STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0711

City of Orono,
Respondent,

vs.

Jay T. Nygard, et al.,
Appellants.

Filed October 22, 2012
Reversed and remanded
Johnson, Chief Judge

Hennepin County District Court
File No. 27-CV-11-5626

Soren M. Mattick, Campbell Knutson, P.A., Eagan, Minnesota; Paul A. Merwin, League of Minnesota Cities, St. Paul, Minnesota (for respondent)

Milton E. Nordmeyer, Woodbury, Minnesota (for appellants)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Chief Judge; and Huspeni, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving 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

JOHNSON, Chief Judge

Jay and Kendall Nygard applied for a permit to erect a wind turbine in the back yard of their residential property in the City of Orono. The city denied the application on the ground that the applicable zoning ordinance does not specifically mention wind turbines as a lawful accessory use in the Nygards' zoning district. The Nygards erected the wind turbine anyway. Both the city and the Nygards sought relief from the district court, which entered judgment in favor of the city. We conclude that the city's stated reason for denying the Nygards' permit application is erroneous in light of the language of the zoning ordinance and the city's concession that it allows other accessory uses in the Nygards' zoning district even though they may not be specifically mentioned in the zoning ordinance. Therefore, we reverse and remand to the city for further consideration of the Nygards' permit application.

FACTS

The Nygards reside in Orono in the One-Family Lakeshore Residential (LR-1B) zoning district. On October 13, 2010, the Nygards applied for a permit to erect a wind turbine on their property. On October 15, 2010, the city denied the Nygards' permit application in a letter from the city's Planning and Zoning Coordinator. The letter states that wind turbines are "not listed as a permitted, accessory or conditional use within the City and more specifically within the LR-1B lakeshore residential district . . . . Therefore the use is not allowed."

On November 12, 2010, city employees observed a concrete footing being installed on the Nygards' property. The city employees believed, correctly, that the Nygards were taking steps to erect a wind turbine despite the city's denial of their permit application. On November 16, 2010, the city issued a stop-work order and demanded that the Nygards remove the concrete footing. The Nygards disregarded the city's demand and completed the installation of the wind turbine in February 2011.

The Nygards' wind turbine is not a large, windmill-style, horizontal-axis wind turbine of the type that is commonly in commercial use in rural areas of the state. It is a vertical-axis wind turbine that is much smaller in height and width. The top of the Nygards' wind turbine is approximately 20 feet above the ground, which the Nygards say is below the roofline of their house. From photographic exhibits appended to the appellate briefs, it appears that the Nygards' wind turbine consists of two Savonius-style turbines that are mounted on a vertical shaft and enveloped by three Darrieus-style aerofoils. At oral argument, the Nygards' counsel represented that the moving parts of the wind turbine typically are mounted at least seven or eight feet above the ground, high enough that a person would not be at risk of injury while standing next to the mounting shaft.

In March 2011, the city commenced an action in the district court for a declaratory judgment that the Nygards' wind turbine is not in compliance with the city's zoning ordinance. In April 2011, the Nygards commenced a separate action against the city to challenge the city's denial of their permit application. The district court consolidated the two cases.

In January and February 2012, the parties filed cross-motions for summary judgment. In March 2012, the district court granted the city's motion and denied the Nygards' motion. The district court concluded that the city's zoning ordinance unambiguously sets forth an exhaustive list of lawful accessory uses, which does not include wind turbines. The district court ordered the Nygards to remove the wind turbine from their property. The Nygards appeal. The district court stayed its order pending appeal with respect to the concrete footing but ordered the Nygards to remove and store away the wind turbine and mounting shaft during the pendency of this appeal.

D E C I S I O N

The Nygards argue that the city and the district court erred by interpreting the city's zoning ordinance as setting forth an exhaustive list of lawful accessory uses, thereby forbidding wind turbines in the LR-1B zoning district.

When reviewing a city's zoning decision, we seek "to 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 to determine whether the evidence could reasonably support or justify the determination." *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quotations omitted). We review the zoning authority's determination without regard for the district court's conclusions. *Northwestern College v. City of Arden Hills*, 281 N.W.2d 865, 868 (Minn. 1979).

The Nygards' argument in this case is best characterized as an argument that the city was "mistaken as to the applicable law." *Stadsvold*, 754 N.W.2d at 332 (quotation omitted). Such an argument is subject to a *de novo* standard of review because "the

interpretation of an existing ordinance is a question of law for the court." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). In reviewing the city's interpretation of its zoning ordinance, we consider three principles:

> First, courts generally strive to construe a term according to its plain and ordinary meaning. . . .
>
> Second, zoning ordinances should be construed strictly against the city and in favor of the property owner. . . .
>
> [Third,] A zoning ordinance must always be considered in light of its underlying policy.

SLS P'ship v. City of Apple Valley, 511 N.W.2d 738, 741 (Minn. 1994) (alteration in original) (quoting *Frank's Nursery*, 295 N.W.2d at 608-09).

The city denied the Nygards' permit application based on its interpretation of section 78-329 of the Orono City Code, which governs accessory uses within the LR-1B district as follows:

> Within any LR-1B one-family lakeshore residential district, the following uses shall be permitted accessory uses:
>
> (1) Buildings temporarily located for purposes of construction on the premises for a period not to exceed time necessary for such constructing.
>
> (2) Communication reception / transmission devices as follows:
>
> a. Accessory antennas. . . .
>
> b. Amateur shortwave radio antennas and towers. . . .
>
> (3) Gardening and other horticultural uses, including aviaries and decorative landscape features.
>
> (4) Home occupations, as defined in this chapter. . . .

> (5) One roadside stand offering for sale only farm products produced on the premises . . . .
>
> (6) Private docks, subject to this code and other applicable regulations, including boat storage density requirements.
>
> (7) Private garages and parking space.
>
> (8) Private swimming pools, tennis courts, and paddocks.
>
> (9) Signs, as regulated in this chapter.

Orono, Minn., City Code § 78-329 (2003). The city's zoning ordinance defines the phrase "accessory use or structure" to mean "a use or structure subordinate to and serving the principal use or structure on the same lot and customarily incidental to the principal use or structure." *Id.* § 78-1.

The city denied the Nygards' permit application because wind turbines are not mentioned as a lawful accessory use in section 78-329. The Nygards contend that section 78-329 sets forth a non-exhaustive list of lawful accessory uses and that their wind turbine is within the general definition of accessory uses. The district court adopted the city's position that section 78-329 sets forth an exhaustive list of lawful accessory uses within the LR-1B district.

We begin by considering the first principle identified by *Frank's Nursery*, that an ordinance should be interpreted according to its plain and ordinary meaning. 295 N.W.2d at 608. In doing so, we are guided by canons of statutory interpretation. *See Smith v. Barry*, 219 Minn. 182, 187, 17 N.W.2d 324, 327 (1944); *Yeh v. County of Cass*, 696

N.W.2d 115, 128 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). "The primary objective of statutory interpretation is to ascertain and give effect to the intention of the legislature." *Greene v. Commissioner of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 721 (Minn. 2008). "The principal method of determining the legislature's intent is to rely on the plain meaning of the statute," which may be discerned by reference to the ordinary meaning of words used in the statute as well as rules of grammar and syntax and the structure of the statute. *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008); *Occhino v. Grover*, 640 N.W.2d 357, 359-60 (Minn. App. 2002), *review denied* (Minn. May 28, 2002). But if a statute is ambiguous, we may refer to extrinsic sources to ascertain its meaning. *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 n.2 (Minn. 2009); *Occhino*, 640 N.W.2d at 359-60.

The plain language of section 78-329 offers some support to the city's interpretation. Section 78-329 states that "the following uses shall be permitted accessory uses" and proceeds to list nine such uses. Orono, Minn., City Code § 78-329. It is reasonable to interpret section 78-329 to mean that the nine accessory uses listed therein are the only lawful accessory uses in the LR-1B district. But the Nygards contend that section 78-329 also can be reasonably interpreted to allow accessory uses that are not listed because the language of section 78-329 is different from the language of nearby sections of the zoning code, which are more explicit in foreclosing the possibility of other allowed uses. For example, section 78-327, which concerns "permitted uses" within the LR-1B district, states that "no land or structure shall be used except for" a list of specified uses. Orono, Minn., City Code § 78-327 (2003). Likewise, section 78-566,

which concerns lawful "accessory uses" within the RS Seasonal District, states that "no accessory structure or use of land shall be permitted except for one or more of the following uses." Orono, Minn., City Code § 78-566 (2003). Because section 78-329 does not use the same type of strong language to negate the possibility of lawful accessory uses not listed within the ordinance, it also is reasonable to interpret section 78-329 more broadly to allow other accessory uses. Thus, section 78-329 is ambiguous as to whether it allows accessory uses that are not expressly mentioned therein.

Moreover, extrinsic sources of interpretation support the Nygards' contention. At oral argument, the city conceded that it has interpreted section 78-329 in other situations to allow accessory uses that are not expressly mentioned therein. We asked the city's appellate counsel whether the city allows structures such as flagpoles, basketball hoops or clotheslines within the LR-1B district. The city's attorney responded in the affirmative, stating that these common features of suburban residential neighborhoods are allowed so long as they are customarily incidental to a residence. This colloquy demonstrates that the city has interpreted section 78-329 to allow accessory uses that are not expressly mentioned in that section of the ordinance. In light of the city's admittedly inconsistent manner of interpreting section 78-329, we cannot uphold the city's denial of the Nygards' permit application or the district court's rationale for entering judgment in favor of the city.

The second principle identified by *Frank's Nursery* requires us to construe a zoning ordinance "strictly against the city and in favor of the property owner." *Frank's Nursery*, 295 N.W.2d at 608. "We must give weight to the interpretation" of an

ordinance that "is least restrictive upon the rights of the property owner to use his land as he wishes." *Id.* at 608-09. "To be effective any restriction on land use must be clearly expressed." *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984). This principle favors the Nygards because the city's *de facto* interpretation of the ordinance in other circumstances is less restrictive than the interpretation asserted by the city in its appellate briefs and in the memoranda it submitted to the district court in this case.

The third principle identified by *Frank's Nursery* requires us to consider the zoning ordinance "in light of its underlying policy." *Frank's Nursery*, 295 N.W.2d at 609. To implement this principle, we must ascertain the city council's intent when enacting the ordinance. *See id.* We are unable to do so in this case because the city has not presented any evidence of the city council's intent when enacting section 78-329. *SLS P'ship*, 511 N.W.2d at 742-43 (noting that parties did not consider underlying purposes and that city did not anticipate the particular use at issue). The city instead chose to rely on the text of the ordinance, which does not expressly allow wind turbines. But our analysis goes beyond the text of the ordinance because we have concluded that the ordinance is ambiguous and that extrinsic evidence supports the conclusion that section 78-329 does not categorically prohibit wind turbines as accessory uses or structures within the LR-1B zoning district.

In sum, we conclude, based on the first and second principles of *Frank's Nursery*, that the city erred when it denied the Nygards' permit application on the sole ground that section 78-329 of its zoning ordinance does not expressly allow wind turbines. For the

reasons stated above, the city's interpretation of section 78-329 was erroneous. Because the city did not provide any other reason or explanation for denying the Nygards' permit application, the district court erred by entering judgment in favor of the city. Therefore, we reverse the judgment of the district court and remand the matter to the city for further consideration of the Nygards' permit application. In light of this disposition, we need not consider the Nygards' constitutional claims.

Reversed and remanded.