Appeal No. A-24-0788

IN THE NEBRASKA COURT OF APPEALS

DAVID W. FRENCH and BRIAN D. NOLAN,

Appellant

s, v.

CITY OF OMAHA ZONING BOARD OF APPEALS,

Appellee.

Appeal from the District Court of Douglas County,

Nebraska Case No. CI 23-3741

The Honorable W. Russell Bowie III

Prepared and Submitted by:

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APPELLANT

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Neb. Rev. Stat. §§ 14-413, 14-414, and 25-403.01. On September 23, 2023, the Douglas County District Court entered an Order affirming the Omaha Zoning Board of Appeals grant of three area variances. On October 23, 2023, Appellant timely filed a Notice of Appeal and deposited the docketing fee.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Appellant David W. French ("French") and co-petitioner Brian D. Nolan ("Nolan") filed a Petition for Review against City of Omaha Zoning Board of Appeals ("ZBA") for granting 3 area variances to McNeil & Company Builders, LLC ("Applicant") regarding vacant land located at the northwest and southwest corners of the intersection of Shirley Street and 168th Street, Douglas County, Omaha, Nebraska. The Petition is made pursuant to Neb. Rev. Stat. §§ 14-413 and 14-414.

II. ISSUES RAISED IN THE DISTRICT COURT

1. Whether common law and public policy dictate that a zoning board of appeals reject setback variances/waivers requests tendered before an applicant for zoning variances/waivers can demonstrate infeasibility and the existence of a hardship or practical difficulty?

2. Whether common law and public policy dictate that a zoning board of appeals not grant variances

or waivers for an applicant's design that is exploratory, speculative, and/or 'wishful thinking' and presented before the applicant demonstrates what variances, if any, applicant actually needs?

3. Whether common law and public policy dictate that a ZBA member not testify for an applicant during a zoning board of appeals meeting?

4. Whether common law and public policy dictate that a zoning board of appeals, after receiving information of self-inflicted nature of alleged hardship(s) or practical difficulty(ies), has a duty to be curious and inquire as to such self-inflicted hardship(s) and/or practical difficulty(ies)?

5. Whether common law and public policy dictate that a zoning board of appeals, after receiving information that impeaches a variance applicant's statements, has a duty to be curious and inquire as to the veracity of applicant's statements?

III. DISPOSITION OF ISSUES IN THE DISTRICT COURT

The District Court entered an Order affirming the Omaha Zoning Board of Appeals grant of three area variances to Applicant.

IV. SCOPE OF REVIEW

On appeal a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. Rosseau v. Zoning Bd. of Appeals, 17 Neb. App. 469, 472 (Neb. Ct of Appeals 2009) (citing Goodman v. City of Omaha, 274 Neb. 539, 742 N.W.2d 26 (2007)); Neb. Rev Stat §

14-413. In reviewing a decision of the district court regarding a zoning appeal, the standard or review is whether the district court abused its discretion or made an error of law. Rosseau v. Zoning Bd. of Appeals, 17 Neb. App. 469, 472 (Neb. Ct of Appeals 2009) (citing Eastroads v. Omaha Zoning Bd. of Appeals, 261 Neb. 969, 628 N.W.2d 677 (2001)). Appeal costs may be recovered against a zoning board of appeals if a court finds such board acted with gross negligence or in bad faith or with malice. Neb. Rev Stat § 14-414.

ASSIGNMENTS OF ERROR

I. THE ZBA AND DISTRICT COURT'S DECISIONS WERE NOT SUPPORTED BY EVIDENCE.

II. THE ZBA AND DISTRICT COURT'S DECISIONS WERE UNREASONABLE.

III. THE ZBA AND DISTRICT COURT'S DECISIONS WERE ARBITRARY.

IV. THE ZBA AND DISTRICT COURT'S DECISIONS WERE CLEARLY WRONG.

V. THE ZBA ACTED WITH GROSS NEGLIGENCE OR IN BAD FAITH.

PROPOSITIONS OF LAW

1. A setback variance a/k/a zoning waiver is a license to disobey zoning regulations. As a matter of law, absent attached express conditions or time limits, a zoning variance runs with the land.

Lamar Co., LLC v. City of Fremont, 278 Neb. 485 (Supreme Ct. of NE 2009); *Thieman v. Cedar Valley Feeding Co.*, 18 Neb. App. 302 (NE Ct. of Appeals 2010).

2. An applicant for a variance has the burden of proof.

City of Battle Creek v. Madison County Bd. of Adjustment, 9 Neb. App. 223 at 229, 609 N.W.2d 706 at 711, 2000 Neb. App. Lexis 130 (Nebraska Ct. App. 2000).

3. "Certain factual circumstances are by themselves insufficient to justify a finding of hardship." These include the desire to build a larger building, the desire to generate increased profits, and where the applicant created his or her own hardships.

Rousseau v. Zoning Bd. of Appeals of Omaha, 17 Neb. App. 469, 478, 764 N.W.2d 130, 136 (2009).

4. A property owner's request for a variance/waiver because it seeks convenience or desires to maximize profits does not justify issuance of a variance/waiver. An owner should not be granted a variance/waiver simply so it can make a greater profit on an already profitable use of the land.

Bowman v. City of York, 240 Neb. 201 at 212-213, 482 N.W.2d 537 at 545, 1992 Neb. Lexis 100 (Supreme Court of Nebraska 1992).

5. The rule respecting a zoning board of appeals "to grant a variance from zoning regulations on the ground of unnecessary hardship is generally that it may not be granted..."

Bowman v. City of York, 240 Neb. 201 at 212, 482 N.W.2d 537 at 545, 1992 Neb. Lexis 100 (Supreme Court of Nebraska 1992).

6. In deciding whether a board of adjustment's decision is supported by the evidence, the district court shall consider any additional evidence it receives.

Bowman v. City of York, 240 Neb. 201 at 211, 482 N.W.2d 537 at 544, 1992 Neb. Lexis 100. (Supreme Court of Nebraska 1992).

7. A variance/waiver from a zoning ordinance is not appropriate where the person seeking the variance has created the condition necessitating the variance.

Rousseau v. Zoning Bd. Of Appeals of Omaha, 17 Neb. App. 469 at 478, 764 N.W.2d 130 at 136, 2009 Neb. App. Lexis 58 (Neb. Ct of Appeals 2009).

8. An owner cannot create a hardship (or practical difficulty) and then request a variance/waiver to remedy the same.

Arter v. Philadelphia Zoning Board of Adjustment, 916 A.2d 1222 at 1228, 2007 Pa. Commw. Lexis 54 (Pa. Commonwealth Ct. 2007); See also *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb. 146 at 151-152, 927 N.W.2d 366 at 370, 2019 Neb. Lexis 87 (Supreme Court of Nebraska 2019).

9. The financial situation or pecuniary hardship of a single owner affords no adequate grounds for granting a variance from a zoning regulation.

Dolezal-Soukup v. Dodge County Bd. of Adjustment, 308 Neb. 63 at 73, 952 N.W.2d 674, 2020 Neb. Lexis 197 (Nebraska Supreme Court 2020).

10. A self-inflicted hardship/practical difficulty is a bar to relief where a property owner seeks an after the fact variance.

See *Rousseau v. Zoning Bd. Of Appeals of Omaha*, 17 Neb. App. 469 (Neb Ct. of Appl 2009); See also *Arter v. Philadelphia Zoning Board of Adjustment*, 916 A.2d 1222 (Pa. Commonwealth Ct. 2007) and *Bruning v. City of Omaha Zoning Board of Appeals*, 303 Neb. 146 at 153, 927 N.W.2d 366 at 371, 2019 Neb. Lexis 87 (Supreme Court of Nebraska 2019).

11. A design preference is a self-inflicted hardship/practical difficulty. A property owner's self-inflicted hardship/practical difficulty precludes issuance of a variance/waiver when owner comes to the restricted subject property with a particular unpermitted use in mind and mindful of the impossible area restrictions for that use.

Dolezal-Soukup v. Dodge County Bd. of Adjustment, 308 Neb. 63, 952 N.W.2d 674, 2020 Neb. Lexis 197 (Nebraska Supreme Court 2020) (citing a holding in *Rousseau v. Zoning Bd. of Appeals of Omaha*, 17 Neb. App. 469 (Neb. Ct. of Appeals 2009) finding no variance from front yard setback requirements was necessary).

12. "Certain factual circumstances are by themselves insufficient to justify a finding of hardship." These include

the desire to build a larger building, the desire to generate increased profits, and where the applicant created his or her own hardships.

Rousseau v. Zoning Bd. of Appeals of Omaha, 17 Neb. App. 469 at 478, 764 N.W.2d 130, 136 (2009).

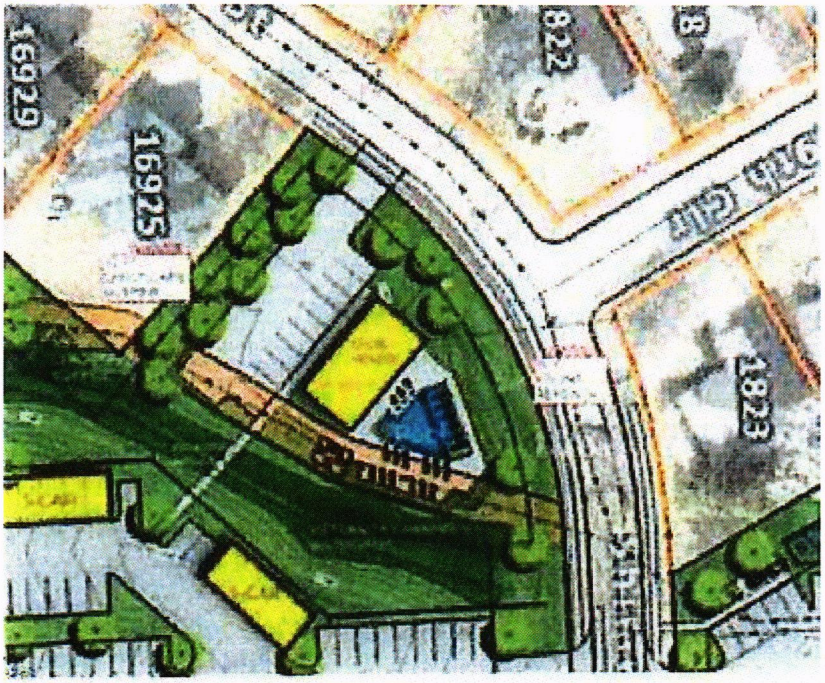
STATEMENT OF FACTS

Applicant owns two adjacent parcels in the Rose Garden Estates subdivision. The land is unimproved (former) farm land consisting on grass, weeds, and a river. P. 9, Bill of Exceptions Vol. 1. It is part of a subdivision platted in 1977 – a common neighborhood consisting of 263 parcels. The south parcel, the parcel for which Applicant desires variances, while owned by Applicant was subdivided by Applicant, which created a 264th parcel (16925 Shirley Street). Exhibits 9 and 10, Bill of Exceptions Vol. 2. Applicant subsequently sold the 264th parcel to a third party. P. 95, Exhibit 1, Bill of Exceptions Vol. 2; Exhibit 10, Bill of Exceptions Vol. 2. According to the ZBA, the boundary between 16925 Shirley Street and Applicant's pool/clubhouse design is "where two of the waivers come into play." P. 30, Exhibit 1, Bill of Exceptions Vol. 2.

Resultantly, today, Rose Garden Estate subdivision is comprised of 262 single family homes and two 'empty' parcels. The subdivision was developed in the opposite order of all other Omaha mixed use (R3/R7 zoning) neighborhoods in the last 10 years. In other Omaha neighborhoods, the land with the denser/densest use was developed prior to the adjacent lower density uses. Exhibit 2, Bill of Exceptions Vol. 2. In the instant, the subdivision became comprised of less dense single family homes first. Pp. 10-11, Bill of Exceptions Vol. 1; pp. 21-22

Exhibit 1, Bill of Exceptions Vol. 2.

The parcel known as 16925 Shirley Street is depicted as "16925" in the following site plan presented in support of Applicant's application to the ZBA:



Applicant proposes to design and construct one integrated apartment complex on an assemblage of the two 'empty' parcels. P. 9, Bill of Exceptions Vol. 1. Applicant's integrated designs propose across the assemblage single amenities like one clubhouse, one pool, and one tornado storm shelter.

Applicant's land is located in Douglas County, Omaha, Nebraska. Petitioners and Applicant are residents of Douglas County, Omaha, Nebraska.

On November 15, 2022, Applicant's land was the subject of

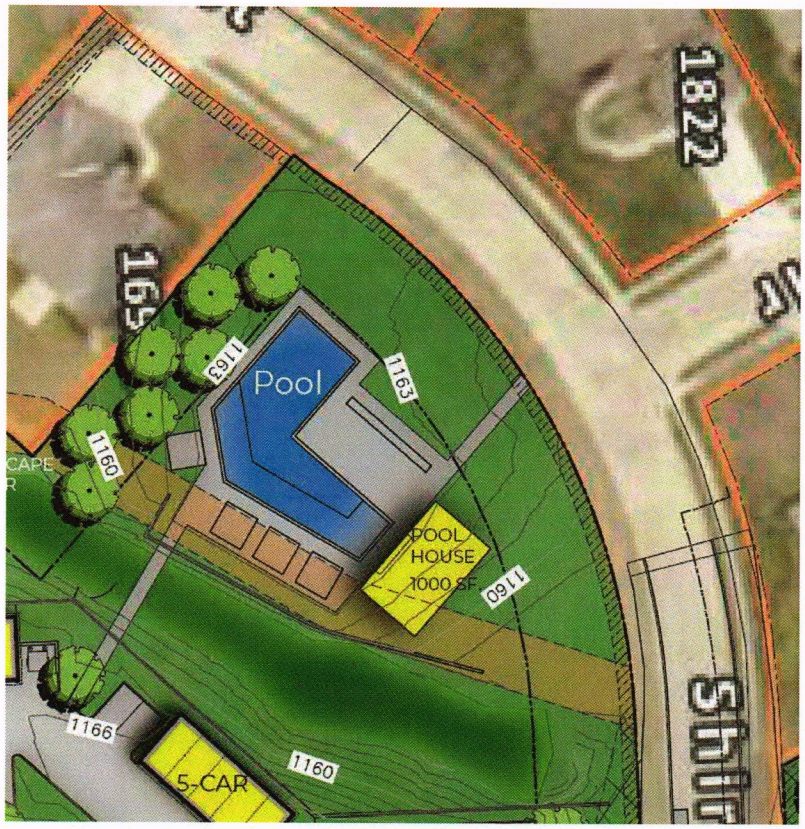
a lengthy public re-zoning hearing in front of the Omaha City Council concerning its application to change use from R3 residential to R7 residential. The Omaha City Council meeting occurred in accordance with the Open Meetings Act and was a public hearing with audio/visual transmission and an audio/visual recording available via youbtube.com. A depiction of the Applicant's design (see green and yellow colored land) as of November 15, 2022 is:

P. 109, Exhibt 1, Bill of Exceptions Vol. 2

In November 2022, Applicant represented specifications for its proposed 3-story building located in the most southwest portion of its land as comprised of 20 units with corresponding parking units:

Exhibits 1 and 2, Bill of Exceptions Vol. 2. In the above drawing, the parcel commonly known as 16925 Shirley Street is labelled "16_" and is located in the top right corner of the drawing.

In November 2022, Applicant represented specifications for the 'club house' amenities as:



Exhibits 1 and 2, Bill of Exceptions Vol. 2.

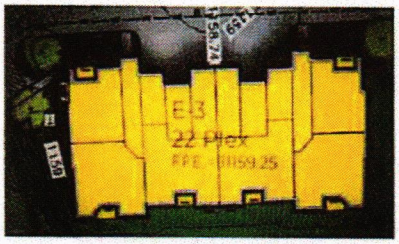
The following month, in December 2022, a neighbor, the Goldie family, residing at 16823 Pine Street, sued Applicant for adverse possession by disputed ownership of land at the north boundary of Applicant's north parcel. The lawsuit was filed and adjudicated at the Douglas County District Court and is commonly known as Case CI 22-9684.

94 days later following November 15, 2022, Applicant applied for setback variances and proposed the following for its multi-story building located in the most southwest portion of its land comprised of 22 units with corresponding parking units:

Evolving Design Preferences

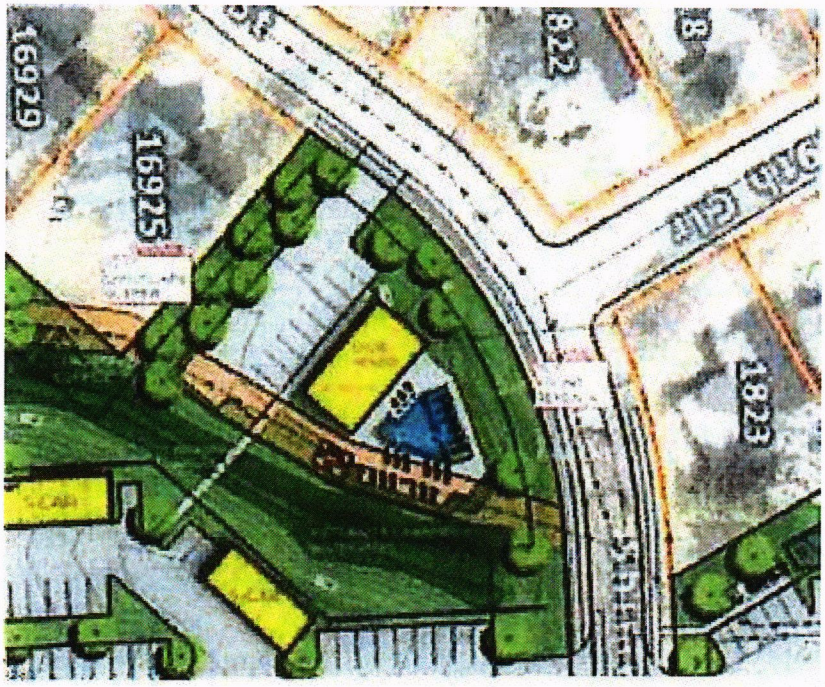
The variances requested for the South Lot arise from design preference, and are not necessary to develop the site.

Planning Board & City Council September 2022	**Today** April 2023
128 units	135 units
107 garages	108 garages
224 parking stalls	228 parking stalls
Pool House	Clubhouse with parking lot



Exhibits 1 and 2, Bill of Exceptions Vol. 2.

For its February 17, 2023 application to the ZBA, Applicant presented specifications for the 'club house' amenities as:



According to the ZBA, the pool/clubhouse design is "where two of the waivers come into play." P. 30, Exhibit 1, Bill of Exceptions Vol. 2. However, all of Applicant's requested variances are vague. None of the variances (requested or awarded) were surveyed and none described with granularity by Applicant or described to (or by) the ZBA with linear precision (e.g. request is for only 100 linear feet to be moved 5 feet and for a certain 50 foot segment of a setback is to moved 8 feet).

The ZBA's procedures prescribe the ZBA weigh, in part, the following factors: (a) "[c]an the property be developed in compliance with the ordinance?" P. 2, Exhibit 14, Bill of Exceptions Vol. 2; (b) "[t]he need for the variance was created either intentionally or inadvertently by the actions of applicant." P. 2, Exhibit 14, Bill of Exceptions Vol. 2; (c) "[t]he requested variance is more than the minimum necessary to be consistent with and in harmony with the zoning regs." P. 2, Exhibit 14, Bill of Exceptions Vol. 2; and (d) "[t]his requested variance would grant special or peculiar favor to this applicant..." P. 2, Exhibit 14, Bill

of Exceptions Vol. 2.

For the April 13, 2023, the Omaha Planning Department recommended denial of all of Applicant's variances, entering the following findings into the record: (1) no hardship/practical difficulty existed. P. 4, Exhibit 1, Bill of Exceptions Vol. 2.; (2) there is no demonstrated hardship or practicality [because] [t]his request is a design preference... [and] the need for the requested variance was created... by the actions of the applicant." PP. 64-65, 72, Exhibit 1, Bill of Exceptions Vol. 2; (3) Applicant's site plan is a self-inflicted design choice. P. 4, Exhibit 1, Bill of Exceptions Vol. 2; and (4) "As this is new construction, the Planning Department finds there is no hardship or practical difficulty to support this request... as [the] new apartment complex could be configured and constructed in a way to comply with all zoning regulations..." P. 4, Exhibit 1, Bill of Exceptions Vol. 2.

ARGUMENT SUMMARY

The ZBA's variance awards were not supported by evidence. Neb. Rev Stat § 14-413. Moreover, the ZBA's decisions were unreasonable. Neb. Rev Stat § 14-413. In addition, the ZBA's variance grants to Applicant were arbitrary and clearly wrong, respectively. Neb. Rev Stat § 14-413. The District Court erred in affirming the ZBA's variance awards. Neb. Rev Stat § 14-413. Petitioners must be awarded recovery of appeal costs against the ZBA because the ZBA acted with gross negligence or in bad faith. Neb. Rev Stat § 14-414.

The ZBA's variances awarded to Applicant (and District Court's affirmation thereof) must be overturned because the Applicant's application was a patent attempt to 'game' the system of granting zoning variances. P. 41, Exhibit 1, Bill of Exceptions Vol. 2. Moreover, the ZBA was complicit with such 'gaming' when it ignored the lack of ripeness, ignored the lack of

the existence of hardship/practical difficulty, ignored the self-inflicted aspects of the alleged hardship/practical difficulty, ignored Applicant's misleading and inaccurate statements, and when a ZBA member testified for Applicant.

Applicant demonstrates significant chutzpah and disingenuousness when it alleges it cannot feasibly design/build an apartment complex on an approximately 8.8 acre unimproved parcel, absent relief from area setbacks. Applicant's variance requests are patent demands to design a larger (and more dense) project to (a) overcome self-inflicted hardships and practical difficulties, (b) placate investors in trying to achieve a higher return on investment (ROI) for the proposed project, and (c) fend off negative impact of the then-pending Goldie adverse possession claim on available green space for the project. The ZBA acted unreasonably and with gross negligence and in bad faith for each of the arguments below and based on the totality of the circumstances.

A zoning board of appeals is not supposed to be the zoning police and not Santa Claus either. Here the ZBA behaved like Santa Claus based on the record. P. 13, Bill of Exceptions Vol. 1.

Zoning area setbacks are for creating a preserving a 'neighborhood', to balance beauty and blight, to make things aesthetically beautiful, and for fire safety. P. 13, Bill of Exceptions, Vol. 1. Implementation of reduced setbacks, on three sides of the land, will unjustly injure the character and beauty of the Rose Garden Estates neighborhood and ruin the park-like setting of the commercial/residential buffer walkway on the south of the property.

In behaving like Santa Claus, the ZBA recklessly and in bad

faith granted Applicant the ability to reduce setbacks on 3 sides of the south parcel. P. 15, Bill of Exceptions Vol. 1.

ARGUMENT

I. THE ZBA'S GRANT OF VARIANCES WAS NOT SUPPORTED BY EVIDENCE, UNREASONABLE, ARBITRARY, AND CLEARLY WRONG BECAUSE THE ZBA IGNORED THE LACK OF RIPENESS FOR APPLICANT'S APPLICATION

Nebraska common law does not offer precedent for a variance applicant requesting a variance *before* having knowledge of infeasibility and *before* being able to demonstrate the existence of a hardship or practical difficulty. Viewing Applicant's conduct in the best light, Applicant's requests were pre-mature and not ripe.

As a preliminary matter, the ZBA had actual and constructive knowledge the land was subject to active pending adverse possession litigation. Pp. 80, 94, 138, 152-3, Exhibit 1, Bill of Exceptions vol. 2; see also pp. 8-9 of Bill of Exceptions Vol. 1 and p. 138 of Exhibit 1, Bill of Exceptions Vol. 2. Yet, the ZBA ignored the same.

Attorney Hiipakka, for the ZBA, stated in a District Court hearing "I would note that a determination if Mr. Goldie were to prevail... in his adverse possession claim, this [appeal] would essentially become moot... in that the site plan that [applicant presented] to request the variance would probably not be possible... from what I've seen in the Zoning Board of Appeals package, would essentially have to start over on this property." see also pp. 8-9 of Bill of Exceptions Vol. 1. As an aside, on

November 18, 2024, the District Court (same court and same judge as for this case) entered an order granting the Goldie's adverse possession claim in Douglas County District Court Case CI 22-9684. For this reason alone the site plan wasn't viable and the variance application was not ripe.

Public policy should not incent, encourage, or 'open the floodgates' to applicants' pre-mature zoning variance requests. Consistent with the same, public policy and common law should dictate that a zoning board of appeals not grant variances or waivers for an applicant's design that is exploratory, speculative, and/or 'wishful thinking'.

In conflict with such public policy, in the instant, the Applicant applied for variances before having knowledge of infeasibility (and being able to demonstrate the same to the ZBA) and before being able to demonstrate the existence of a hardship or practical difficulty. P. 11, Bill of Exceptions Vol. 1.

The ZBA acknowledged a likelihood of Applicant's potential need for revised variances based on unknown trash plan, but nonetheless proceeded in granting variances. P. 44, Exhibit 1, Bill of Exceptions Vol. 2. At the ZBA hearing, Applicant admitted it hadn't planned for trash storage/removal for a $35,000,000-$40,000,000 real estate project. P. 26, 43-44, Exhibit 1, Bill of Exceptions Vol. 2. A trash plan is significant for the layout of the development because dumpster storage and adjacent ingress/egress thereto reduce land available for buildings or parking.

Moreover, the Planning Department testified there is no demonstrated hardship or practicality "[because] [t]his request is a design preference... [and] the need for the requested variance was created... by the actions of the applicant." PP. 4, 64-65, and

72, Exhibit 1, Bill of Exceptions Vol. 2.

Applicant admitted the prematurity of Applicant's site design when Applicant testified "maybe" it will improve the land will a pool, clubhouse, sundeck, restrooms, and parking and it's unsure what design it will actually choose. P. 37, Exhibit 1, Bill of Exceptions Vol. 2.

Applicant admitted the prematurity and infeasibility of Applicant's site plan and design when it testified it hadn't surveyed nor engineered the same for civil engineering, stormwater and wastewater handling, and fire management. P. 11, Bill of Exceptions Vol. 1; pp. 20, 22-23, and 81-84, Exhibit 1, Bill of Exceptions Vol. 2. Applicant's site plan for the most southwest building is also infeasible, presumably part of Applicant's strategy for fire truck access is the Applicant will rely on fire trucks using the sidewalk on the commercial/residential bufferyard (i.e. park-like setting walkway) directly south of Applicant's south parcel as a thoroughfare for fire trucks in the event of a fire. Applicant also admitted its misaligned driveway design had not been reviewed by City of Omaha Public Works for traffic safety compliance. pp. 20, 22-23, and 81-84, Exhibit 1, Bill of Exceptions Vol. 2.

In addition to the above, all of Applicant's requested variances were not ripe because they were vague and not accurately measured on the proposed site plan. The ZBA unreasonably and in bad faith did not condition its evaluation of variance requests on accurate surveyed and engineered data. None were surveyed and none described by Applicant or the ZBA with linear precision (e.g. request is for only 100 linear feet to be moved 5 feet and for a certain 50 foot segment of a setback is to moved 8 feet). Without such detail the ZBA lacked information necessary to grant right-sized variance grants and would

foreseeably grant setback variances for entire boundaries of the land, which it did in the instant.

The scope of the variance grants is unreasonable. Here, the ZBA issued unrestricted variances (unrestricted in time or to whom they were issued) and only conditioned upon installation of extra landscaping. Presumably, they were granted in perpetuity and will run with the land. The ZBA's decision is unreasonable in that the variances will run with the land, apply to 3 entire sides of the south parcel, and, as granted, do not require the Applicant to not build its most southwesterly building closer to the single family homes.

Lastly, Applicant's proposal wasn't ripe because the record reflects the site plan presented to the ZBA neither accurately presented setbacks (per ordinances) or setbacks actually requested by Applicant. Pp. 73-74, 98, Exhibit 1, Bill of Exceptions Vol. 2. Applicant admitted the same. Pp. 9, 29-30, and 39 of Exhibit 1, Bill of Exceptions Vol. 2.

II. THE ZBA'S GRANT OF VARIANCES WAS NOT SUPPORTED BY EVIDENCE, UNREASONABLE, ARBITRARY, AND CLEARLY WRONG BECAUSE THE ZBA IGNORED THE LACK OF EXISTENCE OF A HARDSHIP/PRACTICAL DIFFICULTY

A gating issue for this appeal is whether a hardship or practical difficulty exists. An applicant for a variance has the burden of proof. City of *Battle Creek v. Madison County Bd. of Adjustment*, 9 Neb. App. 223 at 229, 609 N.W.2d 706 at 711, 2000 Neb. App. Lexis 130 (Nebraska Ct. App. 2000). In this case, Applicant did not meet its burden of proof in demonstrating the existence of a hardship or practical difficulty.

For the April 13, 2023 ZBA hearing, there was no inquiry by the ZBA or testimony by Applicant of what developer could potentially construct absent variances/waivers. In contrast, at the November 15, 2022, City Council meeting, Applicant admitted there is no practical difficulty to building 194 units when it testified on November 15, 2022: "[b]ased upon the acreage on the north and the south and with the drainageways and green space areas in here, there's really no ability to build more than the 194 units that are being proposed." P. 92 Exhibit 12, Bill of Exceptions Vol. 2.

94 days later, after Applicant drew a site plan with a 7 unit increase (presumably 201 unit apartment complex), Applicant ironically and spontaneously claims a hardship or practical difficulty exists.

In contrast, the City Planning Department testified that Applicant's site plan is a self-inflicted design choice. P. 4, Exhibit 1, Bill of Exceptions Vol. 2. Further, it said "[a]s this is new

construction, the Planning Department finds there is no hardship or practical difficulty to support this request... as [the] new apartment complex could be configured and constructed in a way to comply with all zoning regulations..." P. 4, Exhibit 1, Bill of Exceptions Vol. 2.

The record is void of any analysis of the existence of hardship or practical difficulty. For its application, Applicant failed to articulate or propose any details why it experienced hardship or practical difficulty. In lieu of explaining the merits for finding existence of a hardship or practical difficulty, Applicant spent significant time explaining how its expansion of buildable area on 3 sides of the south parcel will "help the neighbors" and subjectively be "better". p. 6, Exhibit 1, Bill of Exceptions Vol. 2.

III. ASSUMING ARGUENDO THIS COURT FINDS THE EXISTENCE OF A HARDSHIP/ PRACTICAL DIFFICULTY, THE ZBA'S GRANT OF VARIANCES WAS NOT SUPPORTED BY EVIDENCE, UNREASONABLE, ARBITRARY, AND CLEARLY WRONG BECAUSE THE ZBA IGNORED THE SELF-INFLICTED ASPECTS OF THE ALLEGED HARDSHIP/ PRACTICAL DIFFICULTY

If the ZBA's variance grants are upheld, this Court will create precedent that self-inflicted hardships and practical difficulties do not matter. A variance from a zoning regulation is not appropriate where the person seeking the variance created the condition necessitating the variance. *Rousseau v. Zoning Bd. Of Appeals*, 17 Neb. App. 469, 478 (Neb. Ct of Appeals 2009),

In the instant, there are a plethora of self-inflicted conditions that disqualify Applicant's variance requests, which individually

and collectively evidence ZBA's bad faith conduct.

The first self-inflicted condition is Applicant's decision to not develop the land for 25+ years during its ownership of the land and Applicant's decision, during such time period, to not negotiate with the grantee of the sewer easement to locate the easement in a location favorable to Applicant's future development when the sewer easement came into existence in 1998. P. 10, Bill of Exceptions Vol 1; Exhibit 9, Bill of Exceptions Vol. 2. But for Applicant's failure to negotiate for the location of the easement grant, no alleged hardship or practical difficulty would exist with respect to the sewer easement.

The second is Applicant's decision to propose constructing more densely populated building(s) in a neighborhood *after* all of the single-family homes were constructed and *after* all walkways, sidewalks, and parks were developed.

The third self-inflicted condition is Applicant's voluntary choice (reflected in 2023 design) not to negotiate with the grantee of the sewer easement to modify and make changes to the sewer easement. P. 1-10, Exhibit 8, Bill of Exceptions Vol. 2; pp. 1-4, Exhibit 9, Bill of Exceptions Vol. 2. An easement is a private party contract like any other contract and can be modified (i.e. relocated) by the mutual agreement of the parties. P. 10 Bill of Exceptions Vol. 1.

A fourth self-inflicted condition is Applicant's careless management of its land that resulted in the Goldie's adverse possession claim that was pending during the ZBA application. Pp. 80, 138, 152-3, Exhibit 1, Bill of Exceptions vol. 2; see also pp. 8-9 of Bill of Exceptions Vol. 1 and p. 138 of Exhibit 1, Bill of Exceptions Vol. 2.

A fifth condition is Applicant's re-platting of the south parcel and divestiture of approximately 0.2 acres for which Applicant alleges hardship or practical difficulty. Exhibits 9 and 10, Bill of Exceptions Vol. 2. According to the ZBA, the pool/clubhouse design is "where two of the waivers come into play." P. 30, Exhibit 1, Bill of Exceptions Vol. 2. The Applicant's actions in selling off land (now known as 16925 Shirley Street) exacerbated the alleged hardship or practical difficulty that Applicant alleges exist to stymie construction of its pool/clubhouse design. Had Applicant not re-subdivided its land and removed approximately 0.2 acres directly next to the proposed pool/clubhouse, Applicant's variance requests would not exist. P. 16, Bill of Exceptions Vol. 1; p. 73, Exhibit 1, Bill of Exceptions Vol. 2.

A sixth self-inflicted condition is Applicant's flagrant "design choice" in its building layouts, building sizes, and overall site plan. P. 4, Exhibit 1, Bill of Exceptions Vol. 2. At the ZBA hearing, the City Planning Department testified that Applicant's site plan is a self-inflicted design choice. P. 4, Exhibit 1, Bill of Exceptions Vol. 2. Applicant admitted the same on November 15, 2022, when it testified to the public "[b]ased upon the acreage on the north and the south and with the drainageways and green space areas in here, there's really no ability to build more than the 194 units that are being proposed." P. 92 Exhibit 12, Bill of Exceptions Vol. 2. Applicant's request for variance and proposed site plan are an unveiled attempt to increase the size its development. The site plan presented to the ZBA proposes a 7 unit increase on the south parcel – meaning an aggregate 201 unit development having larger buildings, more parking, etc. Exhibits 1 and 2, Bill of Exceptions Vol. 2.

IV. THE ZBA'S GRANT OF VARIANCES WAS NOT SUPPORTED BY EVIDENCE, UNREASONABLE, ARBITRARY, AND CLEARLY WRONG BECAUSE THE ZBA IGNORED APPLICANT'S MISLEADING, INACCURATE, INCOMPLETE, AND CONTRADICTORY STATEMENTS

As a preliminary matter, despite Applicant's statements to the contrary, neither the Omaha City Council nor the City of Omaha has approved any of Applicant's proposed site plans. P. 5, 24, 81, and 95, Exhibit 1, Bill of Exceptions Vol. 2; Pp. 1-4, Exhibit 4, Bill of Exceptions Vol. 2.

As mentioned above, Applicant's site plan presented to the ZBA neither accurately reflected or measured setbacks (per ordinances) or as requested by Applicant. Pp. 73-74, 98, Exhibit 1, Bill of Exceptions Vol. 2. Applicant admitted the same. p. 9, 29-30, and 39 of Exhibit 1, Bill of Exceptions Vol. 2. Viewed in the worst light, such ambiguities, imprecisions, and inaccuracies identified during the ZBA were an attempt to obscure the true nature of the variance requests. PP. 73-74, 98, Exhibit 1, Bill of Exceptions Vol. 2

During the ZBA meeting, Applicant inaccurately testified Applicant is 'essentially' trying to move/relocate and rotate a building depicted in its November 15, 2022 City Council site plan. P. 5, Exhibit 1, Bill of Exceptions, Vol. 2. Such statements were disingenuous because the two building designs (2022 and 2023 designed) are not identical. Pp. 1-5 of Exhibit 5, Bill of Exceptions Vol. 2; P. 72, 95, and 157, Exhibit 1, Bill of Exceptions Vol. 2.

The record contains many statements calling out Applicant's prima facie attempt to expand the land available for building

including Wendy Nelson's comment letter: "[e]ssentially they are asking for more land." P. 160, Exhibit 1, Bill of Exceptions Vol. 2. See also Pp. 8, 11-12, 14-16, 18-20, 23, 39-40, 80, 138, and 153, Exhibit 1, Bill of Exceptions Vol. 2. Moreover, Applicant testified at the November 15, 2022 public hearing: "[b]ased upon the acreage on the north and the south and with the drainageways and green space areas in here, there's really no ability to build more than the 194 units that are being proposed." P. 92 Exhibit 12, Bill of Exceptions Vol. 2.

When confronted with facts that impeached Applicant's statements, rather than be curious, the ZBA asserted a 'diffusion of responsibility' defense deflecting any obligation to inquire whether the Applicant was lying to them based on November 15, 2022 contradictory statements. ZBA members stated "Like is [what applicant is doing here gaming [the variance granting process]?" and "[w]e don't have the whole transcript and cannot know the whole story in this venue..." p. 41, Exhibit 1, Bill of Exceptions Vol. 2. Had the ZBA asserted any questions to attendees it would have learned Applicant's proponent Mr. Rasmussen, Omaha Planning Department staff, and Messrs. Kass, Nolan, and French, were present and in attendance at the November 15, 2022 City Council meeting and at the April 13, 2023 ZBA meeting.

The ZBA behaved unreasonably and in bad faith when the ZBA embraced Applicant's incredulousness and twisted and paradoxical logic in support of the variance application, as follows:

> Applicant, who claims to be a sophisticated commercial party and experienced with zoning regulations allegedly cannot effectively develop 8.8 acres of raw land without issuance of variances/waivers. Pp. 17-18, Bill of Exceptions Vol. 1;

The simple existence of irregular shaped land and the presence of a tributary to the Missouri River and sewer easement on such land is de facto prima facie evidence of a need to grant variances. P. 15, Bill of Exceptions Vol. 1;

According to Applicant, neighbors should greatly receive Applicant's new 'better design' but the record, in the instant, shows all neighbor commentors reject design features and oppose all of Applicant's variance requests for reasons presented in this brief to the Court;

Applicant's hardship or practical difficulty is a desire to "help the neighbors" and be visually "better". p. 6, Exhibit 1, Bill of Exceptions Vol. 2, but all neighbor commentors objected to the same;

Applicant claims by reducing setbacks to bring improvements closer to neighbors Applicant can move the project away from the neighbors. p. 27, Exhibit 1, Bill of Exceptions Vol. 2; and

Applicant claims by potentially improvements closer to single family homes and the park-like setting walkway to the south of Applicant's south parcel, is enhancing the character of the Rose Garden Estates neighborhood.

In fact rather than preventing visual blight by reducing building size, Applicant proposes to build larger buildings, more garages, and more parking, and seeks to bring proposed improvements closer to the single family homes and commercial/residential buffer park-like setting on the south side of Applicant's south parcel.

For these reasons the ZBA's factfinding was not supported by evidence, was unreasonable, was arbitrary, was clearly wrong, was reckless, and was in bad faith.

V. THE ZBA'S GRANT OF VARIANCES WAS NOT SUPPORTED BY EVIDENCE, UNREASONABLE, ARBITRARY, AND CLEARLY WRONG BECAUSE THE ZBA TESTIFIED FOR APPLICANT

The ZBA compounded the unreasonableness, arbitrary, and clearly wrong decision when ZBA member(s) testified for the Applicant during the April 13, 2023 ZBA meeting. During the April 13th ZBA meeting after Applicant (a) did not articulate what it could build for a $35,000,000 - $40,000,000 development without issuance of requested zoning variances, (b) did not contradict that its design is speculative, impossible, and infeasible, (c) admitted its site plan design is speculative and incomplete because it lacks surveying and engineering considerations, and (d) fumbled in testifying whether hardship or practical difficulty existed, a ZBA member inappropriately and wrongfully testified on Applicant's behalf that the prematurity of Applicant's requests are part of "the journey of development." P. 41, Exhibit 1, Bill of Exceptions Vol. 2. Later in the meeting, after being challenged on incomplete fire, stormwater, wastewater, traffic and other civil engineering considerations, and clubhouse, pool, and trash design plans, Applicant recited the ZBA member's quote verbatim. P. 43, Exhibit 1, Bill of Exceptions Vol. 2.

The ZBA also testified for Applicant when a ZBA member inaccurately stated "I guess I haven't heard any opposition on the commercial property side." P. 35 Ex. 1, Bill of Exceptions Vol. 2. This statement was inaccurate in that the commercial side

contains a buffer walkway used daily by Rose Garden Estates residents to ride bikes, rollerblade, walk, and walk dogs. This activity makes Rose Garden Estates residents neighbors to the south. For this reason, neighbor commentors offered in person and written objections to the grant of any variances for the south side of Applicant's south parcel.

Public policy and common law should dictate that a ZBA member not testify for an applicant during a zoning board of appeals meeting. This is because an applicant for a variance has the burden of proof. *City of Battle Creek v. Madison County Bd. of Adjustment*, 9 Neb. App. 223 at 229, 609 N.W.2d 706 at 711, 2000 Neb. App. Lexis 130 (Nebraska Ct. App. 2000). Therefore, a zoning board on appeals' decision where a coning board member testified for an applicant and the ZBA granted variances to the applicant must be overturned. In the instant the ZBA's granted variance(s) must be overturned.

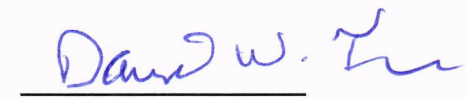
CONCLUSION

For the arguments above, the ZBA behaved like Santa Claus, and the ZBA's conduct violated §§ 14-413 and 14-414.

Appellant respectfully requests that this Court reverse the ZBA's decision and District Court's ruling, both in violation of Neb. Rev. Stat. § 14-413 and enter a finding the ZBA's conduct violated Neb. Rev. Stat. § 14-414 and order the ZBA's reimbursement of petitioners' court costs including, but not limited to, filings fees and subpoena fees paid on May 11, 2023, $131 of filing fees paid on October 23, 2024, $505 for preparing the bill of exceptions paid on November 8, 2024; and return of $75 cash bond posted on October 23, 2024.

Respectfully submitted,

David W. French, Appellant,

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 6,965 words (not excluding any sections) as calculated by Microsoft Word, the typestyle for the body of the brief is 12 pt. Century Schoolbook spaced at 1.2 with extra space between paragraphs.

David W. Fu

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 23, 2025, a true and correct copy of the above and foregoing Brief of Appellant was served in accordance with the Nebraska Rules of Appellate Procedure, including but not limited to Neb. Ct. R. App. P. §§ 2-200(B) and 2-209(A)(1) & (B).

David W. Te

Certificate of Service

I hereby certify that on January 23, 2025 I provided a true and correct copy of this *Brief of Appellant* to the following:

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