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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1906**

Basim Sabri, et al.,
Appellants,

vs.

City of Minneapolis,
Respondent.

**Filed May 29, 2018
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-16-100

Robert M. Speeter, Speeter & Johnson, Minneapolis, Minnesota (for appellants)

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Assistant City Attorneys, Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Halbrooks, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

In this dispute over the proposed expansion of a multi-story ethnic market, appellant developers challenge a condition attached to approval of their application for a certificate of nonconforming use and site plan review that effectively denied their application in part.

Appellants argue that (1) the condition is arbitrary and capricious, (2) respondent city's findings are not supported by the record, (3) the city lacked authority to expand the scope of the appeal to site plan review, (4) the district court erred in dismissing their estoppel claim, and (5) the appeal procedure violated due process. We affirm.

FACTS

From 2003 through 2005, appellants Karmel Properties, LLC and its sole member Basim Sabri (collectively Sabri) developed and constructed Karmel Plaza as a two-story ethnic market. At the time it was built, Karmel Plaza was classified as a farmer's market, a permitted use in an industrial (I1) zone. After respondent City of Minneapolis amended its zoning code in 2006, Karmel Plaza did not meet the definition of a farmer's market. Instead, Karmel Plaza is now classified as a shopping center, which is not a permitted use in the I1 zone. The shopping center use, as it existed in 2006, is legally nonconforming.

From 2010 through 2015, the city approved applications for first-floor additions to Karmel Plaza as well as construction of third and fourth floors and a parking ramp. In approving construction of the third and fourth floors in 2014, the city required a setback on the north side of the building, based on concerns about increased shadowing of the adjacent Midtown Greenway, a popular bicycle and pedestrian trail.

In 2015, Sabri submitted this application for another expansion:

We are proposing an amendment to the existing site plan for an expansion of nonconforming use The proposal is to allow the construction of additional square footage on the 1st floor (451 sf), 2nd floor (993 sf), 3rd floor (6607 sf) and 4th floor (821 sf). The additional square footage includes various tenant spaces throughout the building for the use of retail, restaurant, offices and outdoor seating.

The proposed expansion included a 5,613-square-foot addition to fill in the third-floor, north-side setback that had been required in 2014. Smaller additions on the south side of each floor would connect the parking ramp to the existing structure.¹ City staff issued a report and recommended approval of the application. The recommendations section of the staff report is organized into “A. Expansion of a Nonconforming Use,” with five conditions attached, and “B. Site Plan Review,” with six conditions attached.

The planning commission held a hearing. Councilmember Lisa Bender, who represents the ward where Karmel Plaza is located and serves on the planning commission, expressed concern about expanding the intensity of commercial retail use in a non-commercial zone. Commissioners and staff discussed whether the proposed expansions could be restricted to less intense uses, such as office space. Staff cautioned that it would be difficult to draft clear use restrictions. Ultimately, the planning commission continued the agenda item to gather more information on traffic and parking impacts and the city’s ability to restrict uses.

At a later meeting, staff confirmed that it was possible to approve a physical expansion with use restrictions but recommended a “clean, workable set of conditions of approval.” Staff also presented additional parking-ticket data, which indicated that completion of the parking ramp did not fully resolve parking violations in the area. Sabri’s counsel urged the planning commission not to impose use restrictions on part of the building.

¹ The south-side additions on each floor were approved and are not at issue in this appeal.

A motion was made to approve “staff recommendation A, expansion of non-conforming use, with the addition of a sixth condition; that being, the expansion of non-conforming use be limited to the square footage on the south side of the building only.” The chair of the planning commission clarified, “this is only on Item A, the expansion of a non-conforming use,” and the motion carried. A second motion was made to approve site plan review as recommended in Item B. That motion also carried.

A few days later, Sabri’s counsel emailed city staff, expressing concern that “some members of staff may have taken the position that the addition of the sixth condition to Part A, somehow implicitly also imposed a limit on the site plan approval.” Sabri appealed the planning commission’s decision to the city council’s zoning and planning committee, expressly challenging the sixth condition to Item A but specifying that “the Applicant does not appeal from . . . Item B—Site Plan Review.”

At the zoning and planning committee hearing, staff advised that the planning commission had approved the application, subject to “a condition that eliminated the expansion on the north side of the structure. So just the interior proposals to the courtyard were permitted.” Sabri’s counsel disagreed, arguing that Item B (site plan approval) addressed construction, while Item A (nonconforming use) addressed the use of the expanded space. Thus, he argued, the appeal challenged only the use restrictions on the north-side addition that had been approved.

Councilmember Bender requested clarification from staff, who stated that “the [north-side addition] was not approved in any way, shape or form” and that no expansion was allowed without an expansion of nonconforming use “because the building itself has

non-conforming uses within it.” Staff explained that the planning commission approved site plan review because the smaller south-side additions required it. Councilmember Bender agreed, stating that the planning commission discussed the possibility of allowing the north-side addition, restricted to I1 uses, but elected, “based on recommendations from our attorney and staff,” not to do so.

Councilmember Bender then moved to deny the appeal. She noted the value of Karmel Plaza as a regional destination and community gathering space, but cited the negative effects of increasing intensity of use in an area that is not zoned for that level of intensity. She stated that she did not think the staff report’s third finding—that granting the application would not result in significant increases of adverse off-site impacts such as traffic noise, dust, odors, and parking congestion—had been established. The motion to deny the appeal carried. Thereafter, the full city council denied Sabri’s appeal, adopting the zoning and planning committee’s proposed findings of fact and recommendation.

Sabri filed a five-count complaint in district court under Minn. Stat. § 462.361 (2016). The district court granted the city’s motion for judgment on the pleadings under Minn. R. Civ. P. 12.03, except with respect to count II, which alleged that the city exceeded its authority or jurisdiction in the appeal process. After the parties stipulated to the scope of the record, the district court granted the city’s summary-judgment motion on count II. Sabri appeals.

D E C I S I O N

“The court’s authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked.” *White Bear Docking & Storage, Inc. v. City of*

White Bear Lake, 324 N.W.2d 174, 175 (Minn. 1982) (addressing refusal to grant special-use permit). “The standard of review is the same for all zoning matters, namely, whether the zoning authority’s action was reasonable. . . . Is there a ‘reasonable basis’ for the decision? or is the decision ‘unreasonable, arbitrary or capricious’?” *Id.* at 176 (quoting *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981)).

Even if the city council’s decision is debatable, so long as there is a rational basis for what it does, the courts do not interfere. We do not give any special deference to the conclusions of the lower courts, but rather engage in an independent examination of the record and arrive at our own conclusions as to the propriety of the city’s decision. Our review focuses on the legal sufficiency and factual basis for the reasons given.

Mendota Golf, LLP v. City of Mendota Heights, 708 N.W.2d 162, 180 (Minn. 2006) (quotations and citations omitted).

Under the Minneapolis zoning code, expansion of a legal nonconforming use may be allowed if specific findings are made and other requirements of the zoning code are satisfied. Minneapolis, Minn., Code of Ordinances (MCO) § 531.50(b) (2016). “[A] local government ‘is not required’ to permit the expansion of such nonconformities.” *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010) (quoting *County of Freeborn v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972)). The public policy behind allowing local governments to bar the expansion of nonconforming uses “is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction. This in turn will lead to a uniform use of the land consistent with the overall comprehensive zoning plan.” *County of Freeborn*, 295 Minn. at 99, 203

N.W.2d at 325. Under the city’s zoning code, the regulation of nonconforming uses is intended in part to “bring[] about their gradual elimination.” MCO § 531.10 (2016).

I. The city’s imposition of the sixth condition was not arbitrary and capricious.

Sabri argues that the imposition of a sixth condition to Item A, expansion of nonconforming use, was arbitrary and capricious, based on actions taken by city staff after the fact. Sabri asserts on appeal that the 2015 application sought expansion of nonconforming use—that is, shopping-center use—to the existing third and fourth floors, not just to the proposed additions identified in the 2015 application. Sabri argues that the city’s later approval of commercial tenant applications for the existing third and fourth floors demonstrates that the denial of shopping-center use in the proposed north-side addition was arbitrary and capricious.

We need not entertain this argument because in proceedings before the city, Sabri made a directly contrary argument—that the city had already approved shopping-center use in the existing third and fourth floors. Sabri opposed approval of the north-side addition, restricted to I1 uses, in part because the result would be “vertical zoning and kind of like a Berlin Wall.” Because Sabri’s argument to this court depends on a premise (expansion of nonconforming use to the existing third and fourth floors was part of the 2015 application) that is directly contrary to the argument Sabri made in proceedings before the city (nonconforming use for third and fourth floors was approved in 2010, 2012, and 2014), we will not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally do not consider new theories on appeal).

Sabri also argues that the imposition of the condition was arbitrary and capricious because the zoning and *planning committee's* findings are not a contemporaneous record of the *planning commission's* decision. Sabri's reliance on *Hurrlé v. County of Sherburne ex rel. Bd. of Comm'rs*, 594 N.W.2d 246, 249 (Minn. App. 1999), is misplaced. In *Hurrlé*, the county board denied a preliminary plat application without recording the meeting, making a record of its findings, or directing staff to prepare findings. 594 N.W.2d at 250. Two weeks later, the county board adopted staff-prepared findings in support of the denial. *Id.* at 248. On appeal, this court concluded that it was "unable to determine what connection, if any, the later-adopted justifications have to the decision reached" earlier. *Id.* at 250. Here, the *city council* adopted the zoning and planning committee's proposed findings and recommendation when it denied Sabri's appeal. The city's findings are therefore a contemporaneous record of its decision.

II. The city's findings are supported by a factual basis.

The city adopted staff findings analyzing the application in light of the criteria established by ordinance for expansion of nonconforming use and site plan review, with the exception of any findings inconsistent with imposition of the sixth condition to expansion of nonconforming use. The city also found:

- As reflected in the record, the shopping center use at the site has been expanded several times since becoming nonconforming in the industrial zoning district. Such successive expansions have operated to compound adverse, off-site impacts upon the surrounding neighborhood, as referenced in several submissions to the record including an opposition letter from the Whittier Alliance neighborhood organization.

- Evidence has been submitted to the record demonstrating that the use has led to significant parking congestion and parking violations in the immediate area. A map of tickets for parking violations in the area clearly demonstrates that the violations are centered upon the property in question, which is the major traffic and parking generator in the immediate area. Although the property owner has recently developed a multi-level pay-parking structure, it has not been established that this has alleviated the parking problems. In fact, parking tickets on adjacent streets increased during the first two weeks of October 2015 compared to the first two weeks of September 2015, indicating that users' parking decisions still adversely affect the immediate neighborhood.
- The proposed expanded use is too intensive for this site with light industrial zoning, near a range of residential uses. Shopping centers are higher intensity commercial uses, requiring a conditional use permit in commercial districts. The location of applicant's shopping center . . . has created and distributed substantial traffic, parking and adverse off-site impacts onto residential streets to the north of the development. The large-scale proposed expansion of the nonconforming use that is not internal to the site would exacerbate the existing adverse off-site impacts by an unreasonable and unacceptable factor.

Sabri points to evidence in the record that could have supported a conclusion that the proposed expansion would not adversely impact the neighborhood. But the question is whether there is a factual basis in the record for findings that approval *would* adversely impact the neighborhood. *See RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015) (concluding that if reasons for decision are legally sufficient, appellate courts determine whether “the reasons had a factual basis in the record”). A reviewing court must not substitute its judgment for that of an administrative body when its findings are properly supported by evidence. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003). The denial of a land-use request is not

arbitrary when at least one of the reasons given for the denial has a rational basis. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997).

Here, the record reflects that neighbors communicated concerns about an increase in parking, traffic, and code violations. Although neighbors' vague concerns about "future neighborhood problems" are not sufficient to deny a conditional-use permit,² neighborhood opposition that is "based on concrete information" may be considered. *SuperAmerica Grp., Inc. v. City of Little Canada*, 539 N.W.2d 264, 267-68 (Minn. App. 1995) (addressing consideration of neighborhood opposition based on traffic congestion), *review denied* (Minn. Jan. 5, 1996). The neighbors' concerns here were based on existing problems that are also referenced in Sabri's traffic-demand management plan, not vague future concerns. Although Sabri contends that construction of the parking ramp alleviated parking problems, the parking-violation data in the record supports the city's contrary findings.

Given the limited standard of review of a municipal land-use decision, we conclude that there is an adequate factual basis in the record to support the city's findings that expansion is not compatible with, and would adversely impact, the surrounding neighborhood.

² We note that the legal standard for granting a conditional-use permit is not the same as approving the expansion of a nonconforming use. *Compare Krummenacher*, 783 N.W.2d at 726-27 (stating that municipalities are not required to permit the expansion of nonconformities), *with Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) ("A county's denial of a conditional use permit is arbitrary where the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met.").

III. The city properly exercised its authority on appeal.

Sabri argues that because the administrative appeal was only from Item A of the planning commission's decision, the city lacked authority or jurisdiction to deny the construction of the north-side addition. The argument presumes that the physical buildout was authorized by site-plan-review approval alone, and that the zoning and planning committee improperly revoked that approval and extended the sixth condition to site plan review.

The city's consistent position has been that the two aspects of the application are inextricably linked and that approval of site plan review alone did not authorize construction of the north-side addition. Notably, the application itself does not differentiate between requirements for expansion of nonconforming use and site plan review. And the staff report expressly states that "any expansion to any part of the structure requires an expansion of nonconforming use as well as site plan review." The city's findings incorporate this statement.

The city's position is supported by the plain language of the city code.

Structures containing one (1) or more legal nonconforming uses shall not be . . . enlarged in any way, nor shall such use be intensified, except that the city planning commission may permit the . . . expansion, enlargement or intensification of such use . . . if it makes the following findings [required for expansion of nonconforming use], and the . . . enlargement . . . meets all other applicable regulations of this zoning ordinance.

MCO § 531.50(b) (emphasis added). Under this plain language, physical construction of the north-side addition was not authorized without nonconforming use approval for that

area. Thus, site plan review and nonconforming use were intermingled and inextricable for purposes of Sabri's argument on appeal.

The district court correctly concluded that the city did not impermissibly expand the scope of the appeal. The two aspects of the application were inextricable under the plain language of MCO § 531.50(b), and Sabri did not alter that fact by filing an appeal from Item A only.

IV. The district court did not err in granting judgment on the pleadings on Sabri's estoppel claim.

Sabri argues that the estoppel allegations in the complaint were sufficient to survive a motion under Minn. R. Civ. P. 12.03. Judgment on the pleadings should not be granted unless the pleadings show that the nonmoving party "has no claim to present to the [district] court by evidence." *Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. App. 1986). The complaint here alleges that, "In reasonable reliance upon the action of the [planning commission] in approving the applicants' site plan; applicants purchased substantial material for the project."

"A party bringing a claim of estoppel against a governmental entity has a heavy burden of proof. The party must first show wrongful conduct on the part of the government. The party must also demonstrate expenditures that are unique to the proposed project and would not be otherwise usable." *State, City of Eden Prairie v. Liepke*, 403 N.W.2d 252, 256 (Minn. App. 1987) (citation omitted). The district court determined that Sabri's estoppel claim failed for two reasons: failure to allege wrongful conduct on the part of the city and failure to allege that the expenditures were unique to the proposed north-side

addition and not otherwise usable. On appeal, Sabri makes no argument that the complaint alleges unique expenditures, and our review reveals no such allegations. Because the complaint does not allege unique expenditures, the district court did not err in granting the city's rule 12.03 motion on this count, and we need not consider whether the complaint alleged wrongful conduct on the part of the city.

V. Sabri's due-process rights were not violated.

Sabri argues that the city failed to provide adequate notice that it would reconsider site plan review. We have already concluded that the two aspects of the application are inextricably linked. Moreover, we agree with the district court that Sabri's argument on appeal put site plan review squarely at issue. In addition, the record reflects that Sabri's counsel emailed city staff shortly after the planning commission's decision, stating that "some members of staff may have taken the position that the addition of the sixth condition to Part A, somehow implicitly also imposed a limit on the site plan approval." Thus, Sabri was on notice that the effect of site-plan-review approval would be at issue on appeal, and the city did not violate due-process requirements by its consideration of the application as a whole.³

Affirmed.

³ Sabri also contends that city staff could have appealed the planning commission's decision on site plan review to the zoning and planning committee, but provides no legal analysis that supports this argument. Issues not adequately briefed on appeal are not properly before this court. See *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).