the location of the lakeside deck inside the shore impact zone in violation of the setback requirements of the zoning ordinance.

they had a permit to rebuild the deck on the lakeside of the cabin, and that "because [they] were relocating the stairs to the lake, [they] felt it reasonable to simply make the deck a rectangle inside the space [they] had from the trees."

At the hearing before the board, the board received statements and comments from the Moores, other property owners on Fish Trap Lake, the Morrison County Land Services Director, and the Morrison County Soil and Water Conservation District Director. The Land Services Director discussed the permitting and violation history of the property, the applicable goals of the Morrison County Comprehensive Land Use Plan, and the goals of the Morrison County Comprehensive Water Plan. The comments from the Soil and Water Conservation District Director noted the detrimental effect that the lakeside deck would have on water quality and argued against the new deck's additional encroachment into the shore impact zone. Other public comments also criticized the new lakeside deck for negatively impacting the health of Fish Trap Lake. The Moores argued that while the permit did not expressly authorize additional extension into the shore impact zone, they characterized the descending stairs as part of the old deck, so the new deck fell "within the spirit of the permit."

The zoning ordinance mandates that the board consider six mandatory conditions when deciding if enforcement of the ordinance would cause a practical difficulty to the landowner. Morrison County, Minn., Land Use Control Ordinance § 505.2 (a)-(f) (2021).[4]

[4] At the time of the board's decision, these factors were listed at 506.2(a)-(f) (2020). Since that time, a subsection was removed, and these factors are now numbered at section 505.2(a)-(f). We refer to the current ordinance section number for these factors because the amendments did not include substantive changes to the language applied in this case.

The parties agree that these six factors incorporate the language of the legislative amendment regarding the mandatory conditions a zoning authority must consider when deciding whether a practical difficulty exists. *See* Minn. Stat. § 394.27, subd. 7. Section 505.2 expressly makes consideration of these six factors mandatory and allows a variance only if all six are established:

> The Board of Adjustment shall not grant an application for a variance unless it determines that the strict enforcement of this ordinance would cause a practical difficulty, as defined herein, because of circumstances unique to the individual property under consideration and that the granting of such variance(s) will be in keeping with the spirit and intent of this ordinance. Specifically, the Board of Adjustment must find that each of the following conditions are met:
>
> a. Is the request in harmony with the general purpose of the Morrison County Land Use Ordinance and Comprehensive Plan; and
> b. Is the applicant proposing to use the property in a reasonable manner not permitted by the Land Use Ordinance; and
> c. Will the issuance of the variance maintain the essential character of the locality; and
> d. Is the alleged practical difficulty due to circumstances unique to the property; and
> e. Is the need for the variance created by actions other than the landowner or prior landowners; and
> f. Does the alleged practical difficulty involve more than just economic considerations.

Morrison County, Minn., Land Use Control Ordinance § 505.2.

The zoning ordinance also includes eight additional, discretionary factors that the board may consider when deciding after-the-fact variance requests. Morrison County,

Minn., Land Use Control Ordinance § 505.3 (a)-(h) (2021).[5] The parties agree that section 505.3 incorporates the *Kenney*/*Stadsvold* factors. Section 505.3 expressly makes consideration of these eight factors discretionary and applicable only if the board first determines that all six of the factors listed in section 505.2 weigh in favor of a variance:

> [A]dditional criteria may, in the discretion of [the board], be considered in determining whether to grant or deny the variance request. If [the board] finds that all of the criteria set forth in section 50~~6~~5.2 a through f, are met, then the following additional criteria may be considered and weighed by [the board] in determining whether to grant or deny the request . . . .

Id. (strikethrough in original).

The board orally considered each of the six mandatory factors listed in section 505.2. The board discussed and then voted regarding whether each factor weighed in favor of granting or denying the requested variance.

The board also determined that the size and layout of the new lakeside deck differed from the previous lakeside deck. Instead of repairing or replacing the previous lakeside deck, the Moores expanded the lakeside deck further into the shore impact zone, which is "something that we hold very dear to our considerations in these variance requests." In its discussion, the board declined to accept the Moores' argument that the original descending stairs were properly characterized as part of the original deck. Accordingly, the board concluded that the first, second, and third factors favored denial. By expanding the lakeside

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[5] At the time of the board's decision, these factors were listed at 506.3(a)-(h) (2020). They were also included verbatim in the second half of section 506.2, after the heading "Additional Considerations for After the Fact Applications" and using the letters (g) through (n). We refer to the current ordinance section number for these factors.

deck, the board concluded that the Moores proposed a variance that was not in harmony with the general purposes and intent of the Morrison County Comprehensive Land Use Plan or consistent with the goals of the Morrison County Comprehensive Water Plan. Likewise, the board concluded that the Moores proposed to use the property in an unreasonable manner, not authorized by the ordinance. The board also concluded that based on the size and layout of the new lakeside deck, the Moores' request conflicted with the essential character of the locality.

The board further determined that the Moores' practical difficulties were not because of circumstances unique to the property. The Moores "chose to replace the deck" and "had full control" of the repairs. Because the unique circumstances of the property did not require the Moores to have configured the new deck in such a way as to expand further into the shore impact zone, and because the need for the variance was created by the Moores' actions, the fourth and fifth factors also favored denial of the request.

Sixth and finally, the board concluded that the Moores' practical difficulties involved more than just economic considerations and that this factor weighed in favor of granting the requested variance.

After considering these factors, the board denied the variance request. Because the Moores had not established that each of the six factors favored their request, the board did not expressly discuss or vote on the additional eight, discretionary factors enumerated in the zoning ordinance.

ISSUE

Did the board act arbitrarily, oppressively, or unreasonably when it denied the Moores' variance request?

ANALYSIS

A county board of adjustment has "the exclusive power to order the issuance of variances from the requirements of any official control including restrictions placed on nonconformities." Minn. Stat. § 394.27, subd. 7. The decision of the board is final, subject to an appeal to the district court, which reviews the decision "to determine whether it was reasonable." *Kismet Invs.*, 617 N.W.2d at 90; *see also* Minn. Stat. § 394.27, subd. 9 (2020) (permitting appeal to district court); *Stadsvold*, 754 N.W.2d at 332 (noting that in reviewing a zoning authority's decision, a court "determine[s] [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"). As noted above, as the appealing party, the Moores bear the burden to show unreasonableness, *Schwardt*, 656 N.W.2d at 387, and this court independently reviews the board's decision without deference to the district court, *Town of Grant*, 319 N.W.2d at 717; *Kismet Invs.*, 617 N.W.2d at 90.

To determine whether the board acted reasonably, we consider whether the board's stated reasons were legally valid and whether the decision had a factual basis in the record. *See RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015). 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). We address the Moores' challenge to the legal and factual basis for the board's decision below.

I. Validity of the Legal Basis for the Board's Decision

The Moores first assert that the denial of their request was unreasonable as a matter of law. Specifically, they argue that the board's decision was not legally valid because the board declined to expressly consider each of the *Kenney*/*Stadsvold* factors. We do not agree with the Moores and discern no legal error in the board's decision.

In *Kenney* and *Stadsvold*, the Minnesota Supreme Court considered statutory language that allowed zoning authorities to grant variances when, among other circumstances, "there are practical difficulties or particular hardship." *Stadsvold*, 754 N.W.2d at 327-28 (quoting Minn. Stat. § 394.27, subd. 7 (2006)); *see also Kenney*, 374 N.W.2d at 275 (quoting Minn. Stat. § 394.27, subd. 7 (1984)). In the absence of legislative provisions defining the practical difficulties standard, the supreme court listed discretionary factors for zoning authorities to consider under the practical difficulties standard. *Stadsvold*, 754 N.W.2d at 331, 333; *Kenney*, 374 N.W.2d at 275. Subsequently, the legislature amended subdivision 7 to include a specific list of factors for zoning authorities to consider when applying the practical difficulties standard. 2011 Minn. Laws. ch. 19, § 1, at 1; Minn. Stat. § 394.27, subd. 7 (2020).

We first discuss *Kenney* and *Stadsvold* before considering the impact that the subsequent amendment had on the holdings in these two cases. Because the legislative

amendment partially superseded the holdings in *Kenney* and *Stadsvold*,[6] and because the opinions in these two cases offer suggestive, not mandatory, factors for consideration, the board's decision was legally valid.

In *Kenney*, a landowner requested a variance regarding the renovation of an existing, nonconforming boathouse. 374 N.W.2d at 272. The county board of adjustment concluded that it lacked jurisdiction to grant the request. *Id.* at 273. The landowner initially appealed the denial to the district court, which affirmed the denial. *Id.* The landowner then appealed to this court. *Id.* at 272-73. We agreed with the landowner, reversed the district court, concluded that the board of adjustment had jurisdiction over the variance request, and listed equities in the landowner's favor for the board to consider on remand:

> We believe in this case that substantial equities exist in favor of the landowner, and while we acknowledge that the discretion to grant a variance rests with the Board of Adjustment, we urge consideration of the following factors on remand: (1) appellant acted in good faith, (2) he attempted to comply with the law by obtaining a building permit, (3) the township's building permit violated Minn. Stat. § 394.33 (1978), (4) appellant has made a substantial investment in the property, (5) the repairs were completed before appellant was informed of their impropriety, (6) the nature of the property is residential/recreational and not commercial, (7) there are other similar structures on the lake, and (8) the minimum benefits to the county appear to be far outweighed by the detriment appellant would suffer if forced to remove his boathouse.

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[6] The Moores make no argument that the board failed to follow its own zoning ordinance, that the zoning ordinance required the board to consider the additional discretionary factors in section 505.3, even when section 505.2 was not met, or that the board abused its discretion by not addressing section 505.3. We deem any such arguments forfeited. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address issue not adequately briefed); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (same).

In re Kenney, 358 N.W.2d 120, 123 (Minn. Ct. App. 1984), *aff'd*, 374 N.W.2d at 275. The Minnesota Supreme Court granted review and, in its opinion, quoted the above paragraph, emphasizing the list of "equities in favor of the landowner set out by the court of appeals" for the county board of adjustment to consider on remand. *Kenney*, 374 N.W.2d at 275. ("We concur with the court of appeals' decision in its entirety, including the equities in favor of the landowner set out by the court of appeals.").

In *Stadsvold*, two landowners requested an area variance regarding the construction of a home on their nonconforming lot. 754 N.W.2d at 325. The county board of adjustment denied the request because the landowners failed to establish "adequate hardship unique to the property." *Id.* at 326. The landowners appealed to the district court, which agreed with the county board of adjustment and granted summary judgment in the county's favor. *Id.* at 327. The landowners appealed to this court, which affirmed the district court, concluding that the board of adjustment used the proper standard: particular hardship. *Id.*; *see also In re Stadsvold*, No. A06-1696, 2007 WL 1898565, at *4 (Minn. Ct. App. July 3, 2007), *rev'd* 754 N.W.2d 323 (Minn. 2008) ("The board finding that appellants failed to show an adequate hardship meets the standard set forth in the ordinance. . . . The board used the correct standard in considering appellants' variance request."). The landowners again appealed, and the Minnesota Supreme Court accepted review.

The supreme court first determined that the statutory provisions were ambiguous because they did not include a definition of "practical difficulties," and only defined "particular hardship." *Id.* at 328. The supreme court then concluded that based on legislative history, the practical difficulties standard applied to area variances and the more

stringent "particular hardship" standard applied to use variances. *Id.* at 329-31. Thus, the supreme court concluded that the county board of adjustment erred as a matter of law because it should have applied the practical difficulties standard rather than the particular hardship standard. *Id.* In the absence of a statutory definition, the Minnesota Supreme Court then restated the list of equities from *Kenney*:

> We further hold that the factors for consideration under the "practical difficulties" standard include: (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 difficulty occurred, including whether the landowner created the need for the variance; and (6) whether, in light of all the above factors, allowing the variance will serve the interest of justice.

Id. at 331. The supreme court referenced these factors a second time and characterized them as suggestions for remand:

> In *In re Appeal of Kenney*, a case involving a county board of adjustment's authority to grant the variance sought, we suggested that the board, on remand, consider certain after-the-fact elements, including whether the applicant acted in good faith, attempted to comply with the ordinance, and made a substantial investment. 374 N.W.2d at 275. We also "urged" the board to consider whether (1) the construction was completed, (2) there were similar structures in the area, and (3) the county's benefits were outweighed by the applicant's burden if the applicant were required to comply with the ordinance. *Id.* . . .
>
> To the extent that the County is concerned about variance applications arising out of purposeful violations of its ordinance, such concerns should be alleviated by considering whether the applicant acted in good faith and attempted to

> comply with the ordinance, and whether, in light of all the factors, the interests of justice will be served by granting the variance.

Id. at 333.[7] The supreme court, in its final sentence, again suggested that on remand, the county board of adjustment "consider the equitable factors we set out in Kenney." *Id*. at 334.

In the years following the *Stadsvold* opinion, the legislature amended the zoning statutes to define the practical difficulties standard as follows:

> **Subd. 7. Variances; practical difficulties.** The board of adjustment shall have the exclusive power to order the issuance of variances from the requirements of any official control including restrictions placed on nonconformities. Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control and when the variances are consistent with the comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the official control. "Practical difficulties," as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties. Practical difficulties include, but are not limited to, inadequate access to direct sunlight for solar energy systems. Variances

[7] The Moores make no argument that these two lists are substantively different from one another, that each applies to different types of area variances, or that the two lists in *Stadsvold* might differ from the list in *Kenney*. Instead, the Moores group the lists and the two cases together, referring to a single group of factors. Similarly, the Moores provide no legal argument that the language of the practical difficulties standard in the statute is ambiguous or that it is unambiguously applicable only to before-the-fact area variances. In the absence of adequate briefing, the Moores have forfeited any such statutory or doctrinal interpretation arguments. *Wintz Parcel Drivers, Inc.*, 558 N.W.2d at 480; *Melina*, 327 N.W.2d at 20.

> shall be granted for earth sheltered construction as defined in section 216C.06, subdivision 14, when in harmony with the official controls. No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located. The board of adjustment may impose conditions in the granting of variances. A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.

2011 Minn. Laws. ch. 19, § 1, at 1; Minn. Stat. § 394.27, subd. 7.

We note that this statutory definition enumerates several factors and effectively incorporates many, but not all, of the equitable factors listed in *Kenney* and *Stadsvold*. For example, the statutory definition does not include consideration of the degree of the requested variation, the impact on government services, or the interests of justice. In addition, the legislature specified that economic impacts alone do not constitute practical difficulties. The statute also establishes a requirement that zoning authorities consider the enumerated factors. In these respects, we observe differences between *Kenney* and *Stadsvold* on one hand and the amended statute on the other hand. To this extent, we hold that the statutory amendment superseded the holdings in *Kenney* and *Stadsvold*. Given this holding, we do not agree with the Moores that the board erred when it applied the factors enumerated in the subdivision 7 as opposed to the factors listed in *Kenney* and *Stadsvold*.

In addition, even absent this amendment, we disagree with the Moores' argument that *Kenney* and *Stadsvold* compel consideration of mandatory factors. The consideration of the equitable factors listed in *Kenney* and *Stadsvold* was always a matter of discretion for the zoning authority on remand. *See Stadsvold*, 754 N.W.2d at 333-34; *Kenney*, 374 N.W.2d at 275. Neither opinion reversed a zoning authority's decision for failure to

consider these equitable factors. Instead, the supreme court reversed the county board of adjustment's decision in *Kenney* on jurisdictional grounds, and it reversed the county board of adjustment's decision in *Stadsvold* because the county board of adjustment applied the particular hardship standard. Likewise, the characterization of the factors in *Kenney* shows their discretionary nature. The *Kenney*/*Stadsvold* factors were something that the supreme court "suggested that the board, on remand, consider." *Stadsvold*, 754 N.W.2d at 333. This characterization of the factors as a suggestion conflicts with the Moores' argument that the consideration of the *Kenney*/*Stadsvold* factors is mandatory, and failure to do so constitutes reversible error.

For these reasons, we conclude that the board did not act unreasonably when it applied the statutory definition of the practical difficulties standard. The board's decision rested on a legally sufficient basis because the board applied the proper legal standard.

II. Sufficiency of the Factual Basis for the Board's Decision

Next, the Moores generally argue that the decision must be reversed because the factual record does not support the findings underlying the board's decision. Again, we do not agree.

The record includes the comments of the Morrison County Land Services Director, the Morrison County Soil and Water Conservation District Director, and at least one other property owner on Fish Trap Lake. These statements support the board's factual findings that the lakeside deck would negatively impact water quality and the health of Fish Trap Lake. The statements also support the finding that the variance was not in harmony with the general purposes and intent of the Morrison County Land Use Ordinance and

Comprehensive Plan. The record also supports the factual findings that the descending stairs were not part of the original deck and that the Moores chose to reconfigure the new lakeside deck in a way that extended the structure further into the shore impact zone than the previous deck. Therefore, we conclude that the board's decision had an adequate factual basis in the record, *RDNT*, 861 N.W.2d at 75-76, and will not substitute our judgment for that of the zoning authority, *VanLandschoot*, 336 N.W.2d at 509.

DECISION

Because the stated reasons provided by the board were legally valid and had a factual basis in the record, the board acted reasonably when it denied respondents' variance request.

Reversed.